

Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD

Review on the listing of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf Group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organisations under section 102.1A of the *Criminal Code*

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Introduction

The Public Interest Advocacy Centre

The Public Interest Advocacy Centre ('PIAC') is an independent, non-profit legal and policy centre located in Sydney. Its charter is:

To undertake strategic legal and policy interventions in public interest matters in order to foster a fair, just and democratic society and empower citizens, consumers and communities.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Although located in New South Wales, the work PIAC does is often of national interest or importance or has consequences beyond state boundaries.

PIAC's work extends beyond the interests and rights of individuals; it specialises in working on issues that have systemic impact. PIAC's clients and constituencies are primarily those with least access to economic, social and legal resources and opportunities. PIAC provides its services for free or at minimal cost.

Terms of Reference

PIAC congratulates the Parliamentary Joint Committee on ASIO, ASIS and DSD ('**the Committee**') for taking a robust approach to the scope of its power to review the listing of an organisation as a terrorist organisation under section 102.1A of the *Criminal Code*. The Committee's role is essential to ensuring that the Government, in taking action to prevent politically and/or ideologically motivated violence, does so in a manner that is transparent, accountable and consistent with the Rule of Law. To this end, the Committee should also be commended for adopting protocols that ensure a *merits review of each* listing.¹

PIAC supports the Committee's view that it is critical for 'the Parliament ... [to] have the clearest and most comprehensive information' when deciding whether or not to disallow a regulation that lists a 'terrorist organisation' under the *Criminal Code*.²

PIAC welcomes the opportunity to make a submission to the Committee's review in relation to the proscription of Al-Qa'ida, Jemaah Islamiyyah, Abu Sayyaf, Armed Islamic Group, Jamiat ul-Ansar and Salafist Group ('**the proscribed groups**') under the section 102.1A of the *Criminal Code*.

Since 2001, PIAC has made a number of submissions and appeared before various Parliamentary and Senate Committees regarding the counter-terrorism laws.

This submission does not attempt to address whether or not a particular organisation should be proscribed as a 'terrorist organisation', but rather addresses the broader framework within which the proscriptions powers operate.

¹ Parliamentary Joint Committee on ASIO, ASIS and DSD (2004) *Review of the listing of the Palestinian Islamic Jihad (PIJ)* ('**PIJ Report**') at [2.9].

² PIJ Report at [2.8].

Proscription Powers

Lack of necessity for proscription powers

It is PIAC's understanding that the aim of the proscription power is to prevent politically and/or ideologically motivated violence and acts that intentionally assist such violence. Such violence is already illegal under criminal laws in Australia, as are any actions that intentionally assist or are undertaken in order to assist such violence.

It appears from the supporting material provided on the Committee's website that the acts relied upon for the proscription of the groups that is the focus of the current review are: 'murders, bombings, extortion and kidnap-for-ransom';³ 'hijackings, bombings';⁴ 'hijackings, bombing and abductions';⁵ 'murders, kidnappings, bombings, robbery, extortion and looting';⁶ 'manufacture, use, and smuggling of explosives, assassinations, and military operations ... [and] bombs attacks';⁷ and 'suicide attacks and car bombs'.⁸

Even prior to the proscription power and the enactment of specific 'terrorism' offences, all of the listed acts were already illegal under Australian law, with many providing for severe penalties on conviction. Likewise, persons deliberately assisting in such acts, even if not directly engaged in them, would be caught by the offences of conspiracy and/or incitement.⁹

PIAC recognises in the prevention of politically and ideologically motivated violence, the operations of organisations or groups involved in such acts or the promotion of such acts may require increased regulation. International concern regarding organisations involved in acts of politically and ideologically motivated violence has led to a series of United Nations Security Council ('UNSC') resolutions, which have called on Member States to take steps toward combating terrorism. For example, several UNSC resolutions have called on States to freeze the 'funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist activities or participate in or facilitate the commission of terrorist acts'.¹⁰ Australia has implemented the UNSC Resolutions relating to financing of terrorist organisations through the *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002*.¹¹ The Security Council Committees established under Resolution 1267 and 1373 regularly update the list of individuals, groups and entities associated with Usama bin

³ Information on the Abu Sayyaf Group: Attachment A.

⁴ Information on the Armed Islamic Group: Attachment B.

⁵ Information on Jamiat ul-Ansar: Attachment C.

⁶ Information on the Salafist Group for Call and Combat: Attachment D.

⁷ Information on al Qa'ida: Attachment A.

⁸ Information on Jemaah Islamiyah: Attachment B.

⁹ See, for example, *Criminal Code* sections 11.2 & 11.4-11.5.

¹⁰ United Nations Security Council Resolution 1373 (2001), S/RES/1373(2001).

¹¹ Department of Foreign Affairs and Trade website:
http://www.dfat.gov.au/icat/freezing_terrorist_assets.html

Laden, Al Qaeda and the Taliban.¹² It is PIAC's understanding that it is this list that is incorporated into the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002*.

The proscription power under the *Criminal Code* is, however, distinct from the provisions relating to financing of terrorist organisations and has the effect of banning an organisation. It is the banning of an organisation that is, in principle, a concern to PIAC as it may breach the human rights to freedom of thought, expression and association protected in the *International Covenant on Civil and Political Rights*, to which Australia has been a signatory since 1972. PIAC notes that the United Nations Commission on Human Rights has called for States, when implementing legislation and actions to counter terrorism, to continue to respect and protect the international human rights standards to which they have committed.¹³

It is arguable that because of the existence of specific criminal offences and the UN process incorporated into the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002*, the proscription or banning of organisations is unnecessary. Submissions to this effect were made by many organisations and individuals during the debate prior to the passage of the *Security Legislation Amendment (Terrorism) Act 2002 (Cth)*.¹⁴

When the broadly defined 'terrorism' offences under the *Criminal Code*¹⁵ are taken into account, the superfluity of the proscription power is obvious. Section 100.1 of the *Criminal Code* defines 'terrorist act' in the following terms:

(1)

...

terrorist act means an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection (3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

- (a) causes serious harm that is physical harm to a person; or
- (b) causes serious damage to property; or
- (c) causes a person's death; or
- (d) endangers a person's life, other than the life of the person taking the action; or
- (e) creates a serious risk to the health or safety of the public or a section of the public; or
- (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:
 - (i) an information system; or
 - (ii) a telecommunications system; or

¹² United Nations Security Council Resolution 1390 (2002), S/RES/1390(2002), para 2.

¹³ Commission on Human Rights, *Protecting human rights and fundamental freedoms while countering terrorism*, 60th sess, UN Doc. E/CN.4/2004/91 (2004).

¹⁴ See Senate Legal and Constitutional Legislation Committee (2002) *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2] etc* at [3.101]-[3.140].

¹⁵ *Criminal Code* Part 5.3.

- (iii) a financial system; or
- (iv) a system used for the delivery of essential government services; or
- (v) a system used for, or by, an essential public utility; or
- (vi) a system used for, or by, a transport system.

The following relevant offences are included in the *Criminal Code*:

- section 101.1 makes it an offence to commit a terrorist act;
- section 101.2 makes it an offence to be involved in training related to a terrorist act;
- section 101.3 makes it an offence to possess a thing connected with the commission of a terrorist act;
- section 101.4 makes it an offence to collect or make documents likely to facilitate a terrorist act;
- section 101.5 makes it an offence to do any act in preparation for, or planning of, a terrorist act.

These offences carry penalties ranging from 10 years for recklessly collecting or making documents under section 101.4, to life imprisonment for commission or planning of a terrorist act under sections 101.1 and 101.5. Each of the sections listed in one for which the jurisdiction is extended, by operation of section 15.4 of the *Criminal Code* to actions wherever they occur (not limited to Australia).

Considering, as a useful and relevant example, the apparent justifications given for the listings currently under review and the scope of the existing offences, in particular those in sections 101.1 to 101.5, it is clear that an organisation guilty of any of the actions listed, would have been involved in one or more of the offences under Part 5.3 of the *Criminal Code*. In addition, any financing of an organisation listed by the United Nations and therefore falling under the *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002*.¹⁶ Prosecution for those offences is the appropriate response and, as such, the proscription power under the *Criminal Code* remains unnecessary. To this end, PIAC believes that the current protections provided by existing criminal law and the *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002* are sufficient and the proscription power superfluous.

PIAC concedes that theoretically the UN list of organisations may not include a group or organisation that may be specifically operating in Australia or may pose a particular threat to Australia. In this instance only, may it be necessary for the Australian Government to proscribe an organisation to supplement the UN list.

Proscription powers in practice

PIAC is particularly concerned that the proscription powers are not only unnecessary but that there may be significant dangers arising from their application. PIAC continues to have serious concerns about the secrecy surrounding the exercise of proscription powers and the arbitrariness with which they may be exercised. PIAC also remains concerned that the criteria and procedures relied on by the Federal Attorney-General and the Australian Security Information Organisation ('ASIO') in the process leading to a proscription of an organisation have not been the subject of independent high-level scrutiny. While there are clearly valid concerns about protecting the security of information-gathering processes, disclosure of the criteria relied on and the evidence in support of the listing ought properly be the subject of independent scrutiny.

The supporting information in relation to the proscribed groups currently under review states that ASIO's assessment of the information is that it is 'accurate and reliable'. However, the criteria, processes and evidence relied upon for this assessment remains secret. The test for the Government to proscribe a group requires only that the Attorney-General is:

¹⁶ *Charter of the United Nations Act 1945*, ss 20 and 21.

... satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).¹⁷

However, as noted by the Parliamentary Library's research note, 'The politics of proscription in Australia', there is no requirement that the listed group has links to Australia or poses a threat to Australian interests.¹⁸ Indeed, it notes that, to date, the proscription power has been exercised on an inconsistent basis. For instance, some organisations with links to Australia have not been proscribed while others with no links have been banned.¹⁹ The Committee has itself suggested that the threat to Australia or the involvement of Australians should be given 'particular weight' in considering future listings.²⁰ The Parliamentary Library's research note further observes that the first group that the Government chose to list under the new powers, which was not already listed by the United Nations—the Palestinian Islamic Jihad (proscribed 3 May 2004)—is one that ASIO has stated has no links to Australia.

What is notable about the organisations proscribed under the *Criminal Code* is that they are all Muslim groups. At the very least, this raises reasonable concern that the Government in its 'War on Terror' is targeting Muslims in Australia.

PIAC is concerned about the potential use by the Government of this sensitive power for political rather than security purposes. It is a serious abuse of power to do this and is likely to fuel the flames of ideology that the power is seeking to quell.

Transparency

Promoting transparency and accountability within the proscription process will lead to greater public confidence in the process and acceptance of the outcome as valid and necessary to protect Australia's national interests and Australians. It will also go some way to ensuring that the interests of security are protected in a manner that appropriately recognises the rights of marginalised groups and people in Australia.

PIAC submits that, at the very least, the criteria and procedures relied upon by the Attorney-General in determining whether or not to list a group as a 'terrorist organisation' under the *Criminal Code* should generally be made the subject of independent judicial scrutiny and review at the most senior level.²¹ The same should apply to criteria and procedures relied upon by the ASIO in recommending that a group be proscribed as a 'terrorist organisation'. Similarly, the evidence relied upon by the Attorney-General and ASIO in relation to specific proscriptions should also be subject to independent judicial scrutiny and review.

Proper Criteria

The definition of what constitutes a 'terrorist organisation' remains extremely broad. PIAC maintains that the mere fact that a group meets the statutory definition of a 'terrorist organisation' is not sufficient to justify its proscription. The broad scope of the definition leaves it

¹⁷ *Criminal Code*, section 102.1(2).

¹⁸ N Brew (2004) *The politics of proscription in Australia: Parliamentary Library Research Note No 63*, Foreign Affairs, Defence and Trade Section, Information and Research Services.

¹⁹ *Ibid.*

²⁰ Parliamentary Joint Committee on ASIO, ASIS and DSD (2004) *Review of the listing of the Palestinian Islamic Jihad*, at 24, cited in Brew, above at n18.

²¹ See PIJ report at [2.9].

open for many non-terrorist organisations to be mistakenly classified as such, by indirect association. This definition embraces organisations that many members of the Australian public will not consider ‘terrorist’ organisations. This notion, firstly, draws upon the wide definition of a ‘terrorist act’²², which at its margins embraces certain forms of industrial action like picketing by nurses.²³ Moreover, it is not restricted to organisations whose principal activities are the promotion and engagement of extreme acts of ideological and/or religious violence. A ‘terrorist’ organisation can, for example, be an organisation that is predominantly involved in charitable work but is also indirectly involved in a ‘terrorist’ act.²⁴ For example, in light of the tsunami-disaster, an aid worker providing legitimate training to the Liberation Tigers of Tamil Eelam (LTTE)—a group known to have resorted to acts of ideological and/or political violence in the past—could be culpable under this offence despite having no direct involvement with such violence and could face the prospect of 25 years in jail.

To minimise any undermining of the principle that criminal liability should be imposed because of an individual’s actions in causing harm or damage, PIAC believes that the proscription power should be used only against organisations whose *principal* activities are acts of political and/or ideological violence, or the direct funding of such organisations.

Finally, PIAC recommends that prior to proscribing a group, the Attorney General should be required to consider the impact of any proscription on freedom of political association and communication, both of which are human rights that Australia has an international commitment to protect and respect. This is important as a matter of principle given the ‘serious consequences’²⁵ that result from a proscription.²⁶ It may also be required by the *Constitution*.²⁷

²² *Criminal Code*, section 100.1.

²³ While the definition of a ‘terrorist act’ excludes ‘industrial action’ (*Criminal Code*, section 100.1), this is unlikely to afford any protection to picketing, which has been found not to be ‘industrial action’ under the *Workplace Relations Act 1996* (Cth): *Dauids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550 (*‘Dauids’*) at 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at p 586). For commentary on this case, see John Howe, ‘Picketing and the Statutory Definition of “Industrial Action”’ (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in *Dauids* has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR ¶4-282 and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR ¶4-382.

²⁴ *Criminal Code*, section 102.1.

²⁵ PIJ Report [3.23].

²⁶ These concerns have been acknowledged by the Attorney-General, Philip Ruddock: Philip Ruddock, ‘Australia’s Legislative Response to the Ongoing Threat of Terrorism’ (2004) 27 *University of New South Wales Law Journal* 254, 257.

²⁷ For further discussion, see Joo-Cheong Tham, ‘Possible Constitutional Objections to the Powers to Ban ‘Terrorist’ Organisations’ (2004) 27 *University of New South Wales Law Journal* 482, 484-499.