The Parliament of the Commonwealth of Australia

Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code

Parliamentary Joint Committee on Intelligence and Security

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Foreword

Combating international terrorism has become a high priority for national governments since the tragic loss of thousands of innocent lives in the terrorist attacks by Al Qa'ida on the US in 2001. Over the past five years terrorist violence has claimed hundreds more lives in attacks in Bali, Jakarta, Madrid and London. These events have signalled an increased threat to Australian interests, and several prosecutions for alleged terrorist activity are currently before the courts.

The power to list a 'terrorist organisation' under the Criminal Code was one element of a package of reforms adopted in 2002. Australia has listed nineteen organisations but so far proscription has not been an element in any of the prosecutions for terrorist organisation offences. No listed entity has applied to the Minister to be de-listed or sought judicial review in the courts. Despite this, it was evident throughout the inquiry that some sectors of the community continue to have concerns about the impact of proscription and, in particular, the breadth of terrorist organisation offences. Several witnesses called for reform that would see proscription transferred to the judiciary or a new advisory panel to advise the Minister on possible listings.

The Committee considers that the current model of executive regulation and parliamentary oversight provides a transparent and accountable system that is consistent with international practice. However, there is clearly room to improve the public information available about the implications of listing and data on the application of the new terrorism laws. The appointment of an Independent Reviewer would make a significant contribution to those efforts.

The Hon David Jull MP
Chair

Contents

Membership of the Committee

Chair	The Hon David Jull MP	
Deputy Chair	Mr Anthony Byrne MP	
Members	Mr Stewart McArthur MP	Senator Alan Ferguson (until 14 August 2007)
	The Hon Duncan Kerr SC MP	Senator the Hon Robert Ray
	Mr Stephen Ciobo MP	Senator the Hon John Faulkner
		Senator Fiona Nash
		Senator the Hon Sandy Macdonald (from 17 August 2007)

Committee Secretariat

Secretary	Mr Stephen Boyd (from 4 June 2007)
	Ms Margaret Swieringa (till 1 June 2007)
Inquiry Secretary	Ms Jane Hearn
Executive Assistant	Mrs Donna Quintus-Bosz

Terms of reference

Under Section 102.1A (2) of the *Criminal Code Act 1995* (Cth) the Parliamentary Joint Committee on ASIO, ASIS and DSD has the following function:

(a) to review, as soon as possible after the third anniversary of the commencement of this section, the operation, effectiveness and implications of subsection 102.1(2),(2A),(4)(5)(6)(17) and (18) as in force after the commencement of this section;

(b) to report the Committee's comments and recommendations to each House of the Parliament and the Minister.

List of abbreviations

AAT	Administrative Appeal Tribunal
ADJR	Administration Decisions Judicial Review Act 1977
AFP	Australian Federal Police
AGD	Attorney-General's Department
AMCRAN	Australian Muslim Civil Rights Advocacy Network
ASIO	Australian Security Intelligence Organisation
ATA (No.2)	Anti-Terrorism Act No.2 2005
ATRAC	Australian Tamil Rights Advocacy Council
COAG	Council of Australian Governments
Committee	Parliamentary Joint Committee on Intelligence and Security
Criminal Code	Criminal Code Act 1995
DIAC	Department of Immigration and Citizenship
DPP	Director of Public Prosecutions
DFAT	Department of Foreign Affairs and Trade
EM	Explanatory Memoranda
ESO	External Security Organisation

FCLC (Vic)	Federation of Community Legal Centres (Victoria)
FRLI	Federal Register Legislative Instruments
HREOC	Human Rights and Equal Opportunity Commissio
ICCPR	International Covenant on Civil and Political Right
IGA	Inter-Governmental Agreement on Counter-Terrorism Laws 2004
IGIS	Inspector-General of Intelligence and Security
IISCA	Islamic Information and Support Centre of Australia
IS Act	Intelligence Services Act 2001
LCA	Law Council of Australia
LTTE	Liberation Tigers of Tamil Eelam
NSW CCL	New South Wales Council of Civil Liberties
PIJ	Palestinian Islamic Jihad
PKK	Kurdistan Workers Party
RCOA	Refugee Council of Australia
SAD	Security Appeals Division
SLRC	Security Legislation Review Committee
UNHCR	United Nations High Commissioner for Refugees
UNSC	United Nations Security Council
UNSCR	United Nations Security Council Resolution

List of recommendations

3 The implications and community impacts of proscription

Recommendation 1

The Committee recommends that:

- the Attorney-General's Department develop a communication strategy that is responsive to the specific information needs of ethnic and religious communities;

- there be direct consultation on the management of visa security assessments between the Australian Intelligence Security Organisation, the Inspector General of Intelligence and Security and the UN High Commission for Refugees.

4 Selection of Entities

Recommendation 2

The Committee recommends that the criteria 'ideology and links to other networks and groups' be restated so that:

- the link between acts of terrorist violence and the political, ideological or religious goals it seeks to advance is clearly expressed; and

- links to other networks and groups that share the same world view is identified as a separate criteria.

5 Procedural Issues

Recommendation 3

The Committee recommends that the mandate of the Committee to review the listing and re-listing of entities as 'terrorist organisations' for the purpose of the Criminal Code be maintained.

Recommendation 4

The Committee recommends that the Government give consideration to reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period has expired.

The Committee recognises that the Attorney-General should, in exceptional cases, retain the power to begin the commencement of a listing on the date the instrument is lodged with the Federal Register of Legislative Instruments where the Attorney-General certifies that there are circumstances of urgency and the immediate commencement of the listing is required for reasons of national security.

6 Other Issues

Recommendation 5

The Committee recommends that strict liability not be applied to the terrorist organisation offences of Division 102 of the Criminal Code.

Recommendation 6

The Committee recommends that:

- a regulation listing an entity should cease to have effect on the third anniversary of the date it took effect.
- the Government consult with the Committee on streamlining the administration of proscription to enable periodic review of multiple listings during the parliamentary cycle.

Recommendation 7

The Committee:

- recommends that the Attorney-General's Department be responsible for the publication of comprehensive data on the application of terrorism laws.

- reiterates that an Independent Reviewer be established to monitor the application of terrorism laws, including the use of special police and intelligence powers, on an ongoing basis. In addition, that the Independent Reviewer report annually to the Parliament and the responsibility for examining those reports be conferred on the Committee.

- recommends that the application of the proscription power be included in the review of counter terrorism laws scheduled for 2010 under the auspices of the Council of Australian Governments.

1

Background

1.1 In 2002 the Commonwealth Parliament passed a package of security and counter terrorism laws to strengthen Australia's capacity to respond to the threat of international terrorism.[1] The legislation established a suite of personal and terrorist organisation offences and an executive power to proscribe an entity as a 'terrorist organisation' under the *Criminal Code Act 1995* (the Criminal Code).

1.2 The Committee is required to review the operation, effectiveness and implications of the proscription regime and to report to each House of the Parliament and to the Minister as soon as possible after March 2007.[2]

1.3 In 2005 the Government established the independent Security Legislation Review Committee (SLRC) under the chairmanship of the Honourable Simon Sheller AO QC.[3] The Committee is required to take account of the report of the SLRC, reference is therefore made

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

2 Subsection 102.1A(2) of the Criminal Code.

3 Subsection 4 (9) of the *Security Legislation (Terrorism) Act 2002*. Membership of the SLRC included: Mr Ian Carnell (Inspector-General of Intelligence and Security); Ms Karen Curtis (Commonwealth Privacy Commissioner); Mr Graeme Innes AM – (Human Rights Commissioner); Professor John McMillan (Commonwealth Ombudsman); Mr John Davies APM OAM (former ACT Chief of Police and nominee of the Attorney General); Ms Gillian Braddock SC (Law Council of Australia) and Mr Dan O'Gorman (Law Council of Australia).

throughout the report to the findings and recommendations of the SLRC relevant to this review. The Committee has also drawn on its own experience of reviewing the listing of 'terrorist organisations', a function it has discharged on behalf of the Parliament since 2004.

1.4 The inquiry was advertised generally on 18 November 2006 and published on the Parliament House website on the same date. In November and December 2006 the Committee wrote to relevant Ministers, the Premiers of each of the States and Territories and a wide range of non-government organisations, academics and individuals with an interest in the subject matter. Twenty-nine written submissions were received and all are published on the Committee's website. The Committee also took evidence in public from twenty witnesses during one and a half days of hearings held on 3 and 4 April 2007 conducted in Parliament House, Canberra.

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Operation of the proscription regime

2.1 This chapter outlines the current procedures in place for listing 'terrorist organisations' and the role the Committee plays in ensuring ongoing parliamentary oversight of the use of the proscription power.

Rationale for proscription

2.2 Before turning to the detail of the current scheme it is important to restate the underlying rationale for proscription, which has not changed since its inception as part of the wider reforms in the area of counter-terrorism. Proscription is pivotal to the criminalisation of activities that provide political and economic support to organisations that use terrorism as a strategy to advance their political, ideological or religious cause. It also plays a role in deterring those sympathetic to the organisation's goals from becoming more deeply involved.

2.3 The Attorney-General's Department (AGD) submitted that proscription is a key component of Australia's anti-terrorism laws. AGD stated:

> By criminalising activities such as the funding, assisting and directing of a terrorist organisation, proscription contributes to the creation of a hostile operating environment for groups wanting to establish a presence in Australia for either operational or facilitation purposes. It also sends a clear message to Australian citizens that involvement with such organisations, either in Australia or overseas, will not be permitted. Proscription also communicates to the

international community that Australia rejects claims to legitimacy by these organisations.[1]

2.4 The Committee endorses the continued use of proscription as a legitimate method of suppressing terrorist activity.

Legal effect of proscription

2.5 There are two ways an entity may be designated a terrorist organisation for the purpose of Division 102 of the Criminal Code:

- by a court in the course of a prosecution for a terrorist organisation offence under Division 102; or
- by regulation made by the Governor-General on the advice of the Attorney-General under section 102.1(2).

2.6 This report is concerned only with the second method, that is, the determination by the Attorney-General that an entity meets the legislative definition of a 'terrorist organisation' and the proscription of that entity by regulation. Before the Governor-General makes a regulation the Minister *must be 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 a terrorist act has occurred or will occur); or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

2.7 Once an entity is proscribed, it is a terrorist organisation as a matter of law and the prosecution is relieved of the burden of proving beyond reasonable doubt that an entity is a terrorist organisation in every trial for a terrorist organisation offence under Division 102.[2] To date, the fact that an entity is proscribed has not been an element in any of the trials for offences relating to terrorist organisations.[3]

2.8 Listing is also a pre-requisite to making available a control order to protect the public from a terrorist act by a person who has provided or received training from a listed organisation.[4] The first and, at this

1 AGD, *Submission* 10, p.2.

2 Paragraph 143(1) (b) *Evidence Act 1995* (Cth); Mr. Sheller AO QC, Opening Statement, Exhibit 1, p. 4.

3 Mr Bugg AM QC Commonwealth Director of Public Prosecution, *Submission* 4, p.1.

4 Section 104.2 of the Criminal Code.

time, the only control order was issued on 26 August 2007 by Federal Magistrate Mowbray in respect of Mr Jack Thomas.

2.9 There are currently nineteen entities listed as terrorist organisations under the Criminal Code.[5] To-date all the entities listed by Australia have been proscribed on the basis of their direct involvement in extreme acts of political violence. None have been listed on the basis of the advocacy of terrorism.

The role of ASIO in the listing process

2.10 The Australian Security Intelligence Organisation (ASIO) is responsible for providing security advice to government and provides advice on the proscription of entities under the Criminal Code.[6] ASIO does not have decision making powers in relation to the listing of an entity as a terrorist organisation.

2.11 ASIO's advice is provided in the form of a Statement of Reasons.[7] The assessment is based on publicly available details about an organisation, which are corroborated by classified information.

Statement of Reasons

2.12 The draft Statement of Reasons is provided to the Chief General Counsel of the Australian Government Solicitor, for advice as to whether the document contains sufficient factual material to support an exercise of the proscription power. The advice of Chief General Counsel and the Statement of Reasons is provided to the Attorney-General to assist him in deciding whether an organisation satisfies the legislative requirements for listing under the Criminal Code.[8]

2.13 If the Attorney-General is satisfied, he signs a statement declaring that he is satisfied the organisation is one that meets the statutory criteria. The Attorney-General then writes to the Prime Minister, the Leader of the Opposition, and the States and Territories advising each of the parties of his intention to proscribe the organisation.[9]

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5 Information about listed entities can be accessed on the national security website of the Attorney-General's Department at: http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument

6 Section 17(1) (c) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

7 AGD, *Submission* 10, p.5.

8 AGD, *Submission* 10, p.5.

9 AGD, *Submission* 10, p.6.

Consultation with State and Territories

2.14 The *Intergovernmental Agreement on Counter Terrorism Laws* (IGA) requires that before the power to list an organisation is exercised the Commonwealth will consult with State and Territory Governments about the listing and not list an entity where a majority of the other parties object.[10] Approval for regulations specifying a terrorist organisation must be sought, and responses from States and Territories must be provided, through the Prime Minister and Premiers and Chief Ministers.[11]

2.15 Under the IGA the Commonwealth has undertaken to 'use its best endeavours' to give the other parties a reasonable time to consider and to comment on the proposed regulation.[12] In particular, the IGA requires that the Commonwealth will provide the State and Territory Governments with the text of the proposed regulation, a written brief on the terrorist-related activities of the organisation and will offer an oral briefing by the Director-General of Security.

Consultation with the Leader of the Opposition

2.16 Subsection 102.1(2A) of the Criminal Code requires that before the Governor-General makes a regulation listing an organisation the Attorney-General must arrange for the Leader of the Opposition in the House of Representatives to be briefed.

Commencement of regulations

2.17 Once a regulation is signed by the Governor-General it is lodged with the Federal Register of Legislative Instruments (FRLI). Regulations commence on the day after registration with the FRLI, unless stated otherwise.

Public Notice

2.18 A copy of the Statement of Reasons is published on the National Security Website of the Attorney-General's Department on the day that it is lodged on the FRLI. The Attorney-General also issues a press

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10 Paragraph 3.4 Division 3 of the IGA, 25 June 2004. Accessible at: http://www.coag.gov.au/meetings/250604/iga_counter_terrorism.pdf

11 Subparagraph 3.4(8) IGA. This requirement is an amendment to the original IGA that provided for consultation through the Standing Committee of Attorneys General.

12 Subparagraph 3.4 (3) IGA.

release announcing the listing of the organisation(s), which includes the Statement of Reasons.[13]

Parliamentary scrutiny

2.19 Under the *Legislative Instruments Act 2003* (Cth) regulations must be tabled in both Houses of Parliament within six sitting days of registration on the FRLI. The regulation listing an entity and the Statement of Reasons, which form part of the Explanatory Memoranda (EM), are tabled in both Houses.

2.20 The regulation is subject to disallowance by the Parliament within 15 sitting days of the initial tabling.[14] If a disallowance motion is passed the resolution has the effect of repealing the instrument. Repeal has no retrospective effect. The listing and all actions taken pursuant to the listing remains valid for the period the instrument was in force.[15]

2.21 The Committee has the discretion to review a listing and report its comments and recommendations to each House of the Parliament before the end of the applicable disallowance period.[16] There is provision to extend the disallowance period from one to eight additional sitting days, depending on the date the Committee's report is tabled.[17] See Review by the Parliamentary Committee below.

De – listing

2.22 There are three ways in which an organisation can be de-listed:

- by operation of law under the sunset provisions;
- by declaration of the Attorney-General if the entity ceases to meet the statutory definition; or
- by declaration of the Attorney-General on application by an individual or an organisation.

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13 Information about listed organisations can be accessed at http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument

14 Section 38 and 42 of the Legislative Instruments Act.

15 Section 15 Legislative Instruments Act.

16 Subsection 102.1A (1) of the Criminal Code.

17 Subsection 102.1A (3) of the Criminal Code.

Two year sunset

2.23 A regulation proscribing an organisation ceases to have effect on the second anniversary of the day on which it took effect.[18] This does not prevent the organisation being re-listed. In practice, an organisation will cease to be listed where a new regulation is not made. To date each organisation whose listing has expired at the end of the two year cycle has been re-listed.

Attorney-General's duty to de-list

2.24 The Attorney-General must de-list an organisation where he ceases to be satisfied that the organisation does not meet the statutory criteria of being a 'terrorist organisation'.[19] If the Attorney-General 'ceases to be satisfied' the entity meets the legislative criteria he must make a declaration to that effect by publishing a written notice in the Gazette. The regulations listing the organisation cease to have effect when the declaration is made.[20] To date the Attorney-General has not made a declaration de-listing an entity under section 102.1(4).

Application to the Minister to de-list

2.25 An individual or an organisation may apply to the Attorney-General for a declaration under subsection 102.1(4) on the grounds that there 'is no basis' for the listing and the Attorney-General must consider the application.[21] The Attorney-General is not limited in the matters he may take into account when considering such an application.[22] To date the Attorney-General has received one application to de-list an organisation. The application was rejected.

Judicial review

2.26 Judicial review of the legality of a decision to list is available in the ordinary courts under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR). The general principles of administrative law require that the Minister's decision be made on the basis of logically probative evidence. The decision must also be a proper exercise of power, not

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18 Subsection 102.1(3) of the Criminal Code.

19 Section 102.1(4) of the Criminal Code.

20 AGD, *Submission* 10, p.10.

21 Subsection 102.1(17) of the Criminal Code.

22 Subsection 102.1(18) of the Criminal Code.

flawed by irrelevant considerations, improper purpose or exercised in bad faith.[23] The making of a regulation is also reviewable under section 75(v) of the Australian Constitution and section 39B of the *Judiciary Act 1903* (Cth). To date no application for judicial review has been pursued in any Australian court.

Changes to proscription policy since 2002

2.27 Over the past five years there have been several changes in the scope of the proscription power and the procedures that govern its exercise. As originally enacted, the proscription power was limited to entities identified by decisions of the UN Security Council relating to terrorism and where the organisation was directly or indirectly involved in terrorist activity. In practice, this referred predominantly to the UN Consolidated List overseen by the UNSC1267 Committee.[24] The targeted sanctions regime implemented under UNSCR 1267 is confined to Osama Bin Laden, Al Qa'ida, the Taliban and associated individuals and entities.

2.28 In its original form the commencement of listings was postponed until the day after the disallowance period had expired.[25] This variation to normal procedure was adopted as a safeguard in view of the serious consequences that flow from proscription.[26] After the Bali bombing on 12 October 2002 subsection 102.1 (4) was repealed and the policy reverted to the normal procedure, which brings a regulation into effect on the date lodged with the FRLI.[27]

2.29 Further reforms were adopted in 2004.[28] The precondition that an organisation must be identified by the UN to trigger the listing power was removed, and the power to proscribe an entity expanded to enable the Minister to list an organisation that meets the general definition of a terrorist organisation. The purpose of the amendment

23 Section 5 of the ADJR.

24 UNSCR 1267 requires Member States to freeze the financial assets of designated persons and entities, and make it a criminal offence to deal in the assets of or make funds or assets available to a listed individual or group. In Australia UNSCR 1267 is implemented by regulations under the *Charter of the United Nations Act 1945 (COUNA)*.

25 Original subsection 102.1 (4) of the Criminal Code.

26 See Senate *Journals*, 25 June 2002, p.p. 469-71.

27 *Criminal Code Amendment (Terrorist) Organisations Act 2002* commenced on 23 October 2002. Jemaah Islamiyah was listed on 27 October 2002.

28 *Criminal Code Amendment (Terrorist Organisations) Act 2004*.

is explained in the Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003:

> This amendment enables the Government to independently identify organisations that are a threat to Australia's national security as terrorist organisations – thereby attracting the full weight of the criminal law – without reference to the United Nations Security Council.[29]

2.30 Additional safeguards were introduced to address concerns that the amendment conferred too much discretion on the Minister. These measures:

- require the Leader of the Opposition to be briefed prior to making a regulation;[30]
- conferred a mandate on the Parliamentary Joint Committee on Intelligence and Security to review the listing of terrorist organisations;[31] and
- include a duty to de-list an organisation if the Minister ceases to be satisfied the entity meets the statutory definition.[32]

2.31 In 2005 the *Anti Terrorism Act (No.2) 2005* (ATA) extended the power to proscribe an entity to include organisations that 'advocate the doing of a terrorist act'.[33]

Review by the Parliamentary Committee

2.32 The mandate of the Committee to review the listing of 'terrorist organisations' commenced operation on 10 March 2004'.[34] Where the Committee decides to conduct such a review, it is required to report to each House of the Parliament before the end of the disallowance period.[35]

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29 EM Criminal Code Amendment (Terrorist Organisations) Bill 2003, Item 1 new subsection 102.1(2).

30 Subsection 102.1(2A) of the Criminal Code.

31 Subsections 102.1A (1)-(4) of the Criminal Code.

32 Subsections 102.1(4) (5) (6) of the Criminal Code.

33 Paragraph 102.1(2) (b) of the Criminal Code.

34 *Criminal Code Amendment (Terrorist Organisations) Act 2004.*

35 Paragraphs 102.1A (1) (a) (b) of the Criminal Code.

2.33 In an initial dialogue with ASIO and AGD on 11 March 2004, it was suggested that the role of the Committee was limited to ensuring the Attorney-General was satisfied the Statement of Reasons offered a sufficient factual basis to support the listing.

2.34 The Committee considered this interpretation to be inconsistent with the legislative intent and the scrutiny function of the Parliament.[36] The purpose of conferring a specific mandate on a parliamentary committee with expertise in security and intelligence was to strengthen Parliamentary oversight and scrutiny, recognising that there may be instances where classified information may need to be examined. It was also intended to ensure that decisions were not made in secret by a Minister and that openness, transparency and accountability were built into the system.[37]

2.35 The increased role for Parliament also recognised that there is no prior judicial authorisation required to proscribe an organisation and no independent merit review. There was bi-partisan support for the proposal that this Committee carry out the function, given its unique responsibilities and its ability to examine security sensitive information. Accordingly, the Committee has interpreted the mandate conferred on it as encompassing review of both the procedure and the merit of a listing, based on an examination of all the available material as to the goals and activities of the organisation.

Committee procedure

2.36 The following procedure was adopted by the Committee to guide its approach to this new area of work:

- the regulation and accompanying unclassified brief is to be transmitted to the Committee immediately the regulation is made. The brief should provide details of 'procedure followed in making the regulation', including consultations with States and Territories and the Department of Foreign Affairs and Trade (DFAT).
- ASIO is to provide a private briefing to the Committee. Any classified information the Minister has relied on in forming his decision to list is to be presented at the private briefing, which is Hansard recorded (secret).

36 *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, June, 2004, p.5.

37 *Senate Hansard*, 3 March 2004, 20670, 20752, 20808; *House Hansard*, 4 March 2004, 26015, 26016.

- the Committee decides whether to advertise the review in order to elicit public submissions once it has taken receipt of the regulation and the unclassified brief.
- a decision on whether or not to conduct a hearing is determined once submissions are received. If there is a *prima facie* case against listing or there are members or supporters of the organisation in Australia, the opportunity to give oral evidence will be given.
- if there is no hearing, the Committee's report will be based wholly on the ASIO briefing, other evidence provided and any other relevant material. Publication of the report is subject to national security clearance requirements of Schedule 1, clause 7 of the *Intelligence Services Act 2001* (IS Act).

Committee practice

2.37 To date the Committee has exercised its discretion to review all listings and re-listings. Eleven reports have been made to the Parliament in respect of thirty-five listings. Of these thirty-five the vast majority have concerned the re-listing of entities. There have been only three additions to the Australian list: the Palestinian Islamic Jihad (PIJ), the Kurdistan Workers Party (PKK) and the Al Zarqawi Network.

2.38 All reviews have been advertised providing an opportunity for members of the public to make a submission. Private hearings in which ASIO, AGD and DFAT have given evidence have been conducted in relation to each listing and re-listing. There have been only two exceptions to this general practice. In 2006, the review of the re-listing of Al Qa'ida and Jemaah Islamiyah was conducted entirely on the papers (it was not advertised and there was no private hearing). In May 2007, the Committee advertised its review of the re-listing of seven organisations but received no public submissions and did not seek further evidence from the government.

Committee View

2.39 The Committee considers proscription to be an important element of Australia's new counter-terrorism laws. To date proscription has played a limited role in the prosecution of terrorist organisation offences and only one control order has been issued. Nevertheless, proscription provides a clear statement that Australia rejects the claims to legitimacy of groups that engage in extreme forms of

political violence as a means of achieving their political, ideological or religious goals. In the last five years none of the listed entities have made use of the existing opportunities to seek a de-listing from the Minister or sought judicial review in the ordinary courts.

2.40 There has been a clear commitment to ensure that the power to proscribe an organisation is based, to the maximum extent possible, on publicly available information. The Statement of Reasons is a stand alone document and its publication at the time a listing comes into effect ensures public notification of the listing. The Statement of Reasons also enables an entity to know the case against it and to pursue a remedy if it believes that proscription is unlawful.

2.41 The Australian approach has also emphasised the role of the Parliament in ensuring transparency and accountability in the use of the proscription power. Regular parliamentary review has required the presentation of evidence from executive agencies and enabled ongoing dialogue based around a set of non-statutory criteria (see Chapter 4). Parliamentary review has also provided the opportunity for witnesses who oppose or support proscription to come forward.

2.42 Through this process the Parliament has been able to consider the case for listing the entity and consider the wider impacts of proscription on particular communities. In practice, there has been limited public interest although the proscription of some organisations is clearly more contentious and has attracted a wider range of views. In our view, the Australian model exhibits a high degree of openness and opportunities for accountability both through the ADJR in the ordinary courts and a dedicated parliamentary process.

3

The implications and community impacts of proscription

3.1 This chapter discusses the impact of proscription on religious and ethnic communities within Australia. It was clear from the evidence that there continues to be a degree of concern in some sectors about the application and longer terms effects of the new terrorism laws.

The claim of anti-Muslim bias

3.2 There were no objections to the listing of entities such as Al Qai'da but several witnesses argued that the proscription power is exercised inconsistently and is vulnerable to political manipulation.[1] Australian Muslim Civil Rights Advocacy Network (AMCRAN) remains opposed to proscription on the grounds that the terrorist organisation offences do not require any specific intent by the individual to engage in acts of terrorism.[2]

3.3 The preponderance of self-declared Islamic groups on the Australian list was significant to many witnesses, who argued that the Australian list reflects an anti-Muslim bias as compared to how proscription operates in like-minded countries.[3] In particular, AMCRAN and Islamic Information and Support Centre of Australia (IISCA) said that because all but one of the organisations is 'Muslim' or 'Islamic', many Muslim Australians feel that they have been

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1 AMCRAN, *Submission* 22, p.1; Associate Professor Hogg, *Submission* 6, p.17.

2 AMCRAN, *Submission* 22, p.1.

3 AMCRAN, *Submission* 22, p.3; IISAC, *Submission* 27, p.3; Associate Professor Hogg, *Submission* 6, p.1; PIAC, *Submission* 11, p.5.

'targeted' by the new terrorism laws.[4] AMCRAN claimed that one of the consequences is that Muslim Australians are likely to be subject to higher levels of surveillance and investigation than the rest of the community.[5] AMCRAN expressed the view that this situation:

> … does not help in creating a cooperative environment for addressing and fighting the modern challenges of terrorism, not to mention the adverse impact it is having on the sense of security and safety of the Muslim community.[6]

3.4 Although no organisation has yet been proscribed on the basis of 'advocacy' the power to do so was criticised as infringing freedom of expression, especially of Australian Muslims who are more likely to express unpopular opinions about the Iraq War, the Israel/Palestinian conflict or conflicts in other places such as Afghanistan or Chechnya.[7]

3.5 There was also anecdotal evidence that proscription results in a degree of self-censorship within the Muslim communities.[8] For example, participation in social activities, lawful protest and dissent, financial contributions to charitable organisations and through mosques, were some of the areas of normal civic participation that were said to be affected.[9] IISCA said that:

> Law-abiding organisations have seen funding reduced to a trickle, in part due to the confusion created by the new laws, and, in part, due to the media hype surrounding the groups sharing similar names i.e. anything with Islam or Muslim terminology in the name.[10]

The impact on other ethnic communities

3.6 Similar concerns were raised by the Australian Tamil Rights Advocacy Council (ATRAC) who submitted that if the Liberation Tigers of Tamil Eelam (LTTE) were to be listed under the Criminal

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4 AMCRAN, *Committee Transcript*, 3 April 2007, p.44; IISCA, p.27, p.4.

5 AMCRAN, *Submission* 22, p.9; *Telecommunications (Interception) Amendment Act 2006* (Cth); AMCRAN, *Committee Transcript*, 3 April 2007, p.44; Mr Hess, *Submission* 3, p.1.

6 AMCRAN, *Committee Transcript*, 3 April 2007, p.44.

7 AMCRAN, *Submission 22*, p.6.

8 See, for example, AMCRAN, *Submission* 22; IISCA, *Submission* 27, p.5.

9 AMCRAN, *Committee Transcript*, 3 April 2007, p.44.

10 IISCA, *Submission* 27, p.5.

Code, this would cause many Australian Tamils to withdraw from legitimate activities that have non-violent goals. It was argued that connections, through travel, education, family and humanitarian and development work, means that engagement with the LTTE is inevitable.[11] ATRAC said that because of these deep and ongoing connections, listing the LTTE under the Criminal Code was likely to have a significant and adverse impact on normal social, economic and political activities.[12] In particular, ATRAC said that the suppression of the community's deeply held political convictions was inconsistent with pluralist democracy.[13]

The implications for refugees and asylum seekers

3.7 The Committee also received evidence from the Refugee Council of Australia (RCOA) about its concerns that due to real or alleged association with a listed organisation, refugees and asylum seekers may be exposed to prosecution for a terrorist organisation offence for the same reasons they were granted refugee status. [14] RCOA said that, in complex internal conflicts, it is almost impossible for a person not to have some type of connection with a 'terrorist organisation'.[15] Associate Professor Hogg argued that Australia has granted refugee status to people persecuted because of alleged membership and support of organisations, such as the PKK.[16] RCOA explained that because concepts such as 'membership' and 'association' are broad and undefined, listing an organisation means that these offences have the potential to affect large numbers of people.[17] It was said that many refugees may support an organisation's goals (for example, an independence struggle) but not their method of achieving it.[18]

3.8 The RCOA and UN High Commissioner for Refugees (UNCHR) submitted that proscription may also increase the risk of exclusion

11 ATRAC, *Submission* 8, p.10.
12 ATRAC, *Submission* 8, p.10
13 ATRAC, *Submission* 8, p.12.
14 RCOA, *Submission* 25, p.2.
15 RCOA, *Submission* 25, p.2.
16 Associate Professor Hogg, *Submission* 6, p. 2; se also, RCOA, *Submission 25*, p.2.
17 RCOA, *Submission* 25, p.2.
18 RCOA, *Submission* 25, p.2.

or expulsion under the *Migration Act 1958*.[19] RCOA stated that the power to proscribe organisations could:

> … expand the grounds for exclusion of refugees and asylum seekers imputed to be members or to support a listed terrorist organisation through:
>
> - adverse security assessments;
> - exclusion under Article 1F of the Refugee Convention 1951; and
> - visa cancellation under s501(6) of the Migration Act 1958.[20]

3.9 RCOA said that, having consulted with other organisations, there appeared to be an increasing reliance on security assessment that was causing delays. RCOA also questioned the reliability of intelligence about a refugee or asylum seekers involvement in a listed organisation.[21] UNHCR stated that because an adverse security assessment is not disclosable to a non-national, a presumption arising from a connection to a listed entity cannot be rebutted by a person otherwise found to be in need of protection.[22]

3.10 The Committee asked the Government to clarify the situation. The Department of Immigration and Citizenship (DIAC) confirmed that there is no automatic exclusion based on an association with a 'terrorist organisation' and each case is dealt with individually. Whether or not a person is excluded depends upon the existence of an adverse security assessment by ASIO.[23] The Deputy Director-General of ASIO stated that:

> Obviously it is case by case, you understand, because you are dealing with individuals; you are not dealing with groups. … Whether the group is proscribed here or not, it is still a matter of the individual and the extent to which that person might

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19 RCOA, *Submission 25*, p.3, UNHCR; Public Interest Criterion 4002 of Schedule 4 of the Migration Regulations 1994 which requires that: the applicant is not assessed by ASIO to be *directly or indirectly a risk to security*, within the meaning of section 4 of the ASIO Act 1979; See also PIC 4001 (character test as defined by s.501 (6) of the Migration Act 1958) and 4003 (associated with the proliferation of weapons of mass destruction) Schedule 4 of the Migration Regulations 1994.

20 RCOA, *Submission* 25, p. 3.

21 RCOA, *Submission* 25, p.3.

22 UNHCR, *Submission* 29, p.2;Division 2 of Part IV of the ASIO Act; see also Sundberg J in *Parkin v O'Sullivan* [2006] FCA 1413 at [28] –[32]

23 DIAC, *Committee Transcript*, 4 April 2007, p.57.

> have engaged in, or is likely to engage in, in Australia, activities prejudicial to security. It is not automatic.[24]

3.11 This appears to be consistent with the position advocated by the UNCHR, which submitted that:

> In view of the seriousness of the issues and the consequences of an incorrect decision, the application of any exclusion clause should continue to be individually assessed, based on available evidence, and conform to basic standards of fairness and justice.[25]

3.12 ASIO publishes information in its annual report on the number of visa security assessments processed in each twelve month period. Thus, for example, in the financial year 2005-06 ASIO conducted 53,147 visa security assessments, resulting in 12 individuals, from a range of nationalities being refused entry due to links to politically motivated violence, terrorism or foreign intelligence services.[26]

The adequacy of community information

3.13 It appears to be a commonly held view that informing the community about proscription and the scope of terrorist organisation offences remains a challenge.[27] The Community Relations Commission did not comment on the effectiveness of proscription but made the observation that:

> ..it is an offence to fund a terrorist organisation both within and outside Australia, the Commission would suggest that a communication strategy be put in place to ensure that the Australian community is informed of those organisations that are listed, the law, and the possible consequences of breaching that law.[28]

3.14 The Committee sought up to date information from AGD about the Department's efforts to promote public understanding of the implications of proscription. AGD reiterated that it publishes information about listings on its website and this includes the

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24 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p.74.

25 UNHCR, *Submission* 29, p.3.

26 ASIO, Report to the Parliament 2005-2006, p.30.

27 See, for example, Professor Williams, *Committee Transcript*, 3 April 2007, p.22; Community Relations Commission, *Submission* 1, p.1;

28 Community Relations Commission, *Submission* 1, p.1.

Statement of Reasons.[29] The Attorney-General also releases a press statement at the time of the listing but the extent to which the various ethnic news outlets are covering such matters has not been monitored and is therefore unknown.[30] As a consequence, the Committee has no way of assessing the effectiveness of these routine steps in informing the wider community.

3.15 AGD has also adopted a number of other measures. For example, during the hearing AGD advised that a set of pamphlets produced in 2005 are to be revised to include information about proscribed organisations.[31] The Committee was also informed that these pamphlets have been distributed through some migrant organisations.[32] AGD has also responded positively to invitations to speak at public forums and have made presentations at several such events during the past year.[33]

Committee View

3.16 In a liberal democracy the 'banning' of a political association is inherently controversial. However, proscription of organisations that engage in extreme acts of political violence, while still regarded an exceptional measures, is not entirely new. Few witnesses claimed that proscription *per se* is unjustified as a means to combat terrorism. Provided there is probative material that the entity has adopted terrorism as a strategy to pursue its goals, listing that organisation, regardless of the ideological, political or religious cause it seeks to advance, is a legitimate response by a democratic society.

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29 AGD, *Committee Transcript*, 4 April, 75.

30 AGD, *Committee Transcript* 4 April, p.75; AGD, *Supplementary Submission 10A*, p.5.

31 AGD, *Committee Transcript*, 4 April, p.75.

32 AGD, *Committee Transcript*, 4 April, p.75.

33 AGD, *Committee Transcript*, 4 April, 68; AGD, *Supplementary Submission 10A,* p. 2;27 February 2006 – briefing to the Muslim Community Reference Group on the new counter-terrorism laws; 19 April 2006 – participation in a legislation and policy forum held at Monash University to discuss the counter-terrorism legislation; 17 May 2006 – presentation on the Government's counter-terrorism legislation to Muslim community representatives and Northern Territory police at a National Security and Crisis Management Planning workshop in Darwin; 19 and 20 May 2006 – presentation to a public forum hosted by the Citizens for Democracy in Armidale; 28 May 2006 – presentation to a public forum hosted by the Young Lawyers Association in Sydney; 2 June 2006 – address to the Attorney-General's Non-Government Organisation Forum on Human Rights; 19 July 2006 – presentation on the implications of Australia's new terrorism laws on specific ethnic communities at a conference of The Northern Migrant Resource Centre Inc. in Melbourne.

3.17 The Committee does not accept that the preponderance of militant Islamist groups on the current list is a form of discrimination. The selection of entities is not concerned with the religious faith of any group and is not geared toward selecting Islamic organisations. Nor is the proscription power exercisable purely in relation to organisations that promote some form of religious fundamentalism. There have been numerous efforts to make the distinction between Islam the religion and the violent extremism of some militant Islamist groups, whose indiscriminate violence threatens public safety and/or the existing structures of government.

3.18 That said, the Committee recognises that there remains a tendency in much of the public debate to conflate Islam the religion with the distorted political theology of groups that use terrorist tactics, and this has fed prejudicial attitudes. A general rise in the level of prejudice experienced by Muslim Australians has been recorded, with Muslim women being particularly vulnerable.[34]

3.19 HREOC briefed the Committee on its ongoing work with the DIAC to alleviate the situation. The Committee was especially interested to learn of the *Unlocking the Doors Project* designed to facilitate dialogue between Muslim communities and police in NSW and Victoria, and improve police responses to complaints of racist violence.[35] It is important that such work continues and that everything is done to promote a wider appreciation across the whole community that freedom of speech is not a license to deliberately inflame hostile sentiment against any other group.[36]

3.20 The Committee regard the issue of increased levels of investigation as essentially a question about the operation of police and intelligence powers, a matter that was not examined in detail during this inquiry. We therefore limit our comment to the observation that building cross community partnerships at the operational and community level is important in supporting the efforts of the police and intelligence agencies.[37]

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34 *Isma Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australian's*, 2004.

35 HREOC, *Report to the Department of Immigration and Citizenship on the Unlocking Doors Project*, March 2007; see also, *Report to the DIAC on the Muslim Womens' Project 2006: A Dialogue on human rights and responsibilities*, December 2006.

36 *ASIO's Questioning and Detention Powers: Review of the operation, effectiveness an implications of Division 3 Part III of the ASIO Act 1979*, November 2005, p.75; *Review of Security and Counter Terrorism Legislation*, December 2006, p.32.

37 *Review of Security and Count-Terrorism Legislation*, December, 2006, p.p.23-37.

3.21 The Committee does not agree that proscription on the basis of 'advocacy' of terrorist acts is an unjustified infringement of freedom of expression. While we understand that many of the fears expressed about this aspect of the law are genuine, in light of the fact that no organisation has yet been proscribed on the basis of advocacy, some of the claims appear to overstate the position. The application of the proscription power based on the grounds of 'advocacy' of terrorism is discussed in Chapter 4.

3.22 The Committee recognises that, traditionally, Diaspora communities have considered their ongoing support and connections with overseas organisations as perfectly legitimate. However, Australia has obligations not to provide safe haven or allow its territory to be used for activities that facilitate terrorist violence against foreign states. The Committee has also recognised that assessing the impacts of proscription on ethnic and religious communities is a relevant factor to be taken into account during its review of listings.

3.23 Concerns were raised about the potential for proscription to impact on the determination of refugee status but exclusion is not automatic under Australian law. The Inspector General of Security and Intelligence (IGIS) plays an important role in providing ongoing oversight of the intelligence agencies, and is the appropriate body to deal with individual complaints about delays in assessments in migration related matters.[38] The question of the procedural rights of non-nationals is outside the terms of reference of this inquiry.

3.24 There is an important distinction between activities prior to arrival in Australia and conduct in Australia that breaches Australian criminal law, which clearly does raise the possibility of prosecution. It is therefore of the utmost importance that effective communication strategies are in place to ensure that vulnerable communities are aware of what is and what is not permissible. The Committee has stated the importance of community information on several occasions during its review of listings and it is disappointing that the efforts to-date appear to be quite limited rather than part of a more comprehensive and proactive strategy.

38 See, for example, *IGIS Annual Report 2005-06,* p.18.

Recommendation 1

3.25 **The Committee recommends that:**

- **the Attorney-General's Department develop a communication strategy that is responsive to the specific information needs of ethnic and religious communities;**
- **there be direct consultation on the management of visa security assessments between the Australian Intelligence Security Organisation, the Inspector General of Intelligence and Security and the UN High Commission for Refugees.**

4

Selection of Entities

4.1 This chapter discusses the factors taken into account by ASIO when providing advice to the Government on the listing of an entity under the Criminal Code.

4.2 Australia's proscription regime is consistent with widespread international practice, with the United States, the United Kingdom, Canada and New Zealand all having some form of proscription.[1] In comparison to other likeminded countries, Australia has listed fewer organisations and none have been listed on the basis of 'advocacy' of terrorism. However, the breadth of the definition of 'terrorist organisation' was said to leave national liberation movements vulnerable to proscription because the statutory definition does not require the complexity of internal disputes to be taken into account.[2]

Non-Statutory Criteria

4.3 The potential to apply proscription to a wide number of groups has been recognised by ASIO. Non-statutory criteria have been developed to guide the organisation in what should be taken into account when developing advice for the Minister. The criteria include:

- engagement in terrorism;
- ideology and links to other terrorist groups or networks;

1 Gilbert and Tobin Centre of Public Law, *Submission* 16, p.1.

2 Criminal Bar Association of Victoria, *Submission* 24, p.2; FCLC (Vic), *Submission* 15, p.11; Associate Professor Hogg, *Committee Transcript*, 4 April 2007, p.14; PIAC, *Submission* 11, p.6.

- links to Australia;
- threats to Australian interests;
- proscription by the UN or like minded countries; and
- engagement in peace/mediation processes.

4.4 AGD confirmed that the criteria have no specific legal status. AGD said:

> The criteria… are not expressly specified in the Criminal Code as matters requiring consideration by the Attorney-General under subsection 102.1(2). In particular, there is no statutory requirement to establish a nexus between an organisation and Australia for the purpose of specifying the organisation as a terrorist organisation under the Act. The Criminal Code does not refer to a Statement of Reasons, or any particular criteria for listing an organisation, other than that specified under section 102.1(2)(a) or (b).[3]

4.5 During the hearing the Deputy Director-General of ASIO explained that:

> Against the very large number of potential groups that may meet the legislative test, we have to work out where we start from. So the criteria simply have the status internally of a tool—an accountable tool rather than just a haphazard approach—as to where we start and, as we go through, what comes up next as the more likely ones that will meet the test.[4]

4.6 Both AGD and ASIO were open to considering further refinements to the criteria.[5]

Incorporation of the criteria into the Criminal Code

4.7 The SLRC supported the legislative incorporation of a criteria to guide the Minister's decision making, taking the existing framework as a starting point.[6] During the hearings Mr Sheller and Mr Carnell, on behalf of the SLRC, submitted that statutory criteria would increase transparency and give confidence to local communities about the considerations applied.[7] The recommendation of the SLRC was

3 AGD, *Submission* 10, p.6.

4 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p. 67.

5 *Committee Transcript*, 4 April 2007, p.67.

6 SLRC Report, p.85; see also, HREOC, *Submission* 14, p.8.

7 Mr Sheller AO QC *Committee Transcript* 3 April 2007, p. 3-5; Mr Carnell, *Committee Transcript* 3 April 2007, p. 7.

supported by many of the witnesses.[8] HREOC also proposed that a 'necessity and proportionality' test, possibly similar to that applied in the case of control orders, would enable all relevant factors to be taken into account.[9] This approach was said to minimise the risk of a listing that disproportionately infringes the right to freedom of expression and association by, for example, proscribing elements of an organisation not involved in terrorist activity.[10]

4.8 The Federation of Community Legal Centres took the view that incorporation of the criteria would make little difference unless criteria were further elaborated and are mandatory.[11] AGD was opposed to the adoption of 'fixed' statutory criteria arguing that proscription requires a case by case assessment. The Department submitted that:

> …the proscription process falls within the limitations permitted under the ICCPR. The safeguards in the legislation and the criteria used are designed to ensure that in individual cases freedoms such as freedom of association and freedom of expression will only be restricted where it is necessary to do so to protect national security and public order. This is already a proportionate and tailored response to the threat.[12]

4.9 On this view, proscription requires a wide range of factors to be taken into account and it is not practical to tie the Minister in every case to a set of mandatory criteria. The Committee agrees with this position.

Comments on Relevant Factors

Engagement in terrorism

4.10 To date proscription has only been applied to those groups directly involved in acts of terrorist violence, and in most cases this has included attacks on innocent civilians. The distinction between violence and non-violent activity is discussed below.

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8 See, for example, Queensland Council for Civil Liberties, *Submission* 20, p.3; AMCRAN, *Submission* 22, p.5; LCA, *Submission 17*, p.8; PIAC, *Submission* 11, p.6.

9 HREOC, *Submission* 14, p.9.

10 HREOC, *Submission* 14, p.3.

11 FCLC, *Submission* 15, p.12.

12 AGD, *Supplementary Submission* 10A, p.3.

4.11 On some occasions the Committee has expressed its concern that information has not always been as comprehensive as possible.[13] The case for listing has not always been entirely clear, but overall the agencies have responded to the Committee's requests for further explanations and the justification for listing made out.[14]

Distinction between violence and non-violent activity

4.12 Where an organisation has a degree of legitimacy through popular support and has a wide ethnic or national constituency it is important that listing only be applied to the component that is directly responsible for acts of terrorist violence. For example, Hizballah's stated aim of establishing a radical Shi'a Islamic theocracy in Lebanon remains one of its core ideological pillars. However, Hizballah has evolved into a more pragmatic socio-political movement; it participates in representative politics and has gained a degree of political legitimacy through the election of some of its members to the Lebanese Parliament.[15] It is for this reason that Australia's listing is confined to the External Security Organisation (ESO). Australia has avoided listing Hizballah's social and political arms and has distinguished ESO from Islamic Resistance, the militia wing of Hizballah that operates inside Lebanon.

Advocacy of terrorism

4.13 It has been possible for the government to proscribe an organisation on the basis of its 'advocacy' of terrorism since 2005 but to date no listing has been brought forward on that ground. Several witnesses argued that extending the proscription to include 'advocacy' enables government to infringe freedom of expression, and that the offence of incitement to commit acts of terrorism is a more precise way addressing dangerous speech.[16]

4.14 It has also been said that it is unclear what acts would trigger a use of proscription on these grounds and this lack of clarity puts organisations in a precarious position.[17] AMCRAN argued that, in the current climate, Muslim organisations are more likely to be banned on the basis of

13 *Review of the Listing of Six Terrorist Organisations,* March 2005, paragraph 3.32.

14 *Review of the Listing of Six Terrorist Organisations*, March 2005, paragraph 3.32.

15 http://jtic.janes.com/JDIC/JTIC/

16 AMCRAN, *Submission* 22, 5-7; AMCRAN, *Committee Transcrip*t, 3 April, p.43; Professor Joseph and Ms Hadzanovic, *Submission* 2, p.3; Gilbert and Tobin Centre of Public Law, *Submission* 16, p.4; Uniting for Justice, *Submission* 12, p.4.

17 Gilbert and Tobin Centre of Public Law, *Submission* 16, p.4.

'advocacy' because of the heightened sensitivity about the extreme rhetoric of some individuals and, in particular, the opposition to the Iraq War.[18] As none of the nineteen organisations listed by Australia have been proscribed on the basis of 'advocacy' there is no basis on which to evaluate proscription in this context. However, it would be reasonable to expect that listing would only occur where advocating terrorism is the official policy of the group rather than the intemperate statements of a leader.

Ideology and links to other networks and groups

4.15 The Committee has frequently commented on the criteria 'ideology and links to other networks and groups' and the scope and meaning of this criteria was raised again during the inquiry.[19]

4.16 As noted in Chapter 2, a number of witness, and AMCRAN and IISCA in particular, have voiced their opposition to proscription because it appears to them that listing has only been used against Muslim organisations. Many Muslim Australians regard proscription as an attack on Islam because Australia has listed mostly self-declared Islamist groups compared to the use of proscription in similar countries.[20] AMCRAN said:

> This creates a sense in the Muslim community that Muslims are being specifically targeted because of their beliefs. At the same time, white supremacist groups are not proscribed even though they have perpetrated acts within Australia that would fall under the definition of terrorist acts.[21]

4.17 In addition, it was alleged that ASIO's conception of 'engagement with terrorism' is filtered through an ideological predisposition, but it is unclear precisely what political perspectives are informing the advice provided to government and the government's choices.[22]

4.18 AGD defines the threat of international terrorism in the following terms:

> The main terrorist threat globally over the past decade has been associated with an extremist Islamist ideology that espouses 'global jihad'. The threat also comes from a range of non-Islamic

18 AMCRAN, *Submission* 22, p.7.

19 Dr. Emerton, *Committee Transcript*, 4 April 2007, p. 29.

20 IISCA, *Submission* 27, p.5; AMCRAN, *Committee Transcript,* 3 April 2007, p.43.

21 AMCRAN, *Committee Transcript*, 3 April 2007, p.43.

22 Dr. Emerton, *Committee Transcript*, 4 April 2007, 29.

> groups which, espousing varying ideologies, have all undertaken threat or acts of violence or unlawful harm that are intended or likely to achieve a political objective.[23]

4.19 ASIO and AGD were asked to clarify the specific meaning of 'ideology' and 'links to other networks and groups' in the non-statutory criteria.[24] AGD confirmed that 'ideology' is a reference to the definition of 'terrorist act' in the Criminal Code which requires that the relevant acts are perpetrated to advance an ideological, political or religious cause.[25] AGD explained that:

> The definition of terrorist act specifically refers to religion and ideology but it marries it with violence. If the activity is politically, religiously or ideologically driven then it is the act of violence that defines terrorism. It needs that element to distinguish it from other violent crime.[26]

4.20 In other words, the criteria 'ideology' is not an additional element that imports something new into the statute but points the advisor to the question of whether the relevant violent acts have been carried out for a political, religious or ideological cause and are therefore 'political crimes' rather than crimes for private purposes.

4.21 The Deputy Director of ASIO added that:

> I think it can be looked at as either two separate ones or, if there is an ideological link, then it becomes part of the global networks. … When we look at it, it is the global networks and what links [to] the global network.[27]

4.22 In other words, the criteria read together also function as a tool to identify and prioritise those entities which share the same ideological world view. In practice, 'ideology and links to other networks and groups' operates as shorthand for the 'global jihadist movement', which has often been described as a network of networks. However, to be meaningful this criteria must refer to something more than merely a shared world view and be directed to connections that enhance the capacity of the group (or the other entities to which it is linked) to conduct terrorist operations.

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23 AGD *Submission* 10, p.2.

24 Senator Faulkner, *Committee Transcript*, 4 April 2007, p.66.

25 AGD, *Committee Transcript*, 4 April 2007, 67.

26 AGD, *Committee Transcript*, 4 April 2007, p.71.

27 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p.66.

4.23 The Committee believes that separating and elaborating the criteria would go some way to eliminating some of the misunderstanding. 'Ideology' could be reworded to make explicit the connection between acts of violence and the pre-requisite that such acts have been advanced for a political, ideological or religious reason. Similarly, the extent to which an entity is part of a wider network which shares the same world view could be separately identified.

4.24 Finally, the Committee observes that the primary outcome of proscription to date has been on the threats posed by several of the militant Islamist extremist groups engaged in the use of terrorist violence, much of which is targeted at innocent civilians. But this does not equate with ASIO pursuing an ideologically driven approach to proscription. Nor does the Committee consider it fundamentally at odds with liberal democracy to oppose terrorist violence, whatever its ideological justification.

4.25 The absence of listing is not an implicit statement of legitimacy or illegitimacy of any particular political philosophy or point of view. Division 101 and 103 offences are available, regardless of the motivation of the perpetrator or the nature of the foreign state against which the act is taken. And, in fact, Division 102 offences are also available although in these circumstances it is the court that decides whether or not the entity meets the legislative criteria.

Links to Australia and Australian interests

4.26 AGD submitted that:

> … the security of Australians and Australian interests is not geographically confined to Australia – it extends to wherever terrorist attacks occur. In some cases, Australians or Australian interests are directly targeted, such as in Bali in 2002 and 2005, or they may be caught up in attacks directed at others, such as in New York in 2001, London in 2005 and Egypt in 2006.[28]

4.27 Several witnesses argued that it remained difficult to find a consistent rationale for the selection of entities because the nexus between a listed entity and a threat to Australia's national security was not always clear.[29] This was said to create a problem in providing the necessary rationale for

28 AGD, *Submission* 10, p.2.

29 FCLC (Vic), *Submission* 15, p.13.

applying Australian criminal law to the entity, its members and supporters.[30]

4.28 The Committee has explored this aspect of the criteria on a regular basis during its reviews.[31] The intention of the legislation is to protect Australia's security interests and, although this concept is wider than demonstrable links to Australia, it still implies some connection to Australian security.[32]

4.29 Australia is not unique in responding to regional and domestic threats by adopting an approach to proscription that is wider than the UNSC sanction list. Where proscription departs from the UN list the requirement to establish a connection to Australian security interests acquires a greater significance. The Committee reiterates that particular weight should be placed on the existence of known or suspected links to Australia, the nature of those links and the nature of the threats to Australian interests more generally.

Proscription by the UN or like minded countries

4.30 Whether an organisation is listed by the UN or other like minded countries is an important although not a decisive factor in deciding whether Australia should also use its proscription powers. Proscription will at times be useful to facilitate international cooperation and ensure that Australia does not become a safe haven for groups no longer able to operate elsewhere. As proscription in comparable countries is also generally subject to regular review, any actual or likely change in status should also be taken into account.

Engagement in peace/mediation processes

4.31 ASIO recognises the role of peace and mediation processes and the Committee understands that these considerations are part of the advice to the Minister.[33] ASIO has said that:

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30 See, for example, Associate Professor Russell Hogg, *Committee Transcript*, 4 April 2007, p. 17-20; *Submission* 6, p.9; FCLC (Vic), *Submission* 15, p.12; Dr Emerton, *Submission* 23, p. 4.

31 See, for example, *Review of the listing of six terrorist organisations,* March 2005, p.52.

32 Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003, Item 1 new subsection 102.1(2); AGD, *Committee Transcript*, 1 February 2005, p.2 cited in '*Review of the listing of six terrorist organisations*', March 2005, p.14.

33 *Review of the listing of six terrorist organisations*, March 2005, p.15; see also, ASIO Transcript, 1 February 2005, p.15

> When there is a peace process … you can unintentionally make things worse if you do not think through the implications of the listing.[34]

4.32 During the Committee's review of listings, it has sought broader advice from DFAT on the implications of listing on Australia's longer term strategic interests and on the local or regional context of violent conflict.[35] DFAT's greater involvement and liaison with ASIO will enable the organisation to drawn on the widest possible expertise within government.

Potential adverse security effects

4.33 It was also argued that listing is a 'double edged sword' and the potential for adverse security effects should be weighed in the listing process.[36] In particular, criminologist Associate Professor Hogg said that proscribing a group may make it more difficult to infiltrate a group to obtain intelligence and entrench existing community divisions by positioning of Australia with one side in a conflict.[37] Associate Professor Hogg said that:

> Sound human intelligence is of critical importance and that depends on cultivating cooperative, trusting relationships with communities whose members are in a position to provide vital information about extremist activity. That is where proscription could conceivably work against the effective policing of terrorist activity if it contributes to the alienation of whole communities.[38]

4.34 These factors are not made explicit in the listing criteria but the Committee expects that ASIO would turn its mind to any effects that might be counter-productive to their own efforts and to advise the Minister accordingly.

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34 Private briefing, 3 June 2004, p.6 as cited in *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, June 2004, p.24.

35 *Review of the listing of six terrorist organisations* Parliament of the Commonwealth of Australia, March 2005, paragraphs 2.5-2.7; *Review of the listing of four terrorist organisations*, September, 2005, paragraphs 2.9-2.16.

36 Associate Professor Hogg, *Submission* 6, p.1; United Nations Association of Australia, *Submission 5*, p.3; ATRAC, *Submission* 8, p.10.

37 Associate Professor Hogg, *Submission* 6, p.1.

38 Associate Professor Hogg, *Submission* 6, p.17.

Impacts on Australian citizens and residents

4.35 While there have been few prosecutions for Division 102 offences, it was common ground that proscription is more than 'mere symbolism'. One of the major issues raised during the inquiry was the extent of the impact of listing on Australian citizens and residents, who have connections or support the broad aims of an organisation while not supporting acts of terrorism.[39] Much of this concern is also about the potentially wider chilling affects of proscription on lawful activity, and the possibility that Division 102 offences may catch innocent persons. This factor is not made explicit in the criteria. The extent of the impact of a proscription, in terms of the size of the population that it might affect, is advice that could be usefully provided to the Minister and the Committee.

Statement of Reasons

4.36 The Committee has previously recommended that the Statement of Reasons explicitly address the criteria for listing.[40] AGD has been unable to respond positively to the Committee's recommendation, until the deeper policy question about the extent to which government will agree to be bound by the criteria is made. In our view, whether the criteria are directive or not, greater clarity in the Statement of Reasons would improve transparency and assist the Committee with its own assessment process.

Political influence by foreign states

4.37 During the inquiry it was suggested that proscription was open to influence by foreign states using the 'war on terror' to address internal conflicts or disturbances. Associate Professor Hogg argued that:

> Many foreign governments welcome the proscription by other countries of their political opponents. It reinforces their own efforts to criminalize political opposition and gives them a freer hand to ignore the human rights and legitimate political aspirations of national minorities.[41]

4.38 ATRAC also said it is well-known that the Sri Lankan Government has been actively promoting the proscription of the LTTE to other states.[42]

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39 See, for example, HREOC, *Submission* 14, p.3.

40 *Review of the listing of four terrorist organisations*, September 2005 p.47

41 Associate Professor Hogg, *Submission* 6, p.23.

42 ATRAC *Submission* 8, p.12.

4.39 During the hearing DFAT was asked to what extent the Australian government is being lobbied by overseas governments to proscribe organisations.[43] DFAT informed the Committee that Australia is not subject to 'heavy lobbying' over proscription.[44]

4.40 In response to questioning about the possible influence of foreign intelligence agencies the Deputy Director-General of ASIO informed the Committee that:

> People do express views but not views that we take into account. It might be recorded somewhere in our files, but that is where it would sit.[45]

4.41 DFAT clarified that it includes the political context of the situation in any overseas country in its advice to ASIO.[46]

Committee View

4.42 The Committee does not consider the proscription power to have been overused, although we acknowledge that there is not a complete consensus of all listings. The non-statutory criteria have been a useful tool for ASIO that assists in the development of its advice to the Minister and has provided a basic framework for the Committee's reviews.

4.43 The Committee believes decisions about the justification for proscribing a non-state entity must take account all the facts and the case for and against listing in Australia. The parliamentary process and the criteria which has evolved as a result, provides a more comprehensive justification for proscription than exists in many comparable jurisdictions. It is unrealistic to impose restrictive pre-conditions in the context of proscription, which by its nature requires a degree of flexibility and realism.

43 Senator Ray, *Committee Transcript*, 4 April 2007, p.75.

44 DFAT, *Committee Transcript*, 4 April 2007, p.76.

45 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p.7.

46 DFAT, *Committee Transcript*, 4 April 2007, p.77.

Recommendation 2

4.44 **The Committee recommends that the criteria 'ideology and links to other networks and groups' be restated so that:**

- **the link between acts of terrorist violence and the political, ideological or religious goals it seeks to advance is clearly expressed; and**
- **links to other networks and groups that share the same world view is identified as a separate criteria.**

5

Procedural Issues

5.1 This chapter canvasses the case for and against reform of the procedure for listing an entity as a terrorist organisation under the Criminal Code.

5.2 The issue of independence and transparency in the proscription process was the central focus of much of the evidence placed before the Committee.[1] The topic was canvassed at length during the hearings and considered in detail by the Committee. It is clear that there are widely divergent views on whether the power to proscribe an entity is best exercised by a court or the executive with a degree of parliamentary oversight.

5.3 At one end of this spectrum is the view that proscription is a judicial power.[2] The Committee was told that listing amounts to a finding of guilt and an imposition of punishment by the executive and is inconsistent with the doctrine of the separation of powers.[3] On this view, a decision to list an organisation can only be validly done as an exercise of judicial power under the Commonwealth Constitution.[4]

5.4 However, the Committee understands that, as a general rule, the making of delegated legislation is characterised as a power of a legislative nature. This was the view taken by the Senate Standing Committee for the Scrutiny of Bills, which considered the exercise of

1 See, for example, LCA, *Submission* 17, p.9; Criminal Bar Association of Victoria, *Submission* 24, p.3; HREOC, *Submission* 14, p. 11; Uniting Justice, *Submission* 12, p.5.

2 See, for example, NSW CCL, *Submission 9,* p.6.

3 Professor Joseph and Ms Hadzanovic, *Submission* 2, p.5; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27.

4 SLRC Report, p.92; AMCRAN, *Submission* 22, p.2.

the proscription power as more of a legislative function than an administrative one.[5]

5.5 In 2006, the SLRC concluded that whether proscription was judicial, legislative or administrative, that it is possible a court would imply the common law principles of procedural fairness into the exercise of the proscription power.[6] The SLRC put forward two options for Government to consider:

- judicial process on application by the Attorney-General to the Federal Court; or
- by regulation on the advice of the Attorney-General in consultation with an independent statutory advisory panel.[7]

5.6 These options and related procedural issues raised during the inquiry are discussed below. The Committee's conclusions appear at paragraphs 5.26 to 5.29 below.

Judicial authorisation

5.7 HREOC submitted that judicial process is warranted because:

- the nature of the rights which may be restricted as a result of a decision to proscribe an organisation;
- the serious criminal sanctions that apply to terrorist organisation offences;
- the requirement that, as a matter of fairness and transparency, interested parties should have an opportunity to challenge a proscription application.[8]

5.8 The lack of opportunity to test the factual basis to the decision was said to be important given that, as the SLRC has observed, a defendant in a criminal trial cannot challenge whether the organisation is a terrorist organisation or, perhaps not an organisation

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5 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest No. 3 of 2002*, 20 March 2002, p.51

6 SLRC Report, *Recommendation 3*, p.9; SLRC Report, 84; *Kioa v West* (19985) 159 CLR 550 Mason J at 584; *FAI Insurance Limited v Winneke* (1982) 151 CLR 342; *Annetts v McCann* (1991) 170 CLR 596 at 598-9; *State of South Australia v Slipper* (2004) 136 FCR 259 at 279-8-; *Leghaei v Director General of Security* (unreported) FCA, 10 November 2005, as cited SLRC Report, p. 81-83.

7 SLRC Report, *Recommendation 4*, p.10.

8 HREOC, *Submission* 14, p.11.

at all.[9] HREOC claimed that judicial process would increase public confidence, especially in the Muslim and Arab communities[10] and was said to be more transparent than the existing process.[11] It was also argued that the courts are already making decisions as to whether a body of people constitutes a terrorist organisation.[12]

5.9 HREOC suggested that a judicial process, similar to that which currently exists in relation to unlawful associations in section 30A and 30AA of the *Crimes Act 1914* (Cth), could be adopted with provision to allow the Attorney-General to make an urgent application for proscription of an organisation.[13] In a similar vein, the SLRC recommended the process entail:

- an application by the Attorney-General to the Federal Court for a proscription order;
- an advertisement in the press giving public notification of the application for the order;
- to the extent practicable, service of the application on the organisation and members of the organisation and other persons considered affected by the making of such an order;
- a hearing in an open court.[14]

Independent advisory panel

5.10 As an alternative to a court based process the SLRC recommended that an advisory committee be appointed to advise the Attorney-General on the case for proscription of an organisation. SLRC said:

> The committee would consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and

9 HREOC, *Submission* 14, p.9.

10 HREOC, *Submission* 14, p.12; *Committee Transcript*, 4 April 2007, p.3.

11 HREOC, *Committee Transcript*, 4 April 2007, p.11.

12 LCA, *Committee Transcript*, 4 April 2007, p. 3.

13 HREOC, *Submission* 14, p.11; the existing unlawful association regime requires that the Attorney-General apply to the Federal Court by way of a summons for an order calling on the organisation why it should not be declared to be an unlawful organisation. If the court is not satisfied of cause to the contrary, it may declare the body to be an unlawful association. Any interested person may apply to the Federal Court within 14 days to have the order set aside, with such application to be heard by the Full Court which may affirm or annul the declaration.

14 SLRC Report, p.92.

> legal practice. The role of the committee should be publicised, and it should be open to the committee to consult publicly and to receive submission from members of the public.[15]

5.11 The proposal attracted support, as an alternative to a judicial process that would inject greater independence and transparency into the process.[16] However, support was not universal because such a body, even if open to public submission, would be recommendatory only.[17]

5.12 AGD argued that it was more appropriate that the executive and the Parliament play a role in determining the nature of the organisation taking into account the expert advice of those with an extensive knowledge of the security environment. The AGD said:

> The expertise of members of the executive, who have contact with senior members of the Governments and agencies of other countries, cannot be understated.[18]

5.13 Associate Professor Hogg agreed that listing is inherently a political decision and responsibility for it should remain with the executive, for the reasons the government outlined.[19] He stressed the advantages to retaining the role of the parliamentary committee and argued that the efficacy of the current model requires assessment over a longer period.[20]

Notification and the opportunity to be heard

5.14 Several witnesses advocated some form of prior notification and an opportunity for interested parties to be heard regardless of any other possible changes to the proscription regime.[21] The SLRC concluded that:

> While notification in the case of some overseas organisations may be impracticable, there is no reason for not notifying an Australian organisation and its members or Australian

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15 SLRC Report, p.9.

16 Dr. Andrew Lynch, *Committee Transcript*, 3 April 2007, p. 27; Gilbert and Tobin Centre of Public Law, *Submission* 16, p.2.

17 AMCRAN, *Committee Transcript*, 3 April 2007, p.52.

18 AGD, *Submission*, 10, p.13.

19 Associate Professor Hogg, *Committee Transcript*, 4 April 2007, p.17

20 Associate Professor Hogg, *Committee Transcript*, 4 April 2007, p.17; Associate Professor Hogg, *Submission* 6, p.13.

21 See, for example, ATRAC, *Submission 8*, p.11.

> members of an overseas organisation, if known, before the regulation is made. There is every reason why an Australian organisation and its members should be given an opportunity to oppose the proscription of an organisation.[22]

5.15 The Government argued against such reforms which it said might adversely impact on operational effectiveness; prejudice national security and lead to confusion in the listing processes. AGD also argued that it was not persuaded that advance notice would provide greater transparency.[23]

Delay of commencement of regulation

5.16 As noted in Chapter 2, in its original form the commencement of listings was postponed until the day after the disallowance period had expired.[24] After the Bali bombing on 12 October 2002 subsection 102.1 (4) was repealed and, since that date, listing regulations have commenced on the date lodged with the FRLI.[25]

5.17 AGD agreed that there had not been any circumstances in respect of the nineteen listed entities where national security would have been prejudiced if listing commenced at the end of the disallowance period.[26] AGD also confirmed that whether the entity is listed or not a prosecution for a Division 102 offence could be brought against an accused.[27] In this scenario the question of whether an entity is a 'terrorist organisation' for the purpose of the Criminal Code is a matter for the court. However, AGD argued that:

> … modern terrorist threat necessitates equipping law enforcement and intelligence agencies with the ability to act swiftly against perpetrators of terrorism, including terrorist organisations.[28]

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22 SLRC Report, p.77.

23 AGD, *Submission* 10, p.13; see also, Government Response to Committee Recommendations *Review of the listing of four terrorist organisations [and] Review of* the *listing of six terrorist organisations*, Senate Journals, 16 August 2007, 4243.

24 Original subsection 102.1 (4) of the Criminal Code.

25 See *Senate Journals*, 25 June 2002, p.p. 469-71; *Criminal Code Amendment (Terrorist) Organisations Act 2002* commenced on 23 October 2002. Jemaah Islamiyah was listed on 27 October 2002.

26 AGD, *Committee Transcript*, 4 April, p.69.

27 AGD, *Committee Transcript*, 4 April 2007, p.69.

28 AGD, *Supplementary Submission* 10A, p.3.

5.18 AGD said the rationale for the current system is to enable an entity to be listed quickly to take away the ability of groups to restructure what they are doing as a response in advance of the listing.[29] The power to apply for a control order, and the offence of association and training with a listed organisation would also be unavailable for the period of the delay.[30]

Ministerial review

5.19 In 2004 the right to apply to the Minister for the de-listing of an entity was provided for in the Criminal Code. This was done to provide some additional protection for an entity or any other person affected by a listing who believed the listing had been done on erroneous grounds.

5.20 The SLRC did not focus on the de-listing provisions. However, during the inquiry it was said that giving the de-listing power to the Minister undermined the objectivity of the list process because the decision maker was being asked to review his own decision.[31] As an alternative, it was recommended that the power to de-list be conferred on the judiciary.[32] Professor Joseph also argued that the 'no basis' rule sets the bar impossibly high:

> …requiring an applicant to show that the Minister has absolutely 'no basis' for continuing to list the organisation is too onerous and could only be satisfied in very rare cases, with the effect that only a few, if any, de-listing applications will have the chance of succeeding.[33]

5.21 AGD pointed out that the legislation does not specify what documents the Attorney-General must consider; the procedure to be followed; or the time period for consideration. AGD suggested that in the absence of a specific timeframe an application for delisting would be considered 'within a reasonable time'.[34]

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29 AGD, *Committee Transcript*, 4 April 2007, p.69; AGD, Supplementary *Submission* 10A, p.3.

30 AGD, Supplementary *Submission* 10A, p.3; subsection 102.8 and 102.5(2) of the Criminal Code.

31 Professor Joseph and Ms Hadzanovic, *Submission* 2, p.7.

32 Professor Joseph and Ms Hadzanovic, *Submission* 2, p.8.

33 Professor Joseph and Ms Hadzanovic, *Submission* 2, p.7.

34 AGD, *Submission* 10, p.11.

Access to the court

5.22 Judicial review of the legality of a decision to list is available in the ordinary courts under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR).[35] The AGD confirmed that:

> A review of the Attorney-General's decision by the ADJR is not a merits review, but a review as to whether the decision was made in accordance with the law. This enables a court to determine whether for example, the decision was made in bad faith or at the direction or behest of another person or is so unreasonable that no reasonable person could have exercised the power.[36]

5.23 Several witnesses argued that the breadth of the definition of terrorist act and terrorist organisation are so broad as to render judicial review of little practical utility.[37] In addition, it was argued that judicial review is confined to narrow technical questions of procedural legality and is not concerned with the merit of a decision.[38]

5.24 HREOC identified the lack of merit review as among its key concerns and the reason for its advocacy that the system be redesigned as a model based on prior judicial authorisation.[39] In respect of judicial review HREOC stated that:

> Judicial review is the term applied to the process of checking for technical legal errors in the steps that lead to the making of the order. It is not a process that allows an investigation of whether the decision was made on the right facts.[40]

5.25 The Gilbert and Tobin Centre of Public Law proposed that the Security Appeals Division (SAD) of the Administrative Appeal Tribunal (AAT) provides an existing jurisdiction that could be extended to deal with proscription.[41] In contrast, AGD submitted that

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35 The making of a regulation is also reviewable under section 75(v) of the Australian Constitution, section 39B of the *Judiciary Act 1903.*

36 AGD, *Submission* 10, p. 9.

37 See, for example, HREOC, *Submission 14*, p.10; Professor Joseph, *Submission* 2, p.5.

38 HREOC, *Submission* 10, p.9.

39 HREOC, *Submission* 14, p.6.

40 HREOC, *Submission* 14, p.9.

41 Gilbert and Tobin Centre of Public Law, *Submission* 16, p.5; Professor George Williams, *Committee Transcript*, 3 April 2007, p.19, 21.

judicial review under the ADJR Act strikes the appropriate balance between an unfettered discretion and merit review.[42]

Committee View

5.26 The Committee is not persuaded that judicial authorisation is a practical or more effective method of proscribing 'terrorist organisations'. Nor does the Committee support the SLRC's recommendation for an independent panel, which we regard as introducing an unnecessary additional layer to the process. ASIO has a statutory responsibility to provide advice to government on security matters. The agency has direct access to a range of sources and materials and, in conjunction with AGD and DFAT, ASIO is accountable to the Minister and the Parliament for the proper administration of the proscription regime.

5.27 The Australian model provides strong safeguards against the arbitrary use of the proscription power. For example, there is a clear commitment to base proscription decisions to the maximum extent possible on publicly available information. The Statement of Reasons is a form of public notification and recognises that a listed entity needs to know the case against it. These measures together with consultation with the States and Territories, the briefing of the Opposition Leader and the opportunity for parliamentary review, ensure a good degree of transparency and accountability is built into the system. The majority of listings have not attracted significant opposition, but where a listing is more contentious parliamentary review provides an opportunity to have all the relevant material considered.

5.28 Judicial review under the ADJR is available, and in our view, provides an effective institutional guarantee of lawfulness and protection against regulations that go beyond the scope of powers provided for by the Criminal Code. Accordingly, the Committee does not believe there is a case for adopting merit review of proscription by extending the jurisdiction of the Security Appeals Division of the AAT. Such a process would revisit factual material already considered by the Government, in consultation with the States and Territories, which underpins a regulation that has already commenced operation with the concurrence of the Federal Parliament.

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42 AGD, *Submission* 10, p.9.

5.29 Before reaching the stage of seeking review in the courts there is an opportunity to apply directly to the Minister for a de-listing and the Minister is bound to consider such an application. It is common practice to require a person or an organisation affected by a decision to seek reconsideration of the decision before resorting to external review. Consequently, the Committee does not accept the claim that provision for a de-listing by application to the Minister undermines the integrity of the proscription regime. There may be some benefit in elaborating the procedure for ministerial review to improve the clarity of the law including, for example, a time limit on the decision and reasons. But at this stage the Committee is not persuaded of the need for wider ranging or more fundamental procedural reform.

5.30 In relation to the timing of the commencement of a listing, the Committee notes that the Act originally provided that commencement would be postponed until after the disallowance period had expired. Following the Bali Bombings on 12 October 2002 subsection 102.1(4) of the Criminal Code was repealed and listings have commenced on the date lodged with the Federal Register of Legislative Instruments (FRLI).

5.31 The Committee examined the continuing need to have the listings commence on the date lodged with the FRLI. The Attorney-General's Department agreed, in evidence, that there had not been any circumstances in respect of the nineteen listed entities where national security would have been prejudiced if a listing commenced at the end of the disallowance period. In view of this, the Committee recommends that the Government give consideration to reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period has expired.

5.32 The Committee recognises that the Attorney-General should, in exceptional cases, retain the power to begin the commencement of a listing on the date the instrument is lodged with the Federal Register of Legislative Instruments where the Attorney-General certifies that there are circumstances of urgency and the immediate commencement of the listing is required for reasons of national security.

5.33 This approach would ensure that specific urgent listings could be commenced immediately but all other listings could commence at the end of the disallowance period.

Recommendation 3

5.34 **The Committee recommends that the mandate of the Committee to review the listing and re-listing of entities as 'terrorist organisations' for the purpose of the Criminal Code be maintained.**

Recommendation 4

5.35 **The Committee recommends that the Government give consideration to reverting to the initial legislative approach of postponing commencement of a listing until after the disallowance period has expired.**

The Committee recognises that the Attorney-General should, in exceptional cases, retain the power to begin the commencement of a listing on the date the instrument is lodged with the Federal Register of Legislative Instruments where the Attorney-General certifies that there are circumstances of urgency and the immediate commencement of the listing is required for reasons of national security.

6

Other Issues

6.1 This chapter deals with a number of matters including, the use of strict liability in Division 102 offences; the level of consultation by the Commonwealth with the Governments of the States and Territories; the period after which listing regulations should expire; and the need for the ongoing monitoring of the application of terrorism laws.

Strict Liability

6.2 As noted in chapter 2, the proscription of an entity relieves the prosecution from proving beyond a reasonable doubt that the entity is a terrorist organisation.[1] However, the prosecution must prove either that the accused knew the entity was listed or that the organisation satisfied paragraph (a) of the definition of 'terrorist organisation'. AGD advocated the wider use of strict liability in the terrorist organisation offences to make it easier for the prosecution to prove the knowledge element of the offence.[2]

6.3 The Committee sought evidence on how strict liability would operate in the context of the offence of membership of a 'terrorist organisation'. The Law Council of Australia submitted that:

> . …demonstrating that a person was *intentionally* a member of a particular organisation does not establish the core culpability. The culpability clearly attaches to being a member

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1 Under paragraph 102.1(1) (a) 'terrorist organisation' means an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs).

2 AGD, *Submission* 10, p.15.

of an organisation in the knowledge that, or reckless to the fact that, it is a terrorist organisation.[3]

6.4 It was also argued that the defence of mistake would be of limited utility because it will fail if the prosecution can prove the defendant did not consider whether the organisation was listed; or, that, while the defendant genuinely believed it was not a listed terrorist organisation, such a belief was unreasonable.[4]

6.5 The Committee was also advised that drug offences do not provide a direct analogy. In the context of drug offences the Criminal Code generally requires the prosecution must prove to the criminal standard that the defendant knew or was reckless to the fact that the substance or plant was by law a 'controlled drug' or 'controlled plant'. The accused is not assumed to know the law.[5]

Committee View

6.6 The Committee considered the existing use of strict liability in Division 102 offences during its review of counter terrorism law in 2006.[6] In that review, the Committee agreed with the SLRC that, in order to protect the presumption of innocence, strict liability should be reduced to an evidential burden.[7]

6.7 Where the penalty for an offence includes a period of imprisonment Australian practice is not to apply strict liability. The Committee is not persuaded that strict liability is necessary and restates the importance of ensuring that special terrorism laws conform as much as possible to the ordinary principles of the criminal justice system.

Recommendation 5

6.8 **The Committee recommends that strict liability not be applied to the terrorist organisation offences of Division 102 of the Criminal Code.**

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3 LCA, Supplementary *Submission* 17A, p.9.

4 LCA, Supplementary *Submission* 17A, p.10.

5 LCA, Supplementary *Submission* 17A, p.13.

6 See, 'Reverse onus provisions' in Chapter 5 of the *Review of Security and Counter Terrorism Legislation,* December 2006.

7 *Review of Security and Counter Terrorism Legislatio*n, December 2006, p.83.

Consultation with States and Territories

6.9 The *Intergovernmental Agreement on Counter Terrorism Laws* requires that before the power to list an organisation is exercised the Commonwealth will consult with State and Territory Governments about the listing and not list an entity where a majority of other parties object.[8] The Commonwealth has undertaken to 'use its best endeavours' to give the other parties a reasonable time to consider and to comment on the proposed regulation.[9]

6.10 The Committee did not receive responses from all the State and Territory Governments. However, the Premier of Tasmania noted that in relation to the listing of the PIJ, Tasmania was provided with four days to consider relevant materials and provide a response:

> This is not considered to be 'reasonable time' in the context of the Prime Minister's undertaking.[10]

6.11 The Governments of the Australian Capital Territory (ACT) and Tasmania also expressed concern that the States and Territories have been excluded from decision making about the re-listing of terrorist organisations and that the IGA does not address the role of the States and Territories where de-listing is being considered.[11] The Premier of Tasmania proposed that States and Territories should be consulted, or at the very least advised of an intention to de-list to ensure that there are no transitional law enforcement issues.

Committee View

6.12 The Committee has monitored the timeliness of consultation with Governments of the States and Territories as part of its review function.[12] In fifty per cent of cases the parties have been given five days or less in which to consider and comment on a proposed listing. The large majority of cases involve re-listings, and consultation has in practice become a form of notification. However, in the case of a new listing, for example, the listing of the PKK, the period was also

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8 Paragraph 3.4 of the IGA.

9 Subparagraph 3.4 (3) IGA.

10 Mr Paul Lennon MP Premier of Tasmania, *Submission* 28, p.3.

11 Katy Gallagher MLA, Deputy Chief Minister of the ACT, *Submission* 18, p.3; Mr Paul Lennon MP Premier of Tasmania, *Submission* 28, p.3.

12 See, for example, *Review of the Listing of Six Terrorist Organisations* March 2005, paragraphs 2.9-2.10; *Review of the Listing of Four Terrorist Organisations* September 2005, paragraphs 2.1-2.6.

extremely short with only three working days provided for the Premiers to take advice and respond.[13]

Expiry of listing regulations

6.13 A regulation proscribing an entity expires on the second anniversary of the day on which it took effect.[14] The purpose of automatic expiration is to ensure that if the executive wishes to continue the proscription, the Minister has considered afresh all the relevant information and is satisfied that there is a sufficient factual basis to support the legality of proscription for a further two year period.

6.14 Periodic review is a feature of the proscription regimes of comparable jurisdictions, although how this is achieved varies from country to country:

- UK: every six months by an internal inter-departmental working group;[15]
- Canada: mandatory review every two years and a recommendation made to the Governor in Council as to whether the entity should remain a listed entity;[16]
- New Zealand: expiry after 3 years with the possibility of re-listing.[17] Before expiration the Attorney-General may apply to the High Court to extend the designation for a further three years.[18]
- USA: a designated 'foreign terrorist organisation' can petition for revocation of their designation after two years and, in the absence of any such petition, the designation must be reviewed by the Secretary State after five years.[19]

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13 *Review of the listing of the Kurdistan Workers' Party*, April 2006, p.4.

14 Section 102.1(6) of the Criminal Code.

15 Subsection 14 (3) Prevention of Terrorism Act 2005(UK)

16 The review must be completed within 120 days of commencement. After completing the review the Minister must publish in the *Canada Gazette* notice that the review has been completed; subsection 83.05 (9) (10) of the Canadian Criminal Code.

17 Subsection 35 (1) of the *Terrorism Suppression Act 2002* (NZ); Paragraph 23(c) of the *Terrorism Suppression Act 2002* (NZ).

18 The entity may appeal the extension to the Court of Appeal. A re-listing of an entity where the designation has already expired or has previously been revoked must be based on information that became available after the cessation of the earlier designation, and is significantly different from the information on which the earlier designation was based; subsection 35 (3) of the *Terrorism Suppression Act 2002* (NZ).

19 *Intelligence Reform and Terrorism Prevention Act 2004* (USA).

Committee View

6.15 To date the listing of each entity under the Criminal Code has been subject to a re-listing by the Government and scrutiny by the Committee. The automatic cessation of a listing has been effective in institutionalising the review and ensuring that any changes in circumstances have been taken into account, for example, the renouncement of the use of violence, entry into a peace process, and so forth. Triggering a review is a safeguard both for the entity and the Minister, who must continue to be satisfied the entity meets the legislative criteria. Based on its own experience over the past three years, the Committee considers that extending the period of a regulation from two to three years and providing an opportunity for parliamentary review at least once during the parliamentary cycle, would offer an adequate level of oversight.

Recommendation 6

6.16 **The Committee recommends that:**

- **a regulation listing an entity should cease to have effect on the third anniversary of the date it took effect.**
- **the Government consult with the Committee on streamlining the administration of proscription to enable periodic review of multiple listings during the parliamentary cycle.**

Post enactment review

6.17 There have been various calls for further review of the terrorism laws, in part because several of the reviews, including this one, have taken place at a relatively early stage making it difficult to make a full assessment of the impact and implications of the new terrorism regime. During this inquiry the Premier of Tasmania raised the matter for the Committee's consideration. In light of the extraordinary nature of the provisions and the role the States and Territories have had in their development, the Premier considered it appropriate that the States and Territories all be involved in regular reviews of their application. He recommended that reviews such as this one be

conducted every three to five years while the legislation remains in force.[20]

6.18 In 2006, the SLRC also proposed that an independent review of the counter-terrorism legislation be conducted in a further three years.[21] As an alternative, it was suggested that the review previously agreed to by COAG to re-examine the new measures introduced by the ATA (No.2) in 2010, be expanded to all of Part 5.3 of the Criminal Code.[22]

Committee View

6.19 In 2006, this Committee noted that by July 2006, the AFP had conducted 479 investigations since the introduction of the new laws in 2002, resulting in 25 prosecutions, most of which remain before the courts.[23] While there are some statistics published in annual reports of the AFP, DPP and ASIO, there is no single public source of comprehensive data on the use of terrorism laws and related powers.[24] Future reviews would benefit from comprehensive data on the application of terrorism laws and the special powers conferred on police and intelligence agencies.

6.20 The Committee also reiterates its view that an Independent Reviewer would provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia. The establishment of a mechanism of this kind would contribute positively to community confidence as well as provide the Parliament with regular factual reports.[25] The Independent Reviewer should report annually to Parliament with provision for this Committee to examine the report. In the meantime, and in the interests of ensuring a comprehensive and integrated approach, the Committee recommends that the proscription regime and Division 102 terrorist organisation offences should be included in the review scheduled for 2010 under the auspices of COAG.

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20 Mr Paul Lennon, Premier of Tasmania, *Submission* 28, p.1.

21 SLRC Report, p.8.

22 SLRC Report, p.8.

23 *Review of Security and Counter-Terrorism Legislation*, December 2006, p.15.

24 The AGD National Security Website contains some basic information on current prosecutions.

25 See, for example, SLRC Report, p.8; UNAA, *Submission* 5, p.5; Associate Professor Hogg, *Submission* 6, p.27.

Recommendation 7

6.21 **The Committee:**

- **recommends that the Attorney-General's Department be responsible for the publication of comprehensive data on the application of terrorism laws.**
- **reiterates that an Independent Reviewer be established to monitor the application of terrorism laws, including the use of special police and intelligence powers, on an ongoing basis. In addition, that the Independent Reviewer report annually to the Parliament and the responsibility for examining those reports be conferred on the Committee.**
- **recommends that the application of the proscription power be included in the review of counter terrorism laws scheduled for 2010 under the auspices of the Council of Australian Governments.**

The Hon. David Jull MP

Chair

13 September 2007

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Appendix A - Proscription Processes: International Comparisons

Category	UK	Canada	NZ	USA
Legislation	'International terrorist organisations' Part 2 *Terrorism Act 2000* (TA).	'Terrorist groups' (R.S. 1985,c.C-46) Part II.1 *Criminal Code*.	'Terrorist entity' Part 2 *Terrorism Suppression Act 2002*	Foreign Terrorist Organisation (FTO) *Immigration & Nationality Act* (INA).[1]
Decision Maker	Secretary of State for the Home Department may issue an order placing an entity on Schedule 2 of the TA. [s.3(3)]	Governor in Council may, by regulation, establish a list and place a entity on that list. [s.83.05 (1)]	Prime Minister may designate an entity as a 'terrorist entity'. [s.20-23]	The Secretary of State may designate an entity as a FTO. [s 219 INA]

1 As amended by the *Anti-Terrorism and Effective Death Penalty Act 1996* and the USA *PATRIOT Act 2001.*

Definition	The SSHD must believe the entity is 'concerned with terrorism'. An entity is concerned with terrorism if it commits, participates in or prepares, encourages or promotes terrorism or is otherwise concerned with terrorism. [s.3(4) (5)] In 2006 the grounds of proscription were extended to include 'glorification' of the commission or preparation (in the past, future or generally) of acts of terrorism.[2] [s.3(5A) – (5C)]	The Governor in Council acts on the advice of the Minister for Public Safety. The Governor in Council must be satisfied on reasonable grounds that the entity has carried out, attempted to carry out, participated in or facilitated a terrorist activity or knowingly acted on behalf of, at the direction of or in association with an entity that has done so. [s.83.01 and 83.05 (1) (a)(b) (1.1)]	The PM may proscribe an entity: (i) on an interim basis where he has a 'good cause to suspect'; and (ii) make a final listing where he 'believes on reasonable grounds' that the entity has knowingly carried out or participated in the carrying out of one or more terrorist acts. An 'associate entity' may also be proscribed if it has a relevant connection to a listed organisation or listed associated entity. [s.20(2)(3)]	The Secretary of State may designate an FTO if he finds that the organisation is engaged in 'terrorist activity' or 'terrorism' or 'retains the capability and intent to engage in terrorist activity or terrorism that threatens the security of US nationals or the national security of the USA.[3] [s.212(a)(3)(B)]
Internal Admin & Consultation	Groups are selected on the basis of information and advice from police, security and law officials. Information includes classified information from UK and foreign intelligence agencies. A Government working group is responsible for scrutinising proscriptions. The Home Office published the additional criteria in 2001 to be taken into account when considering listings: (a)the nature and scale of the organisations activities;	The Minister for Public Safety and Emergency Preparedness acts on criminal and security intelligence reports.	The PM may take into account any relevant information including classified security information. [s.30 see also s.32]] The Officials' Committee for Domestic and External Security Coordination considers whether a proposal should be submitted to the PM. Before listing an entity the PM must consult with the Minister for Foreign Affairs and the Attorney-General on an	The Secretary of State may consider classified information in making the designation. In making the designation the Secretary of State creates an 'administrative record', which is a compilation of classified and open source information. The Secretary of State must consult with the Secretary of Treasury and the Attorney-General before making the designation. [8 USC s.1189(a) (1)]

2 Section 21 of the *Terrorism Act 2006* (UK).

3 'National security' is defined broadly to include 'the national defense, foreign relations, or economic interests of the United States…'(8 USC 1189 (c) (2)).

	(b)the specific threat that it poses to the UK; (c) the specific threat that it poses to British nationals overseas; (d)the extent of the organisation's presence in the UK; (e)the need to support international partners in the fight against terrorism.	interim listing and with the Attorney-General for a final listing. [s.20(4)(5)] After listing an entity the PM must advise the Leader of the Opposition and provide a factual briefing is so requested. [s.20(5)(a)(b)]	
Parliamentary Scrutiny	The draft order must be laid before each House and is subject to affirmative resolution by both Houses. In cases of urgency the SSHD may declare that, in his opinion, circumstances warrant immediate commencement. In such cases the order is valid for 40 days. [s.123(4)(5)] Explanatory Memorandum is laid before Parliament which identifies the entities to be listed and provides a summary of their activities.[4] To assist consideration by both Houses the SSHD places in the Libraries, the Vote Office and the Printed Paper Office, copies of a Note setting out a brief summary in respect of each organisation named in a draft Order.		The Secretary of State must provide by classified communication 7 days written notice to the Speaker and the Minority Leader of the House of Representatives, the President pro-tempore, Majority Leader, and Minority Leader of the Senate, and the members of the relevant committees of the House of Representatives and Senate of his intention to designate an organisation. Notification must be provided together with the Secretary's findings and factual basis for the designation. [8 USC 1189 (2)(A)] The Congress can annul a designation by passing overriding legislation. [8 USC 1189(a)(2)(B) (ii)]

4 See, for example, *Explanatory Memorandum to the Terrorism Act 2000 (Proscribed Organisations) Amendment Order 2006 No.2016.*

Takes Effect & Public Notification	Proscription orders come into force on the day the Parliament approves the draft order. The Order is published on the register of Statutory Instruments. Listings are published on the Home Office website.	The listing is published in the Canada Gazette. Listings are also published on the website of the Department of Public Safety.	The listing takes effect on being made and must be made in writing and signed by the PM. [ss.21(b), 23(d)] Interim and final listings must be published in the NZ Gazette. [s.21 (c) 23(e)].	The listing is published on the Federal Register and takes effect from the date of publication.
Notice to the Entity and Other Affected Parties	No statutory requirement for specific notice to the entity or affected members.	No statutory requirement for specific notice to the entity or affected members.	Notice must be given to the entity and any other persons or bodies as directed by the PM if it is practical to do so. [s.23(f)]. The notice must specify the section the listing is made under and whether the entity is listed as a terrorist entity or an associated entity; describe the entity by name or any aliases; the period of the listing; and rights of review and revocation. [s.26, 27,see also 28]] The designation is not invalid because of a failure to provide notice prior to the designation being made. [s.29]	No statutory requirement for specific notice to the entity or affected members.[5]

5 The Court of Appeals for the District of Columbia has concluded that FTO's with a substantial presence in the USA are entitled to due process rights. This includes prior notice and a meaningful opportunity to be heard in opposition; see e.g., *People's Mojahedin Organisation of Iran* v Department of State 182 F.3d 17 (1999); *National Council of Resistance of Iran v Department of State* 251 F.3d 192 (D.C. Cir.2001).

Expiry or Review	There is no automatic expiry of a listing order provided for by the legislation. The Government's working group reviews all proscriptions every six months. The Independent Reviewer conducts reviews of the TA 2000 including the operation of proscription.	Two years after the establishment of the list and every two years after, the Minister must review the list to determine whether there are still reasonable grounds for an entity to be listed and make a recommendation to the Governor in Council as to whether the entity should remain listed. The review does not affect the validity of the list. [s.83.05(9)] The Minister must complete the review as soon as possible and no later than 120 days after its commencement and publish in the Canada Gazette notice that the review has been completed. [s.83.05(10)]	An interim listing is valid for 30 days. [s.21(e)] A final proscription expires after three years unless extended by the High Court. [s.23(g)] A listing may be extended for a further three years by order of the High Court on application by the AG. There is no limit to the number of extension orders that may be made by the Court. [s.35]	An FTO listing must be reviewed by the Secretary of State after five years to determine whether de-listing would be appropriate unless reviewed on application by the entity in that period. [*Intelligence Reform and Terrorism Prevention Act 2004*]
De-listing	The SSHD may de-list an entity by removing it from Schedule 2. A proscribed organisation may apply to the Minister to be de-listed. [s.4] Regulations govern the procedure for an application for de-listing.[6] An application for de-listing must be determined by the Minister within 90 days and notify him of the procedures for appealing against	A listed entity may apply in writing to the Minister to seek a delisting. On application in writing the Minister must decide whether there are reasonable grounds to recommend to the Governor in Council that the applicant no longer be a listed entity. [s.83.05(2)]	The PM may revoke a listing at his own initiative. [s.34(1)] An entity or a third party with a special interest in the listing may make an application to the PM to de-list the entity. [s.34(1)(a)(b)] 'Special interest' includes, for example, an interest in property or an 'especially	The Secretary may revoke a designation at any time if it is found that the circumstances changed to warrant revocation or it is in the interests of the national security of the US to revoke the listing. [8 USC 1189(a)(6)(A)] The entity may apply to the Secretary of State to be de-listed after two years from the date of listing or two years of the

6 *The Proscribed Organisations (Applications for Deproscription etc.) Regulations 2006 (commenced 20 September 2006)*

	the refusal (R. 7, 8). The Parliament may annul an order de-listing the entity by resolution of either House. [s.123(2)].	If the Minister does not make the decision within 60 days after receipt of the application, he or she is deemed to have decided to recommend that the applicant remain listed. [s. 83.05(3)] The Minister must give notice without delay to the applicant of any decision taken or deemed to have been taken respecting the application. [s.83.05(4)] The entity may not make another application unless there has been a material change in its circumstances since its last application or if the Minister has completed the bi-annual review. [s.83.05 (8)]	close association with the listed entity or its interests or objectives'. [s.34(1)(2)(a)(b)(c)] The application must be based on grounds that: the entity no longer satisfies the legislative criteria or the entity is no longer involved in any way with acts that make it eligible for listing. [s.34 (3)] The PM may not refuse an application for de-listing without first consulting the AG. [s.34 (5)]	determination of its most recent petition for de-listing. The FTO must provide evidence of sufficiently changed circumstances to warrant de-listing. [*Intelligence Reform and Prevention of Terrorism Act 2004*]

Appeal Mechanisms	Where an application to the Minister is refused the entity may apply to the Proscribed Organisations Appeal Commission. [s.5(2)] POAC consists of three members, one of whom should be a serving or retired senior judge. An appeal will be allowed if POAC considers the decision was flawed when considered in light of the principles of applicable on an application for judicial review. [s.5] An entity may also appeal to POAC under s.7(1)(a) of the *Human Rights Act 1998* on the grounds that the listing is incompatible with human rights.[7] POAC procedure is governed by separate rules.[8] The presumption is that POAC will conduct its hearings in open court but proceedings may be closed: (a) POAC must not disclose information contrary to national	Judicial review in the ordinary courts is available but the listed entity must apply for judicial review within 60 days of receipt of the notice of decision by the Minister. [83.05(4)] In proceedings for judicial review the judge[11] must: (a) examine *in camera* the security or criminal intelligence and hear any other evidence of information presented by the Minister. A hearing may be conducted in the absence of the applicant and their legal representative if, in the judge's opinion, disclosure would injure national security or endanger the safety of any person. (b) provide the applicant with a summarised statement so as to enable the applicant to be reasonably informed of the reasons for the decision; (c) provide the applicant with	Interim and final listings are subject to judicial review in the ordinary courts. [s.33] An entity may oppose an application by the AG in the High Court to extend the period of the listing. The High Court may receive or hear all or part of the classified security information in the absence of the listed entity, their representatives and members of the public. [s.38 (3)] The Court must approve a summary of information presented by the Attorney-General. The court may amend the summary. A copy of the statement must be provided to the entity. [s.38(4)] Applications and appeals	A person charged with a material support offence under s.2339B is prohibited from challenging the legality of the designation. [8 USC 1189 (a)(8)] A designated FTO may seek judicial review of the designation in the US Court of Appeals for the District Court of Columbia no later than 30 days after the designation is published on the Federal Register. [8 USC] 1189(b)(1)] The review is based solely on the administrative record. The FTO may not submit any information to the reviewing court. The Government may submit classified information used for making the designation for *ex parte* and *in camera* review. [8 USC 1189 (a) (3)(B)] The Court shall set aside the designation if the court finds it to be arbitrary, capricious, and abuse of discretion or not

7 The *Human Rights Act 1998* (UK) gives effect to the European Convention on Human Rights and Fundamental Freedoms.

8 *The Proscribed Organisation Appeals Commission (Procedure) Rules 2007 (No.1286)*.

9 *The Queen (On Application of the Kurdistan Workers' Party & Ors), (On Application of the People's Mojadehin Organisation of Iran & Ors) and (On Application of Lashkar Tayyabah & Ors) v Secretary of the Home Department* [2002] EWHC 644; the High Court found that although the challenges to proscription were arguable Parliament intended POAC to be the forum of first resort for the determination of the lawfulness of proscription under the *Terrorism Act 2000.*

10 Rule 4 of *The Court of Appeal (Appeals from Proscribed Organisations Appeal Commission) Rules 2002 Statutory Instrument 2002 No.1843 (L.7)*

11 Judge means the Chief Justice of the Federal Court of a judge of that Court designated by the Chief Justice (s.83.05(11)).

	security or otherwise contrary to public interest (r.4); (b) appeals may be heard in the absence of the appellant and his representative where necessary (r.22); (c) requires the Secretary of State to apply for permission to withhold 'closed material'. The Secretary of State may not rely on such material unless a special advocate has been appointed (r.14,15). Where POAC reverses the Minister's decision the SSHD must lay a de-listing order before the Parliament as soon as reasonably practicable. [s.5(4) (5)] Where a decision to de-list is upheld a further appeal to the Court of Appeal is allowed on a question of law by leave of the Court or POAC.[9] [s.6(2)] The Court of Appeal must secure that information is not disclosed contrary to the interests of national security or other contrary to the public interest. The court may order the exclusion of any party (except the Secretary of State or his representative) from all or part of the proceedings before the court.[10]	a reasonable opportunity to be heard; (d) determine whether the Minister's decision is reasonable based on the information available to the judge, and, if not, order that the applicant no longer be listed. [s.83.05(6)] The judge may receive into evidence anything that, in the opinion of the judge, is 'reliable and appropriate', even if it would not otherwise be admissible under Canadian law, and may base his or her decision on that evidence. [s.83.05(6.1)] The Minister must publish the final order of the court that the applicant be no longer listed in the Canada Gazette without delay. [s.83.05 (7)]	must be heard by the Chief Justice or one or more judges nominated by the Chief Justice of the High Court. [s.38(3)(a)]	otherwise according to law, contrary to constitutional right, power, privilege or immunity, in excessive of statutory jurisdiction, authority or limitation or short of statutory right, lacking substantial support in the administrative record taken as a whole or in classified information or not in accord with the procedures required by law. [8 USC 1189 (b)(3)]

B

Appendix B – List of submissions

1. Community Relations Commission (NSW)
2. Casten Centre for Human Rights Law – Monash University
3. Mr George Dale Hess
4. Commonwealth Director of Public Prosecutions
5. United Nations Association of Australia
6. Associate Professor Russell Hogg
7. The Hon Syd Stirling,
   Acting Chief Minister, Northern Territory Government
8. Australian-Tamil Rights Advocacy Council

8a. Australian-Tamil Rights Advocacy Council
   Answers to Questions on Notice – Supplementary Submission

9. NSW Council of Civil Liberties
10. Combined Government Submission from:
    Attorney-General's Department
    Australian Security Intelligence Organisation
    Australian Federal Police
    Commonwealth Director of Public Prosecutions

10a. Attorney-General's Department
   Answers to Questions on Notice – Supplementary Submission

11. Public Interest Advocacy Centre

12. Combined Submission from:
Uniting Justice Australia
Justice and International Mission Unit
Synod of Victoria and Tasmania
Uniting Care NSW and ACT

13. Victoria Legal Aid

14. Human Rights and Equal Opportunity Commission

14a. Human Rights and Equal Opportunity Commission
Answers to Questions on Notice – Supplementary Submission

15. Federation of Community Legal Centres (Vic)

16. Gilbert+Tobin Centre of Public Law

16a. Gilbert+Tobin Centre of Public Law
Answers to Questions on Notice – Supplementary Submission

17. Law Council of Australia

17a. Law Council of Australia
Answers to Questions on Notice – Supplementary Submission

18. Ms Katy Gallagher MLA, Acting Chief Minister
ACT Legislative Assembly

19. The Hon Paul Holloway MLC
Government of South Australia

20. Queensland Council of Civil Liberties

21. Federation of Ethnic Communities' Councils of Australia

22. Australian Muslim Civil Rights Advocacy Network

23. Dr Patrick Emerton

23a. Dr Patrick Emerton
Supplementary Submission

24. Criminal Bar Association of Victoria

25. Refugee Council of Australia

25a. Refugee Council of Australia
Supplementary Submission

26. Department of Immigration and Citizenship

26a. Department of Immigration and Citizenship
Answers to Questions on Notice – Supplementary Submission

27. Islamic Information and Support Centre of Australia

28. Government of Tasmania

29. United Nations High Commissioner for Refugees

C

Appendix C – Witnesses appearing at public hearings

Canberra (Public Hearing)
Tuesday 3 April 2007

Security Legislation Review Committee

The Hon Simon Sheller AO QC, Chairman

Mr Ian Carnell, Inspector-General of Intelligence and Security

Gilbert+Tobin Centre of Public Law

Professor George Williams, Centre Director

Dr Andrew Lynch, Director – Terrorism Law Project

Ms Edwina MacDonald, Senior Research Officer

Refugee Council of Australia

Mr John A. Gibson, President

Australian Muslim Civil Rights Advocacy Network

Dr Mohamed Kadous, Co-convenor

Ms Agnes Chong, Co-convenor

Canberra (Public Hearing)
Wednesday 4 April 2007

Law Council of Australia

Mr Peter Webb, Secretary-General

Ms Helen Donovan, Policy Lawyer

Associate Professor Russell Hogg

Dr Patrick Emerton

Australian-Tamil Rights Advocacy Council

Mr Pratheepan Balasubramanian, Committee Member and Spokesman

Human Rights and Equal Opportunity Commission

Mr John von Doussa AO QC, President

Ms Frances Simmons, Associate to the President

Department of Immigration and Citizenship

Mr Vincent McMahon, First Assistant Secretary - Border Security Division

Mr Karl Higgins, Director – National Security and Counter Terrorism Branch

Attorney-General's Department

Mr Geoff McDonald, Assistant Secretary – Security Law Branch

Ms Kirsten Kobus, Principal Legal Officer – Security Law Branch

Australian Security Intelligence Organisation

Deputy Director-General

Department of Foreign Affairs and Trade

Mr Perry Head, Assistant Secretary – Counter Terrorism Branch

Ms Alison Duncan, Executive Officer – Counter Terrorism Policy Section

Mr Justin Whyatt, Executive Officer – International Law and Transnational Crime Section