Submission of the Criminal Bar Association of Victoria to the Parliamentary Joint Committee on Intelligence and Security

Review of the Power to Proscribe Organisations as Terrorist Organisations
Criminal Bar Association of Victoria

1. The Criminal Bar Association of Victoria appreciates the opportunity to make a submission to the parliamentary review of the proscription provisions.

2. Section 102.1 (2) of the *Criminal Code 1995* vests the Minister with the power to proscribe an organisation as a terrorist organisation. A raft of offences applies to persons who have specified links with proscribed organisations pursuant to subsections 102.2- 102.8 of the Code.

3. The Minister may list the organisation as a terrorist organisation if satisfied on reasonable grounds that the organisation:
   a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing a terrorist act (whether or not a terrorist act has occurred or will occur); or
   b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)

4. The potential targets of the proscription power are considerable given the amplitude of the definition of 'terrorist act' contained in s.100.1 of the Code.

5. Many submissions to the 2002 inquiry by the Senate Committee on Legal and Constitutional Affairs into the *Security Legislation Amendment (Terrorism) Bill 2002* noted that the scope of the

original legislation could attach criminal liability to many organisations that the legislation did not intend to trap. The Law Council of Australia concluded that groups that potentially could be proscribed included the East Timorese independence movement, the African National Congress and groups advocating the overthrow of the regimes in Zimbabwe and Myanmar.[1] Movements supporting self-determination or upholding separatist objectives are particularly vulnerable.

6. Although the *Security Legislation Amendment (Terrorism) Bill 2002* was substantially amended, the breadth of the conduct that can trigger proscription and the criminal sanctions that can flow make it undesirable for proscription to be determined by the Attorney-General.

7. Transparent and open decision-making is always preferable to the inherent risk that decisions made behind closed doors may be made for bureaucratic or political advantage. The broad power exercised by the Attorney-General can foster perceptions (rightly or wrongly) of selective and arbitrary exercise of power by the Attorney and erode public confidence in the legislation.

8. In the dissenting report of the Parliamentary Joint Committee on Intelligence and Security's review of the listing of Kurdistan Workers' Party (PKK), the dissenting members questioned why the PKK had been identified as a threat to Australian tourists abroad, but the LTTE (Tamil Tigers) had not. This was particularly pertinent given that more Australians visit Sri Lanka than Turkey.[2] As many submissions to the initial inquiry noted, the breadth of the terminology will always mean that perceptions of selectivity and arbitrariness will occur whenever the power is exercised. The

[1] Submission 251(Law Council of Australia), p. 49
[2] Joint Committee on Intelligence and Security, Review of the listing of the Kurdistan Workers' Party (PKK) as a terrorist organisation under the *Criminal Code 1995*, p. 37

safeguards against the arbitrary exercise of these powers are insufficient in their current form, and should be altered to provide for greater dispersal of power.

9. A decision to proscribe an organisation may be reviewed under the *Administrative Decisions (Judicial Review) Act 1977*. The Criminal Bar Association of Victoria notes that in the absence of judicial involvement in the proscription process, this is an inadequate review mechanism, as the grounds for review of the decision to proscribe an organisation are limited.

10. Broad power wielded by the Attorney-General coupled with very limited oversight by the judiciary results in significant concentration of power with the executive. The Criminal Bar Association of Victoria considers this to be undesirable.

The need for judicial involvement

11. The Criminal Bar Association of Victoria believes that the power to proscribe should be vested with the Federal Court. Decisions of the Court should be subject to judicial review.

12. Other countries have enacted legislation that enables the proscription of organisations involved in terrorist activities. However, the power to proscribe is not as concentrated as in Australia. The British Parliament has enacted the *Terrorism Act 2000*. The power to proscribe an organisation in Britain is still vested solely in the executive, although there is a more robust review mechanism. Under the Act refusals by the responsible Minister to de-proscribe an organisation that has appealed its proscription can be appealed to the Proscribed Organisations Appeal Commission (POAC). This body is comprised of three members, at least one of who holds or has held high judicial office. The POAC has the capacity to meet at short notice, and is able to

hear the appeal in the absence of the appellant where national security concerns are involved. The POAC is a more effective review body than exists in the Australian context.

13. Empowering judicial bodies to review an executive decision, rather than judicial determination of the initial proscription itself, is undesirable. Organisations wrongly proscribed face significant loss of reputation, and members are subject to severe criminal penalties.

14. In order to achieve effective oversight, judicial power is better exercised through the decision to proscribe, rather than as a consequential review of the decision to proscribe. This is currently the case when organisations are declared unlawful pursuant to the *Crimes Act 1914* s.30A & AA. Bodies that advocate or encourage a range of activities may be deemed unlawful by the Federal Court after an application by the Attorney-General. These activities include the overthrow of the Constitution of the Commonwealth by revolution or sabotage. The Law Council of Australia has previously suggested that this statutory framework, in an expanded form, could function as an appropriate instrument to deal with terrorist activities.[3]

15. In order to proscribe, the Court would need to be satisfied on reasonable grounds that the organisation is sponsoring an activity set out in s.102.1 (2) (a) or (b). This is consistent with the current power exercised by the Attorney-General. The organisation would be afforded representation, and would be able to respond to the application. The right to be heard is a fundamental tenet of our legal system, and should not be discarded lightly.

[3] Submission 251(Law Council of Australia), p. 45

16. When sensitive or confidential information relating to national security matters forms the basis, or part of the basis for the Attorney-General's application, the Court should be able to sit in closed session and if absolutely necessary receive highly sensitive evidence in a form that would protect if from the respondent to the application. In such circumstances consideration should be given to mirroring the British arrangement with the appointment of a special representative for the respondent. Such a system would afford maximum procedural fairness to a respondent, whilst also addressing national security concerns.

Application of the power to proscribe

17. The Criminal Bar Association of Victoria is concerned about the selective application of the power to proscribe organisations. In a democratic society governed by the rule of law, the selective application of the law can be perceived as politically tainted.

18. The parliamentary committee responsible for review of listing regulations focused on this issue when it considered the listing of the Kurdistan Workers' Party. According to the dissenting members of the committee, it is unrealistic for every group who engages in political violence to be proscribed in Australia.[4] The Criminal Bar Association of Victoria concurs with this assessment. Therefore, a sound policy must be developed for the application of this power. ASIO has formulated criteria for proscription, which were adopted by the Parliamentary Joint Committee on Intelligence and Security when reviewing the listing of organisations. These criteria included:
    - engagement in terrorism;
    - ideology and links to other terrorist groups/networks;
    - links to Australia;

4. Joint Committee on Intelligence and Security, Review of the listing of the Kurdistan Workers' Party (PKK) as a terrorist organisation under the *Criminal Code 1995*, p. 36

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

19. Others have suggested additional or alternative criteria for the application of the proscription powers. For example, Dr. Patrick Emerton has suggested a set of criteria that include:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law;
- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
    - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
    - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;
    - the way in which the concept of 'membership', and particularly 'informal membership', will be applied in the context of the organisation; [5]

[5] Dr. Patrick Emerton, Submission to the Joint Committee on Intelligence and Security J, Review of the listing of the Kurdistan Workers' Party (PKK) as a terrorist organisation under the *Criminal Code 1995*,

20. If the Federal Court was responsible for the proscription of organisations, its first task should be to formulate criteria underpinning the application of the proscription power. ASIO, the AFP and the Attorney-General could be expected to make submissions. In order to achieve a balance the Court should invite submissions from other bodies or persons with particular expertise.

21. A decision made by a judge of the Federal Court should be subject to judicial review in the customary way.

22. Whether the power to proscribe organisations is exercised by the Attorney-General or the Courts, the Criminal Bar Association strongly submits that the criteria which apply to proscription applications be formulated following public hearing with a capacity for relevant bodies and persons to make submissions. This will dispel significant concerns about the legislation, and ensure public confidence in the proscription process. Sound policy considerations must be seen as grounding decisions rather than arbitrary and unaccountable judgments that may be perceived as targeting particular groups in the community. It is to be noted that 18 of the 19 currently proscribed organisations are Islamic-based.

Recommendations

1. That the power to proscribe organisations be shifted from the Attorney-General to the Federal Court.
2. That a review mechanism be maintained.
3. That clear criteria underpinning the application of the proscription power be formulated following a public hearing.