



Appendix A - Proscription Processes: International Comparisons

Category	UK	Canada	NZ	USA
Legislation	'International terrorist organisations' Part 2 <i>Terrorism Act 2000</i> (TA).	'Terrorist groups' (R.S. 1985,c.C-46) Part II.1 <i>Criminal Code</i> .	'Terrorist entity' Part 2 <i>Terrorism Suppression Act 2002</i>	Foreign Terrorist Organisation (FTO) <i>Immigration & Nationality Act</i> (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	<p>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.</p> <p>[s.3(4) (5)]</p> <p>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</p> <p>[s.3(5A) – (5C)]</p>	<p>The Governor in Council acts on the advice of the Minister for Public Safety.</p> <p>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.</p> <p>[s.83.01 and 83.05 (1) (a)(b) (1.1)]</p>	<p>The PM may proscribe an entity:</p> <p>(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.</p> <p>An 'associate entity' may also be proscribed if it has a relevant connection to a listed organisation or listed associated entity.</p> <p>[s.20(2)(3)]</p>	<p>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</p> <p>[s.212(a)(3)(B)]</p>
Internal Admin & Consultation	<p>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.</p> <p>A Government working group is responsible for scrutinising proscriptions.</p> <p>The Home Office published the additional criteria in 2001 to be taken into account when considering listings:</p> <p>(a)the nature and scale of the organisations activities;</p>	<p>The Minister for Public Safety and Emergency Preparedness acts on criminal and security intelligence reports.</p>	<p>The PM may take into account any relevant information including classified security information.</p> <p>[s.30 see also s.32]]</p> <p>The Officials' Committee for Domestic and External Security Coordination considers whether a proposal should be submitted to the PM.</p> <p>Before listing an entity the PM must consult with the Minister for Foreign Affairs and the Attorney-General on an</p>	<p>The Secretary of State may consider classified information in making the designation.</p> <p>In making the designation the Secretary of State creates an 'administrative record', which is a compilation of classified and open source information.</p> <p>The Secretary of State must consult with the Secretary of Treasury and the Attorney-General before making the designation.</p> <p>[8 USC s.1189(a) (1)]</p>

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	<p>Proscription orders come into force on the day the Parliament approves the draft order.</p> <p>The Order is published on the register of Statutory Instruments.</p> <p>Listings are published on the Home Office website.</p>	<p>The listing is published in the Canada Gazette.</p> <p>Listings are also published on the website of the Department of Public Safety.</p>	<p>The listing takes effect on being made and must be made in writing and signed by the PM.</p> <p>[ss.21(b), 23(d)]</p> <p>Interim and final listings must be published in the NZ Gazette.</p> <p>[s.21 (c) 23(e)].</p>	<p>The listing is published on the Federal Register and takes effect from the date of publication.</p>
Notice to the Entity and Other Affected Parties	<p>No statutory requirement for specific notice to the entity or affected members.</p>	<p>No statutory requirement for specific notice to the entity or affected members.</p>	<p>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.</p> <p>[s.23(f)].</p> <p>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.</p> <p>[s.26, 27, see also 28]]</p> <p>The designation is not invalid because of a failure to provide notice prior to the designation being made.</p> <p>[s.29]</p>	<p>No statutory requirement for specific notice to the entity or affected members.⁵</p>

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	<p>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.</p> <p>The Independent Reviewer conducts reviews of the TA 2000 including the operation of proscription.</p>	<p>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.</p> <p>[s.83.05(9)]</p> <p>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.</p> <p>[s.83.05(10)]</p>	<p>An interim listing is valid for 30 days. [s.21(e)]</p> <p>A final proscription expires after three years unless extended by the High Court.</p> <p>[s.23(g)]</p> <p>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.</p> <p>[s.35]</p>	<p>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.</p> <p>[<i>Intelligence Reform and Terrorism Prevention Act 2004</i>]</p>
De-listing	<p>The SSHD may de-list an entity by removing it from Schedule 2.</p> <p>A proscribed organisation may apply to the Minister to be de-listed.</p> <p>[s.4]</p> <p>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</p>	<p>A listed entity may apply in writing to the Minister to seek a delisting.</p> <p>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.</p> <p>[s.83.05(2)]</p>	<p>The PM may revoke a listing at his own initiative.</p> <p>[s.34(1)]</p> <p>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.</p> <p>[s.34(1)(a)(b)]</p> <p>'Special interest' includes, for example, an interest in property or an 'especially</p>	<p>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.</p> <p>[8 USC 1189(a)(6)(A)]</p> <p>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</p>

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

<p>the refusal (R. 7, 8). The Parliament may annul an order de-listing the entity by resolution of either House. [s.123(2)].</p>	<p>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)]</p>	<p>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)]</p>	<p>determination of its most recent petition for de-listing. The FTO must provide evidence of sufficiently changed circumstances to warrant de-listing. [<i>Intelligence Reform and Prevention of Terrorism Act 2004</i>]</p>
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<p>Appeal Mechanisms</p>	<p>Where an application to the Minister is refused the entity may apply to the Proscribed Organisations Appeal Commission. [s.5(2)]</p> <p>POAC consists of three members, one of whom should be a serving or retired senior judge.</p> <p>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]</p> <p>An entity may also appeal to POAC under s.7(1)(a) of the <i>Human Rights Act 1998</i> on the grounds that the listing is incompatible with human rights.⁷</p> <p>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:</p> <p>(a) POAC must not disclose information contrary to national</p>	<p>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)]</p> <p>In proceedings for judicial review the judge¹¹ must:</p> <p>(a) examine <i>in camera</i> 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.</p> <p>(b) provide the applicant with a summarised statement so as to enable the applicant to be reasonably informed of the reasons for the decision;</p> <p>(c) provide the applicant with</p>	<p>Interim and final listings are subject to judicial review in the ordinary courts. [s.33]</p> <p>An entity may oppose an application by the AG in the High Court to extend the period of the listing.</p> <p>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)]</p> <p>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)]</p> <p>Applications and appeals</p>	<p>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)]</p> <p>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)]</p> <p>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 <i>ex parte</i> and <i>in camera</i> review. [8 USC 1189 (a) (3)(B)]</p> <p>The Court shall set aside the designation if the court finds it to be arbitrary, capricious, and abuse of discretion or not</p>
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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 or 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)]