Law Council
OF AUSTRALIA

Review of the Power to Proscribe Organisations as Terrorist Organisations

Submission to the Parliamentary Joint Committee on Intelligence and Security

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Introduction

1. On 23 November 2006 the Parliamentary Joint Committee on Intelligence and Security (PJCIS) announced a review of the operation, effectiveness and implications of subsections 102.1 (2), (2A), (4), (5), (6), (17) and (18) of the *Criminal Code Act 1995* (Cth) (‘*Criminal Code*’) which regulate the proscription of organisations as terrorist organisations (‘the listing provisions’). The Law Council of Australia (“the Law Council”) welcomes the opportunity to make a submission to the PJCIS in relation to this important review.

2. The Law Council opposed the enactment of the listing provisions when they were introduced in their current form in March 2004. The basis of that opposition was the belief that the Executive should not be empowered to declare that an organisation is a proscribed organisation without:

    (a) prior judicial review and authorisation of the exercise of the power; and

    (b) the opportunity for affected citizens to be heard.

    The Law Council maintains its objections to the listing provisions on that basis.

3. Further, having now observed the listing provisions in operation for almost three years, the Law Council questions whether those provisions actually serve any intrinsic purpose under the *Criminal Code.* Any attempt to understand the law enforcement rationale behind how and when organisations are identified for proscription is confounded by the opaque and ad hoc manner in which the proscription power has been exercised.

4. This lack of transparency has invited the perception that listing provisions do not genuinely operate to combat terrorism and protect the Australian community, but merely created the superficial appearance of activity in this regard. Given the serious criminal consequences of proscription and its potential to unduly infringe rights to freedom of association and expression, the Law Council believes the listing provisions must serve as more than a convenient rhetorical or political tool for the Executive.

5. On that basis the Law Council’s submission reiterates the organisation’s prior concerns in relation to judicial supervision and natural justice and raises further concerns about:

    (a) the failure to apply clear and consistent criteria for selecting organisations for listing; and

    (b) the unnecessary power to proscribe an organisation as a terrorist organisation on the basis of advocacy alone.

6. Many of these issues were thoroughly ventilated before the Security Legislation Review Committee (“the Sheller Committee”). That Committee subsequently recommended a number of crucial reforms to the proscription process when it reported in April 2006. The Law Council hopes that the findings and recommendations of the Sheller Committee, which considered the views of a wide cross-section of stakeholders, will help inform the PJCIS’s deliberations in the context of this review.

Lack of Transparency and Consistency in the Listing Process

Absence of criteria for listing

7. For an organisation to be listed as a terrorist organisation under the *Criminal Code Regulations 2002* (Cth) ('the *Regulations*') the Attorney General must be satisfied on reasonable grounds that the organisation to be listed:

   (a) 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

   (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).[1]

8. An organisation 'advocates' the doing of a terrorist act if:

   (a) The organisation directly or indirectly counsels or urges the doing of a terrorist act; or

   (b) The organisation directly or indirectly provides instructions on the doing of a terrorist act; or

   (c) The organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act.[2]

9. Neither the *Criminal Code* nor the *Regulations* contain any further or more detailed criteria to guide and circumscribe the exercise of the Attorney General's proscription powers. For example, it is no longer a legislative requirement, as it was prior to the *Criminal Code Amendment (Terrorist Organisations) Act* 2004 (Cth), that in order for an organisation to be proscribed under the *Regulations*, it must first have been designated as a terrorist organisation by United Nations Security Council.

10. On the basis of the broad definition contained in s 102.1(2), a considerable number of organisations across the globe are therefore potentially eligible for proscription under the *Regulations*. Nonetheless, only 19 organisations have been listed to date. The rationale behind how and why those organisations in particular have been chosen and the order in which their proscription has been pursued is difficult to discern. Likewise information is not publicly available about other organisations which have been considered for proscription, but ultimately not listed, or about organisations which are currently under consideration for listing.

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[1] *Criminal Code Act 1995* (Cth), s 102.1(2).

[2] *Criminal Code Act 1995* (Cth), s 102.1(1A).

11. In the context of past reviews, ASIO has provided the PJCIS with the criteria it purportedly uses in selecting and assessing entities for proscription under the *Criminal Code*. That criteria includes the following factors:

    (a) engagement in terrorism;

    (b) ideology and links to other terrorist groups/networks;

    (c) links to Australia;

    (d) threat to Australian interests;

    (e) proscription by the UN or like-minded countries; and

    (f) engagement in peace/mediation processes.[3]

12. However, ASIO has explained to the PJCIS that these criteria represent a guide only and that it is not necessary that all elements of the criteria be satisfied before a decision is taken to list an organisation. Moreover, where the criteria have been departed from, ASIO and the Attorney-General's Department have not considered it necessary to advance evidence of special overriding circumstances which justify the listing of the organisation, notwithstanding the fact that the criteria have not been met.[4]

13. The result is that while both the Attorney General's Department and ASIO have acknowledged that it is neither possible nor desirable to list every organisation in existence which meets the broad requirements of the *Criminal Code*, neither organisation has been willing to promulgate binding criteria for singling out particular organisations for listing under that *Code*.

14. At a hearing conducted by the PJCIS during its review of the listing of the Kurdistan Workers Party (PKK), officers from ASIO were questioned on how listing that organisation would assist in the protection of Australian assets or personnel overseas. ASIO responded that:

    > *"If you have information that leads you to conclude that this organisation is a terrorist organisation and you do not [proscribe it] you seem to be failing in your duty of care to the citizens*."[5]

15. ASIO's comments suggest that the listing of the PKK was, at least in part, motivated by the desire to appear proactive against terrorism. In essence, ASIO justified the proscription on the basis that it was better than 'not taking action'. This does not explain either why the PKK was singled out for listing from amongst other militant separatist or nationalist movements or what actual purpose the listing was likely to serve.

16. ASIO's responses to the questions of the PJCIS demonstrate that fixed, transparent criteria are urgently required.

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[3] Parliamentary Joint Committee on Intelligence and Security, 'Review of the listing of the Kurdistan Workers' Party (PKK)', Canberra, April 2006., p. 11.

[4] Minority Report of Parliamentary Joint Committee on Intelligence and Security, above n 3. at p. 36.

[5] Parliamentary Joint Committee on Intelligence and Security, above n 3, at 2.51 p. 29.

Need for nexus with Australia

17. Even on the obvious question of whether a nexus with Australia and/or Australian interests is a critical factor in determining whether an organisation is selected for listing, there has been no consistent response.

18. In April 2004 the Attorney General Phillip Ruddock stated that in establishing what organisations should be listed under the *Criminal Code*, the Government looked to establish linkages with Australia. Accordingly, Mr Ruddock explained that the reason Australia had listed only 16 organisations at that point, while the UN had suggested proscription of some 100 organisations, was that Australian decision makers had been influenced by "whether there is a connection with Australia."[6] In the same interview, Mr Ruddock alluded to the possibility that the Government might move from this position.

19. On 6 August 2005 Attorney General Phillip Ruddock was asked questions about the organisation known as *Hizb ut-Tahrir*. Again his answer indicated that establishing a connection with Australia would be a primary consideration in determining whether to list an organisation. He said:

> "*There is no information that has been made available to me about that organisation that says here in Australia it has been involved in any of the activities which would prompt us domestically to want to ban it. But as you know, where we know an organisation has a presence in Australia and its activities abroad are of concern, consideration can be given to proscribing it.*"[7]

20. Nonetheless, the statement of reasons provided in support of the most recent new listing, that of the PKK, made no mention of links to Australia or threats to Australian interests.

21. Further, in the Attorney-General's Department submission to the Sheller Committee last year, it was stated that terrorism is a global problem that requires a global response. As part of that global response, the Department submitted that Australia must be able to proscribe an organisation as a terrorist organisation even where it has no direct relevance to Australia.

22. Little consideration appears to have been given to whether listing an organisations with no existing presence in Australia or desire to specifically target Australian interests or citizens, might in fact create a new risk to Australian citizens.

Perception that proscription power is a convenient political device

23. The absence of transparent criteria has inevitably made it difficult to allay public fears that the proscription power might be utilised for politically convenient ends rather than to address law enforcement imperatives. This was starkly illustrated by the listing of the PKK in December 2005.

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[6] The Hon. Phillip Ruddock MP, Transcript of interview (Tony Jones interviewer), *Lateline,* 21 April 2004.

[7] The Hon. Phillip Ruddock MP, Transcript of doorstop interview, Canberra, 6 August 2005.

24. The Law Council does not assert that the decision to list the PKK was in fact illegitimate or improper. However, the listing process certainly gave rise at least to the perception that the exercise of the proscription power was susceptible to foreign influence and primarily driven by foreign policy considerations.

25. Significant activity directed towards advancing the proscription of the PKK commenced from April 2005; at or around the time that Prime Minister John Howard visited Turkey.[8] The PKK was eventually proscribed under the *Regulations* on 15 December 2005, just one week after a State visit to Australia by the Turkish Prime Minister.

26. In the Review of the PKK listing which was conducted by the PJCIS, there were marked discrepancies between the evidence of ASIO, the Department of Foreign Affairs and Trade and the Attorney-General's Department about the timetable for preparing the PKK listing. These discrepancies were not resolved even after answers to questions on notice were received.[9]

27. Further, while DFAT gave evidence that a request was made by the Government of Turkey for consideration of the listing in April 2005 and that this request was conveyed to both ASIO and the Attorney-General's Department in May 2005, ASIO did not endorse that evidence.

28. To date no one has been charged with an offence under the *Criminal Code* relating to association with the PKK. This suggests that the listing was not motivated by any pressing need to curtail support from within Australia for the organisation's terrorist related activities.

29. Further the PKK has been internationally active since 1978. General information about the organisation of the type contained in the Attorney-General's relatively brief statement of reasons in support of the listing is abundant and easily located. This suggests that the listing, if pressing, could have been made earlier or at any time.

30. The majority report issued by the PJCIS stated that "the Committee found no evidence that the Turkish Government's approach had affected the proscription timetable."[10] Nonetheless, when there are no available criteria to provide an objective justification for why and when the PKK was selected for proscription, it is difficult to rebut the inference that arises from the available information about the impetus for the PKK's listing and its timing.

31. Perceptions are important, particularly with respect to fostering confidence in and respect for the law. Transparent decision making processes are necessary to demonstrate to members of the community that rights of association and free speech are not placed under threat for improper or discriminatory purposes. The perception that the listing provisions might be used as a rhetorical device by which the Australian Government curries favour with foreign governments and signals to its allies a commitment to fighting the "war against terror" is inherently harmful. Faith in the rule of law is diminished by the promulgation of laws viewed as ad hoc or unnecessary.

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[8] Parliamentary Joint Committee on Intelligence and Security, above n 3, p. 9

[9] Parliamentary Joint Committee on Intelligence and Security, above n 3. p. 8-10.

[10] Parliamentary Joint Committee on Intelligence and Security, above n 3. p.10.

32. For this reason the Law Council endorsed the recommendation of the Sheller Committee that fixed and publicly available criteria for proscription be determined. The Law Council believes that these criteria should be included in the *Criminal Code* or the *Regulations* and that any statement of reason in support of a listing decision should be required to specifically address the criteria. Further, the Law Council believes that these criteria should focus on why the proscription of an organisation as a terrorist organisation is necessary in the context of Australian criminal law.

Opportunity for affected members of the community to be heard

33. Further to the above, the Law Council believes that in addition to establishing more transparent criteria for assessing organisations for listing, there should also be greater transparency about which organisations are under assessment. This would allow members of the community who might be affected by a proposed listing to make a case against the listing before it comes into effect.

34. Again the process by which the PKK was listed highlighted the inadequacy of current procedures. Prior to the listing, no notice was given or consultation conducted with the Kurdish expatriate community in Australia which is thought to include some 4,500 people. Given the nature of the PKK's aspirations and the role it has played over time in agitating for Kurdish rights and freedom, it is possible that there is considerable sympathy and support for the PKK amongst Australia's Kurdish community. It is possible that members of that community view the PKK not as a terrorist group but as a legitimate nationalist movement. No assessment was made of levels of support for the PKK amongst the Kurdish community in Australia nor of how the proscription of the PKK might impact on that community. Indeed ASIO explained to the PJCIS that it did not regard such assessment as necessary or material to the decision making process. When the organisation was listed no distinction was made between the military and other wings of the PKK,[11] as was done with other listed organisations such as Hizbollah.[12]

35. The Law Council believes that the failure to give notice and a right to be heard to those potentially affected by the proscription of an organisation unnecessarily compounds the potential for the listing provisions to operate unjustly.

36. There are avenues for review *after* an organisation has been listed, both before the PJCIS and the Federal Court. However, the Law Council regards such *post facto* review as inadequate, not least of all because people who seek to challenge a listing after it has come into effect may expose themselves to prosecution if, during the course of their application for review, they disclose membership of or support for the relevant organisation.

37. For those reasons. the Law Council again endorses the recommendation of the Sheller Committee that :

[11] Although such a distinction was made in the statement of reasons to the listing.

[12] On 5 June 2003 Hizbollah's External Security Organisation ('ESO') was listed as a terrorist organisation. It was re-listed on 5 May 2005. Careful distinction was made between the political, social, military and terrorist wings of Hezbollah and it was noted that the ESO was autonomous from the other wings of the organisation.

"In all but exceptional circumstances, a proposal to proscribe an organisation should be made public and an opportunity given for interested persons to make comment. If practicable the organisation and its members, or persons affected, or interested persons, should be notified and have the opportunity to be heard before an organisation is proscribed. It is probable that this obligation is implicit in the statutory scheme under the common law doctrine of natural justice. It would be better if it were spelled out in the legislation."

Judicial v Executive Process for Listing

Law Council supports judicial process

38. The Law Council continues to support the view that the listing provisions should incorporate a measure of judicial scrutiny *before* the Attorney-General's decision takes legal effect and potentially criminalises the conduct of citizens. The lack of transparency and consistency which has characterised the exercise of the proscription power to date has served to reinforce that view.

39. The arguments for and against a judicial or administrative listing process are well canvassed in the Sheller Report. The Law Council concurs with the arguments advanced in favour of a judicial process in that Report and does not propose to restate them again in this submission. Suffice to note that the Law Council believes that a judicial process would be best able to deliver transparency, natural justice and safeguards against unnecessary rights infringements and, for that reason, the Law Council prefers the second of the Sheller Committee's alternative recommendations, namely that:

    "*the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected parties and a hearing in open court."*

Law Council rejects arguments in favour of an executive process

40. The primary arguments listed in favour of an executive process in the Sheller report were that:

    (a) the function of declaring an organisation to be a proscribed organisation fits more easily into the executive rather than the judicial mould;

    (b) the Executive is better placed to source and process the type of information necessary to perform the function; and

    (c) the current executive process already incorporates adequate safeguards.

41. Based on existing law and practice, the Law Council does not accept those arguments as overpowering the arguments in favour of a judicial process.

42. Firstly, there is already precedent for the judicial exercise of a proscription power of the same type. Although rarely used, a proscription power with respect to ‘unlawful associations’ has been part of the *Crimes Act 1914* (Cth) since the 1920s. Under s 30AA of the *Crimes Act* the Attorney-General may apply to the Federal Court for a declaration that an organisation is unlawful. An officer or member of the organisation has a statutory right to show cause why the organisation should not be declared unlawful.

43. Further, courts are already engaged in the process of determining whether particular entities constitute terrorist organisations. Under the *Criminal Code* a terrorist organisation is defined as:

    (a) an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or

    (b) An organisation that is specified as such in the *Regulations*.

44. Therefore, provided the prosecution can produce evidence to prove that an organisation satisfies the criteria in (a) above, a person can be prosecuted for an offence relating to their interaction with that organisation notwithstanding that it has not been listed under the *Regulations*.[13] Indeed the Office of the Commonwealth DPP in its submission to the Sheller Committee asserted that the prosecution is required to prove the circumstances in paragraph (a) regardless of whether an organisation is listed in the *Regulations*.[14]

45. Since the creation of the proscription power, 27 people have been charged with offences relating to terrorist organisations.[15] Of those, at least 22 were charged with offences relating to an un-listed terrorist organisation as a result of ‘Operation Pendennis.’ The Attorney-General’s Department reported last year that all charges for offences related to terrorist organisations to date have concerned un-listed organisations.[16]

46. Therefore in practice, courts are already being called upon to receive and assess evidence as to whether a particular organisation falls within the *Criminal Code* definition of a terrorist organisation. While they do not perform this task for the purpose of declaring an organisation to be a proscribed terrorist organisation, the process of admitting and evaluating evidence from a range of disparate sources remains the same, as is the potential effect of the court’s decision.

47. The role which courts are already called upon to play in this regard, belies the submission of the Attorney-General’s Department to the Sheller Committee that:

    > *“Both the Commonwealth Government and the Governments of the States and Territories have concluded that the executive and not the judiciary is best placed to make the necessary decision*

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[13] There are two exceptions to this statement – see *Criminal Code* sections 102.5 and 102.8. The Sheller Committee recommended the amendment of the first provision and repeal of the later provision, recommendations supported by the Law Council.

[14] Report of the Security Legislation Review Committee April 2006, pp64-65,

[15] Information supplied by the Department of the Attorney-General.

[16] Australian Government submission to the PJCIS review of security and counter-terrorism legislation, p.17.

about the nature of the organisations that should be prescribed and that it is desirable that this power not be left to the courts. The Government considers that it is essential that the executive take responsibility for making such decisions and that it should not abdicate this responsibility to the courts."

48. The Law Council believes that it invites uncertainty and inconsistency to have two arms of government simultaneously engaged in assessing organisations against ostensibly the same criteria. The Law Council further believes that the judiciary is the arm of government best placed to perform this function in a transparent manner which allows for natural justice and provides appropriate safeguards against misuse or overuse of the proscription power.

Current safeguards are not adequate

49. Also contrary to the Attorney-General's Department's submission to the Sheller Committee, the safeguards formally and informally incorporated in the current process are inadequate.

PJCIS Review

50. The Attorney-General's Department has emphasised that the current listing process involves Parliament and not just the Executive because Parliament has the power to disallow a regulation that lists an organisation as a terrorist organisation. In this respect, PJCIS review of the listing of organisations is critical to Parliament's role.

51. Section 102.1A of the *Criminal Code* stipulates that the PJCIS *may* review a regulation proscribing an organisation within 15 sitting days of the regulation being laid before the House. The PJCIS has noted that "since Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter."[17] Accordingly, as part of its review the PJCIS may seek submissions from Australian members of the relevant organisation and from other interested parties. The PJCIS is also permitted access to all material (including classified material) upon which the Minister's decision was based.

52. The Parliament is likely to rely upon the judgement of the PJCIS in deciding whether to disallow the proscribing regulation; particularly where classified material is involved.[18]

53. The primary problem with PJCIS review is that it is not mandatory and it takes place after a decision to proscribe an organisation has been made and come into effect.

54. Further, while the PJCIS has been diligent in reviewing listings, robust in it's questioning of relevant government officers, and critical of some aspects of current listing process, it has not succeeded in forcing the Executive:

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[17] Parliamentary Joint Committee on ASIO ASIS and DSD, 'Review of listing of the Palestinian Islamic Jihad (PIJ) as a Terrorist Organisation under the *Criminal Code Amendment Act* 2004', Tabled 16 June 2004.

[18] Because such material will not be available to Parliament.

(a) to commit to a fixed set of criteria for selecting organisations for listing; and

(b) to address its reasons for listing to those criteria.

The PJCIS has indicated that it requires pre-identified criteria to use as a basis for testing a listing and it has adopted for that purpose the ASIO criteria listed in paragraph 11 above. However, as was revealed in the review of the PKK listing, the Executive regards the ASIO criteria only as a rough non-binding guide. Therefore it is difficult for the PJCIS to employ a consistent and rigorous framework for review.

55. Moreover the Law Council believes that, the historical underpinnings of Australia's system of government aside, the reality of party politics in Australia dictates that there is often insufficient distinction between the Executive and the Parliament to suggest the latter can be relied upon to provide independent supervision of the former.

Consultation with States and Territories

56. Mandatory consultation on a proposed new listing with State and Territory leaders, pursuant to the Inter-Governmental Agreement on Counter-Terrorism laws, has provided only doubtful additional accountability. For example, in the case of the PKK listing, although the matter was under consideration for over a year, State and Territory leaders were advised of the proposed listing just six days before the relevant regulation was made and were provided only with the three and half page unclassified statement of reasons in support of the listing.

57. It is difficult to accept that consultation of this type acts as a genuine safeguard. Further, there is no basis for the assumption that representatives of the Executive at the State and Territory level are concerned with policing the misuse or unnecessary use of executive power at the federal level, except to the extent that it involves a Commonwealth incursion into State matters.

Judicial Review

58. While there is the opportunity for judicial review of a decision to proscribe an organisation, it extends only to the legality of the decision and not its merits. Further, as noted above, judicial review is only available after the decision has come into effect.

Expert Advice

59. The Attorney-General's Department has submitted that a further "safeguard" of sorts in the current executive process is that decision makers have access to and act upon expert advice from senior officials, such as the Director-General of ASIO and the Chief General Counsel, and others with extensive knowledge of the security environment. According to the Attorney-General's Department:

> *"The expertise of members of the executive, who have contact with senior members of the Governments and agencies of other countries cannot be understated."*[19]

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[19] Australian Government submission to the PJCIS review of security and counter-terrorism legislation, p.17.

60. The Law Council believes that such submissions misunderstand the critical reason why a judicial process is preferred to an executive process. A judicial process offers greater safeguards because it would involve a transparent decision making process presided over by an independent decision-maker.

61. Before making an application to the court the Attorney-General would still need to gather and be guided by expert opinions from the same members of the Executive he currently consults. And in considering the Attorney-General's application, the court would have access to same range of information from the same range of sources as the Attorney-General.

62. The difference with a judicial process is that the manner in which that information is presented and tested would be more transparent and the ultimate evaluation of that information would rest with the court and not with the Attorney-General. Furthermore, a judicial process might allow for information from other sources, including from those potentially affected by a proposed listing, to also be placed before the ultimate decision maker. While the "expertise of members of the Executive" may be considerable, it should not automatically be assumed that they are necessarily possessed of all the relevant information.

63. At any rate, as the Attorney-General is not bound to follow the advice of the other members of the Executive, the fact that their advice is currently voluntarily sought as part of the listing process does not represent a safeguard in the true sense of the word.

Sheller Committee Proposal

64. In view of the above, the Law Council believes that a judicial process would offer superior accountability. However, if responsibility for making decisions regarding the proscription of organisations is to remain with the Attorney-General, further safeguards at least need to be incorporated into the process prior to a decision being made. On that basis, the Law Council endorses the Sheller Committee's alternative recommendation for an independent advisory committee, established by statute, to advise the Attorney-General on listing decisions.

Advocacy as a Basis for Listing

65. Subsection 102.1(2)(b) of the *Criminal Code* was inserted by the *Anti-terrorism Act (No 2)* 2005 (Cth) and permits the Attorney-General to list an organisation if satisfied that the organisation "advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)." As set out above, s 102.1(1A) explains that an organisation 'advocates' the doing of a terrorist act if:

    (a) *The organisation directly or indirectly counsels or urges the doing of a terrorist act; or*

    (b) *The organisation directly or indirectly provides instructions on the doing of a terrorist act; or*

    (c) *The organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or*

> *any mental impairment (within the meaning of s 7.3) that the person might suffer) to engage in a terrorist act).*[20]

66. Again, the Law Council notes that the discussion of 'advocacy' as a basis for listing was addressed in some detail by the Sheller Committee.[21] The Law Council also notes that the PJCIS has already considered the recommendations of the Sheller Committee in relation to this issue and, significantly, has recommended that "risk" in paragraph (c) be amended to "significant risk".[22] The Law Council welcomes this recommendation and hopes that it results in appropriate amendment to the subsection, unlike the recommendation in the same terms which was made by the Senate Legal and Constitutional Affairs Committee in relation to the original Bill.

67. However, the Law Council believes that this single amendment is not sufficient to address the many potential problems with the application of the sub-section and recommends its repeal.

Power is unjustified and unnecessary

68. The Law Council is not opposed to laws which criminalise incitement to violence or other criminal acts. However, the Law Council believes that s102.1(2)(b) and s102.1(1A) extend well beyond criminalising incitement. Potentially those provisions criminalise the activities of a broad group of people who are not directly or indirectly supportive of acts of terrorism but are merely associated with someone who, although not engaged in the planning or execution of terrorist acts, has expressed encouragement for such conduct.

69. The Law Council is aware that no organisations have been proscribed to date on the basis of advocacy alone. However, the Law Council rejects any subsequent conclusion that this demonstrates that the power has been prudently exercised and will be in the future. On the contrary, the Law Council believes this illustrates that the power to proscribe an organisation on the basis of advocacy is unnecessary. It is a power that can not be prudently exercised because it is inherently excessive.

70. If it can not be demonstrated that an 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) then the organisation should not be outlawed *as a terrorist organisation* and its members exposed to serious criminal penalties.

71. The Government has agued that the provision allowing advocacy as a basis for proscription is aimed at "early intervention and prevention of terrorism."[23] The Law Council believes that disproportionate restraints on freedom of association and speech will not achieve this aim and in fact are likely to prove counter-productive. The members of any organisations are rarely a homogenous group who think and talk as one. On the contrary, although formed around a common

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[20] *Criminal Code Act 1995* (Cth), s 102.1(1A).

[21] The Sheller Committee, 'The Sheller Report' tabled by the Attorney General on 15 June 2006. (www.ag.gov.au/agd).

[22] Parliamentary Joint Committee on Intelligence and Security, 'Review of Security and Counter Terrorism Legislation, Canberra, December 2006.

[23] Australian Government submission to the PJCIS review of security and counter-terrorism legislation, p.6

interest or cause, organisations are often a battleground for opposing ideas, and may represent a forum in which some members' tendencies towards violent ideology can be effectively confronted and opposed by other members.

72. Without s 102.1(2)(b), the Executive is already empowered to prosecute an individual for inciting violence and for a range of terrorist related offences. Without s 102.1(2)(b) the Executive is already empowered to proscribe any organisation which 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). The Law Council believes that any further power risks the unjustified curtailment of the rights of Australians to freedom of speech and association.

Key words not defined

73. A further problem with subsection 102.1(1A) is that key words such as "counsels", "urges" and "praises" are not defined. This creates ambiguity and leaves scope for even broader discretion on the part of the Minister.

74. Subsection 102.1(2)(a) already allows for an organisation to be proscribed on the basis that it has indirectly fostered the doing of a terrorist act whether or not that act has occurred or will occur. The Law Council believes that this, in itself, is dangerously broad and vague. However, the fact that the inclusion of s 102.1(2)(b) was considered necessary suggests that "counselling", "urging" and "praising" are intended to encompass something even less than the "indirect fostering" of a terrorist act. If those words are intended to encompass something less, then the Law Council believes that they cast the net for proscription far too wide. If they are not, then s 102.1(2)(b) must be superfluous.

Attribution of Advocacy

75. Section 102.1(1A) also does not specify when the 'advocacy' of an individual member of a group will be attributable to the organisation as a whole. According to the explanatory memorandum 'advocacy' may include "*all types of communications*, *commentary and conduct'*. The Law Council is concerned that the listing provisions fail to precisely identify:

    (a) The form in which the 'advocacy' must be published;

    (b) The extent to which the 'advocacy' must publicly distributed;

    (c) Whether or not an individual who 'advocates' must be specifically identified as a member of the organisation;

    (d) Whether or not the relevant individual must be the group's leader.

76. If the provision is to remain, the Law Council believes that the uncertainty over when responsibility for 'advocacy' is transferred from an individual to an organisation for the purposes of listing must be clarified.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.