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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.