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# Review of the Listing Provisions of the Criminal Code

## Submission to the Parliamentary Joint Committee on Intelligence and Security

## 2 February 2007

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# 1. Introduction

The Public Interest Advocacy Centre (PIAC) seeks to promote a just and democratic society by making strategic interventions on public interest issues.

PIAC is an independent, non-profit law and policy organisation that identifies public interest issues and works co-operatively with other organisations to advocate for individuals and groups affected.

In making strategic interventions on public interest issues PIAC seeks to:

- expose unjust or unsafe practices, deficient laws or policies;
- promote accountable, transparent and responsive government;
- encourage, influence and inform public debate;
- promote the development of law—both statutory and common—that reflects the public interest; and
- develop community organisations to pursue the interests of the communities they represent.

Established in July 1982 as an initiative of the Law Foundation of New South Wales, with support from the NSW Legal Aid Commission, PIAC was the first, and remains the only, broadly based public interest legal centre in Australia. Financial support for PIAC comes primarily from the NSW Public Purpose Fund and the Commonwealth and State Community Legal Centre Funding Program. PIAC generates approximately thirty per cent of its income from project and case grants, seminars, consultancy fees, donations and recovery of costs in legal actions.

# 2. Terms of reference and scope of submission

Section 102.1A(2) of the *Criminal Code Act 1995* requires the Parliamentary Joint Committee on Intelligence and Security to review, as soon as possible after the third anniversary of the commencement of this section, the operation, effectiveness and implications of subsections 102.1(2), (2A), (4), (5), (6), (17) and (18) and report the Committee's comments to each House of the Parliament and the Minister.

## 2.1 Scope of this submission

*102.1 Terrorist organisation regulations*

(2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of terrorist organisation in this section, the Minister must be satisfied on reasonable grounds that the organisation:

(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).

(2A) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section, the Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

…

(4) If:

(a) an organisation is specified by regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section; and

(b) the Minister ceases to be satisfied of either of the following (as the case requires):

(i) 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);

(ii) that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

the Minister must, by written notice published in the Gazette, make a declaration to the effect that the Minister has ceased to be so satisfied. The regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made.

(5) To avoid doubt, subsection (4) does not prevent the organisation from being subsequently specified by regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section if the Minister becomes satisfied as mentioned in subsection (2).

(6) If, under subsection (3) or (4), a regulation ceases to have effect, section 15 of the *Legislative Instruments Act 2003* applies as if the regulation had been repealed.

…

(17) If:

(a) an organisation (the ***listed organisation***) is specified in regulations made for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section; and

(b) an individual or an organisation (which may be the listed organisation) makes an application (the ***de-listing application***) to the Minister for a declaration under subsection (4) in relation to the listed organisation; and

(c) the de-listing application is made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation:

(i) 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

(ii) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);

as the case requires;

the Minister must consider the de-listing application.

(18) Subsection (17) does not limit the matters that may be considered by the Minister for the purposes of subsection (4).

# 3. Context and unchecked Executive power

## 3.1 Context of reviews of security legislation

PIAC has repeatedly expressed the view that reviews of new national security legislation cannot be meaningfully undertaken without consideration of the broader context in which those security laws operate. Without considering this context it is difficult, if not impossible, to understand the impact of legislative regimes not only in terms of legal rights and obligations but also in terms of social and community values and consequences.

The rationale for the significant range of 'security' legislation at both state and federal level has been that, as a result of the attacks in the USA, Bali and London we are now living in a 'new security environment'. PIAC has, in previous submissions, and continues to challenge this characterisation.[1] However, even if we are to accept that there is a 'new security environment', this does not, in PIAC's view, justify the measures that

[1] Public Interest Advocacy Centre, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3, Part III of the ASIO Act 1979 (Cth)- Questioning and Detention Powers* (2005) 7-9; Public Interest Advocacy Centre, *Submission to the Senate Legal and Constitutional Legislation Committee on the Anti-Terrorism Bill (No 2) 2005 (Cth)* (2005) 11.

have been introduced. Any measure introduced by a democratically elected government should be consistent with the Rule of Law, the Australian *Constitution* and Australia's international human rights obligations.

The Australian Government, in its three branches—the executive, the parliament and the judiciary—needs to be vigilant to ensure a proper separation in the exercise of powers and to ensure that there remains a clear distinction between the roles of law-enforcement agencies and those of intelligence-gathering agencies.

### 3.2 Executive-driven regulation not preferable

The growing power vested in the Federal Attorney-General and the executive more broadly needs to be carefully and continuously scrutinised to ensure that those elected to represent and to govern remain properly accountable to the Australian community, not simply once every three or four years through the ballot box, but through the retention of appropriate mechanisms for reviewing the exercise of executive power.

For example, PIAC has noted, with concern, the shift toward the executive limiting the discretion vested in the judiciary to control court proceedings. The *National Security Information Legislation Amendment Act 2005* (Cth) requires the courts to be closed at the behest of the Attorney-General where there is information likely to be disclosed in the proceedings that the Attorney-General determines to be 'likely to prejudice national security'. This exclusions means that the executive controls the flow of information in the legal system and the traditional discretion afforded to the third arm of government—the judiciary—to control proceedings has been limited.[2]

## 4. Lack of necessity for proscription powers

It is PIAC's understanding that the aim of the proscription power is to prevent politically and/or ideologically motivated violence and acts that intentionally assist such violence. PIAC reaffirms that such violence is already illegal under criminal laws in Australia, as are any actions that intentionally assist or are undertake in order to assist such violence. Even prior to the proscription power and the enactment of specific 'terrorism' offences, all of the listed act were already illegal under Australian law, with many providing for severe penalties on conviction. Likewise, persons deliberately assisting in such acts, even if not directly engaged in them, would be caught by the offences of conspiracy and/or incitement.[3]

PIAC recognises that to achieve the prevention of politically and ideologically motivated violence, the operations of organisations or groups involved in such acts or the promotion of such acts may require increased regulation. International concern regarding organisations involved in acts of politically and ideologically motivated violence has lead to a series of United Nations Security Council (UNSC) resolutions, which have called on Member States to take steps toward combating terrorism. For example, several UNSC resolutions have called on States to freeze the 'funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist activities or participate in or facilitate the commission of terrorist acts'.[4] Australia has implemented the UNSC Resolutions relating to financing of terrorist organisations through the *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002*.[5] The Security Council Committees established under Resolution 1267 and 1373 regularly update the list of individuals, groups and entities associated with Usama bin Laden, Al Qa'ida and the Taliban.[6] It is PIAC's understanding that it is this list that is incorporated into the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002.*

The proscription power under the *Criminal Code* is, however, distinct from the provisions relating to financing of terrorist organisations and has the effect of banning an organisation. It is the banning of an

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2 Public Interest Advocacy Centre, *Submission to the Senate Legal and Constitutional Committee on the inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005 (Cth)* (2005), 5-8.

3 See, for example, *Criminal Code* sections 11.2 & 11.4-11.5.

4 United Nations Security Council Resolution 1373 (2001), S/RES/1373(2001).

5 Department of Foreign Affairs and Trade website: http://www.dfat.gov.au/icat/freezing_terrorist_assets.html

6 United Nations Security Council Resolution 1390 (2002), S/RES/1390(2002), para 2.

organisation that is, in principle, a concern to PIAC as it may breach the human rights to freedom of thought, expression and association protected in the *International Covenant on Civil and Political Rights,* to which Australia has been a signatory since 1972. PIAC notes that the United Nations Commission on Human Rights has called for States, when implementing legislation and actions to counter terrorism, to continue to respect and protect the international human rights standards to which they have committed.[7]

It is arguable that because of the existence of specific criminal offences and the UN process incorporated into the *Charter of the United Nations (Terrorism and Dealing with Assets) Regulation 2002*, the proscription or banning of organisations is unnecessary. Submissions to this effect were made by many organisations and individuals during the debate prior to the passage of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth).[8]

### 4.1 Views of the UN Special Rapporteur

By report dated 14 December 2006, Martin Sheinin, the UN Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, reported to the UN Human Rights Council on his study of Australia in terms of human rights compliance while countering terrorism.[9] The Special Rapporteur raises a number of concerns about Australia's actions to counter terrorism, including concerns in respect of the proscription regime. He notes that it is his view that:

> Australia's definition of a "terrorist act" goes beyond the Security Council's characterization:
>
> (a) By including acts the commission of which go beyond an intention of causing death or serious bodily injury, or the taking of hostages (see sections 100.1(3)(b)(iii) and 100.1(3)(b)(iv)); and
>
> (b) By including acts not defined in the international conventions and protocols relating to terrorism (see sections 100.1(2)(b), (d), (e) and (f)).[10]

The Special Rapporteur then notes that the effect of a listing under the process currently under review by the PJCIS is 'more significant than a designation based on a Sanctions Committee listing'[11], and refers to the range of association and assistance offences set out in sections 102.2, 102.3, 102.4, 102.5, 102.6, 102.7 and 102.8 of the Criminal Code that carry penalties of up to 25 years' imprisonment.

In conclusion in respect of the proscription regime, the Special Rapporteur states:

> … it is problematic that an organization can be listed based upon an ordinary, rather than a criminal, standard of proof, with severe criminal penalties flowing from such a listing. The Special Rapporteur notes that the Security Legislation Review Committee has recommended reform of the process of proscription to meet the requirements of administrative law.[12]

# 5. Proscription powers in practice

PIAC is concerned that there may be significant dangers arising from the application of the terrorist organisation proscription powers. PIAC continues to have serious concerns about the secrecy surrounding the exercise of proscription powers and the arbitrariness with which they may be exercised. PIAC also remains concerned that the criteria and procedures relied on by the Federal Attorney-General and the

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7 Commission on Human Rights, *Protecting human rights and fundamental freedoms while countering terrorism,* 60th sess, UN Doc. E/CN.4/2004/91 (2004).

8 See Senate Legal and Constitutional Legislation Committee (2002) *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2] etc* at [3.101]-[3.140].

9 Martine Sheinin, *Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism*, UN Doc A/HRC/4/26/Add.3 (2006).

10 Ibid, paragraph 15.

11 Ibid, paragraph 22.

12 Ibid, paragraph 23.

Australian Security Information Organisation (ASIO) in the process leading to a proscription of an organisation have not been the subject of independent high-level scrutiny. While there are clearly valid concerns about protecting the security of information-gathering processes, disclosure of the criteria relied on and the evidence in support of the listing ought properly be the subject of independent scrutiny.

The supporting information in relation to the proscribed groups currently under review states that ASIO's assessment of the information is that it is 'accurate and reliable'. However, the criteria, processes and evidence relied upon for this assessment remains secret. The test for the Governor General to proscribe a group requires only that the Attorney-General is:

> … 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 the terrorist act has occurred or will occur).[13]

However, as noted by the Parliamentary Library's research note, 'The politics of proscription in Australia', there is no requirement that the listed group has links to Australia or poses a threat to Australian interests.[14] Indeed, it notes that, to date, the proscription power has been exercised on an inconsistent basis. For instance, some organisations with links to Australia have not been proscribed while others with no links have been banned.[15] The Committee has itself suggested that the threat to Australia or the involvement of Australians should be given 'particular weight' in considering future listings.[16] The Parliamentary Library's research note further observes that the first group that the Government chose to list under the new powers, which was not already listed by the United Nations—the Palestinian Islamic Jihad (proscribed 3 May 2004)—is one that ASIO has stated has no links to Australia.

In respect of the issue of links to Australia, PIAC was interested to note the recent comments of the Federal Attorney-General in respect of NSW Premier Morris Iemma's call for proscription of Hizb ut-Tahrir. In a report on the political debate between these players, the *Sydney Morning Herald* reported that:

> Mr Ruddock said Hizb ut-Tahrir had been closely monitored by the Australian Security Intelligence Organisation but had been found to have done nothing in Australia to warrant it being banned.[17]

What is notable about the organisations proscribed under the *Criminal Code* is that they are all Muslim groups. At the very least, this raises reasonable concern that the Government in its 'War on Terror' is targeting Muslims in Australia.

PIAC is concerned about the potential use by the Government of this sensitive power for political rather than security purposes. It is a serious abuse of power to do this and is likely to fuel the flames of ideology that the power is seeking to quell.

## 5.1 Transparency

Promoting transparency and accountability within the proscription process will lead to greater public confidence in the process and acceptance of the outcome as valid and necessary to protect Australia's national interests and Australians. It will also go some way to ensuring that the interests of security are protected in a manner that appropriately recognises the rights of marginalised groups and people in Australia.

PIAC submits that, at the very least, the criteria and procedures relied upon by the Attorney-General in determining whether or not to list a group as a 'terrorist organisation' under the *Criminal Code* should

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13 *Criminal Code*, section 102.1(2).

14 N Brew (2004) *The politics of proscription in Australia: Parliamentary Library Research Note No 63,* Foreign Affairs, Defence and Trade Section, Information and Research Services.

15 Ibid.

16 Parliamentary Joint Committee on ASIO, ASIS and DSD (2004) *Review of the listing of the Palestinian Islamic Jihad*, at 24, cited in Brew, above at n14.

17 Tom Allard, 'Iemma, Ruddock disagree on Muslim ban', *Sydney Morning Herald* (Sydney), 29 January 2007, 3.

generally be made the subject of independent judicial scrutiny and review at the most senior level.[18] The same should apply to criteria and procedures relied upon by the ASIO in recommending that a group be proscribed as a 'terrorist organisation'. Similarly, the evidence relied upon by the Attorney-General and ASIO in relation to specific proscriptions should also be subject to independent judicial scrutiny and review.

Consistent with the views of the Special Rapporteur, consideration should be given to applying a higher standard of proof before an organisation is proscribed or amending the association and assistance provisions in the Criminal Code in recognition of the inappropriateness of imposing such serious penalties on individuals for association with an organisation.

## 5.2 Proper Criteria

The definition of what constitutes a 'terrorist organisation' remains extremely broad. PIAC maintains that the mere fact that a group meets the statutory definition of a 'terrorist organisation' is not sufficient to justify its proscription. The broad scope of the definition leaves it open for many non-terrorist organisations to be mistakenly classified as such, by indirect association. This definition embraces organisations that many members of the Australian public will not consider 'terrorist' organisations. This notion, firstly, draws upon the wide definition of a 'terrorist act'[19], which at its margins embraces certain forms of industrial action like picketing by nurses.[20] Moreover, it is not restricted to organisations whose principal activities are the promotion and engagement of extreme acts of ideological and/or religious violence. A 'terrorist' organisation can, for example, be an organisation that is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act.[21]

To minimise any undermining of the principle that criminal liability should be imposed because of an individual's actions in causing harm or damage, PIAC believes that the proscription power should be used only against organisations whose *principal* activities are acts of political and/or ideological violence, or the direct funding of such organisations.

Finally, PIAC recommends that prior to proscribing a group, the Attorney-General should be required to consider the impact of any proscription on freedom of political association and communication, both of which are human rights that Australia has an international commitment to protect and respect. This is important as a matter of principle given the 'serious consequences'[22] that result from a proscription.[23] It may also be required by the *Constitution.*[24]

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18 See PIJ report at [2.9].

19 *Criminal Code*, section 100.1.

20 While the definition of a 'terrorist act' excludes 'industrial action' (*Criminal Code*, section 100.1), this is unlikely to afford any protection to picketing, which has been found not to be 'industrial action' under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR 550 ('***Davids***') at 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at p 586). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of "Industrial Action"' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in *Davids* has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR ¶4-282 and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR ¶4-382.

21 *Criminal Code*, section 102.1.

22 PIJ Report [3.23].

23 These concerns have been acknowledged by the Attorney-General, Philip Ruddock: Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, 257.

24 For further discussion, see Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations' (2004) 27 *University of New South Wales Law Journal* 482, 484-499.

# 6. Recommendations of the Sheller Committee

In January 2006, PIAC prepared a submission to the Security Legislation Review Committee, under the chairmanship of The Hon Simone Sheller AO QC, (**Sheller Committee**) to assess and review the operation, effectiveness and implications of amendments made by the following Acts:

(a) *Security Legislation Amendment (Terrorism) Act 2002;*
(b) *Suppression of the Financing of Terrorism Act 2002,*
(c) *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002;*
(d) *Border Security Legislation Amendment Act 2002;* and
(e) *Telecommunications Interception Legislation Amendment Act 2002.*

PIAC's submission (dated January 2006) to the Sheller Committee addressed the proscription of terrorist organisations and in late 2006 the Sheller Committee handed down it's findings.

In response to the Committee's latest request for submissions, PIAC draws the Committee's attention to the relevant recommendations of the Sheller Committee.

> Recommendation 3: Reform of the process of proscription
> The Sheller Committee recommends that the process of proscription be reformed to meet the requirements of administrative law.
>
> The process should be made more transparent and should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.
>
> Recommendation 4: Process of proscription
> The Sheller Committee recommends that either:
>
> i. the process of proscription continue by way of regulation made by the Governor-General on the advice of the Attorney-General.
>
> In this case there should be built into that process a method for providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.
>
> An advisory committee, established by statute, should be appointed to advise the Attorney-General on the case that has been submitted for proscription of an organisation. 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 legal practice.
>
> The role of the committee should be publicized, and it should be open to the committee to consult publicly and to receive submissions from members of the public.
>
> or
>
> ii. 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 persons and a hearing in open court.
>
> Recommendation 5: Publicity of proscription of a terrorist organisation
> The Sheller Committee recommends that once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.

While the Committee will not be reviewing the operation of section 102.1 of the *Criminal Code Act 1995,* which governs the listing of an organisation as a terrorist organisation, PIAC notes that it has, in previous submissions, raised serious concerns about the process and impact of proscription.[25]

[25] Public Interest Advocacy Centre, *Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of the listing of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf Group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat at terrorist organisations under section 102.1A of the Criminal Code* (2005); Public Interest Advocacy Centre, *Submission to the Parliamentary Joint Committee on*

These concerns continue and, as more organisations are proscribed, individuals in the Australian community face an increased risk of inadvertently becoming the subject of criminal investigation and prosecution.

PIAC maintains its original position questioning the necessity of the process of proscription. It does, however, welcome the recommendations of the Sheller Committee that the process of proscription becomes more transparent, involves the public and is subject to set criteria.

*ASIO, ASIS and DSD: Submission on the relisting of Hizballah External Security Organisation, HAMAS' Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba, and the Palestinian Islamic Jihad* (2005).