



Submission to

**Parliamentary Joint Committee on Intelligence
and Security**

**Review of the operation, effectiveness and
implications of section 102.1(2), (2A), (4), (5),
(6), (17) and (18) of the Criminal Code Act**

February 2007

About AMCRAN

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Since it was established in April 2004, AMCRAN has worked to raise community awareness about the anti-terrorism laws in a number of ways, including the production of a booklet *Terrorism Laws: ASIO, the Police and You*, which explains people's rights and responsibilities under these laws; the delivery of community education sessions; and active encouragement of public participation in the law making and review process.

AMCRAN and its members have participated in a number of parliamentary inquiries with respect to anti-terrorism laws in Australia, including:

- Senate Legal and Constitutional Committee Inquiry into the Provisions of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (including appearance before the Committee), 2002;
- Senate Legal and Constitutional Committee Inquiry into the *Anti-Terrorism Bill (No.2) 2004* (including appearance before the Committee), 2004;
- Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004, 2004;
- Parliamentary Joint Committee on ASIO, ASIS and DSD Review 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 as terrorist organizations under section 102.1A of the Criminal Code, 2005;
- Senate Legal and Constitutional Committee Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005, 2005;
- Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers (including appearance before the Committee), 2005; and
- Senate Legal and Constitutional Committee Inquiry into the provisions of the *Anti-Terrorism Bill (No. 2) 2005* (including appearance before the Committee), 2005.

Introduction

We would like to thank the Parliamentary Joint Committee on Intelligence and Security ('the Committee') for the opportunity to make submissions to the present review.

It is AMCRAN's view that there are a number of concerns in relation to the operation, effectiveness and implications of the listing provisions of the Criminal Code. In this submission we outline our views primarily in response to the Sheller Committee's review of the proscription process.

While the Sheller Committee left open the question of what form the proscription process should take, its recommendation that the process must be reformed should be heeded. In particular, we submit that it should meet the requirements of administrative law, that it should be made more transparent, and that it should provide organisations proposed to be listed with the right to be heard.

For the reasons outlined below, procedural fairness and transparency would improve the community's trust in the process and would in turn strengthen and build upon existing cooperation in preventing the scourge of terrorism from befalling Australia. It would also improve Australia's international reputation as a nation where values of personal freedom and civil rights are upheld. However, transparency alone is not sufficient to remedy the inherently anti-democratic nature of the proscription regime. The fact remains the proscription regime allows for the criminalisation of individuals for their political associations or support for listed organisations in the absence of any actual or threatened acts of violence by that individual.

Discretionary nature of prescription process

AMCRAN submits that the proscription regime is problematic primarily because of its discretionary and arbitrary nature. The definition of a "terrorist organisation" as defined under s 102.1 depends upon the exercise of executive discretion in declaring an organisation to be a terrorist organisation under the *Criminal Code*, an exercise of discretion which itself is based upon the overly broad existing definition of terrorism. Under the *Criminal Code*, there is provision for the Attorney-General to proscribe organisations as terrorist organisations if he 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)'.¹ In practice, this process has been criticised as highly subjective and political². While the Attorney-General's decision is subject to judicial review,³ the factual correctness of the decision itself *per se* is not reviewable (as to whether the organisation is or is not a terrorist organisation), but only the legality of the Attorney-General's decision is. The main problem with this broad executive discretion is that it is subject to political manipulation and application. Dr Jenny Hocking condemns it

¹ *Criminal Code*, s 102.1(2).

² *The Politics of Proscription*, Research Note No. 63, 21 June 2004, Parliamentary Library.

³ *Administrative Decisions (Judicial Review) Act 1977* (Cth) and section 75(v) of the *Constitution*.

for breaching ‘the notion of equality before the law in its creation of groups for which the usual judicial process does not apply and it breaches absolutely the separation of powers in even allowing for such a use of executive power’⁴. The Law Council of Australia agrees that the provision is ‘a serious departure from the principle of proportionality, unnecessary in a democratic society, and subject to arbitrary application’⁵. This ‘unacceptably wide...discretion conferred on public officials’⁶ has been labelled by Simon Bronitt, Director of the National Europe Centre, as ‘offensive’⁷.

Despite the breadth of the listing criteria, it is cold comfort that only nineteen organisations have been proscribed. There are many terrorist organisations that meet the same criteria for proscribed organisations, but are not listed. A *Parliamentary Research Note* highlights what appear to be ‘inconsistencies of the proscription process as it is currently applied’ and lists seven organisations that meet the same criteria but which are not listed.⁸

Indeed, the highly politicised nature of the proscription regime is evident in recent weeks from the public comments made by the federal Attorney-General Mr Philip Ruddock and the NSW Premier Mr Morris Iemma in relation the organisation Hizb-ut-Tahrir. Mr Iemma publicly demanded the Commonwealth government review the organisation’s status and ban it,⁹ a position which was also supported by the Attorney-General of Western Australia Mr Jim McGinty. These comments are particularly unhelpful because they reinforce the perception that the process is a political strategy through which politicians can negotiate.

In addition, the group known as Hizb-ut-Tahrir (Arabic for the “The Party of Liberation”) has often been discussed in the context of the proscription regime. After the London bombings in July 2005, the Attorney-General, Mr Ruddock raised the prospect of banning the organisation. The following is from the House of Representatives Hansard of 11 August 2005 discussing issues relating to the potential proscription of Hizb-ut-Tahrir.

Mr BALDWIN (3.12 pm)—My question is addressed to the Attorney-General. Will the Attorney-General advise the House how the government and businesses are working together to protect Australia’s critical infrastructure?

⁴ Dr J. Hocking, *Counter-Terrorism and the Criminalisation of Politics: Australia’s New Security Powers of Detention, Proscription and Control*, in *Australian Journal of Politics and History*, v49, No. 3, 2003, p370.

⁵ Law Council of Australia, quoted by *Senate Committee Report*, op. cit., para 3.104.

⁶ S. Bronitt, *Australia’s Legal Response to Terrorism: Neither Novel Nor Extraordinary?* in *Human Rights 2003: The Year in Review*, 4 December 2003
<<http://www.law.monash.edu.au/castancentre/events/2003/bronitt-paper.pdf>,p5

⁷ Ibid.

⁸ Nigel Brew, *Parliamentary Research Note No 63: The Politics of Proscription* (2004). Available online: <http://www.aph.gov.au/library/pubs/rn/2003-04/04rn63.htm>. These are Mujahideen-e-Khalq (MeK), Liberation Tigers of Tamil Eelam (LTTE), Sendero Luminoso (Shining Path), Euskadi Ta Askatasuna (ETA), Babbar Khalsa International, International Sikh Youth Federation, and (al-)Gama’a al-Islamiyya.

⁹ Tom Allard, ‘Leaders disagree on Muslim ban’, *The Sydney Morning Herald*, 29 January 2007.

Mr RUDDOCK— ... There is another matter, Mr Speaker, that I know you and honourable members are very much aware of, and that is that I asked ASIO for advice on whether there were currently grounds in Australia for listing the organisation Hizb ut-Tahrir. ASIO has advised me that at present there is no basis under current legislation for specifying Hizb ut-Tahrir as a terrorist organisation under the Criminal Code. As I understand it, Hizb ut-Tahrir members overseas have called for attacks in the Middle East and Central Asia, but here in Australia it is not known to have—and I use these words deliberately—planned, assisted in or fostered any violent acts, which are the current legislative tests under the Criminal Code for proscription. At this stage the government is not aware of any information that Hizb ut-Tahrir is connected to the London bombings, as has been suggested elsewhere.

The Criminal Code required that for a group to be specified as a terrorist organisation it must directly or indirectly engage in preparing, planning, assisting in or fostering the doing of a terrorist act. Under this act, in addition, there are separate offences for inciting a terrorist act. However, it remains of concern that some Hizb ut-Tahrir elements have called for attacks against coalition forces in Afghanistan, Iraq and the United States and Israeli interests elsewhere. More generally, Hizb ut-Tahrir espouse a very extreme and radical agenda. I can confirm that my department is reviewing the proscription provisions contained in the Criminal Code and looking at some possible ways to strengthen those provisions. Until I receive that advice and have considered it, I am not prepared to comment on whether this group or any other may be listed in the future.

Furthermore in an article in *The Age* on 30 August 2005¹⁰, in relation to Hizb ut-Tahrir, the Attorney-General said that he would consider introducing laws similar to those introduced in the UK with respect to glorifying terrorism.

Given these statements, and that merely seven weeks later the new anti-terror laws were introduced that included the new grounds of proscription of advocating terrorism, this has led many in the Muslim community that the “advocating terrorism” requirements were specifically tailored for Hizb ut-Tahrir. This does not seem to be an unreasonable conclusion. It reinforces the perception that this is a highly political process rather than one that is genuinely aimed at combating terrorism.

We support the recommendations from the Sheller Committee that at the very least the proscription process should be reformed for transparency, accountability, in order to increase public confidence.

Criteria (a): Directly or indirectly engaged in, preparing, planning assisting in or fostering the doing of a terrorist act

We note that the Committee has recommended in previous reviews that in determining which organisations are to be proscribed, ASIO and the Attorney-General should specifically address each of the following six additional factors:

¹⁰ “Ruddock plans expanded anti-terror laws”, *The Age*, August 30, 2005.

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by likeminded countries;
- whether or not the organisation is engaged in a peace or mediation process.¹¹

However, it appears that these factors provide nothing more than a guide: ASIO has admitted that they are only to be used as a guide only, and that they are applied flexibly. If one examines as an example the proscription process for Kurdistan Workers' Party (PKK), one would find that the guide was only loosely followed. In particular, the evidence presented in relation to an organisation's engagement in terrorism was not verifiable due to 'operational reasons'; no direct link to Australia was presented in the statement of reasons, and indeed, the threat to Australian interests was only confined to the security of Australian tourists while abroad in Turkey. The 'terrorist' activity cited included four incidents only:

... in 1992, where stones and paint and stones were thrown at the Turkish Consulate-General in Melbourne in protest at the killing of Kurds in Turkey; in 1994 when 70 Kurds occupied the German Consulate-General in Melbourne, protesting at the treatment of Kurds in Germany (a window was smashed and a police officer assaulted); in 1999, on the arrest of the PKK leader, Abdullah Ocalan, when 65 Kurds broke into and occupied the office of the Greek Consulate-General causing extensive damage (some charges of assault were laid); and in 1999, in Sydney a young protester set himself alight. Since 1999 Kurdish PKK protest has been peaceful¹²

We have had the benefit of reading the draft submission of the Federation of Community Legal Centres Victoria on this point and we support their submissions and recommendations. In particular, we support the Federation's call for the statutory incorporation of the criteria as put forward by Mr Patrick Emerton as alluded to by the Committee in several listing reviews¹³.

Criteria (b): Advocates the doing of a terrorist act

An organisation may be proscribed as a terrorist organisation if the Minister is satisfied on reasonable grounds that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Section 102.1(1A) of the Criminal Code provides that an organisation 'advocates' the doing of a terrorist act if:

¹¹ PJCAAD, Review of the listing of six terrorist organisations (2005) at 2.3.

¹² Minority Report, Review of the listing of the Kurdistan Workers' Party (PKK), p. 37.

¹³ Most recently in *Review of the listing of the Kurdistan Workers' Party (PKK)* at para 2.7-2.8.

- (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or
- (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or
- (c) the organisation directly or indirectly 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 that the person might suffer) to engage in a terrorist act

We submit that there is considerable uncertainty in the definition, and the reach of the provisions is likely to be broad. For example, “providing instruction on the doing of a terrorist act” and the term “urging the doing of a terrorist act” are unreasonably vague and could potentially cover a wide range of activities. The problem is further exacerbated by the inclusion of “indirectly” as a qualifier.

The criteria in subs (c) is particularly worrying, and we support the Sheller Committee’s recommendation that it be omitted from the definition. As it is currently drafted, it means that an organisation could be proscribed for its mere potential that its views *might* lead another person to engage in a terrorist act. It is also a concern that the question of whether a communication *might* lead another to act is often a subjective matter, one which calls upon a person’s prejudices and political view points. As can be seen from the UK experience of the “glorification of terrorism” offence, statements made by Muslims will often be regarded as “glorification” or “praising” by virtue of their and their audience’s faith.¹⁴

Already Muslim dissent against oppression overseas has been curtailed in a climate of fear and uncertainty. It is clear that should this offence make it into law that Muslims will be the first targets and this will include those who support legitimate liberation struggles as defined by international law be it in Palestine, Iraq, Chechnya or elsewhere in the world. They may even be prosecuted for espousing the same sentiments as the Prime Minister’s wife [who was accused of being a Palestinian suicide bomber sympathiser], or feting figure who are no more or less ‘terrorists’ than Nelson Mandela.¹⁵

The Federation of Community Legal Centres (Vic) Inc. in their submission to the Australian Law Reform Commission review of the sedition laws similarly argued that “the statements of Muslim community members may be perceived through the lens of the highly politicised concept of ‘extremism’ and as a result assessed as ‘terrorist’ or seditious”.¹⁶ Similar conclusions may be drawn in relation to the concept of “praising”, particularly where the “risk” threshold is not qualified.

¹⁴ Fahad Ansari, *Another Pyrrhic Victory: Are Muslims missing the bigger picture* (2006) Islamic Human Rights Commission, <<http://www.ihrc.org.uk/show.php?id=1685>> 23 May 2006.

¹⁵ Massoud Shadjareh, Chair of Islamic Human Rights Commission, ‘UK Terrorism Bill - Who will be prosecuted for glorifying terror and why?’ (Press Release, 15 February 2006).

¹⁶ Submission No. 33 to Australian Law Reform Commission, above n 45 (10 April 2006) (Federation of Community Legal Centres (Vic)).

We have in the past expressed concern that these provisions sever any required nexus between proscription and the organisation's link to acts of political violence. For example, an organisation may become liable to proscription simply on the grounds that it has voiced support for a political struggle somewhere in the world. Currently, all the organisations listed under the *Criminal Code* are primarily based outside Australia. Such an expansion of grounds for proscription would also have the potential to significantly increase the number of Australian organisations liable to be banned, not because of their own participation in political violence, but because of the views they have expressed about political events overseas.

It is arguable, for example, that the statement 'Australians should not be in Iraq and the Iraqis should fight to be free of occupation' advocates terrorism, and any organisation that supports this view may well become liable to proscription. Far from promoting the physical safety of Australians, such criminalisation would expose many ordinary Australians to the coercive power of police and security organisations.

We further object to these listing criteria on four grounds. Firstly, the provisions limit free speech. No clear justification has been given as to why the criteria are necessary to prevent ideologically or religiously motivated violence or to strengthen security given its likely impact on freedom of speech and legitimate debate. For example, consider an organisation that supports resistance to the occupation of Palestinian land, that Palestinians are entitled to fight for an independent state, and that non-violent means for achieving a just arrangement have failed. Would this be considered indirectly counselling of a terrorist act? Resistance actions of Palestinians, even against Israeli military targets, would arguably fall within the gamut of the definition of advocating terrorism.

This will have a particular effect on Muslim community groups who may wish to express solidarity with Muslims who are under the thumb of either oppressive regimes or various kinds of occupying forces. This is particularly the case, as the definition of a terrorist act makes no distinction between legitimate liberation and independence movements and terrorism. Examples of such situation would include commentary on Palestinian oppression at the hands of Israeli occupiers; and groups calling, on the basis of things such as the torture in Abu Ghraib, that America and its allies be forced out of Iraq by any means necessary. It is our view that the above point of view, while unpalatable to some, should not be limited.

Limiting free speech is not only distasteful philosophically, but is also damaging to the fight against terrorism through three effects. Firstly, and ironically, it gives the ideas limited by this legislation a kind of *cachet* and credibility they would not otherwise have; it will be interpreted by those susceptible to extremism as suppression of an idea that is inherently the truth but that the government, in some sense, can not combat by logic, but only through banning. Secondly, it will be interpreted in the community as a form of hypocrisy on the government's part: that other groups can discuss whatever they want, but that special rules apply one way or another to the Muslim community. Finally, it forces the ideas underground, in effect, rather than keeping them in the public where they can be seen, analysed and disassembled.

Further, there is vagueness as to what is meant for an *organisation* to "advocate" terrorism. Does it mean that the leader of the organisation has made comments on one

occasion publicly “advocating terrorism”? Is there a requirement that the comments be made on multiple occasions? Is it sufficient for someone on the forums of a website to have made statements advocating terrorism? Or is advocacy limited to it being stated as one of the doctrines of the organisation? This is very different from the doing of a terrorist act, which clearly requires logistical support and coordinated acts, rather than the speech of a single individual.

Thirdly, it raises questions of accountability, i.e., that a person should be held accountable for their own actions only and not for actions of others. If a person becomes a member of an organisation, and the leader of that organisation then makes pronouncements that qualify as “advocating terrorism” which results in the proscription of the organisation, then the person is being punished as a “member of a proscribed organisation” under s 102.1 of the *Criminal Code* 1995 for the statements of the leader. The person may not have been consulted before the leader made those statements, yet he could easily find himself guilty of an offence. There is a collective punishment nature of the provisions: that innocent members of an organisation may find themselves facing criminal prosecution if another member of the organisation were to indirectly incite terrorist leading to the organisation’s proscription.

Fourthly, it fails the test of proportionality. Punishments for directing, financing, membership and even association are very severe¹⁷, ranging from 3 years to life imprisonment. This could affect hundreds of individuals. Furthermore, even for the leader who made the “advocating” statements thus making the organisation liable to proscription, he or she may be subject to a severe punishment of 25 years imprisonment for “directing a terrorist organisation” under s 102.2 of the *Criminal Code*. This is highly disproportionate, even compared with the penalty for the sedition offence, which is 7 years imprisonment.

While we note that the Sheller Committee considered our recommendations, we reiterate them again here:

Recommendation 1: “Advocating terrorism” should be removed as a ground for proscription.

Recommendation 2: If Recommendation 1 is not accepted, and if “advocating terrorism” must be an offence, it should be made a personal offence and not an offence relating to an organisation. In this way, the impact of a person’s action is limited to just that person. This would be similar to a more narrowly defined version of the sedition offence.

Recommendation 3: If Recommendations 1 and 2 are not accepted, then subsection (c) of the definition of ‘advocates’ in section 102.1(1A) should be omitted as recommended by the Sheller Committee.

Recommendation 4: The criteria for “advocating” on behalf of an organisation must be clarified. For example, possible criteria may be:
(i) the statements are made by the acknowledged leader of the organisation; and

¹⁷ *Criminal Code Act 1995* s 102.

(ii) the statements are made on official material distributed or speeches given by the leader; and
(iii) the statements are made in public conversation; and
(iv) the statements are made on more than 5 occasions.
We note that the Senate Legal and Constitutional Committee in its Inquiry into the Provisions of the *Anti-Terrorism Bill (No. 2) 2005* accepted Recommendation 4.¹⁸

Community awareness and consultation

In the Review of the listing of six terrorist organisations by the Committee in 2005, it was recommended that a comprehensive information program, that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organisation.

However, it is evident that this has not been implemented. In the review of the listing of the Kurdistan Workers' Party (PKK), the Committee noted that there had not been any community consultation on the listing nor was there even an intention to conduct community consultations prior to a listing. This is despite the fact that the listing of PKK would have a large impact on members of the Kurdish community in Australia.

As we have submitted to the Committee previously, the lack of transparency in the proscribing of terrorist organisations is a concern to community. Aside from the *prima facie* bias in that 18 of the 19 proscribed organization identify themselves as Muslim organisations, the current social phenomena manifested as increased levels of racism and discrimination highlighted by the *Isma'* report (HREOC, *Isma' - Listen: National Consultations on Eliminating Prejudice against Arab and Muslim Australians*, 2004) has led to the Muslim community feeling isolated and discriminated against. This does not help in creating a cooperative environment for addressing and fighting the modern challenges of terrorism, not to mention the adverse impact it is having on the sense of security and safety of the Muslim community.

In the current political climate, the proscription regime can be used to criminalise local organisations or affiliations between individual Muslims. Once an organisation is proscribed, it will be an offence for a person to direct the activities of the organisation,¹⁹ to provide support to the organisation,²⁰ to be a member of the organisation,²¹ or even to associate with a member of the organisation.²² A person who is even only remotely connected to the organisation would be under increased surveillance by virtue of recent legislative amendments.²³ This is problematic

¹⁸ Recommendation 32, Senate Legal and Constitutional Committee, Inquiry into the Provisions of the *Anti-Terrorism Bill (No. 2) 2005*.

¹⁹ *Criminal Code* s 102.2.

²⁰ *Criminal Code* s 102.7.

²¹ *Criminal Code* s 102.3.

²² *Criminal Code* s 102.8.

²³ *Telecommunications (Interception) Amendment Act 2006* (Cth).

because of the character of collective punishment that this entails, in the sense that a member of a local organisation who has not been directly involved in terrorism related activities can find themselves subject to this legislation.

In particular, while the majority of the proscribed organisations are overseas organisations, we submit that it is important for community consultation to occur, especially as there is likely to be local connections with diverse organisations and conflicts in a multicultural society. Natural justice would dictate that any organisation under threat of proscription must have the opportunity to be heard.

Conclusion

AMCRAN remains of the view that the present proscription regime is problematic in that it appears to be arbitrary and subject to the political influence rather than one being strictly aimed at combating terrorism in Australia. The process of listing is little known, while the consequences of listing are potentially enormous for an organisation and its members. The criteria for listing on the basis that an organisation 'advocates' the doing of a terrorist act is particularly dangerous given its broad definition, its subjective nature, and the potential for members of ethnic communities to be regarded as advocating terrorism in the current state of volatile affairs. We submit that the 'advocacy' listing criteria should be omitted altogether. In the alternative, we submit that the Sheller Committee's recommendations with respect to the 'advocacy' provisions should be implemented, and that further guidance be provided as to how an *organisation* 'advocates' the doing of a terrorist act. Finally we submit that any organisation which is being considered for proscription must be given the opportunity to be heard as to why it should not be proscribed.