



THE UNIVERSITY
OF
NEW SOUTH WALES



FACULTY OF LAW

7 August 2006

Ms Jane Hearn
Inquiry Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Ms Hearn,

Question on notice – membership offence

Thank you for providing the Gilbert + Tobin Centre of Public Law with the opportunity to appear before the Parliamentary Joint Committee on Intelligence and Security.

At the hearing, Senator Ferguson asked the following questions about the distinction between formal and informal membership in relation to the membership offence: ‘What do other countries do? How do they define membership of terrorist organisations?’

We have reviewed legislation from Canada, the United States, the United Kingdom and New Zealand and determined that none of these jurisdictions criminalises the status of informal membership without any other culpable conduct, and that only the United Kingdom has a membership offence.

Neither Canada nor the United States criminalise formal membership of a terrorist organisation, let alone informal membership.

The United Kingdom has a ‘membership’ offence that applies to a person who belongs or professes to belong to a *proscribed* terrorist organisation (the Australian offence is wider in that it applies to both proscribed organisations and also organisations determined as falling within paragraph (a) of the definition in section 102.1). This would seem to apply only to members or those who claim to be members, but not informal members (unless they claim to be a member). Neither ‘membership’ nor ‘belongs’ is defined in the legislation. The UK Court of Appeal (Criminal Division) stated that the purpose of the section ‘is to criminalise membership of a proscribed organisation’ and that ‘[p]roof of membership may sometimes be difficult; hence

SYDNEY 2052 AUSTRALIA
Email: @unsw.edu.au
Telephone: +61 (2) 9385
2875
Facsimile: +61 (2)
9385 1175
Web:
www.gtcentre.unsw.edu.au

profession of membership is itself a criminal offence'.¹ A copy of the relevant provision is at **Attachment A**.

New Zealand has an offence targeting those who participate in a terrorist group or organisation for the purpose of enhancing the ability of the group or organisation to carry out, or participate in the carrying out of, terrorist acts. While this offence may capture informal members, the targeted conduct is participating in the organisation, not merely the status of membership (formal or informal). Further, a person must participate with a certain purpose that is connected to terrorism. A copy of the relevant provision is at **Attachment B**.

Thus, of the countries examined, Australia is alone in making it an offence for a person to be an informal member of a terrorist organisation. We maintain that, if the membership offence (section 102.3) is to be retained, it should be limited to formal members. The term 'informal member' is unreasonably vague and it is not clear what culpable behaviour the offence of being an informal member captures that would not fall under another offence. It is already an offence if a person directs the activities of a terrorist organisation, recruits for a terrorist organisation, trains or receives training from a terrorist organisation, gets funds to, from or for a terrorist organisation, or provides support to a terrorist organisation. If a person is not a formal member of a terrorist organisation and has not been involved in any of the other terrorist organisation offences, then we do not see how the person has any culpability that justifies an offence punishable by up to 10 years imprisonment.

Please contact us if you require further information.

Yours sincerely,

Dr Andrew Lynch
Director
Terrorism and Law Project

Ms Edwina MacDonald
Senior Research Director

Professor George Williams
Anthony Mason Professor
and Centre Director

¹ Latham CJ, *Re Attorney General's Reference (No 4 of 2002)* [2003] 3 WLR 1153 at 1160.

Terrorism Act 2000 (UK)

11.— *Membership.*

- (1) A person commits an offence if he belongs or professes to belong to a proscribed organisation.
- (2) It is a defence for a person charged with an offence under subsection (1) to prove—
 - (a) that the organisation was not proscribed on the last (or only) occasion on which he became a member or began to profess to be a member, and
 - (b) that he has not taken part in the activities of the organisation at any time while it was proscribed.
- (3) A person guilty of an offence under this section shall be liable—
 - (a) on conviction on indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or
 - (b) on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.
- (4) In subsection (2) “proscribed” means proscribed for the purposes of any of the following—
 - (a) this Act;
 - (b) the Northern Ireland (Emergency Provisions) Act 1996;
 - (c) the Northern Ireland (Emergency Provisions) Act 1991;
 - (d) the Prevention of Terrorism (Temporary Provisions) Act 1989;
 - (e) the Prevention of Terrorism (Temporary Provisions) Act 1984;
 - (f) the Northern Ireland (Emergency Provisions) Act 1978;
 - (g) the Prevention of Terrorism (Temporary Provisions) Act 1976;
 - (h) the Prevention of Terrorism (Temporary Provisions) Act 1974;
 - (i) the Northern Ireland (Emergency Provisions) Act 1973.

Terrorism Suppression Act 2002 (NZ)

13. *Participating in terrorist groups—*

- (1) A person commits an offence who participates in a group or organisation for the purpose stated in subsection (2), knowing that the group or organisation is—
 - (a) an entity that is for the time being designated under this Act as a terrorist entity; or
 - (b) an entity that carries out, or participates in the carrying out of, 1 or more terrorist acts.
- (2) The purpose referred to in subsection (1) is to enhance the ability of any entity (being an entity of the kind referred to in subsection (1)(a) or (b)) to carry out, or to participate in the carrying out of, 1 or more terrorist acts.
- (3) A person who commits an offence against subsection (1) is liable on conviction on indictment to imprisonment for a term not exceeding 14 years.