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Operation of the proscription regime

2.1 This chapter outlines the current procedures in place for listing 'terrorist organisations' and the role the Committee plays in ensuring ongoing parliamentary oversight of the use of the proscription power.

Rationale for proscription

2.2 Before turning to the detail of the current scheme it is important to restate the underlying rationale for proscription, which has not changed since its inception as part of the wider reforms in the area of counter-terrorism. Proscription is pivotal to the criminalisation of activities that provide political and economic support to organisations that use terrorism as a strategy to advance their political, ideological or religious cause. It also plays a role in deterring those sympathetic to the organisation's goals from becoming more deeply involved.

2.3 The Attorney-General's Department (AGD) submitted that proscription is a key component of Australia's anti-terrorism laws. AGD stated:

> By criminalising activities such as the funding, assisting and directing of a terrorist organisation, proscription contributes to the creation of a hostile operating environment for groups wanting to establish a presence in Australia for either operational or facilitation purposes. It also sends a clear message to Australian citizens that involvement with such organisations, either in Australia or overseas, will not be permitted. Proscription also communicates to the

international community that Australia rejects claims to legitimacy by these organisations.[1]

2.4 The Committee endorses the continued use of proscription as a legitimate method of suppressing terrorist activity.

Legal effect of proscription

2.5 There are two ways an entity may be designated a terrorist organisation for the purpose of Division 102 of the Criminal Code:

- by a court in the course of a prosecution for a terrorist organisation offence under Division 102; or
- by regulation made by the Governor-General on the advice of the Attorney-General under section 102.1(2).

2.6 This report is concerned only with the second method, that is, the determination by the Attorney-General that an entity meets the legislative definition of a 'terrorist organisation' and the proscription of that entity by regulation. Before the Governor-General makes a regulation the Minister *must be 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 a terrorist act has occurred or will occur); or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

2.7 Once an entity is proscribed, it is a terrorist organisation as a matter of law and the prosecution is relieved of the burden of proving beyond reasonable doubt that an entity is a terrorist organisation in every trial for a terrorist organisation offence under Division 102.[2] To date, the fact that an entity is proscribed has not been an element in any of the trials for offences relating to terrorist organisations.[3]

2.8 Listing is also a pre-requisite to making available a control order to protect the public from a terrorist act by a person who has provided or received training from a listed organisation.[4] The first and, at this

1 AGD, *Submission* 10, p.2.

2 Paragraph 143(1) (b) *Evidence Act 1995* (Cth); Mr. Sheller AO QC, Opening Statement, Exhibit 1, p. 4.

3 Mr Bugg AM QC Commonwealth Director of Public Prosecution, *Submission* 4, p.1.

4 Section 104.2 of the Criminal Code.

time, the only control order was issued on 26 August 2007 by Federal Magistrate Mowbray in respect of Mr Jack Thomas.

2.9 There are currently nineteen entities listed as terrorist organisations under the Criminal Code.[5] To-date all the entities listed by Australia have been proscribed on the basis of their direct involvement in extreme acts of political violence. None have been listed on the basis of the advocacy of terrorism.

The role of ASIO in the listing process

2.10 The Australian Security Intelligence Organisation (ASIO) is responsible for providing security advice to government and provides advice on the proscription of entities under the Criminal Code.[6] ASIO does not have decision making powers in relation to the listing of an entity as a terrorist organisation.

2.11 ASIO's advice is provided in the form of a Statement of Reasons.[7] The assessment is based on publicly available details about an organisation, which are corroborated by classified information.

Statement of Reasons

2.12 The draft Statement of Reasons is provided to the Chief General Counsel of the Australian Government Solicitor, for advice as to whether the document contains sufficient factual material to support an exercise of the proscription power. The advice of Chief General Counsel and the Statement of Reasons is provided to the Attorney-General to assist him in deciding whether an organisation satisfies the legislative requirements for listing under the Criminal Code.[8]

2.13 If the Attorney-General is satisfied, he signs a statement declaring that he is satisfied the organisation is one that meets the statutory criteria. The Attorney-General then writes to the Prime Minister, the Leader of the Opposition, and the States and Territories advising each of the parties of his intention to proscribe the organisation.[9]

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5 Information about listed entities can be accessed on the national security website of the Attorney-General's Department at: http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument

6 Section 17(1) (c) of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

7 AGD, *Submission* 10, p.5.

8 AGD, *Submission* 10, p.5.

9 AGD, *Submission* 10, p.6.

Consultation with State and Territories

2.14 The *Intergovernmental Agreement on Counter Terrorism Laws* (IGA) requires that before the power to list an organisation is exercised the Commonwealth will consult with State and Territory Governments about the listing and not list an entity where a majority of the other parties object.[10] Approval for regulations specifying a terrorist organisation must be sought, and responses from States and Territories must be provided, through the Prime Minister and Premiers and Chief Ministers.[11]

2.15 Under the IGA the Commonwealth has undertaken to 'use its best endeavours' to give the other parties a reasonable time to consider and to comment on the proposed regulation.[12] In particular, the IGA requires that the Commonwealth will provide the State and Territory Governments with the text of the proposed regulation, a written brief on the terrorist-related activities of the organisation and will offer an oral briefing by the Director-General of Security.

Consultation with the Leader of the Opposition

2.16 Subsection 102.1(2A) of the Criminal Code requires that before the Governor-General makes a regulation listing an organisation the Attorney-General must arrange for the Leader of the Opposition in the House of Representatives to be briefed.

Commencement of regulations

2.17 Once a regulation is signed by the Governor-General it is lodged with the Federal Register of Legislative Instruments (FRLI). Regulations commence on the day after registration with the FRLI, unless stated otherwise.

Public Notice

2.18 A copy of the Statement of Reasons is published on the National Security Website of the Attorney-General's Department on the day that it is lodged on the FRLI. The Attorney-General also issues a press

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10 Paragraph 3.4 Division 3 of the IGA, 25 June 2004. Accessible at: http://www.coag.gov.au/meetings/250604/iga_counter_terrorism.pdf

11 Subparagraph 3.4(8) IGA. This requirement is an amendment to the original IGA that provided for consultation through the Standing Committee of Attorneys General.

12 Subparagraph 3.4 (3) IGA.

release announcing the listing of the organisation(s), which includes the Statement of Reasons.[13]

Parliamentary scrutiny

2.19 Under the *Legislative Instruments Act 2003* (Cth) regulations must be tabled in both Houses of Parliament within six sitting days of registration on the FRLI. The regulation listing an entity and the Statement of Reasons, which form part of the Explanatory Memoranda (EM), are tabled in both Houses.

2.20 The regulation is subject to disallowance by the Parliament within 15 sitting days of the initial tabling.[14] If a disallowance motion is passed the resolution has the effect of repealing the instrument. Repeal has no retrospective effect. The listing and all actions taken pursuant to the listing remains valid for the period the instrument was in force.[15]

2.21 The Committee has the discretion to review a listing and report its comments and recommendations to each House of the Parliament before the end of the applicable disallowance period.[16] There is provision to extend the disallowance period from one to eight additional sitting days, depending on the date the Committee's report is tabled.[17] See Review by the Parliamentary Committee below.

De – listing

2.22 There are three ways in which an organisation can be de-listed:

- by operation of law under the sunset provisions;
- by declaration of the Attorney-General if the entity ceases to meet the statutory definition; or
- by declaration of the Attorney-General on application by an individual or an organisation.

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13 Information about listed organisations can be accessed at http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument

14 Section 38 and 42 of the Legislative Instruments Act.

15 Section 15 Legislative Instruments Act.

16 Subsection 102.1A (1) of the Criminal Code.

17 Subsection 102.1A (3) of the Criminal Code.

Two year sunset

2.23 A regulation proscribing an organisation ceases to have effect on the second anniversary of the day on which it took effect.[18] This does not prevent the organisation being re-listed. In practice, an organisation will cease to be listed where a new regulation is not made. To date each organisation whose listing has expired at the end of the two year cycle has been re-listed.

Attorney-General's duty to de-list

2.24 The Attorney-General must de-list an organisation where he ceases to be satisfied that the organisation does not meet the statutory criteria of being a 'terrorist organisation'.[19] If the Attorney-General 'ceases to be satisfied' the entity meets the legislative criteria he must make a declaration to that effect by publishing a written notice in the Gazette. The regulations listing the organisation cease to have effect when the declaration is made.[20] To date the Attorney-General has not made a declaration de-listing an entity under section 102.1(4).

Application to the Minister to de-list

2.25 An individual or an organisation may apply to the Attorney-General for a declaration under subsection 102.1(4) on the grounds that there 'is no basis' for the listing and the Attorney-General must consider the application.[21] The Attorney-General is not limited in the matters he may take into account when considering such an application.[22] To date the Attorney-General has received one application to de-list an organisation. The application was rejected.

Judicial review

2.26 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). The general principles of administrative law require that the Minister's decision be made on the basis of logically probative evidence. The decision must also be a proper exercise of power, not

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18 Subsection 102.1(3) of the Criminal Code.

19 Section 102.1(4) of the Criminal Code.

20 AGD, *Submission* 10, p.10.

21 Subsection 102.1(17) of the Criminal Code.

22 Subsection 102.1(18) of the Criminal Code.

flawed by irrelevant considerations, improper purpose or exercised in bad faith.[23] The making of a regulation is also reviewable under section 75(v) of the Australian Constitution and section 39B of the *Judiciary Act 1903* (Cth). To date no application for judicial review has been pursued in any Australian court.

Changes to proscription policy since 2002

2.27 Over the past five years there have been several changes in the scope of the proscription power and the procedures that govern its exercise. As originally enacted, the proscription power was limited to entities identified by decisions of the UN Security Council relating to terrorism and where the organisation was directly or indirectly involved in terrorist activity. In practice, this referred predominantly to the UN Consolidated List overseen by the UNSC1267 Committee.[24] The targeted sanctions regime implemented under UNSCR 1267 is confined to Osama Bin Laden, Al Qa'ida, the Taliban and associated individuals and entities.

2.28 In its original form the commencement of listings was postponed until the day after the disallowance period had expired.[25] This variation to normal procedure was adopted as a safeguard in view of the serious consequences that flow from proscription.[26] After the Bali bombing on 12 October 2002 subsection 102.1 (4) was repealed and the policy reverted to the normal procedure, which brings a regulation into effect on the date lodged with the FRLI.[27]

2.29 Further reforms were adopted in 2004.[28] The precondition that an organisation must be identified by the UN to trigger the listing power was removed, and the power to proscribe an entity expanded to enable the Minister to list an organisation that meets the general definition of a terrorist organisation. The purpose of the amendment

23 Section 5 of the ADJR.

24 UNSCR 1267 requires Member States to freeze the financial assets of designated persons and entities, and make it a criminal offence to deal in the assets of or make funds or assets available to a listed individual or group. In Australia UNSCR 1267 is implemented by regulations under the *Charter of the United Nations Act 1945 (COUNA)*.

25 Original subsection 102.1 (4) of the Criminal Code.

26 See Senate *Journals*, 25 June 2002, p.p. 469-71.

27 *Criminal Code Amendment (Terrorist) Organisations Act 2002* commenced on 23 October 2002. Jemaah Islamiyah was listed on 27 October 2002.

28 *Criminal Code Amendment (Terrorist Organisations) Act 2004*.

is explained in the Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003:

> This amendment enables the Government to independently identify organisations that are a threat to Australia's national security as terrorist organisations – thereby attracting the full weight of the criminal law – without reference to the United Nations Security Council.[29]

2.30 Additional safeguards were introduced to address concerns that the amendment conferred too much discretion on the Minister. These measures:

- require the Leader of the Opposition to be briefed prior to making a regulation;[30]
- conferred a mandate on the Parliamentary Joint Committee on Intelligence and Security to review the listing of terrorist organisations;[31] and
- include a duty to de-list an organisation if the Minister ceases to be satisfied the entity meets the statutory definition.[32]

2.31 In 2005 the *Anti Terrorism Act (No.2) 2005* (ATA) extended the power to proscribe an entity to include organisations that 'advocate the doing of a terrorist act'.[33]

Review by the Parliamentary Committee

2.32 The mandate of the Committee to review the listing of 'terrorist organisations' commenced operation on 10 March 2004'.[34] Where the Committee decides to conduct such a review, it is required to report to each House of the Parliament before the end of the disallowance period.[35]

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29 EM Criminal Code Amendment (Terrorist Organisations) Bill 2003, Item 1 new subsection 102.1(2).

30 Subsection 102.1(2A) of the Criminal Code.

31 Subsections 102.1A (1)-(4) of the Criminal Code.

32 Subsections 102.1(4) (5) (6) of the Criminal Code.

33 Paragraph 102.1(2) (b) of the Criminal Code.

34 *Criminal Code Amendment (Terrorist Organisations) Act 2004.*

35 Paragraphs 102.1A (1) (a) (b) of the Criminal Code.

2.33 In an initial dialogue with ASIO and AGD on 11 March 2004, it was suggested that the role of the Committee was limited to ensuring the Attorney-General was satisfied the Statement of Reasons offered a sufficient factual basis to support the listing.

2.34 The Committee considered this interpretation to be inconsistent with the legislative intent and the scrutiny function of the Parliament.[36] The purpose of conferring a specific mandate on a parliamentary committee with expertise in security and intelligence was to strengthen Parliamentary oversight and scrutiny, recognising that there may be instances where classified information may need to be examined. It was also intended to ensure that decisions were not made in secret by a Minister and that openness, transparency and accountability were built into the system.[37]

2.35 The increased role for Parliament also recognised that there is no prior judicial authorisation required to proscribe an organisation and no independent merit review. There was bi-partisan support for the proposal that this Committee carry out the function, given its unique responsibilities and its ability to examine security sensitive information. Accordingly, the Committee has interpreted the mandate conferred on it as encompassing review of both the procedure and the merit of a listing, based on an examination of all the available material as to the goals and activities of the organisation.

Committee procedure

2.36 The following procedure was adopted by the Committee to guide its approach to this new area of work:

- the regulation and accompanying unclassified brief is to be transmitted to the Committee immediately the regulation is made. The brief should provide details of 'procedure followed in making the regulation', including consultations with States and Territories and the Department of Foreign Affairs and Trade (DFAT).
- ASIO is to provide a private briefing to the Committee. Any classified information the Minister has relied on in forming his decision to list is to be presented at the private briefing, which is Hansard recorded (secret).

36 *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, June, 2004, p.5.

37 *Senate Hansard*, 3 March 2004, 20670, 20752, 20808; *House Hansard*, 4 March 2004, 26015, 26016.

- the Committee decides whether to advertise the review in order to elicit public submissions once it has taken receipt of the regulation and the unclassified brief.
- a decision on whether or not to conduct a hearing is determined once submissions are received. If there is a *prima facie* case against listing or there are members or supporters of the organisation in Australia, the opportunity to give oral evidence will be given.
- if there is no hearing, the Committee's report will be based wholly on the ASIO briefing, other evidence provided and any other relevant material. Publication of the report is subject to national security clearance requirements of Schedule 1, clause 7 of the *Intelligence Services Act 2001* (IS Act).

Committee practice

2.37 To date the Committee has exercised its discretion to review all listings and re-listings. Eleven reports have been made to the Parliament in respect of thirty-five listings. Of these thirty-five the vast majority have concerned the re-listing of entities. There have been only three additions to the Australian list: the Palestinian Islamic Jihad (PIJ), the Kurdistan Workers Party (PKK) and the Al Zarqawi Network.

2.38 All reviews have been advertised providing an opportunity for members of the public to make a submission. Private hearings in which ASIO, AGD and DFAT have given evidence have been conducted in relation to each listing and re-listing. There have been only two exceptions to this general practice. In 2006, the review of the re-listing of Al Qa'ida and Jemaah Islamiyah was conducted entirely on the papers (it was not advertised and there was no private hearing). In May 2007, the Committee advertised its review of the re-listing of seven organisations but received no public submissions and did not seek further evidence from the government.

Committee View

2.39 The Committee considers proscription to be an important element of Australia's new counter-terrorism laws. To date proscription has played a limited role in the prosecution of terrorist organisation offences and only one control order has been issued. Nevertheless, proscription provides a clear statement that Australia rejects the claims to legitimacy of groups that engage in extreme forms of

political violence as a means of achieving their political, ideological or religious goals. In the last five years none of the listed entities have made use of the existing opportunities to seek a de-listing from the Minister or sought judicial review in the ordinary courts.

2.40 There has been a clear commitment to ensure that the power to proscribe an organisation is based, to the maximum extent possible, on publicly available information. The Statement of Reasons is a stand alone document and its publication at the time a listing comes into effect ensures public notification of the listing. The Statement of Reasons also enables an entity to know the case against it and to pursue a remedy if it believes that proscription is unlawful.

2.41 The Australian approach has also emphasised the role of the Parliament in ensuring transparency and accountability in the use of the proscription power. Regular parliamentary review has required the presentation of evidence from executive agencies and enabled ongoing dialogue based around a set of non-statutory criteria (see Chapter 4). Parliamentary review has also provided the opportunity for witnesses who oppose or support proscription to come forward.

2.42 Through this process the Parliament has been able to consider the case for listing the entity and consider the wider impacts of proscription on particular communities. In practice, there has been limited public interest although the proscription of some organisations is clearly more contentious and has attracted a wider range of views. In our view, the Australian model exhibits a high degree of openness and opportunities for accountability both through the ADJR in the ordinary courts and a dedicated parliamentary process.