

Selection of Entities

- 4.1 This chapter discusses the factors taken into account by ASIO when providing advice to the Government on the listing of an entity under the Criminal Code.
- 4.2 Australia's proscription regime is consistent with widespread international practice, with the United States, the United Kingdom, Canada and New Zealand all having some form of proscription.¹ In comparison to other likeminded countries, Australia has listed fewer organisations and none have been listed on the basis of 'advocacy' of terrorism. However, the breadth of the definition of 'terrorist organisation' was said to leave national liberation movements vulnerable to proscription because the statutory definition does not require the complexity of internal disputes to be taken into account.²

Non-Statutory Criteria

- 4.3 The potential to apply proscription to a wide number of groups has been recognised by ASIO. Non-statutory criteria have been developed to guide the organisation in what should be taken into account when developing advice for the Minister. The criteria include:
- engagement in terrorism;
 - ideology and links to other terrorist groups or networks;

1 Gilbert and Tobin Centre of Public Law, *Submission 16*, p.1.

2 Criminal Bar Association of Victoria, *Submission 24*, p.2; FCLC (Vic), *Submission 15*, p.11; Associate Professor Hogg, *Committee Transcript*, 4 April 2007, p.14; PIAC, *Submission 11*, p.6.

- links to Australia;
- threats to Australian interests;
- proscription by the UN or like minded countries; and
- engagement in peace/mediation processes.

4.4 AGD confirmed that the criteria have no specific legal status. AGD said:

The criteria... are not expressly specified in the Criminal Code as matters requiring consideration by the Attorney-General under subsection 102.1(2). In particular, there is no statutory requirement to establish a nexus between an organisation and Australia for the purpose of specifying the organisation as a terrorist organisation under the Act. The Criminal Code does not refer to a Statement of Reasons, or any particular criteria for listing an organisation, other than that specified under section 102.1(2)(a) or (b).³

4.5 During the hearing the Deputy Director-General of ASIO explained that:

Against the very large number of potential groups that may meet the legislative test, we have to work out where we start from. So the criteria simply have the status internally of a tool – an accountable tool rather than just a haphazard approach – as to where we start and, as we go through, what comes up next as the more likely ones that will meet the test.⁴

4.6 Both AGD and ASIO were open to considering further refinements to the criteria.⁵

Incorporation of the criteria into the Criminal Code

4.7 The SLRC supported the legislative incorporation of a criteria to guide the Minister's decision making, taking the existing framework as a starting point.⁶ During the hearings Mr Sheller and Mr Carnell, on behalf of the SLRC, submitted that statutory criteria would increase transparency and give confidence to local communities about the considerations applied.⁷ The recommendation of the SLRC was

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

4 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p. 67.

5 *Committee Transcript*, 4 April 2007, p.67.

6 SLRC Report, p.85; see also, HREOC, *Submission 14*, p.8.

7 Mr Sheller AO QC *Committee Transcript* 3 April 2007, p. 3-5; Mr Carnell, *Committee Transcript* 3 April 2007, p. 7.

supported by many of the witnesses.⁸ HREOC also proposed that a ‘necessity and proportionality’ test, possibly similar to that applied in the case of control orders, would enable all relevant factors to be taken into account.⁹ This approach was said to minimise the risk of a listing that disproportionately infringes the right to freedom of expression and association by, for example, proscribing elements of an organisation not involved in terrorist activity.¹⁰

- 4.8 The Federation of Community Legal Centres took the view that incorporation of the criteria would make little difference unless criteria were further elaborated and are mandatory.¹¹ AGD was opposed to the adoption of ‘fixed’ statutory criteria arguing that proscription requires a case by case assessment. The Department submitted that:

...the proscription process falls within the limitations permitted under the ICCPR. The safeguards in the legislation and the criteria used are designed to ensure that in individual cases freedoms such as freedom of association and freedom of expression will only be restricted where it is necessary to do so to protect national security and public order. This is already a proportionate and tailored response to the threat.¹²

- 4.9 On this view, proscription requires a wide range of factors to be taken into account and it is not practical to tie the Minister in every case to a set of mandatory criteria. The Committee agrees with this position.

Comments on Relevant Factors

Engagement in terrorism

- 4.10 To date proscription has only been applied to those groups directly involved in acts of terrorist violence, and in most cases this has included attacks on innocent civilians. The distinction between violence and non-violent activity is discussed below.

8 See, for example, Queensland Council for Civil Liberties, *Submission 20*, p.3; AMCRAN, *Submission 22*, p.5; LCA, *Submission 17*, p.8; PIAC, *Submission 11*, p.6.

9 HREOC, *Submission 14*, p.9.

10 HREOC, *Submission 14*, p.3.

11 FCLC, *Submission 15*, p.12.

12 AGD, *Supplementary Submission 10A*, p.3.

- 4.11 On some occasions the Committee has expressed its concern that information has not always been as comprehensive as possible.¹³ The case for listing has not always been entirely clear, but overall the agencies have responded to the Committee's requests for further explanations and the justification for listing made out.¹⁴

Distinction between violence and non-violent activity

- 4.12 Where an organisation has a degree of legitimacy through popular support and has a wide ethnic or national constituency it is important that listing only be applied to the component that is directly responsible for acts of terrorist violence. For example, Hizballah's stated aim of establishing a radical Shi'a Islamic theocracy in Lebanon remains one of its core ideological pillars. However, Hizballah has evolved into a more pragmatic socio-political movement; it participates in representative politics and has gained a degree of political legitimacy through the election of some of its members to the Lebanese Parliament.¹⁵ It is for this reason that Australia's listing is confined to the External Security Organisation (ESO). Australia has avoided listing Hizballah's social and political arms and has distinguished ESO from Islamic Resistance, the militia wing of Hizballah that operates inside Lebanon.

Advocacy of terrorism

- 4.13 It has been possible for the government to proscribe an organisation on the basis of its 'advocacy' of terrorism since 2005 but to date no listing has been brought forward on that ground. Several witnesses argued that extending the proscription to include 'advocacy' enables government to infringe freedom of expression, and that the offence of incitement to commit acts of terrorism is a more precise way addressing dangerous speech.¹⁶
- 4.14 It has also been said that it is unclear what acts would trigger a use of proscription on these grounds and this lack of clarity puts organisations in a precarious position.¹⁷ AMCRAN argued that, in the current climate, Muslim organisations are more likely to be banned on the basis of

13 *Review of the Listing of Six Terrorist Organisations*, March 2005, paragraph 3.32.

14 *Review of the Listing of Six Terrorist Organisations*, March 2005, paragraph 3.32.

15 <http://jtic.janes.com/JDIC/JTIC/>

16 AMCRAN, *Submission 22*, 5-7; AMCRAN, *Committee Transcript*, 3 April, p.43; Professor Joseph and Ms Hadzanovic, *Submission 2*, p.3; Gilbert and Tobin Centre of Public Law, *Submission 16*, p.4; Uniting for Justice, *Submission 12*, p.4.

17 Gilbert and Tobin Centre of Public Law, *Submission 16*, p.4.

'advocacy' because of the heightened sensitivity about the extreme rhetoric of some individuals and, in particular, the opposition to the Iraq War.¹⁸ As none of the nineteen organisations listed by Australia have been proscribed on the basis of 'advocacy' there is no basis on which to evaluate proscription in this context. However, it would be reasonable to expect that listing would only occur where advocating terrorism is the official policy of the group rather than the intemperate statements of a leader.

Ideology and links to other networks and groups

- 4.15 The Committee has frequently commented on the criteria 'ideology and links to other networks and groups' and the scope and meaning of this criteria was raised again during the inquiry.¹⁹
- 4.16 As noted in Chapter 2, a number of witness, and AMCRAN and IISCA in particular, have voiced their opposition to proscription because it appears to them that listing has only been used against Muslim organisations. Many Muslim Australians regard proscription as an attack on Islam because Australia has listed mostly self-declared Islamist groups compared to the use of proscription in similar countries.²⁰ AMCRAN said:
- This creates a sense in the Muslim community that Muslims are being specifically targeted because of their beliefs. At the same time, white supremacist groups are not proscribed even though they have perpetrated acts within Australia that would fall under the definition of terrorist acts.²¹
- 4.17 In addition, it was alleged that ASIO's conception of 'engagement with terrorism' is filtered through an ideological predisposition, but it is unclear precisely what political perspectives are informing the advice provided to government and the government's choices.²²
- 4.18 AGD defines the threat of international terrorism in the following terms:
- The main terrorist threat globally over the past decade has been associated with an extremist Islamist ideology that espouses 'global jihad'. The threat also comes from a range of non-Islamic

18 AMCRAN, *Submission 22*, p.7.

19 Dr. Emerton, *Committee Transcript*, 4 April 2007, p. 29.

20 IISCA, *Submission 27*, p.5; AMCRAN, *Committee Transcript*, 3 April 2007, p.43.

21 AMCRAN, *Committee Transcript*, 3 April 2007, p.43.

22 Dr. Emerton, *Committee Transcript*, 4 April 2007, 29.

groups which, espousing varying ideologies, have all undertaken threat or acts of violence or unlawful harm that are intended or likely to achieve a political objective.²³

- 4.19 ASIO and AGD were asked to clarify the specific meaning of 'ideology' and 'links to other networks and groups' in the non-statutory criteria.²⁴ AGD confirmed that 'ideology' is a reference to the definition of 'terrorist act' in the Criminal Code which requires that the relevant acts are perpetrated to advance an ideological, political or religious cause.²⁵ AGD explained that:

The definition of terrorist act specifically refers to religion and ideology but it marries it with violence. If the activity is politically, religiously or ideologically driven then it is the act of violence that defines terrorism. It needs that element to distinguish it from other violent crime.²⁶

- 4.20 In other words, the criteria 'ideology' is not an additional element that imports something new into the statute but points the advisor to the question of whether the relevant violent acts have been carried out for a political, religious or ideological cause and are therefore 'political crimes' rather than crimes for private purposes.

- 4.21 The Deputy Director of ASIO added that:

I think it can be looked at as either two separate ones or, if there is an ideological link, then it becomes part of the global networks. ... When we look at it, it is the global networks and what links [to] the global network.²⁷

- 4.22 In other words, the criteria read together also function as a tool to identify and prioritise those entities which share the same ideological world view. In practice, 'ideology and links to other networks and groups' operates as shorthand for the 'global jihadist movement', which has often been described as a network of networks. However, to be meaningful this criteria must refer to something more than merely a shared world view and be directed to connections that enhance the capacity of the group (or the other entities to which it is linked) to conduct terrorist operations.

23 AGD *Submission 10*, p.2.

24 Senator Faulkner, *Committee Transcript*, 4 April 2007, p.66.

25 AGD, *Committee Transcript*, 4 April 2007, 67.

26 AGD, *Committee Transcript*, 4 April 2007, p.71.

27 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p.66.

- 4.23 The Committee believes that separating and elaborating the criteria would go some way to eliminating some of the misunderstanding. 'Ideology' could be reworded to make explicit the connection between acts of violence and the pre-requisite that such acts have been advanced for a political, ideological or religious reason. Similarly, the extent to which an entity is part of a wider network which shares the same world view could be separately identified.
- 4.24 Finally, the Committee observes that the primary outcome of proscription to date has been on the threats posed by several of the militant Islamist extremist groups engaged in the use of terrorist violence, much of which is targeted at innocent civilians. But this does not equate with ASIO pursuing an ideologically driven approach to proscription. Nor does the Committee consider it fundamentally at odds with liberal democracy to oppose terrorist violence, whatever its ideological justification.
- 4.25 The absence of listing is not an implicit statement of legitimacy or illegitimacy of any particular political philosophy or point of view. Division 101 and 103 offences are available, regardless of the motivation of the perpetrator or the nature of the foreign state against which the act is taken. And, in fact, Division 102 offences are also available although in these circumstances it is the court that decides whether or not the entity meets the legislative criteria.

Links to Australia and Australian interests

- 4.26 AGD submitted that:
- ... the security of Australians and Australian interests is not geographically confined to Australia – it extends to wherever terrorist attacks occur. In some cases, Australians or Australian interests are directly targeted, such as in Bali in 2002 and 2005, or they may be caught up in attacks directed at others, such as in New York in 2001, London in 2005 and Egypt in 2006.²⁸
- 4.27 Several witnesses argued that it remained difficult to find a consistent rationale for the selection of entities because the nexus between a listed entity and a threat to Australia's national security was not always clear.²⁹ This was said to create a problem in providing the necessary rationale for

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

29 FCLC (Vic), *Submission 15*, p.13.

applying Australian criminal law to the entity, its members and supporters.³⁰

4.28 The Committee has explored this aspect of the criteria on a regular basis during its reviews.³¹ The intention of the legislation is to protect Australia's security interests and, although this concept is wider than demonstrable links to Australia, it still implies some connection to Australian security.³²

4.29 Australia is not unique in responding to regional and domestic threats by adopting an approach to proscription that is wider than the UNSC sanction list. Where proscription departs from the UN list the requirement to establish a connection to Australian security interests acquires a greater significance. The Committee reiterates that particular weight should be placed on the existence of known or suspected links to Australia, the nature of those links and the nature of the threats to Australian interests more generally.

Proscription by the UN or like minded countries

4.30 Whether an organisation is listed by the UN or other like minded countries is an important although not a decisive factor in deciding whether Australia should also use its proscription powers. Proscription will at times be useful to facilitate international cooperation and ensure that Australia does not become a safe haven for groups no longer able to operate elsewhere. As proscription in comparable countries is also generally subject to regular review, any actual or likely change in status should also be taken into account.

Engagement in peace/mediation processes

4.31 ASIO recognises the role of peace and mediation processes and the Committee understands that these considerations are part of the advice to the Minister.³³ ASIO has said that:

30 See, for example, Associate Professor Russell Hogg, *Committee Transcript*, 4 April 2007, p. 17-20; *Submission 6*, p.9; FCLC (Vic), *Submission 15*, p.12; Dr Emerton, *Submission 23*, p. 4.

31 See, for example, *Review of the listing of six terrorist organisations*, March 2005, p.52.

32 Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003, Item 1 new subsection 102.1(2); AGD, *Committee Transcript*, 1 February 2005, p.2 cited in '*Review of the listing of six terrorist organisations*', March 2005, p.14.

33 *Review of the listing of six terrorist organisations*, March 2005, p.15; see also, ASIO Transcript, 1 February 2005, p.15

When there is a peace process ... you can unintentionally make things worse if you do not think through the implications of the listing.³⁴

- 4.32 During the Committee's review of listings, it has sought broader advice from DFAT on the implications of listing on Australia's longer term strategic interests and on the local or regional context of violent conflict.³⁵ DFAT's greater involvement and liaison with ASIO will enable the organisation to draw on the widest possible expertise within government.

Potential adverse security effects

- 4.33 It was also argued that listing is a 'double edged sword' and the potential for adverse security effects should be weighed in the listing process.³⁶ In particular, criminologist Associate Professor Hogg said that proscribing a group may make it more difficult to infiltrate a group to obtain intelligence and entrench existing community divisions by positioning of Australia with one side in a conflict.³⁷ Associate Professor Hogg said that:

Sound human intelligence is of critical importance and that depends on cultivating cooperative, trusting relationships with communities whose members are in a position to provide vital information about extremist activity. That is where proscription could conceivably work against the effective policing of terrorist activity if it contributes to the alienation of whole communities.³⁸

- 4.34 These factors are not made explicit in the listing criteria but the Committee expects that ASIO would turn its mind to any effects that might be counter-productive to their own efforts and to advise the Minister accordingly.

34 Private briefing, 3 June 2004, p.6 as cited in *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, June 2004, p.24.

35 *Review of the listing of six terrorist organisations* Parliament of the Commonwealth of Australia, March 2005, paragraphs 2.5-2.7; *Review of the listing of four terrorist organisations*, September, 2005, paragraphs 2.9-2.16.

36 Associate Professor Hogg, *Submission 6*, p.1; United Nations Association of Australia, *Submission 5*, p.3; ATRAC, *Submission 8*, p.10.

37 Associate Professor Hogg, *Submission 6*, p.1.

38 Associate Professor Hogg, *Submission 6*, p.17.

Impacts on Australian citizens and residents

- 4.35 While there have been few prosecutions for Division 102 offences, it was common ground that proscription is more than 'mere symbolism'. One of the major issues raised during the inquiry was the extent of the impact of listing on Australian citizens and residents, who have connections or support the broad aims of an organisation while not supporting acts of terrorism.³⁹ Much of this concern is also about the potentially wider chilling affects of proscription on lawful activity, and the possibility that Division 102 offences may catch innocent persons. This factor is not made explicit in the criteria. The extent of the impact of a proscription, in terms of the size of the population that it might affect, is advice that could be usefully provided to the Minister and the Committee.

Statement of Reasons

- 4.36 The Committee has previously recommended that the Statement of Reasons explicitly address the criteria for listing.⁴⁰ AGD has been unable to respond positively to the Committee's recommendation, until the deeper policy question about the extent to which government will agree to be bound by the criteria is made. In our view, whether the criteria are directive or not, greater clarity in the Statement of Reasons would improve transparency and assist the Committee with its own assessment process.

Political influence by foreign states

- 4.37 During the inquiry it was suggested that proscription was open to influence by foreign states using the 'war on terror' to address internal conflicts or disturbances. Associate Professor Hogg argued that:

Many foreign governments welcome the proscription by other countries of their political opponents. It reinforces their own efforts to criminalize political opposition and gives them a freer hand to ignore the human rights and legitimate political aspirations of national minorities.⁴¹

- 4.38 ATRAC also said it is well-known that the Sri Lankan Government has been actively promoting the proscription of the LTTE to other states.⁴²

39 See, for example, HREOC, *Submission 14*, p.3.

40 *Review of the listing of four terrorist organisations*, September 2005 p.47

41 Associate Professor Hogg, *Submission 6*, p.23.

42 ATRAC *Submission 8*, p.12.

- 4.39 During the hearing DFAT was asked to what extent the Australian government is being lobbied by overseas governments to proscribe organisations.⁴³ DFAT informed the Committee that Australia is not subject to 'heavy lobbying' over proscription.⁴⁴
- 4.40 In response to questioning about the possible influence of foreign intelligence agencies the Deputy Director-General of ASIO informed the Committee that:
- People do express views but not views that we take into account. It might be recorded somewhere in our files, but that is where it would sit.⁴⁵
- 4.41 DFAT clarified that it includes the political context of the situation in any overseas country in its advice to ASIO.⁴⁶

Committee View

- 4.42 The Committee does not consider the proscription power to have been overused, although we acknowledge that there is not a complete consensus of all listings. The non-statutory criteria have been a useful tool for ASIO that assists in the development of its advice to the Minister and has provided a basic framework for the Committee's reviews.
- 4.43 The Committee believes decisions about the justification for proscribing a non-state entity must take account all the facts and the case for and against listing in Australia. The parliamentary process and the criteria which has evolved as a result, provides a more comprehensive justification for proscription than exists in many comparable jurisdictions. It is unrealistic to impose restrictive pre-conditions in the context of proscription, which by its nature requires a degree of flexibility and realism.

43 Senator Ray, *Committee Transcript*, 4 April 2007, p.75.

44 DFAT, *Committee Transcript*, 4 April 2007, p.76.

45 Deputy Director-General of ASIO, *Committee Transcript*, 4 April 2007, p.7.

46 DFAT, *Committee Transcript*, 4 April 2007, p.77.

Recommendation 2

4.44 The Committee recommends that the criteria 'ideology and links to other networks and groups' be restated so that:

- the link between acts of terrorist violence and the political, ideological or religious goals it seeks to advance is clearly expressed; and
- links to other networks and groups that share the same world view is identified as a separate criteria.