SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) INC

TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

REVIEW OF THE LISTING PROVISIONS OF THE CRIMINAL CODE ACT 1995

February 2007

This submission was prepared by Vicki Sentas and Marika Dias, of the Anti-Terrorism Laws Working Group, on behalf of the Federation of Community Legal Centres (Vic).

Inquiries to Sarah Nicholson, Policy Officer, Federation of Community Legal Centres (Vic) on 9654 2204 or Sarah_Nicholson@clc.net.au

Contents

The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for fifty-two Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres provide free legal advice, information, assistance and representation to more than 60,000 Victorians each year. We exercise an integrated approach combining assistance of individual clients with preventative community legal education and work to identify and reform laws, legal and social systems.

Community Legal Centres have expertise in working with excluded and disadvantaged communities and people from culturally and linguistically diverse backgrounds. We operate within a community development framework. We provide a bridge between disadvantaged and marginalised communities and the justice system. We work with the communities of which we are a part. We listen, we learn, and we provide the infrastructure necessary for our communities' knowledge and experiences to be heard.

The Federation, as a peak body, facilitates collaboration across a diverse membership. Workers and volunteers throughout Victoria come together through working groups and other formal and informal networks to exchange ideas and strategise for change.

The day-to-day work of Community Legal Centres reflects a 30-year commitment to social justice, human rights, equity, democracy and community participation.

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports community legal centres to provide targeted community legal education programs for communities affected by the State and Commonwealth counter-terrorism laws and supports community legal centre lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth counter-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth counter-terrorism laws on affected communities and individuals.

Introduction

This review seeks to assess the operation, effectiveness and implications of section 102.1(2), (2A), (4), (5), (6), (17) and (18) of the Criminal Code Act 1995. In this submission we draw on the Federations' previous objections to the listing provisions as submitted to:

- reviews of the listing of individual organisations as conducted by the Parliamentary Joint Committee on Intelligence and Security and its predecessor, the Parliamentary Joint Committee on ASIO, ASIS and DSD ('the Committee').
- the Security Legislation Review conducted by the Sheller Inquiry ('the SLRC').

The Federation believes that the listing provisions of the code are fundamentally inconsistent with the aspirations for a democratic society and compromise fundamental principles of the criminal law. The automatic criminalisation of political affiliations, associations and convictions by executive discretion, in the absence of direct harm to the physical safety of Australian citizens is dangerous and draconian. We believe that the listing provisions should be repealed in their entirety. In the event that the Committee does not recommend overall repeal of the listing provisions, we alert the Committee to a number of recommendations in our submission for the repeal or amendment of particular provisions.

General concerns regarding the listing of organisations

The practice of listing organisations creates offences in relation to an organisation regardless of the specific activities of that organisation in Australia at a given point in time. Once listed as a terrorist organisation, the consequences of being a "listed organisation" continue regardless of what activities that organisation does or does not undertake. This effectively functions as a legislative 'black list'. This kind of blacklisting gives rise to two major sites of concern.

Our first concern is that organisations which use force may be blacklisted even where the use of force in question is in furtherance of self determination and recognised under international law. Our second concerns is that organisations and individuals which do not use force or indeed engage in any serious criminal activity may be blacklisted merely because they are associated (even tenuously) with groups that do use force, whether or not the use of force is recognised under international law as legitimate.

In our view, listing is not an appropriate legislative practice in a democratic society. The practice of listing organisations removes the nexus between criminal prosecution and actual criminal activity. For example, a person who provides training to a listed organisation will have committed an offence, regardless of whether that organisation has been involved in some sort of criminal activity under Australian law and regardless of whether the training provided relates to any criminal activity. In this regard the listing power moves away from a fundamental principle of the criminal law of only assigning criminal responsibility to individuals based on their actions and intentions in causing harm to the community. Instead, once an organisation has been listed, an associated individual may attract criminal liability based solely upon the activities of that organisation prior to the listing.

We are also concerned that these provisions are inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),[1] most notably those obligations relating to freedom of association (Article 22). We suggest that the listing power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security, particularly in light of the threat of ideological and political violence.[2]

Furthermore, the practice of listing organisations is not a necessary. In our view, the existing criminal law offers sufficient protection against ideologically motivated violence. If listed organisations are responsible for the kinds of ideologically motivated violence alleged, then the offences reasonably required to

[1] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.

[2] Article 22(2), *International Covenant on Civil and Political Rights*.

protect the public from such actions are already available to law enforcement authorities, in the following ways:

1. Through 'ordinary' criminal law. Murder, kidnapping, intentionally causing serious injury and robbery *inter alia* are already serious offences. Deliberately assisting in these acts would fall under offences such as conspiracy to commit such acts.
2. Through the terrorism offences set out in Paragraph 101 of the *Criminal Code*.
3. If the organisation is not listed, under the terrorist organisation offences (provided that the prosecution is able to show that an organisation meets the definition of 'terrorist organisation' under Paragraph 102.1 of the *Criminal Code*).

It is, therefore, difficult to see how listing an organisation would assist matters other than in cases where the link between the accused or the relevant organisation and the 'terrorist act' could not be established to the satisfaction of a court. In such cases we submit that the imposition of criminal liability is not justified.

We also note that there is no evidence to suggest the practice of listing organisations was necessitated by an inability to prosecute those involved with these organisations in Australia, as would be evidenced by failed prosecutions.

Statutory criteria for listing

Definition of 'Terrorist Organisation'

The determinative criterion for listing is whether an organisation fits the legislative definition of a 'terrorist organisation'. The Federation agrees with the broad criticism of this definition as being far too expansive. The definition hinges on the definition of 'terrorist act' which itself covers an expansive array of acts and threats of acts. Furthermore, there is no requirement that the terrorist act in question be directed to a non-military target. The definition could conceivable include acts or threats of action outside of Australia, including those directed towards a brutal regime and in support of self-determination. The characterization of armed conflicts as terrorism is discussed further below.

Internal armed conflict

In a number of reviews of individual listings the Committee has argued that a distinction should be made where organisations are involved in armed conflict, and their designation as terrorist might not be the most applicable or useful.[3]

The applicability of the law of armed conflict to the definition of terrorism was recently considered by the Committee in its December 2006 report, *Review of Security and Counter Terrorism Legislation*. The Committee recommended that:

> "…to remove doubt the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict."[4]

The Federation supports the committee's recommendation to exclude armed conflict from the definition of terrorism in accordance with international humanitarian law. The recognition of Australia's obligations under international humanitarian law (as well as human rights and refugee law), is an important attempt to import legal stability to the excessively broad definition of terrorist act. In our view, the proscription regime is incompatible with the aims and purpose of the law of armed conflict.

The practical application of this recommendation raises a number of fundamental questions for this current review. Force used by national liberation movements to resist a denial of self-determination is legitimate under the UN Charter since the international adoption of the *1970 Declaration on Self-determination*.[5] The protocols and common articles of the Geneva Convention are acknowledged as dynamic and evolving instruments, in part due to the customary rules of

---

[3] Parliamentary Joint Committee on ASIO, ASIS and DSD, 2005, *Review of the listing of Palestinian Islamic Jihad (PIJ),* June 2004, p.23. See also *Review of the listing of four terrorist organisations*, September, p.45.

[4] Parliamentary Joint Committee on Intelligence and Security, 2006, *Review of Security and Counter Terrorism Legislation*, December, recommendation 12, at p.65.

[5] *The UN Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations,* Higgins, ibid at 33; 51-52.

international humanitarian law that define in much greater detail than treaty law, the obligations of parties to an armed conflict. Consequently, the question of when the use of force by non-state actors is regulated by the law of internal conflict is acknowledged by experts to be complex and contested.

The likely interaction between the law of armed conflict and the operation of the proscription regime requires consideration. As noted above, the *legal* effect of acceptance by either party of the minimum articles of the Geneva Conventions does not depend on the formal accession of the relevant state to the relevant protocol. While national liberation movements will meet obstacles to their accession to the Geneva Conventions, this does not stop them from declaring their intention to apply and be bound by these Conventions. For example the African National Congress (ANC) made a statement regarding their willingness to apply the Geneva Conventions to the International Committee of the Red Cross.[6] While the ANC may not have met the threshold definition for the purpose of the Convention, the political imperative and legitimacy of the use of force was clearly supported in international law. Yet today, the failure of formal implementation of the humanitarian law framework by most states may result in the *political* effect of its non-applicability when it interacts with counter-terrorism law, in jurisdictions such as Australia.

Given the current operation of the proscription regime, it is unlikely that the executive would accept a unilateral accession by a non-state actor to be bound by the law of armed conflict (however legally or morally defensible) and thus exclude it from the definition of terrorist act. The discretionary processes of executive proscription are inconsistent and contradictory with the kind of factual determination required for the law of armed conflict to regulate a party to a conflict. The purpose and aims of the law of armed conflict are not incompatible with Parliaments intention for terrorism laws to prevent and protect its citizenry from ideological violence. As discussed there are ample provisions in the criminal law to prevent and prosecute ideologically motivated violence in Australia. At the very least, criminal sanction should not attach against Australians for affiliations or involvement with international organizations that are subject to the law of armed conflict.

> "It may seem difficult for a State to treat insurgents fighting for self-determination as lawful combatants rather than as criminals; but it must be borne in mind that the counterpart to such treatment is greater protection for the civilian population, a much more extensive restriction on the methods and means of warfare and thus much greater humanitarian protection for all those embroiled in the armed conflict."[7]

[6] Higgins, ibid at 27.
[7] Cassese, A 1984, 'Wars of national liberation and humanitarian law' as cited in Higgins, ibid, at p.48.

While it predates the 'war on terror', this commentary by an international humanitarian law scholar, suggests that proscription might be counter productive to the operation of the Geneva Convention. In particular, it highlights how the practice of listing is inconsistent with Convention concepts such as the concept of the lawful combatant, and the applicability of war crimes to parties who harm civilians.

While we do not purport to offer an expert opinion on the law of armed conflict in light of the above issues, we urge the Committee to investigate the proscription regime's potential incompatibility with the law of armed conflict.

Advocacy of a terrorist act

The Federation argues that the grounds for listing a terrorist organisation are unduly expansive. An organisation that directly or indirectly engages in preparing, planning, assisting in or fostering such a terrorist act may be classified as a terrorist organisation.

This definition has been made even more expansive by the *Anti-Terrorism Act (No 2) 2005 (Cth)* which, also defines a terrorist organisation as one which 'advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)'.[8] In this context 'advocates' may include directly or indirectly counselling or urging a terrorist act or directly praising the doing of a terrorist act where this *might* have the effect of leading a person to engage in a terrorist act.[9] In our view, this broad definition exposes an inordinately large number of organisations to proscription. Furthermore, it removes a nexus between the organisation to be listed and any actual terrorist activity. As a 'terrorist act' may itself be constituted by a mere threat, an organisation which simply advocates the making of a threat may be listed. In this way, organisations with very tenuous links to "terrorist" activities may be proscribed.

It also remains unclear what types of organisational acts would be required to make an organisation fall within this definition. The legislation does not make it clear whether the acts of one member of an organisation are sufficient to cast the organisation as a 'terrorist organisation' or not. While the Attorney General has commented that single statements by individual members are unlikely to be attributed to a whole organisation, with regard to advocacy provisions, it has been acknowledged that what is 'organisational' has a broad reach.[10] The breadth of the definition of "terrorist act" and "terrorist organisation" means that there is uncertainty in the application of any law centering on these terms. There is also a manifest risk of arbitrary, and in particular politically motivated, use of such law.

[8] Paragraph 10, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*
[9] Paragraph 9, ibid.
[10] *Report of the Security Legislation Review Committee,* June 2006 at pp. 71-72.

In response to such concerns, the Security Legislation Review Committee (SLRC) has suggested the removal of paragraph (c) from Section 102.1(1A).[11] For its part the Committee has recommended that subsection (c) be amended to include a 'substantial risk', as first recommended by the Senate Legal and Constitutional Committee in November 2005.[12] In the event that the listing provisions are not repealed, we submit that neither the recommendation of the Committee nor the recommendation by the SLRC adequately remedy the breadth of the section. Rather, the entirety of section 102.1 (1A) should be repealed.

The advocacy provisions as a whole criminalise an excessively broad range of encounters, the utterance of political views, their development and communication, without any clear or direct nexus to an actual harmful act. Because of the broad definition of terrorist act, and concepts such as indirectly counselling and urging, the entire section relies on the mere *potential* that these views and communications might lead to violent acts. The flawed pre-emptive logic of proscription generally is evident in the rationale for section 102.1 (1A) as outlined in the Explanatory Memorandum to the legislation, i.e. 'that such communications and conduct are inherently dangerous because they could inspire a person to cause harm to the community.'[13] The suppression of political opinion and activity as *a priori* dangerous and hence necessary to prevent terrorism is unsubstantiated and unevidenced. In our view, it is anathema to notions of democracy that the executive decides that particular political opinions, even if they are broadly unpopular, are inherently so dangerous to warrant the blacklisting of an organisation and the triggering of serious criminal offences.

[11] Ibid, Recommendation 10 at para 8.10.
[12] Parliamentary Joint Committee on Intelligence and Security, 2006, *Review of Security and Counter-Terrorism Legislation,* December, Recommendation 14 at p. 71.
[13] *Anti-Terrorism Bill* (No. 2) 2005 (Cth) Explanatory Memorandum, Schedule 1, Item 9 at p. 7.

Non-statutory criteria for listing

ASIO's discretionary power

In recommending organisations for proscription, ASIO has been acknowledged that it takes account of the following factors outside of the statutory definition of terrorist organisation:

- 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.[14]

The ASIO criteria have the status of guidelines or policy rather than being statutorily enshrined. As a result, no clear application of the criteria is discernable across any of the listings. Indeed, the criteria are acknowledged by ASIO as merely a guideline, and that some criteria are more relevant to some organisations than others.[15] The ASIO criteria are treated inconsistently by the Committee (the reviewing body) and by ASIO and the Attorney General (the decision making bodies). For example, according to a minority report of this Committee, the criteria were adopted by the Committee as a template, and are explained in the following terms:

> "Those criteria were intended to justify discrimination between those organisations which have resorted to the use of political violence that should be listed as terrorist organisations under Australian domestic law (in which case membership or support of those organisations, without more, becomes a crime) and those (the larger majority) which should not."[16]

In the case of the listing of the PKK, the minority pointed out that the organisations' listing was achieved by reliance on the 'literal terms of the statutory definition of a terrorist organisation'[17] and not the template criteria relied on by the committee for previous listings. As the minority point out, this is quite legal, however, we submit that it demonstrates the unacceptable consequences of a proscription regime, which confers discretionary power in the executive.

The minority went on to say:

> "If the Joint Committee accepts justifications for new listing without a proper basis and that are inconsistent with the reasoning of its own prior reports and not

[14] Parliamentary Joint Committee on ASIO, ASIS and DSD, 2005, *Review of the listing of six terrorist organisations* at para 2.3.
[15] Parliamentary Joint Committee on ASIO, ASIS and DSD, 2005, *Review of the listing of Tanzim Qa'idat aljihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* at para 2.4.
[16] Parliamentary Joint Committee on Intelligence and Security, Minority Report, 2006, *Review of the listing of the Kurdistan Workers' Party (PKK)* at para 1.7.
[17] Ibid at para 1.8.

> based on existing (or any) stated policy we invite inconsistency. It would permit ad hoc decisions, incapable of justification on rational grounds to be reached. That would be inconsistent with the Joint Committee's obligations to the Parliament."[18]

ASIO is a secret organisation whose functions turn on a great deal of expansive discretion. ASIO's significant role in the decision making process is arguably problematic due to its vested interest in proscribing organisations in order to increase the scope of its operational powers. The criteria extend ASIO's discretion by imposing automatic criminal liability for actions, views, and speech acts which go beyond direct harm to civilians. Furthermore it is difficult to establish how such views, speech acts, and affiliations could *automatically* be preparatory to violence against civilians. It is concerning that the process for listing lends ASIO such discretion and that ASIO's advice then triggers the Minister's decision to proscribe. This gives rise to a particularly subjective form of executive criminalisation of organisations.

The SLRC has suggested that if the existing criteria were fixed the Minister's discretion would be circumscribed. The SLRC found that, "The criteria proposed by ASIO and supported by HREOC and the PJC are a useful starting point."[19] Further, the SLRC recommended 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."[20]

If in the event the section is not repealed, the Federation supports the provision of transparent and clear statutory criteria and public disclosure of all such criteria, evidence and processes involved in its exercise. We also strongly support adherence with fundamental principles of administrative law.

The Federation does not support the statutory incorporation of the present criteria. This would provide no greater limit to ASIO's discriminatory or arbitrary application because of the subjective discretionary nature of the criteria. Indeed, the Committee itself has drawn on the alternative criteria proposed by Patrick Emerton, stating that it 'has found them valuable and has used them and will continue to use them as the basis of questions at hearings on particular listings.'[21] Given the Committee has expressed concerns about the confusing nature of the existing criteria, and in practice deduces evidence using quite different tests, the enshrining of the ASIO template in the criminal code would be counter productive.

---

[18] Ibid at para 1.12.
[19] *Report of the Security Legislation Review Committee 2006* at paras 8.20- 8.23, 9.1.1.
[20] Ibid at para 9.33.
[21] Parliamentary Joint Committee on Intelligence and Security, 2006, *Review of the listing of the Kurdistan Workers' Party (PKK*) at para 2.5.

The problem with the ASIO template

At the heart of the issue of appropriate criteria is the disjuncture between the original parliamentary intent of the listing power and the discretionary political objectives of the executive in the exercise of the power. While the purported legislative aim of this power is the maintenance of Australia's national security, it is evident that this aim is not used to inform the exercise of the power. In practice, the executive does not require that organisations actually pose a threat to Australian national security before they are listed. By listing organisations with no demonstrable threat to Australian security, the executive is arguably exceeding the intended scope of the legislation.

In previous listings, an organisations links to Australia and the threat posed to Australia have not been strongly weighted. Most organisations that have been listed have been found to have no link to Australia nor to pose any threats to Australian security/interests. This is despite recognition by the Committee that it considers links and threats to Australia as an important consideration, and presented evidence that this is also the view of the Attorney-General.[22]

Contradictorily, the Attorney-Generals' department argued to the SLRC that demonstrated relevance to Australia is not required to list an organisation as terrorist, as terrorism is a global problem and requires a global response.[23] This is an alarming proposition. It confirms both the import of foreign policy interests into the criminal law and signals the inevitable expansion of the proscribed list, not as reserved for exceptional circumstances, but as the global norm. Indeed in practice, ASIO criteria such as the proscription by 'like minded countries' have been strongly relied upon in listing decisions to date. Banning organisations that do not pose a direct threat to Australia's domestic national security reflects a highly politicised and extraordinary process of criminalising support for the political opponents of Australia's allies.

Likewise, the relevance and precise meaning of concepts such as the 'ideology' of an organisation, 'engagement in terrorism' and 'Australia's interests' remain largely undefined or confused in listing reviews to date. The weight given to such concepts and the process of applying the aforementioned criteria is subject wholly to ASIO and the Attorney General's discretion. The supporting information relied on by ASIO is untested, unverifiable and not subject to cross-examination. For example, in relation to the criteria of the threat to Australia's interests, ASIO gave evidence to the Committee that the apparently larger number of Australian tourists visiting Turkey, as compared to Sri Lanka, was a threshold issue justifying the listing of the PKK rather than the LTTE.[24] In spite of the Committee

[22] Parliamentary Joint Committee on Intelligence and Security, 2006, *Review of the listing of the Kurdistan Workers' Party (PKK)* at para 2.33-2.36.
[23] *Report of the Security Legislation Review Committee 2006* at para 9.7.
[24] Parliamentary Joint Committee on Intelligence and Security, 2006, *Review of the listing of the Kurdistan Workers' Party (PKK)* at para 2.44.

establishing the error of this assertion, (that there were in fact more Australians visiting Sri Lanka), this had little bearing on the efficacy of the application of the criteria or the validity of the listing. Even if the existing criteria were amended and clearly linked to the purported legislative intent of protecting Australia's national security, the listing process would remain an executive decision, the factual basis of which would not be testable by a court.

In the event that the listing provisions are not repealed, we support the statutory incorporation of the Emerton criteria, as alluded to by the Committee in several listing reviews.[25] In particular, a listing should only be made if it can be shown that an organisation poses a real threat to Australia and Australians (and not merely overseas interests). Detailed evidence should be provided by ASIO as to how the listing will actually assist them, beyond existing laws and measures, in protecting Australian citizens and residents from the threat of physical harm or property damage.

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

Right to be heard and review of listings

The Federation is concerned that the broad criteria for listing organisations, the lack of judicial review and the lack of transparency combine to create an excess of executive power. A serious outcome is that a person charged with an offence is not able to challenge the proscription of the organisation.

We agree with the SLRC that an organisation facing listing should have the opportunity to make a case against the proposed listing, before they are listed, and in accordance with natural justice. In addition we note that the Committees intention to assess the possible impact of a listing on Australian citizens and residents has yet to be facilitated by any formal community consultation by any government department. We submit that there should be an express provision in the legislation that communities likely to be affected by the proscription be consulted before a listing is made and that a publicly available assessment on the potential impact on Australian citizens and residents be made out. The very serious and disproportionate consequences of proscription necessitate this express statutory provision. The impact on communities in Australia should be a major consideration *before* a listing decision is made. In our view, merely publicising material justifying the rationale for a listing after it is made, will not as the SLRC suggests, ensure either that those affected can be sure of what precisely amounts to risky organisational connections or 'foster community understanding and acceptance'.[26] Rather, if particular ethnic and Muslim communities are criminalised for activity otherwise legal and legitimate in a putatively robust democracy, this is likely to only reinforce a real and material social alienation and its chilling effect on political freedoms.

As the Committee will be aware, the review of the listing decision by the Committee is not binding on the Attorney-General and does not function as an appeals process. If the listing provisions are not repealed, we recommend that listing only take effect *after* the Committee has conducted its inquiry and not immediately upon the tabling of the legislation.

We submit that the provisions for de-listing of an organisation, while they allow parliament to play a limited role, are not an independent review mechanism in the absence of full and judicial merits review. Accordingly, if the proscription regime remains intact as an executive function, we recommend the provision for full and judicial merits review of listing decisions.

[26] *Report of the Security Legislation Review Committee 2006* at para 9.1.3.

Terrorist Organisation offences

The Federation wishes to raise a number of general concerns regarding terrorist organisation offences insofar as they are consequences of the proscription regime.

Nexus Between the Terrorism Organisations Offence and a Terrorist Act

The terrorist organisation offences do not require a nexus between the offence and an actual act of ideologically motivated violence. Offences may arise where no actual terrorist act has taken place and possibly was not even planned. It is possible that the organisation in question has somehow simply indirectly 'fostered' a terrorist act. Members and associates of the organisation would still be liable to prosecution. The offences themselves also do not require a connection between the offence and an act of terrorism. For the offence of receiving training from a terrorist organisation, it is not required that the training received be directly linked to a terrorist act. It may be, therefore, that the training received pertains to a perfectly innocent purpose, and yet the training recipient may still be liable to prosecution. While we support the recommendations of both the SLRC and the Committee to draw the offence more clearly and in relation to a terrorist act, the present overly broad definition of terrorist act would limit the legal certainty of any amendment. Where the aim of this legislation is to deter and to punish acts of terrorism, we submit that prosecuting individuals who are only tenuously linked to acts of terrorism at best, is beyond the scope of the purpose of the legislation.

Recklessness

The problems with the broad definition are compounded by the fact that all of the offences, apart from the membership offence, may be prosecuted where the individual concerned is merely reckless as to whether the organisation in question is a terrorist organisation. That is, actual knowledge is not required to commit the offence. The Federation does not accept that prosecuting people for their reckless involvement with organisations, which themselves may not have actually been involved in a terrorist act, is necessary to prevent acts of terrorism in Australia. Further, this is an excessively draconian legislative response in light of the level of terrorist threat in Australia.

Excessive Penalties

A further excess is the sentences specified in relation to the terrorist organisation offences. All of these offences attract very serious penalties, ranging from a maximum of 10 years imprisonment for membership to 25 years imprisonment for all of the other offences where committed with actual knowledge. The severity of the penalties involved are particularly worrying where the breadth of these offences is considered. For example, the offence of providing or receiving training does not require that the training relate in any way to a terrorist act. That being the case, it would be possible for a person to train a supposed 'terrorist organisation' in anything from first aid to accounting practices and receive a term of imprisonment of up to 25 years for so doing. In our view the penalties that flow

from these offences are excessive given the breadth of the offences and the absence of a requirement that there be a nexus between the offences and actual terrorist violence.

Social repercussions and discriminatory impact

The Federation is concerned that these particular offences have and will continue to be applied disproportionately to Muslim individuals and organisations. In our current social context, media and political manoeuvring has been such that the term 'terrorism' has become largely associated with Muslim organisations. Despite the definition of 'terrorist organisation' being extremely broad, it has only been applied to Muslim organisations to date, with one exception. It is our concern, that the acts of a Muslim organisation may be more likely to render it labelled a 'terrorist organisation' than the same acts would if they were committed by a non-Muslim organisation. For example, where a Muslim organisation somehow indirectly fosters the doing of a terrorist act it is more likely to be viewed as a terrorist organisation itself than would, for example, a secular or a Christian organisation which did the same thing. The corollary of this is that Muslim individuals are much more likely to be prosecuted for the above offences than their non-Muslim counterparts where both have the same, highly tenuous link to specific acts of ideologically motivated violence. This has clearly been illustrated insofar as there has been no indication that members of neo-Nazi or white supremacist groups involved in the Cronulla riots would be prosecuted for terrorist organisation offences although arguably their organisations would fall under the required definition for listing.

The suppression of political affiliations and deeply held convictions has the likely long term impact of criminalising political and ethnic identity, particularly where that identity is bound up in liberation struggle. In a multicultural society where diverse communities maintain a range of otherwise political aspirations and connections with movements for self-determination, proscription will criminalise entire communities via a specific type of ethno-political profiling by authorities. The listing provisions are likely to translate into a general power of surveillance to circumscribe political views and affiliations, predicated on ASIO's characterisation of particular ethnic communities. For example in the review of the listing of the PKK, ASIO was asked to identify any violent conduct of concern by Kurdish Australians. In response, ASIO pointed to four demonstrations at embassies, one of which involved property damage. As the minority pointed out, this kind of activity is not remotely 'terrorist'.[27] This raises the alarming spectre of the criminalisation of protest.

The long-term social impacts of proscription, primarily the social exclusion of vulnerable ethnic communities, should not be under estimated and requires serious consideration. In our view, the provision of government education programs explaining counter-terrorism laws, do not address the causes and profoundly draconian and potentially devastating impacts of criminalisation.

[27] *Review of the listing of the Kurdistan Workers' Party (PKK),* Minority Report at para 1.16, 1.17.