GILBERT + TOBIN
CENTRE OF PUBLIC LAW

THE UNIVERSITY OF NEW SOUTH WALES

FACULTY OF LAW

9 February 2007

Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Secretary

Review of the Listing Provisions of the Criminal Code Act 1995

1. Thank you for inviting the Gilbert + Tobin Centre of Public Law to made a submission to this inquiry.

2. We accept the need for laws that target organisations as part of Australia's response to terrorism. While there are legitimate concerns with banning any organisation, we recognise that the proscription of terrorist organisations is a practical and appropriate means of addressing the problem of terrorism. Proscription targets the growth and development of terrorist groups, and clearly identifies to the public those organisations with which it is unlawful to be involved. Such an approach is also consistent with widespread international practice, with the United States, the United Kingdom, Canada and New Zealand all having some form of proscription.

3. In summary, we recommend:
   1. Proscription should occur by regulation made by the Governor-General on the advice of the Attorney-General.
   2. The Attorney-General should only act after consulting with an independent, statutory advisory committee. The number of times the Attorney-General departs from the advisory committee's advice should be reported annually.
   3. The proscription process should include:
      a) more specific statutory criteria;
      b) a process to notify affected people of a proposal for proscription and a right to be heard; and
      c) wider publicity of proscription decisions.
   4. Paragraph (c) should be deleted from the definition of 'advocates' in s 102.1(1A).
   5. Existing review mechanisms, including the role of the Parliamentary Joint Committee on Intelligence and Security, should be retained.

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

6. There should be a mechanism for merits review by the Security Appeals Division of the Administrative Appeals Tribunal of the Attorney-General's decision to proscribe an organisation.
7. The offences in Div 102 should be amended as recommended by this Committee in its Review of Security and Counter Terrorism Legislation and s 102.8 should be repealed.

The decision-maker

4. We support the first option proposed by the Security Legislation Review Committee (SLRC) that proscription decisions be made by regulation on the advice of the Attorney-General in consultation with an independent, statutory advisory committee.

5. We are convinced by the reasons set out in the SLRC report that it is appropriate that the executive undertake the decision-making role given the nature of the process. If proscription is to be used as a preventative tool, courts may not be able to act early or quickly enough, or have access to all the necessary information. Courts and their procedures are not best equipped to make prompt decisions about sensitive national security issues where much of the information may be inadmissible. Further, the parliamentary process provides some oversight and accountability and the continuing review mechanism ensures that each case is reconsidered at least every two years.

6. In light of the very serious consequences which flow from such a determination there should be mechanisms to inform and constrain the Attorney-General's decision. This includes the establishment of a statutory advisory committee to provide advice to the Attorney-General. The committee should comprise people independent from the proscription process with relevant expertise in security, law and government. These could include members similar to those on the SLRC committee, that is, a retired judge as chair of the committee, the Inspector-General of Intelligence and Security, the Privacy Commissioner, the Human Rights Commissioner and the Commonwealth Ombudsman, as well as security experts such as former senior staff of ASIO and the Office of National Assessments. Such a committee would add to the integrity of the proscription process by providing for expert advice and public consultation.

7. Ideally, the reports of the advisory committee would be publicly available, but it is likely that security concerns would make this impractical. An alternative approach that would allow for a measure of transparency would be to require annual reporting of the number of times the Attorney-General departs from the advisory committee's advice.

Recommendation 1: Proscription should occur by regulation made by the Governor-General on the advice of the Attorney-General.

Recommendation 2: The Attorney-General should only act after consulting with an independent, statutory advisory committee. The number of times the Attorney-General departs from the advisory committee's advice should be reported annually.

Making the proscription decision

8. We agree with the SLRC's recommendations that the proscription process should meet the requirements of administrative law, such as natural justice, and be made more transparent. The criteria for proscribing an organisation should be set out in the legislation. People affected by the proscription of an organisation as a terrorist organisation should be notified of a proposal to proscribe the organisation and given a right to be heard. Once an organisation has been

proscribed, its proscription should be widely publicised so that people in danger of committing related offences are aware of this risk and can take action to avoid it.

9. We agree with the SLRC that ASIO's current evaluation criteria, supported by this Committee in its *Review of the listing of four terrorist organisations*, could be used a starting point for the criteria. These criteria are:

- engagement in terrorism;
- ideology and links to other terrorist groups/networks;
- links to Australia;
- threat to Australian interests;
- proscription by the UN or like-minded countries; and
- engagement in peace/mediation processes.

10. Requiring such criteria to be considered would appropriately circumscribe the Attorney-General's discretion in determining which organisations should be proscribed. It would also create greater transparency by informing the public as to the reasons for which an organisation might be determined to be a terrorist body.

11. Natural justice demands that when an order is to be made that will deprive a person of a right, interest or legitimate expectation of a benefit, that person is entitled to know the case made against them and be given the opportunity to reply to it.[1] The legislation should expressly provide that people affected by a proposed proscription are notified and given a right to be heard, in line with the requirements of natural justice. The Advisory Committee recommended above could play a role in consulting with and hearing from affected people.

12. The proscription of a terrorist organisation triggers the application of offences to people involved in that organisation. Under s 102.5, for example, a person who provides training of any kind to a terrorist organisation is guilty of an offence punishable by up to 25 years in jail unless they can point to evidence that they were not reckless to the circumstance that the organisation was a terrorist one. Widely publicising a proscription decision will alert people in contact with terrorist organisations of the possibility they may be committing an offence. Improving the process of proscription will also provide greater transparency and allow the community to gain a better understanding of how the system operates. Doing so would go some way to addressing the SLRC's recommendation that the government make greater efforts to communicate with the public, in particular the Muslim and Arab communities.

13. One immediate difficulty with providing some specific form of notification is that the offence of membership of a terrorist organisation in s 102.3 extends to 'informal members' by virtue of the definition in subs 102.1(1). However, we note and support this Committee's earlier recommendation that this offence be replaced by one simply of participation in such an organisation (PJCIS, *Review of Security and Counter Terrorism Legislation*, Canberra, December 2006, Recommendation 15).

Recommendation 3: The proscription process should include:

a) more specific statutory criteria;
b) a process to notify affected people of a proposal for proscription and a right to be heard; and
c) wider publicity of proscription decisions.

[1] See *Kioa v West* (1985) 159 CLR 550 and the SLRC's discussion of this and other cases at pages 81 to 84 of their *Report of the Security Legislation Review Committee* (2006).

Advocacy as a ground for proscription

14. We support the SLRC's recommendation to remove paragraph (c) from the definition of advocacy in subsection 102.1(1). Under the existing law, an organisation can be proscribed if the Attorney-General is satisfied on reasonable grounds that the organisation advocates the doing of a terrorist act (subsection 102.1(1A)). Paragraph (c) means that an organisation can be proscribed when the organisation praises terrorism even if the praise does not result in a terrorist act, it was not intended that a terrorist act would occur and the organisation has no substantive involvement in terrorism. There need only be a risk that such praise might lead a person to engage in a terrorist act, regardless of that person's age or mental capacity.

15. It is unclear what would actually constitute advocacy and praise. Must the statement be made publicly or are private statements also included? Does the statement need to take the form of a formal statement or would the words of a leader (or even a single member) suffice? If the latter, it is possible that an organisation may be banned on the basis of statements that not all its members support.

16. The definition of 'terrorist act' covers acts that form part of a struggle for liberation, such as the actions of Nobel Prize winner Nelson Mandela.[2] A person who praises Nelson Mandela's resistance against apartheid in South Africa may risk encouraging someone else in Australia or elsewhere in the world to take up arms against a similarly abhorrent regime. Incredibly, such praise could place the person's organisation at risk of being proscribed as a terrorist organisation. Many other potential examples come to mind, such as where someone praises past liberation struggles in East Timor or against a colonial power, or current battles in West Papua, the Middle East and parts of Africa. Whatever the merits or otherwise of these struggles, the Australian law is far too broad.

17. In attempting to explain the causes of terrorism, organisations such as Red Cross or Amnesty International must also take care not to be seen as supporting such activities. If they were, then on a strict reading of the Criminal Code the Attorney-General may be entitled to proscribe the organisation and its members could face criminal prosecution.

18. Once banned, an organisation's members face jail under the associated offences. While it may be acceptable to ban groups which actively engage in, or prepare for, terrorism, it is not justifiable to ban an entire group merely because someone affiliated with it praises terrorism. Speech which directly incites a specific crime or urges violence against Australia may be prosecuted as incitement or sedition. It is quite another matter to prosecute a third person for the statements of another, even more so when such statements need not be directly and specifically connected to any actual offence or where the person being prosecuted may not even agree with what has been said.

Recommendation 4: Paragraph (c) should be deleted from the definition of 'advocates' in s 102.1(1A).

[2] A recent United Kingdom High Court decision found that the meaning of 'terrorism' in UK's anti-terror laws includes assistance for a regime change irrespective of the nature of the regime; that is, it includes struggles by a liberation movement against an undemocratic and oppressive regime: *R v F* (unreported, Woolwich Crown Court, Mackay J, 25 January 2007). The decision was scheduled for appeal in the Court of Appeal on 5 February 2007.

Mechanisms for review

19. While we recognise the need for proscription, it cannot be forgotten that this is an extraordinary measure. As such, appropriate safeguards must be in place. We acknowledge that the proscription process already contains several safeguards, including judicial review, Parliament's power to disallow proscription regulations, the ability of the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman to conduct investigations into the administrative conduct of the executive, and the power of the Committee to review regulations proscribing terrorist organisations. We are of the view that the role of this Committee in reviewing the proscription of organisations should be preserved. The existence of dissenting reports is also encouraging in that it shows that despite the sensitivity of the material being considered the Committee provides a forum for reasoned disagreement. We support the continued role of the Committee in reviewing proscription decisions.

Recommendation 5: Existing review mechanisms, including the role of the Parliamentary Joint Committee on Intelligence and Security, should be retained.

20. An additional review mechanism should be established. Merits review by the Security Appeals Division of the Administrative Appeals Tribunal (AAT) should be made available to people who wish to challenge the Attorney-General's decision to proscribe a terrorist organisation. The Security Appeals Division currently has the power to review preventative detention orders, ASIO security assessments and decisions relating to access to archived ASIO records. As such, it has experience in, and procedures for, operating in a secure environment and dealing with highly sensitive information. For example, the proceedings are held in private, Tribunal members and staff working in the Division are security cleared, and the applicant and their representative can be excluded from hearing sensitive evidence or submissions at the Minister's discretion.

21. This would allow an independent and expert tribunal to decide based on the facts before it whether the Attorney-General made the correct decision to proscribe an organisation in accordance with the law.

Recommendation 6: There should be a mechanism for merits review by the Security Appeals Division of the Administrative Appeals Decision of the Attorney-General's decision to proscribe an organisation.

Offences

22. A major concern with the proscription regime is its interaction with the offences in Div 102. While the scope of this review is limited to s 102.1 of the *Criminal Code*, this provision has implications for offences that refer to 'terrorist organisations'. The process for proscribing organisations cannot be considered without having regard to its effect.

23. It is a general principle of criminal law and the government's policy that the elements of an offence should be provided for in the offence provision and not left to be provided for by some other instrument.[3] This ensures that the prosecution must prove every element of the offence and that a person can easily ascertain what conduct is permitted and what conduct is not permitted.

---

[3] See Australian Government, *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, issued by the authority of the Minister for Justice and Customs, February 2004, 27-28.

24. In this case, the fact that an organisation is a terrorist one is central to the question of culpability in the offences in Div 102. To turn again to s 102.3 by way of example, a person can be guilty of an offence for being a member, or even informal member, of an organisation that the executive has proscribed as terrorist. They can only contest their status as a member, not the crucial element of whether the organisation was actually a terrorist one. The executive, rather than the judiciary, determines whether an organisation is a terrorist organisation.

25. While we believe that proscription should remain with the executive, subject to the enhanced safeguards discussed earlier, our concerns about the power to ban grounds would also be addressed by amending the offences to ensure that they are more carefully targeted. The amendments recommended by this Committee in its *Review of Security and Counter Terrorism Legislation* would improve the scheme by ensuring that the prosecution must prove, and the defendant can contest, the culpable behaviour targeted by the offence. Such amendments include replacing the membership offence with a participation offence linked to the purpose of furthering terrorist aims and amending the training offence to target particular types of training. The association offence in s 102.8 should also be removed, as recommended by the SLRC.

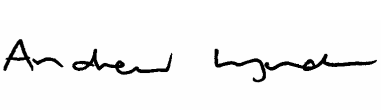
Recommendation 7: The offences in Div 102 should be amended as recommended by this Committee in its Review of Security and Counter Terrorism Legislation and s 102.8 should be repealed.

A judicial process

26. Should reform of the proscription process and the offences to which it pertains not occur along the lines we favour above, we support the alternative judicial process proposed by the SLRC in preference to retention of the status quo. A judicial model would also address our major concerns with the current system by providing an opportunity for people affected by a proscription decision to be heard and for decisions triggering offences to be made by a court. A judicial process would also allow for greater transparency and would improve public confidence in the independence and integrity of the process.

27. Various arguments for a judicial process have been advanced. A judicial process model certainly has its own strengths and we would see the introduction of it as a worthwhile improvement on the current model. However, having seen the current process in practice and other developments domestically and internationally, we are of the view that proscription by regulation combined with appropriate safeguards and more limited offences is preferable.

Yours sincerely,



Dr Andrew Lynch
Director
Terrorism and Law Project

Edwina MacDonald
Senior Research Director

Professor George Williams
Anthony Mason Professor
and Centre Director