Secretary

Parliamentary Joint Committee on ASIO, ASIS and DSD

Parliament House
Canberra ACT 2600

14 January 2005

Dear Secretary

Submission in relation to listing of Al-Qa'ida and other groups as 'terrorist organisations' under the *Criminal Code*

I would like to thank the Parliamentary Joint Committee on ASIO, ASIS and DSD ('the Committee') for the opportunity to make a submission in relation to the proscription of Al-Qa'ida, Jemaah Islamiyyah, Abu Sayyaf, Armed Islamic Group, Jamiat ul-Ansar and Salafist Group ('the proscribed groups') under the *Criminal Code.*

My submission largely addresses broader considerations. It, firstly, comments on the approach that should be taken by the Committee in exercising its power to review under section 102.1A(1) of the *Criminal Code.* It then argues that these specific listings, in fact, confirm the view that there is no need for the proscription power under the *Criminal Code* in efforts to prevent politically/ideologically-motivated violence. Finally, it suggests principles that should govern the exercise of the proscription power.

I SUGGESTED APPROACH FOR EXERCISING REVIEW POWERS UNDER SECTION 102.1A(1) OF THE *CRIMINAL CODE*

The Committee should be credited for taking a robust approach towards its power to review under section 102.1A of the *Criminal Code*. Specifically, it should be commended for adopting protocols which ensure *merits review* of *each* listing.[1]

Such an approach clearly finds support in the Committee's view that there is no other avenue for merits review. It finds further support in its correct view that its advice is critical for 'the Parliament . . . (to) have the clearest and most comprehensive information' when deciding whether or not to disallow a regulation listing a 'terrorist organisation' under the *Criminal Code*.[2]

The Committee's approach is additionally justified by its obligation to review the operation, effectiveness and implications of the proscription power under the *Criminal Code* as soon as possible after 10 March 2007.[3] It is similarly justified by the Committee's obligation to review the operation, effectiveness and implications of various 'terrorism' offences including those pertaining to 'terrorist organisations' as soon as possible after July 2005.[4]

These obligations, in fact, strongly suggest that the Committee when exercising its power under section 102.1A(1) of the *Criminal Code* should not only review the merits of the *specific* listing but should also have an eye towards the desirability or otherwise of the *proscription power itself*. Such an approach will mean that the Committee will be in a stronger position when required to review the proscription power and its attendant offences; reviews that should be based upon a broad-ranging understanding of the operation of the proscription power.

I, therefore, recommend, that the Committee should pursuant to section 102.1A(1) of the *Criminal Code:*

- **review each listing of an organisation as a 'terrorist organisation';**
- **review such listings on its merits;**

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[1] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) ('PIJ report') [2.9].
[2] PIJ report [2.8].
[3] *Criminal Code* (Cth) s 102.1A(2).
[4] *Intelligence Services Act* (Cth) s 29(1)(ba).

- **review such listings with a view towards evaluating the desirability or otherwise of the proscription power under the *Criminal Code.***

II LISTED GROUPS PROVE LACK OF NECESSITY FOR PROSCRIPTION POWER

In the debate leading up to the passage of the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), many groups and individuals argued that a power to ban or proscribe 'terrorist organisations' was unnecessary in efforts to prevent politically/ideologically motivated violence.[5]

This argument for lack of necessity is simple. It says that if the aim is to prevent politically/ideologically motivated violence and acts that intentionally assist such violence, a power to proscribe or ban organisations is unnecessary because such violence and acts are already illegal.

If there were organisations that would seriously put this argument to the test, it would be the proscribed groups which include al-Qa'ida. On the contrary, they vindicate this position. It would appear from the supporting material that the key acts relied upon for the proscription of these groups are: 'murders, bombings, extortion and kidnap-for-ransom';[6] 'hijackings, bombings';[7] 'hijackings, bombing and abductions';[8] 'murders, kidnappings, bombings, robbery, extortion and looting'[9] and 'suicide attacks and car bombs'.[10]

Even without the proscription power and the 'terrorism' offences, these acts were already illegal with many, notably murder, punishable by severe penalties. In a similar vein, persons deliberately assisting such acts, while not directly engaged in them, would be caught by the offences of conspiracy and/or incitement.[11] When the broad-

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[5] See Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation Amendment (Terrorism) Bill 2002 [No 2] etc* (2002) [3.101]-[3.140].
[6] Attachment A: Abu Sayyaf Group.
[7] Attachment B: Armed Islamic Group.
[8] Attachment C: Jamiat ul-Ansar
[9] Attachment D: Salafist Group for Call and Combat.
[10] Attachment B: Jemaah Islamiyah.
[11] See, for example, *Criminal Code* ss 11.2 & 11.4-11.5.

ranging 'terrorism' offences under the *Criminal Code* are put in the picture, the lack of necessity of the proscription power becomes even more stark.[12]

In short, the listing of the proscribed groups or, more accurately, the ostensible justifications for their listings demonstrate that the proscription power under the *Criminal Code* still remains unnecessary in efforts to prevent politically/ideologically motivated violence.

III PRINCIPLES TO GOVERN EXERCISE OF PROSCRIPTION POWER UNDER *CRIMINAL CODE*

Those who opposed a proscription power not only argued that it was unnecessary but that it carried very significant dangers. Many of these concerns were voiced by Senator John Faulkner, then ALP Senate leader, when he said in relation to the original proposal for a proscription power under the *Criminal Code* that it provided:

> a regime of secret proscriptions, of decisions in closed rooms, or significant and potentially destructive power in the hands of one person alone.[13]

These comments underscore two dangers with proscription powers: *secrecy* and *arbitrariness*.

It is clear that both dangers have been realised. In relation to secrecy, the criteria and procedures relied upon by the Attorney-General and ASIO in the process leading to a proscription of a group has not been made fully public.[14] While the supporting information in relation to the proscribed groups states that ASIO assesses such information to be 'accurate and reliable', there is no indication of the evidence relied upon ASIO for its assessment. All these point to the fact that the proscription power has been exercised based on secret criteria, processes and evidence.

There is also good evidence that this power has been exercised in an arbitrary fashion. The Parliamentary Library has recently published an excellent research note entitled, 'The politics of proscription in Australia'. Its key thesis is that the *Criminal Code* proscription power has, to date, been exercised on an inconsistent basis: for instance,

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[12] *Criminal Code* Part 5.3.
[13] Commonwealth, *Parliamentary Debates*, Senate, 16 June 2003, 11432 (Senator John Faulkner).

some organisations with links to Australia have not been proscribed while others with no links have been banned.[15] Further, there is a dramatic inconsistency between the groups proscribed under the *Criminal Code* and those that have been listed by the Foreign Minister under the *Charter of UN Act*.[16] Importantly, all the organisations proscribed under the *Criminal Code* are Muslim groups. At the very least, this gives rise to a reasonable apprehension that Muslims are being targeted by the government in the 'War on Terror'.

In light of this, even if the Committee accepts the desirability of this power, it should, in my view, strive to ensure that this power is exercised in a manner that is:

- transparent;
- based upon valid criteria; and
- informed by sufficient evidence.

Such considerations are significant not only because they ensure due process to those affected by the use of the proscription power but also because they will promote the effectiveness of efforts to prevent politically/ideologically motivated violence. In a general way, they promote community confidence in such efforts. Such confidence, in turn, will facilitate co-operation required to detect and prevent politically/ideologically motivated violence.

Moreover, all these considerations will facilitate better decision-making in relation to this power by requiring rational criteria and good evidence. They will, in the Committee's words, put in place 'a more considered process'.[17]

In a powerful sense, the twin virtues of these considerations, ensuring due process and promoting effectiveness of efforts to prevent politically/ideologically motivated violence, refute the view that there is a necessary 'tension between security and civil liberties'.[18] They demonstrate that measures that safeguard civil liberties by ensuring

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[14] The process followed by ASIO in relation to the proscription of Palestinian Islamic Jihad have been detailed at PIJ report [3.16].
[15] Nigel Brew, *The politics of proscription in Australia: Parliamentary Library Research Note No 63/2003-04* (2004).
[16] For latter, see http://www.dfat.gov.au/icat/persons_entities.
[17] PIJ report [3.23].
[18] PIJ report [1.1].

due process, in many ways, enhance the efficacy of efforts to promote physical security.

A *Transparency*

At the very least, the criteria and procedures relied upon by the Attorney-General in determining whether or not to list a group as a 'terrorist organisation' under the *Criminal Code* should generally be made public.[19] The same should apply to criteria and procedures relied upon by the Australian Security Intelligence Organisation ('ASIO') in recommending that a group be proscribed as a 'terrorist organisation'. Similarly, the evidence relied upon by the Attorney-General and ASIO in relation to specific proscriptions should generally be made public.

I, therefore, recommend that:

- **the criteria and procedures relied upon by the Attorney-General in determining whether or not to list a group as a 'terrorist organisation' under the *Criminal Code* should generally be made public;**
- **the criteria and procedures relied upon by ASIO in recommending that a group be proscribed as a 'terrorist organisation' should generally be made public; and**
- **the evidence relied upon by the Attorney-General and ASIO in relation to specific proscriptions should generally be made public.**

B *Proper Criteria*

I agree with officers from ASIO and Attorney-General's Department that:

> the role of the Committee was to ensure that . . . the public supporting statement on the listing offered sufficient reasons for the listing.[20]

The point to be made, however, is that with a 'broad generic definition of a terrorist organisation',[21] the mere fact that a group meets the statutory definition of a 'terrorist organisation' should not be sufficient to justify its proscription.

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[19] See PIJ report [2.9].
[20] PIJ report [2.2].
[21] PIJ report [3.5].

This definition embraces organisations that many members of the Australian public will not consider 'terrorist' organisations. This notion, firstly, draws upon the wide definition of a 'terrorist act'[22] which, at its margins, embraces certain forms of industrial action like picketing by nurses.[23] Moreover, it is not restricted to organisations whose principal activities are the promotion and engagement of extreme acts of ideological/religious violence. A 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act.[24]

If the statutory definition were the sole criterion for the proscription of a group then it is strongly arguable that the Liberal Party should be proscribed for its support of the use of military force in Iraq. Such military force clearly meets the statutory definition of a 'terrorist act'. Among others, it caused deaths and was done 'with the intention of advancing a political . . . cause', whether it be democracy, freedom or otherwise and 'with the intention of coercing . . . the government of . . . a . . . foreign country', namely, coercing the then existing Iraqi government.[25]

If the use of military force in Iraq is a 'terrorist act' under the *Criminal Code* then an organisation that is 'directly or indirectly . . . fostering' the use of such force, for instance, through political support would, like the Liberal Party, be a 'terrorist organisation' under the *Criminal Code.*

This example clearly demonstrates that besides legal sufficiency, there should be additional criteria for the proscription of organisations under the *Criminal Code.* A key criterion should be the principle that the proscription power is used only after

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[22] *Criminal Code Act* s 100.1.
[23] While the definition of a 'terrorist act' excludes 'industrial action' (*Criminal Code Act* s 100.1), this is unlikely to afford any protection to picketing which has been found not to be 'industrial action' under the *Workplace Relations Act 1996* (Cth): *Davids Distribution Pty Ltd v National Union of Workers* (1999) 165 ALR, 550, 575 per Wilcox and Cooper JJ (with whom Burchett J agreed at p. 586). For commentary on this case, see John Howe, 'Picketing and the Statutory Definition of 'Industrial Action'' (2000) 13 *Australian Journal of Labour Law* 84-91. The ruling in Davids has subsequently been applied in *Auspine Ltd v CFMEU* (2000) 97 IR 444; (2000) 48 AILR ¶4-282 and *Cadbury Schweppes Pty Ltd v ALHMWU* (2001) 49 AILR ¶4-382.
[24] *Criminal Code* s 102.1.
[25] Ibid s 100.1. See generally Ben Goulder and George Williams, 'What is 'Terrorism'?: Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270.

other strategies to prevent or deter the targeted acts of political/ideological violence have been found to be ineffectual.

In this respect, there are clearly other strategies that law enforcement and security agencies can utilise in preventing such acts; strategies that do not suffer from the dangers of secrecy and arbitrariness. For instance, prosecutions of alleged perpetrators have the benefit of such prosecutions being determined in an open court based on credible evidence.

Further, it must always be borne in mind that the exercise of the proscription power under the *Criminal Code* imposes criminal liability upon entire group and persons who engage in certain forms of association with the proscribed group. In other words, it imposes guilt by association and breaches the principle that criminal liability should be based on an individual's actions in causing harm or damage.

Breach of this principle is highlighted by the fact that the 'terrorist organisation' offences criminalise conduct distantly related to acts like bombings and hijackings. The 'terrorist organisation' training offence vividly illustrates this. A 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act. Moreover, the training element of these offences does not have to be related to a 'terrorist act': it suffices that any training is received or provided to a 'terrorist' organisation.[26] For example, an aid worker providing 'first aid' training in to a predominantly charitable organisation s/he knows has, on a few past occasions, engaged in an extreme act of ideological/political violence would clearly be committing a training offence. Even more vividly in light of the tsunami-disaster, an aid worker providing such training to movements such as Gerakan Aceh Merdeka or the Tamil Liberation Tigers, groups that are known to have resorted to acts of ideological/political violence, would definitely be culpable under this offence despite having no direct involvement with such violence. Given that there is knowledge that the organisation is a 'terrorist' organisation, the aid worker in both scenarios presently faces the prospect of 25 years in jail.

[26] *Criminal Code* s 102.5.

To minimise the breach of the principle that criminal liability should be imposed because of an individual's actions in causing harm or damage, the proscription power should be used only against organisations whose principal activities are acts of political/ideological violence.

Finally, prior to proscribing a group, the Attorney-General should consider the impact of any proscription on freedom of political association and communication. This is important as a matter of principle given the 'serious consequences'[27] that result from a proscription.[28] It is also probably required the *Constitution.*[29]

I, therefore, recommend that criteria for the use of the proscription power under the *Criminal* should include the following:

- **the proscription power should only be used once other strategies, for instance, prosecutions of persons engaged in politically/ideologically motivated violence have been found to be ineffectual;**
- **it should only be used against groups whose principal activities involve extreme acts of political/ideological violence; and**
- **it should be exercised after considering the impact of any proposed proscription on freedom of political speech and association.**

C *Sufficient Evidence*

There are various aspects to this criterion. First, the evidence should demonstrate that any criterion and procedure relied upon has been met or complied with. Further, such evidence should be credible. There is, of course, an important role to be played in this respect by the internal processes of the Attorney-General's Department and ASIO. Equally important are review avenues like that provided by this Committee. There are, however, limitations to the Committee's ability to scrutinise in-depth the

[27] PIJ report [3.23].
[28] These concerns have been acknowledged by the Attorney-General, Philip Ruddock: Philip Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, 257.
[29] For further discussion, see Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations' (2004) 27 *University of New South Wales Law Journal* 482, 484-499.

evidence relied upon by the Attorney-General and/or ASIO not least the length of time available which the Committee itself has acknowledged as 'quite short'.[30]

To provide a proper system of reviewing the evidence used in relation to a proscription, I **recommend that the Inspector-General of Intelligence and Security be obliged to review the veracity and credibility of such evidence.**

I thank members of the Committee for reading this submission. Should the Committee have any queries, please do no hesitate to contact me.

Yours sincerely,

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[30] PIJ report [2.4].