HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY REVIEW OF THE POWER TO PROSCRIBE TERRORIST ORGANISATIONS

February 2007

INTRODUCTION

1. The Human Rights and Equal Opportunity Commission (HREOC) makes this submission to the Parliamentary Joint Committee on Intelligence and Security review of the power to proscribe organisations as terrorist organisations (the PJCIS Review).

2. The Criminal Code (Cth) establishes a process where the Attorney-General has a broad discretion to proscribe and delist a 'terrorist organisation'. HREOC has previously expressed its concern that the proscription process does not comply with human rights principles to the Security Legislation Review Committee (the Sheller Committee).[1] This submission reiterates those concerns and endorses the Sheller Report's recommendation that:

> [the proscription] 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.[2]

3. In raising its concerns, HREOC emphasises that international human rights law is not an 'optional extra' during times of concern about international terrorism. International human rights law permits States to take protective actions to prevent terrorism but requires that those actions be necessary and proportionate to meet the gravity of the threat.[3]

4. HREOC submits the PJCIS should adopt this 'human rights approach' to reviewing the operation of the proscription process because it:

   - involves asking whether the legislation is a reasonably proportionate means to achieve national security; and

   - is consistent with Security Council resolutions on terrorism, which require anti-terrorism laws to be consistent with international human rights law.[4]

SUMMARY: WHY SHOULD THE PROSCRIPTION PROCESS BE REFORMED?

5. HREOC is concerned the Attorney-General's power to proscribe or delist a terrorist organisation does not satisfy the international human rights law requirement that any interference with ICCPR rights (in this case, the right to association and freedom of expression) be prescribed by law and be proportionate and necessary to achieve a legitimate end.

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[1] HREOC, Submission to Security Legislative Review Committee, January 2006, available at http://www.hreoc.gov.au/legal/submissions/security_legislation_review.html

[2] Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), Recommendation 3.

[3] In an Australian context, this requirement involves asking whether legislation is a reasonably proportionate means of achieving the intended object of protecting the security of people living in Australia and Australians living overseas. This approach was adopted by the Sheller Committee in assessing the operation and effectiveness of counter-terrorism legislation, including the power to proscribe terrorist organisations. Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), 3

[4] See UN Secretary-General's keynote address to the Closing Plenary of the International Summit on Democracy, Terrorism and Security, Madrid, Spain, 10 March 2005. See also, Security Council Resolution 1373 (2001) adopted by the Security Council at its 4385th meeting, on 28 September 2001.

6. HREOC believes inadequate safeguards in the current proscription process create the potential for arbitrary and disproportionate decision-making. HREOC's key concerns are:

    - The absence of criteria for the exercise of the Attorney-General's discretion to proscribe or delist a terrorist organisation;

    - The lack of opportunities for organisations or individuals to oppose the proposed proscription of an organisation;

    - The absence of merits review of the Attorney-General's decision to proscribe a terrorist organisation or not to delist a terrorist organisation.

7. If the decision to proscribe a terrorist organisation is made arbitrarily or on the wrong facts it may disproportionately infringe the rights of freedom of association and freedom of expression.

8. HREOC endorses the Sheller Committee's recommendation to create a more transparent proscription process. The fact that, as a result of proscription, a person associated with an organisation may be charged and convicted of serious criminal offences reinforces the need for a fairer and more transparent proscription process. A more transparent proscription process would increase public confidence in the proscription regime and help allay fears that the proscription regime unfairly targets Muslim and Arab communities.

9. HREOC recommends that to create a transparent, fair proscription process that complies with Australia's international human rights obligations,

    - The proscription process should be a judicial rather than executive process; or

    - In the event that a judicial proscription process is not adopted, the existing proscription provisions should be amended to:

        - Include the criteria to be taken into account by the Attorney-General in determining whether to proscribe or delist a terrorist organisation; and

        - Allow judicial merits review of the Attorney-General's decision to proscribe an organisation under the Act.

WHAT IS THE FOCUS OF THIS REVIEW?

10. Section 102.1A (2) of the *Criminal Code Act 1995* requires the PJCIS to review, as soon as possible after March 2007, the operation, effectiveness and implications of subsections 102.1(2), (2A), (4), (5), (6), (17) and (18) and report the Committee's comments to each House of Parliament and the Minister.

11. In summary, the provisions being reviewed set up a process for the executive proscription of a 'terrorist organisations' subject to very limited statutory safeguards:

    - Section 102.1(2) provides for the proscription of an organisation as a terrorist organisation where the Attorney General is satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a 'terrorist act' (whether or not the terrorist act has occurred or will occur) or 'advocates' the doing of a terrorist act.

- Section 102.1(2A) provides that before a regulation is made proscribing an organisation as a terrorist organisation the Leader of the Opposition to be briefed in relation to the proposed regulation.

- Section 102.1(4) enables the Attorney-General can decide to repeal the listing of a proscribed terrorist organisation, although section 102.1(5) states such a decision does not prevent an organisation from being re-listed.[5]

- Section 102.1(17) provides that an individual or organisation (including the proscribed organisation) can make an application to the AG to be de-listed. Section 102.2(18) states that while the AG has to consider the application, the AG has absolute discretion as to the matters the AG may consider in deciding whether to de-list an organisation.[6]

12. HREOC notes that while an applicant whose application for de-listing has been refused may apply for judicial review of the Minister's decision under the *Administrative Decisions (Judicial Review) Act 1975* (Cth) (the 'ADJR Act'), the factual correctness of the decision itself is not subject to merits review.

13. HREOC observes that certain provisions of the Criminal Code which have a significant impact on the operation of the Attorney-General's proscription power are not the subject for this review, including the broad definition of 'terrorist act' in s100.1 and 'advocates' in s102.1(1A)[7]. HREOC notes both these provisions were the subject of the recent PJCIS review and supports the PJCIS recommendations to amend s100.1 and s102.1(1A) to improve the specificity of these definitions[8].

14. HREOC reiterates its concern that the overly broad definition of 'advocates', which forms the basis of the second limb of the Attorney-General's proscription power, may potentially lead to disproportionate outcomes and impermissibly restrict the right to freedom of expression.[9] As well as supporting the PJCIS report's recommendation to amend the reference to 'risk' in the definition of 'advocates' to 'substantial risk'[10] , HREOC also considers that the criteria to which the Attorney-General should have regard in proscribing an organisation should include specific criteria applicable to determining whether an organisation advocates terrorism.[11]

WHAT ARE THE POSSIBLE CONSEQUENCES OF PROSCRIPTION?

[5] Section 102.1(6) provides that if, under subjection (3) or (4), a regulation ceases to have effect section 15 of the Legislative Instruments Acts applies as if the regulation had been appealed.
[6] Section 102.2(18)
[7] Advocates' is defined in section 102.1(1A) as follows: (1A) In this Division, an organisation *advocates* the doing of a terrorist act if: (a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or (b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or (c) the organisation directly or indirectly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.
[8] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, Recommendations 7-14.
[9] See HREOC, Submission to Security Legislation Review Committee, January 2006, available at http://www.hreoc.gov.au/legal/submissions/security_legislation_review.html.
[10] Parliamentary Joint Committee on Intelligence and Security, *Review of Counter-terrorism and Security Legislation*, December 2006, Recommendation 14, 71.
[11] For further discussion see HREOC, Submission to Security Legislation Review Committee, January 2006, 6.15-6.17.

15. The proscription of a terrorist organisation can have very serious consequences. A person who is connected with a proscribed terrorist organisation may, at the moment of proscription, become liable to prosecution for a range of derivative offences contained in Division 102 Subdivision B of Part 5.3 of the Criminal Code.

16. The fact that criminal sanctions are consequential on the executive decision to proscribe a terrorist organisation has led to criticism of the fairness of the existing proscription process. The Sheller Report concluded that there is:

> … no sufficient process in place that would enable persons affected by such proscription to be informed in advance that the Attorney General is considering whether to proscribe the organisation, and to answer the allegation that the organisation is a terrorist organisation. A consequence of prosecution is that, in account of their connection with the organisation, persons become upon proscription liable to criminal prosecution. In that prosecution the defendant cannot deny the proscribed organisation is a terrorist organisation or for that matter an organisation… a fairer and more transparent proscription process should be devised for proscribing terrorist organisations. [12]

17. While the derivative offences (s102.2-102.8) are not the subject of this PJCIS Review[13], the fact that the executive decision to proscribe a terrorist organisation may lead to criminal sanctions is a critical consideration of any evaluation of the proscription regime.

DOES THE PROSCRIPTION PROCESS COMPLY WITH HUMAN RIGHTS?

What are the relevant human rights principles?

18. HREOC believes the broad discretion given to the Attorney-General to proscribe and subsequently de-list an organisation does not satisfy the international human rights law requirement that any interference with ICCPR rights be 'prescribed by law' and be proportionate to the legitimate aim sought to be achieved by the legislature.

19. The proscription of a terrorist organisation, and the derivative offences in the Criminal Code may give rise to a substantial interference with the right to freedom of expression[14] under article 19 of the *International Covenant of Civil and Political Rights* (ICCPR) or the right to freedom of association under article 22 of the ICCPR.

20. However, the rights set out in article 19 and article 22 are not absolute. Both articles provide that any limitation on the rights to freedom of expression and association must be prescribed or provide by law and proportionate to the legitimate end sought to be

[12] Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), 4.
[13] The derivative offences (ss102.2-102.8) and the statutory definitions contained in s102.1(1) (including the definition of 'terrorist organisation') were the subject of the PJCIS report on Security and Counter Terrorism Legislation released in December 2006 .
[14] Article 19 of the ICCPR provides 'everyone shall have the right to freedom of expression', including 'the freedom to sell, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice'.

achieved.[15] The principle of proportionality is imported into article 19(3) by the word 'necessary'[16] and into article 22(2) by the words 'necessary in a democratic society'.[17]

When are limitations on human rights permitted?

21. Both article 22 and article 19 reflect the international human rights law principle which safeguards against the arbitrary breach of human rights. This principle is that protected rights can be limited but only to the extent that the limitations are provided or prescribed by law and proportionate and necessary to achieve a legitimate end.

22. The test of proportionality adopted by the United Nations Human Rights Committee (HRC) requires that a particular limiting measure be the **least restrictive means** of achieving the relevant purpose.[18]

23. The HRC has stated that the expression 'provided by law' in the context of article 19(3) and 'prescribed by law' in the context of article 22(2) requires that the law which sets out the limiting measure must be clearly set out, [19] and not so vague as to permit too much discretion and unpredictability in its implementation.[20]

24. The HRC has stated that laws which authorise the restriction of rights 'should use precise criteria and may not confer an unfettered discretion on those charged with their execution'.[21] A provision which gives the executive an unfettered discretion may not constitute a restriction prescribed by law and may result in an arbitrary interference with ICCPR rights.[22]

25. Like the HRC, the European Court of Human Rights has held that legislative provisions giving the executive absolute discretion will not constitute a limitation prescribed by law where it leads to an arbitrary interference with ECHR rights. For example, in *Hasan and Chaush v Bulgaria*[23] the court found that the interference of the applicants' freedom of religion in that case was not prescribed by law because 'it was arbitrary and was based on legal provisions which allowed unfettered discretion to the executive and did not meet the required standards of clarity and foreseeability'.[24]

What are the human rights problems with the proscription process?

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[15] Article 19 provides the right to freedom of expression may be subject to restrictions, but these restrictions must be provided by law and necessary (a) for respect of the rights or reputations of others; or (b) for the protection of national security, public order, public health or morals. Article 22 provides the only restrictions that can be placed on the right to freedom of association are restrictions which 'are prescribed by law and which are necessary in a democratic society, in the interests of national security or public safety, public order, the protection of public health or morals or the protection of rights and freedoms of others.

[16] See *Faurisson v France*, HRC Communication No. 550/93, [8].

[17] See S Joseph, et al., *ICCPR: Cases, Materials and Commentary*, 2nd Ed, OUP 2004, [19.05].

[18] See generally regarding proportionality and the tests applied internationally: J Kirk "Constitutional Guarantees, Characterisation and Proportionality" (1997) 21 *MULR* 1.

[19] S Joseph et al., *ICCPR: Cases, Materials and Commentary*, 2nd Ed, OUP 2004, [1.67] and [18.19].

[20] S Joseph et al., *ICCPR: Cases, Materials and Commentary*, 2nd Ed, OUP 2004[1.67].

[21] Human Rights Committee, *Freedom of movement (Art.12)*, UN Doc CCPR/C/21/Rev.1/Add.9, General Comment No.27 (General Comments) available at www.unhchr.ch/tbs/doc.nsf

[22] Human Rights Committee, *Freedom of movement (Art.12)*, UN Doc CCPR/C/21/Rev.1/Add.9, General Comment No.27 (General Comments) [1.68]. See also *Pinkney v Canada* HRC Communication No. 27/1977, UN Doc CCPR/C/14/D/27/1977 available at www.unhchr.ch/tbs/doc.nsf

[23] (2002) 34 EHRR 55.

[24] (2002) 34 EHRR [86].

26. HREOC is concerned that the absolute nature of the Attorney-General's power to proscribe a terrorist organisation and the absence of adequate safeguards create the risk of arbitrary and disproportionate decision-making. These problems mean that:

    - The current proscription process may not meet the international human rights law requirement that it be 'prescribed by law';

    - The current proscription process may not pass the proportionality test.

27. HREOC does not believe the current requirements that listing regulations be placed before parliament; and that the leader of the Opposition be briefed in relation to proposed regulations, are sufficient safeguards against the potentially arbitrary exercise of the proscription power.

28. The lack of clear criteria for the exercise of the Attorney-General's proscription power, the absence of merits review of the Attorney-General's decisions, and the lack of opportunities for affected parties to oppose the proposed proscription of an organisation, may lead to arbitrary and disproportionate decision making, in breach of human rights law.[25] For example, it may be a disproportionate limitation on the right to freedom of association or expression to:

    - Proscribe an organisation whose activities are directed against a repressive and brutal regime and who do not target civilians.[26]

    - Proscribe an organisation that does not have any current known links to Australia or who has not conducted any terrorist operations against Australia or Australians.[27]

    - Impose criminal sanctions (via the derivative provisions in division 102) on a person who supports the non-violent or political wing of a specified organisation which has several aspects to its organisation.[28]

Problem 1: No criteria for the exercise of the Attorney-General's discretion

29. HREOC's first concern about the proscription process is the absence of any criteria for the exercise of the Attorney-General's discretion in proscribing an organisation as a terrorist organisation or in deciding whether to de-list an organisation.[29]

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[25] See S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428, 438.

[26] See, for instance, *The Queen (On Application of the Kurdistan Workers' Paper and Others), (On Application of the People's Mojahedin Organisation of Iran and Others) and (On Application of Lashkar e Tayyabah and Others) v Secretary of the Home Department* [2002] EWHC 644. See also, S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428, 434.

[27] See Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of four terrorist organisations*, May 2005, [3.88]-[3.89], available at http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/report.htm

[28] HREOC notes that in Australia (unlike Canada and the USA) it would appear that only the military wing of Hamas has been specified by the Attorney-General: see Henry Jackson, 'The power to proscribe terrorist organisations under the Commonwealth Criminal Code: Is it open to abuse?' (2005) 16 *Public Law Review* 134, fnte 38. However, in the absence of any criteria circumscribing the Attorney-General's power to specify an organisation as a terrorist organisation and given the breadth of the definition of 'terrorist organisation', in HREOC's view, it would be open to the Attorney-General to specify the non-violent aspect of Hamas on the basis that it indirectly assisted in or fostered the doing of a terrorist act.

30. HREOC believes the proscription provisions should be amended to clearly set out the criteria the Attorney-General must take into account when (a) deciding whether to proscribe an organisation as a terrorist organisation and (b) considering an application for de-listing. Clear criteria for decision-making would help ensure that the proscription process meets the requirement that it be 'prescribed by law' and the requirement of proportionality.

31. In its *Review of the listing of four terrorist organisations*[30] the then Parliamentary Joint Committee on ASIO, ASIS and DSD recommended that ASIO and the Attorney-General specifically address each of the following six criteria in the statements of reasons accompanying listing regulations:[31]

    - Engagement in terrorism
    - Ideology and links to other terrorist groups/networks
    - Links to Australia
    - Threat to Australian interests
    - Proscription by the UN or other like-minded countries[32]
    - Engagement in peace/mediation processes

32. In subsequent reviews of the listing of terrorist organisations, the PJCIS has repeated its recommendation that the Attorney-General and ASIO specifically address the above criteria in the statements of reason accompanying listing regulations.[33]

33. HREOC believes the factors suggested by the PJCIS could form the basis of legislative criteria to which the Attorney-General is required to consider when considering whether to proscribe or delist an organisation.[34]

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[29] An example of the process followed by the Attorney-General is contained in Chapter 1 of the Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of four terrorist organisations*, May 2005, the full text of which is available at: http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/report.htm

[30] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of four terrorist organisations*, May 2005, available at: http://www.aph.gov.au/house/committee/pjcaad/terrorist_listingsc/report.htm

[31] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of four terrorist organisations*, May 2005, [3.2].

[32] However, HREOC notes that proscription regimes in the UK and Canada and the USA operate in the context of the *Human Rights Act 1988* (UK) and the *Canadian Charter of Rights and Freedoms* and the US *Bill of Rights*, respectively. In relation to the UK, HREOC notes that the *Human Rights Act 1998* (UK) operates to ensure that the *Terrorism Act 2000* (UK) (in both its terms and operation) is consistent with the ECHR. In particular the *Human Rights Act 1998* provides affected persons with an opportunity to challenge action taken against them under the *Terrorism Act 2000*. Hence, while the proscription regime established by the Criminal Code reflects that adopted under the UK *Terrorism Act 2000*, when considering the UK Act, it should be remembered that the *Human Rights Act 1998* creates a fundamental difference in the context in which the UK and Australian laws operate.

[33] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations*, October 2006, Recommendation 1.

[34] This suggestion was welcomed by the Sheller Committee as a 'useful starting point' in determining a clear criteria for proscription See Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), [9.1]

34. Whether the proscription of a particular organisation meets the proportionality test will depend on all the facts and evidence before the decision maker at the time. HREOC considers that in addition to the criteria suggested in above paragraph 31, the Attorney-General should be required to consider whether proscription is proportionate in all the circumstances.[35]

35. Adopting clear criteria for the exercise of the Attorney-General's discretion will provide greater legal certainty to organisations and persons to whom the derivative offences may apply. It will also help meet the international human rights law requirement that the proscription process be prescribed by law and proportionate to the threat.

36. Clarifying the basis on which organisations are proscribed will (depending on the criteria) help ensure that the proscription process does not operate in a discriminatory manner, contrary to article 26 of the ICCPR.[36]

37. In the event that a judicial proscription process is adopted (see discussion in paragraphs 48-51) HREOC submits that the legislation should set out the factors the courts must consider in determining whether to proscribe an organisation, including the requirement that the proscription beproportionate in the circumstances. This will ensure that any judicial proscription process complies with the requirement that it be 'prescribed by law' and proportionate in all the circumstances.

Problem 2: Lack of opportunities to oppose the proposed proscription process

38. HREOC's second concern is the lack of opportunities for interested parties to oppose the proposed proscription of a terrorist organisation. The current proscription process does not require notice to be given to an organisation, or persons affected by a proposed proscription before the regulation is made. There is also no opportunity for an affected organisation or person to be heard in opposition to a proposed proscription. HREOC endorses the Sheller Report's view that:

> While notification in the case of some overseas organisations may be impracticable, there is no reason for not notifying an Australian organisation and its members or Australian members of an overseas organisation, if known, before the regulation is made. There is every reason why an Australian organisation and its members should be given an opportunity to oppose the proscription of an organisation.[37]

39. The importance of being able to challenge the proposed proscription of an organisation is particularly important given that, as the Sheller Report observes, a person charged with a derivative offence can not specifically raise a defence that the organisation is not a terrorist organisation or, perhaps, not an organisation at all.

40. In HREOC's view the best way to allow affected persons and organisations to be heard is to create a judicial proscription process where any person or organisation interested in

[35] This could be achieved by adopting a provision similar to s 104.4 of the Criminal Code, which imports a proportionality test. That section provides that, in relation to the making of an interim control order, the issuing court must be satisfied on the balance of probabilities that 'each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the [legitimate] purpose of protecting the public from a terrorist act'.

[36] Article 26 of the ICCPR provides that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law.

[37] Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), [8.15].

opposing the proposed proscription is given an opportunity to be heard (see discussion below at para 48-51)

Problem 3: No merits review

41. HREOC's third concern is the absence of merits review of the Attorney-General's decision not to de-list an organisation. Review of the Attorney's decision is limited to judicial review under the ADJR Act. Judicial review is the term applied to the process of checking for technical legal errors in the steps that lead to the making of the order. It is not a process that allows an investigation of whether the decision was made on the rights facts.

WHAT WOULD A TRANSPARENT PROSCRIPTION PROCESS LOOK LIKE?

42. HREOC supports the Sheller Committee's unanimous conclusions that:

- Criteria for proscription need to be determined and stated;
- Other than in exceptional circumstances, proposals to proscribe terrorists organisations should be made public and interested persons should have the opportunity to be heard before an organisation is proscribed;
- Once an organisation has been proscribed, steps should be taken to publicise the proscription with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution.[38]

43. While the Sheller Committee agreed the proscription process needed to be reformed, the Committee disagreed about whether the reformed proscription process should be a judicial process or an executive process with additional safeguards. As a result the Sheller report recommended that either:

a. the process of proscription continue by way of regulation made by the Attorney General on advice of the Governor General but subject to reforms which create:

   i. a method of providing a person, or organisation affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition;

   ii. an independent statutory advisory committee to advise the Attorney-General on the case for the proscription of the organisation. The committee should consult publicly and receive public submissions.

or

b. the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court.[39]

[38] Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), [9.1].
[39] Security Legislation Review Committee, *Report of the Security Legislation Review Committee*, (2006), XX

Option 1: A judicial proscription process

44. HREOC believes the proscription process should be a judicial rather than executive process. [40] This level of scrutiny is necessary because of:

    - the nature of the human rights which may be restricted as a result of a decision to proscribe a terrorist organisation;
    - the serious criminal sanctions that apply to the derivative offences; and
    - the requirement that, as a matter of fairness and transparency, interested parties should have an opportunity to challenge a proscription application.

45. HREOC submits that a judicial process similar to that currently existing in relation to unlawful associations in sections 30A and 30AA of the *Crimes Act 1914* (Cth) could be adopted.[41] Under the unlawful association provisions:

    - the Attorney-General may apply by way of summons to the Federal Court for an order calling upon a body of persons to show cause why it should not be declared to be an unlawful organisation; [42]
    - the summons must set out the facts relied upon in support of the application;[43]
    - any officer or member of the body may appear on behalf of the body; [44]
    - if the court is not satisfied of cause to the contrary, it may declare the body to be an unlawful association; [45] and
    - any interested person may apply to the Federal Court within 14 days to have the order set aside, with such application to be heard by the Full Court who may affirm or annul the declaration.[46]

46. Any new provisions should allowthe Attorney-General to make an urgent application for the proscription of an organisation, upon establishing reasonable grounds for the urgency.

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[40] See *Hasan and Chaush v Bulgaria* (2002) 34 ECHRR 55. See also, *Al-Nashif v Bulgaria* (2003) 36 ECHRR 37, [H14] a case involving detention for the purposes of deportation of an alien on national security grounds, the European Court of Human Rights held that: 'Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive's assertion that national security is at stake'.

[41] HREOC notes that the Gibbs report into the review of federal criminal law recommended the repeal of the unlawful association provisions on the basis that 'activities at which these provisions are aimed can best be dealt with by existing criminal laws creating such offences such as murder, assault, abduction, damage to property and conspiracy: Attorney-General's Department, Review of Commonwealth Criminal Law, *Fifth Interim Report*, AGPS 1991, 314.

[42] Section 30AA(1).

[43] Section 30AA(2).

[44] Section 30AA(5).

[45] Section 30AA(7).

[46] Sections 30AA(8) and (9).

47. Judicial oversight will help ensure that the proscription process does not operate in a politically motivated or discriminatory manner contrary to article 26 of the ICCPR,[47] Increase public confidence in the impartiality of the proscription process, and allay fears that the proscription process unfairly targets Muslim and Arab Australians.

Option 2: An executive process with stronger safeguards

48. In the absence of a judicial proscription process, HREOC considers that the reforms to the executive proscription process recommended by the Sheller Report should be implemented. In addition to these reforms, HREOC recommends that merits review should be available to persons seeking to challenge the Attorney-General's decision to proscribe an organisation.

49. Merits review, which would assess the factual basis on which a proscription decision was made, is a vital safeguard against error and abuse and would assist in ensuring that the proscription power does not operate disproportionately, and impose impermissible restrictions on the right to freedom of association and expression.[48]

50. HREOC notes that to date all terrorist organisations regulations have been subject to review by the PJCIS. However, the current practice of making all terrorist listing regulations subject to Parliamentary scrutiny is not compulsory. Therefore, in the absence of a judicial proscription process, HREOC recommends s 102.1A(1) be amended to ***require*** that terrorist organisation regulations be reviewed by the PJCIS.

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[47] Article 26 of the ICCPR requires that all persons be equal before the law and entitled without discrimination to the equal protection of the law.

[48] See S Joseph, 'Australian Counter-Terrorism Legislation and the International Human Rights Framework', (2004) 27(2) *UNSW Law Journal* 428, 438.