



Refugee Council
of Australia

Review of the Listing Provisions of the Criminal Code Act 1995

Submission to the Parliamentary Joint Committee on Intelligence and Security

9 February 2007

1. Introduction

The Refugee Council of Australia (RCOA) welcomes the opportunity to contribute to this review and raise our concerns in relation to the powers of the Australian Government to proscribe organisations as terrorist organisations (“the proscription powers”). While the scope of the review is general, RCOA will respond mainly in relation to the impact these powers have or will potentially have on refugees and asylum seekers.

In relation to the more general impact of this legislation, RCOA would like to commend the submission made by the Public Interest Advocacy Group (PIAC).

RCOA has 25 years experience in research, advocacy and policy analysis regarding international and domestic refugee issues. This submission draws on consultations we have had with key organisations and individuals working in support of refugees and asylum seekers.

2. The Proscription Powers

RCOA is manifestly opposed to terrorism or terrorist acts. However, RCOA believes, that in a democratic society which upholds the rule of law, individuals’ human rights should always be central. Anti-terrorism legislation should be carefully and skilfully balanced with the rights of the individual. A focus on individual rights is vital to ensuring that anti-terrorist legislation does not result in disproportionate responses which risk violating fundamental human rights.

RCOA is concerned about the use of the proscription powers for the following reasons:

- The proscription process lacks accountability and transparency.
- The proscription process could be used for arbitrary and political motivations, rather than genuine security concerns (as we fear has occurred in the case of the listing of the PKK [Kurdistan Workers Party] as a terrorist organisation).
- The proscription of an organisation criminalises those who are directly or indirectly imputed as its members. In practice, this could result in persons who are completely innocent of terrorist intentions being convicted and punished.
- The power breaches a key principle of criminal law, in that guilt is attributed to individuals by attributing criminal liability by association on whole groups and those associated with them.
- The power may breach freedom of expression or freedom of association under the International Covenant on Civil and Political Rights, to which Australia is a signatory.

3. The Situation of Refugees and Asylum Seekers

As noted above, the offences under the Criminal Code have the potential to criminalise non-violent activities. As such, these offences may also place refugees and asylum seekers in Australia at risk of security monitoring or prosecution for association with listed organisations. The concepts of “membership” or “association” of or with a terrorist organisation are broad, undefined concepts. Therefore, these concepts have the potential to affect a large group of refugees or asylum seekers who clearly do not support any form of armed insurgency or terrorist action.

It is important to understand the refugee experience to be able to understand the potential impact of the proscription powers on refugees. Refugees and asylum seekers come from situations where conflict has almost become a way of life. This is precisely the reason why they flee their countries and seek sanctuary in another country. In numerous circumstances, refugees are unable to choose not to become involved with the activities of a particular organisation. Civilian populations are often forced to become parties to a conflict, even if they don't agree to it. Therefore, a refugee could easily be defined as a member, associate or supporter of a certain organisation listed as terrorist, independently of their individual actions (considering the very broad scope of such definitions). In those circumstances, the proscription powers have the dangerous unintended consequence of penalising innocent people.

Additionally, in many cases, claims of persecution may be based on membership or imputed membership of certain organisations or association with an organisation which may be fighting for self determination. Many refugees and asylum seekers might be easily caught by the inclusion of certain organisations on the list of proscribed organisations. In these cases, it is essential to take into consideration both the complexity of the situation under which organisations linked with self-determination struggles (such as the PKK) operate and also the complexity of the organisations themselves. In many cases, they operate in an environment where groups face persecution for their ethnicity and where some association with the organisation which is struggling for them is unavoidable. With the passing of time, such organisations might evolve into mainstream political organisations. For example, the African National Congress, the Palestine Liberation Organisation and Fretilin may, in the past, have been classified as terrorist organisations but each is now a legitimate representative or governing party in a nation state.

Organisations linked with self determination struggles will often be involved in a range of activities of which violent action may be just one. For instance, refugees might be involved with the non-violent arm of an organisation. Many refugees may support an organisation's goals (for example, an independence struggle) but not their method for achieving it. Alternatively, they may fund an organisation for the non-violent work that they are doing. These activities should not criminalise them and subject them to prosecution.

It is a cruel irony that the same act which may result in a refugee being recognised as deserving international protection could also criminalise her or him as a member of a listed terrorist organisation. In other words, refugees could be criminalised for the same reasons they are granted asylum.

There are additional issues of concern, including the reliability of intelligence obtained about refugee or asylum seeker's involvement with listed organisations. To use the PKK as an example, it would be of concern if intelligence gained from the Turkish government was used, as the government has a long history of persecuting the Kurdish people. This would be the

same for a number of other organisations fighting struggles for self determination if they were listed. This is potentially a major problem for refugees and asylum seekers.

4. Impact on refugees and Asylum Seekers

The power to proscribe organisations as terrorist organisations raises some serious concerns in regard to its potential impact on Refugee Status Determination (RSD) processes and the access to a fair and transparent asylum system. Such power could indeed broaden the grounds for exclusion of refugees and asylum seekers imputed to be members or to support a listed terrorist organisation through:

- adverse security assessments;
- exclusion under Article 1F of the Refugee Convention 1951; and
- visa cancellation under s501(6) of the Migration Act 1958

RCOA believes that the listing of certain organisations as terrorist organisations would disproportionately affect asylum seekers in a way that they would not be under current “serious crimes” provisions in the Refugee Convention. Current laws require an investigation of the circumstances behind an individual’s past activities and an individual assessment of whether there are “serious reasons” to consider if a particular individual comes within the exclusion provision of the Refugee Convention. By contrast, simple proscription of an organisation fails to take account of such complex circumstances and could place asylum seekers at risk of being unfairly denied refugee status. This could be despite the applicant having no direct or indirect involvement in terrorist activities. As a result, asylum seekers with compelling cases for protection could be removed from Australia to danger.

It is RCOA’s concern that the criminalising of certain organisations will affect (and has had already affected to some extent) the situation of refugees and asylum seekers in Australia. As noted above, membership or imputed membership of certain groups had traditionally been considered as genuine grounds for invoking Australia’s protection obligations. RCOA questions the impact that the listing has or could have on decision-making. For instance, according to our experience and as a result of consultations with other organisations, RCOA is aware of a growing reliance on security assessments in the RSD process. Our concern is that there are already long delays in the processing of security assessments, with some security assessments which previously took a month now taking up to a year to be completed.

Proscribing certain organisations as terrorist organisations may also impact adversely on off-shore humanitarian applicants who have only distant links with such organisations but could be deemed as supporters. This could be the case for elderly parents who may have discreetly assisted their children’s political action and who could be caught unfairly under this legislation.

5. Concluding Remarks

RCOA reiterates its position that access to the RSD process should always be on an individual basis. Equally, assessments of the grounds for exclusion under the Refugee Convention or the Migration Act should also be solely on an individual basis. An asylum seeker should not, under any circumstances, be affected as a result of his or her membership or imputed membership of a particular group. The grounds for exclusion should only apply when an investigation of the circumstances behind an individual’s past activities and an individual assessment have taken place. Assumptions on the basis of membership or imputed membership of a group are not acceptable.

It is difficult to estimate to what extent refugees’ access to the RSD process and decision-making have already been affected by the proscription powers and the inclusion of certain

organisations (such as the PKK) in the list. There is not enough information available in this area. RCOA is concerned about the potential for refugees and asylum seekers to be affected by such powers, through the listing of organisations involved in self-determination struggles.

6. Recommendations

RCOA therefore recommends:

- *That research be carried out to establish the extent to which refugees and asylum seekers have already been affected by this regulation or could be affected in the future.*
- *That specific reporting requirements for the Department of Immigration and Citizenship be established in order to quantify the extent to which refugees and asylum seekers have been affected by proscription powers.*
- *That refugees and asylum seekers be given procedural rights to challenge adverse security assessments.*
- *That the procedures relied upon by the Attorney General in determining whether a particular organisation is a terrorist organisation be made the subject of independent judicial review.*