



Australian Government
Attorney-General's Department

**Security and Critical
Infrastructure Division**

07/3016

| 30 April 2007

Ms Margaret Swieringa
Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
CANBERRA ACT 2600

Dear Ms Swieringa

Inquiry into the Terrorist Organisation Listing Provisions of the *Criminal Code Act 1995*

I refer to your letter of 18 April 2007.

Please find **attached** responses to the Questions on Notice received from the Parliamentary Joint Committee on Intelligence and Security on Wednesday, 4 April 2007.

The Australian Security Intelligence Organisation was also asked to provide responses to Questions on Notice 2 and 3. The attached responses to questions 2 and 3 are made jointly with ASIO.

Yours sincerely

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Parliamentary Joint Committee on Intelligence and Security
Inquiry into the terrorist organisation listing provisions in the *Criminal Code Act 1995*

Questions on notice

Attorney-General's Department

Question 1: How many meetings has the Department had with relevant stakeholders, subsequent to proscriptions, to inform them of the effects of proscriptions?

ANSWER

Departmental officers spoke on nine occasions at the following forums during the past year:

- 27 February 2006 - Departmental staff briefed the Muslim Community Reference Group on the new counter-terrorism laws;
- 19 April 2006 – Departmental staff participated in a legislation and policy forum held at Monash University to discuss the counter-terrorism legislation;
- 17 May 2006 – Departmental staff provided a presentation on the Government’s counter-terrorism legislation to Muslim community representatives and Northern Territory police at a National Security and Crisis Management Planning workshop in Darwin.
- 19 and 20 May 2006 – Departmental staff provided a presentation on the Government’s counter-terrorism legislation to a forum hosted by the Citizens for Democracy in Armidale.
- 28 May 2006 – Departmental staff provided a presentation on the Government’s counter-terrorism legislation to a forum hosted by the Young Lawyers Association in Sydney;
- 2 June 2006 – Departmental staff addressed the Attorney-General's Non-Government Organisation Forum on Human Rights; and
- 19 July 2006 – Departmental staff provided a presentation on the implications of Australia’s new terrorism laws on specific ethnic communities at a conference of The Northern Migrant Resource Centre Inc. in Melbourne.
- 7 December 2006 – Departmental staff provided a presentation on Australian counter-terrorism legislation and arrangements at the National Security and Crisis Management Workshop in Sydney.

Question 2: Have there been any circumstances with respect to the proscription of the 19 organisations where national security interests would have been prejudiced if the proscription did not take effect before the expiry of the Parliamentary disallowance period?

ANSWER

To date, there have been no such circumstances. However, the reasons for removing the requirement for delayed commencement of regulations proscribing terrorist organisations are still pertinent.

Firstly, the nature of the modern terrorist threat necessitates equipping law enforcement and intelligence agencies with the ability to act swiftly against perpetrators of terrorism, including terrorist organisations. If the normal disallowance period were to apply to proscription regulations, some proscriptions would not come into effect for months, depending on the timing of Parliamentary sitting weeks. Parliament recognised the deficiencies of this situation and accordingly passed the Criminal Code Amendment (Terrorist Organisations) Bill 2002 in October 2002 to remove the disallowance period requirement.

As Mr McDonald mentioned at the hearing before the PJCIS, having a delay between the making of a regulation and its coming into force would give terrorist organisations advance notice and permit them to restructure to avoid prosecution.

Secondly, there are a number of offences [associating with a terrorist organisation (s102.8) and training with a listed terrorist organisation (s102.5(2))] and the power to issue a control order which would be unavailable to law enforcement in the absence of a proscription.

Question 3: Should there be a new provision introduced into the Criminal Code that is similar to s 104.4 which would require the Attorney-General to consider, in determining whether an organisation should be proscribed, whether proscription is ‘proportionate in all the circumstances’?

ANSWER

This question was raised in relation to paragraph 34 of the Human Rights and Equal Opportunity Commission’s submission about whether the proscription of an organisation meets “the proportionality test”. At paragraph 5 of their submission HREOC outline their concern that the power to proscribe organisations “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 proscribed by law and be proportionate and necessary to achieve a legitimate end”.

In HREOC’s view, the legislation should set out the criteria the Attorney-General is required to consider when deciding whether to proscribe an organisation including whether the proscription is proportionate in all the circumstances; ie proportionate to the threat. HREOC uses section 104.4 of the Criminal Code as an example of a provision which imports a proportionality test. That provision requires a court in issuing a control order to be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by a control order is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

The Department submits that the proscription process falls within the limitations permitted under the ICCPR. The safeguards in the legislation and the criteria used are designed to ensure that in individual cases freedoms such as freedom of association and freedom of expression will

only be restricted where it is necessary to do so to protect national security and public order. This is already a proportionate and tailored response to the threat.

A terrorist organisation can only be proscribed by regulation where the Minister 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'. The term 'terrorist act' is specifically defined in the Criminal Code, making the operation of the provisions clear and foreseeable. The proscription of terrorist organisations is specifically subject to scrutiny by the PJCIS, and the regulations giving effect to the measure are disallowable by the Australian Parliament. The Government is also satisfied that the proscription of terrorist organisations is a necessary measure to protect Australia's national security.

As Mr McDonald noted during the hearing before the PJCIS, it is our view that once it is established that an organisation was either involved in, or advocated the doing of, a terrorist act or acts, proscription of that organisation will always be proportionate.

Question 4:

a) Have there been instances where the Attorney-General's Department has consulted (including informally) with the States and Territories prior to a proscription?

b) Have there been any recent consultations with other jurisdictions about potential future listings?

ANSWER

a) Yes. Once the Attorney-General signs a Statement declaring he is satisfied that an organisation meets the legislative criteria for being proscribed, the Attorney-General then writes to the States and Territories advising them that he is satisfied that the particular organisation should be listed. The Attorney-General also provides jurisdictions with a copy of the Statement of Reasons for the proposed listing.

Hizballah's External Security Council, the military wing of Hamas, and Lashkar-e-Tayyiba were first listed by legislation through amendment to the Criminal Code. The Prime Minister wrote to State and Territory leaders regarding the proposed amendments and seeking the agreement of the majority of States and Territories to the listing.

There has been an occasion where there was informal consultation.

b) Yes.

Question 5: Can further information be provided about the issue of strict liability in relation to Division 102 offences?

ANSWER

In its submission to the Security Legislation Review Committee, the Commonwealth Director of Public Prosecutions (CDPP) outlined its views on how strict liability would operate in relation

to Division 102 offences. The Attorney-General's Department subsequently summarised those views in its submission to the PJCIS' present inquiry.

Each of the terrorist organisation offences contained in Subdivision B of Division 102 of the Criminal Code require the prosecution to prove that the accused knew the relevant organisation was a terrorist organisation. To prove this knowledge, the Criminal Code requires the prosecution to prove that the accused was aware that the organisation was a terrorist organisation. In its submission to the Security Legislation Review Committee in January 2006, the CDPP stated:

'In our view this pre-supposes that the circumstance actually exists and is not simply a mistaken belief of the defendant. Accordingly, to prove knowledge on the part of the defendant it will be necessary to not only prove that the defendant was aware the organisation was engaged in preparing, planning, assisting in or fostering the doing of a terrorist act but also that the organisation was *in fact* engaged in preparing, planning, assisting in or fostering the doing of a terrorist act. This results in a continued need for the prosecution to prove beyond reasonable doubt that the organisation in question was engaged in conduct falling within sub-paragraph (a) of the definition of a terrorist organisation whether or not it is specified in the regulations. The effect of this is to negate any assistance that might otherwise have been provided by specifying an organisation in the regulations.'

Therefore, whilst proscribing an organisation as a terrorist organisation would enable the prosecution to prove that the organisation was a terrorist organisation, the prosecution would still need to prove that the defendant knew of the existence of the regulations.

The Attorney-General's Department consider strict liability may be an appropriate way to address this difficulty. Strict liability would apply to the fact that the relevant organisation is a listed terrorist organisation. As a consequence, a proscribed organisation would be taken, as a matter of law, to be a terrorist organisation. As accused persons are assumed to know the law (that is, ignorance of the law is not a defence), where an organisation is a listed terrorist organisation, the prosecution would no longer be required to prove that the accused knew of the regulations.

Question 6: Does the Attorney-General's Department keep a track of whether press releases by the Attorney-General announcing proscriptions are run in local community media?

ANSWER

We have been unable to locate information to respond to this question. However, we are continuing to review this matter and will keep the Committee informed.