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2 February 2007

The Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

By Email: pjcis@aph.gov.au

Dear Sir/Madam,

Re: Review of the Listing Provisions of the Criminal Code Act 1995

This submission is made on behalf of the NSW Council for Civil Liberties in respect of the abovenamed legislation. We give permission for our submission to be published, and seek permission to publish it on our own website. In this submission, references to subsections are references to subsections of section 102.1, unless the contrary is clear from the context.

Summary

The CCL is opposed in principle to the listing of organisations. The law should criminalise those who plan or engage in terrorist acts, but should not criminalise membership of an organisation whose leaders use it to engage in such activities.

The power of the Attorney-General to make membership of an organisation a crime is dangerous. It is even more dangerous if there is no immediate parliamentary review and no judicial review on the merits.

If the listing of organisations is to continue, proscription should be done by a court, with provision for appeal and review.

1. The appropriateness of proscription.

1.1 The power to proscribe an organisation is open to substantial misuse. It creates a manifest risk of arbitrary, and politically motivated abuse. In a severe case, it can be used to ban opposition parties and to suppress dissent. It is too dangerous a power to be entrusted to governments.[1]

1.2 The lists of proscribed organisations are a recipe for arbitrary and politically motivated decision-making. Hundreds of groups and individuals have now been criminalised around the world and the various lists are expanding as states attempt to add all groups engaged in resistance to occupation or tyranny. Amongst them, those exercising what many people around the world see as a legitimate right to self-defence and determination are increasingly being treated—on a global basis—the same way as Osama Bin Laden and Al Qa'ida.

1.3 Proscription of an organisation criminalises those who remain its members. It is tempting to governments, for it is often easier to demonstrate that persons are members of or have supported a proscribed organisation than it is to prove that that they have engaged in terrorist actions or in actions in preparation for such actions.

1.4 But ease of conviction is not a good basis for determining legislation, especially for policies that threaten fundamental rights. Proscription of organisations makes it more likely that persons who are innocent of any terrorist intentions will be convicted and punished.

1.5. For the most part, it is possible to protect Australia and Australians against terrorist acts by the use of the laws against murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy and treason, and conspiracy to commit these offences.

1.6 For these reasons, the Council is opposed in principle to the proscription of organisations.

1.7 The listing provisions or section 102.1 of the Criminal Code Act should be repealed.

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[1] In the words of Professors Bill Bowring and Douwe Koriff, proscription legislation 'is a recipe for arbitrary, secretive and unjust executive decision-making, shielded for the scrutiny of the courts, and equally removed from public debate precisely because of the 'chilling' effect of the use of the term 'terrorism'.' (Bill Bowring and Douwe Koriff, **Statewatch News**, February 2005.)

2. The criteria for proscription.

A. 'Terrorist act' and 'advocating the doing of a terrorist act'.

2.1 The current criteria specified under subsection (2) depend on the definition of 'advocates' in subsection (1A) and of 'terrorist act' in section 100.1. The defects of the latter have been repeatedly pointed out, perhaps most cogently by. Patrick Emerton of Monash University.[2]. To his examples (the American War of independence, some actions in the American Civil War, actions by the African National Congress) we may add the following: the bombing of civilian areas by national air forces with the intention to persuade enemies to surrender such as the fire bombing of Dresden and Tokyo, and the atomic bombing of Hiroshima and Nagasaki, and the proposal to drop a basinful of bombs on North Vietnam.[3]

2.2 The point is that violent action in the pursuit of political ends is sometimes justified and sometimes open to debate.

2.3 The leaders of large number of Australian organisations, such as the RSL, speaking for their organisations, have at one time or another defended or praised one or more of these actions.

2.4 Political bodies are said to be protected by the legislation in three ways. First, in order for their defence of these actions to count as advocating as terrorist action, the praise must be done in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of Section 7.3) that the person might suffer) to engage in a terrorist act. Second, the Attorney-General must seek a regulation and the Governor-General must agree to it. Thirdly, the Parliament can disallow a regulation once it is made.

2.5 The first protection is nearly useless. Making a recording a university lecture available in a library, giving a television interview, discussing an issue in a newspaper are not protected, because the audience is not known.

2.6 The second protection depends on the decency and good sense of the Attorney General and the government of the day. It is not good policy to have to rely on either. Nor does history support the idea that they can be relied upon.

2.7 That leaves the Parliament. The Parliament has long periods when it does not meet. (Besides which, it can be prorogued.) A great deal of mischief can be done[4], and a great

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[2] Patrick Emerton, Submission to the Security Legislation Review Committee

[3] It may of course been argued whether they were unjustified, and that they were terrorist acts. But that is not the point.

[4] Say by banning an organisation *associated* with a political party, with senior members of the party involved.

deal of political benefit obtained, before Parliament can disallow a regulation. Also the government of the day will control the lower house and so much will rely on the ability on getting a majority of the Senate to look closely as such proscription which may not always happen depending on the politics of the day.

2.7 An appeal to the courts is possible on procedural grounds, especially since the processes followed do not follow the principles of natural justice. But there is no such appeal on the merits of the case.

2.8 Therefore this process remains essentially a political rather than an evidence based process.

2.9 If the listing provisions are retained, then, the definition of 'terrorist act' needs to be restricted.

2.10 It is doubtful, however, that even a much tighter restriction could be found that would not restrict legitimate debate. Subsection (1A) and clause (b) of subsection (2) should be repealed.

2.11 If that is not done, then at the least, clause (c) of subsection (1A) and should be repealed.

B. If proscription is to occur, these principles should apply.

2.12 For proscription to be admissible, the organisation must be engaged in preparing, planning or assisting in terrorist actions, have threatened to perform them or have already committed them.

2.13 An organisation should not be banned unless its commitment to performing terrorist actions is current. It is a reason to resist proscription that the organisation is involved in peace or mediation processes.

2.14 It is also important that the definition of 'terrorism' should not encompass justified armed struggle against tyrannical or repressive regimes, or legitimate struggles against occupation and for self-determination.[5]

[5] 'Whether the Kurdish people have a right to self-determination under international law is an open question. However, the international law has increasingly come to recognise the legitimacy of the struggle of peoples for liberation to use all means, including armed struggle. While this does not justify violence which breaks the rules that apply to armed conflicts of this nature or other violations of human rights, it does acknowledge and reflect the complexity of political violence and the fundamental importance of respect for the rule of law.' Parliamentary Joint Committee (Commonwealth) on Security and Intelligence, quoted in the Sheller Report, p.19.

2.15 Since actions in the prosecution of a war, including a war of liberation, are subject to the laws of war and the law of treason, attacks on military targets during a war should not be treated as terrorism.

2.16 Care should be taken lest refugees are criminalised for the same reasons that they are granted asylum.

2.17 Given the consequences which follow from proscription of an organisation, the definition of 'terrorist actions' for the purposes of proscription should be limited to those that are designed cause terror. Where lives are not put at risk, criminal actions that seek to put pressure on governments by attacking property, or communication systems, or transport systems, or the economy, wrong though they may be, do not justify the same precautions nor the same penalties that acts of arbitrary mass murder do.

2.18 Proscription decisions should also take account of the following:

- how close the links are between the Australian part of the organisation and those parts involved in terrorist activities;
- whether there are links to other terrorism groups or networks;
- whether there are threats to Australians;
- whether the United Nations has proscribed the organisation.

2.20 It is not acceptable that the members of an organisation should be forced to leave it because of intemperate, provocative or indeed illegal statements by the leaders of the organisation.[6] Unless statements are made repeatedly by the acknowledged leader of an organisation, on official stationery or on official occasions, and the other members know of these things and do nothing about it, it should not be taken that the organisation advocates terrorism.

3. The process of proscription.

3.1 The current process for proscription is subject to substantial defects which were pointed out by the Sheller Committee. As noted above the current process is essential a political one involving the government and the Parliament. There is no provision of an opportunity for members of an organisation to present a case against proscription until after the event, or for intervention by members of the public or interested organisations. There is no requirement that the organisation be notified of the fact of proscription. The provision for a merits review in subsection 17 is an appeal from Caesar to Caesar.

3.2 There is no current requirement in the legislation for the organisation to be informed of the reasons for its proscription. Unless they are so informed, the opportunity to make an application for de-listing may be rendered otiose.

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[6] For example, a mosque or a church should not be shut down because of the sermons of an imam or a clergyman.

3.3 As the PJC has repeatedly noted[7], no measures are in place for informing the members of an organisation that it has been proscribed beyond the issue of a press release.

3.4 Proscription should be done by a Federal judge, in open court, on application by the Federal Attorney-General. An appeal should lie with a superior court on the facts as well as the lawfulness of the proscription. This should be the only method by which an organisation may be proscribed.

3.5 The criteria for proscription should be determined by the legislation.

3.6 The process should be transparent, and provide members of the organisation that it is proposed to proscribe, other persons affected and members of the public with notification that it is proposed to proscribe the organisation, and to provide them with the right to be heard and to present evidence in opposition.

3.7 The proscription must be followed by widespread publicity of the fact that it has occurred, and of the reasons for it; sufficient for people who may be associated with the organisation to learn that joining or remaining a member of the organisation may expose them to prosecution.

3.8 In view of the risks of abuse of the process for political or vindictive ends, and in view of the grave consequences for individuals, the use of secret evidence (i.e. evidence that is made available to the court but not to the organisations at risk of proscription) should not be allowed. Such proceedings should not be subject to the National Security Information (Criminal and Civil Proceedings) Act 2004.

4. The effectiveness of proscription.

The Sheller Report raises some issues concerning the effectiveness of proscription in combating terrorism. In this regard, the CCL notes that it would be open to the members of a listed organisation to disband and create a new organisation comprising the same members. In its *Response to Questions on Notice from the Review*, the Australian Federal Police notes 'As stated in our submission these offences are somewhat ineffective given the difficulties of establishing that persons and/or assets are connected to a proscribed entity. This is largely because terrorist organisations either lack any formal organisational and membership structure or adapt and change their names once they are proscribed.'[8]

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[7] E.g. Parliamentary Joint Committee on Intelligence and Security, *Review of the Re-Listing of Al Qa'ida and Jemaah Islamiyah as Terrorist Organisations* at 1.11 and 1.12

[8] Australian Federal Police, Response to questions on notice from the AFP's appearance on 8 February 2006, p. 6. Cf. also p. 3.

5. The need for further review.

5.1 This review is limited to those clauses that the Act itself requires the Parliamentary Committee to examine. The CCL considers that there are other features of the listing provisions that are likely to cause injustice. In particular, we are concerned about the offences that are created by the listing of an organisation.

5.2 Clause (c) of subsection 3 concerns us also. The point of the sunset provision is to ensure that an organisation remains listed only on the basis of current terrorist activities. The clause does not require that the Minister give fresh reasons for re-listing.

5.3 Although these matters have been the subject of recommendations by the Senate Legal and Constitutional Committee, the Sheller Committee and the Joint Parliamentary Committee itself, no improvements have been made to the legislation.

We would welcome the opportunity to present further argument to the Parliamentary Joint Committee on those matters.

Yours faithfully,

Martin Bibby, Assistant Secretary
David Bernie Vice President
NSW Council for Civil Liberties