SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY – REVIEW OF THE LISTING PROVISIONS OF THE CRIMINAL CODE ACT 1995

Summary

The submission argues that the impact of proscription legislation is currently more symbolic than instrumental in nature. The laws are more important for what they say than what they do. There have been no prosecutions relating to the 19 organisations so far proscribed under the legislation. It is difficult to assess whether proscription has produced other practical benefits, like aiding intelligence gathering. However, proscription is likely to be a double-edged sword when it comes to cultivating useful human intelligence sources in relevant communities, What is clear, even from the reports of the PJC, is that for many of the proscribed organizations there is likely to be little, if any, practical benefit from proscription, simply because no meaningful nexus exists between the organizations in question and Australian interests.

Also the PJC's reports and criticisms regarding many of the listings and the listing process suggest relevant executive government agencies fail to administer the listing provisions with the care and restraint that the exercise of such exceptional powers demands. This adds to the impression that it is more about symbols than practical outcomes. Proscription then largely appears as a form of waving the Australian flag in the global "war on terrorism".

The submission accepts that symbolism is unavoidable. The problem is that symbolism cuts more than one way. The breadth of the legal criteria for proscription and the absence of additional limiting criteria that are coherent and consistently applied mean that listing is a largely arbitrary and indiscriminate exercise. This is fundamentally objectionable in principle. It is a grave violation of the core tenets of the rule of law that the executive can effectively at the stroke of a pen subject a whole category of persons to criminal prosecution for serious crimes on the basis of a limited connection ("informal membership", "support") with a proscribed organization without a requirement to prove any harmful act or intent on the part of the individual accused. It also potentially brings these laws into conflict with Australian refugee laws and obligations. None of this is lost on diaspora communities in Australia – Muslim, Arab, Kurdish – who likely fear these laws are designed to target them in a discriminatory and oppressive manner. If, or when, offences relating to membership and support of a terrorist organization are prosecuted their odious and counterproductive nature is likely to become manifest.

In the meantime some of the proscriptions themselves convey dangerous messages to many in Muslim communities in Australia and abroad. They tend to conflate many different forms and expressions of political Islam with al-Qaeda global terrorism. If anything they are more likely to serve as an obstacle rather than an aid to the peaceful resolution of intractable political conflicts (such as those in the Middle East). Worse still, in time the risk is that they could become self-fulfilling, fomenting more political violence than they prevent, drawing Australia into the orbit of violent political conflicts

that are currently confined to national and regional settings remote from Australia's borders and transposing some of that violence to Australia.

Peace and the reduction of global political violence is better served by constructive political and diplomatic engagement with the parties to such conflicts rather than the partisan alignment of Australian criminal laws with one or other of the adversaries, especially where the violent tactics adopted from time to time by *all* parties warrant moral condemnation.

The Government has already stated its view regarding proposals to reform the listing provisions in response to the report of the Security Legislation Review Committee[1] –

> 'The Government believes the current listing process contains sufficient safeguards, including judicial review and parliamentary oversight, and that it is more appropriate for the proscription power to be vested with the executive.'

The recommendations in this submission, or even by the PJC, to overhaul the listing provisions are unlikely to influence the position of the Government. This submission commends the bi-partisan work of the PJC in its searching reviews of many of the listings, recognizes the difficult political climate the "war on terror" creates for parliamentary scrutiny of executive action and urges the PJC to continue its conscientious approach to its responsibilities.

This submission would be reluctant to recommend, even in principle, that proscription should be by way of judicial rather than executive process, for this would seem to further confirm and entrench the role of domestic criminal law in the management of a problem, most of whose critical dimensions are of a quintessentially political character and require political solutions.

Assuming the retention of the listing provisions this submission makes a number of other recommendations for reform largely in accordance with those of the Sheller Committee and the PJC.

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[1] Attorney-General Media Release 111/2006, 15 June, 2006, accompanying the tabling of the Security Legislation Review Committee Report.

1. BACKGROUND AND EARLIER REVIEWS

According to the Senate Legal and Constitutional Legislation Committee in its report on the *Security Legislation (Terrorism) Bill 2002 [No2]* and related anti-terrorism legislation executive proscription "was clearly one of the most significant issues of concern during this inquiry and aroused the most vehement opposition."[2] The Bill empowered the Attorney-General to proscribe an organisation simply by declaration, provided for very broad grounds for proscription,[3] raised issues of constitutionality,[4] created broadly defined strict liability offences carrying severe penalties and permitted no merits review of proscription decisions and no revocation mechanism. All of these provisions attracted criticism.

In arguing that proscription ought to be a decision for the Parliament rather than a single member of the executive whose decision was subject to no legal merits review, Justice John Dowd (a former NSW Attorney-General) warned in his submission –

> governments are very quick to come to Australia to get their enemies in their own countries proscribed…Those things will happen very quickly and are going to be very difficult with the comity between nations.[5]

The Committee also expressed particular concern over the potential reach of the proscription regime –

> The Committee raised with the Department the concerns expressed by witnesses and in submissions about support by Australians for pro-independence or other similar movements in other countries, but was not persuaded by the Department's response. *The Committee considers that any review of the proscription provisions*

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[2] Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee: Security Legislation (Terrorism) Bill 2002 [No2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002*, Parliament of Australia, p58.

[3] The Attorney-General could declare an organisation to be a proscribed organisation if satisfied on reasonable grounds that:

- the organisation, or a member of the organisation, has committed or is committing a terrorism offence, whether or not the organisation or member has been charged with, or convicted of, the offence;
- the declaration is reasonably appropriate to give effect to a decision of the UN Security Council that the organisation is an international terrorist organisation;
- the organisation has endangered or is likely to endanger the security or integrity of the Commonwealth or another country.

Supra, note 2, p46.

[4] References were made to the striking down of the Menzies Government's legislation to dissolve the Australian Communist Party in the Communist Party Case: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1.

[5] Quoted by the Committee, supra note 2, p57.

> *must ensure that such organisations would not be caught by the provisions*.[6] (emphasis added)

The Committee recommended the Bill not be enacted and that the Attorney-General develop an alternative procedure which met these and other criticisms.

The regime that passed into law in the *Security Legislation Amendment (Terrorism) Act 2002* failed to address many of the bi-partisan concerns of the Senate Committee. The concerns have been echoed in criticisms and reservations expressed in some of the reports of the Parliamentary Joint Committee on Intelligence and Security (hereafter PJC) on individual listings, although the PJC has not recommended disallowance of any regulation.

The Attorney-General has claimed parliamentary oversight as a virtue of the proscription provisions in answer to concern over the concentration of power in the executive. The claim however is rather undercut by the fact that the Government has repeatedly dismissed the criticisms and recommendations of bi-partisan parliamentary committees on core issues.

The Government also summarily dismissed the major recommendations of the independent external review it appointed. The Security Legislation Review Committee (the Sheller Committee) made recommendations for greater accountability and transparency in the listing process, including provision for notification of affected parties and an opportunity to be heard prior to listing, consideration of a judicial mechanism for proscription in place of executive proscription, and amendment of the legal criteria for listing (by restricting the meaning of advocacy in the definition of a 'terrorist organization'). At the time he tabled the report the Attorney-General issued a press release in which he stated[7] –

> 'The Government believes the current listing process contains sufficient safeguards, including judicial review and parliamentary oversight, and that it is more appropriate for the proscription power to be vested with the executive.'

The dismissive government response to parliamentary and other reviews underlines the validity of deeply held concerns about the powers of the executive in listing organizations and the need for robust scrutiny.

[6] Supra, note 2, p49.
[7] Attorney-General Media Release 111/2006, 15 June, 2006, accompanying the tabling of the Security Legislation Review Committee Report.

2. OPERATION OF THE LISTING PROVISIONS

2.1 Listing Provisions

Criminal Code s102.1(2) states the criteria on which a regulation may be made by the Governor-General (on the advice of the Attorney-General) proscribing a named organization as a 'terrorist organisation'.

Section 102.1(2A) requires the Leader of the Opposition to be briefed prior to the making of a regulation under s102.1(2).

Section 102.1(4) requires the de-listing of a proscribed terrorist organization by the Minister (the Attorney-General) if s/he ceases to be satisfied that the organization is a terrorist organization.

Under s102.1(5) the de-listing of an organization under s102.1(4) does not affect the power to subsequently re-list the organization if the criteria under s102.1(2) are satisfied.

Section 102.1(17) allows a person to make application to the Attorney-General to have a listed organization de-listed. Under s102.1(18) this does not affect the powers of the Attorney-General under102.1(5).

A regulation specifying an organization as a terrorist organization has effect for a period of two years unless in the intervening period it is repealed or ceases to have effect because of a declaration by the Attorney-General that s/he is no longer satisfied that the organisation is a terrorist organisation. An organisation may be re-listed before, at or after the expiry of the two year period.

Decisions to list are subject to judicial review as to the legality of the decision, but not a merits review.[8] The only merits review available is political. A regulation listing an organistion may be reviewed by the PJC[9]. The Committee may review the regulation as soon as possible after it is made and make a report and recommendations to Parliament before the expiry of a disallowance period of 15 sitting days.

In its first report reviewing a listing the PJC stated its intention to undertake merits reviews of all listings. It rejected the view of the Attorney-General and ASIO that its role be confined to reviewing the appropriateness of the listing process adopted and whether the Attorney-General's supporting statement offered sufficient grounds for the listing.[10]

Under the Inter-governmental Agreement on Counter-Terrorism the Commonwealth also agreed to consult with the states and territories prior to each proposed listing.

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[8] Parliamentary Joint Committee on ASIO, ASIS and DSD *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, Parliament of the Commonwealth of Australia, June, 2004, p8-9.
[9] S102.1A.
[10] *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, Parliament of the Commonwealth of Australia, June, 2004, ch 2.

2.2 Legal Criteria for Listing an Organisation

Under Division 102 of the *Criminal Code* an organization may be listed as a "terrorist organization" if the Attorney-General is satisfied on reasonable grounds that the organization:

- is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or

- advocates the doing of a terrorist act by way of

- directly or indirectly counselling or urging the doing of a terrorist act, or
- directly or indirectly providing instruction on the doing of a terrorist act, or
- directly praising the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act.

The definition applies in each case whether or not a terrorist act has occurred or will occur.

The definition refers in turn to the meaning of "terrorist act" under s100.1 of the Code. Justice Whealy observed in *R v Lohdi* (unreported NSW Supreme Court) 23 December 2005, para 52) that this provision "postulates an action or threat of action of the widest possible kind" as long as it is accompanied by the double intent to advance a political, religious or ideological cause and coerce or intimidate a government or the public or a section of the public. The definition of "terrorist act" encompasses behaviour that is remote from the execution of a violent act and the definition of "terrorist organization" further enlarges the scope of criminal liability.

The provisions also operate extra-territorially. That is to say, as Justice Bell put it in *R v Ul-Haque*, they create offences "that may be committed by a foreigner against a foreigner in a foreign country remote geographically from, and of no particular interest to, Australia." (Unreported NSW Supreme Court, 8 February 2006 at para 32).[11]

Others have pointed out that in principle the laws capture the use or threat of political force in all its forms and regardless of context or circumstance. They also capture other activities only loosely connected with the use or threat of political force. To that extent the definitions are so broad as to be meaningless as a guide to action, especially when it is recognized that the use and threat of force for political ends is an essential feature of any political order. Whatever meaning and limits can be claimed for the provisions derives not from the legislation but is imported from the tacit framing of the terrorist threat in political and popular discourse.

[11] Justice Bell rejected a challenge to the constitutional validity of the law, finding that it was supported by the external affairs power. The decision is on appeal to the High Court.

2.3 Consequences of Listing an Organisation – Terrorist Organisation Offences

Although this review is confined to the listing provisions it is impossible to assess their "operation, effectiveness and implications" without noting the gravity of the immediate legal consequences that flow from proscription.

There are seven terrorist organization offences –

- directing the activities of a terrorist organization (25 years maximum)
- membership of a terrorist organization, including 'informal membership' (10 years)
- recruiting for a terrorist organization (15 or 25 years maximum depending upon the person was reckless as to whether the organization was a terrorist organization or knew it was a terrorist organization)
- training, or receiving training from, a terrorist organization (25 years)
- getting funds to or from a terrorist organization (25 years)
- providing support to a terrorist organization (15 or 25 years depending upon whether the person was reckless as to whether the organization was a terrorist organization or knew it was a terrorist organization)
- associating with a terrorist organization (3 years)

These offences – especially broad and ill-defined offences based on proof of membership, support or association – extend liability to very loose and uncertain connections with a terrorist organization and attach severe consequences, as the penalty maxima indicate.

The proscription power permits the executive with little more than the stroke of a pen to render people liable to criminal prosecution on one or more serious charges by virtue simply of their association or identification with a particular political cause, without the requirement to prove participation in the commission of a violent act, any form of assistance to commit a violent act or even support or approval for the commission of a violent act. It is in the nature of any political organization that not all its members or supporters approve of all actions or decisions of the organization. A political cause or objective may be supported without this implying support for the use of violence in furtherance of the cause.

The PJC in its *Review of Security and Counter Terrorism Legislation* (2006) made recommendations for amending terrorist organization offence provisions which if accepted would substantially restrict their reach. Assuming retention of the listing provisions implementation of these recommendations would mitigate the more oppressive and objectionable aspects and potential of the listing regime. This submission supports those recommendations.

2.4 Listed Organisations

Nineteen organisations are currently listed under the provisions. All bar one are self-declared Islamic organisations. The exception is the Kurdistan Workers Party (or PKK).

Most of the other 18 have no apparent links to organisations or wrongful activities in Australia. Aside from organisations, like al-Qaeda, that are widely believed to have a global agenda and south east Asian organisations, like Jemiyah Islamiah, that can plausibly be claimed to have Australian links, most of the other organizations operate within fairly well-defined geo-political boundaries. They include Palestinian organisations (Hamas and Palestinian Islamic Jihad (or PIJ)), the Lebanese organisation Hizbollah, and groups in Algeria, Iraq, the Philippines and Kashmir.

Most of these organisations are engaged in local or national conflicts over territory and political power that are remote from the Australian region. Hizbollah represents the largest ethno-religious group in Lebanon (the Shi'ites) and constitutes a significant bloc in the Lebanese Parliament. It has supporters within the Lebanese community in Australia as evidenced by calls from respected community leaders during the 2006 Israel/Lebanon war for the organization to be de-listed.[12] Hamas won a landslide victory in the January 2006 Palestinian Authority elections. Both organizations deliver a range of social, educational and religious services to their communities and have deep, popular roots in the populations of Lebanon and the Palestinian Occupied Territories. Both have been engaged in long term territorial and political conflicts with the state of Israel. Both have engaged in suicide bombings and other political violence within their immediate region. They have also observed ceasefires at various times. Acts of violence against civilians ought to be condemned, but to define these organizations solely by reference to such acts is a gross distortion and a hindrance to effective policy-making.

What all these organisations (except the PKK) have in common, and what seems to be the underlying rationale for listing them, is that they are Islamic revivalist organizations. However, the predominant focus of organizations like Hamas and Hizbollah, unlike al-Qaeda, is on national rights. This focus has deepened with their participation and success in parliamentary processes, a form of political engagement that is anathema to al-Qaeda.

2.5 Application of Listing Criteria

Two themes related to the criteria for listing organisations have recurred in the PJC reports. The PJC has made the point on several occasions that the definition of a terrorist organisation in the Code is so broad as to permit a limitless range of groups throughout the world to be listed or proscribed. It has repeatedly called for a clear public statement of criteria for listing organisations.

[12] "PM can't be swayed on Hezbollah" *The Australian* 4/8/06.

In several of its reviews the PJC observed that the listed organization had no known links to Australia and/or presented no threat to Australian interests. It has expressed concern that the Attorney General does not regard these as critical considerations in the decision to list. The Attorney-General has responded by simply invoking the breadth of the statutory criteria. In reminding the PJC that the *Criminal Code* "does not require that an organization have a link to Australia before it can be listed" the Attorney-General emphasized the "proactive", preventive goal of the provisions. The PJC observed that this is only "superficially logical", failing as it does to explain the precise choice of organizations for listing from the vast number captured by the statutory definition and how in each case the listing is related to safeguarding Australia's security interests. The PJC has been clearly frustrated by the inability of the Government to provide anything more than vague and contradictory criteria for listing terrorist organizations. As the Committee baldly put it in one report[13] –

> The question remains: how and why are some organizations selected for proscription by Australia?

ASIO stated to the PJC that it *does* take Australian links into account in its assessments, but frequently admitted that there were none or asserted a link without specifying or substantiating it. Sometimes it claimed an indirect link existed. This usually involved one or both of two things. First Australian interests were subsumed within some amorphous conception of western interests. The PJC described ASIO's view as being that "Australian interests should be considered at threat if they are part of a generalized threat from any organisation which clearly targets Western or foreign interests in a given country or region."[14] The reference to "foreign interests" would capture any belligerent actor (state or non-state) in any form of conflict over territory or national rights. Secondly, ASIO claimed that proscription was justified because Australians travelling overseas may be victim to an indiscriminate attack perpetrated by the organisation. This is to say no more than that Australians who travel to regions of violent conflict are at increased risk of being killed or injured by warring parties. If in the Palestinian territories, for example, they are probably just as likely to be unlawfully killed by Israeli armed forces as by any listed organisation, as British citizens have been in recent times.[15]

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[13] *Review of the listing of six terrorist organisations* Parliament of the Commonwealth of Australia, March 2005 at para 2.22.

[14] See *Review of the listing of four terrorist organisations* Parliament of the Commonwealth of Australia, September 2005, para 3.82.

[15] Terri Judd "Activist was unlawfully killed in Israel, says inquest jury" *The Independent* 11/4/06. The story refers to the intentional shooting by an Israeli soldier of 22 year old British peace activist Tom Hurndell whilst he was sheltering Palestinian children from Israeli military fire in Gaza in April 2003. Israel boycotted the inquest: see Vikram Dodd "Israel to boycott inquest into death of British peace activist shot in Gaza" *Guardian* 10/4/06. Hurndell was one of three British civilians killed in a seven month period by Israeli soldiers. British inquests have found in each case that the shooting was intentional: also see "Jury rules Israeli soldier murdered British journalist" in similar circumstances: also see "Jury rules Israeli soldier murdered British journalist" *Sydney Morning Herald* 8-9 April, 2006 at p19 referring to the shooting of James Miller in Gaza a month after Hurndell's shooting and within a mile of where it happened. In none of the cases did the British government condemn the shootings or seek action against those responsible.

As the PJC concluded this takes us no closer to a statement of satisfactory listing criteria for there is little proscription in Australia can do to prevent such events or bring to justice their perpetrators, notwithstanding the extra-territorial character of the proscription laws.[16]

The PJC saw the listing of organisations that have no Australian links as merely symbolic, without practical effect and "costly in time and effort and possibly distracting for Australia's anti-terrorism efforts."[17] It is tempting to go further and see the symbolism involved as potentially counter-productive, a point I will return to below.

The PJC also echoed concerns expressed by the Senate Legal and Constitutional Committee in its report on the original bill that there was a need to distinguish terrorism from violence involved in armed political conflicts of a local or regional nature where peace and mediation processes may play a part in their resolution[18] -

> the Committee would also note there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances – within an armed conflict – the targeting of civilians should be condemned, and strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and, with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organizations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee:
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> > [When] there is a peace process…you can unintentionally make things worse if you do not think through the implications of the listing.

This submission shares these concerns of the PJC over the current operation of the listing provisions. They are of critical relevance to assessing their effectiveness. The issues may be more complex however than is suggested by the PJC where it states that financial support for a foreign organization may justify its proscription in a third country.

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[16] *Review of the listing of six terrorist organisations* Parliament of the Commonwealth of Australia, March 2005, para 2.28.

[17] *Review of the listing of four terrorist organisations* Parliament of the Commonwealth of Australia, September 2005, para 3.50.

[18] *Review of the listing of the Palestinian Islamic Jihad (PIJ)* Parliament of the Commonwealth of Australia, June, 2004, para 3.21, also quoted by the Committee in its conclusion to its review of the listing of four organizations, including Hamas and Hizbollah, *Review of the Listing of four terrorist organisations* Parliament of the Commonwealth of Australia, September 2005, para 3.87.

An indication of the problem appeared in late 2005 when police raided a Melbourne Tamil group (Tamils Rehabilitation Organisation) after a Sri Lankan Government warning to the Australian Government that charity donations to the group may have been used to fund the Tamil Tigers, a political movement engaged in a lengthy and bloody war to establish a separate homeland in northern Sri Lanka. The Tamil Tigers are not listed as a terrorist organization in Australia, but they clearly fall within the statutory definition and there must be a possibility that the organization will be listed in the future. The director of the charitable organization in Australia, a Melbourne doctor, pointed out that it was impossible not to cooperate with the Tigers in directing charitable support to those parts of the country effectively controlled by them. He also indicated his support for the political cause of national self determination for the Tamils, although not with their methods.[19]

In its review of the re-listing of Hamas the PJC noted on the basis of its own independent inquiries that the organization had adopted a truce with Israel in the mid 1990s and committed to observing it indefinitely if Israel returned to its pre-1967 borders and withdrew all Jewish settlements from the Palestinian territories (which, it might be added, is to demand no more than that Israel comply with international law). Hamas observed a ceasefire for more than 12 months. Its continued proscription was nevertheless sought in 2005 on the basis that it would not formally commit to a permanent unilateral Palestinian ceasefire and has asserted its continuing right to use force to advance Palestinian national rights. The Australian Government and other governments that have proscribed Hamas (the US, Canada, UK and the EU) are arguably hamstrung in constructively responding to its democratic electoral success and the challenge of achieving peace by way of a just settlement to Israeli/Palestinian conflict. There are clear signals since its election that Hamas is prepared to seek a political resolution of the conflict with Israel, but is unwilling to unilaterally renounce the use of violence whilst ever Israel continues its occupation and annexation of Palestinian land and operates an effective military and economic blockade of the Palestinian territories. [20] The refusal to deal with Hamas (a logical consequence of listing it as a terrorist organisation) and the cessation of virtually all aid to the Palestinian Authority is also exacerbating already serious humanitarian problems. This is likely to fan rather than diminuish the violence.

It is significant that ASIO has acknowledged that proscription may on occasions not only be ineffective but actually "make things worse". It may undermine peace efforts, exacerbate violence and further entrench and broaden conflict. This is a salutary reminder that the listing provisions carry risks to security, and not merely to legal and political freedoms. The statutory criteria do not protect against such risks. As ASIO argued it is necessary to "think through the implications of the listing".

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[19] See C. Stewart and N. Robinson, 'Tamil Tigers in tsunami funds row' *The Australian* 25/11/05.

[20] Ed O'Loughlin "Hamas hints at moderation bid for funding" *Sydney Morning Herald* April 8-9, 2006; Conal Urquhart "Hamas in call to end suicide bombings" *The Observer* 9/4/06. Many knowledgeable commentators regard Hamas as a pragmatic political organisation capable of providing the honest and effective leadership that was lacking in the administration of the PLO: see Alastair Crooke "The Rise of Hamas" *Prospect* February, 2006, pps 12-13.

We need to consider how well this "thinking through" has been performed under the provisions to date.

2.6 Listing Process and Procedures

The PJC has from its earliest reports been critical of the procedures adopted by the Attorney-General in listing organisations. The PJC has repeated these criticisms in subsequent reports, suggesting Government indifference to its findings and recommendations. Some only have been belatedly acted upon by the Government.

The criticisms include the following –

(1) Failure to provide appropriate warning of impending listings to the Committee so that it could effectively fulfil its responsibilities.[21]

(2) Failure to provide comprehensive, accurate and balanced information to support listings and validate the process. Information supplied to the Committee and/or published by the Attorney-General in a press release to support a listing has on at least two occasions proved to be inaccurate and been subsequently corrected in private hearings with the Committee.[22] ASIO assessments supporting some listings have been contradicted by other authoritative sources.[23]

(3) Failure to undertake appropriate community information and consultation with respect to listings. With few exceptions the Attorney-General's Department has done no more than issue a press release and place information on its website with respect to a proposed listing. (2005a: para 2.38-2.40). This limits the opportunity for interested parties to respond to the listing or to know in some cases of their vulnerability to prosecution on serious criminal charges.[24]

(4) Failure to undertake consultations with state and territory leaders prior to listings as required under the Intergovernmental Agreement on Counter- Terrorism. If the majority of governments object the Commonwealth must refrain from making a regulation. However, in relation to most of the listings to date the states and territories have been given so little notice that objection was practically impossible. In some cases they were informed only 24 hours prior to a regulation being made.[25]

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[21] *Review of the Listing of Six Terrorist Organisations* March 2005, para 2.2-2.3.
[22] *Review of the Listing of Four Terrorist Organisations* September 2005, paras 3.13, 3.39-3.40;
[23] *Review of the Listing of Six Terrorist Organisations* March 2005, para 3.32.
[24] *Review of the Listing of Six Terrorist Organisations* March 2005, para 2.38-2.40; *Review of the Listing of Seven Terrorist Organisations* August 2005, para 2.15-2.17; *Review of the Listing of Four Terrorist Organisations* September 2005, para 2.17-2.21; *Review of the Listing of the Kurdistan Workers' Party(PKK)* April 2006, para 1.20-1.23.

[25] *Review of the Listing of Six Terrorist Organisations* March 2005, para 2.9-2.10; *Review of the Listing of Four Terrorist Organisations* September 2005, paras 2.1-2.6.

(5) The substantial failure of the Department of Foreign Affairs and Trade (DFAT) to make substantive input into the decision-making process for listing organisations. In most cases it has done little more than send an email to the Attorney-General's Department expressing support for a proposed listing. The PJC has drawn attention to the poverty of DFAT's contribution to the listing process on more than one occasion. The implication is that the label "terrorist" precludes any regard for the local or regional context of violent conflict or the political or foreign policy implications particular to the listing of specific organisations and consequently DFAT has largely abdicated any meaningful role in decisions to list.[26] The PJC's criticism of the perfunctory attitude of DFAT stems no doubt from its own sensitivity to these issues. In the cases where it has expressed reservations about a listing the information often came from authoritative sources extraneous to the Government.

In its submission to the Sheller Committee the Commonwealth Attorney-General's Department (AGD) rejected arguments in favour of replacing executive listing with a judicial process. It claimed that the executive was best placed to consult widely and tap into and evaluate authoritative sources of knowledge and advice. Its performance to date does not support its own arguments favouring retention of executive proscription.

This submission does not support the introduction of a judicial process for listing organizations, but regards the arguments of the AGD supporting retention of an executive process as hollow in the light of its own performance and that of other executive agencies. There are few grounds for confidence that the process of thinking through the implications of a listing (including the security implications) is currently being undertaken effectively.

If executive proscription is to be retained reform to the process is urgently needed.

In its report on the listing of the PKK the PJC listed the factors that should be covered by DFAT advice on proposed listings.[27] This submission supports that recommendation. The Sheller Committee made detailed recommendations for improving consultation with relevant communities and affected parties in the listing process. Although the Attorney-General appears to have rejected these recommendations no convincing argument has been made for doing so. As the PJC reviews have demonstrated the outcomes of the listing process are likely to be the poorer for not according a hearing to the widest range of interests and sources. This submission supports the Sheller Committee recommendations.

There is reason to question how conscientious the executive is about its exercise of exceptional powers carrying such potentially far-reaching consequences for the rights of individuals and national security interests. These concerns go to the transparency and

18 *Review of the listing of six terrorist organisations* Parliament of the Commonwealth of Australia, March 2005, para 2.5-2.7; *Review of the listing of four terrorist organisations* Parliament of the Commonwealth of Australia, September, 2005, para 2.9-2.16.

[27] *Review of the Listing of the Kurdistan Workers' Party(PKK)* April 2006, para 1.18.

fairness of the listing process, but once again they are also relevant to assessing the effectiveness of the provisions.

3. EFFECTIVENESS OF THE LISTING PROVISIONS

3.1 The Terrorist Threat

The operation of the listing provisions must be judged against established legal principles, particularly those that safeguard human rights and democratic values. It is common in the current climate of (understandable) fear regarding the threat of terrorism to stress that such principles must be interpreted in a manner which recognizes the need to strike a balance with the protection of national security. That is to say the need for such laws and their effectiveness must also be assessed by reference to the character and scale of the terrorist threat. Difficulties emerge immediately because of disagreement and uncertainty in relation to the latter. Recognizing this, the PJC urged more research into the phenomenon of violent radicalization in its *Review of Security and Counter Terrorism Legislation* in 2006 (recommendation 1). This submission supports that recommendation.

In a speech in January 2006, entitled 'A safe and secure Australia: An update on counter-terrorism', the Commonwealth Attorney-General repeated the oft stated view that –

> Terrorism is arguably the greatest threat this nation has faced in many decades, and perhaps the most insidious and complex threat we have ever faced.[28]

A very different view is offered by many international relations experts, like Hugh White[29] (Professor of Strategic Studies at ANU) and Gwynne Dyer.[30] White suggests that the way western societies have responded to 9/11 has been shaped by the "conviction" that "terrorism poses an existential threat". He challenges this belief suggesting –

> ..to the calmer view of future historians this conviction, which is apparently self-evident to so many people today, will seem surprising, even bewildering. Of course the destruction of the West is the declared aim of the terrorists themselves. But why would we believe they have the capacity to do it? Even nuclear terrorism, which would cause terrible suffering and disruption, would hardly threaten the underlying fabric of Western societies.
> The truth is that terrorism presents a serious threat. It poses a small, but not negligible, danger to the safety of each one of us. But it does not pose a threat to our society at large.

[28] Speech delivered at Manly Pacific Hotel 21 January, 2006.
[29] "Terrorism a threat, but not to our way of life" *The Age* 11 September, 2006.
[30] *Future: Tense – the Coming World Order* Scribe, 2006, pps 51-6.

Providing a "logarithmic scale for disasters" and comparing terrorism with the consequences of other catastrophic events and threats like nuclear and non-nuclear wars and the AIDS epidemic Dyer concludes that terrorism is a seventh magnitude threat -

> Terrorism is the weapon of the weak. It is a technique that tries to maximize the political impact of relatively minor acts of violence – because that is generally all that such weak groups can manage – through the magnifying glass of media coverage. Indeed terrorism scarcely existed as a discrete political strategy before the emergence of the popular mass media in the late nineteenth century; as a political technique in its own right, terrorism is overwhelmingly a modern phenomenon. And the most important thing about it is that it is relatively speaking a very *small* threat.

This does not mean that terrorism is not "insidious and complex", for as Dyer maintains, it achieves its effects largely because of the manner in which terrorist groups and individuals achieve or enhance their power through media publicity, something that is massively magnified in the new media environment.[31] It also works by provoking responses from government that actually serve the ends of the terrorists (for example crackdowns that create or deepen the social divisions upon which they play).[32] Public fears engendered by terrorism may be exaggerated and may not be entirely rational (like many everyday fears) but they are no less real for this and no less a matter that governments must respond to. On the other hand, the responses are part of the calculations of the terrorists themselves and care is needed to ensure they are not self-defeating.

More sober assessments gauge terrorism as more akin to serious crime than a strategic threat. Martin Bryant showed the violent havoc that a single determined and well-armed individual can inflict at Port Arthur in 1996. But like serious crime, the social impact of terrorism cannot be assessed purely in terms of loss of human life, actual and threatened. Modern western societies have become habituated to a high degree of everyday civic peace. Where this was threatened by conventional wars – the two world wars for example - there was widespread public acceptance of the need for common national and individual sacrifice: that lives would be lost, freedoms curtailed. There was collective psychological adjustment. People even derived strength from cooperation and common striving in the face of adversity. The threat was external and its source and contours well-defined. The terrorist threat to countries like Australia is very different and no doubt experienced very differently. It is not (or not primarily) the scale of loss involved (when compared to world wars, natural disasters, epidemics), but the uncertain threat hovering within everyday life that a sudden, random, violent attack will shatter its institutions and normal routines. This may exact a major psychological toll in fear and dread of what *could* happen. Reminders of this are constantly provided by the incessant global media circulation of images of violent events occurring elsewhere in the world.

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[31] See Simon Jenkins, "Bin Laden is laughing" *Guardian Weekly* September 15-21, 2006, p14.
[32] David Fromkin "The Strategy of Terrorism" *Foreign Affairs* (1974-1975) 53: 683-698.

This makes it much more difficult to judge the necessity, proportionality and effectiveness of measures taken to discourage and control the threat of terrorist violence. Uncertainty regarding the degree and precise source of the risk of terrorist attack coupled with the grave human consequences of a successful attack inevitably produces a tendency for governments to err on the side of caution by taking tough measures and being seen to do so. It is not being unduly cynical to say that politicians know that if they are *not seen* to be doing all that is possible to discourage and prevent an attack they will be punished politically, especially in the event of a serious terrorist event occurring. The preemptive mindset is fostered not by a known or calculable risk of a terrorist attack but by the very uncertainty surrounding the threat.

3.2 Al-Qaeda: proscription as symbolism

In its *Review of Security and Counter Terrorism Legislation* the PJC observed that the principal contemporary terrorist threat stems from individuals and groups "inspired" by al-Qaeda.[33] It is the ideological influence of al-Qaeda rather than its organizational form or power that is central in this assessment, a view shared by the Director-General of the Office of National Assessments[34] and the British security service[35].

In light of this it is not only the definition of terrorism, but also the question of what constitutes an "organization" that presents difficulties. In its submissions in *R v Ul-Haque* (Unreported NSW Supreme Court, 8 February, 2006, at para 51) the Crown stressed the breadth of the definition of "organization" in s100.1(1) of the *Criminal Code* in the following terms –

> In considering the meaning of "terrorist organization", it is first to be noted that the legislation is referring to an organization, that is, a standing body of people with a particular purpose; not a transient group of conspirators who may come together for a single discrete criminal purpose. The requirement for an "organization" is consistent with the provision for an entity with an ongoing purpose of committing a number of terrorist acts with the intention of advancing the same political, religious or ideological purpose.

Even this broad definition however probably fails to capture the extremely fluid and elusive forms of organizational activity involved in contemporary global terrorism. Global Islamic terrorism does not operate through any conventional organizational form or entity. The evidence from events like the Madrid and London bombings is that the principal threat is likely to come from local, self-starter individuals and groupings who are inspired by a combination of extremist Islamic ideology and outrage at what they perceive to be the injustices inflicted on the Arab and Muslim world by the West. The

[33] Para 2.6.
[34] Peter Varghese, "Islamist Terrorism: The International Context", Speech to the Security in Government Conference, Canberra, 11 May 2006.
[35] "The International Terrorist Threat to the UK", speech by the Director General of the Security Service, Dame Eliza Manningham-Buller at Queen Mary's College, London, 9 November, 2006.

ideas, sources of motivation, training and technical knowledge needed to execute attacks are not disseminated by structured organizations but in the constant, global flow of information afforded by new communications media: the internet, satellite television and so on. The organization required for attacks like those in London and Madrid is so limited and fluid, the finance required so small, that proscription legislation may be all but irrelevant to their prevention. Given the character of an organization like al-Qaeda, if "organization" is even a useful term to describe it, the instrumental effect of proscription is likely to be limited or non-existent.

Al-Qaeda is more a brand than an organization. Because for so many it is synonymous with wrongdoing on a monstrous scale its proscription is unlikely to greatly trouble many people, as indicated by the paucity of submissions to the PJC when it was re-listed in 2006. However, proscription is largely a symbolic gesture. It may provide some comfort to impose a familiar shape to a formless threat, fostering the allusion that it is amenable to control by tough legal measures, but it is unlikely to contribute much if anything to the prevention of terrorism.

As Hugh White wisely observes, "the best response is effective police and intelligence work – mundane, routine and unspectacular."[36] Sound human intelligence is of critical importance and that depends on cultivating cooperative, trusting relationships with communities whose members are in a position to provide vital information about extremist activity. That is where proscription could conceivably work against the effective policing of terrorist activity if it contributes to the alienation of whole communities.

3.3 Islamist *and* non-Islamist Terrorism and the Risks of Proscription

Gwynne Dyer makes another important point. Terrorism is a technique not an ideology and as such it can be used by all sorts of groups and individuals –

> 'You don't have to even represent a lot of people or a very popular ideology to make an impact as a terrorist; a small number of people with not-very-popular ideas will do. When small groups of terrorists commit spectacular acts of destruction and get the public's attention, it doesn't mean that they have suddenly become large and powerful groups; just that what they did was widely publicized.'

The almost exclusive focus on Islamist terrorism (terrorism as ideology rather than technique) can distort understanding and policy responses in several respects.

The French scholar of Islam, Olivier Roy, argues that contemporary terrorism has much more to do with globalization than Islamism. He points out that the contemporary world is witnessing a more general religious revivalism, reflected in Christian and other religious movements as much as in Islam. In this process, according to Roy, "religiosity

[36] See note 28.

is ..more important than religion" . That is, what is significant and what is changing is not the religion (be it Islam, Christianity or whatever) but the "relationship to religion", in particular the way in which that relationship is to be given expression at the level of the individual in a more highly personal relationship to faith and belief.[37]

Roy argues that fundamentalism in its various forms, both violent and non-violent, is both a reaction to and an instrument of globalization. Even as it deplores the decline of traditional religious tenets and pure faith, its resolution of the problem further weakens traditional religious authority and hierarchy. We witness a proliferation of self-appointed spiritual-political leaders (like bin Laden), religious cults and the like. The vast majority of these contemporary forms of expression of fundamentalism (religious or otherwise) are non-violent. They are as common amongst non-Muslims as Muslims. And the minority of violent forms are not monopolized by Islamists. We should recall that the only significant bio-terrorist attack of recent times was carried out not by an Islamist group but the Aum Shinrikyo cult in Japan when members released Sarin gas on the Tokyo underground in 1995, killing 12 people and seriously injuring another 40.[38]

Roy's analysis is also supported by evidence that a large number of the leading figures in serious Islamist terrorist attacks (including 9/11) were in important respects *outsiders* from Muslim society. Many were middle class, educated in colleges and universities in the west, and lived in western societies for long periods of time in circumstances of considerable cultural isolation and alienation. They often had a sketchy knowledge of Islam and their everyday religious observation was erratic to say the least. Their radicalization to violent jihad was nurtured in these conditions, was highly individualistic and molded by a combination of global media and involvement in highly localized subcultural groups, isolated from Muslim society and culture.[39]

In this respect, Roy and others suggest that contemporary terrorism has more in common with the forms of terrorism that have waxed and waned throughout the modern era, from the nineteenth century Russian anarchists to the Bader-Meinhof gang, Red Army Brigades and other forms of leftist terrorism in the 1970s, than is usually acknowledged. What has changed is the global reach of ideas and know-how and the increased lethality provided by new technologies.

This carries lessons for how we should understand and respond to the problem. First, as Dyer stresses, terrorism is a weapon of the weak and isolated. Effective responses will seek to minimize the risk of increasing its attractions and further empowering it. More attention needs to be given to the local contexts and conditions that are favourable to recruitment, including self-recruitment, into politically and religiously inspired violence. Our prison systems, for example, are an obvious locus of such activity, but do we have policies and research programmes that anticipate and reflect this possibility?

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[37] *Globalized Islam – the Search for a New Ummah* Hirst and Company, 2004, p28-29.
[38] See Robert Jay Lifton *Destroying the World to Save It – Aum Shinrikyo, Apocalyptic Violence, and the New Global Terrorism* Metropolitan Books, 1999.
[39] Peter Bergen and Swati Pandey "The Madrassa Scapegoat" *The Washington Quarterly* March 1, 2006; D. Benjamin and S. Simon *The Next Attack – the Globalization of Jihad* Hodder and Stoughton, 2005.

Secondly, we should not confuse or conflate terrorist violence with fundamentalism, let alone Islamism. Like the radicalism of the 60s and 70s most forms of fundamentalism are non-violent and many are personal, apolitical and retreatist. What people wear, what languages they speak, what flags they drape themselves in on public occasions and weird belief systems are poor guides to violent proclivities.

Thirdly, we should be cautious not to overstate the role of Islamic ideologies (of any kind). This is not just a case of cultural or religious sensitivity. It is more importantly a matter of analytical and strategic clarity. If we are concerned about prevention we should be prepared for the fact that terrorism - as a technique - may in the contemporary world be adopted by a wide variety of groups and individuals with very different backgrounds, grievances and agendas. Some of these – like the Oklahoma city bomber, Timothy McVeigh or the Aum Shinrikyo cult – will have nothing to do with Islam. For some others, perhaps al-Qaeda may serve as little more than a flag of convenience, a way of conferring perverted nobility on the violent expression of grievance and a globally recognizable brand that ensures instant attention on a vast scale.

If we too readily equate contemporary terrorism with Islamism we will fail to properly grasp either. And we will risk aiding bin Laden's cause by responding to his provocation in precisely the ways he intends. The Middle East expert, Michael Scott Doran[40], has emphasized the need "to comprehend the symbolic universe into which he [bin Laden] has dragged us", a struggle (as Doran saw it) primarily *within* Islam: involving the efforts of a small, extremist and violent Islamic *Salafi* movement to mobilize Muslims globally (the *umma*) around a highly purist model of Islam harking back, it is claimed, to the practice of the prophet and his followers. This struggle is directed primarily *against* the apostate political regimes and the polluted forms of Islam practiced in the contemporary Muslim world *as well as* their allies in the west. As Doran puts it –

> Polarising the Islamic world between the *umma* and the regimes allied with the United States will help achieve bin Laden's primary goal: furthering the cause of Islamic revolution within the Islamic world itself, in the Arab lands especially and in Saudi Arabia above all. He has no intention of defeating America. War with the United States is not a goal in and of itself but rather an instrument designed to help his brand of extremist Islam survive and flourish among the believers. Americans, in short, have been drawn into somebody else's civil war.

Insofar as the al-Qaeda message resonates in the Muslim world this is because of the level of popular disaffection and humiliation felt by many Muslim people, the sources of which include but are not confined to western interventions in Muslim countries, including the historical destruction and parceling out of the Ottoman Empire amongst European nations after World War 1, support for Israel against Palestinian nationalism, aid for autocratic regimes in the Arab world and latterly the US-led invasion of Iraq. It does not necessarily signal active support for terrorist violence or adherence to the al-Qaeda agenda. As Doran and other Islamic experts (Olivier Roy and Bruce Lawrence)

[40] "Somebody Else's Civil War" *Foreign Affairs* (2002) 81(1): 22-42.

point out al-Qaeda offers virtually nothing in the way of a programme to address the current problems afflicting many Muslim societies, like poverty and political autocracy.

There is a grave danger of conflating all forms of Islamic fundamentalism (let alone Islam generally) with al-Qaeda extremism. This is about as strategic as treating all forms of Christian fundamentalism as all of a kind with those extremist groups in the USA that bomb abortion clinics.[41] It is a dangerous error to fall into for precisely the reason that it accepts and operates within the symbolic universe of al-Qaeda, doing bin Laden's work for him by colluding in the very polarization and Manichean world view he promotes.

A report by the Canadian-based Human Security Centre[42] shows that there has been a global decline in political violence since the end of the Cold War, the one exception being terrorism. The report explains the welcome overall decline in terms of continuing decolonization in the non-western world and the fact that the end of the Cold War opened the way to peace-building interventions in many strife torn regions of the world. There is a grave risk that the "war on terror" will throw this positive trend into reverse, if (as the PJC has itself stressed) there is a failure to clearly differentiate terrorism from other forms of politically-inspired violence that are amenable to political settlement.

Where Islamic organizations participate in national political processes and pursue local and national political goals (e.g. Hamas, Hizbollah) surely it is prudent to encourage this as leading to political normalization in these settings. Instead proscription contributes to the isolation of these organizations, sending the message that there are no benefits to be had from democratic participation, and that its fruits will only be respected where they yield the outcomes desired by the west.[43]

The corollary at present in the Palestinian territories appears to involve western arming of the discredited and divided Fatah wing of the PLO[44] against Hamas with the possible consequence of fomenting a civil war and a complete decimation of Palestinian institutions and society.[45] Do supporters of such a strategy honestly believe that increased regional and global security will rise from the ashes of such a conflagration? That the factions will not be driven to greater extremism? That the arms imported into the territories today will not be turned against Israel tomorrow?

Symbolism is absolutely central to acts of terrorism and to bin Laden's violent jihad in particular. I have stressed that the role of proscription may also be more symbolic than instrumental. This is not intended as a criticism so much as an observation. But if it is correct more careful consideration needs to be given to the content of the message and its

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[41] Patricia Baird-Windle and Eleanor Bader *Targets of Hatred – Anti-Abortion Terrorism* Palgrave, 2001.
[42] *War and Peace in the 21st Century* Human Security Report 2005: available on-line at http://www.humansecuritycentre.org/
[43] See Timothy Garton Ash "A little democracy is a dangerous thing – so let's have more of it" *Guardian* 3/8/06.
[44] Fatah has lately been reinvented in the west as the 'moderates' although its armed wing, the al-Aqsa Martyrs Brigades, claimed responsibility for a suicide bombing in Israel in January 2007, the first in 9 months: see Rory McCarthy "Three Israelis dead as Eilat suffers first suicide attack" *Guardian* 30/107.
[45] Ed O'Loughlin "Attacks in Gaza escalate as unity talks collapse" *Sydney Morning Herald* 29/1/07, p7.

possible effects for fear that bin Laden may prove more adept at symbolic politics than his adversaries.

The overwhelming focus in the listing process on Islamic organisations and the failure to differentiate amongst those with a global focus and those engaged in predominantly local, national or regional conflicts suggests a tendency to assimilate all forms of political Islam to al-Qaeda terrorism, a monolithic global conspiracy against western values and interests. This is both simplistic[46] and dangerous. We deny ourselves the flexible political tools and options needed to deal with complex political situations.

We need to consider the sort of messages that this conveys to Muslims in Australia and to the wider world and the danger that anti-terror laws will be widely perceived as a proxy for official anti-Islamism without regard for the particularities of conflicts involving Islamic groups and the justice or otherwise of their cause. This is likely to pour fuel on the flames of division and extremism.

In overall terms, the listing provisions are of questionable effectiveness and carry the risk of making matters worse. They appear to be more important for what they say than what they do. Where proscription can be readily justified (e.g. al-Qaeda) it is unlikely to be of much instrumental utility and may provide only false comfort given the protean qualities of contemporary terrorism. In many instances proscription is a distraction from the challenge of developing concrete strategies to address violent political conflicts. At worst, the use of Australian criminal laws to pick sides in foreign political conflicts may increase threats to Australian security interests by drawing Australia into these conflicts in a partisan capacity rather than as a promoter of peace and compromise.

4. IMPLICATIONS OF THE LISTING PROVISIONS

4.1 Implications for Australia's Muslim Communities

In its *Review of Security and Counter Terrorism Legislation* (2006) the PJC drew attention to the evidence of a rise in prejudicial attitudes towards Muslim Australians and to Muslim fear, alienation and distrust due both to the perception that the laws target Muslims and to uncertainty regarding their reach and effect.[47] This was largely dealt with as if it was a misunderstanding based on insufficient information and community education regarding the laws. However, it *is* the case that the laws are extremely broad in their potential reach. They consequently confer enormous discretion on authorities and create inevitable uncertainty in relation to their possible use and impact. They put at risk of criminal prosecution a large number of law-abiding Australian citizens and residents who happen to "support" organizations like Hizbollah or Hamas or might be construed as

[46] See for example the special report, "Forty shades of green", in *The Economist* 4/2/06, pps 22-24 which describes the very different ideologies, goals and methods of Islamic political organisations with their roots in the tradition of the Muslim Brotherhood (like for example Hamas) compared with those of al-qaeda. In particular there is a fundamental divergence of view on the use of violence, the former seeing it as justified only in exceptional circumstances like self defence or foreign occupation.
[47] See chapter 3.

being “informal” members of such organizations. The terms are not defined in the legislation so the legal position is not clear, but if we are required to take our own laws seriously then the fears held by many are entirely justified. Improved community education in relation to the laws will confirm not dispel these fears.

It was suggested earlier in this submission that the statutory criteria for listing organizations is so broad that it can only be given meaning by reference to the manner in which the terrorist threat is framed in public and political discourse. Repeated protestations to the contrary notwithstanding, there is abundant evidence that political leaders and the media in Australia repeatedly frame the problem in essentially Islamic terms. New citizenship tests, demands that Muslims learn English[48] (why only Muslims?), the problematization of Muslim modes of speech and dress, demands that imams preach in English[49] and that “moderate” Muslim leaders more readily condemn extremism[50] (as if such condemnation is routinely reported in the media anyway) all contribute to framing the issue in these terms. The everyday lives and habits of Muslim Australians - what they wear and what they say or even fail to say (or are not heard or reported as saying) – are framed in terms of the terrorist threat. Mundane realities are inflected by terrorist fears and turned into security threats. This reflects a dangerous distortion of the character of contemporary terrorism and the role of the Islamic factor within it.

4.2 Inconsistency with Australian Refugee Law and Obligations

In refugee and extradition law Australian courts have recognized that politically inspired violence against a foreign government may be justified in a claim for refugee status in Australia or in resisting an extradition order by an Australian court to face criminal charges in another country. The courts have said that the violence needs to be judged by reference to the political context in which it occurred and not against some abstract universal standard.

In *A v Minister for Immigration and Ethnic Affairs* [1997 HCA, 24 February 1997] Justice McHugh observed –

> ..governments cannot be expected to tolerate political opinion or conduct that calls for their violent overthrow. Punishment for expressing such opinions is unlikely to amount to persecution. Nevertheless, even in these cases, punishment of the holders of opinions may amount to persecution. It will certainly do so when the government in question is so repressive that, by the standards of the civilized world, it has so little legitimacy that its overthrow even by violent means is justified.

[48] “PM tells Muslims to learn English” lead story in *The Ausralian* 1/9/06.
[49] “Plea for imams to preach in English” lead story, *The Sun-Herald* 17/9/06, reporting calls by the Parliamentary Secretary for immigration, Andrew Robb, that Muslim leaders preach in English and “take responsibility for combating extremists in their ranks”.
[50] “PM attacks terror war ‘pussyfoots’”, lead story *The Australian* 11/9/06, reporting calls by the PM for ‘moderate’ Muslims to speak out more often against terrorism.

In *Minister for Immigration and Multicultural Affairs v Singh* Justice Kirby observed (at.para 106-107) -

> The Convention, including Art 1F(b), should not be read with an eye focussed solely on the experience of the political processes of Australia or like countries. The Convention was intended to operate in a wider world. It was adopted to address the realities of "political crimes" in societies quite different from our own. What is a "political crime" must be judged, not in the context of the institutions of the typical "country of refuge" but, on the contrary, in the circumstances of the typical country from which applicants for refugee status derive.
>
> This reminder also emphasises the care that must be applied by municipal judges in construing the phrase "serious non-political crime" solely by reference to their own experience. As Lord Mustill pointed out, in most developed countries (including, one might say, Australia), the assassination of political leaders, police officers and other public officials is regarded as an anathema. However, with every respect to Callinan J's reasons in this case, it is too late, and would be mistaken, to place outside the definition of "political crimes", the murder of such personnel in societies having a different history, constitutional organisation, political arrangements and internal tensions.

The other majority judges agreed that the violent act in question must take its character – as political or not – from the particular political context in which it was committed.[51] Many foreign governments welcome the proscription by other countries of their political opponents. It reinforces their own efforts to criminalize political opposition and gives them a freer hand to ignore the human rights and legitimate political aspirations of national minorities.

There were suggestions that the proscription of the Kurdistan Workers' Party (PKK) was undertaken in response to overtures by the Turkish Government, a notion that was bolstered by the timing of the proscription to coincide with a visit by the Turkish Prime Minister.[52] Putting this controversy to one side more serious issues may arise from decisions by the Refugee Review Tribunal accepting an asylum claim based on a fear of persecution by the Turkish Government due to the applicant's links with the PKK.

For example, a summary of the decision in case N04/49229 in the Refugee Review Tribunal Bulletin observed –

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[51] See also *T vHome Secretary* [1996] AC 742

[52] *Review of the Listing of the Kurdistan Workers' Party(PKK)* April 2006, para 1.24-1.29. Although the Committee concluded that there was no evidence that the listing had been influenced by an approach from the Turkish Government DFAT acknowledged that such an approach was made in April 2005. Although there were discrepancies in the evidence given by DFAT and ASIO it is clear that the process that led to proscription did not begin prior to April 2005. The coincidences hardly dispel suspicions that Turkish overtures exercised an influence.

> The Tribunal noted independent evidence to the effect that the security forces continued to torture, beat and otherwise abuse people, particularly Kurds regarded as "activists". It found that the applicant's records would show that he had been identified as a Kurd who had admitted to supporting the PKK. The Tribunal accepted that the authorities continued to be highly motivated to identify any Kurd who wanted a separate state for Kurds, or was a supporter of the PKK. It found that laws to protect individual rights existed, but were not properly implemented in practice. The Tribunal accepted that persons merely suspected of membership of an illegal organisation were handed over to the Anti-Terror Branch of the police where torture was practised systematically.[53]

Proscription therefore may prevent the making of legitimate claims for asylum under the Refugee Convention for fear that evidence justifying the claim will provide grounds for laying a serious criminal charge under Australian anti-terrorism laws. This also means that Australia will fail in its obligations under international law. More profoundly, there is the question of who now are the persecutors. The PKK having been proscribed in Australia N04/49229 can also be handed over to Australia's "Anti-Terror" police. The reasons why, according to an Australian Tribunal, he had a well-founded fear of persecution in Turkey may now be reasons for him to fear prosecution under Australian criminal laws.

Some might claim that this is far-fetched and makes no allowance for the discretions which attend decisions to prosecute such offences. The discretion to prosecute though is precisely that: a discretion *to* prosecute. Individuals cannot be expected to know what officials will do. They can only be guided by what the law says.

5. CONCLUSIONS

5.1 Proscription Provisions: Abolish or reform?

There are principled objections to the proscription provisions and this submission broadly shares them. Just as importantly, it doubts the practical efficacy of proscription as a tool to combat terrorism and believes (with ASIO and the PJC) that its misuse could make matters worse in some instances. Recognizing however that the Government is committed to its retention it is necessary to consider what reforms should be made to the existing provisions.

5.2 Executive or Judicial Process?

[53] Decision of the RRT N04/49229, 30 September, 2004. Summary provided in RRTBulletin 2/2005 at p12. Also see the decision in V05/18061. RRT statistics show that in the 8 months to February 28 2006 the Tribunal considered 30 asylum claims from Turkish nationals. It upheld twice as many as it set aside.

One of the options for reforming the process supported by some but not all members of the SLRC was to replace executive proscription with a judicial or quasi-judicial process. Other members of the SLRC believed proscription should remain an executive function with strengthened safeguards.

This is a difficult issue but on balance this submission takes the view that if proscription is to be retained it is more appropriately a matter for the executive rather than a judicial body. However, this should depend on the executive demonstrating that it can be trusted with the power and that the power is exercised effectively with due regard to both the effect on individual rights and Australian national security interests.

In response to the argument that the power be vested in a judicial process rather than the executive the Commonwealth Attorney-General's Department (AGD) argued in its submission to the Sheller Committee –

> ..the listing of organizations is a process that does not just involve the executive: it also involves the Parliament, as it is Parliament that has the power to disallow a regulation that prescribes an organization as a terrorist organization. It is appropriate that the executive and the Parliament play a role in determining the nature of the organisation taking into account the expert advice of those with an extensive knowledge of the security environment. The expertise of members of the executive, who have contact with senior members of the Governments and agencies of other countries cannot be understated.

If these arguments are accepted their logical implications ought also to be accepted. Where the existing process has been found wanting in the very terms in which its advocates support it they should welcome reforms to rectify the problems. This submission has summarized the failings identified by the PJC in the administration of the provisions, many of which suggest that the advantages claimed for an executive process are not being realized in practice. For example, the executive has frequently failed to undertake the consultations it claims are so important, with DFAT in particular playing no meaningful role in many of the listings. The Commonwealth has frequently failed to consult state and territory governments, contrary to the agreement to do so. The knowledge base upon which many listings have been made is defective both in terms of quality and comprehensiveness. If the executive claims to be better informed and better qualified to make the decision to proscribe an organization, this should be manifest from the process. The PJC has repeatedly found the opposite to be the case.

In conscientiously reviewing each listing and making strong criticisms where it felt they were warranted the PJC has upheld the traditions of parliamentary scrutiny and independence and deserves credit for doing so. But contrary to the submission of the AGD, quoted above, this exposes the limitations of existing accountability mechanisms. Despite strongly expressed misgivings about process, about the quality of the information supplied to the PJC in some instances and the substantive merits of particular listings the PJC has not disallowed any listing. It is unlikely to do so for perhaps understandable reasons. Once the Attorney-General has listed an organization there is inevitably a

politically-driven momentum to confirmation and, in practice a strong, perhaps irresistible, presumption against disallowance. The implication of some of the PJC reports is that the Attorney-General has (to say the least) made a questionable decision to list an organisation, based on poor information, poor advice and without publishing adequate reasons. He has done so (and will continue to do so) because *he can*.

That is, there is no adequate check on the executive proscription power. This is a source of grave concern because of the implications for civil liberties *and* equally for Australia's security interests and its role in promoting the resolution of conflict in other parts of the world.

5.3 Reforming the Listing Criteria

The crux of the problem stems from the breadth of the statutory listing criteria and the failure of the Government to specify any additional meaningful criteria governing the discretion to list. This is a bi-partisan concern shared by the Senate Legal and Constitutional Legislation Committee (in its original report on the legislation), the PJC and the Sheller Committee, as well as many organizations and individuals in the community.

In its submission to the Sheller Committee the AGD argued that additional criteria are "unnecessary" and the discretion to list "needs to be assessed on a case by case basis". It further argued that a requirement that there must be direct links to Australia before an organization was listed is "inconsistent with the international nature of terrorism."

With respect this is unhelpful and disingenuous. What is being required in each case is a statement of the reasons for listing an organization that explain the effect on, and benefit, to Australia's security interests. To respond by simply invoking the mantra that terrorism is "international" or global in character affords no meaningful support for a decision to list. Indeed it gives rise to the suspicion that the concrete security and other implications of listing an organization are not carefully weighed.

This problem points to the more fundamental question of how terrorism is to be defined. The concept of terrorism may provide a cloak of legalism and legitimacy for what are really political decisions. It can seem to reduce complex political realities to apparently simple moral choices, masking the real challenges involved in resolving or mitigating violent political conflicts. Opposing or dissenting views are marginalized, de-legitimated and, quite possibly under anti-terrorism laws, actually criminalized. To the extent that they function in this way terrorism laws are unlikely to serve Australia's long term security interests.

If it is accepted that proscription is properly a matter for the *political* branch of government this does not obviate the need for accountability. This does not appear possible without clear and explicit listing criteria.

This submission agrees with the Sheller Committee (and the PJC) that criteria for proscription need to be determined and stated. The statutory criteria should be tightened, beginning with amendment to the advocacy provisions as proposed by the Sheller Committee, but not necessarily restricted to this.

5.4 Process

This submission supports the recommendations of the Sheller Committee and the PJC in relation to publicizing proposed listings, notice to interested parties, and the opportunity to be heard prior to a listing and the widespread publication of details after an organization has been listed.

5.5 Oversight

The recommendation of the Sheller Committee and the PJC for an Independent Reviewer, resourced and empowered to report to Parliament on all aspects of the anti-terrorism laws and their administration inclusive of the listing provisions, is also supported.

The PJC should continue to play a robust role in the review of listings. It is encouraged to continue its practice of seeking information from a wide range of sources relevant to particular listings.