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The Process of Review

2.1 The *Criminal Code Amendment (Terrorist Organisations) Act 2004* gained assent on 10 March 2004. On 11 March, the Committee sought a briefing from officers from ASIO and the Attorney-General's Department on the expected nature and extent of the operations of the new provisions and the implications of the Act for the Committee. The Committee was particularly concerned to understand the Minister's decision-making processes. Members also asked what type of information on a listing would be made available to members of the Committee. The Committee was told that the Minister made his judgements on the basis of open source material only, although this was corroborated by intelligence, and that the same material would be supplied to the Committee for its review.

2.2 It was the view of the officers from ASIO and the Attorney-General's Department that the role of the Committee was to ensure that the Attorney-General had gone through the appropriate processes and to limit their consideration to whether the public supporting statement on the listing offered sufficient reasons for the listing. However, they noted that there was nothing in the legislation to prevent the Committee from looking at other matters in considering the merits of the case.

2.3 The Committee also sought advice from the Parliamentary Library on the Committee's role and the extent and limits of the Committee's powers under the Act. The following matters were raised:

- Whether the review process was discretionary. The Act states that the Committee may review the regulation as soon as possible after the making of the regulation. The Committee was advised that: The use of the word 'may' generally means that something is a matter of discretion rather than obligation (see section 33(2A) Acts Interpretation Act). However, even with provisions such as section 33(2A), there have been occasions where 'may' has been held to be synonymous with 'must' after the court has examined the object of the statute or the surrounding text.
- Whether a merits review process was justified or useful. There is nothing in the Act which precludes a merit review process. Whether the Committee should conduct a merit review was considered on the basis of what other review processes were available under the regulations.

2.4 In its own deliberations on the type of review that it might conduct, the Committee considered a number of factors:

- **International comparisons.** Other comparable jurisdictions have listing procedures for terrorist organisations. There is a similarity in many of the procedures. The Committee noted the regulations in three other countries: the United States, the United Kingdom and Canada. These are complex matters and, for the purpose of this exercise, only the listing and review processes will be outlined. In each of these cases, initiative for listing is vested in the executive and supervision is, in varying degrees, given to the judiciary or the legislature.

  In the **United States**[1], a foreign terrorist organisation can be designated by the Secretary of State, in consultation with the Secretary of the Treasury and the Attorney-General, if he/she is satisfied that the organisation is a foreign organisation, and that it engages in terrorist activity as defined and the activity threatens US nationals or US national security. Certain Congressional office holders must be informed of the designation and the factual basis for it.

  Congress can block or revoke a designation. The Secretary of State can also revoke a designation on the basis of changed circumstances. In addition, there is a provision for judicial review by the United States Court of Appeal for the District of Columbia,

1 Information in this section is taken from public information available on the web site of the United States Department of State.

if the applicant applies within 30 days of the publication of the designation. The basis of the review is the administrative record as well as any classified information. The specified grounds for setting a decision aside include that the decision was arbitrary, capricious, contrary to a constitutional right or not in accordance with the procedures set down.

The consequences of designation are deportation of aliens who are members of such organisations and the freezing of any funds belonging to such organisations.

At the time of writing, the United States had designated 37 organisations as foreign terrorist organisations.

In the **United Kingdom**, terrorist organisations are proscribed by the Secretary of State for Home Affairs on the basis that he/she believes that an organisation is concerned in terrorism i.e. commits/participates in acts of terrorism, prepares for terrorism, promotes/encourages terrorism or is otherwise concerned in terrorism. Parliament must agree to the proscription of any new organisation and the Parliament must keep the list 'constantly under review'.[2] It is unclear how this process happens.

Appeals on the part of any affected individual or organisation can be made to the Home Secretary. If this is refused, an appeal can be made to a specific judicial body, the Proscribed Organisations Appeal Commission, on the basis that the decision is flawed on judicial review principles. A further appeal can be made to a court.

Criminal penalties apply to offences under this act: on conviction or indictment, to imprisonment for a term not exceeding ten years, to a fine or to both, or on summary conviction, to imprisonment for a term not exceeding six months, to a fine not exceeding the statutory maximum or to both.

At the time of writing, the United Kingdom had proscribed 25 organisations under the *Terrorism Act 2000*. In addition, 14 organisations have been proscribed in Northern Ireland under previous emergency legislation.

In **Canada**, lists of terrorist organisations are made under the *Anti Terrorism Act* and the *Criminal Code* on the recommendation of the Solicitor-General to the Governor in Council. The Governor in

2 Information in this section is taken from public information available on the web site of the Home Office of the United Kingdom.

Council must be satisfied that there are reasonable grounds to believe that the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity; or is knowingly acting on behalf of, at the direction of or in association with an entity that has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist activity.

Entities so listed can apply to the Solicitor General for delisting. After 60 days, if the entity remains unsatisfied with the decision, a further application may be made to the federal court. The judge shall determine whether the decision to list is reasonable on the basis of the information (a statement summarising the reasons for the decision).

It is not a crime to be listed; however, once listed an entity's property can be the subject of seizure / restraint and / or forfeiture. Banks, brokerages etc are also subject to reporting requirements.

As at November 2003, 35 organisations had been listed in Canada under this legislation.

- **The length of time available to the Committee.** The Act stipulates 15 sitting days. This is quite short and of itself will necessarily limit the any inquiry. There is not, under the legislation, a means by which this period can be extended to allow an in-depth inquiry and greater opportunity for public comment.

- **Other review mechanisms**. There appeared to be three avenues of appeal for any organisation listed by regulation under the Australian legislation: back to the Minister, to the courts and to the Committee.

  ⇒ Once listed an entity may apply to the Attorney-General for de-listing, 'on the grounds that there is no basis for the Minister to be satisfied that the listed organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.'

  ⇒ If de-listing is denied by the Minister, the entity has the opportunity, under the *Administrative Decisions (Judicial Review) Act 1977*, to have this decision reviewed. It should be noted however that this review involves testing the legality of the decision rather than its merits. It is a review of process not of merits.

  ASIO has also advised the Committee that, further to the above, 'the making of the regulation is subject to judicial review under

section 75(v) of the Australian Constitution, and section 39B of the *Judiciary Act 1903*.'[3] However, this is not an avenue for merit review.

⇒ The Act provides that each regulation may be reviewed by the Parliamentary Joint Committee on ASIO, ASIS and DSD. The Act does not specify or limit the nature of the Committee's review. It would appear that it is open to the Committee to conduct a review of the merits of the regulation. It also appears that the Committee, as the process now stands, might be the only avenue for this to occur, other than the Attorney-General who has made the original decision.

- **The consequences of the listing**. The offences under the Act are broad and the consequences severe. When, by regulation, it is determined that an organisation is a terrorist organisation under the provisions of the Criminal Code, it is an offence to:
  - ⇒ Direct the activities of the organisation;
  - ⇒ Recruit persons to the organisation;
  - ⇒ Receive training from or provide training to the organisation;
  - ⇒ Receive funds from or make available funds to the organisation;
  - ⇒ Provide support or resources to the organisation;
  - ⇒ Be a member of the organisation.

  The penalty can be a prison sentence of up to 25 years.

- **Principles of procedural fairness (natural justice).** These principles apply in general to the decisions of administrative decision makers.

  > It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is to be made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.
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  > **High Court case of Kioa v West**

2.5 During debates on the Bill a number of Members of Parliament were concerned about the protection of civil liberties and the maintenance of parliamentary oversight of any executive power to proscribe

3 Private briefing, 13 May 2004.

organisations. The Labor Opposition had opposed the Bill in its original form (2003) stating that:

> proposals to erode our freedoms and our rights will ultimately erode our security as well. … we will not accept a regime of secret proscriptions, of decision in closed rooms, of such significant and potentially destructive power in the hands of one person alone.[4]

2.6 Even in its amended form, when briefings of the Leader of the Opposition and consultation with State governments and the review mechanism by the Joint Parliamentary Committee were added to the Bill, the minor parties in the Senate remained unhappy with the quality of the oversight.

> You should not be able to ban organisations in this country without the authority of Parliament. … There is no safeguard to prevent this from occurring. The best that the Parliament can do some time later – and it may be months before it gets the opportunity – is to restore the organisation, but not until after members have been jailed, funds have been seized and offices and so on have been closed down.[5]

2.7 Finally, however, the Opposition argued that, given the possibly classified nature of much of the information underpinning any listing, Parliamentary oversight was best achieved through the joint intelligence committee.

> We say that the parliamentary joint intelligence committee, with what are unique statutory powers in this Parliament under the Intelligence Services Act and with what has been, I think it is fair to say, a professional and bipartisan approach … to these security intelligence matters, is an appropriate body to review the basis of a listing decision and to provide an informed recommendation to the Parliament about the merits of the decision.[6]

2.8 None of the other available review mechanisms offers a review of the merits of the decision. Given the severity of the penalties and the principles of natural justice, it seems prudent for the Committee to adopt a course of action that is as rigorous as possible. The Committee's obligation to report to the Parliament prior to the end of

4 Senator Faulkner, Senate debates, 16 June 2003, p. 11432

5 Senator Brown, Senate debates, 3 March 2003, pp. 20747-48.

6 Senator Faulkner, Senate debates, 3 March 2003, pp. 20753-54

the disallowance period offers the only opportunity for an accused entity to test, through an independent reviewer, the validity of the listing on both the procedures and the merits. Beyond this period there can only be reviews on the basis of process. Moreover, since the Parliament is able to disallow a regulation, the Parliament should have the clearest and most comprehensive information upon which to make any decision on the matter. Where classified material is involved, the Parliament will rely heavily on the judgement of the Committee.

Protocols for the consideration of an individual listing

2.9 The Committee discussed all these factors when deciding the procedures it would adopt for the review of terrorist organisation listings. It also took into consideration the normal procedures of parliamentary committees which seek to offer open and public scrutiny of executive actions. A further consideration, however, was the likely classified nature of some of the evidence. At its meeting of 13 May 2004, the Committee adopted the following procedures. They may be altered in future in the light of the Committee's experience in handling the regulations.

- The Government should be required to present the regulation and the accompanying unclassified brief formally to the Committee immediately the regulation is made. In this brief, the Government should provide details of its consultation with the States and Territories and the Department of Foreign Affairs regarding the making of the regulation. There should also be details of the procedures followed in the making of the regulation.
- ASIO should be called to provide a private briefing to the Committee. Any classified information that pertained to the listing and the reasoning behind the listing should be presented at this briefing. This briefing should occur whether or not the Committee chooses to hold a public review. It will be Hansard recorded by the cleared Hansard officers of the Parliament.
- On receipt of the regulation and accompanying brief from the Attorney-General, the Committee will decide whether to advertise the review. The normal parliamentary process is to advertise any inquiry, even if the Committee then chooses to take evidence in private and make submissions confidential. This demonstrates to

the public that the process of parliamentary scrutiny exists; it seeks to elicit from the public any information of which the Committee might be unaware; and it offers to members of listed entities an opportunity to contest adverse assessments made by ASIO.

- After considering the nature of the listing, the submissions received from community organisations or others and whether the listed organisation has members in Australia who might seek to make representations, the Committee may decide to hold a hearing on a listing. In particular, if the Committee were convinced that there appeared to be a *prima facie* case against a particular listing, a hearing would be held.
- If a hearing is to be held, it could be in-whole or in-part in public or in-camera depending on the sensitivities of those giving evidence.
- If the Committee decides not to hold a hearing, its report will be based wholly on the papers supplied to it and the ASIO briefing.
- A report will then be drafted and tabled in Parliament within the time frame as dictated by the legislation. The legislation requires that the Committee report before the end of the disallowance period.