6

Other Issues

6.1 This chapter deals with a number of matters including, the use of strict liability in Division 102 offences; the level of consultation by the Commonwealth with the Governments of the States and Territories; the period after which listing regulations should expire; and the need for the ongoing monitoring of the application of terrorism laws.

Strict Liability

6.2 As noted in chapter 2, the proscription of an entity relieves the prosecution from proving beyond a reasonable doubt that the entity is a terrorist organisation.[1] However, the prosecution must prove either that the accused knew the entity was listed or that the organisation satisfied paragraph (a) of the definition of 'terrorist organisation'. AGD advocated the wider use of strict liability in the terrorist organisation offences to make it easier for the prosecution to prove the knowledge element of the offence.[2]

6.3 The Committee sought evidence on how strict liability would operate in the context of the offence of membership of a 'terrorist organisation'. The Law Council of Australia submitted that:

> . …demonstrating that a person was *intentionally* a member of a particular organisation does not establish the core culpability. The culpability clearly attaches to being a member

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1 Under paragraph 102.1(1) (a) 'terrorist organisation' means an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs).

2 AGD, *Submission* 10, p.15.

of an organisation in the knowledge that, or reckless to the fact that, it is a terrorist organisation.[3]

6.4 It was also argued that the defence of mistake would be of limited utility because it will fail if the prosecution can prove the defendant did not consider whether the organisation was listed; or, that, while the defendant genuinely believed it was not a listed terrorist organisation, such a belief was unreasonable.[4]

6.5 The Committee was also advised that drug offences do not provide a direct analogy. In the context of drug offences the Criminal Code generally requires the prosecution must prove to the criminal standard that the defendant knew or was reckless to the fact that the substance or plant was by law a 'controlled drug' or 'controlled plant'. The accused is not assumed to know the law.[5]

Committee View

6.6 The Committee considered the existing use of strict liability in Division 102 offences during its review of counter terrorism law in 2006.[6] In that review, the Committee agreed with the SLRC that, in order to protect the presumption of innocence, strict liability should be reduced to an evidential burden.[7]

6.7 Where the penalty for an offence includes a period of imprisonment Australian practice is not to apply strict liability. The Committee is not persuaded that strict liability is necessary and restates the importance of ensuring that special terrorism laws conform as much as possible to the ordinary principles of the criminal justice system.

Recommendation 5

6.8 **The Committee recommends that strict liability not be applied to the terrorist organisation offences of Division 102 of the Criminal Code.**

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3 LCA, Supplementary *Submission* 17A, p.9.

4 LCA, Supplementary *Submission* 17A, p.10.

5 LCA, Supplementary *Submission* 17A, p.13.

6 See, 'Reverse onus provisions' in Chapter 5 of the *Review of Security and Counter Terrorism Legislation,* December 2006.

7 *Review of Security and Counter Terrorism Legislatio*n, December 2006, p.83.

Consultation with States and Territories

6.9 The *Intergovernmental Agreement on Counter Terrorism Laws* requires that before the power to list an organisation is exercised the Commonwealth will consult with State and Territory Governments about the listing and not list an entity where a majority of other parties object.[8] The Commonwealth has undertaken to 'use its best endeavours' to give the other parties a reasonable time to consider and to comment on the proposed regulation.[9]

6.10 The Committee did not receive responses from all the State and Territory Governments. However, the Premier of Tasmania noted that in relation to the listing of the PIJ, Tasmania was provided with four days to consider relevant materials and provide a response:

> This is not considered to be 'reasonable time' in the context of the Prime Minister's undertaking.[10]

6.11 The Governments of the Australian Capital Territory (ACT) and Tasmania also expressed concern that the States and Territories have been excluded from decision making about the re-listing of terrorist organisations and that the IGA does not address the role of the States and Territories where de-listing is being considered.[11] The Premier of Tasmania proposed that States and Territories should be consulted, or at the very least advised of an intention to de-list to ensure that there are no transitional law enforcement issues.

Committee View

6.12 The Committee has monitored the timeliness of consultation with Governments of the States and Territories as part of its review function.[12] In fifty per cent of cases the parties have been given five days or less in which to consider and comment on a proposed listing. The large majority of cases involve re-listings, and consultation has in practice become a form of notification. However, in the case of a new listing, for example, the listing of the PKK, the period was also

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8 Paragraph 3.4 of the IGA.

9 Subparagraph 3.4 (3) IGA.

10 Mr Paul Lennon MP Premier of Tasmania, *Submission* 28, p.3.

11 Katy Gallagher MLA, Deputy Chief Minister of the ACT, *Submission* 18, p.3; Mr Paul Lennon MP Premier of Tasmania, *Submission* 28, p.3.

12 See, for example, *Review of the Listing of Six Terrorist Organisations* March 2005, paragraphs 2.9-2.10; *Review of the Listing of Four Terrorist Organisations* September 2005, paragraphs 2.1-2.6.

extremely short with only three working days provided for the Premiers to take advice and respond.[13]

Expiry of listing regulations

6.13 A regulation proscribing an entity expires on the second anniversary of the day on which it took effect.[14] The purpose of automatic expiration is to ensure that if the executive wishes to continue the proscription, the Minister has considered afresh all the relevant information and is satisfied that there is a sufficient factual basis to support the legality of proscription for a further two year period.

6.14 Periodic review is a feature of the proscription regimes of comparable jurisdictions, although how this is achieved varies from country to country:

- UK: every six months by an internal inter-departmental working group;[15]
- Canada: mandatory review every two years and a recommendation made to the Governor in Council as to whether the entity should remain a listed entity;[16]
- New Zealand: expiry after 3 years with the possibility of re-listing.[17] Before expiration the Attorney-General may apply to the High Court to extend the designation for a further three years.[18]
- USA: a designated 'foreign terrorist organisation' can petition for revocation of their designation after two years and, in the absence of any such petition, the designation must be reviewed by the Secretary State after five years.[19]

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13 *Review of the listing of the Kurdistan Workers' Party*, April 2006, p.4.

14 Section 102.1(6) of the Criminal Code.

15 Subsection 14 (3) Prevention of Terrorism Act 2005(UK)

16 The review must be completed within 120 days of commencement. After completing the review the Minister must publish in the *Canada Gazette* notice that the review has been completed; subsection 83.05 (9) (10) of the Canadian Criminal Code.

17 Subsection 35 (1) of the *Terrorism Suppression Act 2002* (NZ); Paragraph 23(c) of the *Terrorism Suppression Act 2002* (NZ).

18 The entity may appeal the extension to the Court of Appeal. A re-listing of an entity where the designation has already expired or has previously been revoked must be based on information that became available after the cessation of the earlier designation, and is significantly different from the information on which the earlier designation was based; subsection 35 (3) of the *Terrorism Suppression Act 2002* (NZ).

19 *Intelligence Reform and Terrorism Prevention Act 2004* (USA).

Committee View

6.15 To date the listing of each entity under the Criminal Code has been subject to a re-listing by the Government and scrutiny by the Committee. The automatic cessation of a listing has been effective in institutionalising the review and ensuring that any changes in circumstances have been taken into account, for example, the renouncement of the use of violence, entry into a peace process, and so forth. Triggering a review is a safeguard both for the entity and the Minister, who must continue to be satisfied the entity meets the legislative criteria. Based on its own experience over the past three years, the Committee considers that extending the period of a regulation from two to three years and providing an opportunity for parliamentary review at least once during the parliamentary cycle, would offer an adequate level of oversight.

Recommendation 6

6.16 **The Committee recommends that:**

- **a regulation listing an entity should cease to have effect on the third anniversary of the date it took effect.**
- **the Government consult with the Committee on streamlining the administration of proscription to enable periodic review of multiple listings during the parliamentary cycle.**

Post enactment review

6.17 There have been various calls for further review of the terrorism laws, in part because several of the reviews, including this one, have taken place at a relatively early stage making it difficult to make a full assessment of the impact and implications of the new terrorism regime. During this inquiry the Premier of Tasmania raised the matter for the Committee's consideration. In light of the extraordinary nature of the provisions and the role the States and Territories have had in their development, the Premier considered it appropriate that the States and Territories all be involved in regular reviews of their application. He recommended that reviews such as this one be

conducted every three to five years while the legislation remains in force.[20]

6.18 In 2006, the SLRC also proposed that an independent review of the counter-terrorism legislation be conducted in a further three years.[21] As an alternative, it was suggested that the review previously agreed to by COAG to re-examine the new measures introduced by the ATA (No.2) in 2010, be expanded to all of Part 5.3 of the Criminal Code.[22]

Committee View

6.19 In 2006, this Committee noted that by July 2006, the AFP had conducted 479 investigations since the introduction of the new laws in 2002, resulting in 25 prosecutions, most of which remain before the courts.[23] While there are some statistics published in annual reports of the AFP, DPP and ASIO, there is no single public source of comprehensive data on the use of terrorism laws and related powers.[24] Future reviews would benefit from comprehensive data on the application of terrorism laws and the special powers conferred on police and intelligence agencies.

6.20 The Committee also reiterates its view that an Independent Reviewer would provide a more integrated and ongoing approach to monitor the implementation of terrorism law in Australia. The establishment of a mechanism of this kind would contribute positively to community confidence as well as provide the Parliament with regular factual reports.[25] The Independent Reviewer should report annually to Parliament with provision for this Committee to examine the report. In the meantime, and in the interests of ensuring a comprehensive and integrated approach, the Committee recommends that the proscription regime and Division 102 terrorist organisation offences should be included in the review scheduled for 2010 under the auspices of COAG.

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20 Mr Paul Lennon, Premier of Tasmania, *Submission* 28, p.1.

21 SLRC Report, p.8.

22 SLRC Report, p.8.

23 *Review of Security and Counter-Terrorism Legislation*, December 2006, p.15.

24 The AGD National Security Website contains some basic information on current prosecutions.

25 See, for example, SLRC Report, p.8; UNAA, *Submission* 5, p.5; Associate Professor Hogg, *Submission* 6, p.27.

Recommendation 7

6.21 **The Committee:**

- **recommends that the Attorney-General's Department be responsible for the publication of comprehensive data on the application of terrorism laws.**
- **reiterates that an Independent Reviewer be established to monitor the application of terrorism laws, including the use of special police and intelligence powers, on an ongoing basis. In addition, that the Independent Reviewer report annually to the Parliament and the responsibility for examining those reports be conferred on the Committee.**
- **recommends that the application of the proscription power be included in the review of counter terrorism laws scheduled for 2010 under the auspices of the Council of Australian Governments.**

The Hon. David Jull MP

Chair

13 September 2007