

Your reference

Our reference TP:LGP



t: (03) 9269 0234 f: (03) 9269 0440

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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
P.O Box 6021
Parliament House
CANBERRA ACT 2600

Melbourne Office

350 Queen St
Melbourne VIC 3000

GPO Box 4380
Melbourne VIC 3001

DX 210646 Melbourne VIC

t: 03 9269 0234
1800 677 402

www.legalaid.vic.gov.au
ABN 42 335 622 126

By email: pjcis@aph.gov.au

Dear Committee Secretary

Review of the Listing Provisions of the Criminal Code Act 1995

Thank you for the opportunity to comment on the operation, effectiveness and implications of the listing provisions of the Criminal Code 1995.

I attach Victoria Legal Aid's comments for your consideration.

If you would like any further information about our comments, please contact me on 9269 0247 or Llewellyn Prain (Manager, Policy) on 9269 0138.

Yours faithfully

TONY PARSONS
Managing Director

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1. Summary

Victoria Legal Aid (VLA) does not support the Listing Provisions of the Criminal Code for the following reasons:

- The provisions are a departure from fundamental principles of criminal law which underpin our democracy
- They vitiate longstanding principles of freedom of association
- The provisions are not an effective mechanism for combating politically, religiously or ideologically motivated violence in Australia.
- The criteria used to list organisations may be applied to an excessively broad range of organisations including organisations resisting oppressive regimes
- The Attorney-General's discretion is too wide and there is a potential risk that the power may be exercised in an inconsistent, discriminatory and politically motivated way.

3. Submission

3.1 The provisions are a departure from fundamental principles of criminal law which underpin our democracy

The proscription power breaches a fundamental principle of criminal law. Guilt is normally attributed to an individual on the basis of their own actions or involvement in causing harm or damage. By imposing criminal liability on groups and on those who associate with them the proscription power introduces guilt by association. It imposes criminal liability on individuals who may not have a provable connection to violent acts that threaten the safety of the public.

The listing provisions create offences in relation to an organisation regardless of the specific activities of that organisation in Australia at a given point in time. Once listed as a terrorist organisation, the consequences of being a listed organisation continue regardless of what activities that organisation does or does not undertake. This is not appropriate in a democratic society.

3.2 The provisions vitiate long standing principles of freedom of association

The proscription power is inconsistent with Australia's international obligations under the International Covenant on Civil and Political Rights, most notably those obligations relating to freedom of association (Article 22). The proscription power imposes criminal liability by association on whole groups and on those who associate with them.

3.3 The provisions are not an effective mechanism for combating politically, religiously, or ideologically motivated violence in Australia.

It is unclear whether the practice of listing an organisation is effective in combating politically and religiously motivated violence. The existing criminal law offers sufficient protection against politically and ideologically motivated violence. If members of listed organisations are responsible for the kinds of politically and ideologically motivated violence alleged, then the offences required to protect the public from such actions are already available to law enforcement authorities.

It is unclear how the listing of an organisation would assist other than in cases where the link between the accused or the relevant organisation and the "terrorist act" could not be established to the satisfaction of a court. In such cases the imposition of criminal liability is not justified.

3.4 The criteria used to list organisations have the potential to be applied to an excessively broad range of organisations including organisations resisting oppressive regimes

In order for an organisation to be proscribed the Attorney General must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). In 2005 the latter part of this definition was amended to read 'whether or not a terrorist act occurs'.

The definition has also been amended so that it applies where an organisation 'advocates the doing of a terrorist act'. Broadly, a 'terrorist act' is a defined action or threat of an action done or made with:

- the intention of advancing political, religious or ideological cause; and
- the intention of coercing or influencing by intimidation a government of the Commonwealth, State, Territory, foreign country or the public.

This definition criminalises politically, religiously and ideologically motivated acts and is therefore particularly prone to being applied in a discriminatory manner or in a way that suppresses political dissent. 'Motivation' for an act is now a relevant factor in respect of criminality rather than the action itself. Under normal principles, it is the action itself that poses a social problem regardless of the motivation for that act. Without this change to normal principles, existing criminal law definitions and offences address terrorist activity. For example, an act of property damage or endangerment to persons may be prosecuted under standard criminal legislation.

3.5 The Attorney-General's discretion is too wide and there is a potential risk that the power may be exercised in an inconsistent, discriminatory and politically motivated way.

As a further consequence of these broad definitions the Attorney-General is afforded an extremely wide discretion in determining which organisations should be listed as terrorist organisations. This is exacerbated as the legislative regime does not provide for judicial determination of which organisations should be listed nor any mechanism for substantial judicial review on the merits of a decision. An organisation facing listing has no opportunity to make a case against the proposed listing. The Attorney-General's decision to list an organisation may be appealed pursuant to the Administrative Decisions (Judicial review) Act 1977. This offers a limited merits review, however, given the broad criteria for listing it is unlikely that a decision to list would be found unlawful.

In determining whether an organisation is suitable for proscription ASIO has acknowledged that it takes the following factors into account:

- The organisation's engagement in terrorism
- The ideology of the organisation, and its links to other terrorist groups or networks
- The organisation's links to Australia
- The threat posed by the organisation to Australian interests

- The proscription of the organisation by the United Nations or by like minded countries
- Whether or not the organisation is engaged in a peace or mediation process.

These imprecise criteria combined with wide-reaching Ministerial discretion have in practice resulted in inconsistent application of the listing power. We refer particularly to *The Politics of Proscription in Australia*, published by the Australian Parliamentary Library.¹ This research illustrates the arbitrary way that organisations are listed. There has been listing of organisations that have no links to Australia, while other organisations that do have links with Australia have not been listed.

While the purported legislative aim of this power is the maintenance of Australian national security, it is evident that this aim is not used to inform the exercise of the power. In practice, the executive does not require that organisations actually pose a threat to Australian national security before they are listed. We submit that, by listing organisations with no demonstrable link to Australia the executive is exceeding the intended scope of the legislation.

¹ Parliamentary Library Research Note, *The Politics of Proscription in Australia*, 2003-04 No. 63, 21 June 2004