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Re: FECCA submission to review of Listing Provisions of the Criminal Code

Summary

FECCA welcomes the review and the opportunity to contribute viewpoints of our culturally and linguistically diverse background community [CLDB].

FECCA acknowledges the need for appropriate measures to safeguard the people and institutions of the nation; within the context of the rights of citizenry to liberty, protection from arbitrary or unreasonable detention, equal treatment before the law, freedoms of movement, association, religion, belief and speech must not be disturbed in any sense.

FECCA also emphasises that the task of proscribing organisations is an onerous one that must take seriously the potential adverse impact that proscribing can have on the individuals, their families, the communities and the reciprocal adverse impact on our relatively harmonious community relations, something which we have developed over an extended period of time.

FECCA recommends:

- protection of the public good is a primary concern, however, the rights of citizenry to liberty, protection from arbitrary or unreasonable detention, equal treatment before the law, freedoms of movement, association, religion, belief and speech must not be disturbed in any sense;
- all Australian Governments act in a manner that is consistent with the international law of human rights;
- that the Australian Government should fully co-operate with relevant United Nations working bodies to ensure Australia is not contravening human rights obligations, international law and conventions when implementing new security provisions;
- that Australia help to build fairer and more transparent International Law procedures for such proscription;
- that legislative frameworks ensure that organisations of people from CLDB have real equality under the law;
- the proper placement of Power to Proscribe rests with a strong institutional base rather than discretionary initiative. FECCA believes that the time is now ripe to reconsider the original legislation and replace the onus with a Senior

Judicial Officer, as recommended in the Report of the Security Legislation Review Committee, June 2006 Sheller Report, rather than the Attorney-General;

- the limited means available to review such a power of proscription must not be further diluted but enhanced to incorporate an annual independent review to report on the operation of all anti-terrorism legislation, as conducted in the United Kingdom;
- an Australian Bill of Rights form a basis of additional safeguards;
- proscription power relying on guilt by association, which affects many innocent associates, be reassessed;
- care be taken in proscribing organisations when such proscription could be politically based rather than a clear danger to the domestic national security;
- that current criteria for listing organisations are overly broad and could be better clarified; and
- substantial information programs be run for community groups who may be potentially affected by listings including presentations by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security's offices.

Introduction

FECCA welcomes the opportunity to provide comment on the review of Listing Provisions of the Criminal Code.

FECCA is the national peak body representing Australians from diverse cultural and linguistic backgrounds. Our role is to advise, advocate and promote issues on behalf of our constituency to government, business and the broader community. Our charter includes promoting full access and equity, advocating community harmony and the celebration of diversity, championing human rights and Multiculturalism as central to the social, economic and cultural health of Australia.

FECCA members welcome the attempts by our governments, Commonwealth, State and Territory, to ensure the security of Australian citizens. This protection of the public good is a primary goal of government. In doing so, however, the rights of citizenry to liberty, protection from arbitrary or unreasonable detention, equal treatment before the law, freedoms of movement, association, religion, belief and speech must not be disturbed in any sense. Parliaments have a critical role in protecting these rights of citizens.

FECCA takes as an agreed starting point the desire to see that all Australian Governments act in a manner that consistent with the international law of human rights. The standards in human, political and civil rights as well as social justice as outlined in international agreements to which our government is a signatory must be maintained to create a just and fair society.

United Nations Context

There are both international and domestic processes for proscribing an organisation. Within this context, FECCA firmly believes that the Australian Government should fully co-operate with relevant United Nations working bodies to ensure Australia is not contravening human rights obligations, international law and conventions when implementing new security provisions. FECCA understands there is scope for the principles of natural justice, which underpin Australian Law, to be better reflected in the United Nations processes for proscribing an organisation as a terrorist organisation. Although it is beyond the scope of this Inquiry's immediate terms of reference, FECCA urges that consideration be given through the appropriate channels for ways that Australia can work with the United Nations to help to build fairer and more transparent International Law procedures for such proscription.

Domestic Legal Procedures

Turning more particularly to the Australian methods for Proscribing an organisation, FECCA acknowledges that a system has been designed and is now being reviewed which allows careful decision-making through the Executive arm of Government with the Attorney General making the initial determination. This determination is in the form of a disallowable regulation, reviewable by the Joint Committee and by the Parliament.

It is fundamental to FECCA that all persons are equal before the law and are entitled without any discrimination to the equal protection of the law. It is, therefore, essential that the Australian security system ensure procedural guarantees and due process under the law. There is clear evidence that there are many barriers to organisations of people from Culturally and Linguistically Diverse Backgrounds [CLDB] having equality under the law. These barriers include issues such as lack of understanding of Australian Incorporation and Association laws, lack of appropriate and up-to-date multilingual resources, and lack of interpreters adversely impacting on achieving real equality for individuals and organisations of people from CLDB in the Australian legal system, particularly those who come from non English speaking countries. FECCA firmly believes that any system of listing should address these factors to ensure equitable application of the law.

FECCA appreciates that there can be community or political pressure brought to bear about the proscribing of particular organisations. FECCA has, for example, previously raised concerns about the listing of the PKK after a briefing by the Turkish Prime Minister. Intelligence sharing between countries is vital for the security of Australia's citizens. However, the Attorney-General may not be able to assess the real basis of information gathered from overseas Government's in respect to domestic groups accused of terrorist involvement. This process would be more objective if it was removed from the political realm and undertaken by a Senior Judicial Officer.

There can be criticism about the time involved in making careful determinations based on evidence. Yet we would like to caution that the urge to shorten the procedures should not interfere with the fundamental principle of equality of law for all persons and groups of people. The Proscription laws have disproportionately affected the Arab and Muslim sections of the Australian community, undermining the

appearance of equality before the law whilst concurrently undermining what we believe is the most effective tool in addressing terrorism, community harmony.

Organisations under investigation for proscription must be awarded the uncompromised protection of the justice system so due process is not only done but is also seen to be done. FECCA believes that the Federal Government should implement the recommendations of the Sheller Report in respect to reforms to the proscription process. An organisation should be informed of prospective banning, there need to be clear criteria for proscription, the ability to contest proscription and increased safeguards throughout the process.

It is also necessary for the Federal Government to tighten the definition of a terrorist organisation from that which represents a "risk" to society to one that poses a "substantial risk". This has ramifications under the provisions that allow a person with informal membership of a group deemed to be a terrorist organisation to face 10 years' jail, even if they are unaware of any terrorist activities. This level of accountability in relation to informal group membership is far higher than that required of elected Federal Parliamentarians that have responsibility for a Ministry.

Proper Placement of Power to Proscribe

FECCA argues that leaving the matter to the discretion of the Minister is not sufficient, since upholding the law requires a strong institutional base rather than discretionary initiative. FECCA believes that the time is now ripe to reconsider the original legislation and replace the onus with a Senior Judicial Official, rather than the Attorney General. This will aid transparency and confidence in the operation of this particular security legislation.

Power has been abused in other contexts

FECCA members share the concerns of other Australians for safety. They hold dear the protection by Government from acts of terrorism and violence. FECCA members, however do have concerns about the operation of Anti-Terrorism legislation in Australia. Numbers of their members have emigrated or escaped from regimes where government power was used to oppress its citizens. There is a need for robust safeguards. These concerns would be heightened if the already somewhat limited means available to review such a power of proscription were further diluted.

FECCA believes that it is necessary, in particular due to the lack of an Australian Bill of Rights, that an independent review mechanism be established.

This mechanism should utilise an independent panel to report on the operation of the Proscription legislation as well as all other anti-terrorism legislation. This mechanism is utilised on an annual basis in the United Kingdom. The advantage of having an independent panel review the legislation is that it ensures impartiality from the political and executive arms of government.

Bill of rights

To address the balance between the needs for security and the concerns for safeguards, FECCA recommends an Australian Bill of Rights form a basis of additional safeguards against abuse of power, including abuse of power by successive governments.

General concerns relating to the Proscription of Organisations under the Criminal Code

We are concerned that the proscription power relies on guilt by association, by imposing criminal liability on whole groups and on those who associate with them. It therefore imposes criminal liability on individuals who may have no proven or provable connection to violent acts which threaten the safety of the public. We believe that this proscription 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). We believe the listing power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security.

FECCA members have raised concerns that banning organisations that do not pose a direct threat to Australia's domestic national security reflects a politicised process. We are concerned for example that the listing of the Kurdistan Workers Party (PKK) was made one week after the visit of the Turkish Prime Minister, leading to perceptions that this proscription serves mainly to criminalise domestic support for the political opponents of an Australian ally.

Criteria for Listing as Proscribed Organisation

The criteria for listing organisations are overly broad, which in turn creates issues of inconsistent application and wide ministerial discretion. Given this wide ministerial discretion, this power must be exercised in an open and transparent manner to ensure due process and executive accountability, and should involve public disclosure of all criteria, evidence and processes involved in its exercise. We argue that in making his decisions, the Attorney General has not, to date, made public sufficient verifiable and credible grounds for proscription.

Effect of Proscription of an Organisation

The Criminal Code provides for a number of offences, which arise where an organisation has been listed or where an organisation fits the definition of a terrorist organisation. The terms involved in defining these offences are overly broad and vague and therefore have the potential to apply to an excessively large category of people.

There can be potentially devastating impact of proscription on communities of people who share some of the non-violent aims of the organisation in Australia. Given that the nineteen organisations so far proscribed are made up of Muslim people, this kind of impact will fall

disproportionately on members of already vulnerable communities and may also affect wider negative media, public comment and perception of these communities.

Further concerns relating to the process of proscription of an organisation

FECCA calls for substantial information programs for community groups who may be potentially affected by listings. Given that the proscription power relies on guilt by association, rather than a provable link to involvement with violent actions, FECCA believes that it is important for communities to have a full understanding of what groups have been listed and why.

It is imperative that community information programs include members of the Commonwealth Ombudsman's and the Inspector-General of Intelligence and Security offices. This will assist in alleviating the misinformation that is presently circulating within the community, often in the form of community education. It is necessary for the Federal Government to make information about the laws available in easy to understand documents that are translated into the appropriate community languages.

FECCA also raises some due process concerns. We are concerned about the lack of adequate notice and time given for public submissions, with the timing over the holiday break particularly counter-productive to an open and accountable process.

Effects on Muslim and Arab Australians.

The Committee is well aware that members of Australia's Arab and Muslim communities are bearing the brunt of prejudice and fear. These concerns are reflected in the Report of the Security Legislation Review Committee, June 2006 (Sheller Report) and in the Committee's own report Review of Security and Counter Terrorism. FECCA's consultations confirm the concerns raised in these reports that Arab and Muslim Australians are bearing an unintended burden as a result of the Security regime, including the Proscription powers. At a human level, this can mean a young girl is spat on as she walks to school and no longer feels safe to walk in her local community.

This can also mean that a schoolboy is attacked for his appearance and no longer feels safe to attend the local school or to participate in local sporting clubs.

These effects tend to segregate Arab and Muslim communities from the broader community and exacerbate prejudice and fear. Children then only attend Arab and Muslim schools/organisations rather than being part of the broader community. The social consequences of these actions need to be considered and strategies to overcome the potential problems need to be implemented. Otherwise there is a risk of generating an environment from which the objective of community cohesion and anti-terror is undermined.

FECCA urges further development of a range of strategies which minimise the unintended adverse consequences of the measures which were initially introduced to provide greater security for the whole community. These strategies include different procedures for in this case the proscribing process, procedures which reflect best practice in transparency and natural justice. Other strategies include very clear education programs to assist members of affected communities so that they can feel very confident about what is lawful and what is not lawful as a result of the proscription of an organisation. For example, if an organisation is proscribed, how will the relevant people and their associates know whether they can participate in a peaceful public meeting about issues of concern? Further work is also needed to develop effective community education programs to reassure the person in the street that because a particular organisation has been proscribed, it does not mean that there is a need to fear those people who share that ethnicity or those religious convictions. Until we get this right, individual Australians are paying an awful price and the broader community is suffering from the seeds of divisiveness.

Conclusion:

The best protection against terrorism for Australia is further fostering and enhancing community harmony. Measures such as the proscription powers have to be carefully analysed for their effects on community harmony and social cohesiveness.

We would be happy to discuss any of the issues raised in this submission. Please do not hesitate to contact me on 0414 532 529 or the FECCA Director, Mark Kulasingham on (02)6282 5755, should you wish to do so.

Yours sincerely

A handwritten signature in black ink, appearing to read 'V. Messimeri'.

Voula Messimeri

FECCA Chairperson