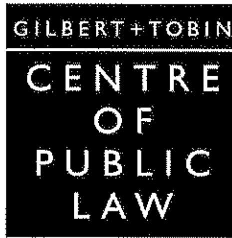

THE UNIVERSITY OF
NEW SOUTH WALES

FACULTY OF LAW

30 April 2008

Parliamentary Joint Committee on the Australian Crime Commission
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Secretary

Inquiry into the legislative arrangements to outlaw serious and organised crime groups

Thank you for inviting the Gilbert + Tobin Centre of Public Law to provide a submission to the inquiry into the legislative arrangements to outlaw serious and organised crime groups by the Parliamentary Joint Committee on the Australian Crime Commission (the Committee).

In making this submission, we seek merely to draw to the attention of the Committee the findings and recommendations of past parliamentary and government reviews of legislation banning terrorist organisations and criminalising related conduct, such as membership and association, found in Division 102 of the Commonwealth Criminal Code.

In particular, we will refer to the following reports:

- *Report of the Security Legislation Review Committee*, June 2006 (the SLRC);
- Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006; and
- Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007 (the PJCIS).

We believe that the findings of these Committees in relation to legislation regarding terrorist organisations would assist the Committee in its current inquiry as to whether steps should be taken to outlaw serious and organised crime groups and criminalise membership or association with such groups.

Yours sincerely,

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Proscription of an organisation

The following concerns raised with respect to the proscription of 'terrorist organisations' should be considered in any attempt to outlaw serious and organised crime groups.

Grounds of proscription

The report of the SLRC highlighted the need to carefully consider the grounds on which an organisation may be proscribed, in light of the serious consequences for individuals under accompanying criminal provisions.

In particular, the Committee should note the problems which the SLRC identified with any attempt to outlaw an organisation based not upon its activities but its speech.[1] Admittedly, this is unlikely to be a feature of legislation directed to the concerns of this inquiry given the largely secretive nature of organised crime, but in light of the seepage of legislative initiatives originally devised as anti-terrorism measures into other areas of the criminal law (noted by Dr Andreas Schloenhardt in his submission to the Committee at 5.4.4, in respect of the proposed South Australian laws on organisations engaged in serious crime) we feel it worth stating explicitly that any use of 'advocacy' of criminal activity as a basis for proscription of groups should be avoided.

While it is certainly legitimate that speech directly inciting a specific crime may be prosecuted as incitement under s 11.4 of the Criminal Code, it is quite another matter to prosecute persons as a consequence of the statements of another. But this is the result of attaching offences of membership or association to a regime for the banning of organisations on the grounds of speech as well as activities.

Process of proscription

The difficulties attendant upon outlawing organisations through a process of proscription of entities, rather than by legislative definition should be noted. In 2006 the SLRC expressed concern about the process of proscription of a 'terrorist organisation' under the Criminal Code:

> The legislation does not require that notice be given to an organisation, or persons affected by the regulation proposed, before the regulation is made, nor is there any opportunity for that organisation or such person to be heard in answer to the case for making the regulation before the regulation is made. While notification in the case of some overseas organisations may be impracticable, that is no reason for not notifying an Australian organisation and its members or Australian members of an overseas organisation, if known, before the regulation is made. There is every reason why an Australian organisation and its members should be given an opportunity to oppose the proscription of the organisation.[2]

The SLRC refused to rule upon whether the process for proscription generally or in a particular case fails to comply with a fundamental rule of the common law doctrine of natural justice. However, it stated that 'the operation and effectiveness of the legislation is clouded by this possibility'.[3]

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[1] *Report of the Security Legislation Review Committee*, June 2006, [8.1-8.11].
[2] *Report of the Security Legislation Review Committee*, June 2006, [8.15].
[3] *Report of the Security Legislation Review Committee*, June 2006, [8.30].

The SLRC emphasised the importance of transparency in the process of proscription. It recommended that the process 'should provide organisations, and other persons affected, with notification, unless this is impracticable, that it is proposed to proscribe the organisation and with the right to be heard in opposition'.[4]

Further, the SLRC recommended that 'once an organisation has been proscribed, steps be taken to publicise that fact widely with a view, in part, to notifying any person connected to the organisation of their possible exposure to criminal prosecution'.[5]

The Committee should also note the recent recommendation of the PJCIS in its report of the proscription process in September 2007. It recommended that subordinate legislation listing an entity should cease to have effect on the third anniversary of the date it took effect and that the Government consult with the Committee on streamlining the administration of proscription to enable periodic review of multiple listings during the parliamentary cycle.[6] In essence, any proscription process should be time-limited and subject to ongoing review.

These concerns as to process by which groups are rendered illegal go to the heart of unease over Division 102 of the Code. We note and support Dr Schloenhardt's criticisms, at 5.4.1 and 5.4.4 of his submission, of the South Australian proposal that proscription occur largely through ministerial determination. This replicates, to a significant degree, the Commonwealth Attorney-General's power to proscribe 'terrorist organisations' which the SLRC recommended be supplanted by a judicial process or substantially enhanced through the addition of safeguards including an advisory committee.[7]

Division 102 also defines a 'terrorist organisation' quite apart from the proscription process open to the Attorney-General. While this would appear less contentious as a model for the outlawing or serious crime organisations, the ability of prosecuting authorities to satisfy a court as to the existence of an 'organisation' and the effect which this may have upon securing conviction remains unknown at this stage. The present trial of a number of men in Victoria on this basis – membership of a (non-proscribed) terrorist organisation under s 102.3 – will provide some demonstration of this in due course.

The PJCIS seemed to endorse the Commonwealth Crown's argument in *R v Ul-Haque* that an organisation was more than 'a transient group of conspirators which may come together for a single discrete criminal purpose'.[8] In light of these observations, it would be advisable to include in any legislation, some indication of the level of connection required between individuals in order to constitute an 'organised crime group'.

Offences related to proscribed organisations

Membership of an organisation

Section 102.3 of the Criminal Code makes it an offence to be a member, including an informal member, of a terrorist organisation. While the inclusion of 'informal members' seeks to address

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[4] *Report of the Security Legislation Review Committee*, June 2006, [9.1], [9.33-9.34].
[5] *Report of the Security Legislation Review Committee*, June 2006, [9.35].
[6] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007, recommendation 6.
[7] *Report of the Security Legislation Review Committee*, June 2006, [9.34].
[8] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [5.75].

the existence of looser groups of association, this kind of offence has been criticised as unreasonably vague. It should be avoided in any new legislative initiatives.

Australia is alone in making it an offence for a person to be an informal member of a terrorist organisation. In response to a question on notice from the PJCIS, the Gilbert + Tobin Centre conducted a review of legislation from Canada, the United States, the United Kingdom and New Zealand and determined that none of these jurisdictions criminalises the status of informal membership without any other culpable conduct, and that only the United Kingdom has a membership offence.[9]

After noting the difficulties of establishing 'informal membership' of secretive groups, the PJCIS recommended that the membership offence be replaced with an offence of 'participation' in a prohibited organisation, and that 'participation' be expressly linked to the purpose of furthering the terrorist aims of the organisation.[10] This recommendation sought to create greater certainty of the scope of the offence and more directly address the underlying purpose of the membership offence, which is to stop people from *participating* in entities/organisations that engage in or promote terrorism.[11]

These considerations seem apt to any attempt to criminalise membership of 'serious and organised crime groups'.

Association with an organisation

Under section 102.8 of the Criminal Code, it is an offence punishable by up to 3 years imprisonment to knowingly associate on two or more occasions with a member of a listed terrorist organisation or a person who directs/promotes activities of a listed terrorist organisation, with the intention of providing support and that assists the organisation to expand or continue to exist.

The SLRC recommended that this offence be repealed,[12] but its reasons for doing so – alarm amongst Australia's Muslim communities – are hardly a consideration in the present context. In its later review in the same year, the PJCIS recommended that this provision be re-examined taking into account the SLRC's concerns.[13]

Aside from the impact of s 102.8 upon attempts at positive counter-terrorism relationships, a generic concern with a provision of this sort is that it does not properly target the culpable conduct. The primary aim of the association offence should be to capture those who 'support' an illegal organisation with the intention that their support assists it to expand or to continue to exist.[14] The core culpable conduct is not then the person's association with a member of an organisation rather it is the provision of support to the organisation itself.

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[9] For more information, see Response to question on notice to Parliamentary Joint Committee on Intelligence and Security, 'What do other countries do? How do they define membership of terrorist organisations?'
[10] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, recommendation 15.
[11] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [5.76].
[12] *Report of the Security Legislation Review Committee*, June 2006, [10.77].
[13] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, recommendation 19.
[14] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, December 2006, [5.98].

Strict liability

Lastly, the PJCIS in its September 2007 report endorsed the views of the SLRC and recommended that strict liability should not be applied to the terrorist organisation offences of Division 102 of the Criminal Code.[15]

The placement of legal and evidential burdens in respect of any new scheme for other criminal groups should be similarly mindful of the need to ensure those charged with such offences are afforded the presumption of innocence.

[15] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007, recommendation 5.