

# THE PROSCRIPTION OF TERRORIST ORGANISATIONS IN AUSTRALIA

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## I INTRODUCTION

The proscription of organisations has long been a central feature of legal regimes aimed at the suppression of terrorism. Australia is no exception. Going back many decades, the Commonwealth government has sought to meet the threat of political violence through the proscription of related organisations.<sup>1</sup> In the wake of the September 11 terrorist strikes against New York and Washington, renewed efforts were made for the proscription of organisations in many national jurisdictions (for example, the United Kingdom,<sup>2</sup> United States<sup>3</sup> and Canada<sup>4</sup>) as well as at the

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<sup>1</sup> See *Unlawful Associations Act 1916* (Cth); *Unlawful Associations Act 1917* (Cth); *Crimes Act 1914* (Cth) pt IIA; *National Security Act 1939* (Cth); *National Security Regulations 1940* (Cth); *Communist Party Dissolution Act 1950* (Cth). Of these enactments, only pt IIA of the *Crimes Act 1914* (Cth) (as amended) is still in force.

<sup>2</sup> The United Kingdom proscribes 'international terrorist organisations' under the *Terrorism Act 2000* (UK) c 11, sch 2. At 27 June 2008, 45 international terrorist organisations had been proscribed. There are 14 Northern Irish paramilitary organisations proscribed under prior emergency legislation. See *Proscribed Terrorist Groups* (2008) United Kingdom Home Office <<http://www.homeoffice.gov.uk/security/terrorism-and-the-law/terrorism-act/proscribed-groups>> at 27 June 2008.

<sup>3</sup> The United States proscribes 'foreign terrorist organisations' under the *AntiTerrorism and Effective Death Penalty Act of 1996*, Pub L No 104-132, 110 Stat 1214 (44 organisations as at 8 April 2008); designates 'organisations and individuals linked to terrorism' under Executive Order 13224; and maintains a 'terrorist exclusion list' under the *Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA Patriot Act) Act of 2001*, Pub L 107-56, 115 Stat 272 for immigration purposes. See Office of the Coordinator for Counter Terrorism, *Foreign Terrorist Organisations: Fact Sheet* (2008) US Department of State <<http://www.state.gov/s/ct/rls/fs/08/103392.htm>> at 8 April 2008.

<sup>4</sup> Canada proscribes 'terrorist groups' under pt II.1 of the *Criminal Code*, RSC 1985, c 46 (introduced by the *Anti-Terrorism Act*, RSC 2001, c 41). At 27 June 2008, there were 41 organisations on the list. See *Currently Listed Entities* (2008) Public Safety Canada <<http://www.publicsafety.gc.ca/prg/ns/le/cle-en.asp>> at 27 June 2008.

international level (for example, through the United Nations<sup>5</sup> and the European Union<sup>6</sup>).<sup>7</sup>

In Australia, the Commonwealth looked directly to the justifications offered by the United Kingdom's Lord Lloyd of Berwick and Paul Wilkinson just a few years before. In their major *Inquiry into Legislation Against Terrorism*, Lord Lloyd and Wilkinson presented three principal rationales to explain the role of proscription in the prevention of terrorism: ease of proof;<sup>8</sup> providing a basis for the criminalisation of fundraising and other activities of terrorist groups;<sup>9</sup> and as a clear symbol of 'public revulsion and reassurance that severe measures [are] being taken'.<sup>10</sup> The Commonwealth Attorney-General's Department conceived this final rationale as

<sup>5</sup> The Al-Qaida and Taliban Sanctions Committee established pursuant to *Security Council Resolution on the Situation in Afghanistan*, SC Res 1267, UN SCOR, 54<sup>th</sup> sess, 4051<sup>st</sup> mtg, [6], UN Doc S/Res/1267 (1999) maintains a consolidated list of individuals and entities associated with Al-Qaida or the Taliban. At 4 June 2008, there were 113 entities and other groups associated with Al-Qaida on the list (and no entities or other groups associated with the Taliban). See United Nations Security Committee, *Consolidated List Established and Maintained by the 1267 Committee with Respect to Al-Qaida, Usama bin Laden, and the Taliban and Other Individuals, Groups, Undertakings and Entities Associated with Them* (4 June 2008).

<sup>6</sup> The European Union has incorporated the United Nations sanctions regime into EU law by Council Regulation (EC) No 881/2002 of 27 May 2002 *Imposing Certain Specific Restrictive Measures Directed Against Certain Persons and Entities Associated with Usama Bin Laden, the Al-Qaida Network and the Taliban, and Repealing Council Regulation (EC) No 467/2001 Prohibiting the Export of Certain Goods and Services to Afghanistan, Strengthening the Flight Ban and Extending the Freeze of Funds and Other Financial Resources in Respect of the Taliban of Afghanistan* [2002] OJ L 139/9 and designates 'persons, groups and entities involved in terrorist acts' under Council Common Position of 27 December 2001 *on the Application of Specific Measures to Combat Terrorism* [2001] OJ L 344/93, 93 and Council Regulation (EC) No 2580/2001 of 27 December 2001 *on Specific Restrictive Measures Directed Against Certain Persons and Entities with a View to Combating Terrorism* [2001] OJ L 344/70. At 22 December 2007, there were 54 persons and 48 groups and entities on the list. See European Union, *Factsheet: The EU List of Persons, Groups and Entities Subject to Specific Measures to Combat Terrorism* (2008) Council of the European Union 5 <[http://consilium.europa.eu/uedocs/cmsUpload/080206\\_combatterterrorism\\_EN.pdf](http://consilium.europa.eu/uedocs/cmsUpload/080206_combatterterrorism_EN.pdf)> at 6 February 2008.

<sup>7</sup> Still the most comprehensive comparative resource in this respect is Victor V Ramraj, Michael Hor and Kent Roach (eds), *Global Anti-Terrorism Law and Policy* (2005). For a more recent work which draws together developments in the United Kingdom and the United States of America — both significant influences on Australian national security legislation and policy — see Laura K Donohue, *The Cost of Counterterrorism: Power, Politics and Liberty* (2008).

<sup>8</sup> Lord Lloyd of Berwick and Paul Wilkinson, *Inquiry into Legislation Against Terrorism* (1996) vol 1, 29–30; vol 2, 57.

<sup>9</sup> Ibid. See also Attorney-General's Department, Australian Security Intelligence Organisation, Australian Federal Police and Commonwealth Director of Public Prosecutions, Submission No 10 to Parliamentary Joint Committee on Intelligence and Security ('PJICIS'), Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 2007, 2.

<sup>10</sup> Berwick and Wilkinson, above n 8, vol 2, 57.

sending a general message to Australians 'that involvement with such organisations, either in Australia or overseas, will not be permitted'.<sup>11</sup>

Despite the extent of experience in Australia and elsewhere, proscription remains controversial because it raises fundamental questions about public law and the limits of executive power, while also challenging the accepted boundaries of the criminal justice system. Proscription regimes often devolve wide discretions to the government of the day, with few effective checks and balances. Hence, much of the specific debate about proscription necessarily focuses upon the model by which organisations are to be banned and the scope for review of government decision making. This has been an important and visible fault-line in the review of Australia's proscription scheme under Division 102 of the Commonwealth *Criminal Code Act 1995* (Cth) ('*Criminal Code*') and it is these particular issues that this article explores.

In doing so, the authors do not deny the strength of the objections that have been raised as to both the conceptual and practical aspects of the Australian proscription regime.<sup>12</sup> In part, these stem from misgivings over the attempt to define (and criminalise) the concept of 'terrorism' itself. While understanding this unease, we do not share it to the same extent,<sup>13</sup> and in any case, it seems that particular horse has bolted.<sup>14</sup> Consequently, we accept that establishing mechanisms by which organisations committed to political violence may be proscribed *can* be a justifiable response to the threat they pose. Proscription is in step with the preventative purpose that has been such a dominant characteristic of many anti-terrorism laws since September 11 – both in Australia and overseas. While very legitimate concerns exist as to the impact of this trend on traditional criminal justice and legal institutions,<sup>15</sup>

<sup>11</sup> See Attorney-General's Department et al, above n 9, 2.

<sup>12</sup> See Patrick Emerton, 'Australia's Terrorism Offences – A Case Against' in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007), 75, 83; Jenny Hocking, 'Counter Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, 360; and Russell Hogg, 'Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border between Crime and Politics' in Miriam Gani and Penelope Mathew (eds), *Fresh Perspectives on the 'War on Terror'* (2008) 297, 308. Additionally, we acknowledge the drawbacks clearly identified by Clive Walker in respect of the United Kingdom's proscription of the Irish Republican Army in his seminal study *The Prevention of Terrorism in British Law* (1986) 50–1.

<sup>13</sup> Ben Golder and George Williams, 'What is "Terrorism"? Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270.

<sup>14</sup> Saul reports that, on available evidence in 2004, 86 nation states prosecuted terrorism as an ordinary crime, while 46 employed 'simple terrorism offences' and a further 48 had 'composite terrorism offences': Ben Saul, *Defining Terrorism in International Law* (2006) 264–9. Additionally, significant strides have been made in the last decade in producing a general definition of 'terrorism' in international law: Henry J Steiner, Philip Alston and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals* (3<sup>rd</sup> ed, 2008) 376–8.

<sup>15</sup> See, eg, Andrew Goldsmith, 'Preparation for Terrorism: Catastrophic Risk and Precautionary Criminal Law' in Andrew Lynch, Edwina Macdonald and George Williams (eds), *Law and Liberty in the War on Terror* (2007) 59, 59–73; Kent Roach, 'The World Wide Expansion of Anti-Terrorism Laws after 11 September 2001' (2004) *Studi Senesi* 487; Lucia Zedner, 'Seeking Security by Eroding Rights – The Side-stepping of Due Process' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2007) 257, 257–75.

accepting that security is both an important condition for the successful functioning of a liberal democracy<sup>16</sup> and also an integral aspect of a state's duty towards its citizens<sup>17</sup> means that it is difficult to object outright to legal mechanisms created towards this goal. In short, a bare contest over proscription per se risks replaying many of the deficiencies of the hollow attempt to 'balance' security with liberty,<sup>18</sup> not least of which would be its inconclusiveness.

Instead, we approach the legitimacy of the Commonwealth proscription regime by focussing on the process by which organisations may be listed. Importantly, we recognise that several vital considerations underpin this exercise. The very fact of the pre-emptive nature of most proscription regimes, together with the severe consequences which accrue for individuals connected in some way to the proscribed organisation, demands a strict standard. Further, in its effort to secure one public good, the impact of proscription upon freedom of expression and association, particularly in political matters, can present a fundamental challenge to other essential elements of a successfully functioning democratic state. These considerations do not simply yield to the claims of national security, nor are they a complete response in themselves so as to counter those claims.<sup>19</sup> Rather, they inform a deeper examination of proscription in order to determine on what conditions it may conceivably be supported as an appropriate strategy for the effective prevention of terrorism.

## II PROSCRIPTION OF TERRORIST ORGANISATIONS IN AUSTRALIA AFTER 9/11

On 11 September 2001, the only federal regime in Australia enabling the proscription of organisations was the 'unlawful associations' provisions added to Part IIA of the *Crimes Act 1914* (Cth) in the 1920s.<sup>20</sup> Although Part IIA would arguably have enabled the proscription of terrorist groups, by the end of 2002 two additional legislative regimes had been established for the proscription of such organisations. It should be stressed that Part IIA remains in force, and as shall be discussed later in this article, has been influential in some quarters as an alternative model for proscription to those more recently devised by the Commonwealth.

<sup>16</sup> Ian Loader and Neil Walker, *Civilizing Security* (2007); Zedner, 'Seeking Security by Eroding Rights', above n 15, 257–8.

<sup>17</sup> As well as the subject of international obligations such as that found in *Security Council Resolution on Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56<sup>th</sup> sess, 4385<sup>th</sup> mtg, art 2(b), UN Doc S/Res/1373 (2001).

<sup>18</sup> Andrew Ashworth, 'Security, Terrorism and the Value of Human Rights' in Benjamin J Goold and Liora Lazarus (eds), *Security and Human Rights* (2007), 203, 207–10; Donohue, above n 7, 4–6; Loader and Walker, above n 16, 54–6; Christopher Michaelsen, 'Balancing Civil Liberties Against National Security? A Critique of Counter-Terrorism Rhetoric' (2006) 29(2) *University of New South Wales Law Journal* 1; Lucia Zedner, 'Securing Liberty in the Face of Terror: Reflections from Criminal Justice' (2005) 32 *Journal of Law and Society* 507, 509–18.

<sup>19</sup> Loader and Walker warn against the presentation of such arguments as simply 'a negative, oppositional force, one that evacuates the terrain that the security lobby so effectively and affectively occupies': Loader and Walker, above n 16, 14.

<sup>20</sup> For a history of these provisions see Roger Douglas, 'Keeping the Revolution at Bay: The Unlawful Associations Provisions of the Commonwealth Crimes Act' (2001) 22 *Adelaide Law Review* 259.

The first of these additional regimes was the *Suppression of the Financing of Terrorism Act 2002* (Cth) ('*Financing of Terrorism Act*'), which re-enacted the provisions of the *Charter of the United Nations (Anti-terrorism Measures) Regulations 2001* (Cth) as Part IV of the *Charter of the United Nations Act 1945* (Cth). The original regulations had been made in response to *United Nations Security Council Resolution 1373* of 28 September 2001, which required member states, amongst other things, to adopt measures to stem the flow of monies to terrorist organisations. Part IV of the principal Act now enables an organisation to be listed by order of the relevant minister<sup>21</sup> or through regulations made by the Governor-General.<sup>22</sup> It is an offence to directly or indirectly deal with an asset that is listed or is owned or controlled by a proscribed person or entity, or to make an asset available to a proscribed person or entity.<sup>23</sup>

However, it is the legislative scheme for proscription established by the Commonwealth in Division 102 of the *Criminal Code* that has been far more prominent in both public debate and subsequent review, whilst also leading to a number of criminal prosecutions against individuals. It is this scheme that is the subject of analysis in this article. In broad terms, Division 102 is divided into two parts. Subdivision A sets out a process for proscribing an organisation as a terrorist organisation. The various stages of this process, namely, the listing, re-listing and de-listing of an organisation, as well as review of the listing process, are explained in detail below. Subdivision B then goes on to establish a range of offences (carrying sentences of imprisonment from 3<sup>24</sup> to 25<sup>25</sup> years) for persons who are involved, in various ways, with a proscribed organisation.<sup>26</sup>

#### A Listing of an organisation under Division 102 of the Criminal Code

As introduced into Parliament, the *Security Legislation Amendment (Terrorism) Bill 2002* gave the Attorney-General the power to proscribe organisations as 'terrorist organisations' at his or her own initiative or in response to a decision of the United Nations Security Council to list that organisation. A number of significant amendments were made to the Bill before its enactment. First, the declaratory power was replaced by a capacity for the Attorney-General to make regulations. The effect of this was that the proscription of an organisation would be subject to parliamentary disallowance. Second, the power of the Attorney-General to proscribe an organisation was limited to organisations that had been identified in, or pursuant to, a decision of the United Nations Security Council relating to terrorism, or using a mechanism established under such a decision.<sup>27</sup>

The latter restriction was removed by the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth). The Explanatory Memorandum outlined the case for the removal of the limitation, stating that it

<sup>21</sup> *Charter of the United Nations Act 1945* (Cth) s 15.

<sup>22</sup> *Charter of the United Nations Act 1945* (Cth) s 18.

<sup>23</sup> *Charter of the United Nations Act 1945* (Cth) ss 20–21.

<sup>24</sup> See, eg, *Criminal Code Act 1995* (Cth) s 102.8 (associating with terrorist organisations).

<sup>25</sup> See, eg, *Criminal Code Act 1995* (Cth) s 102.2 (directing the activities of a terrorist organisation) and s 102.5 (training a terrorist organisation or receiving training from a terrorist organisation).

<sup>26</sup> For discussion of these offences see Andrew Lynch and George Williams, *What Price Security?: Taking Stock of Australia's Anti-Terror Laws* (2006) 21–7.

<sup>27</sup> *Criminal Code Act 1995* (Cth) s 102.1(2) (pre-10 March 2004).

operated as a significant restriction upon the efficacy of the legislation, as the United Nations Security Council identifies only organisations with a link to the Taliban or Al Qaida. Many organisations whose activities and ambitions represent a threat to Australia have no apparent relationship to Al Qaida.<sup>28</sup>

In its current form, s 102.1 of the *Criminal Code* defines a 'terrorist organisation' to be:

- an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or
- an organisation that is specified by the regulations for the purposes of this paragraph.

### 1 *Making of a regulation by the Attorney-General*

The Attorney-General may make a regulation proscribing an organisation where he or she is satisfied 'on reasonable grounds' that the organisation:

- (a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).<sup>29</sup>

Division 102 does not contain any more detailed factors that the Attorney-General is required to take into account in making this determination. However, in practice, the Attorney-General relies upon an unclassified statement of reasons prepared by the Australian Security and Intelligence Organisation ('ASIO'). The statement of reasons contains an assessment by ASIO (after a process of consultation with the Department of Foreign Affairs and Trade ('DFAT'))<sup>30</sup> of the relevant organisation against at least six factors, namely:

- engagement in terrorism;
- ideology and links to other terrorist groups or networks;
- links to Australia;
- threats to Australian interests;
- proscription by the United Nations or like-minded countries; and,
- engagement in peace/mediation processes.<sup>31</sup>

Before being provided to the Attorney-General, this statement of reasons is certified by the Chief General Counsel of the Australian Government Solicitor as providing a

<sup>28</sup> Explanatory Memorandum, Criminal Code Amendment (Terrorist Organisations) Bill 2004 (Cth) 4.

<sup>29</sup> *Criminal Code Act 1995* (Cth) s 102.1(2). As at 16 April 2009, 18 organisations are proscribed by regulation under s 102.1(2).

<sup>30</sup> Attorney-General's Department et al, above n 9, 5.

<sup>31</sup> These factors were revealed to the Parliamentary Joint Committee on ASIO, ASIS and DSD ('PJC-ASIO') by ASIO in a confidential exhibit: see PJC-ASIO, Parliament of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.24]. See Attorney-General's Department et al, above n 9, 6. A similar but certainly not identical list of factors guiding the discretion to proscribe was released by the British Home Office in early 2001: see Clive Walker, *Blackstone's Guide to the Anti-Terrorism Legislation* (2002) 48.

sufficient basis for the Attorney-General to be satisfied that the organisation meets the definition of a terrorist organisation.<sup>32</sup>

The Attorney-General is also required, before making a regulation, to brief the leader of the opposition<sup>33</sup> and to consult with the leaders of the States and Territories. The *Intergovernmental Agreement on Counter-Terrorism Laws* provides that the Attorney-General will not make a regulation if a majority of the States and Territories object.<sup>34</sup> However, a frequent complaint made by the leaders of the States and Territories is that they are given insufficient time by the Attorney-General to fully reflect upon the impact of a regulation, and therefore a considered objection to the making of a regulation is practically impossible.<sup>35</sup> Consequently, despite the advisory and consultative process, the Attorney-General has in effect a very wide discretion to determine whether it is appropriate to proscribe an organisation, constrained only by the generally-worded criteria in ss 102.1(2)(a) and (b).

Significantly, there is no obligation on the Attorney-General to provide the relevant organisation, its members or other affected persons with an outline of the case against the organisation or a copy of the material on which the case is based. This lack of notification means that there is no opportunity for a person to make submissions to the Attorney-General opposing the making of the regulation. In fact, Division 102 does not mandate any public notification at all. It is only by convention that, on the day after the regulation is lodged in the Federal Register of Legislative Instruments, the Attorney-General issues a press release, including a statement of reasons, announcing the listing of the organisation. This press release is circulated widely to the media and placed on the National Security Website.<sup>36</sup>

## 2 Declaration by the Federal Court

The Federal Court does not play a role in the assessment of whether an organisation is a terrorist organisation until a person is prosecuted for one of the offences in Subdivision B of Division 102. The role of the Court differs according to whether a regulation exists proscribing the organisation as a terrorist organisation. If the organisation has not been proscribed by regulation, it falls to the Court to determine whether the body satisfies the criterion in s 102(1)(a); that is, whether the organisation is 'directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs)' for the purpose of establishing the elements of the offence on the particular facts. This does not itself result in the organisation in question being 'proscribed' – though steps by the Attorney-General to that end would seem a likely response to any judicial determination of this sort.

<sup>32</sup> Attorney-General's Department et al, above n 9, 5–6.

<sup>33</sup> *Criminal Code Act 1995* (Cth) s 102.1(2A).

<sup>34</sup> *Intergovernmental Agreement on Counter Terrorism Laws* ('IGA') (25 June 2004) div 3 [3.4(2)].

<sup>35</sup> In some cases, the leaders of the States and Territories were informed only 24 hours prior to a regulation being made. See, eg, PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.8]–[2.10]; PJC-ASIO, Parliament of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [2.1]–[2.6]. The PJCIS found that in fifty percent of cases, the States and Territories had been given five days or less in which to consider or comment upon a proposed listing or re-listing of an organisation. See PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995* (2007) [6.9]–[6.12].

<sup>36</sup> Attorney-General's Department et al, above n 9, 8.

Alternatively, if the organisation has been proscribed by regulation, then there is some debate regarding the precise nature and scope of the Court's role. The Security Legislation Review Committee ('the SLRC'), in rejecting a submission that sub-s (a) of the definition of a terrorist organisation should be removed because it creates uncertainty regarding an organisation's status as lawful or unlawful, noted the benefit that use of the sub-section provides to a defendant:

in a prosecution relying on establishing what is set out in paragraph (a), one potential source of unfairness is removed. The prosecution, in proving at trial that the terrorist organisation is a terrorist organisation, must call evidence giving the defendant an opportunity to challenge the conclusion that there is an organisation and, if so, that the organisation is a terrorist organisation, and an opportunity to lead evidence to the contrary. If, on the other hand, the prosecution relies on paragraph (b) to prove that the organisation is a terrorist organisation, the character of the organisation as a terrorist organisation is proved by the tender of the regulation that specifies it as such.<sup>37</sup>

Hence, there does not appear to be any room for a person to challenge the facts upon which a regulation proscribing an organisation under sub-s (b) is based. However, the SLRC went on to accept the submission of the Commonwealth Director of Public Prosecutions ('DPP') that the requirement of knowledge on the part of a person accused of a terrorist organisation offence means that, in practice, the prosecution remains bound to prove beyond reasonable doubt that the organisation meets the definition of a terrorist organisation even where there is a regulation proscribing that organisation.<sup>38</sup> The DPP argued that, in order to prove knowledge, it is necessary to prove (a) 'that the defendant was aware the organisation was engaged in preparing, planning, assisting in or fostering the doing of a terrorist act' and (b) 'that the organisation was *in fact* engaged in preparing, planning, assisting in or fostering the doing of a terrorist act.' Therefore, the DPP suggested that the requirement of knowledge 'negate[s] any assistance that might otherwise have been provided by specifying an organisation in the regulations.'<sup>39</sup>

Whilst this construction is possible, a court would be unlikely to adopt it. Such an interpretation would render the proscription of an organisation by regulation void of any practical effect in the prosecution of individuals for a Division 102 offence and so would be inconsistent with a core rationale for proscription, namely, to facilitate the burden of proof. In this respect, it is important to stress that proscription, of itself, does not have any practical consequences here. Unlike other proscription regimes (such as Part IIA of the *Crimes Act 1914* (Cth) or the defunct *Communist Party Dissolution Act 1950* (Cth)), a proscribed organisation is not automatically dissolved and nor is its property liable to be confiscated by the state. Instead, the focus of Division 102 is on the criminalisation of involvement by individuals with a terrorist organisation, and the central function of proscription is to facilitate the prosecution of such individuals. The

<sup>37</sup> Security Legislation Review Committee ('SLRC'), Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 64.

<sup>38</sup> Ibid 65. There is no requirement of knowledge in s 102.5(2) (training with a terrorist organisation) and therefore a regulation would still be conclusive in prosecutions for this offence. By contrast, there is neither a mens rea nor knowledge requirement for the basic offence of 'belonging' to a proscribed organisation under UK law: *Terrorism Act 2000* (UK) c 11, s 11(1). See further, *R v Hundal* (Avtar Singh); *R v Dhaliwal* (Kesar Singh) [2004] EWCA Crim 389.

<sup>39</sup> SLRC, above n 37, 64–5.



centrality of this function tells against the interpretation put forward by the Director of Public Prosecutions. An alternative interpretation of the knowledge requirement has been suggested by Emerton. He suggests that, where organisation X has been listed by regulation

to prove that A knew that he was (for example) a member of a terrorist organization, it would be sufficient to prove (i) that A knew that he was a member of an organization, and (ii) that A knew that the organization in question was X.

This would be consistent with the general doctrine that ignorance of the law is no excuse.<sup>40</sup>

### **B Re-listing of an organisation under Division 102 of the Criminal Code**

Division 102 contains a sunset clause, which provides that regulations cease to operate on the second anniversary of the date on which they took effect.<sup>41</sup> A new regulation by the Attorney-General is necessary if the organisation is to continue to be listed. The decision-making process for re-listing an organisation is essentially the same as that for its original listing, with one important exception.

The previous Attorney-General, Phillip Ruddock, was of the opinion that the provisions of the *IGA* do not apply to the re-listing of an organisation.<sup>42</sup> If this interpretation is correct, the provisions of the *IGA* providing that the Attorney-General may not make a regulation if a majority of the States and Territories object would be inapplicable to the re-listing of an organisation. The PJCIS was 'not sure that it accepts the distinction made by the Attorney-General's Department between procedures for listings and re-listings.'<sup>43</sup> However, there has been no detailed discussion of this question and it remains undecided.

In this climate of uncertainty, the Attorney-General, at least of the Howard government, adopted notification and consultation practices that limited the involvement of the States and Territories in the re-listing decision-making process. ASIO and the Attorney-General frequently failed to include current material about an organisation in the statement of reasons for the re-listing. Instead, the statement of reasons essentially contained the same material as the statement of reasons for the original listing two years earlier.<sup>44</sup>

### **C De-listing of an organisation under Division 102 of the Criminal Code**

Division 102 gives the Attorney-General the power to de-list an organisation. In fact, there is an obligation on the Attorney-General to make a declaration in the *Gazette*, which has the consequence that the regulation no longer has effect, if he or she 'ceases to be satisfied' of the criteria necessary for listing an organisation.<sup>45</sup> An organisation or

<sup>40</sup> Patrick Emerton, Submission No 23 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 2007, 3.

<sup>41</sup> *Criminal Code Act 1995* (Cth) s 102.1(3).

<sup>42</sup> PJC-ASIO, Parliament of Australia, *Review of the Listing of Seven Terrorist Organisations* (2005) [2.6].

<sup>43</sup> *Ibid* [2.7].

<sup>44</sup> PJCIS, Parliament of Australia, *Review of the Re-Listing of Abu Sayyaf Group, Jamiat-Ul-Anser, Armed Islamic Group and Salafist Group for Call and Combat as Terrorist Organisations under the Criminal Code Act 1995* (2007) [2.6]–[2.7].

<sup>45</sup> *Criminal Code Act 1995* (Cth) s 102.1(4).

individual may also apply to the Attorney-General for the organisation to be de-listed on the ground that there is 'no basis' for the Attorney-General to be satisfied that the organisation meets the definition of a 'terrorist organisation'.<sup>46</sup> The Attorney-General has an obligation to 'consider' such an application. A fundamental flaw in Division 102, however, is that it does not specify the factors or material that the Attorney-General must take into account, the process that the Attorney-General must follow in considering a de-listing application or the time-period within which the decision must be made.<sup>47</sup> No organisation has yet been de-listed.<sup>48</sup>

## D Review of a listing under Division 102 of the Criminal Code

### 1 Judicial review

There are two ways in which the courts may be involved in the review of a regulation. First, if the DPP's argument is correct, in all terrorist organisation prosecutions (even where a relevant organisation has been proscribed by regulation), a court will be required to determine whether that organisation meets the definition of a terrorist organisation in s 102.1(a). As noted above, we are sceptical of this argument. However, even if the DPP's interpretation is correct, an examination by the courts of whether an organisation satisfies the definition of a 'terrorist organisation' is not strictly a review of the regulation. The Court's purpose in that situation is simply to determine whether the prosecution has proved each element of one or more terrorist organisation offences. Even if the Court concludes that the elements have not been proved because the organisation does not meet the definition of a terrorist organisation, the Court does not have the power to declare the regulation invalid. It remains within the discretion of the Attorney-General to decide whether he or she is still satisfied that the organisation meets the definition of a terrorist organisation and whether the regulation should remain in effect. In practice, however, one would imagine it would be awkward for the Attorney-General to maintain that an organisation meets the definition of a terrorist organisation in the face of a judicial declaration to the contrary.

Second, limited judicial review of a decision of the Attorney-General to make a regulation or to refuse to de-list an organisation is available under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('ADJR Act') or s 75(v) of the *Constitution* and s 39B of the *Judiciary Act 1903* (Cth). However, this form of judicial review does not permit an investigation of whether a proscribed organisation *in fact* meets the definition of a terrorist organisation. Review is limited to an assessment of the legality of the Attorney-General's decision, for example, whether the decision was made in bad faith or at the direction of another person, or is so unreasonable that no reasonable person could have exercised the power.<sup>49</sup> The ability of the courts to examine the

<sup>46</sup> *Criminal Code Act 1995* (Cth) s 102.1(17).

<sup>47</sup> These characteristics, while not criticised, are acknowledged by the Attorney-General's Department et al, above n 9, 11.

<sup>48</sup> PJCIS, 'Inquiry into the Terrorist Organisation Listing Provisions', above n 35, [2.24]. Algeria's Armed Islamic Group, however, was not relisted when its listing expired in November 2008. The Commonwealth Attorney-General noted that 'GIA no longer meets the threshold for proscription in the legislation': Robert McClelland, 'Three Terrorist Organisations Re-Listed' (Press Release, 4 November 2008). This is because the GIA has since been dispersed into other organisations.

<sup>49</sup> *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 5.

legality of a decision of the Attorney-General is further limited by: the judicial deference and restricted access to crucial information which typically distinguish cases involving national security;<sup>50</sup> the breadth of the definition of a 'terrorist organisation'; and the absence of any legal criteria guiding the Attorney-General's discretion. These factors mean that 'judicial review of proscription will be largely sacrificed to the totem of security interests'<sup>51</sup> and is ultimately of little practical utility.<sup>52</sup>

## 2 Executive and parliamentary review

The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) significantly broadened the Attorney-General's discretion by removing the precondition that an organisation must be identified in a decision of the United Nations Security Council. This was purportedly offset by the introduction of a number of safeguards in the form of mechanisms for executive and parliamentary review.

First, as discussed above, the Attorney-General has the power to review his or her own decision and to de-list an organisation. Second, the PJCIS was required to conduct a one-off review of the operation, effectiveness and implications of Division 102 three years after the 2004 amendments commenced.<sup>53</sup> Third, the PJCIS has the discretion to review any regulation as soon as possible after it is made and to report its comments and recommendations to each House of Parliament before the end of the 15 day parliamentary disallowance period.<sup>54</sup> If the PJCIS decides to review a regulation, the inquiry is advertised in major newspapers and on the Parliamentary Joint Committee's website and public submissions are invited.<sup>55</sup> Fourth, either House of the Commonwealth Parliament has 15 sitting days<sup>56</sup> after a regulation is tabled in that House<sup>57</sup> to disallow the regulation. If a disallowance motion is passed by either House, the resolution has the effect of repealing the regulation. However, a clear deficiency of this process is the fact that a regulation comes into effect on the day after it is registered

<sup>50</sup> The pervasive operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) ensures that any legal proceeding is subject to strict controls: see contrasting assessments in Phillip Boulton, 'Preserving National Security in the Courtroom: A New Battleground' in A Lynch, E MacDonald, and G Williams (eds) *Law and Liberty in the War on Terror* (2007) 98 and Stephen Donaghue, 'Reconciling Security and the Right to a Fair Trial: The National Security Information Act in Practice' in A Lynch, E MacDonald and G Williams (eds) *Law and Liberty in the War on Terror* (2007) 87.

<sup>51</sup> Walker, 'Blackstone's Guide', above n 31, 61; see 55–61 for a concise examination of the UK case law leading to this assessment. Donoghue warns against assuming that the judiciary is 'the most important player, or even the final word, in respect of counterterrorism': Donoghue, above n 7, 335.

<sup>52</sup> Ibid.

<sup>53</sup> *Criminal Code Act 1995* (Cth) s 102.1A(2). The PJCIS report was released in September 2007: PJCIS, 'Inquiry into the Terrorist Organisation Listing Provisions', above n 35.

<sup>54</sup> *Criminal Code Act 1995* (Cth) s 102.1A(1).

<sup>55</sup> PJCIS, 'Inquiry into the Terrorist Organisation Listing Provisions', above n 35, [2.38].

<sup>56</sup> This period is extended if the Parliamentary Joint Committee chooses to make comments or recommendations to either or both Houses of the Parliament: *Criminal Code Act 1995* (Cth) s 102.1A(3).

<sup>57</sup> Section 38(1) of the *Legislative Instruments Act 2003* (Cth) requires a regulation to be tabled in both Houses of Parliament within six sitting days of registration on the Federal Register of Legislative Instruments. Both the regulation and the statement of reasons, which forms part of the Explanatory Memorandum, must be tabled.

on the Federal Register of Legislative Instruments,<sup>58</sup> and disallowance of that regulation does not have retrospective effect.<sup>59</sup> Therefore, all action taken by the executive in accordance with the regulation (for example, a prosecution instituted against a person for membership of a terrorist organisation) prior to the disallowance resolution remains valid. There is no precedent for this approach in Australia's proscription regimes. The earlier *Communist Party Dissolution Act 1950* (Cth) provided that a declaration did not take effect until 28 days after the publication of the declaration in the *Gazette* or, if an organisation or person challenged the validity of the declaration in the courts, until a judge decided that the organisation or person was an organisation or person to whom the *Communist Party Dissolution Act 1950* (Cth) relates.<sup>60</sup>

### III CONCERNS ABOUT THE CURRENT EXECUTIVE DECISION-MAKING PROCESS

Even if one accepts that proscription is a legitimate preventative response to the threat of terrorism, there are nonetheless valid concerns remaining about the dominant role played by the executive in the decision-making process.<sup>61</sup> Some are specific to the decision-making process established by Division 102 of the *Criminal Code* whereas others are generally applicable to executive decision-making. Clearly identifying these concerns is an important step in any attempt to construct the optimal proscription decision-making process.

#### A Arbitrary and politicised decision-making

Firstly, it needs to be recognised that the current process for the listing, re-listing and de-listing of organisations as terrorist organisations carries an unnecessarily high potential for the generation of arbitrary and overly-politicised decisions. This is principally because there are insufficient checks in Division 102 on the discretion of the Attorney-General. In the absence of any subsidiary criteria that he or she is required to consider, the vague and broad definition of a 'terrorist organisation' provides little guidance or constraint.<sup>62</sup> The Castan Centre for Human Rights Law noted that:

<sup>58</sup> *Legislative Instruments Act 2003* (Cth) s 12(1).

<sup>59</sup> *Legislative Instruments Act 2003* (Cth) s 42.

<sup>60</sup> *Communist Party Dissolution Act 1950* (Cth) ss 5(2), 6, 9(4). There were a number of exceptions to this general rule. For example, if a person held any office or position to which s 10(1) related, he or she would be suspended from the date of publication of the declaration. The office or position would then become vacant upon the expiry of 28 days, if the person did not apply to the Court to set aside the order, or otherwise upon the making of an order by the Court that the declaration is valid.

<sup>61</sup> This is only to be expected since the 'single most defining feature of counterterrorist law is hypertrophic executive power': Donohue, above n 7, 6.

<sup>62</sup> As discussed in pt I, for some, definitional difficulties negate the justification for proscription in principle. But they may also be considered at a lower level of complaint – in relation to the specific merits of a particular scheme.

the Minister is not bound by any rules of precedent nor is s/he required to follow any set criteria and as such is free to exercise the power to list terrorist organizations in a politically motivated, inconsistent, selective and discriminatory fashion.<sup>63</sup>

It might be argued that the Attorney-General's actions are constrained by political, if not legal, factors. He or she is responsible to the Parliament and is also held to account by the people at federal elections. The flip-side, however, is that rather than improving the quality of the decision-making process, this relationship with the public may in fact have a detrimental effect on the proscription process. The public can place a politically irresistible degree of pressure on the executive government for protection from actual and apprehended terrorist threats. In the aftermath of a terrorist attack, such pressure may be based on a general climate of fear, especially about particular ethnic and religious groups within the community, rather than a rational assessment of the security threat.

This pressure may lead to the proscription of organisations that do not pose any real threat to the national security of Australia. As Hogg points out, '[i]t is not being unduly cynical to say that politicians know that if they are *not seen* to be doing all that is possible to discourage and prevent an attack they will be punished politically, especially in the event of a serious terrorist event occurring.'<sup>64</sup> Additionally, the effectiveness of parliamentary and public accountability mechanisms is undermined. Experience has shown that it is relatively easy to justify proscription of an organisation as a reasonable response to the terrorist threat. As the Castan Centre for Human Rights has noted:

In light of today's inflated fear of terrorism, it can be assumed that any alleged step taken by the government to combat terrorism will be readily accepted as reasonable making it extremely easy for the Minister to justify his or her decision to list any particular organization.<sup>65</sup>

Almost without exception,<sup>66</sup> members of Parliament and the PJCIS have been unwilling to speak out strongly against the proscription of specific organisations – notwithstanding that, in many cases, the executive has failed to put forward any evidence that the organisation poses a direct or indirect threat to the security of Australia. Another factor is the discrepancy of views as to which organisations constitute a threat to our security. This not unexpected uncertainty nevertheless creates a very real risk of selectivity in decision-making.<sup>67</sup> So much is evident from a

<sup>63</sup> Castan Centre for Human Rights Law, Monash University, Submission No 2 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 22 January 2007, 6.

<sup>64</sup> Russell Hogg, Submission No 6 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 31 January 2007, 16.

<sup>65</sup> Castan Centre, above n 63, 5–6.

<sup>66</sup> The only case in which there has been a minority report issued by the PJCIS was in the PJCIS, Parliament of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK) as a Terrorist Organisation under the Criminal Code Act 1995* (2006) 35–41. There have been no disallowances of regulations by the Parliament.

<sup>67</sup> This is hardly peculiar to the Australian scheme. Walker suggested the UK government would court ridicule in attempting to be the arbiter between 'terrorist' and 'freedom fighter': Walker, 'Blackstone's Guide', above n 31, 49; while Cole has highlighted the inevitable selectivity of the Secretary of State's discretion under the US proscription regime: David Cole, *Terrorism and the Constitution* (2006) 137–40, 198.

comparison of the organisations that are listed under Division 102 and under the *Charter of the United Nations Act 1945* (Cth). Currently 18 organisations are proscribed under Division 102. However, at 1 December 2008, 433 entities were listed under the *Charter of the United Nations Act 1945* (Cth).<sup>68</sup>

The politicisation of decision-making that this selectivity can generate was most apparent in the listing of the Kurdistan Workers' Party in 2006. A number of submissions to the PJCIS were concerned about the timing of the announcement of the listing, which coincided with a visit of the Turkish Prime Minister to Australia.<sup>69</sup> The Australian Muslim Civil Rights Advocacy Network noted:

We are concerned that the listing of an organisation with seemingly no security threat to Australia illustrates a proscription regime that is primarily dictated by foreign policy considerations rather than the more appropriate ends of protecting Australian citizens from the threat of terrorism.<sup>70</sup>

As Hogg has pointed out, even where such politicisation is not in fact a factor in a proscription decision, a strong perception that the process of proscription is politicised is still concerning given that it may fuel community tensions.<sup>71</sup>

## B Discrimination

Selectivity in the decision-making process has generated a fear amongst certain ethnic communities, particularly the Muslim community, that they will be targeted in a discriminatory manner under the proscription regime. This operates at two levels. First, that a disproportionate number of, for example, Muslim organisations will be proscribed – a fear which has in fact been realised. Despite the breadth of the definition of a 'terrorist organisation' in Division 102, all but one (the Kurdistan Workers' Party ('PKK')) of the 1972 organisations that have been proscribed to date in Australia are self-identified Islamic organisations.<sup>73</sup> The Public Interest Advocacy Centre noted this in its submission to the PJCIS inquiry and then stated that it was

concerned about the potential use by the Government of this sensitive power for political rather than security purposes. It is a serious abuse of power to do this and is likely to fuel the flames of ideology that the power is seeking to quell.<sup>74</sup>

This selective listing of Islamic organisations stems from an ideologically-focused interpretation of 'terrorism'. For example, in 2006 the SLRC cited with evident

<sup>68</sup> See the Consolidated List, available at Department of Foreign Affairs and Trade, *Australia's Implementation of United Nations Security Council Financial Sanctions* <[http://www.dfat.gov.au/icat/UNSC\\_financial\\_sanctions.html](http://www.dfat.gov.au/icat/UNSC_financial_sanctions.html)> at 1 December 2008.

<sup>69</sup> See many of the submissions to the PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66.

<sup>70</sup> Australian Muslim Civil Rights Advocacy Network, Submission No 14 to PJCIS, Parliament of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK) as a Terrorist Organisation under the Criminal Code Act 1995 (Cth)*, 2006, 1.

<sup>71</sup> Hogg, 'Executive Proscription of Terrorist Organisations in Australia', above n 12, 318.

<sup>72</sup> The listing of one of these organisations, the Armed Islamic Group (GIA), was not renewed when it expired in November 2008. There are currently 18 organisations proscribed as terrorist organisations.

<sup>73</sup> Emerton, 'Submission No 23', above n 40, 4.

<sup>74</sup> Public Interest Advocacy Centre, Submission No 11 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 2 February 2007, 5.

agreement the comments of the former Australian Human Rights Commissioner Dr Sev Ozdowski that 'contemporary acts of terrorism [are] premised on an entirely unsustainable concept: namely the total subjugation of non-believers to a specific "religio-political" ideology.'<sup>75</sup> Focusing on religious extremism ignores other organisations or actions that fall within the definition of a 'terrorist organisation' or 'terrorist act' for the purposes of the *Criminal Code*, such as nationalist and secular insurrectionary groups. Indeed, a tendency to conceive of terrorists as motivated purely by religious fanaticism may lead to dangerous errors in countering the actual threat. Holmes has shown at length that the simplistic characterisation of the 9/11 hijackers as religious zealots unhelpfully distorted the strategies adopted by the United States government in responding to that attack.<sup>76</sup> In obscuring the range of other possible motivating factors behind an organisation's use of political violence, proscription may impose obstacles rather than create opportunities for the root causes of terrorism to be understood and addressed.<sup>77</sup>

The threat that an organisation poses to Australia is purported by the executive to be one of the central factors in determining whether an organisation should be proscribed. Nevertheless, for many of the proscribed Islamic organisations there has been no evidence of any direct or indirect threat to Australia's security.<sup>78</sup> In contrast, Emerton points out that the closest examples of 'terrorism' on Australian soil were the fire bombings by white supremacists of Chinese restaurants in Perth in the late 1980s and again in 2004. However, such actions are typically not framed within the language of terrorism. No white supremacist groups have been proscribed as terrorist organisations in Australia.<sup>79</sup>

The second, more strategic, level at which this perceived discrimination must be appreciated is the social impact upon the already marginalised Muslim community. As the Australian Muslim Civil Rights Advocacy Network explained, proscription has consequences for how members of the Muslim community interact with one another and with the community at large:

One of the main effects of [the Anti-Terrorism Bill (No 2) 2004] is that it will create two further levels of isolation: it will create isolation between the Muslim community and the wider Australian community, since non-Muslim Australians will fear, rationally or irrationally, that they may be talking to a member of a terrorist organisation and will thus shun Muslims, and likewise within the Muslim community, it will lead to people not wanting to talk to one another, again, for fear of falling foul of this legislation. This is at a time when both Muslim and non-Muslim Australians need to work together closely to prevent terrorism.<sup>80</sup>

<sup>75</sup> SLRC, above n 37, [5.8].

<sup>76</sup> Stephen Holmes, *The Matador's Cape – America's Reckless Response to Terror* (2007) ch 1.

<sup>77</sup> See Hogg, 'Executive Proscription of Terrorist Organisations in Australia', above n 12, 307–9, 318–22.

<sup>78</sup> Emerton, 'Submission No 23', above n 40, 4–5.

<sup>79</sup> Ibid 6.

<sup>80</sup> Australian Muslim Civil Rights Advocacy Network, Submission No 84 to Senate Legal and Constitutional Legislation Committee, Parliament of Australia, *Inquiry into the Provisions of the Anti-Terrorism Bill (No 2) 2004*, 2004, 13.

### C Transparency of decision-making

The secrecy with which the Attorney-General and his or her advisors both gather and consider information has undoubted benefits. Principally, it ensures that all material evidence is available for use by the executive in making a proscription decision. However, proponents of a judicial decision-making model argue that any such benefits are outweighed by the transparency of the judicial system. Generally, the judicial system offers opportunities for an affected organisation to hear the case against it and make submissions in opposition to proscription. The current decision-making process, by contrast, does not allow for any involvement by the relevant organisation, its members or other affected persons in the making of the decision to proscribe. This is a major deficiency that the SLRC has urged the Commonwealth to rectify.<sup>81</sup>

In practice, however, this may be inevitable given the amorphous or underground nature of many affected organisations.<sup>82</sup> There is little reason to suspect that a judicial decision-making model would be any more effective in safeguarding the rights of groups or individuals potentially affected by a proscription decision, particularly their right to procedural fairness. It is unlikely that organisations or persons based overseas would be able or willing to submit to the jurisdiction of the Court and to make submissions objecting to the proscription of the organisation. All of the organisations that have been proscribed under Division 102 are based overseas and do not have any known cells in Australia. Although some of these organisations may have members or associates within Australia, it is difficult to imagine that these persons would identify themselves to the courts and thus expose themselves to the risk of subsequent criminal prosecution.

Even in court proceedings, the ability of the public, the affected organisation and possibly even its legal representatives to view the evidence upon which the Attorney-General relies to support the case for proscription would be restricted under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). This Act goes further than the public interest immunity at common law (and as codified in s 130 of the *Evidence Act 1995* (Cth)) by requiring the court, when considering whether to order disclosure of the evidence to the other party, to give the greatest weight to the possible prejudice to national security.<sup>83</sup> Thus a judicial decision-making process is unlikely to be much more transparent than the present process.

### D Consequences of proscription

A final source of disquiet about Division 102 looks to the consequences of proscription – its potential to restrict basic human rights and the harsh penalties for an individual found guilty of any of the wide-ranging derivative offences. The seriousness of these consequences suggests that there should be a high threshold for proscription, as well as independent oversight of the decision-making process.

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<sup>81</sup> SLRC, above n 37, [9.1]–[9.2].

<sup>82</sup> Ibid [8.29], [9.1].

<sup>83</sup> *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(8).



**(a) Restriction of basic human rights**

The breadth of the definition of a 'terrorist organisation' has the potential to infringe the freedoms of expression and association under international law<sup>84</sup> and the *Commonwealth Constitution*.<sup>85</sup> For example, an organisation may be proscribed if it 'advocates' the doing of a terrorist act. The definition of 'advocates' includes providing instruction on, or praising, the doing of a terrorist act. Depending on the interpretation of 'providing instruction' and 'praising', it is possible that a media organisation or lobby group that airs or expresses views about a recent or long-past terrorist attack, or perhaps an opinion as to how Australia should respond to an overseas conflict, could be proscribed. Once proscribed, it would be an offence to be a member of that organisation and the organisation would effectively be prevented from functioning. The addition by the *Anti-Terrorism Act (No 2) 2005* (Cth) of 'advocacy' as a ground for proscription only sharpened existing concerns that the scheme potentially violates constitutional freedoms.<sup>86</sup>

**(b) Breadth of the derivative offences**

The offences in Part IIA of the *Crimes Act 1914* (Cth) and Division 102 of the *Criminal Code* are consequential upon an organisation being declared to be an 'unlawful association' or proscribed as a 'terrorist organisation'. There is an important difference, however, between the two regimes. Under Part IIA, an organisation that satisfies the definition of an unlawful association is declared or deemed to be unlawful and there are consequences that immediately follow for the organisation itself. Section 30G provides that all goods and chattels belonging to an unlawful association, or held for or on its behalf, and all publications issued by or on behalf or in the interests of an unlawful association, are to be forfeited to the Commonwealth. By contrast, under Division 102, an organisation that satisfies the definition of a terrorist organisation is not, of itself, unlawful. There is no alteration, as a consequence of an organisation meeting this definition, to the organisation's status as a legal entity or its ability to hold property and other assets. However, as an organisation operates through its members and the other participants in its activities, the breadth of the offence regime in Division 102 means that proscription effectively paralyses an organisation.

The offences for which individuals may be liable under the two schemes are similar but far from identical. Part IIA provides that it is an offence to be a member or officer

<sup>84</sup> See arts 19, 20 and 23 of the *Universal Declaration on Human Rights*, GA Res 217 A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/Res/3/217 (1948); and arts 19, 21 and 22 of the *International Covenant on Civil and Political Rights*, GA Res 2200 A (XXI), UN GAOR, 21st sess, 1496th plen mtg, UN Doc A/Res/2200(XXI) (1966). Both freedoms are widely regarded as being part of customary international law.

<sup>85</sup> The High Court unanimously accepted the existence of an implied freedom of political communication in the *Commonwealth Constitution* in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*'). While the Court has not agreed on the implication of a freedom of association, in *Kruger v Commonwealth* (1997) 190 CLR 1, three Justices accepted such a freedom: 91 (Toohey J), 116, 126 (Gaudron J), 142 (McHugh J). See further, *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, 225-6 [113]-[116] (McHugh J), 277 [284] (Kirby J), with more limited support at 297 [334] (Gummow and Hayne JJ, with whom Heydon J agreed).

<sup>86</sup> Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban 'Terrorist' Organisations' (2004) 27 *University of New South Wales Law Review* 482.

of an unlawful association,<sup>87</sup> to contribute money or goods to an unlawful association,<sup>88</sup> to intentionally print, publish, sell or expose for sale any publication for or in the interests of or issued by an unlawful association,<sup>89</sup> or to intentionally permit any meeting of an unlawful association to be held in premises over which the person has control.<sup>90</sup> Under Division 102, it is unlawful to be a member of a terrorist organisation,<sup>91</sup> to direct the activities of a terrorist organisation,<sup>92</sup> to recruit for a terrorist organisation,<sup>93</sup> to train a terrorist organisation or receive training from a terrorist organisation,<sup>94</sup> to get funds to, from or for a terrorist organisation,<sup>95</sup> to provide support to a terrorist organisation<sup>96</sup> and to associate with a member of a terrorist organisation.<sup>97</sup>

A comparison, however, of the membership offence under each regime reveals substantial differences of scope and severity. A 'member' for the purposes of Division 102 includes a person who is an 'informal member', who has 'taken steps' to become a member or who is a director or officer of an organisation that is a body corporate.<sup>98</sup> There is no definition of 'informal member' or 'taken steps' in the *Criminal Code*. There is no conclusive definition of 'member' in Part IIA either. Instead, Part IIA sets out the manner in which membership of an unlawful association may be proved:

In any prosecution under this Act, proof that the defendant has, at any time since the commencement of this section:

- (a) been a member of an association;
- (b) attended a meeting of an association;
- (c) spoken publicly in advocacy of an association or its objects; or
- (d) distributed literature of an association;

shall, in the absence of proof to the contrary, be evidence that at all times material to the case he was a member of the association.<sup>99</sup>

It is possible that any of (b)-(d) may also satisfy the definition of an 'informal member' or 'taken steps' for the purposes of Division 102. However, the key distinction between Division 102 and Part IIA is that the latter contains the additional safeguard that, in proving whether a person is a member for the purposes of Part IIA, the presumption that a person is a member where one of the matters in (a)-(d) has been made out may be challenged or disproved by evidence to the contrary. That is, once the prosecution makes out one of the matters, there is an evidential burden on the defendant to show there is a reasonable possibility that he or she is not a member of the unlawful association. By contrast, under Division 102, if a person is found to be an informal member of a terrorist association by virtue, for example, of attending a meeting of the organisation, the only opportunity that the defendant has to raise

<sup>87</sup> *Crimes Act 1914* (Cth) s 30B.

<sup>88</sup> *Crimes Act 1914* (Cth) s 30D.

<sup>89</sup> *Crimes Act 1914* (Cth) s 30F.

<sup>90</sup> *Crimes Act 1914* (Cth) s 30FC.

<sup>91</sup> *Criminal Code Act 1995* (Cth) s 102.3.

<sup>92</sup> *Criminal Code Act 1995* (Cth) s 102.2.

<sup>93</sup> *Criminal Code Act 1995* (Cth) s 102.4.

<sup>94</sup> *Criminal Code Act 1995* (Cth) s 102.5.

<sup>95</sup> *Criminal Code Act 1995* (Cth) s 102.6.

<sup>96</sup> *Criminal Code Act 1995* (Cth) s 102.7.

<sup>97</sup> *Criminal Code Act 1995* (Cth) s 102.8.

<sup>98</sup> *Criminal Code Act 1995* (Cth) s 102.1(1).

<sup>99</sup> *Crimes Act 1914* (Cth) s 30H.

contrary evidence is under s 102.3(2). This subsection places a higher legal burden<sup>100</sup> on the defendant to prove on the balance of probabilities that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after he or she knew that the organisation was a terrorist organisation.<sup>101</sup>

These definitional differences are further exacerbated by an examination of the consequences of membership of an unlawful association and a terrorist organisation. Under Part IIA, the penalty is imprisonment for one year<sup>102</sup> and exclusion from voting in elections for seven years.<sup>103</sup> Under Division 102, the penalty is imprisonment for ten years,<sup>104</sup> and, if the term of imprisonment is greater than three years, exclusion from voting for the whole term of imprisonment.<sup>105</sup> In addition, Division 102 (but not Part IIA) contains an 'association' offence. That is, if Person A is found to be a member (including an 'informal member') of a terrorist organisation, Person B may commit an offence merely by intentionally associating with Person A, on two or more occasions, in the knowledge that Person A is a member or is a person who promotes or directs the activities of the terrorist organisation and where the association intentionally provides support to the organisation in some way, for example, by assisting its operations or expansion. Person B associates with Person A for the purposes of Division 102 merely if he or she meets or communicates with Person A.<sup>106</sup> Although there are exceptions for family members, lawyers and others, the penalty for associating with a member of a terrorist organisation is imprisonment for three years.<sup>107</sup> The SLRC found that s 102.8 was awkwardly drafted, superfluous to the offence of supporting an organisation in s 102.7 and should be repealed.<sup>108</sup>

<sup>100</sup> The legal burden of proof generally rests on the prosecution, and requires it to prove each element of the offence. However, here, the legal burden is on the defendant to prove that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after he or she knew that the organisation was a terrorist organisation. By contrast, the evidential burden may traditionally rest on either party. Neither is required to *prove* a particular issue, but the evidential burden requires them to produce sufficient evidence to merit the consideration of a particular issue by the jury.

<sup>101</sup> There are two obvious difficulties with this defence. First, the lack of a clear definition of membership means that a person may not realise that he or she is an informal member of an organisation and therefore will be unable to take reasonable steps to cease to be a member of that organisation. Second, if merely attending a meeting is sufficient to render a person an informal member of an organisation, it is unclear what would constitute reasonable steps to cease to be a member of that organisation.

<sup>102</sup> *Crimes Act 1914* (Cth) s 30B.

<sup>103</sup> *Crimes Act 1914* (Cth) s 30FD. This is presumably now unconstitutional in light of the decision of the High Court in *Roach v Electoral Commissioner* (2007) 233 CLR 162 ('*Roach*').

<sup>104</sup> *Criminal Code Act 1995* (Cth) s 102.3(1).

<sup>105</sup> Prior to 2006, the *Commonwealth Electoral Act 1918* (Cth) disqualified persons serving a term of imprisonment of three years or more from voting for that term. In *Roach* (2007) 233 CLR 162, the Court held that 2006 amendments to the Act disqualifying persons serving *any* term of imprisonment from voting for that term were constitutionally invalid. The orders of the Court in *Roach* returned the Act to the situation pre-2006.

<sup>106</sup> *Criminal Code Act 1995* (Cth) s 102.1(1).

<sup>107</sup> *Criminal Code Act 1995* (Cth) s 102.8(1), (2).

<sup>108</sup> SLRC, above n 37, [10.77].

#### IV RESPONDING TO THESE CONCERNS

The above concerns indicate a pressing need to improve the decision-making process under Division 102 of the *Criminal Code*. Two alternative means of so doing are considered below. The first means would not so much 'improve' the existing decision-making process as fundamentally overhaul it, by removing the decision-making role from the Attorney-General and transferring it to the courts. The second approach is far more modest (although its impact on the quality of the decision-making process is arguably no less). It leaves the decision-making process in the hands of the Attorney-General but attempts to tighten the legal framework for proscription so as to restrict the Attorney-General's discretion, as well as to introduce meaningful judicial oversight.

##### A A judicial decision-making model?

Some critics of Division 102 of the *Criminal Code* have argued that it would be more appropriate for the judiciary to determine whether an entity should be proscribed as a terrorist organisation.<sup>109</sup> This proposal has been given short-shrift by government departments and agencies, with the principal response being that the judiciary is poorly placed to make decisions affecting national security.<sup>110</sup> This is despite the fact that in the exercise of other functions under the counter-terrorism laws, most notably when issuing control orders, judges are required to do just that.<sup>111</sup> Indeed, in that context, the advantages of judicial over executive decision-making have been asserted by members of the High Court.<sup>112</sup>

As discussed above, the courts already have a significant role to play under Division 102 of the *Criminal Code*. During the course of a prosecution of a person for a terrorist organisation offence and in the absence of formal proscription, it will fall to the court to determine whether a group is a 'terrorist organisation'. To date, this has been far more important than the executive's power of proscription under s 102.1(b). The majority of individuals charged and prosecuted under Division 102 have not been involved with a proscribed organisation. Twelve men arrested in Melbourne in late 2005 were charged with terrorist organisation offences,<sup>113</sup> but the relevant

<sup>109</sup> New South Wales Council for Civil Liberties, Submission No 9 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 2 February 2007, 6; Human Rights and Equal Opportunity Commission, Submission No 14 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, February 2007, 11-12; Law Council of Australia, Submission No 17 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 9 February 2007, 9.

<sup>110</sup> SLRC, above n 37, [9.5] (Commonwealth Attorney-General's Department); Attorney-General's Department et al, above n 9, 13-14.

<sup>111</sup> *Criminal Code Act 1995* (Cth) div 104.

<sup>112</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 329-30 (Gleeson CJ), 507-9 (Callinan J) ('*Thomas*').

<sup>113</sup> Each of the defendants was charged with one count of being a member of a terrorist organisation (s 102.3 of the *Criminal Code Act 1995* (Cth)). Some were also charged with providing funds to a terrorist organisation (s 102.6). One of the defendants, Benbrika, was charged with directing the activities of a terrorist organisation (s 102.2). Benbrika and six of his co-accused were found guilty of terrorist organisation offences. Four of the other accused were found not guilty. The jury could not reach a verdict in relation to the final accused. It has recently been announced that he will be re-tried.

organisation was an informal, and previously unknown, group pursuing a violent form of jihad. In the first half of 2007, a further three men were charged with terrorist organisation offences in connection with the Liberation Tigers of Tamil Eelam ('LTTE').<sup>114</sup> The LTTE is proscribed by over thirty countries world-wide, but not in Australia. Only Jack Thomas<sup>115</sup> and Izhar Ul-Haque<sup>116</sup> have been charged with crimes in connection with a listed organisation – both attempts at prosecution being ultimately unsuccessful.

The issue of who should proscribe terrorist organisations has been quite polarising in Australia, with even the members of the SLRC being unable to agree.<sup>117</sup> Clearly then, the suggestion that the courts might play a more direct role in the proscription of terrorist organisations is deserving of thorough analysis.

### 1 *Part IIA of the Crimes Act 1914 (Cth) – A precedent for a judicial process*

Under Part IIA of the *Crimes Act 1914* (Cth), an organisation is an 'unlawful association' either by virtue of its own attributes or as a result of a declaration of the Federal Court that the body meets one of the criteria in s 30A. Section 30A declares several categories of bodies to be unlawful:

- first, any body (or an affiliated body) which, by its constitution or propaganda, advocates or encourages: the overthrow of the *Constitution* by revolution or sabotage; the overthrow, by force or violence, of an established government of the Commonwealth, a State or any other civilised country; or the destruction or injury of Commonwealth property or property used in trade or commerce with other countries or between the States;
- second, any body which advocates or encourages the doing of any act having or purporting to have as its object the carrying out of a 'seditious intention';<sup>118</sup> and

<sup>114</sup> Each of the defendants (Aruran Vinayagaamoorthy, Sivarajah Yathavan and Arumugan Rajeevan) was charged with being a member of a terrorist organisation (s 102.3 of the *Criminal Code Act 1995* (Cth)), making funds available to a terrorist organisation (s 102.6), providing support or resources to a terrorist organisation (s 102.7) and making an asset available to a prescribed entity contrary to s 21 of the *Charter of the United Nations Act 1976* (Cth). All charges, except those under the *Charter of the United Nations Act 1976* (Cth), were withdrawn in early March 2009.

<sup>115</sup> Thomas was charged with intentionally receiving funds from a terrorist organisation (Al Qa'ida) (s 102.6 of the *Criminal Code Act 1995* (Cth)), two counts of making funds available to a terrorist organisation (Al Qa'ida) (s 102.7), and a non-terrorism offence. He was convicted in February 2006 of the first of these charges. His conviction was quashed on appeal in August 2006 (*R v Thomas* (2006) 14 VR 475). In October 2008, he was retried for one count of falsifying an Australian passport and one count of receiving funds from a terrorist organisation. He was found guilty only of the first charge.

<sup>116</sup> Ul-Haque was charged with training with a listed terrorist organisation (Lashkar-e-Toiba) (s 102.5 of the *Criminal Code Act 1995* (Cth)). In November 2007, the NSW Supreme Court ruled that admissions made by Ul-Haque to the Australian Federal Police were inadmissible (*R v Ul-Haque* (2007) 177 A Crim R 348). Prosecution was immediately abandoned.

<sup>117</sup> SLRC, above n 37, [9.34]. The SLRC recommended either that the Attorney-General make proscription decisions on the advice of an advisory committee or the process of proscription become a judicial process.

<sup>118</sup> 'Seditious intention' is defined in s 30A(3) of the *Crimes Act 1914* (Cth).

- finally, any branch or committee of an unlawful association and any school or institution conducted by or under the actual or apparent authority of an unlawful association.

The Attorney-General's power in relation to proscription is limited to applying to the Federal Court for a declaration<sup>119</sup> or requiring a person to answer questions, furnish information or allow the inspection of documents relating to monies held or transactions entered into by an unlawful association.<sup>120</sup> The only body that possesses the power to declare an organisation to be an unlawful association is the Federal Court. An interested person may make an application to the Full Court of the Federal Court, within 14 days of the making of a declaration by the Federal Court, for that declaration to be set aside.<sup>121</sup> The Full Court may either affirm or annul the declaration.<sup>122</sup> Although it is not expressly stated in the legislation, review by the Full Court covers both the legality and the merits of the declaration, the latter being whether the organisation in fact meets the definition of an 'unlawful association'. If a judicial decision-making process was adopted in the terrorism proscription context, there would be a case for amendment of the process in Part IIA to enable the Attorney-General to make urgent applications to the Court for the proscription of an organization.

The history of Part IIA, however, counsels against excessive faith in it as an alternative model to executive-based proscription. No organisation has ever been declared to be unlawful under Part IIA and only one person has been tried for an offence under these provisions, with the conviction subsequently overturned by the High Court.<sup>123</sup> The Commonwealth made one attempt from 1935 to 1937 to have the Friends of the Soviet Union ('FOSU') and the Communist Party declared to be unlawful by the courts.<sup>124</sup> However, the litigation was settled before it went to trial.<sup>125</sup> Despite the Communist Party's vocal opposition to World War II, no Communist was prosecuted under Part IIA, nor was any sustained attempt made to use the unlawful associations provisions to have the Party declared to be unlawful.<sup>126</sup> In short, Part IIA hardly provides a demonstrably successful mechanism for the proscription of organisations on security grounds.

<sup>119</sup> *Crimes Act 1914* (Cth) s 30AA.

<sup>120</sup> *Crimes Act 1914* (Cth) s 30AB. The penalty for failing to comply with a request by the Attorney-General is imprisonment for six months.

<sup>121</sup> *Crimes Act 1914* (Cth) s 30AA(8).

<sup>122</sup> *Crimes Act 1914* (Cth) s 30AA(9).

<sup>123</sup> *R v Hush; Ex parte Devanny* (1932) 48 CLR 487. See Douglas, 'Keeping the Revolution at Bay', above n 20, 278–9, for analysis.

<sup>124</sup> Douglas, 'Keeping the Revolution at Bay', above n 20, 279–82. The Communist Party was only added as a defendant in order to strengthen the Commonwealth's case against the FOSU. The Commonwealth's case was based on the affiliation of the FOSU with an unlawful association, namely, the Communist Party. Douglas suggests (at 281) that the decision to seek a declaration that the Communist Party was unlawful was based not on any particular objection to the Party but on an assessment that it was necessary if the Commonwealth was to succeed in its case against the FOSU.

<sup>125</sup> *Ibid* 282.

<sup>126</sup> Roger Douglas, 'Saving Australia from Sedition: Customs, the Attorney-General's Department and the Administration of Peacetime Political Censorship' (2002) 30 *Federal Law Review* 135, 138.

## 2 *The Executive or the Judiciary – Who should make proscription decisions?*

There is a clear consensus across Australia, the United Kingdom,<sup>127</sup> Canada,<sup>128</sup> New Zealand<sup>129</sup> and the United States<sup>130</sup> that the executive is the most appropriate body to decide whether an organisation satisfies the definition of a terrorist organisation. There appear to be two central reasons for this.

First, judicial and executive decision-makers operate in distinct fields. The former are involved in the making of objective determinations of disputes of law and/or fact. They are assisted in this by their secure tenure, protecting them from the brunt of public pressure and disapprobation. On the other hand, it is necessary for executive decision-makers to ascertain for themselves the nature and scope of a social problem. They are then required to sift through the range of policy options available whilst simultaneously taking into account extrinsic political factors. The latter may include the financial cost of each option, the need for co-operation with other domestic and international political players and the maintenance of a sufficient level of public approval to ensure the executive's political survival.

While undoubtedly the judiciary are often required to balance competing societal interests and policy values, it is an exaggeration to suggest that it does so anywhere near the same degree as the executive. It is hard to think of two more politically charged decisions than to designate a group as one within the definition of a 'terrorist organisation', and then to determine whether the group poses a sufficient threat to Australia and/or the international community to justify its proscription. The making of these two decisions occurs in a highly contested and subjective arena, due to a confluence of factors: the multi-faceted and intersecting definitions of 'terrorist act' and 'terrorist organisation'; the absence of detailed criteria for the decision-maker to apply and the inability to precisely calculate the source, scope and nature of the terrorist threat posed by a particular organisation to Australia.

In light of the attendant subjectivity and politicisation of proscription decision-making, it seems more appropriate for the Attorney-General and, to a limited extent, the Parliament, to make such decisions. The executive has greater experience than the judiciary in making policy-based decisions involving such a clear mix of political considerations. It is also accountable to Parliament and, in turn, to the people. While scrutiny of decisions affecting national security is always inhibited by the need to protect information, it may be that continuing accountability and more effective oversight of decisions to proscribe organisations will be facilitated if the power is retained by the Attorney-General rather than ceded to the courts.

While we concede that the first justification may be debatable, the second justification regularly given in favour of executive-based proscription is, we suggest, indisputable. It is simply that the judicial arm lacks the capacity to make these

<sup>127</sup> *Terrorism Act 2000* (UK) c 11, s 3(3). The Secretary of State for the Home Department may issue an order proscribing an entity as an 'international terrorist organisation' and placing it on sch 2 of the act.

<sup>128</sup> *Criminal Code*, RSC 1985, c 46, s 83.05(1). The Governor in Council may, by regulation, establish a list of 'terrorist groups' and place an entity on that list.

<sup>129</sup> *Terrorism Suppression Act 2002* (NZ) ss 20–23. The Prime Minister may designate an entity as a 'terrorist entity'.

<sup>130</sup> 8 USC § 1189 (2007). The Secretary of State may designate an entity as a 'foreign terrorist organisation'.

decisions, whereas the executive has the necessary human, financial and intelligence resources. That the courts are rarely the most appropriate body to evaluate the competing interests in questions of national security has received clear judicial endorsement. In *A v Secretary of State for the Home Department*,<sup>131</sup> Lord Nicholls of Birkenhead stated that:

All courts are very much aware of the heavy burden, resting on the elected government and not the judiciary, to protect the security of this country and all who live here. All courts are acutely conscious that the government alone is able to evaluate and decide what counter-terrorism steps are needed and what steps will suffice. Courts are not equipped to make such decisions, nor are they charged with that responsibility.<sup>132</sup>

In making an assessment of whether an organisation satisfies the definition of a terrorist organisation and whether that organisation should be proscribed, ASIO, DFAT and the Attorney-General are required to gather and consider information from a range of sources – formal and informal, domestic and international, publicly available and secret. On a practical level, the courts are not sufficiently resourced or experienced in intelligence gathering to undertake this inquisitorial role, at least not with the same level of effectiveness as the executive. In particular, the courts would not receive the same benefit that the executive does of constant expert advice from persons with extensive knowledge of the security environment.

One possible risk of transferring the proscription decision-making power to the courts might be that the potential sources of evidence are diminished. The executive and Australian intelligence agencies are able to provide an absolute guarantee of confidentiality to informants which encourages persons and organisations within both Australia and overseas to provide relevant information, and provides the executive with a broad range of evidence before it upon which to base its decision.

The traditional approach of the courts to the admission and disclosure of evidence is quite different. The courts' starting point is that any probative evidence is admissible and that any evidence that is admissible should be disclosed to all parties to the proceedings. The onus is on a party opposing disclosure of evidence to establish that there is a compelling public policy reason for non-disclosure (for example, that disclosure would prejudice the national security).<sup>133</sup> This approach, and the absence of an absolute guarantee of confidentiality in judicial proceedings, might reduce those persons and organisations that are prepared to provide evidence to assist in making proscription decisions.

Of course, this problem could be avoided by modifying the courts' evidentiary rules to allow for greater confidentiality of intelligence sources (as is provided for now by the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth)). However, this may also have the undesirable consequence of reducing public

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<sup>131</sup> [2005] 2 AC 68.

<sup>132</sup> Ibid 128 [79]. See also *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 272; *Alister v The Queen* (1984) 154 CLR 404, 455 (Brennan J), 435 (Wilson and Dawson JJ).

<sup>133</sup> In *Alister v The Queen* (1984) 154 CLR 404, 412, Gibbs CJ stated that the common law public interest immunity operates as a balancing test. It requires a balancing of 'the nature of the injury which the nation ... would be likely to suffer, and the evidentiary value and importance of the documents in the particular litigation.' See further *Evidence Act 1995* (Cth) s 130(1), and also the more skewed provisions of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth).



confidence in the objectivity and transparency of the judicial system. As discussed above, the decision to proscribe an organisation is inherently political and subjective in nature. For the courts to not only make such decisions, but to make them in an atmosphere of heightened secrecy, may result in the public perceiving members of the judiciary as political players rather than neutral arbiters of the law.

In his recent dissenting opinion in *Thomas v Mowbray*, Hayne J, in explaining why the issuing of control orders over individuals by the federal judiciary for the 'purpose of protecting the public from a terrorist act' was unconstitutional, neatly encapsulated many of the concerns about the suitability of a judicial decision-making process canvassed in this section:

For the most part courts are concerned to decide between conflicting accounts of past events. When courts are required to predict the future, as they are in some cases, the prediction will usually be assisted by, and determined having regard to, expert evidence of a kind that the competing parties to the litigation can be expected to adduce if the point in issue is challenged. Intelligence information, gathered by government agencies, presents radically different problems. Rarely, if ever, would it be information about which expert evidence, independent of the relevant government agency, could be adduced. In cases where it could not be tested in that way (and such cases would be the norm rather than the exception) the court, and any party against whose interests the information was to be provided, would be left with little practical choice except to act upon the view that was proffered by the relevant agency.

These difficulties are important, but not just because any solutions to them may not sit easily with common forms of curial procedure. They are important because, to the extent that federal courts are left with no practical choice except to act upon a view proffered by the executive, the appearance of institutional impartiality and the maintenance of public confidence in the courts are both damaged.<sup>134</sup>

With respect to the majority in *Thomas*, the quoted passage appears to be consistent with the courts' traditional reluctance to accept or assume responsibility for making important predictive decisions on national security questions.

Alarm bells are justifiably rung by the executive's possession of a wide and largely unconstrained discretion affecting the lawfulness of political and religious groups. However, no obvious solution to this problem is readily apparent. The arguments presented by the respective proponents of the executive and judicial decision-making processes are finely-balanced. Indeed, it is important to acknowledge that, over time, our own support for each of these models has wavered.<sup>135</sup> But ultimately we have come to favour an executive decision-making process. Concerns about the current executive decision-making process would not necessarily be allayed by its substitution with a judicial process, and may in fact create even more problems. An executive decision-making process is preferable both in terms of efficiency and institutional integrity, while also recognising the clear aversion that the political arms of government have to investing courts with the power to declare political and other organisations outside the law.

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<sup>134</sup> *Thomas v Mowbray* (2007) 233 CLR 307, 477-8.

<sup>135</sup> See, for example, SLRC, above n 37, [9.10] (George Williams). Cf Gilbert + Tobin Centre of Public Law, Submission No 16 to PJCIS, Parliament of Australia, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, 9 February 2007, 2.

## B An improved executive decision-making process

There is currently a sharp gap between the rhetoric and the practice of executive decision-making on proscription. In 2005, the Director-General of ASIO refuted a statement by Emerton that 'ordinary methods of criminal investigation and prosecution' may be adequate to deal with terrorism by stating:

we have a very high degree of transparency and accountability within the system to demonstrate to the inspector-general, this committee, the minister, the parliament and so on that we use the resources we are given in a way that is directed at real problems, not simply ones that justify their existence.<sup>136</sup>

The aims of this statement are laudable — 'transparency', 'accountability' and the targeting of 'real problems'. However, they have not been carried through into practice. Not only are the provisions of Division 102 distant from such aims (for example, in failing to set out appropriate criteria for the executive to apply in its decision-making process), but the executive has also failed to comply with its own undertakings (for example, in failing to give the States and Territories adequate time to consider a proscription proposal). This illustrates that rather than seeking to change the decision-maker, the focus of making effective improvements to the proscription regime should be to properly constrain the discretion *per se*. Substantial amendments, especially to the procedural provisions of the proscription regime, are necessary to ensure that the executive is accountable for its decisions, that a high quality of information gathering and decision-making is attained and that the civil liberties of organisations and individuals are adequately protected.

### 1 Establishment of an independent advisory body

The authors agree with the recommendation of the SLRC in 2006 that an independent body consisting of retired judges and persons 'with experience in security legislation, investigation and policing'<sup>137</sup> be established to advise the Attorney-General *prior* to a decision being made to proscribe an organisation. In order for this body to play an effective role in curtailing the discretion of the executive, it must be given sufficient time to consider the advice of ASIO and DFAT, as well as to gather any further information it regards as significant. The factual findings and recommendations made by the independent advisory body would be of assistance to the Attorney-General in making his or her decision. However, the real value of the body lies in involving the community and those potentially affected by the decision in the decision-making process.

Under the current decision-making model, the only information that is provided by the Attorney-General's Department to the public is in the form of a press release, attaching the statement of reasons and the updating of the Department's website.<sup>138</sup> However, in some cases even this has not been done. For example, when re-listing the Kurdistan Workers Party in early 2008, the Attorney-General's Department did not issue a media release giving public notice of the regulation nor was a statement of

<sup>136</sup> PJC-ASIO, 'Four Terrorist Organisations', above n 35, 16 [2.28] (Director-General of ASIO).

<sup>137</sup> SLRC, above n 37, 91.

<sup>138</sup> See, for example, PJCIS, Parliament of Australia, *Review of the Re-Listing of Al-Qa'ida and Jemaah Islamiyah as Terrorist Organisations* (2006) [1.5], [1.10], [1.13]–[1.14]. The only exception was the listing of Hizbollah and Hamas, where a newspaper campaign was conducted. See PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.38].

reasons provided.<sup>139</sup> This lack of public notification was exacerbated by the failure of the PJCIS to issue a media release calling for submissions for its review of the relisting.<sup>140</sup>

An independent advisory body would remedy this lack of public information by making two practical changes to the decision-making process. The independent advisory body would engage in community consultation, in accordance with the recommendation of the PJC-ASIO in 2005 that it 'would be most beneficial if community consultation occurred prior to the listing of an organisation under the Criminal Code.'<sup>141</sup> The factual findings and recommendations of the advisory body would also be widely publicised to the community (after the redaction of any information that the body considered might prejudice Australia's security). This would achieve a number of inter-related goals:

- 1 It would assist the proscribed organisation, its members and other affected persons (as well as the public more generally) to understand the reasons for proscription;<sup>142</sup>
- 2 It would give the community a sense of assurance about controversial proscription decisions. Otherwise, it is likely that the proscription of an organisation will be viewed, certainly by those most affected by the decision, as 'anti-democratic interferences with civic and political freedom.'<sup>143</sup> For this reason, the advisory body would need to pay particular attention (in both the consultation and notification stages) to vulnerable community groups that are disproportionately affected by the proscription of the organisation.<sup>144</sup> For example, in relation to the listing of the PKK, several submissions were made to the PJCIS about the failure of the Attorney-General to conduct any community consultation despite the broad support in the Kurdish community in Australia for the fight of Kurds overseas for self-determination and for the PKK itself;<sup>145</sup>
- 3 It is crucial to the deterrence purpose of proscription, as community education would 'help [per]suade any persons considering involvement in the activities of such an organisation [of] the reasons why membership of such an organisation should be avoided, rather than seeing it as a subjective decision

<sup>139</sup> Federation of Community Legal Centres (Victoria) Inc, Submission No 7 to PJCIS, Parliament of Australia, *Review of the Re-Listing of the Kurdistan Workers' Party (PKK) as a Terrorist Organisation under the Criminal Code Act 1995*, May 2008, 4.

<sup>140</sup> See PJCIS, *Media Releases*, Parliament of Australia <[http://www.aph.gov.au/house/committee/pjcis/pkk\\_1/media.htm](http://www.aph.gov.au/house/committee/pjcis/pkk_1/media.htm)> at 3 December 2008. See also *ibid*.

<sup>141</sup> PJC-ASIO, Parliament of Australia, *Review of the Listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi Network) as a Terrorist Organisation* (2005) [1.22].

<sup>142</sup> Ian Johnstone, 'The UN Security Council, Counterterrorism and Human Rights' in Andrea Bianchi and Alexis Keller (eds), *Counterterrorism: Democracy's Challenge* (2008) 335, 350.

<sup>143</sup> Patrick Emerton, Submission No 4 to PJC-ASIO, Parliament of Australia, *Review of the Listing of Four Terrorist Organisations*, 29 July 2005, 13.

<sup>144</sup> PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.40].

<sup>145</sup> See, for example, PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [1.23].

made by the Australian government.<sup>146</sup> Deterrence is most effective if people are enabled to understand the basis upon which the decision was made; and

- 4 It would contribute to the strength of accountability mechanisms. First, it would encourage members of the community to participate in the proscription process (which the public generally regards as taking place in the secretive 'national security' environment). This would assist the advisory body to gather all the information needed to make an informed decision, for example, information about the objectives of the organisation, its role in Australia and the effect that the proscription of an organisation would have upon a particular ethnic or religious community. Second, the publication of the factual findings and recommendations of the advisory body would provide a template against which to judge the ultimate decision of the Attorney-General. The Attorney-General would have to justify any decision that was not in accordance with the recommendations of the advisory body.

An alternative to the creation of an independent advisory body might be the inclusion of a right to seek merits review of proscription decisions in the courts. There are, however, two immediate problems with this idea. First, merits review is inconsistent with the proposition that proscription decisions are, by their nature, best left in the hands of the executive. Second, as the courts could only become involved after the making of a regulation, their effectiveness would likely be inhibited due to the traditional deference of the courts on matters of national security. It seems realistic to share Hogg's view that, '[o]nce the Attorney-General has listed an organization there is inevitably a politically-driven momentum to confirmation and, in practice a strong, perhaps irresistible, presumption against disallowance.'<sup>147</sup> For these reasons, it would be more effective to build a safeguard onto the front of the proscription process in the form of an independent advisory body rather than to establish a system of ex-post facto merits review by the courts.

## 2 Introduction of more detailed criteria for proscription

The definition of a terrorist organisation in Division 102 potentially encompasses many organisations. However, only a small number of them have been selected for proscription. This indicates that the current broad definition is insufficient, of itself, to delimit which organisations should be proscribed. The current absence in Division 102 of further detailed criteria as well as an obligation on the Attorney-General to justify his or her decision against those criteria partially explains why arbitrary and politicised decision-making is possible in the proscription context.

The criteria currently taken into account by ASIO in preparing the statement of reasons only have the status of guidelines or policy. These criteria need not be consistently applied by ASIO or the Attorney-General. ASIO has explained that:

[the criteria] are taken as a whole; it is not a sort of mechanical weighting, that something is worth two points and something is worth three points. It is a judgement across those factors, and some factors are more relevant to groups than others.<sup>148</sup>

<sup>146</sup> Australian Muslim Civil Rights Advocacy Network, Submission No 15 to PJC-ASIO, Parliament of Australia, *Review of the Listing of Six Terrorist Organisations*, 24 January 2005, 2.

<sup>147</sup> Hogg, 'Submission No 6', above n 64, 25-6.

<sup>148</sup> PJC-ASIO, 'al-Zarqawi Network', above n 141, [2.4].

In September 2005, the PJCIS recommended that ASIO and the Attorney-General specifically address all six criteria in future statements of reasons.<sup>149</sup> The PJCIS has 'stress[ed] the need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the Criminal Code'<sup>150</sup> and said:

a clearer exposition of the criteria would strengthen the Government's arguments, provide greater clarity and consistency in the evidence and therefore increase public confidence in the regime as a whole. Therefore ... it would greatly facilitate the Committee's review process if the [statement of reasons addressed these criteria].<sup>151</sup>

The criteria applied by ASIO and the Attorney-General have also been adopted by the PJCIS as a template for determining which organisations falling within the definition of a terrorist organisation should be proscribed.<sup>152</sup> However, as with ASIO and the Attorney-General, the PJCIS has not consistently applied these criteria. In reviewing the listing of the Kurdistan Workers' Party in 2006, the PJCIS' minority report noted that the listing was achieved by reliance on the 'literal terms of the statutory definition of a terrorist organisation' and not the template criteria previously relied on by the PJCIS.<sup>153</sup> The minority report went on:

If the Joint Committee accepts justifications for new listings without a proper basis and that are inconsistent with the reasoning of its own prior reports and not based on existing (or any) stated policy we invite inconsistency. It would permit ad hoc decisions, incapable of justification on rational grounds, to be reached. That would be inconsistent with the Joint Committee's obligations to the Parliament.<sup>154</sup>

The inconsistent application of the criteria is most evident from an examination of two particular criteria, namely, that the listed group has 'links to Australia' or poses a 'threat to Australian interests'. The PJCIS has acknowledged, on several occasions, the significance of these criteria in determining whether an organisation should be proscribed.<sup>155</sup> After referring to the Attorney-General's Department's statement that the statutory intention of proscription is 'ultimately ... about whether listing is in the security interests of this country',<sup>156</sup> the PJCIS observed that it is unclear how proscribing organisations that have no direct link to individuals in Australia and do not pose any threat to Australian interests would meet this description.<sup>157</sup> Some organisations with links to Australia (such as the LTTE)<sup>158</sup> have not been proscribed,

<sup>149</sup> PJC-ASIO, 'Four Terrorist Organisations', above n 35, 47 (Recommendation 1).

<sup>150</sup> PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [2.8].

<sup>151</sup> PJCIS, 'Review of the Re-Listing of Abu Sayyaf Group', above n 44, [1.27].

<sup>152</sup> See, for example, PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [2.3]; PJCIS, Parliament of Australia, *Review of the Relisting of Hizballah's External Security Organisation (ESO)* (2007) [2.4]; PJCIS, Parliament of Australia, *Review of the Re-Listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as Terrorist Organisations* (2007) [1.10].

<sup>153</sup> PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, Minority Report, [1.8].

<sup>154</sup> Ibid [1.12].

<sup>155</sup> See, for example, PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.27]–[2.28], [3.50], and PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [2.33]–[2.36]. This was also acknowledged by the former Attorney-General, Philip Ruddock.

<sup>156</sup> PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.19].

<sup>157</sup> PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [2.36].

<sup>158</sup> PJCIS, 'Review of the Re-Listing of Abu Sayyaf Group', above n 44, [1.13].

while others with no links to Australia have been proscribed.<sup>159</sup> Emerton has calculated that 13 of the 19 organisations that have been proscribed by the Attorney-General have, according to the ASIO material supporting their listing, no connection to Australia or Australians.<sup>160</sup> Two other organisations have only been linked to Australia insofar as Australian personnel are present as part of the foreign forces in Iraq.<sup>161</sup> Only four organisations have been identified as posing a threat to Australia's security.<sup>162</sup>

The Attorney-General's Department has submitted that the specification of further criteria in Div 102 was 'unnecessary' and the 'considerations taken into account by the Attorney-General need to be assessed on a case by case basis.'<sup>163</sup> The Department also noted that there was already a check on the Attorney-General's decision-making power in the form of judicial review under the *ADJR Act* (for example, if the Attorney-General failed to consider a relevant consideration or took into account an irrelevant consideration). While the flexibility to deal with unexpected or unusual circumstances is obviously desirable, confusion amongst the relevant executive bodies, the public and the Parliament as to the grounds on which an organisation may be proscribed renders mechanisms of political accountability unworkable. In terms of judicial review, the breadth of the definition of a 'terrorist organisation' also means that it would be difficult to establish that there were *any* considerations that the decision-maker was bound to take into account or not.<sup>164</sup>

More detailed criteria should be entrenched in Div 102 so as to guide the decision-making power of the Attorney-General. The current non-legislative criteria used by ASIO, the Attorney-General and the PJCIS are problematic for the reasons discussed by Emerton in his various submissions to the PJCIS. The criteria of 'engagement in terrorism' and 'ideology and links to other terrorist groups/networks' are 'so broad as to be axiomatic'.<sup>165</sup> The first criterion may simply reiterate the definitional requirement that an organisation be engaged in terrorism and the second provides no indication as to what ideologies the Attorney-General regards as illegitimate.<sup>166</sup> There is an unfortunate emphasis on foreign policy rather than domestic security considerations in the fourth and fifth criteria ('threat to Australian interests' and 'proscription by the UN or like-minded countries').

There is no doubt that Australia's democratically elected government has the right to pursue its foreign policy goals in accordance with its conception of the country's national

<sup>159</sup> Parliamentary Library (Foreign Affairs, Defence and Trade Section, Information and Research Services), *The Politics of Proscription in Australia*, Parliamentary Library Research Note No 63, June 2004. This was also noted by the PJC-ASIO, 'Six Terrorist Organisations', above n 31, [3.49].

<sup>160</sup> Emerton, 'Submission No 23', above n 40, 4–5.

<sup>161</sup> Ibid. Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn and Ansar al-Islam.

<sup>162</sup> Ibid. Al-Qa'ida, Jemaah Islamiyah, Egyptian Islamic Jihad and Lashkar-e-Tayyiba.

<sup>163</sup> Attorney-General's Department et al, above n 9, 6.

<sup>164</sup> See *Sean Investments v McKellar* (1981) 38 ALR 363, 375 (Deane J); and *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1 (Mason J).

<sup>165</sup> PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.26].

<sup>166</sup> Patrick Emerton, Submission 18 to PJCIS, Parliament of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK)*, 2006, 6–7.

interest. But the criminal law should not be used as a tool to enforce these foreign policy preferences.<sup>167</sup>

Given these problems, an alternative set of criteria should be adopted. We support the criteria proposed by Emerton who has suggested that any decision taken by the Australian government to ban an organisation should indicate:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law;
- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
  - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
  - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;
  - the way in which the concept of 'membership', and particularly 'informal membership', will be applied in the context of the organisation;
  - the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.<sup>168</sup>

These criteria were acknowledged by the PJCIS in 2006 to be of valuable assistance and have thereafter been used by the PJCIS as the basis of questions at hearings in relation to particular listings.<sup>169</sup>

No set of criteria should be treated as exhaustive, however, they should include matters that ASIO and the Attorney-General must at least take into account in considering whether to proscribe an organisation. The value of this would be that, where the Attorney-General seeks to proscribe an organisation in the absence of one of the above criteria or relies upon a different criterion to support the case for proscription, the onus would be placed upon him or her to clearly and publicly justify the basis for the regulation being made.

### 3 *Procedural fairness*

There is no mention in Division 102 of the right to procedural fairness, that is, the right of an organisation or person affected by a proscription decision to a hearing before the Attorney-General. The Attorney-General's Department has argued that 'providing notice prior to listing could adversely impact operational effectiveness and prejudice national security', and therefore the right to procedural fairness is excluded by Division 102.<sup>170</sup> This issue was considered but not resolved by the SLRC in 2006.<sup>171</sup> In

<sup>167</sup> Ibid 7.

<sup>168</sup> Ibid 7–8.

<sup>169</sup> PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [2.8].

<sup>170</sup> Attorney-General's Department et al, above n 9, 13.

<sup>171</sup> SLRC, above n 37, 81–4.

our opinion there is no sufficient policy reason for procedural fairness to be denied to an affected organisation or person in all cases.<sup>172</sup>

The Department's reference to 'operational effectiveness' presumably means that proscription decisions must be made urgently, without there being any opportunity for consultation with affected individuals or organisations. In both theory and practice, this is not the case. Proscription is just the first step in a long process aimed at the prevention of terrorist acts. It does not have any immediate effect on an organisation but rather aims to facilitate the prosecution of persons who are, or may be in the future, involved in the commission of terrorist acts. It also, as discussed above, serves a symbolic purpose that could only be better served by a more open and accountable process. On a practical note, even Al Qa'ida was not proscribed until more than three months after the Attorney-General was granted the power of proscription.<sup>173</sup> An intervening period such as this would provide ample time for the Attorney-General to consult with affected individuals and organisations.

The Department's claim that affording individuals and organisations procedural fairness would 'prejudice national security' is also disingenuous. In deciding whether to proscribe an organisation, the Attorney-General relies upon a statement of reasons prepared by ASIO which is unclassified and contains publicly-available information about the organisation.<sup>174</sup> Indeed, after a regulation has been made, the Statement is published on the National Security Website. It is worth noting that, in the United Kingdom, the Secretary of State for the Home Department's power of proscription requires a draft of the relevant order to be laid before and approved by resolution of each House of Parliament.<sup>175</sup> The explanatory memorandum that accompanies each proscription order provides information on the aims and history of the organisation, the attacks it has carried out, both generally and in relation to UK and Western interests, and its representation in the UK. In effect, this explanatory memorandum provides a publicly accessible statement of reasons for the proscription. The UK example demonstrates that the decision to proscribe an organisation is not always based on confidential information, the disclosure of which would prejudice national security.<sup>176</sup>

Central to any reform of Division 102 should be the confirmation that the Attorney-General is required to accord procedural fairness to an organisation, its members and other affected persons, to the extent practicable, prior to making a decision to proscribe

<sup>172</sup> For a comprehensive discussion of whether the right to procedural fairness applies to proscription decisions, see Nicola McGarrity, 'Review of the Proscription of Terrorist Organisations: What Role for Procedural Fairness?' (2008) 16 *Australian Journal of Administrative Law* 45.

<sup>173</sup> Commonwealth, *Parliamentary Debates*, House of Representatives, 23 October 2002, 8452 (Simon Crean, Leader of the Opposition).

<sup>174</sup> Attorney-General's Department et al, above n 9, 5. See also PJCIS, 'Inquiry into the Terrorist Organisation Listing Provisions', above n 35, [2.40].

<sup>175</sup> *Terrorism Act 2000* (UK) c 11, s 123(4). An exception operates in urgent cases, as defined by the Secretary of State. In these cases, an order containing a declaration of the Home Secretary's opinion bypasses parliamentary scrutiny and is valid for 40 days (s 123(5)).

<sup>176</sup> See the comments of Madgwick J in *Leghaei v Director-General of Security* [2005] FCA 1576, [81]. Additionally, see Johnstone's rejection of procedural fairness as a 'zero-sum' trade-off with security under the UN's Resolution 1267 proscription regime: Johnstone, above n 142, 348-9.



that organisation. There may be some circumstances in which notification is impossible or unlikely to elicit a response, such as when an organisation is based overseas or its location is unknown. However, it is important for public confidence in the proscription regime that there be a general rule that the Attorney-General must accord procedural fairness.

#### 4 Review mechanisms

##### (a) The PJCIS

At present, the PJCIS serves an important function in reviewing regulations after they have been made by the Attorney-General. However, it has faced a number of practical difficulties. The solution to these does not lie in legislative amendments but rather a more co-operative approach by the executive departments and agencies involved in the decision-making process.

The PJCIS has complained about the failure of the Attorney-General to provide it with adequate warning of impending listings. This is a problem given the short period of time within which the PJCIS is required to review a regulation and make any recommendations (that is, within the 15 day parliamentary disallowance period). The PJCIS has requested, but the Attorney-General has generally failed to comply, that it be 'given as much warning as possible of an impending listing so that the Committee's work program could accommodate the review.'<sup>177</sup>

The failure to provide comprehensive, accurate and balanced information to the PJCIS to justify listings has also been a source of disquiet.<sup>178</sup> Three principal issues arise out of the PJCIS' reviews of listings and re-listings of organisations. First, as already discussed, the PJCIS has been particularly critical of ASIO and the Attorney-General's Department for failing to systematically address the criteria and to provide it with information on each criterion.<sup>179</sup> The PJCIS commented in relation to one review that '[t]he information, both on the processing of the regulations and on the listed entities themselves, could be deemed to be inadequate for the Committee to judge the case for proscription with confidence.'<sup>180</sup> Second, the PJCIS has noted the failure of ASIO and the Attorney-General's Department to provide it with current information in relation to re-listings of organisations, rather than simply that which was furnished at the initial listing.<sup>181</sup> Finally, the PJCIS has commented on the inadequacy of using only publicly available material to assess listings and re-listings of organisations. The public information in the statement of reasons is frequently insufficient to justify the listing or re-listing.<sup>182</sup> ASIO informed the PJCIS that it has 'a very detailed process by which we [fact-check] every point that was made in our statement of reasons and each fact is generally supported by open-source and classified supporting corroborating intelligence.'<sup>183</sup> However, it does not appear that the classified information is supplied

<sup>177</sup> PJC-ASIO, above n 31, 'Six Terrorist Organisations', [2.2]–[2.3].

<sup>178</sup> PJC-ASIO, above n 35, 'Four Terrorist Organisations', [3.13], [3.39]–[3.40].

<sup>179</sup> See, eg, PJCIS, 'Review of the Re-Listing of Ansar al-Sunna', above n 152, [1.15].

<sup>180</sup> PJC-ASIO, above n 31, 'Six Terrorist Organisations', [3.48].

<sup>181</sup> PJCIS, Parliament of Australia, *Review of the Re-Listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi Network) as a Terrorist Organisation* (2007) [1.11]–[1.12]; PJCIS, 'Review of the Re-Listing of Abu Sayyaf Group', above n 44, [2.6]–[2.7].

<sup>182</sup> PJCIS, 'Review of the Re-Listing of Abu Sayyaf Group', above n 44, [2.8]–[2.13].

<sup>183</sup> Ibid [2.12].

to the PJCIS, except perhaps in response to specific questions put by it to governmental agencies. Therefore, in some circumstances the PJCIS may have to blindly accept ASIO's assurance that the listing or re-listing is justified by the classified material.

Despite the discretionary nature of its review mandate, the PJCIS has conducted a review of all listings and re-listings of organisations as terrorist organisations.<sup>184</sup> In the first review conducted by the PJCIS, it stated that:

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 ... 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.<sup>185</sup>

Unfortunately, the PJCIS has failed to follow through on its resolution to conduct 'rigorous' reviews. On only one occasion has any member opposed the listing or re-listing of an organisation.<sup>186</sup> By contrast, on several occasions the PJCIS has stated that, despite finding that a number of the criteria were not made out, it 'will err on the side of caution' with respect to the listing or re-listing and will not recommend to the Parliament that the regulation be disallowed.<sup>187</sup> This cautious approach is due, in large part, to the inadequacy of the information placed before it, but can hardly be said to fulfil the PJCIS' commitment to 'rigorous' review.

**(b) A proscribed organisations appeal commission?**

It is appropriate to consider whether the Australian proscription regime would be enhanced by the creation of a body similar to the United Kingdom's Proscribed Organisations Appeal Commission ('POAC'). This requires a clear understanding of the nature and role of this body.

Under Section 3 of the *Terrorism Act 2000* (UK), the Home Secretary has the power to proscribe an organisation as a terrorism organisation by adding it to Schedule 2 of that Act if he or she 'believes that it is concerned in terrorism'.<sup>188</sup> The Secretary also has the power to remove an organisation from Schedule 2. This may be of his or her own volition (acting generally on the advice of a government working group which reviews all proscriptions every six months 'in the light of intelligence and other information, all of which is quality assessed'<sup>189</sup>), or on the application of a proscribed organisation or any affected person.<sup>190</sup> De-listing applications must be determined by

<sup>184</sup> PJCIS, 'Inquiry into the Terrorist Organisation Listing Provisions', above n 35, [2.37].

<sup>185</sup> PJC-ASIO, Parliament of Australia, *Review of the Listing of the Palestinian Islamic Jihad* (2004) [2.8].

<sup>186</sup> PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, 35–41.

<sup>187</sup> PJCIS, Parliament of Australia, *Review of the Relisting of Hizballah's External Security Organisation (ESO)* (2007) [2.32]; PJCIS, 'Review of the Re-Listing of Abu Sayyaf Group', above n 44, [2.49]; PJC-ASIO, 'Six Terrorist Organisations', above n 31, [3.47].

<sup>188</sup> An organisation is 'concerned with terrorism' if it commits or participates in acts of terrorism, prepares for terrorism, promotes or encourages terrorism or is otherwise concerned in terrorism (*Terrorism Act 2000* (UK) c 11, s 3(5)).

<sup>189</sup> Lord Carlile of Berriew QC, *Report on the Operation in 2005 of the Terrorism Act 2000* (2006) 11.

<sup>190</sup> *Terrorism Act 2000* (UK) c 11, s 4(1), (2).

the Secretary within a time specified by regulation (90 days),<sup>191</sup> and must state the grounds on which the decision is made.<sup>192</sup> There are two stages to determining a de-listing application – a determination of whether the organisation 'is concerned in terrorism' (first stage) and a determination of whether the discretion to proscribe an organisation should be exercised (second stage).<sup>193</sup>

Where an application for de-listing is refused, the applicants may appeal to the POAC.<sup>194</sup> An appeal will be allowed if POAC 'considers that the decision to refuse was flawed when considered in the light of the principles applicable on an application for judicial review'.<sup>195</sup> On its face, therefore, POAC simply offers a specialist site and procedures for the application of standard administrative review principles.<sup>196</sup> It is not permitted to engage in merits review. However, in the only case that has come before POAC – *Lord Alton v Secretary of State for the Home Department*<sup>197</sup> – the administrative review principles it applied were broader than those generally utilised by courts and administrative tribunals. First, POAC considered all relevant evidence available to it at the hearing, and not simply the evidence that was available to the Secretary when making the de-proscription decision.<sup>198</sup> Second, POAC said that it was required to subject both stages of the Secretary's decision to 'intense and detailed scrutiny'<sup>199</sup> beyond that required by the doctrine of *Wednesbury* unreasonableness.<sup>200</sup> To avoid straying into merits review, POAC acknowledged that 'appropriate deference has to be given to the Secretary of State in, for example, assessments of national security or on foreign policy issues'.<sup>201</sup> In *Lord Alton*, POAC only considered the first stage of the Secretary's determination, finding that there were no reasonable grounds for the Secretary to believe that the People's Mojahadeen Organisation of Iran ('PMOI') was 'concerned in terrorism'.<sup>202</sup> We might surmise that POAC's deference to the Secretary is likely to be greater in considering the second stage of the determination.<sup>203</sup>

POAC performs ostensibly the same judicial review function as the courts and administrative tribunals. However, it has been held that appeals against a decision of

<sup>191</sup> *The Proscribed Organisations (Applications for Deproscription etc) Regulations 2006* (UK) cl 7.

<sup>192</sup> *Terrorism Act 2000* (UK) c 11, s 4(4).

<sup>193</sup> *Lord Alton v Secretary of State for the Home Department* (Unreported, Proscribed Organisations Appeal Commission, 30 November 2007) [67]–[68].

<sup>194</sup> *Terrorism Act 2000* (UK) c 11, s 5(2).

<sup>195</sup> *Terrorism Act 2000* (UK) c 11, s 5(3).

<sup>196</sup> It should be noted that this includes application of the guarantees of the European Charter of Human Rights since POAC is a 'public authority' under the *Human Rights Act 1998* (UK) c 42, s 6: Helen Fenwick, *Civil Liberties and Human Rights* (4<sup>th</sup> ed, 2007) 1397–8.

<sup>197</sup> *Lord Alton v Secretary of State for the Home Department* (Unreported, Proscribed Organisations Appeal Commission, 30 November 2007) [119].

<sup>198</sup> *Ibid* [109]–[112].

<sup>199</sup> *Ibid* [114].

<sup>200</sup> The doctrine of *Wednesbury* unreasonableness only requires the POAC to ask whether there was material on which the Secretary could conclude: first, that the organisation was 'concerned in terrorism'; and, second, that the discretion to proscribe should be exercised.

<sup>201</sup> *Lord Alton v Secretary of State for the Home Department* (Unreported, Proscribed Organisations Appeal Commission, 30 November 2007) [119].

<sup>202</sup> *Ibid* [360].

<sup>203</sup> *Ibid* [121]. At [360], the POAC noted that it would not have accepted the appellants' arguments in relation to the second stage of the Secretary's determination.

the Secretary must be made to POAC rather than the courts.<sup>204</sup> It is only where the Secretary's decision is upheld by POAC that a further appeal to the Court of Appeal is allowed on a question of law. The leave of POAC or that Court is required.<sup>205</sup> As Walker wrote soon after POAC was established:

in some circumstances, judicial review in the courts might be preferred to judicial review by the POAC — court process is more open and more clearly independent, since the judges have forms of tenure not held by members of POAC.<sup>206</sup>

This passage raises two of the distinguishing features of POAC. First, it is composed of persons selected by the Lord Chancellor on such terms and conditions as determined by that officeholder. The *Terrorism Act 2000* stipulates that each sitting panel must have three members of whom at least one must be or have been a judicial officer. Second, POAC makes use of the 'special advocates' procedures which have been developed in the UK to enable appointment of a security-cleared legal representative to act on behalf of an appellant in cases where he or she and their lawyer are excluded from proceedings due to concerns over classified security information. That system has been attracting increasing criticism.<sup>207</sup> Its impact in POAC proceedings is particularly pronounced given that body is not subject to the ban on use of intercept evidence that applies in the UK courts.<sup>208</sup> The inability of persons appealing the proscription of an organisation to access such evidence raises serious doubts as to their capacity to effectively challenge the Secretary's decision. Indeed, both Fenwick and Walker suggested that the combination of these features means POAC is possibly in breach of guarantee of a fair trial in Article 6 of the European Convention on Human Rights ('ECHR').<sup>209</sup> POAC itself has briefly commented on whether the provisions of the *Terrorism Act 2000* (UK) violate the rights in the ECHR but unsurprisingly found that any limitations on these rights are 'legitimate and proportionate'.<sup>210</sup>

Despite the success of the PMOI in overturning the Secretary's refusal to de-proscribe it, POAC does not provide anything substantial that is not available through the Australian courts. POAC applies principles of judicial review which, as discussed earlier, are of limited utility in all but the most extreme cases. It exists as an appeal destination separate from the UK courts but it mainly does so in order that it can consider intercept evidence. Australian courts are able to exercise much the same powers of judicial review of proscription decisions and are not barred from accessing intercept evidence. While POAC is an innovative tribunal sitting somewhere between the executive and the judicial arms, it has been criticised for its lack of true independence from the former and adds little to the quality of review available through the latter.

<sup>204</sup> *R (on the Application of the Kurdistan Workers' Party) v Secretary of State for the Home Department* [2002] EWHC 644 (Admin).

<sup>205</sup> *Terrorism Act 2000* (UK) c11, s 6.

<sup>206</sup> Walker, 'Blackstone's Guide', above n 31, 55.

<sup>207</sup> United Kingdom Parliament, Joint Committee on Human Rights, *Tenth Report: Counter-Terrorism Policy and Human Rights (Ninth Report): Annual Renewal of Control Orders Legislation 2008* (2008) 4-5.

<sup>208</sup> *Regulation of Investigatory Powers Act 2000* (UK) c 23, s 18(1)(f).

<sup>209</sup> Fenwick, above n 196, 1400-1; Walker, 'Blackstone's Guide', above n 31, 52-3.

<sup>210</sup> *Lord Alton v Secretary of State for the Home Department* (Unreported, Proscribed Organisations Appeal Commission, 30 November 2007) [354].

## 5 Consultations with the States and Territories

Consultations between the Attorney-General and the States and Territories prior to the proscription of an organisation have been inadequate.<sup>211</sup> The PJCIS has described such consultations as being 'mechanical rather than meaningful',<sup>212</sup> with the States and Territories generally given insufficient time to consider the material and to lodge any objections to the proscription of an organisation.<sup>213</sup> Furthermore, the States and Territories are merely provided with the statement of reasons<sup>214</sup> and are not given a classified intelligence briefing. While there may be some circumstances in which the short amount of notice given to the leaders of the States and Territories is justified by the surrounding circumstances and the urgency of a particular listing, this should be the exception rather than the rule. Once again, it is difficult to see how this situation can be remedied by legislative amendment. Instead, it is dependent upon the adoption of a more accommodating approach by the Commonwealth.

## 6 Commencement of the regulation

As mentioned earlier, a regulation commences on the day it is registered in the Federal Register of Legislative Instruments. But, a regulation should not commence until the day after the last day of the disallowance period. In the alternative, the disallowance of a regulation should have retrospective effect so that any prosecutions commenced after the commencement of the regulation, but prior to the disallowance of the regulation, will be invalid. This would have a substantial impact on the efficacy of the Parliament as a mechanism for review of a decision of the Attorney-General to proscribe an organisation. It would ensure that prosecutions would not be commenced against a person for a terrorist organisation offence until the Parliament has approved the regulation or the disallowance period has expired. In December 2008, the Commonwealth Government indicated that it would not go so far. However, it would adopt the practice of considering, on a case-by-case basis, whether to delay the commencement of a regulation (when an organisation is listed for the first time) until after the parliamentary disallowance period has expired.<sup>215</sup>

<sup>211</sup> PJC-ASIO, 'Six Terrorist Organisations', above n 31, [2.9]–[2.10]; PJC-ASIO, 'Four Terrorist Organisations', above n 35, [2.1]–[2.6].

<sup>212</sup> PJCIS, 'Review of the Re-Listing of Al-Qa'ida', above n 138, [1.10].

<sup>213</sup> PJCIS, 'Review of the Listing of the Kurdistan Workers' Party', above n 66, [1.10]–[1.11].

<sup>214</sup> Ibid [1.12]–[1.13].

<sup>215</sup> Attorney-General's Department, *Australian Government Response to PJCIS Inquiry into the Proscription of Terrorist Organisations under the Australian Criminal Code – December 2008* (2008) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications\\_AustralianGovernmentresponseToPJCISInquiryintotheProscriptionofTerroristOrganisationsundertheAustralianCriminalCode-December2008](http://www.ag.gov.au/www/agd/agd.nsf/Page/Publications_AustralianGovernmentresponseToPJCISInquiryintotheProscriptionofTerroristOrganisationsundertheAustralianCriminalCode-December2008)> at 16 April 2009. The Government indicated that it would make a number of other changes to the terrorist organisation offences and the process for listing terrorist organisations. This includes requiring ASIO and the Attorney-General's Department to develop an unclassified protocol which outlines the key indicators which are taken into account when determining whether an organisation meets the statutory test for proscription. Without seeing the detail of the Australian Government's response (which has not yet been released to the public), it is difficult to comment on what the precise effect will be.

#### IV CONCLUSION

The power to proscribe organisations is but one part of Australia's substantial corpus of counter-terrorism law. Despite the repeated attention which this mechanism has garnered through the listing and re-listing of organisations and then subsequent reviews by the PJCIS, to date no individual has been convicted of a criminal offence in connection with an organisation which has been formally proscribed. Only two have been subject to control orders on the ground of having trained with a listed organisation, though no orders remain in force.<sup>216</sup> This begs the question, just how important is proscription for the protection of the Australian community? And if it is of so little consequence to the apprehension and prosecution of would-be terrorists, does it really matter which arm of government exercises the power of proscription and how?

It is hardly controversial to suggest that, since September 11, numerous governments of varying political persuasions have engaged enthusiastically in law-making as a response to the threat of terrorism, even when the usefulness of the measures adopted is less than obvious.<sup>217</sup> The Commonwealth of Australia has hardly been an exception to this phenomenon.<sup>218</sup> It is likely that governments respond in this way because they believe the laws created may potentially assist intelligence and police agencies, they feel a need to respond to a public clamour for 'action' and legislating is something over which they can actually exercise some control. However, the fact is that some of the laws infringe individual freedoms while not being really effective in promoting – or even worse having a negative impact upon – public safety.<sup>219</sup> It is a particular irony that often it is these same laws which provide the public with reassurance and confidence as to their security.<sup>220</sup>

It is not unreasonable to entertain a suspicion that laws targeting 'terrorist organisations' are in this vein. They present to the community a particularly clinical picture of the threat of political violence which suggests that its sources are simple both to identify and quell. This is so in two distinct senses. First, is the notion that terrorism is predominantly 'organised' by clearly structured and coherent groupings of individuals. But the centrality of organised structures to understanding the nature of the terrorist threat was significantly diminished by the circumstances of the 2005 London bombings. Although the four suicide bombers responsible had links with others who have since been arrested in relation to the attack, it appears that the plot was home-grown rather than the implementation of an edict delivered from the higher command of Al Qa'ida. In any event, the latter itself is more perceptively understood

<sup>216</sup> *Jabbour v Thomas* (2006) 165 A Crim R 32; *Jabbour v Hicks* (2007) 215 FLR 454; and *Jabbour v Hicks* [2008] FMCA 178 (Unreported, Donald FM, 19 February 2008).

<sup>217</sup> See Ben Golder and George Williams, 'Balancing National Security and Human Rights: Assessing the Legal Response of Common Law Nations to the Threat of Terrorism' (2006) 8 *Journal of Comparative Policy Analysis* 43, 57; and Roach, 'The World Wide Expansion of Anti-Terrorism Laws', above n 15.

<sup>218</sup> Anthony Reilly, 'The Processes and Consequences of Counter-Terrorism Law Reform in Australia 2001–2005' (2007) 10 *Flinders Journal of Law Reform* 81.

<sup>219</sup> Kent Roach, 'Must We Trade Rights for Security? The Choice Between Smart, Harsh, or Proportionate Security Strategies in Canada and Britain' (2006) 27 *Cardozo Law Review* 2151, 2172–87.

<sup>220</sup> Philip B Heymann, *Terrorism, Freedom and Security: Winning without War* (2003) 88–9.

as 'an idea rather than an organisation'.<sup>221</sup> Terrorist violence is, as a consequence, not so much 'organised' as inspired or facilitated through 'shared values, common socialisation, effective bonds and modern communication' — making it far less susceptible to rigid offence categories of 'directing' or 'supporting' a terrorist organisation.<sup>222</sup> Sloan has stressed that the use of decentralised and cell-like groups has been critical to the effectiveness of many recent terrorist strikes, particularly against governments who persist in thinking and acting themselves only in terms of 'an organizational doctrine characterized by a ladder hierarchy, top-down command and control, bureaucratic layering and jurisdictional complexity'.<sup>223</sup>

Second, is the idea — more fundamental to anti-terrorism law generally — that the label of 'terrorism' can be applied with ease to the actions of some organisations but not others, even though their methods may appear to have a great deal in common. The ambiguous stance towards the use of political violence which this inconsistency causes has attracted sound criticism to which reference has been made in this article. While Emerton objects to Australia intervening via proscription in the democratic struggles of other nations, Hogg's chief complaint is that application of the 'terrorist' tag to certain groups will stymie 'political initiatives to address effectively the roots of violent political conflicts'.<sup>224</sup> Particularly in the case of nationalist groups, there is support for the idea that in the longer term the use of violence will decline if steps are taken towards accommodating those organisations in the political system.<sup>225</sup> Proscription forecloses this development.

Legitimate as all these criticisms may be, it is clear that our agreement with them does not lead us to dismiss proscription outright. We believe that the State should be able to identify and condemn particular organisations on the basis of their activities while, at the same time, sending a message through the use of criminal sanctions to its citizens to avoid implicating themselves with these groups. The symbolic value of doing so may outweigh the practical, in light of what both research and experience appears to confirm about how modern terrorism is practiced, but this does not render the exercise meaningless.

<sup>221</sup> Hogg, 'Executive Proscription of Terrorist Organisations in Australia', above n 12, 304.

<sup>222</sup> Goldsmith, above n 15, 70–1.

<sup>223</sup> Stephen Sloan, 'Foreword: Responding to the Threat' in Robert J Bunker (ed), *Networks, Terrorism and Global Insurgency* (2005) xx, xxiv–v.

<sup>224</sup> Hogg, 'Executive Proscription of Terrorist Organisations in Australia', above n 12, 297.

<sup>225</sup> Fernando Reinares, 'Nationalist Separatism and Terrorism in Comparative Perspective' in Tore Bjørgo (ed), *Root Causes of Terrorism — Myths, Reality and Ways Forward* (2005) 119, 129.

Inescapably though, the power of the State to brand some movements as 'terrorist' while leaving others free of that taint is a political judgment. To some, it is one made with scant regard for democratic considerations and, depending on how the process actually works, that may well be true. Where we diverge from some of the critics of the scheme is that we do not think that its fundamentally political function renders it illegitimate *per se*. Instead, while we believe that numerous features of Australia's proscription regime at present fairly attract this sort of criticism, we have argued that substantial reform of the process — namely the adherence to clear criteria; enhanced transparency and procedural fairness; and meaningful critical review both on the merits through parliament and judicial review in the courts — would lessen these concerns and present conditions upon which the existence of a power to proscribe organisations is justifiable.