Review of the proscription of terrorist organisations: What role for procedural fairness?

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The Commonwealth Attorney-General has a broad discretion under the Criminal Code Act 1995 (Cth) to proscribe a group as a "terrorist organisation". To prevent this discretion being exercised arbitrarily, it is imperative that proscription decisions are subject to review. The Criminal Code ostensibly provides for self-review, parliamentary review and judicial review of proscription decisions. However, this article identifies fundamental problems with each of these review mechanisms. This article does not suggest wholesale reform of the review mechanisms. Instead, it proposes that an obligation on the Attorney-General to accord procedural fairness to an affected group and its members should be expressly incorporated into the Criminal Code. This obligation would not prejudice national security or undermine operational effectiveness as previously suggested by the Attorney-General's Department. And it would substantially improve both the transparency of the proscription decision-making process and the accountability of the Attorney-General for proscription decisions.

INTRODUCTION

In response to the terrorist attacks in the United States on 11 September 2001, the Commonwealth Parliament enacted a package of laws aimed at the prevention and suppression of terrorism.[1] Central to the Commonwealth's counter-terrorism regime was the creation of a mechanism by which terrorist organisations could be proscribed. The Commonwealth Attorney-General is empowered by Div 102 of the *Criminal Code Act 1995* (Cth) (*Criminal Code*) to make a regulation proscribing an organisation as a "terrorist organisation".[2] It is a criminal offence for an individual to be involved in certain specified ways with a proscribed organisation (for example, to be a member of a terrorist organisation or to provide resources to a terrorist organisation).[3]

The discretion of the Attorney-General to proscribe an organisation is extremely broad. One legal academic has argued that every army in the world would fall within the definition of a terrorist organisation and every police force would be a serious candidate for proscription.[4] Another has suggested that the Liberal Party would qualify as a terrorist organisation because of its support for the use of military force in Iraq.[5] The breadth of the Attorney-General's discretion means that any decision to proscribe an organisation is, in large part, a product of the political climate in which that decision is made. This, combined with the serious consequences of proscription, makes it imperative

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[1] *Security Legislation Amendment (Terrorism) Act 2002* (Cth); *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* (Cth); *Suppression of the Financing of Terrorism Act 2002* (Cth); *Border Security Legislation Amendment Act 2002* (Cth); *Telecommunications Interception Legislation Amendment Act 2002* (Cth).

[2] *Criminal Code Act 1995* (Cth), s 102.1(2).

[3] *Criminal Code Act 1995* (Cth), Div 102, subdiv 2.

[4] Emerton P, "The War on Terror" (Paper presented at Advance Australia Fair: Building Sustainability, *Justice and Peace*, Melbourne Trades Hall, 31 July 2005).

[5] Tham J-C, Submission No 8, p 7, Aust, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Six Terrorist Organisations*, Report (2005), App A.

that there is close scrutiny of proscription decisions and that the Attorney-General is held to account for both the decision itself and the process by which it is reached.

The *Criminal Code* establishes a range of mechanisms for the review of proscription decisions – self-review, parliamentary review and judicial review. In light of this, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) concluded in 2007 that the "the Australian model exhibits a high degree of openness and opportunities for accountability".[6] However, the PJCIS' conclusion fails to recognise the substantive deficiencies in each of the review mechanisms. Eighteen organisations have been proscribed as terrorist organisations in Australia.[7] However, on no occasion has a proscription decision been rejected by any of the review bodies.[8] While this may, on one view, show that the Attorney-General's decisions have been carefully considered and correctly made, it also gives reason to pause and consider the inherent weaknesses of ex post facto review of executive decisions, especially those made in the national security context. Review bodies have adopted a cautious approach to the review of proscription decisions, presumably in recognition of their own inexperience in dealing with the threat of terrorism as well as the community's overpowering demand for action to be taken in response to that threat.

These inherent weaknesses were compounded by the Howard Government's calculated attempts to limit the avenues for review. The Attorney-General's Department submitted to the PJCIS in 2007 that the Attorney-General is not required to provide procedural fairness to an organisation, its members or other affected persons prior to proscribing that organisation.[9] On this interpretation of the *Criminal Code*, the Attorney-General is not required to notify the public, either before or after proscription, of his or her decision or the reasons underlying it. This has the consequence that there is no opportunity for an affected organisation or individual to make submissions opposing the proscription of that organisation. This is a disturbing result. The failure to accord procedural fairness is likely to have a detrimental effect on the quality of the Attorney-General's decision-making, by denying him or her a valuable source of information. Furthermore, as Gaudron J stated in *Re Nolan* (1991) 172 CLR 460 at 496-497 (albeit in relation to judicial proceedings): "open and public proceedings are necessary in the public interest because secrecy is conducive to the abuse of power and, thus, to injustice".

Unfortunately, the question whether the Attorney-General is under an obligation to accord procedural fairness has been given little attention by the independent and parliamentary bodies that have conducted reviews of Australia's counter-terrorism legislation. Only the Security Legislation Review Committee (SLRC) addressed it in any detail. The SLRC concluded in 2006 that it was not within its role to determine whether the "process for proscription generally or in a particular case fails to comply with … natural justice".[10] However, after a careful consideration of the judicial authorities,[11] it noted that "the operation and effectiveness of the legislation is clouded by this possibility".[12] It recommended that the *Criminal Code* be amended to clearly incorporate the common law right to procedural fairness.

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[6] Aust, Parliamentary Joint Committee on Intelligence and Security (PJCIS), *Inquiry into the Proscription of "Terrorist Organisations" under the Australian Criminal Code*, Report (2007), [2.42]; see also [5.27]-[5.28] (http://www.aph.gov.au/House/committee/pjcis/proscription/report/report.pdf).

[7] *Criminal Code Regulations 2002* (Cth), regs 4A-4W. It was recently announced that the Armed Islamic Group would not be re-listed: Attorney-General's Department, Media Release, *Three Terrorist Organisations Re-Listed*, 3 November 2008. The listing of the Armed Islamic Group expired on 2 November 2008.

[8] In fact, only one application for review has ever been made. This was an application to the Attorney-General under *Criminal Code Act 1995* (Cth), s 102.1(17), for an organisation to be de-listed. This application was referred to by the PJCIS, however, it is not clear what organisation this application related to: see PJCIS, n 6, [2.25]-[2.26].

[9] Attorney-General's Department, Submission No 10, p 13, PJCIS, n 6.

[10] Aust, Security Legislation Review Committee (SLRC), *Report of the Security Legislation Review Committee* (June 2006), [8.30].

[11] SLRC, n 10, [8.24]-[8.28].

[12] SLRC, n 10, [8.30].

This article aims to dispel the clouds of uncertainty surrounding the scope of review of proscription decisions. It first briefly outlines the manner in which an organisation is proscribed as a terrorist organisation by the Attorney-General. It then turns to look at the extent to which review, particularly judicial review under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), is available to an organisation or individual affected by a proscription decision. After examining the inadequacies of these review mechanisms, the remainder of the article focuses on one particular ground of review, the denial of procedural fairness. It considers whether the rules of procedural fairness have been excluded by the proscription legislation, in particular, whether the circumstances in which proscription decisions are made and/or the subject matter of proscription, namely, the relationship between proscription and national security, result in the implied exclusion of procedural fairness. Even if procedural fairness has been excluded, the article considers whether this is an appropriate result. Ultimately, the article concludes that, taking into account the rationales for the proscription of terrorist organisations and the requirements of national security, there is no justification for the Attorney-General not to accord procedural fairness to an organisation, its members and other affected persons, at least to the extent that this is practicable and does not prejudice national security in any particular case.

PROSCRIPTION OF TERRORIST ORGANISATIONS UNDER THE CRIMINAL CODE

Subdivision 1 of Div 102 of the *Criminal Code* sets out the means by which an organisation may be classified as a "terrorist organisation". In its original form, Div 102 was framed in relatively narrow terms. It only permitted an organisation to be proscribed by the Attorney-General as a terrorist organisation if it had previously been identified as such by the UN Security Council or pursuant to a mechanism established by the Security Council.[13]

The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) removed this limitation on the Attorney-General's power. The Attorney-General may now make a regulation proscribing an organisation as a terrorist organisation where he or she is satisfied that the organisation is either "directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act" or "advocates the doing of a terrorist act", regardless of whether a terrorist act has occurred or will occur.[14] Such a regulation only has effect for two years, after which time the Attorney-General must decide whether he or she is still satisfied that the organisation falls within the definition of a terrorist organisation and, if so, make a new regulation in relation to that organisation.[15] There are currently 18 organisations that have been proscribed by the Attorney-General.[16]

The proscription of an organisation does not have any automatic consequences for the organisation itself. Unlike the infamous *Communist Party Dissolution Act 1950* (Cth),[17] a "terrorist organisation" is not declared to be unlawful or required to forfeit its property. Rather, the purpose of proscription is preventative, that is, it aims to prevent terrorist organisations from functioning by stemming the flow of human and financial resources available to them. This is achieved by criminalising an individual's involvement with a terrorist organisation. In its submission to the PJCIS in 2007, the Commonwealth Attorney-General's Department stated:

[13] *Criminal Code Act 1995* (Cth), s 102.1(2) (pre-10 March 2004).

[14] *Criminal Code Act 1995* (Cth), s 102.1(2). If there is no regulation in effect, the Federal Court has the power to declare, during the course of a prosecution of an individual for a terrorist organisation offence, that the relevant organisation satisfies the first limb of the definition of a terrorist organisation. The Federal Court does not have the power to make a declaration in relation to an organisation that merely "advocates the doing of a terrorist act".

[15] *Criminal Code Act 1995* (Cth), s 102.1(3).

[16] See n 7.

[17] *Communist Party Dissolution Act 1950* (Cth), s 4 declared the Australian Communist Party (ACP) to be an unlawful association, immediately dissolved the ACP and vested all its property in a receiver appointed by the Governor-General; s 5 set out similar consequences for any organisation declared by the Governor-General to be affiliated with the ACP and to be "prejudicial to the security and defence of the Commonwealth or to the execution and maintenance of the Constitution or the laws of the Commonwealth"; ss 9-12 dealt with individuals who were affiliated with the ACP.

> [The] identification [of terrorist organisations] is pivotal to the criminalisation of activities which would otherwise see such organisations prosper.
>
> By criminalising activities such as the funding, assisting and directing of a terrorist organisation, proscription contributes to the creation of a hostile operating environment for organisations wanting to establish a presence in Australia for either operational or facilitation purposes.[18]

This quotation also highlights another purpose of proscription, which is to prevent the spread of support for terrorist organisations in the community in the long-term by sending a symbolic message to Australians "that involvement with such organisations, either in Australia or overseas, will not be permitted".[19]

Subdivision 2 of Div 102 of the *Criminal Code* provides that it is an offence to be a member (formal or informal) of a terrorist organisation,[20] to direct the activities of a terrorist organisation,[21] to recruit for a terrorist organisation,[22] to train a terrorist organisation or receive training from a terrorist organisation,[23] to get funds to, from or for a terrorist organisation[24] and to provide support to a terrorist organisation.[25] The broadest of all the terrorist organisation offences, the association offence, does not even require *any* involvement with a terrorist organisation. Under s 102.8, an individual commits an offence if, on two or more occasions:

- he or she "intentionally associates with … a [formal or informal] member of, or a person who promotes or directs the activities of, an organisation"; and
- he or she "knows that the organisation is a terrorist organisation" and that the person they associate with "is a member of, or a person who promotes or directs the activities of, the organisation"; and
- the nature of the association is that it "provides support" to the terrorist organisation which is intended to "assist the organisation to expand or continue to exist".

Serious criminal sanctions of between three[26] and 25[27] years imprisonment attach to the various offences in Div 102.

In addition to forming the basis for the establishment of terrorist organisation offences, proscription is also intended to assist in the prosecution of individuals for such offences. As Lord Lloyd of Berwick stated in his October 1996 report on the United Kingdom's counter-terrorism laws, proscription "will furnish a conclusive presumption that an organisation which is for the time being proscribed is a terrorist organisation" and thus "facilitate the burden of proof in terrorist cases".[28] Therefore, if an organisation is proscribed by regulation, it is not necessary for the prosecution in the trial of an individual for a terrorist organisation offence to prove that the organisation is a terrorist organisation. This will be conclusively established by the regulation.[29]

[18] Attorney-General's Department, n 9, p 2.

[19] Attorney-General's Department, n 9, p 2.

[20] *Criminal Code Act 1995* (Cth), s 102.3.

[21] *Criminal Code Act 1995* (Cth), s 102.2.

[22] *Criminal Code Act 1995* (Cth), s 102.4.

[23] *Criminal Code Act 1995* (Cth), s 102.5.

[24] *Criminal Code Act 1995* (Cth), s 102.6.

[25] *Criminal Code Act 1995* (Cth), s 102.7.

[26] See, eg, *Criminal Code Act 1995* (Cth), s 102.8 (associating with terrorist organisations).

[27] 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).

[28] Lloyd of Berwick, Lord, *Inquiry into Legislation Against Terrorism* (1996), Vol 1, p 29-30, Vol 2, p 57.

[29] The Director of Public Prosecutions submitted to the SLRC in 2006 that the requirement of knowledge or recklessness on the part of a person accused of a terrorist organisation offence (with the exception of the offences in *Criminal Code Act 1995* (Cth), ss 102.5, 102.8) means that in practice the prosecution remains bound to prove beyond a reasonable doubt that the organisation satisfies the definition of a terrorist organisation, ie, the prosecution must prove first "that the defendant was aware the organisation was engaged in preparing, planning, assisting in or fostering the doing of a terrorist act" and secondly, "that the

MECHANISMS FOR REVIEW OF PROSCRIPTION DECISIONS

The proscription regime in Div 102 of the *Criminal Code* has been criticised for creating an arbitrary and politicised decision-making process.[30] This is principally because of the breadth of the definition of a "terrorist organisation" and the absence of fixed guidelines for the Attorney-General to apply in deciding whether to proscribe an organisation. A common response from supporters of the proscription regime is that the accountability of the Attorney-General and the transparency of the decision-making process are ensured by the review mechanisms available under Div 102.[31] In its 2007 report, the PJCIS noted:

> The Statement of Reasons is a form of public notification and recognises that a listed entity needs to know the case against it. These measures together with consultation with the States and Territories, the briefing of the Opposition Leader and the opportunity for parliamentary review, ensure a good degree of transparency and accountability is built into the system …
>
> Judicial review under the ADJR is available and in our view, provides an effective institutional guarantee of lawfulness and protection against regulations that go beyond the scope of powers provided for by the *Criminal Code*.[32]

The judicial and non-judicial review mechanisms, and the inadequacies of each of these, are discussed below.

Non-Judicial mechanisms for review

Review by the Attorney-General

There are two mechanisms through which proscription decisions may be reviewed by the Attorney-General, the original decision-maker. First, if the Attorney-General "ceases to be satisfied", at any time, that an organisation satisfies the definition of a terrorist organisation, he or she must issue a declaration that the regulation no longer has effect.[33] Secondly, an application may be made by any organisation or individual to the Attorney-General to de-list an organisation 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.[34] The Attorney-General is obliged to "consider" such an application.

These self-review mechanisms both suffer from the same problem. That is, as Joseph and Hadzanovic pointed out in their submission to the PJCIS, giving the de-listing power to the Attorney-General undermines the objectivity of the listing process because the decision-maker is being asked to review his or her own decision.[35] The PJCIS correctly noted in 2007 that "it is common practice to require a person or organisation affected by a decision to seek reconsideration of the decision [internally] before resorting to external review".[36] However, the PJCIS failed to acknowledge three points of distinction between the ordinary process of internal review of administrative decisions and the review of proscription decisions by the Attorney-General. First, internal review is usually

organisation was *in fact* engaged in preparing, planning, assisting in or fostering the doing of a terrorist act". SLRC, n 10, pp 64-65. The author believes that this is a possible interpretation, however, it is unlikely. This is because one of the clear purposes of proscription is to "facilitate the burden of proof". This purpose would be frustrated if the prosecution was required to prove again that the organisation satisfies the definition of a terrorist organisation.

[30] See eg, Emerton P, Submission No 23, p 4, PJCIS, n 6; Castan Centre for Human Rights Law, Monash University, Submission No 2, pp 5-6, PJCIS, n 6.

[31] See, eg, PJCIS, n 6, [2.39]-[2.42], [5.26]-[5.33].

[32] PJCIS, n 6, [5.27]-[5.28].

[33] *Criminal Code Act 1995* (Cth), s 102.1(4).

[34] *Criminal Code Act 1995* (Cth), s 102.1(17). Section 102.1(18) provides that the Attorney-General is no limited in the matters he or she may take into account when considering such an application. Only one application has been received by the Attorney-General. This application was rejected: see PJCIS, n 6, [2.25].

[35] Castan Centre for Human Rights Law, n 30, p 7.

[36] PJCIS, n 6, [5.29]. For example, under the *Freedom of Information Act 1982* (Cth), a person is required to apply to the agency that made the decision for an internal review under s 54 before applying to the Administrative Appeals Tribunal for a further review under s 55.

conducted by a different person (or panel of persons) from the person who made the original decision.[37] The Administrative Review Council has stressed, on several occasions, the need for an internal review officer to be separate from the primary decision-making areas of a governmental agency. This helps to ensure that the internal review officer is independent and does not have a vested interest in the decision.[38] Secondly, it is necessary for there to be a sufficient level of personal contact between internal review officers and applicants for review, that is, procedural fairness should be accorded to applicants.[39] Finally, there must be a meaningful process of external review available to closely scrutinise the decision made by the internal review officer. The Administrative Review Council noted in 1995:

> an applicant can benefit greatly from internal review if the agency's decision is quickly set aside or varied in his or her favour. However, in the context of a system which also provides for independent external merits review, the Council considers that the most significant contribution to the merits review system is made by external review tribunals.[40]

The second review mechanism discussed above also suffers from a number of specific deficiencies. First, it does not specify the time frame within which the decision must be made, the types of matters that must be taken into account or whether the Attorney-General is required to accord the applicant procedural fairness.[41] Secondly, the "no basis" requirement is extremely onerous. This means that few, if any, de-listing applications will be successful.[42] Finally, and most importantly, the exercise of the right to make a de-listing application is obviously dependent upon the applicant being aware that the organisation has been proscribed. If an organisation or individual is not effectively alerted to the proscription of that organisation, either by the Attorney-General, the PJCIS or the Parliament, there will be no opportunity for individuals to disassociate themselves from the organisation and its activities and/or for those individuals or the organisation itself to apply to the Attorney-General for de-listing. The next opportunity for a challenge to the relevant regulation may not be until after the commencement of a prosecution of an individual for a terrorist organisation offence. However, it is unlikely that the courts would even entertain a submission challenging the facts or material that formed the basis for the regulation. The regulation would constitute conclusive proof that the organisation is a terrorist organisation. Even if an organisation or individual is successful in applying to the Attorney-General for the organisation to be de-listed, the de-listing does not have retrospective effect.

Parliamentary review

Since 10 March 2004,[43] the PJCIS has possessed a discretionary power to review the making of a regulation proscribing an organisation as a terrorist organisation.[44] This power encompasses review of both the procedure behind, and the merits of, a proscription decision. Thus far, the PJCIS has exercised its discretion in relation to every decision by the Attorney-General to proscribe or

[37] See Administrative Review Council, *Internal Review of Agency Decision Making*, Report No 44 (2000), [2.1]-[2.49].

[38] In 1995, the Administrative Review Council concluded that internal review should be encouraged, provided that it is relatively timely, is not subject to a fee, is undertaken by sufficiently independent review officers, and involves an appropriate level of contact between internal review officers and applicants: Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995), Recommendation 75. The Administrative Review Council has described internal review as "a process of review on the merits of an agency's primary decision. It is undertaken by another officer within the same agency, usually a more senior officer": Administrative Review Council, n 37, [1.4]. The reasons for this separation between the original decision-maker and the internal review officer were discussed at [3.16]-[3.36].

[39] Administrative Review Council, n 37 [5.2]-[5.13].

[40] Administrative Review Council, n 38, Report No 39, [6.67].

[41] Attorney-General's Department, n 9, p 11. The PJCIS noted that "[t]here may be some benefit in elaborating the procedure for ministerial review to improve the clarity of the law including, for example, a time limit on the decision and reasons": PJCIS, n 6, [5.29].

[42] Castan Centre for Human Rights Law, n 30, p 7.

[43] *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

[44] *Criminal Code Act 1995* (Cth), s 102.1A(1)-(3).

re-proscribe an organisation.[45] However, the effectiveness of this mechanism has been limited by the un-co-operative approach adopted by the Executive. This has manifested itself in the failure of the Attorney-General to provide the PJCIS with both adequate warning of impending listings[46] and comprehensive, accurate and balanced information to justify those listings.[47] In any event, the PJCIS does not have the power to disallow a regulation. The most it can do is to provide its factual findings and recommendations to the Parliament. It is perhaps the PJCIS' recognition that it is a "toothless tiger" which has led to its half-hearted approach to reviews. The PJCIS has certainly not lived up to its promise to "adopt a course of action that is as rigorous as possible".[48] Instead it has repeatedly expressed its determination to "err on the side of caution"[49] in reviewing proscription decisions and on no occasion has it recommended to the Parliament that a regulation be disallowed.[50]

On the other hand, the Parliament does have the power to disallow a regulation within 15 days of its initial tabling.[51] However, this mechanism of review is defective for one simple reason. A regulation takes effect on the day after it is listed on the Federal Register of Legislative Instruments (FRLI) and the disallowance of a regulation by the Parliament, like the de-listing of an organisation by the Attorney-General, does not have retrospective effect.[52] Therefore, even if the Parliament decides to disallow the regulation, any steps taken by the Executive in accordance with the regulation prior to disallowance continue to be valid, for example, prosecutions of individuals for terrorist organisation offences.[53]

Judicial review

The significant deficiencies in the non-judicial mechanisms of review mean that a strong mechanism of judicial review is of critical importance in checking the Attorney-General's discretion and safeguarding the civil liberties of organisations and individuals. While there is no express mention of judicial review in Div 102 of the *Criminal Code*, the Explanatory Memorandum to the *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth) makes it clear that "[t]he lawfulness of the Attorney-General's decision making process and reasoning is subject to judicial review under the *Administrative Decisions (Judicial Review) Act 1977*".[54]

In its current form, judicial review under Div 102 suffers from a number of shortcomings. The effect of these shortcomings is to so limit the scope of judicial review that it is rendered almost meaningless. It is perhaps because of this situation that there have not yet been any applications for judicial review of proscription regulations. As a result, it is only possible to discuss the shortcomings of judicial review in the abstract.

The primary shortcoming of judicial review is that it does not extend to a review of the merits of a decision to proscribe an organisation. The canonical description of the role of judicial review was expressed by Brennan J in *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-36:

[45] PJCIS, n 6, [2.37].

[46] Parliamentary Joint Committee on ASIO, ASIS and DSD, Report, n 5, [2.2]-[2.3].

[47] Aust, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Four Terrorist Organisations* (September 2005) [3.13], [3.39]-[3.40].

[48] Aust, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of the Palestinian Islamic Jihad* (June 2004), [2.8].

[49] See, eg, PJCIS, *Review of the relisting of Hizballah's External Security Organisation (ESO)* (2007), [2.32].

[50] On one occasion a minority of the PJCIS recommended to the Parliament that a regulation be disallowed: PJCIS, *Review of the Listing of the Kurdistan Workers' Party (PKK)* (April 2006), pp 35-41.

[51] *Criminal Code Act 1995* (Cth), s 102.1A(4); *Legislative Instruments Act 2003* (Cth), ss 38, 42.

[52] *Legislative Instruments Act 2003* (Cth), s 15. In its original form, Div 102 provided that a regulation would commence on the day after the end of the 15 day disallowance period (original *Criminal Code Act 1995* (Cth), s 102.1(4)). The PJCIS suggested in 2007 that the government should give consideration to reverting to the original legislative approach: PJCIS, n 6, [5.31]-[5.35].

[53] PJCIS, n 6, [2.20].

[54] Explanatory Memorandum, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth), 16.

> The duty and jurisdiction of the court to review administrative action does not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.

The absence of merits review means that there is no room under Div 102 for a person to challenge the facts upon which a regulation is based. The only grounds on which a regulation may be challenged are procedural and are set out in s 5(a)-(j) of the ADJR Act. They include:

- a breach of the rules of procedural fairness;[55]
- procedures required by law were not observed by the decision-maker;
- the making of the decision was an improper exercise of power (for example, the decision-maker took an irrelevant consideration into account, failed to take a relevant consideration into account, exercised a power in bad faith or the decision is so unreasonable that no reasonable decision-maker could have made that decision, that is, Wednesbury unreasonableness[56]);
- the decision involves an error of law;
- the decision was induced by fraud; and/or,
- there is no evidence to justify the making of the decision.

These grounds of review are vulnerable to further limitation or even exclusion by the Commonwealth Parliament. For example, in relation to the *Migration Act 1958* (Cth),[57] the scope of judicial review was limited, first, by way of a privative clause in s 474 and, secondly, by excluding the common law right to a natural justice hearing. This was replaced by s 422B of that Act, which provides that Div 4 of Pt 7 contains an exhaustive statement of the natural justice hearing rule in relation to reviews of protection visa decisions.

Before moving on to discuss the application of the ADJR Act to proscription decisions, it should be noted that the High Court has original jurisdiction under s 75(v) of the Commonwealth *Constitution* in all matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.[58] Unlike the jurisdiction of the courts under the ADJR Act, this jurisdiction cannot be limited or excluded by legislation. Therefore, an applicant may always have recourse to the High Court where he or she alleges that an officer of the Commonwealth has committed a "jurisdictional error". The real question revolves around the meaning and scope of jurisdictional error and whether this would be an adequate substitute for the ADJR Act. In *Minister for Immigration & Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [82], McHugh, Gummow and Hayne JJ stated:

> What is important, however, is that identifying the wrong issue, asking the wrong question, ignoring relevant material or relying on irrelevant material *in a way that affects the exercise of power* is to make an error of law. Further, doing so results in the decision-maker exceeding the authority or powers given by the relevant statute. In other works, if an error of those types is made, the decision-maker did not have authority to make the decision that was made, he or she did not have the jurisdiction to make it [emphasis added].

The court noted that this list of errors is not exhaustive. For example, in *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, the jurisdictional error was the denial of procedural

[55] The legislation refers to "natural justice". However, in *Kioa v West* (1985) 159 CLR 550 at 583, Mason J noted: "It has been said on many occasions that natural justice and procedural fairness are to be equated: see, eg *Wiseman v Borneman* … *Bushnell v Secretary of State for the Environment* … And it has been recognised that in the context of administrative decision-making it is more appropriate to speak of a duty to act fairly or to accord procedural fairness."

[56] An "improper exercise of power" is defined in *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2) as including these factors.

[57] For a further discussion of the limitation of judicial review under the *Migration Act 1958* (Cth), see O'Donnell B, "Jurisdictional error, invalidity and the role of injunction in s 75(v) of the Australian Constitution" (2007) 28 Aust Bar Rev 291 at 293-294, 295.

[58] The Federal Court has co-extensive jurisdiction under *Judiciary Act 1903* (Cth), s 39B subject to certain exceptions relating to criminal prosecutions.

fairness. Therefore, the errors that enliven jurisdiction under s 75(v) appear to be similar, if not identical, to those under the ADJR Act. And yet, several members of the High Court have concluded that review under the ADJR Act is wider than review for jurisdictional error.[59] O'Donnell suggests that the basis for this conclusion is that the error must be one that "affects the exercise of power" in a "sufficiently substantial [manner] to prevent the procedure that was actually undertaken from having some or all of the legal consequences that the statute says would flow from an unflawed procedure".[60] Regardless of any differences in the scope of review of proscription decisions under the ADJR Act and s 75(v) of the *Constitution*, both of these review mechanisms suffer from the four problems of application discussed below.

First, the narrowness of the grounds of review is exacerbated by the traditional reluctance of the courts to interfere with national security decisions made by the Executive. This reluctance is informed by the realisation that the courts are "ill-equipped itself to evaluate pieces of intelligence obtained by ASIO"[61] and "[q]uestions of national security naturally raise issues of great importance … which will seldom be wholly within the competence of a court to evaluate".[62] This does not mean that the courts simply rubber stamp the decisions of the Executive. However, they will generally give "considerable weight" to the opinion of the Executive on questions of national security.[63] For example, although Div 102 of the *Criminal Code* requires the Minister to come to his decision that an organisation falls within the definition of a terrorist organisation "on reasonable grounds",[64] the courts are likely to accept submissions by the Attorney-General that the decision was necessary to protect national security without requiring him or her to provide detailed evidence in support of those submissions.

Secondly, the breadth of the definition of a "terrorist organisation", and the resulting breadth of the Attorney-General's discretion to proscribe an organisation, would make it difficult for the narrow grounds of review in the ADJR Act to be successfully used to invalidate a proscription decision. This is a common problem with the framing of discretionary powers related to national security, where it is felt necessary to give the Executive the power to deal with unforeseen situations.[65] For example, it is unlikely that a court would find that the Attorney-General had made an error of law because the organisation did not in fact fall within the definition of a "terrorist organisation" or the decision was not made on "reasonable grounds". For similar reasons, it is extremely doubtful that a claim based on Wednesbury unreasonableness would be successful. The absence of fixed criteria[66] for the Attorney-General to take into account in making his or her decision means that the courts would be unable to conclude that there were any considerations (other than the broad criteria involved in the definition of a "terrorist organisation") that the Attorney-General was *bound* to take into account.[67] Therefore, it would be difficult for an organisation or individual to succeed in a claim that the Attorney-General had taken into account an irrelevant consideration or failed to take into account a relevant consideration.

Thirdly, while there is no doubt that the courts will insist that any proscription decision follows the procedural requirements set out in Div 102, these procedures are lacking in any meaningful detail and may be so easily complied with by the Attorney-General that they do not operate as a real check on his or her discretion. One of the few obligations expressly placed on the Attorney-General is to

[59] *Applicant S20/2002* (2003) 77 ALJR 1165 at [27];198 ALR 59 (McHugh and Gummow JJ).

[60] O'Donnell, n 57 at 334-335.

[61] *Kioa v West* (1985) 159 CLR 550 at 455 per Brennan J.

[62] *Kioa v West* (1985) 159 CLR 550 at 435 per Wilson and Dawson JJ.

[63] *Kioa v West* (1985) 159 CLR 550 at 435.

[64] *Criminal Code Act 1995* (Cth), s 102.1(2).

[65] Finn C, "The Justiciability of Administrative Decisions: A Redundant Concept?" (2002) 30 Fed L Rev 239 at 251.

[66] There are criteria that ASIO and the Attorney-General use to assess whether an organisation should be proscribed, however, these only have the status of guidelines or policy and are not consistently applied. The PJCIS has stressed the "need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the *Criminal Code*": PJCIS, n 50, [2.8].

[67] *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39 (Mason J).

consult with the leaders of the States and Territories and to restrain from making a regulation if a majority of them object.[68] However, Div 102 does not specify the background material or amount of time that must be given to the leaders of the States and Territories in considering a regulation. As discussed above, similar problems exist in relation to the Attorney-General's power to de-list an organisation.

Finally, an organisation or individual seeking judicial review would face practical difficulties in obtaining the evidence necessary to establish that the Attorney-General exceeded his or her powers. As Williams noted in his oral submissions to the Senate Legal and Constitutional Committee in 2002:

> where a decision is made where reasons do not need to be given, where someone can be proscribed under any one of four criteria, the onus resting upon the organisation to disprove that the decision was properly made is too high a burden. It is very hard to ever marshal evidence to show that there were not adequate national security grounds for making such a decision. It is stacked against the organisation and against the courts in such a way that there is unlikely to be adequate review.[69]

The following mechanisms would provide some protection for the Commonwealth from being compelled to reveal national security information under a discovery application to an applicant for judicial review:

- the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth);
- the inherent jurisdiction of the courts to refuse to disclose evidence to a party where the public interest in preserving secrecy or confidentiality of the evidence outweighs the public interest in making it available; and,
- the doctrine of public interest privilege at common law[70] and as codified in s 130 of the *Evidence Act 1995* (Cth).[71]

In *Church of Scientology v Woodward* (1982) 154 CLR 25 at 75-76, Brennan J noted that discovery would not be given against the Director-General of the Australian Security Intelligence Organisation (ASIO) save in the "most exceptional case" and "[t]he secrecy of the work of an intelligence organisation which is to counter espionage, sabotage etc is essential to national security, and the public interest in national security will seldom yield to the public interest in the administration of civil justice".

A recent Federal Court case highlights the range of difficulties that individuals may face in obtaining information about matters relating to national security. Scott Parkin, an American political activist, challenged an adverse security assessment of him prepared by ASIO. On the basis of this assessment, his visa was cancelled by the Department of Immigration and Citizenship. Parkin's argument was that the assessment was invalid because there was no factual basis upon which it could be said that he posed a threat to Australia's national security. In order to make good this argument, Parkin sought discovery of a number of ASIO documents. Two arguments were made by ASIO in opposition to discovery. First, that Parkin was on a "fishing expedition". This is a common problem in national security matters, as applicants are required to establish that the relevant documents exist and be able to identify these documents with sufficient precision.[72] Secondly, that where national security is involved, discovery should be ordered only in an exceptional case. Both of these arguments were rejected by Sundberg J. In relation to the second argument, Sundberg J noted that the comments of Brennan J in *Church of Scientology* may have "critical implications for the parties at the production

[68] *Intergovernmental Agreement on Counter Terrorism Laws* (25 June 2004), Div 3, para 3.4(2).

[69] Evidence to the Aust, Senate Legal and Constitutional Committee, *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (2002), 8 April 2002, 42.

[70] This is discussed in detail in Barnett M, "Dobbing-In and the High Court – Veal Refines Procedural Fairness" (2007) 30(1) NSWLJ 127 at 140-141.

[71] These mechanisms are discussed in detail in Bush C, "National Security and Natural Justice" (2008) 57 *AIAL Forum* 78 at 85ff.

[72] Jackson H, "The power to proscribe terrorist organisations under the Commonwealth Criminal Code: Is it open to abuse?" (2005) 16 PLR 134 at 149.

stage, but [are] not determinative of the discovery question".[73] That is, while issues of national security may prevent a party from inspecting documents at the production stage, such issues will not necessarily prevent the provision of a list of discovered documents. Sundberg J therefore ordered discovery of a number of documents, including the adverse security assessment, a classified ASIO determination setting out the criteria applied by ASIO in making the assessment and records of ASIO's advice to the Minister for Immigration that led to the cancellation of his visa.[74] This decision was upheld on appeal. The Full Federal Court noted, however, that national security may in some circumstances prevent even the discovery of documents:

> we recognise the reality that, in some, and perhaps many, cases, the identification of a document with the kind of specificity that is normally required for discovery may itself be contrary to the public interest.[75]

Two obstacles continue to stand in the way of Parkin gaining access to the information. First, Sundberg J has only ordered discovery of the documents. This does not mean that the documents will actually be produced to Parkin. Secondly, it is still possible that the Attorney-General could issue a certificate under the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth). Parkin's barrister, Julian Burnside QC, described the impact of such a certificate:

> The difficulty that confronts us, potentially, is that the Attorney-General has got power under the *National Security Information Act* to certify conclusively that revealing the contents of the report would adversely affect Australia's national security interests. And if he certifies that, then any court hearing our challenge will have to hold a private hearing in which the court considers whether or not to allow the evidence to be produced in court. And in that process the statute directs the judge to give primary weight to the conclusive certificate of the Attorney, which looks (and it's never been tested) but it looks as though it gives him the chance to stymie the process of examining the basis for the report.[76]

In light of the above discussion, the only ground of review in the ADJR Act that provides any real measure of protection to affected organisations and individuals is the obligation on the Attorney-General to accord procedural fairness. This makes the statement by the Attorney-General's Department that this ground of review does not apply to a proscription decision even more disturbing. The nature of procedural fairness and whether it applies to proscription decisions is considered in detail below.

GENERAL PRINCIPLES OF PROCEDURAL FAIRNESS

Where an administrative power is exercised adversely to the rights or interests of an individual, the courts presume that Parliament intends the exercise of that power to be subject to the rules of procedural fairness.[77] This presumption may only be overruled by "the clear manifestation of a contrary statutory intention"[78] or "plain words of necessary intendment",[79] either expressly stated in the legislation or necessarily implied. The rationale for this presumption has been expressed in both instrumental and non-instrumental terms. On the instrumental side, procedural fairness has the practical effect of improving the accuracy and logic of decision-making and giving the decision-maker access to additional or better information by requiring proper input from all parties.[80] Non-instrumental rationales, by contrast, "focus on the doctrine's contribution to party and community participation in decision-making and the broader social value of participation and accountability". These rationales include the following:

[73] *O'Sullivan v Parkin* [2006] FCA 1654 at [19]-[20].

[74] *Parkin v O'Sullivan* [2007] FCA 1647.

[75] *O'Sullivan v Parkin* (2008) 169 FCR 283 at [35] per Ryan, North and Jessup JJ.

[76] "Scott Parkin", *The Law Report*, ABC Radio National, 20 September 2005.

[77] *FAI v Winneke* (1982) 151 CLR 342 at 360 (Mason J); *Kioa v West* (1985) 159 CLR 550 at 585 (Mason J).

[78] *Kioa v West* (1985) 159 CLR 550 at 584 per Mason J.

[79] *Annetts v McCann* (1990) 170 CLR 596 at 598 per Mason CJ, Deane and McHugh JJ.

[80] Barnett, n 70 at 129.

> procedural fairness enhances formal justice and the rule of law because it assists to guarantee objectivity and impartiality; it contributes to protecting human dignity, common decency and democratic values by ensuring that people are told why they are being treated in a certain way and enables parties to take part in that decision; it assists parties to accept unfavourable decisions; and it enables the legitimacy of authoritative standards to be disputed and, if necessary, rejected [footnotes omitted].[81]

The first question in analysing any legislative provision granting a decision-making power to the Executive is to determine whether there is a clear legislative intention to exclude the rules of procedural fairness. This is rarely, however, the critical question. In most cases, the question is quickly answered in the negative and the critical question becomes: "what does the duty to act fairly require in the circumstances of the particular case".[82] In *National Companies & Securities Commission v News Corp Ltd* (1984) 156 CLR 296 at 312, Gibbs CJ noted that "natural justice does not require the inflexible application of a fixed body of rules". The precise content of procedural fairness will depend upon the particular circumstances of the case. In *Kioa v West* (1985) 159 CLR 550 at 583-585, Mason J set out a non-exhaustive list of the criteria that determine the nature and scope of the duty to accord procedural fairness:

> the circumstances of the case and they will include, inter alia, the nature of the inquiry, the subject matter, and the rules under which the decision-maker is acting … [as seen] in the light of the statutory requirements, the interests of the individual and the interests and purposes, whether public or private, which the statute seeks to advance or protect or permits to be taken into account as legitimate considerations.

In broad terms, procedural fairness consists of the "hearing rule" and the "bias rule". Only the hearing rule is addressed in this article. The essence of this rule is twofold. First, an affected person "is entitled to know the case sought to be made against him"[83] and the decision-maker is required to disclose any "credible, relevant and significant" information before him or her.[84] Secondly, an affected person is entitled to "be given an opportunity of replying to [the case and information against him or her]".[85]

Question 1: Does Div 102 of the Criminal Code exclude the rules of procedural fairness?

Current Practice under Div 102 for public notification and consultation

Division 102 does not make any express reference to the rules of procedural fairness, whether to exclude or include them. Nor does Div 102 give substantive effect to the rules of procedural fairness. There is no requirement that the Attorney-General give notice to an organisation, its members or other affected individuals of the essential features of the case for proscription. The Attorney-General is also not required to provide them with copies of the material and information upon which he or she relies to support that case. Such lack of notification before the Attorney-General makes his or her decision denies an affected organisation or individual any opportunity to make submissions opposing the proscription of that organisation.

Division 102 does not mandate any public notification at all, either before or after the making of a regulation. It is only by convention that, on the day after a regulation is lodged on the FRLI, the Attorney-General issues a press release, including a Statement of Reasons, announcing the listing of the organisation. The Statement of Reasons is an assessment by ASIO (after a process of consultation with the Department of Foreign Affairs and Trade[86]) of the relevant organisation against a range of

[81] Barnett, n 70 at 129.

[82] *Kioa v West* (1985) 159 CLR 550 at 585 per Mason J.

[83] *Kioa v West* (1985) 159 CLR 550 at 582 per Mason J.

[84] *Kioa v West* (1985) 159 CLR 550 at 629 per Brennan J.

[85] *Kioa v West* (1985) 159 CLR 550 at 582 per Mason J.

[86] Attorney-General's Department, n 9, p 5.

factors.[87] 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 sufficient basis for the Attorney-General to be satisfied that the organisation meets the definition of a terrorist organisation.[88] The press-release is then circulated and placed on the National Security Website.[89]

In some cases, however, even this minimal level of public notification does not occur. For example, a regulation re-listing the Kurdistan Workers' Party was made on 12 February 2008.[90] The Attorney-General's Department did not issue a media release giving public notice of the re-listing and did not provide a Statement of Reasons.[91] In such a case, the only other opportunity for indirect notification and education of the public is during a review of the regulation by the Commonwealth Parliament or the PJCIS. However, the lack of public notification in relation to the re-listing of the Kurdistan Workers' Party was exacerbated by the failure of the PJCIS to issue a media release calling for public submissions. There was simply a statement on the PJCIS website requiring public submissions to be made by 5 May 2008.[92] Unsurprisingly, only seven submissions were made to the PJCIS' review of the re-listing of the Kurdistan Workers' Party. By contrast, 22 submissions were made to the PJCIS' review of the original listing of this organisation in 2006.

The Attorney-General's Department has argued that:

> providing notice prior to listing could adversely impact operational effectiveness and prejudice national security … [and the Department is] not persuaded that advance notification would provide any greater transparency to the existing process and considers that such notification could lead to confusion with the listing process.[93]

However, even assuming for the moment that the Attorney-General's Department is correct in its assessment of the impact of prior notification, this nonetheless does not justify the failure to impose a requirement of general public notification, as well as specific notification of the relevant organisation, its members and other affected individuals, *after* the regulation is made. The rationales for proscription, particularly the emphasis on deterrence and prevention of terrorist activities, would suggest that such notification would substantially increase the effectiveness of the proscription regime. Once an individual is made aware that an organisation has been proscribed, the serious consequences of being found guilty of a terrorist organisation offence and the breadth of the offences themselves would dissuade him or her from commencing or continuing any involvement with that organisation.

Notification of organisations and individuals after a decision has been made will not, however, adequately compensate for the absence of an opportunity to make submissions in advance of a decision being made. This is because of the specific deficiencies in the review mechanisms identified above, as well as the inherent deficiencies of ex-post facto review (especially review that is limited to the legality of a decision). The serious consequences of proscription and the inadequacies of any ex post facto review highlight the need for procedural fairness to be accorded to the relevant organisation, its members and other affected individuals prior to the making of the regulation.

Implied exclusion by Div 102 of the rules of procedural fairness

As there is no express reference to the rules of procedural fairness (or even judicial review more generally) in Div 102, the question becomes whether Div 102 impliedly excludes the rules of procedural fairness.

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[87] These factors were revealed to the PJCIS by ASIO in a confidential exhibit: see Parliamentary Joint Committee on ASIO, ASIS and DSD, Report, n 5, [2.24]. The factors include: including engagement in terrorism, ideology and links to other terrorist organisations, links to Australia, threat to Australian interests, listing by the UN or other like-minded countries and engagement in peace and mediation processes: see Attorney-General's Department, n 9, p 6.

[88] Attorney-General's Department, n 9, pp 5-6.

[89] Attorney-General's Department, n 9, p 8.

[90] Federation of Community Legal Centres (Vic) Inc, Submission No 7, p 4, PJCIS, *Review of the re-listing of the Kurdistan Workers Party (PKK)* (2008).

[91] Federation of Community Legal Centres (Vic) Inc, n 90, p 4.

[92] Federation of Community Legal Centres (Vic) Inc, n 90, p 4.

[93] Attorney-General's Department, n 9, p 13.

A legislative intention to exclude the rules of procedural fairness will not be implied from "indirect references, uncertain inferences or equivocal considerations", or the "presence in a statute of rights which are commensurate with some of the rules of procedural fairness".[94] In *Twist v Council of Municipality of Randwick* (1976) 136 CLR 106 at 109, Barwick CJ stated:

> if that is the legislative intention it must be made unambiguously clear … Where the legislation is silent on the matter, the court may presume that the legislature has left it to the courts to prescribe and enforce the appropriate procedure to ensure natural justice.

The inference of a legislative intention to exclude procedural fairness was discussed in *Leghaei v Director General of Security* [2005] FCA 1576.[95] Madgwick J found that the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) did not exclude the rules of procedural fairness. Judicial review on the ground of a denial of procedural fairness was available to an alien[96] in respect of whom ASIO had made an adverse security assessment. Madgwick J found (at [82]) that:

> it is my view that an obligation positively to consider what concerns and how much detail might be disclosed to the subject visa holder to permit him/her to respond, without unduly detracting from Australia's national security interests, is minimally necessary to ensure a fair decision-making process. Further, on balance, such a requirement is not sufficiently clearly shown to have been excluded by necessary statutory implication.

This conclusion was reached by Madgwick J notwithstanding:

(a) that the legislation set up an ex post facto regime of procedural fairness only for the benefit of Australian citizens and permanent residents;[97]
(b) that a wide discretion was reposed in the Director-General and the Attorney-General to refuse to disclose an assessment to the affected person if he or she was satisfied that disclosure would be prejudicial to the security of the nation;[98] and
(c) the submission of the Director-General of ASIO that the nature of the matters to be considered and the circumstances of urgency in which a decision had to made were irreconcilable with an obligation of procedural fairness (at [48]).

Unlike the ASIO Act, there is nothing in the terms or surrounding provisions of Div 102 from which it could be implied that the Parliament intended to exclude the rules of procedural fairness. In fact, it is clear from the Explanatory Memorandum to the *Security Legislation Amendment (Terrorism) Bill 2002 [No 2]* (Cth) that the Commonwealth Parliament intended that proscription decisions would be subject to judicial review. There is no reference to the exclusion of procedural fairness from the grounds of judicial review. The only argument that might be made by the Attorney-General to support the claim that Div 102 excludes the rules of procedural fairness is that the circumstances in which a proscription decision is made and the nature of the subject matter are irreconcilable with an obligation to accord procedural fairness to the organisation, its members and other affected persons.

Two possible arguments are considered below. First, that a proscription decision must be made in urgent circumstances that do not allow notification and consultation processes to take place. Secondly, that it would prejudice national security to disclose the fact that a proscription decision might be made, the essential features of the case for proscription or the information on which the Attorney-General relies to support that case.

Urgency

As Aronson, Dyer and Groves note, the need for an administrative power to be exercised urgently may reduce the content of the duty to give a hearing to an affected organisation or individual. In such a

[94] *Annetts v McCann* (1990) 170 CLR 596 at 598-599 per Mason CJ, Deane and McHugh J. This was reiterated in *South Australia v Slipper* (2004) 136 FCR 259 at 279-280 (Finn J, with whom Branson and Finkelstein JJ agreed).

[95] This decision was upheld on appeal to the Full Court of the Federal Court (*Leghaei v Director-General of Security* [2007] FCAFC 37) and an application for special leave to appeal was refused by the High Court (*Leghaei v Director-General of Security* [2007] HCATrans 655).

[96] That is, a person who is not an Australian citizen or permanent resident.

[97] *Australian Security Intelligence Organisation Act 1979* (Cth), s 36.

[98] *Australian Security Intelligence Organisation Act 1979* (Cth), s 38.

situation, the decision-maker may have a greater say as to what level of procedural fairness is consistent with the urgency of the circumstances.[99] However, a distinction needs to be made between two categories of administrative powers. The first category contains those powers that, of their very nature, must always to be exercised in urgent circumstances that do not provide an opportunity for disclosure by the decision-maker and a hearing.[100] In such circumstances, an intention will generally be imputed to the Parliament to exclude the hearing rule.[101] The second category contains those powers that may sometimes need to be exercised urgently but which will be often exercised in situations that would provide an opportunity to be heard.[102] This category is the more common of the two. Urgency in such cases is generally not a sufficient justification for excluding (or reducing to "nothingness") the right to procedural fairness.[103] The content of the right to a hearing must simply be tailored to the urgency of a particular case, just as it is tailored to the circumstances of any other case.

The courts are more likely to find that the legislative intent is to exclude the rules of procedural fairness where the effects of the decision are short-term and there will be a subsequent chance for an affected organisation or person to have a hearing before the decision-maker. As pointed out by Aickin J (with whom Stephen and Mason JJ agreed) in *Heatley v Tasmanian Racing & Gaming Commission* (1977) 137 CLR 487 at 514-515, an "emergency situation can properly be dealt with by short-term measures which are themselves sufficient and appropriate to cope with such a situation":

> it may, in circumstances of likely immediate detriment to the public, be appropriate for the Commission to issue a warning-off notice without notice or stated grounds but limited to a particular meeting or meetings over a short period of time, coupled with a notice that the Commission proposed to make a long-term order on stated grounds and giving an opportunity for the person concerned to make representations to the Commission. There would then be a true opportunity for the person affected to bring forward any material to the Commission which he thought helpful to him and to seek to disabuse the Commission of any misapprehensions which he thought it entertained.

There is very little evidence, if any, to suggest that the Attorney-General's power to proscribe an organisation is *always* exercised in circumstances of urgency or emergency. It is not enough for the Attorney-General to make a statement that the national security context requires proscription decisions to be made urgently. This statement is undermined by the fact that it is not a pre-requisite for proscription that an organisation poses a threat to the security of Australia or Australian interests. Many organisations that do not pose a threat to Australia fall within the definition of a terrorist organisation in s 102.1(2). While the level of threat to Australia is one of the criteria that ASIO takes into account in preparing its advice to the Attorney-General, these criteria only have the status of guidelines or policy. 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 judgment across those factors, and some factors are more relevant to organisations than others.[104]

As a consequence, many organisations that pose no threat to Australia have been proscribed by the Attorney-General. Emerton[105] calculates 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

[99] Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (3rd ed, 2004), p 483. See also *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 241 (Wilcox J).

[100] *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 241 (Wilcox J). Such powers might include "a power to destroy dangerous animals or forcibly to enter premises at a time of fire or natural disaster". It might also include the destruction of diseased meat (*White v Redfern* (1879) 5 QBD 15) or the removal to hospital of a child suffering from a dangerous infectious disease (*R v Davey* [1899] 2 QB 301).

[101] *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 241 (Wilcox J).

[102] *Marine Hull & Liability Insurance Co Ltd v Hurford* (1985) 10 FCR 234 at 241 (Wilcox J).

[103] *Kioa v West* (1985) 159 CLR 550 at 615 (Brennan J); *Lisafa Holdings Pty Ltd v Commissioner of Police* (1988) 15 NSWLR 1 at 15 (Kirby P); *Minister for Aboriginal & Torres Strait Islanders Affairs v Western Australia* (1996) 67 FCR 40 at 59.

[104] Aust, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Tanzim Qa'idat alijihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a Terrorist Organisation* (2005), [2.4].

[105] Emerton, n 30, pp 4-5.

to Australia.[106] Two other organisations have only been linked to Australia insofar as Australian personnel are present as part of the foreign forces in Iraq.[107] In the author's opinion, it is only where an organisation constitutes an immediate threat to Australia that it could *possibly* be argued that there is insufficient time to notify an affected organisation, its members or other affected individuals.

The only real evidence of urgency is the fact that, in 50% of cases, the leaders of the States and Territories have been given five days or less in which to consider or comment upon a proposed listing or re-listing of an organisation.[108] This may give some indication of the attitude of the Attorney-General's Department to the urgency of the situation, as the *Intergovernmental Agreement on Counter Terrorism Laws* requires the Commonwealth to "use its best endeavours" to give the leaders of the States and Territories a "reasonable time" to respond.[109] Of course, from a more cynical point of view, it might be suggested that "reasonable" is a subjective term and the short amount of time may be a mechanism to limit the amount of opposition to a listing. Regardless of the motivation of the Attorney-General, ultimately the level of urgency of a situation is for the courts to determine on an objective basis, albeit that deference may be paid by the courts to the opinion of the Executive.

The Commonwealth might also seek to rely upon the repeal of the delayed commencement provision for proscription decisions to support its argument that the rules of procedural fairness are excluded. That is, to argue that the repeal was an implicit recognition by the Commonwealth Parliament of the need for proscription decisions to be made urgently. In its original form, Div 102 provided that regulations could not take effect any earlier than the day after the last day of the disallowance period.[110] The amended section, which was introduced by the *Criminal Code Amendment (Terrorist Organisations) Act 2002* (Cth), provided that regulations took effect on the day they were registered on the FRLI. The *Bills Digest* suggests that the principal purpose of the removal of the delayed commencement provision was to bring the commencement provision into line with the usual commencement practice for regulations.[111] This was also noted by the then Attorney-General, Daryl Williams, in the Second Reading Speech for the Bill.[112] However, Williams also indicated that removal of the delayed commencement provision was necessary to ensure that the listing of Jemaah Islamiyah as a terrorist organisation came into effect before the end of the 2002 parliamentary sitting schedule. Williams stated that the 15-day waiting period before the regulation took effect meant that:

> the government cannot, under the existing law, complete the listing of a terrorist organisation – such as a terrorist organisation believed to be involved in the Bali bombing – until next year.
>
> As a result, even though there may be known members of a terrorist organisation here in Australia, this will limit the ability of authorities to investigate them and, if there is enough evidence, to prosecute them, until well into 2003.
>
> This is totally unacceptable.
>
> We need to be able to act swiftly against the perpetrators of terrorist acts.[113]

This does not, however, suggest that proscription will always be urgent. The case of Jemaah Islamiyah was exceptional in two respects. First, Jemaah Islamiyah is one of only four proscribed

[106] Abu Sayyah Organisation, Jamiat ul-Ansar, Armed Islamic Organisation, Salafist Organisation for Call and Combat; Asbat al-Ansar, Islamic Movement of Uzbekistan, Jaish-e-Mohammad, Lashkar-e Jhangvi, Islamic Army of Aden, Hizballah's External Security Organisation, Palestinian Islamic Jihad, HAMAS' Izz al-Din al-Qassam Brigades, and the Kurdistan Workers Party.

[107] Tanzim Qa-idat al-Jihad fi bilad al-Rafidayn Ansar al-Islam.

[108] PJCIS, n 6, p 49. In some cases, the leaders of the States and Territories were informed only 24 hours prior to a regulation being made: see eg, Parliamentary Joint Committee on ASIO, ASIS and DSD, Report, n 5, [2.9]-[2.10].

[109] *Intergovernmental Agreement on Counter Terrorism Laws* (25 June 2004), Div 3, para 3.4.

[110] *Criminal Code Act 1995* (Cth), s 102.1(4) (in its form prior to 23 October 2002).

[111] "Criminal Code Amendment (Terrorist Organisations) Bill 2002" (2002-2003) 87 *Bills Digest* at 5.

[112] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 October 2002, p 8450 (Williams, D, Attorney General).

[113] Attorney-General, n 112, p 8450.

organisations identified as posing a threat to Australia.[114] Secondly, if the regulation did not take effect until the end of the 15-day disallowance period, there would have been a gap from 12 December 2002 (the last sitting day of 2002) to 4 February 2003 (the first sitting day of 2003). This was because there were only 14 days left in the 2002 parliamentary sitting calendar. Few would deny that it is clearly undesirable for there to be a delay of almost three months for the proscription of an organisation posing a threat to Australia's security to come into effect. This is quite different, however, from the amount of time that would be necessary to provide organisations and individuals with an opportunity to respond to the Attorney-General's case in favour of proscription. Notification and consultation with the relevant organisation and any affected individuals could presumably take place within the space of several weeks.

The proposition that proscription decisions are always made in circumstances of urgency is not supported by the Howard Government's own practice.[115] The then Leader of the Opposition, Simon Crean, noted in 2002 that Al Qa'ida was not proscribed until more than three months after the Attorney-General was granted the power of proscription.[116] It was also acknowledged by Senator Hill, the Minister for Defence, on 22 October 2002 on Australian Broadcasting Corporation's *Lateline* program that:

> We know there has been constant movement from Indonesia into Australia and that may well include JI supporters.
>
> …
>
> Well, it's in the *last six months* that we've started to understand this organisation better, in particular out of arrests in Singapore where it was intended to attack the Australian, US and British embassies [emphasis added].[117]

Nonetheless, it was not until 15 October 2002 that the then Attorney-General first took steps to proscribe Jemaah Islamiyah as a terrorist organisation.[118] Crean stated:

> If the government had moved quickly to list it, we would not be required to deal with this legislation today. Because the government has failed to act quickly and because there is a flaw in its legislation, its urging of the United Nations to list Jemaah Islamiah means that, under current legislation, the organisation could not be proscribed in Australia until February of next year.[119]

The above discussion is not meant to suggest that there will never be circumstances in which it is necessary to urgently proscribe an organisation. However, even in those circumstances in which the proscription of an organisation *is* urgent, there will generally still be sufficient time for notification of affected organisations and persons and for those organisations or persons to be given an opportunity to make submissions to the Attorney-General opposing the making of the regulation. The Commonwealth is required by the *Intergovernmental Agreement on Counter Terrorism Laws* to consult the leaders of the States and Territories prior to making a regulation. By convention, a Statement of Reasons is prepared by ASIO, confirmed by the Chief General Counsel of the Australian Government Solicitor and provided to the Attorney-General for his or her consideration before the Attorney-General is satisfied that an organisation meets the definition of a terrorist organisation in s 102.1(2)(a) or (b). It would clearly be possible for notification and consultation with an organisation and any affected individuals to take place during this period. The circumstances surrounding the making of a decision to proscribe an organisation are therefore not such as to be irreconcilable with the operation of the rules of procedural fairness.

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[114] Emerton, n 30, pp 4-5.

[115] No new listings have been made by the Rudd Government. However, six organisations have been listed and one organisation has not been re-listed.

[116] Commonwealth, *Parliamentary Debates*, House of Representatives, 23 October 2002, p 8452 (Crean, S Leader of the Opposition).

[117] "JI operatives may be in Australia: Hill", *Lateline*, ABC, 22 October 2002 (http://www.abc.net.au/lateline/stories/s708312.htm).

[118] Leader of the Opposition, n 116, p 8452.

[119] Leader of the Opposition, n 116, p 8452.

Finally, if we revisit the rationales for proscription, it is clear that proscription is not an end in itself. Proscription is the first stage in an extended process aimed at preventing the commission of terrorist acts. One of its principal purposes is to facilitate the prosecution of individuals who are, or may be in the future, involved in the commission of terrorist acts, by criminalising involvement with a proscribed organisation. There is frequently a delay between the proscription of an organisation and the prosecution of any individuals for terrorist organisation offences in connection with that organisation.[120] Furthermore, even prior to the proscription of an organisation, it is still possible for a person to be charged with, and prosecuted for, a terrorist organisation offence. First, the power of Australian intelligence agencies to investigate an individual who is suspected of committing a terrorist organisation offence is the same regardless of whether the relevant organisation has been proscribed. Secondly, the courts have the power to make a declaration that an organisation is a terrorist organisation during the course of a prosecution of an individual for a terrorist organisation offence. This is not merely a theoretical possibility. On a number of occasions, persons have been charged with terrorist organisation offences in connection with an organisation that has not yet been proscribed by regulation. Twelve men were charged with terrorist organisation offences in connection with a Melbourne-based organisation whose philosophy allegedly revolved around the pursuit of a violent form of jihad.[121] In the first half of 2007, three men were prosecuted for terrorist organisation offences in connection with the Liberation Tigers of Tamil Eelam (LTTE).[122] The LTTE is proscribed by over 30 countries worldwide, however, it has not yet been proscribed by Australia.

Therefore, it appears that the proscription of an organisation by the Attorney-General is not a power which, of its nature, is always exercised in circumstances of urgency or emergency. It may be that, in some circumstances, there is an urgent need for an organisation to be proscribed. However, this is a determination to be made by the courts in the particular circumstances of any case and the onus should be on the Attorney-General to establish that the circumstances are such as to justify the denial of procedural fairness to an organisation and affected individuals. Even where it is necessary to make a proscription decision urgently, it is likely that there would still be sufficient time for notification and consultation by the Attorney-General. Once again, it is for the courts and not the Executive to consider what level of procedural fairness is consistent with the urgency of a particular situation.

Prejudice to National Security

The rules of procedural fairness will be reduced or excluded whether the subject matter of the information upon which a decision is based is irreconcilable with the disclosure of that information. For example, where the information involves a consideration of matters relating to national security and to disclose that information would threaten the security of the nation. In *Salemi v McKellar [No 2]* (1977) 137 CLR 396 at 421, Gibbs J stated:

> Reasons of security may make it impossible to disclose the grounds on which the executive proposes to act. If the Minister cannot reveal why he intends to make a deportation order, it will be difficult to afford the prohibited immigrant a full opportunity to state his case, for he may not know what it is that he has

[120] Izhar Ul-Haque was arrested in April 2004. He was charged with receiving training from a terrorist organisation (Lashkar-e-Tayyiba (LeT)) in 2003 contrary to s 102.5(1). The *Criminal Code Amendment Regulations 2003 (No 10)*, which proscribed LeT as a terrorist organisation, commenced on 9 November 2003. There was therefore a delay of five months from proscription to arrests. Jack Thomas was arrested in November 2004. He was charged with getting funds from Al Qa'ida contrary to s 102.6(1) and with two counts of providing resources to Al Qa'ida contrary to s 102.7(1). These events allegedly occurred in March to July 2001. The *Criminal Code Amendment Regulations 2002 (No 2)*, which proscribed Al Qa'ida as a terrorist organisation, commenced on 21 October 2002. There was therefore a delay of more than two years from proscription to prosecution of Jack Thomas.

[121] Each of the defendants was charged with one count of being a member of a terrorist organisation (*Criminal Code Act 1995* (Cth), s 102.3). Some of the defendants were 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). Seven were found guilty of terrorist organisation offences. Four others were found not guilty of terrorist organisation offences. The jury could not reach a verdict in relation to the final accused.

[122] Each of the defendants (Aruran Vinayagaamoorthy, Sivarajah Yathavan and Arumugan Rajeevan) were charged with being members of a terrorist organisation, making funds available to a terrorist organisation and sending money collected in Australia to a proscribed entity, along with other terror charges.

> to answer. This is not to say that it might not be practicable for the Parliament to provide a procedure for the review of deportation orders … but the Parliament has not done so.[123]

In relation to Division 102 of the *Criminal Code*, the Attorney-General's Department argues that giving prior notification to affected organisations and persons could "adversely impact operational effectiveness and prejudice national security".[124] As discussed above, the courts are generally reluctant to interfere with national security decisions made by the Executive. However, the assessment of the Attorney-General as to whether the disclosure of confidential information would prejudice national security is not, of itself, determinative. The level of deference that the courts will give to the Executive's national security decisions will ultimately be determined by the terms of the legislation itself. In *Church of Scientology v Woodward* (1982) 154 CLR 25, the High Court held that ASIO could be the subject of judicial review proceedings to ensure that it had not acted in excess of its legislative power to obtain, correlate, evaluate or communicate intelligence that is "relevant to security". A majority of the court came to the conclusion that this question was justiciable. As Mason J stated (at 59-61):

> It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence is "for purposes relevant to security". Courts constantly determine issues of relevance and questions of relevance … Intelligence is relevant to security if it can reasonably be considered to have a real connexion with that topic, judged in the light of what is known to ASIO at the relevant time. This is a test which the courts are quite capable of applying.

It is therefore for the courts rather than the Executive to objectively determine whether the rules of procedural fairness are irreconcilable with the protection of national security. While it is undeniable that the decision to list or to re-list an organisation as a terrorist organisation will involve a consideration of national security issues, it does not automatically follow that the disclosure to the relevant organisation, its members or other affected persons of the essential features of the case in favour of proscription, or the information upon which the Attorney-General relies in support of that case, would prejudice national security. In *Leghaei v Director General of Security* [2005] FCA 1576 at [81], Madgwick J stated:

> Nor is it inevitably the case that an adverse security assessment will depend on material that of its nature or by reason of its sources demands confidentiality. Some foreign powers are strident about their ambitions even when Australia might regard them as nefarious. Some ideologically motivated individuals who advocate and are prepared to promote revolution, insurrection, terror or communal violence likewise do not hide their light under a bushel. At least where public conduct of a security-assessed person is relied on, there is no point, based on protection of confidential materials or sources, in denying a right to be heard.

In making a determination as to whether he or she is satisfied on "reasonable grounds" that an organisation meets the definition of a "terrorist organisation", the Attorney-General considers the Statement of Reasons provided by ASIO. The Statement of Reasons "is prepared as a stand alone document and is publicly available". It is "based on publicly available details about an organisation which are corroborated by classified information".[125] The PJCIS has similarly stated that: "There has

[123] See also *Kioa v West* (1985) 159 CLR 550 at 616 (Brennan J); *R v Secretary of State for the Home Department; Ex parte Fayed* [1997] 1 All ER 228 at 241 (Lord Woolf); *Amer v Minister for Immigration & Ethnic Affairs* (unreported, Federal Court, Lockhart J, 19 December 1989) pp 2-3; *Nicopoulos v Commissioner for Corrective Services* (2004) 148 A Crim R 74 at [83], [96], [100]; [2004] NSWSC 562.

[124] Attorney-General's Department, n 9, p 13.

[125] Attorney-General's Department, n 9, p 5. The Statement of Reasons "usually includes in outline the principal names and aliases of the organisation the history of the formation of the organisation, its ideology, purpose, organisational structure and location, membership details, funding sources, affiliations with other terrorist organisations and its history of engagement in terrorism".

been a clear commitment to ensure that the power to proscribe an organisation is based, to the maximum extent possible, on publicly available information."[126]

That is, in the Statement of Reasons, ASIO merely collates all publicly available and relevant information about an organisation into an easily accessible form. This information is generally made publicly available after a regulation has been registered on the FRLI. It is difficult to see, therefore, how disclosing this information to the relevant organisation or any affected individuals prior to the regulation being made would prejudice national security. This situation is quite distinct from the adverse security assessment considered in *Leghaei*. First, the assessment was based on classified material. Secondly, for this reason, the assessment in *Leghaei* would never be released to the public. There is a possibility that additional classified information may be provided to the Attorney-General to support the case for proscription. However, the courts should deal with such a situation as it arises. It may be that the Statement of Reasons would be provided to the organisation or affected individuals but not the classified information.

In addition to the argument that disclosure of information would prejudice national security, it might be argued that merely to alert an organisation to the prospect of a regulation being made might prejudice national security. However, as discussed above in relation to the urgency of the circumstances in which proscription decisions are made, proscription does not have any immediate consequences for an organisation. It merely facilitates the prosecution of individuals for terrorist organisation offences. Given that a public announcement is made when an organisation is proscribed and there is usually a delay between proscription and prosecution, it is impossible to see how prior notification of an organisation might prejudice national security.

Furthermore, one of the very rationales for the proscription of terrorist organisations is to encourage individuals to disassociate themselves from proscribed organisation. This rationale is made clear by s 102.3, which establishes the offence for membership of a terrorist organisation. A defence to this offence lies where a person proves that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after the person knew that the organisation was a terrorist organisation.[127] In order to establish this defence, it is obviously necessary that a person is made aware of the proscription of a particular organisation and is also given sufficient time to take steps to cease to be a member of that organisation. Therefore, the argument that national security would be prejudiced if an organisation or individual was alerted in advance to the proscription of that organisation is unsustainable.

Question 2: What is the scope of the obligation to accord procedural fairness?

It is apparent that neither the subject matter of proscription nor the circumstances in which proscription decisions are made is inherently irreconcilable with an obligation on the Attorney-General to accord procedural fairness to an organisation, its members and other affected individuals prior to proscription. That is, to inform them of the case against the relevant organisation, provide them with the material on which this case is based and give them an opportunity to make submissions in response. While there may be circumstances in which national security information must be sheltered from disclosure or there is an immediate need for an organisation to be proscribed, it is for the courts and not the Attorney-General to determine when such circumstances arise. They will be the exception rather than the rule. Given this, it appears that there is an obligation on the Attorney-General under Div 102 of the *Criminal Code Act 1995* (Cth) to accord procedural fairness to an organisation, its members and other affected individuals prior to proscription.

In 2006, the SLRC concluded that the obligation to accord procedural fairness and the content of that obligation should be expressly spelt out in Div 102.[128] This is the only way to truly dispel the

[126] PJCIS, n 6, [2.40].

[127] *Criminal Code Act 1995* (Cth), s 102.3(2).

[128] SLRC, n 10, [9.1].

cloud of uncertainty regarding whether the Attorney-General is under an obligation to accord procedural fairness. The specific recommendations made by the SLRC as to how to frame this obligation are sensible ones.

First, the SLRC recommended that, in all but exceptional cases, there is an obligation on the Attorney-General to accord procedural fairness to an organisation or individual adversely affected by a proposal to proscribe that organisation.[129] An understandable concern arises as to when circumstances will be regarded as "exceptional". This will ultimately be for the courts to determine. In *Leghaei* at [88], Madgwick J found that the duty to accord procedural fairness was satisfied by evidence that the Director-General of ASIO had given genuine consideration to the possibility of disclosure, however, the potential prejudice to the interests of national security was such that the content of procedural fairness is reduced to "nothingness". As discussed above, the circumstances in which proscription decisions are made are quite distinct from those in which security assessments are made by ASIO (as discussed in *Leghaei*). In particular, a large part, if not all, of the information on which a proscription decision is based will ultimately be revealed to the public in the form of a Statement of Reasons. Therefore, a far stricter and more rigorous approach to "exceptional" circumstances should be adopted by the courts in relation to proscription decisions. There will always be some amount of information that may be disclosed to the organisation, its members and other affected persons prior to proscription and some time given for submissions to be made in response. It may be that the amount of time for such responses will be shortened if the Attorney-General establishes to the satisfaction of the court that this is required in the interests of national security. Or it may be that the actual information disclosed will be redacted if the Attorney-General establishes to the satisfaction of the court that he or she is relying on confidential information. However, it is difficult to imagine any circumstances in which the obligation to accord procedural fairness in relation to a proscription decision would be reduced to nothingness.

Secondly, the obligation to provide procedural fairness would require that the organisation, its members and any other individuals whom the Attorney-General identifies as potentially affected by the proposal:

(a) be notified of the proposal to proscribe that organisation;
(b) be notified of the case in favour of proscription;
(c) be given a copy of any information or material that the Attorney-General relies on to support the case for proscription; and,
(d) be given the opportunity to make submissions to the Attorney-General in relation to the proposal.[130]

Thirdly, the SLRC noted that there may be practical problems faced by the Attorney-General in locating the organisation and identifying its members.[131] This is compounded by the fact that all of the organisations that have thus far been proscribed by the Attorney-General are based overseas and have no known cells in Australia. Therefore, the obligation should be framed so that the Attorney-General is required to make reasonable efforts to contact the organisation and its members. If this is not possible, the Attorney-General would not be required to specifically notify the organisation and its members. A general public notification, which is widely-circulated, of the proposal to proscribe that organisation would be sufficient. The public at large must be given an opportunity to make submissions about the proposal.

In summary, the obligation to accord procedural fairness is properly applicable to proscription decisions made by the Attorney-General. It will only be excluded where the Attorney-General demonstrates, to the satisfaction of the court, that it is not possible (either in practical terms or for reasons of national security) to comply with this obligation. In such circumstances, it is for the court to determine whether the obligation is reduced to "nothingness" or whether some level of procedural fairness remains possible.

[129] SLRC, n 10, [9.1].

[130] SLRC, n 10, [9.1].

[131] SLRC, n 10, [9.1].

CONCLUSION

In *Church of Scientology*, Brennan J described the role of judicial review in the following terms:

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[132]

This description can be applied to review more generally. Review of executive action aims to constrain the discretion of the Executive and ensure that a decision-maker is accountable for his or her decisions, with the ultimate purpose of limiting the potential for misuse of power.

Unfortunately, Div 102 of the *Criminal Code* does not appear to fulfil this description. While Div 102 ostensibly provides for a range of review mechanisms, this article has exposed the serious deficiencies in each of these mechanisms. These deficiencies have the consequence that, with the exception of the broad criteria contained in the definition of a terrorist organisation, there are very few legal constraints on the discretion of the Attorney-General to proscribe an organisation. This may not be so troubling if there were effective political constraints on the discretion of the Attorney-General, for example, the potential for an electoral backlash if the Attorney-General made a decision that did not accord with community standards. However, the public has traditionally (and understandably) accorded the Executive a wide margin of appreciation in making decisions for the protection of Australia and Australians from internal and external threats. This is particularly apparent today. 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 organisation.[133]

In light of this, it is imperative that there be legal constraints on the discretion of the Attorney-General. In examining what these legal constraints should be, this article takes a modest approach. It does not seek to advocate wholesale reform of the review mechanisms available under Div 102. Instead, it concentrates on the Attorney-General's argument that he or she is not under an obligation to accord procedural fairness to an organisation, its members or other affected individuals prior to proscribing that organisation. After a close examination of the reasons given by the Attorney-General in support of this argument and the judicial authorities, it concludes that the Attorney-General is (and should be) under such an obligation in all but exceptional cases.

The recognition of an obligation on the Attorney-General to accord procedural fairness might appear to some people to be an almost inconsequential change to the proscription regime. However, it is a change that is very easily achievable, requiring only the express recognition in Div 102 of the obligation, and has the potential to open up the Attorney-General's decision-making process to greater, and much needed, scrutiny by both the courts and the public.

[132] *Church of Scientology v Woodward* (1982) 154 CLR 25 at 70.

[133] Castan Centre for Human Rights Law, n 30, pp 5-6.