SUBMISSION OF THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC.) INC

TO THE SECURITY LEGISLATION REVIEW COMMITTEE

SECURITY LEGISLATION AMENDMENT (TERRORISM) ACT 2002, SUPPRESSION OF FINANCING OF TERRORISM ACT 2002, CRIMINAL CODE AMENDMENT (TERRORISM) ACT 2003

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ABOUT THE FEDERATION OF COMMUNITY LEGAL CENTRES VICTORIA

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's') assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use CLC's are on low incomes, with most receiving some form of pension or benefit. CLC's also see a considerable number of people from culturally and linguistically diverse communities.

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth anti-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth anti-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth anti-terrorism laws on affected communities and individuals.

EXECUTIVE SUMMARY

In summary our concerns and recommendations regarding the security acts relating to terrorism are as follows:

<u>General Concerns</u>

- That the acts do not serve to deter or prevent politically, religiously or ideologically motivated violence.

- That the acts are an unjustified and disproportionate legislative response given the level of terrorist threat in Australia.
- That the acts have been and remain prone to being applied in a discriminatory manner.

Terrorist Act

- That the definition of 'terrorist act' is overly broad, particularly in that it includes a mere threat, and goes beyond accepted notions of what constitutes an act of terrorism.
- That the definition of terrorist act criminalises politically, religiously and ideologically motivated acts and is thereby prone to discriminatory application and application to suppress political dissent.
- That the exceptions relating to protest, advocacy, dissent and industrial action should be unqualified so that these activities are not unnecessarily conflated with 'terrorism'.

Terrorism Offences

- That the terms involved in defining these offences are overly broad and vague and therefore the offences have the potential to apply to an excessively large category of people.
- That the breadth of definitions has the further consequence of increasing the exercise of ASIO's special powers.
- That these offences are not necessary, particular in light of the recent enactment of control order and preventative detention order regimes.
- That the penalties specified for these offences are excessive and do not reflect the actual seriousness of the offences.
- That the penalties involved are particularly disproportionate where a terrorist act does not occur.
- That the penalties for these offences should be substantially reduced.

Listing Terrorist Organisations

- That the practice of listing organisations is undemocratic and a departure from fundamental principles of criminal law.

- That the practice of listing organisations unduly impinges on freedom of association.
- That the practice of listing organisations is neither a necessary nor effective mechanism for combating politically, religiously and ideologically motivated violence.
- That the criteria for listing organisations are overly expansive and therefore listing has the potential to be applied to an excessively broad range of organisations.
- That the listing regime affords the Attorney-General very wide discretion, thereby creating the risk that the power may be exercised in an inconsistent, discriminatory and politically motivated manner.

Terrorist Organisation Offences

- That the definition of 'terrorist organisation', which gives rise to the offences, is overly broad thereby making the offences themselves very expansive.
- That the terms involved in defining these offences are themselves generally vague, overly broad and ambiguous.
- That the offences should require some nexus between the offence and a terrorist act, which at present they do not.
- That the offences should not include mere recklessness.
- That the penalties specified in relation to the offences are excessive.
- That the offences are prone to discriminatory application and have been applied disproportionately to Muslim individuals.
- That extended geographical jurisdiction should not apply to these offences.

Financing Terrorism

- That the penalty of life imprisonment is excessive given that this offence is intended to prosecute persons who act recklessly.
- That the offence does not require a nexus between the financing and an actual terrorist act and therefore is inordinately broad.

- That this offence exceeds the legislative purpose of deterring and punishing acts of terrorism.
- That this offence is no longer required, given the recent introduction of the offence of 'Financing a Terrorist'.

Treason

- That this offence is not appropriate to a modern, democratic society.
- That this offence may be used to quash political dissent or opponents of government policy.
- That this offence is no longer required given existing criminal law and recent amendments to Australian sedition law.
- That the penalties specified in relation to these offences are excessive.

Listing and Proscription of Organisations for Asset Freezing

- That the regime for listing/proscribing organisations should incorporate a mechanism for judicial determination or review of the decision to list/proscribe.
- That the processes for listing/proscription should be transparent and the decision-maker accountable so as to counter politically motivated decision-making.

Dealing With Assets of Terrorist Organisations

- That these offences exceed the intention of the relevant United Nations resolution by severing the connection between the 'dealings' and knowing involvement in an act of terrorism.
- That the Minister's discretion to authorise certain dealings is open to being exercised in an inconsistent, discriminatory or politically motivated manner.

INTRODUCTION

This submission relates to the operation, effectiveness and implications of the following legislation:

- *Security Legislation Amendment (Terrorism) Act 2002*
- *Suppression of Financing of Terrorism Act 2002*
- *Criminal Code Amendment (Terrorism) Act 2003*

We do not discuss the *Border Security Legislation Amendment Act 2002*, the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* and the *Telecommunications Interception Legislation Amendment Act 2002*, as these instruments are beyond the scope of our knowledge and expertise.

The Federation is of the view that the above legislation should be repealed due to numerous of serious concerns, which are detailed below. We have, however, also included commentary and recommendations on the substance of the above legislation. We hope this will assist the Committee in its deliberations in the event that it is minded to recommend that the above legislation continue to apply but with certain amendments.

GENERAL CONCERNS

The Federation has a number of broad concerns regarding the above legislation and indeed the government's legislative response to the issue of politically and religiously motivated violence in general.

Necessity

Firstly, the Federation is of the view that a legislative response to politically and religiously motivated violence will not function as a deterrent to such activity. The very nature of politically and religiously motivated violence is such that perpetrators are unlikely to be deterred by the threat of punitive measures. It is by its very nature underground, covert and illegal. It is our view that supplementary legislative mechanisms do not serve to combat terrorist activity any more than existing the criminal law is already able to. It would therefore be

more beneficial seek to address the root causes of terrorist activity rather than to pursue increased punitive and restrictive legislative regimes.

While the above security acts relating to terrorism do create additional mechanisms for prosecuting terrorism offences after they occur, we submit that existing criminal law is equally adapt for that task. A case in point is that of Jack Roche who was prosecuted and convicted in 2004 for his involvement in a plot to bomb the Israeli Embassy in Australia. In that case Mr Roche was successfully tried and convicted under pre-existing criminal legislation, using conspiracy offences and offences relating to damage using explosives. In our view, the necessity of the above Acts seems particularly questionable when one considers that we already have criminal legislation which is capable of dealing with many of the issues raised by politically and religiously motivated violence.

Justification

We are also concerned that the above legislation is unjustifiable in light of the extraordinary nature of the Acts themselves. It is our understanding that the national terrorism threat level, as assessed by the Australian Security Intelligence Organisation ('ASIO') has remained at 'medium' level since 11 September 2001, notwithstanding various overseas terrorism events in the intervening period. This means that a terrorist act 'could' occur in Australia but is neither 'likely' (which would attract a 'high' level assessment) nor 'imminent' (which would attract an 'extreme' level assessment). Given this assessment, we do not believe that an extreme legislative response is required. We take the view that extraordinary legislation, such as the above Acts, is particularly unjustifiable in a context where our national security agencies are only able to indicate that a terrorist act may, or similarly may not, occur.

Proportionality

While the issue of politically and religiously motivated violence may be a highly pressing concern in the global context, any domestic legislative response must be proportionate to the risk of such activity occurring in Australia. In light of the level of the threat of terrorist activity occurring in Australia, we believe that all of the above legislation represents an excess of executive power and an inordinate curtailment of civil liberties – that is, a disproportionate response. All of the above Acts, to varying degrees, increase the state's capacity to restrict and monitor the behaviours and associations of individuals and community groups. In some cases this includes restrictions that represent a departure from fundamental legal and democratic principles. Further, they provide for severely punitive measures where citizens and groups fail to abide by those restrictions.

Discriminatory Application

The Federation is deeply concerned that the above acts are prone to being applied in a discriminatory manner. Until recently, only Muslim organisations have been listed and proscribed and only Muslim individuals have been subject to prosecution for terrorism offences. Despite the extraordinary breadth of the terrorism offences and the expansive definition of 'terrorist act', these offences have not been utilised to prosecute activities of non-Muslim groups which arguably fall within their ambit. For example, there has been no indication that the security acts relating to terrorism might be used to prosecute white-supremacist and neo-Nazi groups, particularly with respect to their involvement in the recent Cronulla riots. While the Acts may not be discriminatory in their content, it would seem that they are discriminatory in their impact. This issue will be discussed in further detail below in regards to specific legislative provisions.

CRIMINAL CODE ACT 1995 (CTH)

The *Criminal Code Act 1995 (Cth)* has been amended by the following legislation:

- *Security Legislation Amendment (Terrorism) Act 2002*
- *Criminal Code Amendment (Terrorism) Act 2003*

Amongst other things, these amendment acts define a 'terrorist act', allow for the specification of terrorist organisations by regulations and create a number of offences relating to terrorist acts, terrorist organisations, financing terrorism and treason.

Definition of 'Terrorist Act'

Broadly, a 'terrorist act' is defined as an action or threat of action done or made with

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

Further, to be a 'terrorist act', the action must either cause or threaten serious physical harm to a person, serious property damage, a person's death, endangerment to a person's life, a serious risk to public health or safety, or serious interference with an electronic system.[1]

An exception has been created for advocacy, protest, dissent or industrial action that is not intended to cause death, physical harm, endangerment to a person or a serious risk to public health or safety.[2]

[1] Paragraph 100.1, Schedule 1, *Criminal Code Act 1995 (Cth)*
[2] ibid

The above definition is operative in the *Border Security Legislation Amendment Act 2002*, the *Security Legislation Amendment (Terrorism) Act 2002*, the *Suppression of the Financing of Terrorism Act 2002* and in the *Criminal Code Amendment (Terrorism) Act 2003*. It should also be noted that it is an offence under the *Criminal Code Act 1995 (Cth)* ('the *Criminal Code*') to commit a terrorist act. [3]

Breadth of Definition

The Federation is of the view that this definition is overly broad and consequently may be applied to an inordinately wide array of acts and threats of acts. This is of particular concern given that all terrorism offences (discussed below) and the criteria for identifying and specifying organisations as terrorist organisations derive from this key definition. It is of even greater concern since the recent passage of the *Anti-Terrorism Act (No 2) (Cth) 2005* which itself broadens further the definition of a terrorist organisation for the purpose of specification as such.[4] This new legislation also amends the *Criminal Code* to allow control orders to be made in relation to persons where the order would substantially assist in preventing a terrorist act.[5] In addition, the new legislation provides for preventative detention orders to be made in relation to persons where it is suspected that they will engage in a terrorist act or posses a thing connected with the preparation for or engagement of a person in a terrorist act or has done an act in preparation for or planning a terrorist act.[6] In this regard the overly broad definition of 'terrorist act' makes more people liable to be subject to control orders and preventative detention orders. Bearing in mind the highly intrusive and extraordinary nature of these orders, the overly broad definition of 'terrorist act' requires urgent refinement and clarification.

[3] Paragraph 101.1, ibid
[4] Paragraph 10, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*
[5] Paragraph 104.4, Schedule 1, *Criminal Code Act 1995 (Cth)*
[6] Paragraph 105.4, ibid

Mere Threats

The breadth of this definition is substantially exacerbated by the inclusion of the mere 'threat' of the designated activities. This may be illustrated by looking at how a threat as 'terrorist act' may be applied in the context of the terrorism offences. A 'terrorist act' may be constituted by a politically, religiously or ideologically motivated threat to inflict some violence or damage for the purposes of coercion or influence. When applied within the terrorism offences, a terrorism offence may arise where a person does any act preparatory to or in planning for making the threat. This effectively creates offences that amount to thought crimes. For example, where a person simply contemplates making a threat of property damage for political reasons and has a discussion with another person regarding whether this is a good idea and whether that other person would hypothetically wish to be involved, a 'terrorist act' may be committed. It is unspecified in the definition of 'terrorist act' that the threat must be made publicly or broadcast in some manner. On the legislation as it stands, it may be that the threat is simply expressed to another individual. Even if it is deemed that a 'terrorist act' has not occurred here, the act of having that conversation may itself constitute doing an act preparatory to a terrorist act. These offences may be found regardless of whether the property damage occurs or would ever have in fact occurred, given the preliminary nature of the person's enquiry. It may even be that ultimately the threat itself is never made public or is never actually used to coerce or influence. While it may be perceived that prosecution of the offences in this example would be unlikely, nonetheless, the definition of 'terrorist act' would permit this to occur. It is also important to recall that evidence of potentially theoretical discussions regarding suicide bombing and 'jihad' have been used as evidence in the ongoing prosecution of Abdulla Merhi and others in Victoria to demonstrate that the individuals involved were members of an organisation that was planning/preparing a terrorist act. The Federation believes that this type of prosecution, which effectively creates thought crimes, has no place in a modern democracy and represents a massive excess of state power. This kind of inordinate interference into the liberty of the individual is particularly unjustified

where it is unclear that an act of violence, endangerment or damage has been committed, would ever be committed or would even be threatened in any public sense.

With such an expansive nature, this definition of 'terrorist act' goes beyond commonly accepted notions of what constitutes an act of terrorism. It may be argued that heightened community fears of terrorism give the government a mandate to legislate in relation to such acts. Where, however, the resulting legislation goes far beyond the acts that the public are concerned about, it is our view that any such mandate has been exceeded.

Criminalising Political, Religious and Ideological Acts

A further concern is that the definition of 'terrorist act' necessarily criminalises politically, religiously and ideologically motivated acts only, particularly insofar as committing a 'terrorist act' is an offence in itself. In this sense this definition is particularly prone to being applied in a discriminatory manner or in a way that suppresses political dissent. This also raises the important question of whether the motivation for the act is actually a relevant factor and in fact a suitable matter for legislative application. In our view, it is the action itself that poses a social problem, regardless of the motivation for that act. It follows from this that in fact existing criminal law definitions and offences should suffice to address terrorist activity. An act of property damage or endangerment to persons may be prosecuted under standard criminal legislation. The definition of 'terrorist act' simply creates additional offences that incorporate specific motivational elements while the actions being prosecuted are the same as those under criminal law. We are concerned that, politically and in the media, terrorist activity has been imbued with some special status that is unjustified and that is politically expedient. This mythology seems to have also permeated the legislative arena. Designating terrorist activity as a special kind of offence does not necessarily assist in dealing with terrorism as a problem. In our submission, the widespread

quasi-mystical regard for politically and religiously motivated violence should not be pandered to by the legislature nor should it be legislatively enshrined.

Exceptions Relating to Protest, Advocacy etc

The Federation is further concerned that certain qualifications have been placed on the exceptions relating to protest, advocacy, dissent and industrial action. This creates the danger that these activities may, under certain circumstances, be regarded as terrorist activity. Should any of the excepted outcomes such as death or endangerment result from protest, advocacy, dissent or industrial action those outcomes could be the basis for criminal prosecution under existing criminal law. It is not necessary that those involved be prosecuted as the perpetrators of an act of terrorism. In this regard, the definition of 'terrorist act' as it stands serves to conflate dissenting political activity and activism with terrorism in certain situations. While the those situations may themselves pose a particular social problem, for example where death arises from some sort of protest or industrial action, it is not necessary to equate political dissent with terrorism in such cases. Furthermore, in our view, this type of equation is under no circumstances appropriate in a truly democratic society.

As stated above, it is our view that all of the above security acts relating to terrorism should be repealed. If, however, the Committee intends to recommend their continued operation, we recommend that the definition of 'terrorist act' be significantly refined. It should be amended to apply only to an action, rather than the mere threat of an action. It should further be amended to provide a complete exception for advocacy, protest, dissent and industrial action.

Terrorism Offences

The *Criminal Code* has been amended to provide for the following terrorism offences:

- committing a terrorist act;[7]
- providing or receiving training connected with terrorist acts;[8]
- possessing things connected with terrorist acts;[9]
- collecting or making documents likely to facilitate terrorist acts;[10]
- doing an act in preparation for or planning terrorist acts.[11]

Breadth of Definitions and Terms

The Federation is concerned that the broad definition of 'terrorist act', as discussed above, inordinately increases the range of conduct covered by the above terrorism offences. As the definition of 'terrorist act' is extremely expansive, so too is each terrorism offence which hinges on that definition. This has the effect of rendering many more people liable to prosecution for terrorism offences than would otherwise be, were the definition more precise and restrictive.

Further, as the definition of 'terrorist act' itself includes a threat of politically, ideologically or religiously motivated acts, there is not necessarily a nexus between the above offences and acts of violence. Generally speaking, the legislation is silent on what kind of nexus there need be between the offending behaviour and a terrorist act. For example, the offence of doing an act in preparation for a terrorist act does not specify what kind of connection there must be between the preparatory act and the terrorist act. 'An act in preparation' is an extremely vague term and may encompass an extremely wide array of behaviour, much of which would only be indirectly linked to the terrorist act in question. What kind of link there need be is not clear on the legislation, which gives rise to the possibility that even tenuously linked preparatory acts may be subject to prosecution. Furthermore, there may be no nexus between the offence and an actual act of politically, religiously or ideologically motivated violence. The

[7] Paragraph 101.1, Schedule 1, *Criminal Code Act 1995 (Cth)*
[8] Paragraph 101.2, ibid
[9] Paragraph 101.4, ibid
[10] Paragraph 101.5, ibid
[11] Paragraph 101.6, ibid

offence in this case may include doing an act that is simply preparatory for making a threat of politically, ideologically or religiously motivated violence. In our view, there should be a close nexus between the above offences and acts of terrorist violence. Insofar as it lacks this close nexus, the above regime of terrorism offences exceeds the legislative purpose of preventing acts of terrorism in Australia and thereby represents a disproportionate response to the threat of terrorism in Australia.

The breadth of some of these offences is increased by the vagueness of the terms used. In the offences relating to providing/receiving training, possessing things, and collecting/making documents the offending actions must be 'connected with preparation for, the engagement of a person in, or assistance in a terrorist act'.[12] It is unclear what might constitute such a connection or the degree of connection required. The title heading of the offence of collecting or making documents seems to suggest that in that case the collection or production of documents must be 'likely to facilitate terrorist acts'.[13] This indication, however, is not contained in the actual statutory provision and so the degree of connection required ultimately still remains unclear. With respect to this particular offence it is also unclear what might constitute 'collection' of documents. As noted above, we are concerned about the expansive nature of these offences as this widens the class of people that may be liable to prosecution and also has the effect of making this particular part of the legislation a disproportionate response to the threat of terrorism in Australia. The ambiguous terms used to describe each offence simply heightens this problem.

ASIO's Special Powers

The breadth of these offences also impacts on ASIO's special powers, which relate to the gathering of intelligence in relation to terrorism offences. Pursuant to Part III, Division 3 of the *Australian Security Intelligence Organisation Act 1979*

[12] Paragraph 101.2, 101.4 and 101.5, ibid
[13] Paragraph 101.5, ibid

(Cth) ASIO may question non-suspects for periods up to 24 hours where it is reasonably believed that this will 'substantially assist the collection of intelligence that is important in relation to a terrorism offence.'[14] Further ASIO may detain a non-suspect for up to 7 days were it is believed on reasonable grounds, *inter alia*, that if the person is not immediately detained the person may alert a person involved in a terrorism offence that the offence is being investigated.[15] Insofar as the above terrorism offences encompass an exceedingly wide array of acts and behaviours, ASIO's special powers are easily triggered and therefore a broad class of individuals may be subject to questioning and detention. It is widely accepted that ASIO's special powers already amount to a departure from fundamental legal and democratic principles of, amongst other things, habeas corpus and the principle that non-suspects should be free from arbitrary state interference, (although whether this departure is justified has been the subject of much debate). We are therefore deeply concerned that, due to the extraordinarily broad range of terrorism offences, these special powers may be applied to a very broad class of individuals. While we acknowledge that ASIO's powers have not been used so widely to date, the current terrorism offences regime does allow for their widespread use and therefore should be amended to ensure that this problem does not arise in the future.

Necessity

The Federation would also question the necessity of the above offences in relation to the prevention of terrorist acts in Australia. As discussed above, it is our view that a legislative response is an inherently flawed means of dealing with the threat of terrorist violence. Furthermore, in relation to the terrorism offences, we would argue that recent legislative amendments have rendered them somewhat redundant insofar as deterrence and prevention are concerned. As discussed above, as a result of the *Anti-Terrorism Act (No 2) 2005 (Cth)* we now have regimes of control orders and preventative detention which are designed to

[14] Section 34D, *Australian Security Intelligence Organisation Act 1979 (Cth)*
[15] Section 34F, ibid

prevent terrorist acts. The above terrorism offences are primarily aimed at acts occurring prior to the commission of a terrorist act. As there are now new mechanisms for preventing terrorist acts, it is important to examine whether such a broad array of terrorism offences is still required. In our view, insofar as the above offences are designed to intercept persons in the process of committing terrorist acts, they are no longer justified.

Severity of Penalties

We do recognise that these offences also have a punitive aim, however, we submit that the penalties specified in the legislation are excessive and the range of conduct punishable overly broad, given the severity of penalty involved. These offences all have penalties of or exceeding 10 years imprisonment. It is our submission that the penalties specified in this legislation are particularly excessive where recklessness is an element of the offence rather than actual knowledge.

Where a Terrorist Act Does Not Occur

Given the breadth of the above offences, the Federation is further concerned that all of the above offences may be made out even where a terrorist act does not occur. We are particularly concerned regarding instances where a lesser offence of recklessness may be made out and the terrorist act in question is a threat only. Where the terrorist act in question is comprised of a mere threat and that threat is not carried out, it is our view that a prosecution which may lead to a very severe penalty is not a proportionate response. It would be excessive, for example, to prosecute the offence of reckless possession of a thing connected with making a threat of a terrorist act, which has a maximum penalty of 10 years imprisonment, where the threat in question was never actually made.

While it is our recommendation that the above offences be repealed, if this part of the legislation is to continue we recommend that the offences be significantly clarified and narrowed to address the concerns we have raised above.

Listing Terrorist Organisations

As amended by the *Criminal Code Amendment (Terrorism) Act 2003*, Paragraph 102.1 of the *Criminal Code* defines a terrorist organisation as an organisation that is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act) occurs.

As noted above, this definition hinges on the definition of 'terrorist act'.

There are two consequences where an organisation that is found to meet the definition of a 'terrorist organisation'. Firstly, that organisation may be 'specified' as a terrorist organisation in regulations made by the Governor-General ie 'listed' as a terrorist organisation and secondly, a series of terrorism offences arise in relation to that organisation.

<u>Listing Organisations</u>

In order for the Governor-General to make regulations specifying a particular organisation as a terrorist organisation the relevant Minister, that is the Attorney-General, must be satisfied on reasonable grounds that:

- the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).

More recently the latter part of this definition has been amended by the *Anti-Terrorism Act (No 2) 2005 (Cth)* to read 'whether or not a terrorist act occurs' rather than referring to a specific terrorist act. This definition has also been amended so that it may be applied where an organisation 'advocates the doing of a terrorist act'.

When the *Criminal Code* was originally amended by the *Security Legislation Amendment (Terrorism) Act 2002*, which is subject to this review, it was also required that:

- the Security Council of the United Nations had made a decision relating wholly or partly to terrorism; and
- the organisation was identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates.

These additional criteria were subsequently repealed by the *Criminal Code Amendment (Terrorist Organisations) Act 2004*.

The Federation has a number of concerns regarding the listing of organisations and in particular the definition of a 'terrorist organisation' and how this definition is applied. We note that the listing and proscription of organisations under the *Suppression of the Financing of Terrorism Act 2002* will be discussed later in this submission.

General Concerns Regarding the Listing of Organisations

The Federation is concerned about the practicing of listing organisations as it creates offences in relation to an organisation regardless of the specific activities of that organisation in Australia at a given point in time. Once listed as a terrorist organisation, the consequences of being a listed organisation continue regardless of what activities that organisation does or does not undertake. This effectively functions as a legislative 'black list'. In our view, this is not an appropriate legislative practice in a democratic society. The practice of listing organisations removes the nexus between criminal prosecution and actual criminal activity. For example, a person who provides training to a listed organisation will have committed an offence, regardless of whether that organisation has been involved in some sort of criminal activity under Australian law and regardless of whether the training provided relates to some sort of criminal activity. This power moves away from a fundamental principle of criminal

law, that is, of assigning criminal responsibility to individuals based on their actions and intentions in causing harm to the community. Instead, an individual will attract criminal liability based solely upon the activities of an organisation.

We are also concerned that these provisions are inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),[16] most notably those obligations relating to freedom of association (Article 22). We suggest that the listing power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security, particularly in light of the threat of ideological and political violence.[17]

Furthermore, it is also not clear that the practice of listing organisations is a necessary legislative mechanism or one that serves to combat politically and religiously motivated violence. Firstly it would seem unlikely that listing an organisation would actually have deterrent effect where serious terrorist violence is concerned. As noted above, a legislative response to politically and ideologically motivated violence is unlikely to prevent such activity given the inherently extra-legal nature of the activity. In addition, it is our view that existing criminal law offers sufficient protection against politically and ideologically motivate violence. If listed organisations are responsible for the kinds of politically and ideologically motivated violence alleged, then the offences reasonably required to protect the public from such actions are already available to law enforcement authorities, in the following ways:

1. Through 'ordinary' criminal law. Murder, kidnapping, intentionally causing serious injury and robbery *inter alia* are already serious offences. Deliberately assisting in these acts would fall under offences such as conspiracy to commit such acts.

[16] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.
[17] Article 22(2), *International Covenant on Civil and Political Rights*.

2. Through the terrorism offences set out in Paragraph 101 of the *Criminal Code*.
3. If the organisation is not listed, under the same terrorist organisation offences (provided that the prosecution is able to show that an organisation meets the definition of 'terrorist organisation' under Paragraph 102.1 of the *Criminal Code*).

It is, therefore, difficult to see how listing an organisation would assist matters other than in cases where the link between the accused or the relevant organisation and the 'terrorist act' could not be established to the satisfaction of a court. In such cases we submit that the imposition of criminal liability is not justified in any event.

We also note that there is no evidence to suggest the practice of listing organisations was necessitated by an inability to prosecute those involved with these organisations in Australia, as would be evidenced by failed prosecutions.

Broad Criteria for Listing

The Federation is also of the view that the criteria for listing organisations is overly broad, which in turn creates issues of inconsistent application and excessive Ministerial discretion. As noted above, the determinative criterion for listing is whether an organisation fits the legislative definition of a 'terrorist organisation'. This definition is extremely general. Firstly, it hinges on the definition of 'terrorist act' which itself covers an expansive array of acts and threats of acts (as discussed above). Secondly, an organisation need only be directly or indirectly engaged in preparing, planning, assisting in or fostering such a terrorist act to be a terrorist organisation according to the legislative definition. Further, it is important to recall that this definition has been made even more expansive due to the *Anti-Terrorism Act (No 2) 2005 (Cth)* which, as noted above, also defines a terrorist organisation as one which 'advocates the doing of

a terrorist act (whether or not a terrorist act has occurred or will occur)'[18]. In this context 'advocates' may include directly or indirectly counselling or urging a terrorist act or directly praising the doing of a terrorist act where this might have the effect of leading a person to engage in a terrorist act.[19] Given the broad statutory definitions of 'terrorist organisation' and 'terrorist act', a remarkably wide range of groups may fall within the ambit of the listing regime. In a modern democratic society it is clearly undesirable that there be this kind of listing of organisations, particularly insofar as it restricts citizens' freedom of association. If, however, it is accepted that such a practice is required due to certain exceptional circumstances certainly that practice should be restricted and clarified to impinge on individual freedoms as little as possible. Here the opposite has occurred. The criteria for listing organisations is so broad that it creates the possibility that a very large number of organisations may be listed as terrorist organisations. In our view this legislative response is not commensurate with the level of terrorist threat in Australia.

Wide Ministerial Discretion

As a further consequence of these broad definitions the Attorney-General is afforded an extremely wide discretion in determining which organisations should be listed as terrorist organisations. This is exacerbated as the legislative regime does not provide for judicial determination of which organisations should be listed nor any mechanism for substantial judicial review on the merits of a decision. An organisation facing listing has no opportunity to make a case against the proposed listing. Once an organisation is listed, this does trigger a review of the decision by the Parliamentary Joint Committee on Intelligence and Security (formerly ASIO, ASIS and DSD), however the outcome of this review is not necessarily binding on the Attorney-General and does not function as an appeals process. The Attorney-General's decision to list an organisation may be appealed pursuant to the *Administrative Decisions (Judicial Review) Act 1977*.

[18] Paragraph 10, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*
[19] Paragraph 9, ibid.

This offers limited merits review, however, given the broad criteria for listing we imagine that it is unlikely that a decision to list would be found unlawful.

Given the wide Ministerial discretion and lack of judicial review, it is also crucial that this power be exercised in an open and transparent manner in order to ensure due process, executive accountability and public confidence in the executive. To achieve this there should be public disclosure of all criteria, evidence and processes involved in its exercise.

In our submission, the information relied on by ASIO in recommending that an organisation be listed as a terrorist organisation should be publicly available. Furthermore, the credibility of this evidence should be publicly demonstrable. At present, there is no publicly available means of testing the reliability of the supporting information obtained and relied on by ASIO. In addition, the specific criteria applied by the Attorney-General in deciding whether or not to list an organisation should be publicly known. We further submit that the supporting information and process of applying the criteria to that information should be publicly available in each individual case where this power is exercised.

The Federation is concerned that the broad criteria for listing organisations, the lack of judicial review and the lack of transparency combine to create a massive excess of executive power. By giving the Attorney-General a very broad the decision-making power and failing to provide for judicial review or transparent processes, the legislative regime gives rise to the possibility that the power to specify organisations may be misused or abused for political ends.

Inconsistent Application

We further submit that these broad definitions and wide-reaching Ministerial discretion have actually allowed inconsistent application of the listing power to occur. To date, the Minister has listed 19 organisations listed as terrorist organisations pursuant to this legislative regime. Until 15 December 2005 when

the Kurdistan Workers Party (PKK) was listed, all of these organisations were Muslim organisations. Given the very broad criteria, which would allow for the listing of a very large number of organisations, it is particularly concerning that the Minister's discretion has been exercised in a way which clearly targets Muslim organisations only.

The discriminatory exercise of this power is further evinced by its inconsistent application .We refer particularly to a research note, *The Politics of Proscription in Australia,* recently published by The Parliamentary Library.[20] This research illustrates, by way of examples, the arbitrary listing of organisations thus far. There has been listing of organisations that have no links to Australia, while other organisations that do have links with Australia have not been listed. For example, in the case of the listing and proscription of the Palestinian Islamic Jihad, ASIO expressly acknowledged that there were no financial or other links to Australia and that the organisation's proscription and listing was largely prompted by its proscription in other countries.[21]

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

It is therefore our view that that the provisions allowing the listing of organisations as terrorist organisations should be repealed. If they are to continue, however, it is imperative that the criteria for listing be clarified as suggested above and that mechanisms to ensure transparent and reviewable decision-making be inserted.

[20] Nigel Brew, *The Politics of Proscription in Australia*, Parliamentary Library Research Note No 63/2003-04 (2004).
[21] PIJ Report [3.15]

Terrorist Organisation Offences

The *Criminal Code* provides for a number of offences relating to terrorist organisations. These offences arise where an organisation has been listed, as discussed above, or where an organisation fits the definition of a terrorist organisation.

The offences which follow are that of

- directing the activities of a terrorist organisation;[22]
- membership of a terrorist organisation;[23]
- recruiting for a terrorist organisation;[24]
- giving training to or receiving training from a terrorist organisation;[25]
- getting funds to or from a terrorist organisation;[26]
- providing support to a terrorist organisation.[27]

A further offence of associating with members of a terrorist organisation also arises, however, this offence is not provided for under the legislation currently under review and therefore will not be specifically discussed herein.[28]

Definition of a Terrorist Organisation

Given the number of serious offences which arise in relation to terrorist organisations, the Federation is concerned that the definition of 'terrorist organisation' is overly broad. This has the effect of significantly expanding the class of individuals who might be liable to prosecution.

[22] Paragraph 102.2, Schedule 1, *Criminal Code Act 1995 (Cth)*
[23] Paragraph 102.3, ibid
[24] Paragraph 102.4, ibid
[25] Paragraph 102.5, ibid
[26] Paragraph 102.6, ibid
[27] Paragraph 102.7, ibid
[28] Paragraph 102.8, ibid

As noted above, a terrorist organisation is defined as one which is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs).[29]

This is an extremely expansive definition and therefore may expose a very large number of organisations to being classed as terrorist organisations. Consequently the number of people that may be prosecuted for terrorist organisation offences, such as being members of such organisations or providing support to such organisations, is also dramatically increased. It may be the case that a person may be prosecuted for recruiting for an organisation that at some point has simply indirectly fostered the doing of a terrorist act. The organisation in question may have never itself engaged in any act of terrorism and the legislative definition does not necessarily require that the 'fostering' concerned be intention. Further, the person involved may have only been reckless as to the fact that the organisation would fall under the definition of a 'terrorist organisation'. If this is the case, a very large number of people may be liable to similar such prosecutions.

It is also unclear what types of organisational acts would be required to make an organisation fall within this definition. Would the acts of one member of an organisation which fall within the definition thereby render the whole organisation liable to be found a terrorist organisation? Would it need to be a director of the organisation or might it simply be a member? For example, if a prominent member of an organisation indirectly assisted in the doing of a terrorist act, would that render all who receive training from that organisation liable to prosecution for receiving training from a terrorist organisation? The individuals receiving training might be unaware of the conduct of that particular individual (albeit recklessly so) or they may not feel that the individual concerned is representative of the organisation. Nonetheless, the legislation does not make it clear whether the acts

[29] Paragraph 102.1, ibid

of one member of an organisation are sufficient to cast the organisation as a 'terrorist organisation' or not.

It is also unclear from the legislation what is deemed to constitute an 'organisation'. The membership offences currently being prosecuted in Victoria are a useful illustration of this ambiguity. From all accounts, the 10 individuals concerned are being prosecuted for being members of a terrorist organisation. In their case however it seems that the 'organisation' concerned was not a formal, registered organisation and did not even have a name. This raises the question of what kind of arrangements are required to constitute an 'organisation'. In this case the types of matters raised included group excursions and a pooling of funds. These factors, however, may be indicative of a great many things and not necessarily of an intention to form an 'organisation'. For example, it is a common practice in Muslim communities for friendship groups to pool money into what is called a 'sandooq' which functions as a loans system in lieu of conventional bank loans. The Federation is concerned that the lack of specificity in the definition of 'terrorist organisation' permits the prosecution of individuals for offences that should not truly apply to them. We are also concerned that, because this kind of sloppy prosecution is facilitated by the legislation, the terrorist organisation offences may become something of a 'catch-all' that allow prosecutions to take place where no evidence relating to actual terrorist acts has been obtained by police. In our view, it is likely that this has occurred in the on-going Victoria prosecutions involving Shane Kent and Amer Haddara, two of the above 10 suspects who are both accused of being members of a terrorist organisation. In their recent bail hearing, the presiding Magistrate described the police case as 'a work in progress', however His Honour elected to rely on police assurances that more evidence did exist against the suspects.[30] To date, this evidence has not been forthcoming and in fact the prosecution brief has been delayed by two months. This raises the serious concern that the police have proceeded with a

[30] His Honour Reg Marron, as quoted in 'Bail Denied for Terror Suspects', *The Age*, 22 December 2005

prosecution without adequate evidence and that the broad terrorist organisation offences have facilitates this. This is not without serious consequences, the suspects being remanded in solitary confinement until the matter is finalised.

Nexus Between the Offence and a Terrorist Act

This raises a further concern that the terrorist organisation offences do not require a nexus between the offence and an actual act of politically, religiously or ideologically motivated violence. The above offences may arise where no actual terrorist act has taken place and possible was not even planned. It may that the organisation in question has somehow simply indirectly 'fostered' a terrorist act. Members and associates of the organisation would still be liable to prosecution. The offences themselves also do not require a connection between the offence and an act of terrorism. For the offence of receiving training from a terrorist organisation, it is not required that the training received be directly linked to a terrorist act. It may be, therefore, that the training received pertains to a perfectly innocent purpose, and yet the training recipient may still be liable to prosecution. Where the aim of this legislation is to deter and to punish acts of terrorism, we submit that prosecuting individuals who are only tenuously linked to acts of terrorism at best, is beyond the scope of this legislative purpose. While it may be unlikely to occur in practicality, we are concerned that the legislation has scope to allow this kind of prosecution at all, for it means that there is the potential that at some point it may be used to do so.

Recklessness

This issue is compounded by the fact that all of the above offences, apart from the membership offence, may be prosecuted where the individual concerned is merely reckless as to whether the organisation in question is a terrorist organisation. That is, actual knowledge is not required to commit the offence. The Federation does not accept that prosecuting people for their reckless involvement with organisations, which themselves may not have actually been involved in a terrorist act, is necessary to prevent acts of terrorism in Australia.

Further, this would seem to be an excessively draconian legislative response in light of the level of terrorist threat in Australia as discussed above.

Excessive Penalties

A further excess are the sentences specified in relation to the above offences. All of these offences attract very serious penalties, ranging from a maximum of 10 years imprisonment for membership to 25 years imprisonment for all of the other offences where committed with actual knowledge. The severity of the penalties involved are particularly worrying where the breadth of these offences is considered. For example, the offence of providing or receiving training does not require that the training relate in any way to a terrorist act. That being the case, it is possible for a person to train a supposed 'terrorist organisation' in anything from first aid to accounting practices and receive a term of imprisonment of 25 years for so doing. In our view the penalties that flow from these offences are overwhelmingly excessive given the breadth of the offences and the absence of a requirement that there be a nexus between the offences and actual terrorist violence.

Discriminatory Application

The Federation is concerned that these particular offences have and will continue to be applied disproportionately to Muslim individuals. In our current social context, media and political manoeuvring has been such that the term 'terrorism' has become largely associated with Muslim organisations. Despite the definition of 'terrorist organisation' being extremely broad, it has only been applied to Muslim organisations to date, with one exception. It is our concern, that the acts of a Muslim organisation may be more likely to render it labelled a 'terrorist organisation' than the same acts would if they were committed by a non-Muslim organisation. For example, where a Muslim organisation somehow indirectly fosters the doing of a terrorist act it is more likely to be viewed as a terrorist organisation itself than would, for example, a secular or a Christian organisation which did the same thing. The corollary of this is that Muslim individuals are

much more likely to be prosecuted for the above offences that their non-Muslim counterparts where both have the same, highly tenuous link to specific acts of politically, religiously or ideologically motivated violence. This has clearly been illustrated insofar as there has been no indication that members of neo-Nazi or white supremacist groups involved in the Cronulla riots would be prosecuted for terrorist organisation offences although it seems clear that their organisations would fall under the required definition.

Extended Geographical Jurisdiction

The extended geographical jurisdiction which applies to these offences means that it does not matter whether the offences take place in Australia whether the consequences of the offences occur in Australia. This further expands the class of people that may be liable to prosecution. It is also deeply concerning that people may be prosecuted for having involvement with an organisation in an overseas jurisdiction where, in that jurisdiction, the organisation is not classed as a terrorist organisation. An organisation may fall within our, extremely broad, definition of a terrorist organisation but may not be so defined overseas. A person who provides funds to that organisation whilst overseas, for example, may be later prosecuted under Australian law even if when they gave the funds they did not know that the organisation would be classed as a terrorist organisation under Australian law. The person may have known about the activities of the organisation that would attract this classification but without knowledge of the classification system, the person had know way of knowing that an offence was being committed. This is particularly worrying in the case of migrants to Australia, who may have had no way of knowing that they were contravening Australian legislation and yet they may be subject to prosecution for contraventions which occurred before they arrived here or perhaps before they even considered entering Australia.

Lack of Specificity

The Federation is also concerned that these offences lack specificity and seem to have been enacted without consideration of the possible consequences that may arise, even if they are unlikely to. For example, in the offence relating to getting funds to or from a terrorist organisation an exception has been created to allow lawyers to receive money for the purposes of providing legal representation. There is not further exception, however, to cover other service providers. The legislation also does not require a link between the funds provided or received and an actual terrorist act. The funds could therefore relate to all manner of things, including ordinary and perfectly innocent goods and services provided and received. This has the potential to expose an array of people to prosecution even where these individuals are not connected to any terrorist act. This example typifies the way the above offences may be applied to individuals

Given all of the above concerns, the Federation submits that these offences should be repealed. If, however, they continue to apply we recommend that they be amended to require a link between the offence and an actual act of terrorism. We also recommend that the offences require actual knowledge only, rather than mere recklessness. The offences should all be amended and made more specific so as to minimise the class of people that may be liable to prosecution and the penalties should be reduced so as to better reflect the seriousness of the offences and their link to actual terrorist violence. We further recommend that the offences apply only to conduct occurring in the Australian jurisdiction. It is our intention that these recommendations be applied in combination with our recommendations relating to the definition of ‘terrorist organisation’ and ‘terrorist act’ as outlined above.

Financing Terrorism

The *Criminal Code* has also been amended to create an offence of 'financing terrorism'. This offence is committed where a person intentionally provides or collects funds and is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.[31] The potential penalty for this offence is life imprisonment.[32] Extended geographical jurisdiction applies to the offence so it may be prosecuted even if the offence takes place outside of Australia.[33]

Excessive Penalty

The Federation is concerned that a potential sentence of life imprisonment applies to this offence given that the offence is expressly intended to prosecute people who act recklessly, rather than with the express intention of funding a terrorist act. The Note to Paragraph 101.3(1) does provide that there must be an intention to provide or collect the funds. There need not, however, be an intention that the funds would be used to facilitate or engage a terrorist act or actual knowledge that this would be the outcome of providing or collecting the funds. It is our view that a term of life imprisonment is entirely unjustified for an offence of mere recklessness.

Nexus Between Financing and a Terrorist Act

It is further concerning that no nexus is required between the provision/collection of funds and an actual terrorist act. The offence does not specify that the funds must be provided to the actual perpetrator of a terrorist act, and in fact does not specify who the funds must be provided to at all. It is also not specified that the funds must actually be used to facilitate a terrorist act for the offence to be prosecuted. In addition, the term 'will be used' is highly ambiguous. The statutory provision does not clarify the degree of usage required to make out the offence. Would it be necessary that the funds provided were directly used to buy a bomb,

[31] Paragraph 103.1(1), Schedule 1, *Criminal Code Act 1995 (Cth)*
[32] ibid
[33] Paragraph 103.1(3), ibid

for example? Or might it be sufficient that the funds provided were used to hire a meeting room in which making a terrorist threat was discussed? It would seem that both examples might fall within the scope of this offence given the breadth implicit in the words 'used to facilitate or engage in'.

Furthermore, the term 'provide or collects funds' is also extremely broad. It may be that a person provides money to an organisation as a charitable donation or it may be that the money provided is in exchange for goods or services received. Both of these are ordinary, quotidian transactions and yet this statutory provision seems to require that all citizens now exercise an inordinate degree of care in any such financial exchange.

These issues are exacerbated by the very broad definition of a 'terrorist act', which has been discussed in detail above. As a terrorist act may be constituted by a mere threat of politically, religiously or ideologically motivate violence, it is possible that this offence may be made out even where there is only a tenuous link between the funds provided/collected and an act of violence. It is even more concerning, in this respect, that the statutory provision expressly contemplates prosecuting individuals for this offence where no terrorist act occurs.[34] In our view, the prosecution of individuals who have only a minimal and recklessly-created link to terrorist acts that *do not* occur seems farcical. This is all the more the case where a potential sentence of life imprisonment is added to the equation. At the very least we would argue that this type of prosecution is an unwarranted and unjustified legislative excess.

Given the very serious penalties involved it is deeply concerning that this part of the legislation has been so loosely drafted as to expose such a large number of people to prosecution. This offence also seems to significantly exceed the legislative purpose of deterring and punishing acts of terrorism, especially when it is considered that extended geographical jurisdiction applies to this offence. It is

[34] Paragraph 103.1(2), ibid.

difficult to comprehend how prosecuting people for recklessly funding terrorist acts, where the funding and the acts both occur outside of Australia, will substantially assist in protecting Australia itself from a terrorist act. Even if some indirect deterrent or protective benefit may be derived, it would be minimal at best and in our view would not justify the expansive and far-reaching nature of the offence. It also seems to be a misdirected use of resources to be prosecuting individuals for recklessly providing/collecting funds that may be used to facilitate a terrorist act rather than focussing all attention and resources on dealing with the potential terrorist act itself and those who may perpetrate it.

Necessity

In light of the above concerns, it is our recommendation that this offence be repealed. We note at this juncture that the *Criminal Code* has recently been amended to include a further offence of 'financing a terrorist'.[35] While the Federation has consistently opposed the introduction of this further offence, as it has now been introduced it would seem that having both offences is unnecessary. While not without its own problems, the newly introduced offence is more clearly drafted, specifying to whom the funds must be collected for or made available to and the connection between that person an a terrorist act. It is difficult to envisage a situation where the new Paragraph 103.2 might not suffice to deal with a situation of financing terrorism, apart from situations where there really is a very tenuous link between the person providing/collecting funds and the terrorist act. Further, it is our view that under the latter circumstances there should be no prosecution in any event.

If, on the other hand, the Committee is minded to recommend that this statutory provision continue to apply, it is our view that it must be substantially amended to address the concerns we have raised above.

[35] Paragraph 103.2, Schedule 1, *Criminal Code Act 1995 (Cth)*

Treason

The *Security Legislation Amendment (Terrorism) Act 2002* amends the *Criminal Code* to provide for the offence of treason. Broadly this offence may be committed by:

- causing death, harm or imprisonment to the Sovereign, Governor General or Prime Minister; or
- levying war against the Commonwealth; or
- assisting an enemy at war with the Commonwealth; or
- assisting an organisation or country that is engaged in armed hostilities against the Australian Defence Force (ADF); or
- instigating a non-citizen to invade Australian territory; or
- forming an intention to do any of the above and manifesting that intention by an overt act. [36]

There is an exception relating to the provision of humanitarian aid which applies where the treasonous act consists of assisting the enemy or an organisation/country engaged in armed hostilities against the ADF or forming an intention to do so.

The Federation has a number of general concerns regarding this aspect of the legislation.

It is our view that the above offences are not appropriate to a modern, democratic society and we oppose the revival of these anachronistic offences in contemporary legislation. These offences fail to recognise that we live in highly pluralistic society which includes an immense variety of divergent political opinions and allegiances. These opinions and allegiances may include support for countries that at times contradicts Australian government policy. For example, there are a great many people in Australia who oppose the occupation of Iraq and support the Iraqi people's right to take up arms against what is widely

[36] Paragraph 80.1, ibid.

regarded as an illegal invasion. This support may translate to providing financial or other material support to Iraqi organisations involved in resisting Western forces. The Federation does not believe that this type of activity should attract prosecution and is particular concerned about the suppression of political dissent and freedom of association involved.

In our view, it is also unclear why separate offences might be required for murder or threats to kill where committed against the officials specified above. This would suggest that the murder of the Prime Minister or a threat to kill the Governor-General, for example, is in some way more serious than or diverse from the murder of or threats to kill any other person. The social purpose of punishing these offences separately to the equivalent crimes under ordinary criminal law is unclear, particularly in a contemporary setting.

The offences relating to assisting the enemy restrict freedom of political association. In our view, these offences are prone to being used to suppress dissent and opponents of government policy, particularly with respect to the activities of the ADF. In this respect we are particularly concerned that prosecutions of treason offences may not proceed without the consent of the Attorney-General. This raises the serious issue that criminal prosecution may be influenced by political motivations.

We would also question the continued need for these provisions, given the recent amendments to sedition law by the *Anti-Terrorism Act (No 2) 2005 (Cth)*. While the Federation consistently opposed the reactivation of the archaic sedition offences, in our opinion, the updated sedition offences combined with ordinary criminal law are sufficient to prosecute the various offences contemplated in this section on treason.

We are also concerned about the inclusion of these offences in counter-terrorism legislation. This could lead to inconsistent application of the treason provisions,

given the widespread political, legislative and public association with Muslim groups and terrorism, which is in more detail discussed above.

The Federation is further concerned about the severity of the penalties specified for these offences. It is particularly worrying that a penalty of life imprisonment may apply where a person simply forms an intention engage in conduct that assists another country that is engaged in armed hostilities with the ADF, especially given that the assistance may be 'by any means whatever'[37].

The Federation submits that these offences should be repealed. Alternatively, they should be amended to reduce the penalties involved and to provide greater protection for freedom of political association.

SUPPRESSION OF THE FINANCING OF TERRORISM ACT 2002 (CTH)

The Federation wishes to express concern regarding amendments contained in the *Suppression of the Financing of Terrorism Act 2002 (Cth)* relating to:

- the listing and proscription of organisations; and
- dealing with the assets of terrorist organisations.

Listing and Proscription of Organisations

In addition to the *Criminal Code* listing regime, the *Suppression of the Financing of Terrorism Act* amends the *Charter of the United Nations Act 1945 (Cth)* to allow for the listing and proscription of organisations.

The Minister must list an person or entity if satisfied of certain prescribed matters which are contained in regulations made by the Governor-General.[38] These regulations effectively provide that the Minister *must* list a person or entity where

[37] Paragraph 80.1(1)(f), ibid
[38] Section 15, *Charter of the United Nations Act 1945 (Cth)*

the person commits, attempts to commit, participates in or facilitates the commission of terrorist acts or where the entity is owned or directly or indirectly controlled by such a person.[39] The Minister must also list persons or entities acting on behalf of or at the direction of such persons or entities.[40] For the purposes of listing assets, the Minister *may* list assets or a class of assets controlled or owned by a person or entity that falls within these criteria.[41]

The Governor-General may also make regulations proscribing person or entities. This may only occur where the proscription gives effect to a Security Council (Chapter VII) decision that relates to terrorism and dealing with assets that Australia is required by the Charter of the United Nations to carry out.[42]

While the Federation is opposed to the listing and proscription of organisations, we are aware that these provisions are intended to give effect to Resolution 1373 of the United Nations which requires States to freeze the assets of terrorist organisations and individuals who participate in terrorist activity. The Federation has a number of concerns, however, regarding the mechanisms by which this takes place. These concerns are heightened given the potential consequences for groups and individuals. As noted by Iain Cameron in an article on European listing,

> *The effects of a freezing order, if it is effectively implemented, are devastating for the target, as he or she cannot use any of his or her assets, or receive pay or even, legally speaking, social security.* [43]

The Federation is concerned that this regime does not provide any opportunity for person or entity involved to contest any of the allegations raised to support

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[39] Regulation 6(1), *Charter of the United Nations (Terrorism and Dealings With Assets) Regulations 2002 (Cth)*
[40] ibid
[41] Regulation 6(2), ibid
[42] Section 18, ibid.
[43] Cameron, Iain, 'European Anti-Terrorist Blacklisting' *Human Rights Law Review* Vol 3, No 2 as quoted in Statewatch Analysis, Ben Hayes, 'Terrorising the Rule of Law: the policy and practice of proscription' available at http://statewatch.org

the listing or proscription before the listing or proscription is effected. The regime is completely devoid of process of judicial determination or even of substantive judicial review. Pursuant to Section 17 of the *Charter of the United Nations Act 1945 (Cth)*, a listed person or entity may make a written application to the Minister to have the listing revoked.[44] Given that the Minister is also the original decision-maker, clearly this review mechanism will be extremely limited. We note that a lack of judicial review relating to listing and proscription is not an international norm. In the United Kingdom, for example, we understand that if seeking that the Home Secretary review a listing decision, the applicant may also appeal to the 'Proscribed Organisations Appeals Committee and then further to the higher UK courts and potentially to the European Court of Human Rights.

As the Australian Act does not provide for any mechanisms of judicial review, the Minister is given a very broad discretion to determine whether an organisation fits the Resolution 1373 criteria. Given the very broad definition of 'terrorist act' operative in Australian legislation, a very large number of organisations may theoretically meet the criteria for listing or proscription. Resolution 1373 does not, for example, contain any temporal specifications and so organisations may be listed although the activities of concern occurred in the distant past.

The breadth of criteria and lack of judicial review, increase the scope for these powers to be exercised for political motives, misused or abused. We are also concerned that the interests of foreign governments may be brought to bear on the Minister's decision-making regarding whether to list or proscribe persons or entities. It may occur that overseas governments seek to influence this process in order to hinder their opponents' political activity in Australia.

We are further concerned that the information relied on by the Minister in deciding whether to list a person or entity is not open to public scrutiny. Furthermore, the processes for applying that information to the prescribed

[44] Section 17, *Charter of the United Nations Act 1945 (Cth)*

matters is also not transparent. In our view, this is conducive to arbitrary, secretive and potentially unjust decision-making on the part of the executive. As discussed above with respect to listing under the *Criminal Code*, we submit that their must be public disclosure of the evidence and processes involved in the exercise of the listing and proscription powers. This is imperative in ensuring due process and executive accountability, and is particularly crucial given the grave impact of listing or proscription.

Dealing With Assets of Terrorist Organisations

As noted above, pursuant to the listing power, the Minister may also 'list' the assets of an organisation.[45] These assets are then deemed freezable assets, as do any assets derived from the listed assets. Further, the assets controlled or owned by a proscribed organisation are automatically deemed to be freezable assets.

The *Suppression of the Financing of Terrorism Act 2002* amends the Charter of the United Nations Act 1945 to provide for an offence of dealing with freezable assets. This offence is committed where a person holds a freezable asset and

- uses or deals with the asset; or
- allows the asset to be used or dealt with; or
- facilitates the use of the asset or dealing with the asset.[46]

This Act has also created the further offence of giving an asset to a proscribed entity. This offence occurs where a person directly or indirectly makes an asset available to a person or entity.

[45] Section 15(3), ibid
[46] Section 20, ibid

The Federation is concerned that these offences far exceed the intention of Resolution 1373 by criminalizing individuals whose connection with terrorist activity is potentially very much innocent. With respect to the offence of dealing with freezable assets, the offence does not require knowledge on the part of the offender that the asset is listed or an asset of a listed/prescribed organisation. Further, it is not required that the dealings involved are in some way connected with terrorist activity. With respect to the remaining offence, it is not required that the asset is given to the proscribed person or entity in connection with some terrorist activity. It is also possible to commit the offence by indirectly giving the asset to the person or entity. For both offences, the connection between the offence and terrorist activity may be negligible or even non-existent and yet the offence may be made out. This not only exposes a great many people to prosecution but further, in this regard, the legislation is excessive and strays beyond the purpose of preventing terrorist activity.

For both of the above offences dealings authorised by the Minister are an exception. The Minister's authorisation must be applied for and provided in writing and may be subject to conditions.[47] This raises the concern that the Minister may exercise this discretion in manner that is inconsistent, discriminatory or influenced by political motivations.

CONCLUSION

In light of the above concerns, we strongly urge the Committee to recommend the repeal of the security acts relating to terrorism currently under review. Alternatively, we recommend that this legislation be substantially amended to address the many issues we have raised above.

[47] Section 22, ibid.

Furthermore, if the security acts relating to terrorism are to continue operation we recommend that a sunset provision be inserted to cover each Act. All of the above legislation was passed in response to a specific set of international events and circumstances. Further, it is clear that the above legislation sacrifices democratic freedoms and principles in the interests of a notion of national security. It is therefore imperative that these Acts be in force only for as long as the circumstances that that prompted their enactment exist. It is our view that a three year sunset clause, with provision for public and independent review, must be included if the Acts are to continue operation. We believe that a lengthier period of operation without review will risk these laws lapsing into being a permanent part of our legal landscape. While a further review in three years may seem onerous, in our submission extraordinary laws such as these warrant frequent and regular re-examination, regardless of how onerous this task may be.