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

TO THE PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD

REVIEWS OF THE LISTINGS OF:

- THE ABU SAYYAF GROUP,
- THE ARMED ISLAMIC GROUP,
- THE JAMIAT UL-ANSAR,
- THE SALAFIST GROUP FOR CALL AND COMBAT,
- AL QA'IDA, AND
- JEMAAH ISLAMIYAH

AS TERRORIST ORGANISATIONS UNDER THE CRIMINAL CODE ACT 2004

January 2005

This submission was prepared by Marika Dias, Dan Nicholson and other members of the Anti-Terrorism Laws Task Group, on behalf of the Federation of Community Legal Centres (Vic).

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The Federation of Community Legal Centres

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 Community Legal Centres are on low incomes, with most receiving some form of pension or benefit. Community Legal Centres also see a considerable number of people from culturally and linguistically diverse communities.

Introduction

The Federation does not seek to make specific comments about Al-Qa'ida, Jemaah Islamiyah, Abu Sayyaf, Armed Islamic Group, Jamiat ul-Ansar and Salafist Group ('the listed organisations'). Nor do we seek to make any comment about the particular merits or otherwise of listing these particular organisations as 'terrorist organisations'.

The Federation wishes to express a number of concerns about the way the proscription power under the Criminal Code ('the proscription power') is exercised. These concerns are based on the potential impact of these laws on the communities we work with. We believe these concerns are relevant in considering the listing of these or any other organisations. We note that the Federation previously expressed its concerns to this committee.[1]

The Federation believes that taking a rigorous approach to the review of the listing of organisations is necessary given the breadth of the definition of terrorism, the lack of other forms of merits review of listing, and the seriousness of the offences set out in the Criminal Code, some of which do not require the knowledge that an organisation in listed. We note that this Committee has previously taken such an approach, in particular in relation to the listing of Palestinian Islamic Jihad.[2]

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[1] Federation of Community Legal Centres (Vic) Inc, *Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002, Suppression of Financing of Terrorism Bill 2002, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 10 April 2002.

[2] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the Listing of Palestinian Islamic Jihad*, June 2004 ('PIJ Report').

Breach of fundamental principles of criminal law and civil and political rights

We would first like to express our concern about the proscription power itself. We are particularly concerned that this power moves away from a fundamental principle of criminal law, that is, assigning criminal responsibility to individuals based on their actions and intentions in causing harm to the community.

We believe that the exercise of this power moves towards a collective form of punishment by imposing criminal liability upon groups, and more particularly on those associating in various ways with certain organisations. We are especially concerned with the offences that do not require actual knowledge that the organisation with which a person has an association is a terrorist organisation.[3]

We are also concerned that these provisions are inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),[4] notably those obligations relating to freedom of association (Article 22). We believe that the proscription power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security in light of the threat of ideological and political violence.[5]

Necessity of the exercise of listing powers

We submit that the listing of organisations is not necessary in order to protect the public from politically and ideologically motivated violence. If these organisations are responsible for the kinds of politically and ideologically motivated violence alleged,[6] 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.

2. Through the terrorism offences set out in s 101 of the *Criminal Code*.

3. If the organisation is not listed, under the same offences provided for in the listing regime (provided that the prosecution is able to show that an

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[3] Criminal Code, s 102.
[4] 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.
[5] ICCPR, Art 22(2).
[6] See Attachments A-D.

organisation meets the definition of terrorist organisation under s.102 of the *Criminal Code*).

It is, therefore, difficult to see how this power would be required other than in cases where the link between the accused or the relevant organisation and the 'terrorist acts' could not be established to the satisfaction of a court. In such cases we do not believe that the imposition of criminal liability is justified.

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

Transparency

If we assume that the proscription power is warranted, this power must 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 must be public disclosure of all criteria, evidence and processes involved in its exercise.

There is currently insufficient publicly available information relating to:

1. The criteria relied upon by the Attorney General in deciding to proscribe an organisation.
2. The supporting information provided by ASIO in recommending proscription and relied upon by the Attorney General in determining whether an organisation should be proscribed.
3. The process for applying the criteria to the relevant supporting information in order to decide whether or not to proscribe an organisation.

In our submission, the information relied on by ASIO in recommending proscription 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.

The criteria applied by the Attorney General in deciding whether or not to exercise the proscription power 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 the proscription power is exercised.

Inconsistent Application of the Proscription Power

We submit that the broad statutory definitions of 'terrorist organisation' and 'terrorist act', combined with the wide discretion afforded to the Attorney General, allow inconsistent application of the proscription power to occur.

We refer particularly to a research note, *The Politics of Proscription in Australia,* recently published by The Parliamentary Library.[7] This research illustrates, by way of examples, the arbitrary application of the proscription power thus far. There has been proscription of organisations which have no links to Australia, while other organisations which do have links with Australia have not been listed. For example, in the case of the 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 was largely prompted by its proscription in other countries.[8]

While the purported legislative aim of the proscription power is maintenance of Australian national security, it is evident that this aim is not used to inform the exercise of the proscription power. In practice, the executive does not require that organisations actually pose a threat to Australian national security before the proscription power is exercised. We submit, that in applying the proscription power in cases where there is no link to Australia, is going outside the intent of the legislation.

We are also particularly concerned that all of the organisations banned using the proscription power are Muslim organisations. It appears that the executive has been discriminatory in its application of the proscription power. At the very least, it would seem that Muslim organisations have been disproportionately affected by the exercise of this power.

Lack of Merits Review

The statutory definitions of 'terrorist organisation' and 'terrorist act' are extremely broad. When coupled with these broad definitions, the formula in s 102.1 of the *Criminal Code* gives the Attorney General an extremely wide discretion to proscribe. It is therefore of particular concern that there is no avenue for judicial review of the merits of a decision to proscribe. Although there is provision for review of the Attorney General's decision under the *Administrative Decisions (Judicial Review) Act 1977*, given the broad statutory definitions applying to proscription, a decision is unlikely to be found unlawful. In effect, the executive is immune from judicial review of its exercise of the proscription power.

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

[8] PIJ Report [3.15]

The overly general definitions, the lack of transparency and the Attorney General's wide discretion combine to allow the possibility that this power can be exercised solely for political motives and with relative ease. In light of these deficiencies we believe that the lack of merits review of decisions to proscribe is of grave concern.

Summary of Key Points in this submission

- The exercise of the proscription power represents a move away from a fundamental principle of the criminal law, namely the imposition of criminal liability on the basis of the actions and intentions of individuals.

- The exercise of the proscription power is inconsistent with Australia's international obligations in relation to freedom of association under Article 22 of the International Covenant on Civil and Political Rights.

- The listing of organisations is unnecessary as existing laws allow for criminal liability to be imposed for the acts that listed organisations are alleged to be carrying out.

- All criteria, supporting information and processes used in the exercise of the proscription power should be publicly disclosed, both generally and with regards to the listing of specific organisations.

- The proscription power has been exercised in an inconsistent and discriminatory manner.

- In deciding whether to list an organisation, regard should be had to the links that the organisation has to Australia and the threat posed to Australian national security. Organisations with no links to Australia should not be listed.

- There should be avenues for independent merits review of decisions to list organisations. Lack of merits review effectively provides the executive with immunity from any sort of review.