PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY

Review of the Listing Provisions of the *Criminal Code Act 1995*

Joint Submission

February 2007

1. Overview

The main terrorist threat globally over the past decade has been associated with an extremist Islamist ideology that espouses 'global jihad'. The threat also comes from a range of non-Islamic groups which, espousing varying ideologies, have all undertaken threats or acts of violence or unlawful harm that are intended or likely to achieve a political objective.

The terrorist threat is global in terms of the motivating factors behind terrorist groups, the ability of groups to draw support from around the world and the willingness of terrorists to conduct attacks anywhere.

In this environment, the security of Australians and Australian interests is not geographically confined to Australia - it extends to wherever terrorist attacks occur. In some cases Australians or Australian interests are directly targeted, such as in Bali in 2002 and 2005, or they may be caught up in attacks directed at others, such as in New York in 2001, London in 2005 and Egypt in 2006

The counter-terrorism legislative changes since 2002 have been effective in strengthening the counter-terrorism framework to allow law enforcement and security agencies to respond to the evolving threat of terrorism. The proscription provisions in the Criminal Code are a key component of this legislative framework as they enable organisations which engage in, prepare, plan, assist, foster or advocate the doing of a terrorist act to be identified as terrorist organisations. This identification 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 groups wanting to establish a presence in Australia for either operational or facilitation purposes. It also sends a clear message to Australian citizens that involvement with such organisations, either in Australia or overseas, will not be permitted. Proscription also communicates to the international community that Ausralia rejects claims to legitimacy by these organisations.

2. Introduction

The *Security Legislation Amendment (Terrorism) Act 2002* (SLAT Act) received Royal Assent on 5 July 2002.

One of the principal provisions of the SLAT Act was to amend the *Criminal Code Act 1995* (Criminal Code) by adding Part 5.3 – Terrorism which introduced a statutory definition of 'terrorist act', created specific terrorism offences and provided for a power to proscribe organisations as terrorist organisations under subdivision A of Division 102 of the Criminal Code.

Part 5.3 of the Criminal Code was repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003* to give the federal counter-terrorism offences comprehensive national application following the reference of power from the States in accordance with section 51(xxxvii) of the Constitution.

3. Criminal Code – Subdivision A of Division 102 – Historical Background

The SLAT Act 2002 amended the Criminal Code by introducing a process for specifying or proscribing an organisation as a terrorist organisation.

3.1 Definition of terrorist organisation

Subsection 102.1(1) of the Criminal Code defines a 'terrorist organisation' as:

(a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or
(b) an organisation that is specified by the regulations for the purposes of this paragraph (under subsection (2), (3) and (4)).

This definition is central to the offences relating to terrorist organisations in Subdivision B of Part 5.3 of the Criminal Code.

3.1.1 Identifying an organisation as a *terrorist* organisation

Under the Criminal Code there are two methods for an organisation to be identified as a terrorist organisation.

(i) *Court finds an organisation to be a 'terrorist organisation'*

The first method occurs where there is a prosecution of a person for a terrorist organisation offence under sections 102.1 to 102.9 (inclusive), where the offence relates to an organisation found by a Court to be a 'terrorist organisation' as defined in subsection 102.1(1) of the Criminal Code.

(ii) *Proscription of terrorist organisation by regulations*

The second process occurs by the making of regulations under subsection 102.1(2).

3.2 Proscription power

As originally enacted, subsection 102.1(3) of the Criminal Code provided that before the Governor-General could make a regulation specifying an organisation as a terrorist organisation, the Attorney-General had to be satisfied upon reasonable grounds that:

(a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and
(b) the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and
(c) 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).

3.2.1 Criminal Code Amendment (Terrorist Organisations) Act 2004 - Removal of role of United Nations Security Council

The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Terrorist Organisations Act 2004) amended the proscription process in section 102.1 of the Criminal Code, by removing the requirement that an organisation be first identified in, or pursuant to, a decision of the United Nations Security Council relating wholly or partly to terrorism, or using a mechanism established under the decision, as a condition precedent to specifying the organisation in regulations as a terrorist organisation. This Act also made a number of other consequential amendments, including introducing parliamentary review of Regulations.

3.2.2 Anti-Terrorism Act (No. 2) 2005 - Addition of element of 'advocacy'

The *Anti-Terrorism Act (No. 2) 2005* further amended the Criminal Code to include an additional criterion for listing an organisation. An organisation may be listed if it advocates the doing of a terrorist act.

Subsection 102.1(1A) provides that an organisation 'advocates' the doing of a terrorist act if it directly or indirectly counsels or urges the doing of a terrorist act, provides instruction on the doing of a terrorist act, or directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person to engage in a terrorist act.

Subsection 102.1(2) now provides that before the Governor-General makes a regulation specifying an organisation as a 'terrorist organisation' the Attorney-General must be satisfied on reasonable grounds, that the organisation:

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

The regulations specifying organisations as terrorist organisations are included in the *Criminal Code Regulations 2002*.

There are currently 15 individuals committed to stand trial this year before the NSW and Victorian Supreme Courts on Commonwealth offences which have a 'terrorist organisation' element. These prosecutions do not rely upon the terrorist organisation proscription provisions.

4. Process of proscribing a terrorist organisation by regulations

As noted above, the definition of a 'terrorist organisation' under subsection 102.1(1) provides that an organisation may be specified as a terrorist organisation by the making of regulations.

Before the Governor-General makes a regulation, the Attorney-General 'must be satisfied on reasonable grounds' that the organisation satisfies the criteria specified under subsection 102.1(2)(a) or (b).

In being satisfied on 'reasonable grounds' the Attorney-General, in each case for proscribing an organisation, considers an unclassified Statement of Reasons prepared by the Australian Security Intelligence Organisation (ASIO) in consultation with the Department of Foreign Affairs and Trade (DFAT).

4.1 Statement of Reasons

ASIO has provided security advice regarding the listing of terrorist organisations to the Attorney-General since the introduction of the listing provisions in 2002. ASIO's advice is provided as an unclassified 'Statement of Reasons', which addresses the legislative requirements for listing set out in subsection 102.1(2) of the Criminal Code. The Statement of Reasons is prepared as a stand alone document and is publicly available. The assessment is based on publicly available details about an organisation which are corroborated by classified information.

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.

The draft Statement of Reasons is provided to the Chief General Counsel of the Australian Government Solicitor, for independent advice as to whether the statement provides a sufficient basis for the Attorney-General to be satisfied on `reasonable grounds' that the organisation meets the criteria for listing as a terrorist organisation under section 102.1 of the Criminal Code.

This advice and the statement of reasons is provided to the Attorney-General to assist him or her in deciding whether an organisation satisfies the legislative requirements for listing under the Criminal Code. The provision of the statement of reasons is consistent with ASIO's responsibility for matters relevant to security under the *Australian Security Intelligence Organisation Act 1979*.

ASIO does not have decision making powers in relation to the listing of a terrorist organisation.

4.1.1 Attorney-General's Statement

Having considered the Statement of Reasons and prior to the making of a regulation proscribing an organisation as a terrorist organisation, the Attorney-General considers, and if satisfied, signs a Statement declaring that he is satisfied the organisation is 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 has occurred or will occur); or advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

The Attorney-General then writes to the Prime Minister, the Leader of the Opposition, and where appropriate, the States and Territories, advising that he is satisfied that the organisation meets the criteria for listing pursuant to section 102.1(2) of the Criminal Code and advises that a regulation may be made proscribing the organisation. Further details on the consultation process are outlined below.

4.1.2 Statement of Reasons - criteria to be considered

In considering whether to put forward an organisation for possible listing as a terrorist organisation, ASIO evaluates an organisation against a range of factors, including:

- engagement in terrorism
- ideology and links to other terrorist groups/networks
- links to Australia
- threat to Australian interests
- listing by the UN or like-minded countries and
- engagement in peace/mediation processes.

Depending upon available information, some criteria may carry more weight than others. However, all factors are considered in the evaluation. The relative lack of information relating to a particular factor, such as links to Australia, does not and should not preclude an organisation from consideration for proscription.

The criteria mentioned above are not expressly specified in the Criminal Code as matters requiring consideration by the Attorney-General under subsection 102.1(2). In particular, there is no statutory requirement to establish a nexus between an organisation and Australia for the purpose of specifying the organisation as a terrorist organisation under the Act.

The Criminal Code does not refer to a Statement of Reasons, or any particular criteria for listing an organisation, other than that specified under section 102.1(2)(a) or (b). The Attorney-General's discretion to proscribe an organization is limited by the requirement that he or she be satisfied that the organization is directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). Then and only then is the Governor-General empowered to make the necessary regulations proscribing the organisation as a terrorist organisation.

The Department submits that specifying further criteria in legislation such as the organisation's links to Australia, the specific threat to Australia's interests, and proscription by the United Nations or like-minded countries is unnecessary. The considerations taken into account by the Attorney-General need to be assessed on a case by case basis. If the Attorney-General makes a decision by taking irrelevant considerations into account or by failing to take relevant considerations into account, then the organisation can seek review of the decision under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) or avail itself of delisting provisions.

In relation to the suggested criteria that the activities of the organisation must have direct relevance to Australia before it may be listed, the Department submits that this is inconsistent with the international nature of terrorism. Terrorism is not a phenomenon that is relevant only to a particular region or country; it is a global problem that requires a global response. Being able to proscribe an organisation as a terrorist organisation is a part of that global response and gives effect to Australia's international obligations to combat terrorism.

4.2 Government consultations on the proposed proscription of a terrorist organisation

The *Inter-Governmental Agreement on Counter-Terrorism Laws* (25 June 2004) (IGA) provides that before making a regulation specifying a terrorist organisation for the purposes of Part 5.3 of the Criminal Code, the Commonwealth will consult the States and Territories about the proposed listing.

The IGA provides that approval for regulations specifying a terrorist organisation must be sought and responses from States and Territories must be provided, through the Prime Minister and Premiers and Chief Ministers.

In practical terms, the Prime Minister (or the Attorney-General on his behalf) writes to the Premiers and Chief Ministers of the States and Territories advising them of the proposed making of a regulation specifying a new listing of a terrorist organisation, and attaching a copy of the Statement of Reasons. The Prime Minister (or the Attorney-General) invites comments from the States and Territories.

In cases of re-listing a terrorist organisation, it is the practice that the Attorney-General writes to the Attorneys-General of the States and Territories advising of the proposed re-listing and providing a copy of the Statement of Reasons.

The IGA provides an important safeguard in the agreement to list or specify a terrorist organisation. Paragraph 3.4(2) of the IGA provides that if a majority of the States and Territories object to the making of a regulation to specify a terrorist organisation within a timeframe nominated by the Commonwealth, and provide reasons for their objections, the Commonwealth will not make the regulation at that time. To date, States and Territories have not objected to the making of a regulation.

4.3 Consultation with the Leader of the Opposition

Subsection 102.1(2A) of the Criminal Code provides that before the Governor-General makes a regulation specifying an organisation as a terrorist organisation, the Attorney-General must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed regulation.

In accordance with this requirement the Attorney-General writes to the Leader of the Opposition advising of a proposed listing or re-listing of a terrorist organisation and provides a copy of the Statement of Reasons. The Leader of the Opposition is offered a briefing on the proposed regulation.

4.4 Commencement of Regulations

Once the regulations are signed by the Governor General, they are lodged with the Federal Register of Legislative Instruments (FRLI) and commence the day after registration with FRLI unless stated otherwise.

4.5 Organisations proscribed by Australia

To date, 19 organisations have been specified or proscribed under regulations as a 'terrorist organisation' (see Attachment A). A number of these organisations have been re-listed upon expiry of their proscription. Most recently, four organisations, the Abu Sayyaf Group, Jamiat ul-Ansar, Armed Islamic Group and Salafist Group for Call and Combat, were re-listed in November 2006.

ASIO assesses that, since 11 September 2001, the main terrorist threat to Australian interests (both domestic and overseas) comes from Islamic extremists, many with roots in the Middle East and South/South East Asia. As such, Islamic extremist groups represent the majority of groups currently listed.

This assessment is supported by the fact that since 11 September 2001, Australia has been named as a target for al-Qa'ida in public statements by Usama bin Laden and his deputy Ayman al-Zawahiri on several occasions. Australia has also figured in media and Internet statements by al-Qa'ida and other Islamic extremist sources. These statements are not necessarily directed at members of al-Qa'ida or any specific group but provide encouragement and justification for any individual who may desire to undertake attacks against Western, including Australian, interests in the name of jihad.

Attached is a table setting out the name of each organisation which has been listed, and the relevant dates and names of the regulations affecting its listing or re-listing (Attachment A).

Also **attached** is a table comparing those organisations listed by the Government with those organisations listed by relevant international partners (Attachment B).

5. Publicising the proscription of a terrorist organisation

Once a regulation is made by the Federal Executive Council, the Attorney-General issues a press release announcing the proscription of that organisation. The press release attaches the Statement of Reasons upon which the Attorney-General based his decision to list the organisation.

The press release is circulated and is also placed on the national security website www.nationalsecurity.gov.au

6. Consequences of being listed as a terrorist organisation

Once an organisation is listed as a terrorist organisation, a number of offences under sections 102.2 to 102.8 of the Criminal Code may apply. It is an offence to direct the activities, recruit for, train or receive training from, get funds to, from or for and be a member of a terrorist organisation. It is a defence to the membership offence if, as soon as practicable after becoming aware that the organisation is a proscribed organisation, a person takes all reasonable steps to cease being a member of the organisation (subsection 102.3(2)). It is also an offence to associate with another person who is a member of, or who promotes or directs the activities of, a listed terrorist organisation. A person who has trained with a listed terrorist organisation can also be the subject of a control order under Division 104 of the Criminal Code.

It is important to note that the proscription regime and offences are aimed at individuals who engage with organisations who plan, advocate or commit terrorist acts. The Criminal Code does make it an offence for a person to provide support to a terrorist organisation (section 102.7). However, this offence is not designed to criminalise the conduct of people who merely express their support for an organisation's objectives. The offence at section 102.7 of the Criminal Code requires the prosecution to prove beyond reasonable doubt that a person intended that the support provided to an organisation would help that organisation directly or indirectly engage in preparing, planning, assisting in or fostering the doing of a terrorist act and that the person knew that the organisation was a terrorist organisation or was reckless as to that fact. The Government in its submission to the PJC Review on Security and Counter-Terrorism Legislation indicated that it does not consider that the word 'support' can be construed in any way to extend to the publication of views that appear to be favourable to a proscribed organisation and its stated objectives.

7. Review of Attorney-General's decision

Any decision by the Attorney-General that he or she was satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur), is a decision which may be reviewed under the ADJR Act.

A review of the Attorney-General's decision by the ADJR is not a merits review, but a review as to whether the decision was made in accordance with the law. This enables a court to determine whether for example, the decision was made in bad faith or at the direction or behest of another person or is so unreasonable that no reasonable person could have exercised the power.

Once an organisation is listed, the Criminal Code provides for an application to be made to de-list an organisation as a terrorist organisation.

Some submissions to the Security Legislation Review Committee (SLRC) chaired by His Honour Justice Sheller suggest that the decision to list an organisation should be subject to a full judicial merits review. This would mean that a court would be able to determine not only whether the Attorney-General's decision was made in accordance

with the law, but whether there was sufficient substantive evidence for the Attorney-General to have reached the decision that was made.

The Department submits that judicial review of the Attorney-General's decision under the ADJR Act strikes the appropriate balance between an unfettered discretion and merits review.

8. De-listing a proscribed terrorist organisation

8.1 Sunset of regulations

Subsection 102.1(3) provides that regulations proscribing an organisation cease to have effect on the second anniversary of the day on which they take effect. Subsection 102.1(3) provides that this provision does not prevent the repeal of the regulations, the cessation of effect of the regulations or the making of new regulations.

In effect an organisation will cease to be a proscribed terrorist organisation upon the sunset of the regulation proscribing the organisation in circumstances where a new regulation was not made.

The Canadian, UK and US proscription processes have different requirements for the review of existing listings. Like Australia, Canada reviews its proscription listings every two years. In 2004, the US replaced its two year redesignation requirements with certain review and revocation procedures which mean listings are reviewed at least every five years. The UK has no legal requirement to review existing proscriptions.

8.2 The Attorney-General ceasing to be satisfied

One process for the de-listing of a proscribed terrorist organisation is where the Attorney-General ceases to be satisfied under subsection 102.1(4) that either the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

If the Attorney-General 'ceases to be satisfied' of the criteria necessary for listing an organisation, the Attorney-General must make a declaration to that effect, by publishing a written notice in the *Gazette*. The regulations listing the organisation as a terrorist organisation cease to have effect when the declaration is made.

The declaration by the Attorney-General does not prevent the organisation being again listed by regulations, if the Attorney-General is again satisfied that the criteria for listing under subsection 102.1(2) are met.

8.3 Application to de-list an organisation

Another process for de-listing an organisation may occur under subsection 102.1(17), which provides for an individual or an organisation may apply to the Attorney-General for a declaration (under subsection 102.1(4)) that he has ceased to be satisfied of the criteria for listing.

A de-listing application may be made on the grounds that there is no basis for the Attorney-General to be satisfied that the listed organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Subsection 102.1(18) provides that the provisions of the de-listing application in subsection 102.1(17) does not limit the matters that the Attorney-General may consider for the purposes of subsection 102.1(4).

Where such an application is made, the Criminal Code states that the Attorney-General 'must consider the de-listing application'. The legislation does not specify what documents the Attorney-General must consider in deciding to de-list, the procedure to be followed in considering a de-listing application, nor a time period for the consideration of a de-listing application. The absence of this suggests that an application for de-listing would be considered within a reasonable time.

9. Comments on SLRC recommendations for reform of the process of proscription

The report of the SLRC was tabled on 1 June 2006. The Government provided a submission to the PJCIS' Review of Security and Counter-Terrorism Legislation, in which it commented on each of the SLRC's recommendations (the Government Submission).

9.1 Definition of Terrorist Organisation

Recommendation 10 of the SLRC's report commented on paragraph (a) of the definition of '*terrorist organisation*'. The SLRC recommended that as part of the reform of the proscription process, paragraph (a) of the definition of '*terrorist organisation*' be deleted, so that the process of proscription would be the only method by which an organisation would become an unlawful terrorist organisation.

The Government Submission indicated that the current dual definition for a '*terrorist organisation*' is central to a range of terrorism offences in the Criminal Code and is necessary in order to capture the activities of persons associated with emerging terrorist organisations.

To date all of the charges for offences related to terrorist organisations have, or will be, prosecuted on the basis that the organisation was a terrorist organisation within

paragraph (a) of the definition. At the time the offences were committed, none of the respective organisations were proscribed organisations.

If the definition of '*terrorist organisation*' was limited to proscribed terrorist organisations it would have precluded those charges being laid, and would preclude future prosecutions for offences associated with new or emerging terrorist organisations that had not yet been identified or proscribed.

Overseas experience has also demonstrated the need to ensure that law enforcement has the capacity for early intervention and proactive disruption of previously unidentified or 'home-grown' terrorist groups.

9.2 Definition of 'advocates'

Paragraph (c) of subsection 102.1(1A) of the Criminal Code provides that an organisation advocates the doing of a terrorist act if 'the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person … to engage in a terrorist act'.

In Recommendation 9, the SLRC recommended that paragraph (c) be omitted from the definition of advocates. Alternatively if paragraph (c) is not omitted from the definition, the SLRC recommends that 'risk' should be amended to read 'substantial risk'.

The Government Submission indicated that such an amendment at this time would be premature as the legislation has only recently been enacted and has yet to be tested by the courts.

In addition, the Government Submission indicated a concern that elevating the requirement in paragraph (c) of subsection 102.1(1A) to a *substantial* risk could undermine the operational effectiveness of the provision which is aimed at early intervention and prevention of terrorism.

9.3 Conformity with administrative law and accountability mechanism

Recommendation 3 of the SLRC proposed a reform of the process of proscription to meet the requirements of administrative law.

The Government Submission indicated that the current process of proscription conforms with administrative law and provides for sufficient accountability.

A decision by the Attorney-General to proscribe an organisation is reviewable under the ADJR Act. Under the Act it is a review as to whether the decision to specify an organisation was made in accordance with the law. This enables a court, for example, to determine whether the decision that the Attorney-General is satisfied that an organisation is assisting in the doing of a terrorist act, was not made in bad faith or at the direction or behest of another person or is so unreasonable that no reasonable person could have so exercised the power.

9.4 Advance notification of a proposed proscription

As part of Recommendations 3 and 4, the SLRC proposed that the process of proscription be more transparent and that it should provide organisations, and other persons affected, with notification, if it is practicable, that it is proposed to proscribe the organisation and with the right to be heard in opposition.

The Government Submission indicated that providing notice prior to listing could adversely impact operational effectiveness and prejudice national security. The Government Submission indicated that the Government 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.

Allowing for a right to be heard in opposition would necessarily involve advance notice as a pre-condition.

Once an organisation is listed, the legislation does allow for a case to be put to the Attorney-General outlining why the organisation should be de-listed.

The SLRC also recommended that greater efforts be made by the Government to engage in particular with the Muslim and Arab communities to explain the security legislation.

While it is not possible to ensure that all persons connected with an organisation are notified of the proscription of an organisation, the Government is currently investigating ways in which the proscription of organisations can be even more widely publicised. The Government has also agreed that information regarding the proscription of an organisation be made publicly available in the top eight languages (French, Vietnamese, Traditional Chinese, Spanish, Arabic, Malay, Turkish and Indonesian) and other languages where it is deemed appropriate. The Department has also prepared pamphlets in a number of languages outlining the provisions of the *Anti-Terrorism Act (No. 2) 2005*. These pamphlets are distributed by Departmental officers at forums and seminars that Departmental officers are invited to speak at about the Australian Government's counter-terrorism legislation.

9.5 Executive or Judicial Process of Proscription

The proscription of an organisation is a process that does not just involve the executive: it also involves the Parliament, as it is Parliament that has the power to disallow a regulation that proscribes an organisation as a terrorist organisation. It is appropriate that the executive and the Parliament play a role in determining the nature of the organisation taking into account the expert advice of those with an extensive knowledge of the security environment. The expertise of members of the executive, who have contact with senior members of the Governments and agencies of other countries, cannot be understated.

Both the Commonwealth Government and the Governments of the States and Territories have concluded that the executive and not the judiciary is best placed to make the necessary decision about the nature of the organisations that should be proscribed and that it is desirable that this power not be left to the courts. The

Government considers that it is essential that the executive take responsibility for making such decisions and that it should not abdicate this responsibility to the courts.

Recommendation 4 of the SLRC Report provides two alternative options for reform of the proscription process. Recommendation 4 (ii) provides that the process of proscription become a judicial process on application by the Attorney-General to the Federal Court with media advertisement, service of the application on affected persons and a hearing in open court.

In the Government Submission, the Government has indicated that it does not support this recommendation. The Government considers that the current listing process contains sufficient safeguards including judicial review and parliamentary oversight (including a power to disallow a regulation proscribing a terrorist organisation), and that it is more appropriate for the proscription power to be vested with the Executive.

9.6 Advisory Committee

Recommendation 4 (i) of the SLRC Report provides that if the process of proscription either continues by way of its current method of a regulation made by the Governor-General on the advice of the Attorney-General, there should be a notification process and the establishment by statute of an advisory committee. The Government's response to the notification proposal has been outlined above at paragraph 7.3.

The SLRC suggested that the advisory committee would advise the Attorney-General on the case that has been submitted for proscription of an organisation. The report recommended that the committee should consist of people who are independent of the process, such as those with expertise or experience in security analysis, public affairs, public administration and legal practice. The role of the committee should be publicised, and it should be open to the committee to consult publicly and to receive submissions from members of the public.

In the Government Submission, the Government has indicated that it does not support this recommendation and considers that the process of proscription should continue as an executive decision based on the advice of relevant Australian Government agencies. The Government considers that opening up that advisory process to a public committee would be inappropriate given the sensitivity of the information. It would also unnecessarily complicate review processes.

The UK's *Terrorism Act 2006* contains provisions regarding the proscription of terrorist organisations. Section 126 of the Act requires the Home Secretary to lodge a review of the Act before Parliament every 12 months. Lord Carlile was appointed Independent Reviewer of this Act in 2001.

By contrast, Australia defers review to a joint parliamentary committee, the PJCIS. It is maintained that joint parliamentary oversight is more rigorous than review conducted by one individual. If an Independent Reviewer was to be established in Australia, he or she would then review PJCIS decisions regarding re-listings. This would lead to a situation of multiple review processes which is neither desirable nor efficient.

10. Fault elements – strict liability when organisation is a proscribed organisation

The terrorist organisation offences in Division 102 require the prosecution to prove that the defendant either knew that the organisation was a terrorist organisation or, in certain cases, was reckless as to that fact. This requires the prosecution to show either that the defendant knew (or was reckless as to the fact) that the organisation is 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 (whether or not a terrorist act occurs) or that the defendant knew (or was reckless as to the fact) that the organisation was proscribed.

In its submission to the SLRC, the Commonwealth DPP stated that whilst proscribing an organisation as a terrorist organisation would enable the prosecution to prove that the organisation was a terrorist organisation, it does not assist in establishing the defendant's knowledge as to that fact. In most cases, the prosecution will not be able to show that the defendant knew about (or was reckless as to) the existence of the regulations. This means that the prosecution must prove that the defendant either knew (or was reckless as to the fact) that the organisation is directly or indirectly engaged in, preparing, planning, assisting in, or fostering, the doing of a terrorist act (whether or not a terrorist act occurs). This in turn means that the prosecution has to establish beyond reasonable doubt the nature of the organisation.

An alternative to the above may be to provide that strict liability applies to the fact that the organisation is a terrorist organisation when the organisation is a proscribed organisation. Once an organisation is proscribed, then it is a terrorist organisation as a matter of law. As such, the prosecution should not be required to establish that the person knew the law, although the defence of mistake of fact will be open to the accused.

When the organisation was not a proscribed organisation, the prosecution would continue to be required to prove that the defendant either knew (or was reckless as to) the nature of the organisations.

11. Proscription in other countries

Australia's close international partners, the United States, the United Kingdom and Canada, have proscription regimes based on an engagement in terrorist acts.

There are however, significant jurisdictional differences between the countries' proscription processes and regimes. There are also differences in the organisations proscribed by each country and these often reflect the differences associated with legislation and particular security-related issues associated with each country.

United Kingdom

Proscription in the UK is provided for under the *Terrorism Act 2000* (TA2000). The *Terrorism Act 2006* (TA2006) amended the existing definition of terrorism to include the 'glorification' of the commission or preparation of acts of terrorism.

To date, the UK has proscribed 44 organisations under the TA2000. Two of these organisations were proscribed for the 'glorification' of terrorism under the TA2006.

The TA2000 provides that a proscribed organisation may apply to the Secretary of State for removal of proscription. If this application is unsuccessful, there is an avenue of appeal to the Proscribed Organisations Appeals Commission. Unlike Australia however, the regulation proscribing an organisation in the UK is not subject to parliamentary scrutiny or review.

Canada

Terrorism offences and the proscription regime fall under the *Criminal Code* (C46-Canada).

Under C46, the Canadian Governor in Council may list an entity if satisfied:

(a) the entity has knowingly carried out, attempted to carry out, participated in or facilitated a terrorist act; or
(b) the entity is knowingly acting on behalf of, at the direction of or in association with an entity referred to in (a).

A listed entity may apply to be 'de-listed' as an entity. The Attorney-General may make a recommendation not to list an entity where there are 'reasonable grounds' to recommend that the entity is no longer a listed entity.

In the event that such an application is unsuccessful, the entity may seek judicial review of the listing.

Canadian legislation provides for a review of all listed entities every two years on the anniversary of the establishment of the list. The review must be completed 120 days after its commencement and notice of its completion must be gazetted.

The last review of the list was conducted on 9 November 2006 when all 40 entities listed by Canada were re-listed.

United States

The United States has three pieces of legislation governing designated individuals and terrorist groups:

- Foreign Terrorist Organisations (FTO)
  Designation occurs under section 219 of the *Immigration and Nationality Act*. This process most closely resembles Australia's proscription process

- Terrorist Exclusion List (TEL)
  This facilitates the US Government's ability to exclude from entry non-citizens associated with entities on the List.

- Executive Order 13224
  This authorises disruption to the financial assets of foreign individuals and entities that commit or pose a significant risk of committing terrorist acts.

Designation of an FTO is done by the Secretary of State based on the following criteria:

- that the organisation is a foreign organisation; and
- the organisation is engaged in terrorist activity; and
- the organisation is a threat to the security of US citizens or the national security of the US.

The USA has designated 42 organisations as an FTO.

Once an organisation has been designated as an FTO control over financial assets can be lost, members and representatives of the FTO are ineligible for entry into the US and it is an offence to provide material support or resources to an FTO.

An FTO may apply to the Secretary of State for revocation of the designation within a set petition period. The FTO may also seek judicial review of the designation.

In comparison with Canada, the UK and the US, the Australian proscription regime is highly transparent and accountable, in that it is subject to legislated regular review by the Parliament (PJCIS) and that the Attorney-General's decision to list an organisation is a reviewable administrative decision under the ADJR Act. The Canadian, UK and US processes have no such legislated external public review. In addition, Australia is the only country whose case for proscription (the 'statement of reasons') is publicly available.

11. Listing by the United Nations

The listing of terrorist organisations by the Attorney-General under the *Criminal Code Act 1995* is distinct from the listing of terrorists and terrorist organisations under the *Charter of the United Nations Act 1945* ('the UN Charter Act') and associated regulations. However, both mechanisms are mutually supportive in efforts to combat terrorism.

The primary purpose of the UN Charter Act is to implement domestically Australia's international obligations to freeze the funds and other financial assets or economic resources of entities and individuals who are:

(a) designated by the Security Council as being connected to Al Qaeda, the Taliban or Usama bin Laden under UN Security Council resolutions that comprise the Al Qaeda and Taliban sanctions regime (including resolutions 1267, 1333, 1390, 1526, and 1617); or
(b) determined (by individuals states) to be associated with terrorism within the meaning of Operative Paragraph (OP) 1 (c) of UN Security Council Resolution 1373; and to prevent the provision of such funds, financial assets and economic resources to

such entities and individuals. OP 1 (c) of SCR 1373 provides that action must be taken against:

persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;

Australia has given effect to the obligation in OP 1 (c) of SCR 1373, including by establishing a power for the Minister for Foreign Affairs to proscribe individuals and entities under section 15 of the UN Charter Act.

The listing mechanism under sections 15 and 18 of the UN Charter Act is directed specifically at terrorist financing, and involves different, but related, considerations to those under the Criminal Code. For example, Australia must list under the Charter of the UN Act all those individuals and organisations listed by the 1267 Committee.