

Chapter Fourteen

Executive Proscription of Terrorist Organisations in Australia: Exploring the Shifting Border between Crime and Politics

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Introduction

A core feature of anti-terror laws enacted throughout the world after the events of 11 September 2001 (9/11) has been the provision for executive proscription of terrorist organisations.¹ This chapter examines the Australian provisions and their use since their enactment in 2002.

It begins in Part I with a brief account of the background to the legislation. Part II examines in detail the legislative scheme governing the listing of terrorist organisations, including the concept of a 'terrorist act', the statutory criteria for listing organisations, the definition of an 'organisation', the listing procedure and the range of terrorist organisation offences. Part III focuses on the provisions in action, including the range of organisations currently listed, the reviews of listings undertaken by the Parliamentary Joint Committee on Intelligence and Security and controversies relating to the listing criteria and listing procedures. Part IV considers some of the actual and potential impacts of listing particular organisations. An important theme woven through the entire analysis is the play between two essential elements of terrorist legal discourse: the criminal and the political. Part V is devoted to an explicit consideration of this issue. I argue that in addition to endangering established legal principles, proscription laws distract from the need for political initiatives to address effectively the roots of violent political conflicts. Ironically, whilst enhancing the coercive powers of the executive they may inhibit recourse to the more flexible political and policy

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¹ For a useful overview of the anti-terror laws of several countries see UK Foreign and Commonwealth Office, *Counter-Terrorism Legislation and Practice: a Survey of Selected Countries* (2005). Also see V Ramraj, M Hor and K Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge, New York: Cambridge University Press, 2005).

instruments (diplomacy, aid, trade) needed to safeguard national security interests.

In liberal democratic societies, use of the criminal law to ban political organisations and to punish individuals for a connection with a banned organisation, thus dispensing with the need to prove any element of harmful conduct or intent, is inevitably controversial. Where the banning power is placed in the hands of the executive it is even more so. Reviewing the first major package of anti-terror legislation, which contained the proscription provisions in their initial form, the Senate Legal and Constitutional Committee of the Australian Parliament noted that executive proscription 'was clearly one of the most significant issues of concern during this inquiry and aroused the most vehement opposition'.²

Critics object that executive proscription threatens the rule of law, violating its core requirements like the principle of individual responsibility and eroding the role of the courts in judging criminal liability. They also point to the manner in which the law offends fundamental freedoms, such as freedoms of association and expression. Some invoke Justice Dixon's warning from the *Communist Party Case*, in which the High Court struck down the most famous attempt by an Australian government to ban a political organisation: 'History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it has been done not seldom by those holding the executive power.'³

Defenders of the new laws respond that the threat we face from global terrorism driven by violent, fundamentalist Islamic ideology is unprecedented. It necessitates a response that reflects both the global character of the threat and the imperative of preventing potentially catastrophic attacks. Banning organisations is required to disrupt terrorist activities and stem actual and potential sources of terrorist support.⁴

I. Executive Proscription: Background to the Legislation

Executive proscription powers were contained in the first major package of Australian anti-terrorism legislation passed by the Australian Parliament

² Senate Legal and Constitutional Legislation Committee, Parliament of the Commonwealth of Australia, *Consideration of Legislation Referred to the Committee: Security Legislation (Terrorism) Bill 2002 [No2]; Suppression of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002 (2002)* [3.155].

³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, [178].

⁴ Australian Government: Department of Foreign Affairs and Trade, *Transnational Terrorism: the Threat to Australia* (Canberra: Commonwealth of Australia). The former Commonwealth Attorney-General more recently argued that '[t]errorism is arguably the greatest threat this nation has faced in many decades, and perhaps the most insidious and complex threat we have ever faced': P Ruddock, 'A Safe and Secure Australia: An Update on Counter-Terrorism' (Speech delivered at Manly Pacific Hotel, 21 January 2006).

following 9/11.⁵ In its original form, the Security Legislation Amendment (Terrorism) Bill 2002 would have empowered the Attorney-General to proscribe an organisation by declaration. It provided very broad grounds for proscription.⁶

The Bill also created broadly defined strict liability offences carrying serious penalties. It permitted no merits review of proscription decisions and no revocation mechanism was provided. The provisions attracted concerted criticism and issues of constitutionality were also raised.⁷

In its review of the Bill, the Senate Legal and Constitutional Committee expressed particular concern over the potential reach of the proscription regime:

The Committee raised with the Department the concerns expressed by witnesses and in submissions about support by Australians for pro-independence or other similar movements in other countries, but was not persuaded by the Department's response. The Committee considers that any review of the proscription provisions must ensure that such organisations would not be caught by the provisions.⁸

The Committee recommended against enactment of the Bill and that the Attorney-General develop an alternative procedure.

In the regime that passed into law in the *Security Legislation Amendment (Terrorism) Act 2002* (Cth), the power to proscribe by declaration was replaced by a power allowing the making of a regulation specifying an organisation as a terrorist organisation. The grounds for proscription were restricted by linking them to United Nations Security Council decisions and resolutions. In 2003, each of the states passed legislation referring constitutional powers to the Commonwealth in an endeavour to guarantee the constitutionality of executive proscription.⁹

⁵ Senate Legal and Constitutional Legislation Committee, above n 2.

⁶ Under the proposed s 102.2 the Attorney-General could declare an organisation to be a terrorist organisation if satisfied on reasonable grounds that:

- the organisation, or a member of the organisation, has committed or is committing a terrorism offence, whether or not the organisation or member has been charged with, or convicted of, the offence;
- the declaration is reasonably appropriate to give effect to a decision of the UN Security Council that the organisation is an international terrorist organisation;
- or the organisation has endangered or is likely to endanger the security or integrity of the Commonwealth or another country.

⁷ Reference was made to the striking down by the High Court of the Menzies government's legislation to dissolve the Australian Communist Party in the Communist Party Case: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1: Senate Legal and Constitutional Legislation Committee, above n 2, [3.107]-[3.109].

⁸ Senate Legal and Constitutional Legislation Committee, above n 2, [3.115].

⁹ *Criminal Code Amendment (Terrorism) Act 2003* (Cth). There nevertheless remain unresolved constitutional questions that will not be further discussed here. They relate not to the subject of legislative power under which the laws were passed, as that is resolved by the state referral of power under s 51 (xxxvii) of the *Australian Constitution*, but to possible infringements of implied freedoms of political speech and association protected by the Constitution and the separation of the judicial power. For a full

In 2003, legislation was used to ban particular organisations on the basis that the required link to UN Security Council decisions and resolutions imposed undue restriction on the ability to deal with specific threats within Australia.¹⁰ Subsequently, the requirement for a link to UN Security Council resolutions and decisions was dropped.¹¹ The criteria for listing an organisation were linked to the concept of a 'terrorist act' (see below), restoring the Attorney-General's broad listing power subject to the Parliament's disallowance power in relation to any listing regulation. The amendments also provided that the Parliamentary Joint Committee on the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS) and Defence Signals Directorate (DSD) (since re-named the Parliamentary Joint Committee on Intelligence and Security (PJC)) can review each regulation and report its findings and recommendations to the Parliament before the expiry of a disallowance period of 15 sitting days.¹² Decisions to list are also subject to judicial review restricted to testing the legality of the decision.

The only merits review is that which may be conducted by the PJC. In its first report the PJC stated its intention to undertake reviews of all listings both as to merits and process. It dismissed the advice of the then Attorney-General and ASIO that it restrict its role to reviewing the appropriateness of the process adopted for listing an organisation and deciding whether the Attorney-General's supporting statement provided sufficient grounds for the listing.¹³ I will return to a more detailed examination of the PJC reviews later.

A regulation specifying an organisation as a terrorist organisation has effect for a period of two years.¹⁴ In the intervening period, the regulation may be repealed or cease to have effect upon a declaration by the Attorney-General that s/he is no longer satisfied that the organisation is a terrorist organisation.¹⁵ An organisation may be re-listed before, at or after the expiry of the two-year period.¹⁶ There is also provision for application to the Attorney-General to de-list a listed organisation.¹⁷ The PJC has adopted a policy of fully reviewing

discussion see J Tham, 'Possible Constitutional Objections to the Powers to Ban "Terrorist" Organisations' (2004) 27(2) *University of New South Wales Law Journal* 482, 509-22.

¹⁰ *Criminal Code Amendment (Hizballah) Act 2003* (Cth); *Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003* (Cth).

¹¹ *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth).

¹² *Criminal Code Act 1995* (Cth) s 102.1A ('Criminal Code').

¹³ Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Review of the listing of the Palestinian Islamic Jihad PIJ* (2004) [2.2]-[2.9].

¹⁴ *Criminal Code* s 102.1(3).

¹⁵ *Criminal Code* s 102.1(4).

¹⁶ *Criminal Code* s 102.1(5).

¹⁷ *Criminal Code* s 102.1(17).

the re-listing of organisations, reflecting its view that the two-year sunset clause should be taken seriously.¹⁸

II. Listing Terrorist Organisations

A. Concept of a 'Terrorist Act'

The criteria for listing a terrorist organisation revolve around the concept of a 'terrorist act'. 'Terrorist act' is defined as an action *or threat* of action where the action:

- causes serious harm that is physical harm to a person;
- causes serious damage to property;
- causes a person's death;
- endangers a person's life, other than the life of the person taking the action;
- creates a serious risk to the health or safety of the public or a section of the public; or
- seriously interferes with, seriously disrupts, or destroys, an electronic system.¹⁹

Such conduct is already covered by the general criminal law. What gives this conduct its terrorist character is the additional requirement that the action is taken or threat is made with the dual intent of advancing a political, religious or ideological cause *and* coercing or intimidating a government or intimidating the public or a section of the public.²⁰

Action that is advocacy, protest, dissent or industrial action is exempted from the definition of 'terrorist act' if it is not intended to cause serious physical harm to a person, cause a person's death, endanger the life of a person (other than the person taking the action), or create a serious risk to the health or safety of the public or a section of the public.²¹ The onus of proof is on an accused to bring him or her self within the exemption.

The definition of 'terrorist act' is broad, complex and uncertain. In *R v Lodhi* Justice Whealy observed that the provision 'postulates an action or threat of action of the widest possible kind' as long as it is accompanied by the double intent of advancing a political, religious or ideological cause and coercing or intimidating a government or the public or a section of the public.²² It includes

¹⁸ Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Review of the relisting of Al Qa'ida and Jemaah Islamiyah as Terrorist Organisations under the Criminal Code Act 1995* (2006) [1.15]-[1.17]; Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [2.8].

¹⁹ Criminal Code s 100.1(2).

²⁰ Criminal Code s 100.1(1).

²¹ Criminal Code s 100.1(3).

²² *R v Lodhi* [2005] NSWSC 1377 (Unreported, Whealy J, 23 December 2005) [52].

a wide range of actions beyond those conforming to the image of terrorism as involving acts that cause or threaten death or serious injury to persons. Threats of these other types of action are also included.

The commission of a terrorist act (which includes making threats to engage in one of the relevant types of action) is a crime punishable by life imprisonment.²³ Ancillary offences criminalise an ill-defined range of additional behaviour antecedent to the commission of a terrorist act. These include: providing or receiving training connected with a terrorist act,²⁴ possessing things connected with a terrorist act,²⁵ collecting or making documents likely to facilitate the commission of a terrorist act,²⁶ other acts done in preparation for, or planning, a terrorist act.²⁷ In each case there is no requirement to prove that a terrorist act occurred or the connection with a specific intended terrorist act. The offences carry penalties ranging from ten years to life imprisonment.

Terrorist activity attracts particular condemnation because it targets civilians. This definition is not so confined, but extends to conduct aimed directly at coercing or intimidating governments as well. The equation of government and citizenry for this purpose might not generate great concern in contemporary Australia, but the definition is not restricted to Australia or to governments in Australia. The provisions also have extended geographical jurisdiction.²⁸ In the words of Justice Bell in *R v Ul-Haque*, they create offences 'that may be committed by a foreigner against a foreigner in a foreign country remote geographically from, and of no particular interest to, Australia'.²⁹ Broadly defined actions of the relevant kind are included in the definition of terrorism regardless of the character of the government or political regime against which they are directed. All forms of national independence struggle, from the American and French revolutions to the anti-colonial struggles of the recent past, would constitute terrorism, as would many lesser forms of political and industrial activism.

B. Criteria for Listing a Terrorist Organisation

Based on this broad concept of a 'terrorist act', the executive proscription regime extends the scope of criminal liability even further by creating a range of terrorist organisation offences. Before considering these (in section E below) it is necessary to outline the statutory criteria for listing terrorist organisations. The Attorney-General may make a regulation specifying that an organisation is a

²³ Criminal Code s 101.1.

²⁴ Criminal Code s 101.2.

²⁵ Criminal Code s 101.4.

²⁶ Criminal Code s 101.5.

²⁷ Criminal Code s 101.6.

²⁸ Criminal Code s 100.1(4).

²⁹ *R v Ul-Haque* (Unreported, NSW Supreme Court, Bell J, 8 February 2006) [32].

terrorist organisation if 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 or advocates the doing of a terrorist act, whether or not in each case a terrorist act has occurred or will occur.³⁰

The advocacy provision is a recent addition to the *Criminal Code Act 1995* (Cth) ('Criminal Code'). It is defined in broad terms. An organisation advocates the doing of a terrorist act if it directly or indirectly counsels or urges the doing of a terrorist act, directly or indirectly 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.³¹

The advocacy provision, in particular, is of uncertain scope³² although it clearly takes in organisations far removed from participation in violent activity, especially via its third limb concerning 'praise' for terrorist acts. Statements by an organisation in Australia that condemned Israel's invasion of Lebanon in 2006 and expressed support for the resistance led by Hizballah could well be defined as advocacy justifying proscription of the organisation as a terrorist organisation. The definition invades what many would conceive as the realm of open, pluralistic, democratic discourse concerning events of international significance.

It is important to note that in addition to proscription by the executive an organisation may be determined to be a terrorist organisation by a court.³³ If an individual is charged with an offence relating to an alleged terrorist organisation, being an unlisted organisation, proof of the offence requires proof that the organisation in question is in fact a terrorist organisation. That would in turn require proof of the necessary connection to a 'terrorist act' (see Gani Chapter 13 this volume).

C. What is an 'Organisation'?

The concept of terrorism has received a great deal of attention but it is salient to ask also what constitutes an 'organisation' under the legislation. In its submissions in *R v Ul-Haque* the Crown stressed the breadth of the definition of 'organisation' under s 100.1(1) of the Criminal Code, which defined 'organisation' to mean 'a body corporate or an unincorporated association':

In considering the meaning of 'terrorist organisation', it is first to be noted that the legislation is referring to an organisation, that is, a standing body of people

³⁰ Criminal Code s 102.1.

³¹ Criminal Code s 102.1(1A).

³² Eg, it is not clear what links are required between an organisation and statements amounting to advocacy to justify proscription of the organisation. Do the statements have to be endorsed as the policy of the organisation? Will it be enough that they are statements by a leader of the organisation? Would statements by any member on behalf of the organisation suffice?

³³ Under para (a) of the definition of 'terrorist organisation' in Criminal Code s 102.1(1).

with a particular purpose; not a transient group of conspirators who may come together for a single discrete criminal purpose. The requirement for an 'organisation' is consistent with the provision for an entity with an ongoing purpose of committing a number of terrorist acts with the intention of advancing the same political, religious or ideological purpose.³⁴

It is widely agreed that the principal threat and target of laws passed after 9/11 is the organisation held responsible for that atrocity, Al Qa'ida, and those it inspires. However, it is the ideological influence of Al Qa'ida rather than its organisational form or power that is central in this assessment.³⁵ Many expert commentators argue that Al Qa'ida can be more accurately conceived as an idea rather than an organisation.³⁶ This tends to be confirmed by events like the Madrid and London bombings, which suggest that the major threat stems from local, self-starter individuals and groupings who are inspired by a combination of extremist Islamic ideology and outrage at what they perceive to be the injustices inflicted on the Arab and Muslim world by the West. Such attacks require little by way of structured organisation or finance.³⁷ What is needed in the way of motivation, training, technical knowledge and support is available in the constant, global flow of information delivered by new communications media: the internet, satellite television and so on. Thus even the broad definition of 'organisation' offered in *R v Ul-Haque* may fail to capture the extremely fluid and elusive forms of organisational activity involved in contemporary global terrorism. The effect of invoking the word 'organisation' may therefore be mostly symbolic, to provide illusory comfort by imposing a familiar shape on a formless threat.

D. Listing Procedure

Listing an organisation involves a number of steps. An unclassified statement of reasons is prepared by ASIO that details the case for the listing. This is submitted to the Attorney-General who signs the statement confirming that the criteria for listing the organisation are satisfied, signs a regulation with respect to the organisation and sets in train the other formalities required to make the regulation. Prior to making a regulation the Attorney-General is required by

³⁴ *R v Ul-Haque* (Unreported, NSW Supreme Court, Bell J, 8 February, 2006) [51].

³⁵ P Varghese (Director-General of the Office of National Assessments), 'Islamist Terrorism: The International Context' (Speech delivered at the Security in Government Conference, Canberra, 11 May 2006); Dame E Manningham-Buller (Director General of the UK Security Service), 'The International Terrorist Threat to the UK' (Speech delivered at Queen Mary's College, London, 9 November, 2006).

³⁶ J Burke, *Al-Qaeda — the True Story of Radical Islam* (London: Penguin, 2004) 1-21; K Greenberg (ed), *Al Qaeda Now — Understanding Today's Terrorists* (Cambridge: Cambridge University Press, 2005) 9-12.

³⁷ United Kingdom, Report of the Official Account of the Bombings in London on 7th July 2005 (2006); D Benjamin and S Simon, *The Next Attack — the Globalization of Jihad* (UK: Hodder and Stoughton, 2005) 5-16.

law to brief the Leader of the Opposition.³⁸ The Commonwealth also agreed under the Inter-Governmental Agreement on Counter-Terrorism to consult the State and Territory leaders prior to each listing and not to proceed with any listing if objected to by a majority. Having fulfilled these requirements the Attorney-General notifies the chair of the PJC of the decision to list an organisation and provides the statement of reasons. A press release is issued announcing the listing and providing the reasons. A regulation takes effect immediately it is made, but is subject to disallowance by the Parliament.

E. Terrorist Organisation Offences

Listing an organisation as a terrorist organisation is a momentous decision for a number of reasons. Its immediate legal effect is to bring into play a range of serious criminal offences relating to those with a connection to the listed organisation (see Gani Chapter 13 this volume). Strictly speaking the listing does not directly ban or dissolve the organisation. Proscription is achieved by the effect of these offences. The offences are:

- directing the activities of a terrorist organisation;³⁹
- membership of a terrorist organisation;⁴⁰
- recruiting for a terrorist organisation;⁴¹
- training a terrorist organisation or receiving training from a terrorist organisation;⁴²
- getting funds to, from or for, a terrorist organisation;⁴³
- providing support to a terrorist organisation;⁴⁴ and
- associating with a terrorist organisation.⁴⁵

Aside from the association offence (punishable by three years imprisonment) the other offences carry penalties of between ten and 25 years imprisonment. These are serious crimes, therefore, although they require proof of no element of violent conduct or intent on the part of the individual, only the specified connection with the listed organisation. We have seen that the concept of a 'terrorist act' is very broadly defined and encompasses virtually any form of politically motivated violence. Political entities of all kinds (including states, armies, police forces as well as national liberation movements) use violence for political ends. In most cases the violence is a means to an end, not an end in itself. It is the objective that commands popular allegiance and support (the

³⁸ Criminal Code s 102.1(2A).

³⁹ Criminal Code s 102.2.

⁴⁰ Criminal Code s 102.3.

⁴¹ Criminal Code s 102.4.

⁴² Criminal Code s 102.5.

⁴³ Criminal Code s 102.6.

⁴⁴ Criminal Code s 102.7.

⁴⁵ Criminal Code s 102.8.

maintenance of the peace by a legitimate government, the achievement of a national homeland, the overthrow of a despotic regime). Thus individuals join, support, fund and participate in political organisations for reasons entirely unrelated to the violent means that those organisations may adopt on occasions.

If the qualifying adjective 'terrorist' is momentarily bracketed out it will be seen therefore that these offences criminalise a broad range of conventional activities constitutive of any political movement or organisation. If then we recall the breadth of the definition of terrorist organisation, a definition that does not differentiate according to the contexts and causes of political conflict, the potential reach of the proscription regime will be seen to be both very extensive and uncertain. The uncertainty offends a basic principle of the rule of law: that the law should afford a guide to conduct. Citizens should be able to ascertain with some certainty the boundary demarcating acceptable and unacceptable conduct. When the conduct in question is political in character, uncertainty may also have a chilling impact on democratic institutions and discourse.

It has also been regarded as fundamental to the concept of the rule of law that punitive consequences should attach to conduct, not to the status or social type of the offender.⁴⁶ In reality, status offences have been far from uncommon in the criminal laws of liberal states. Laws relating to vagrancy, 'common prostitutes' and consorting afford examples. But such offences have overwhelmingly fallen at the less serious end of the spectrum of crimes.

The terrorist organisation offences are a fundamental departure insofar as they attach severe penalties to proof of the relevant status. Key terms, like 'member' and 'support', are not defined and none of the offences require proof of a link between the prohibited status or activity and the commission or intention to commit a terrorist act. Thus, a person who is a member (including an 'informal member') of an organisation designated as terrorist by a regulation made by the Attorney-General may be sentenced to ten years imprisonment for what others in the organisation have done or are preparing, planning, assisting, fostering or advocating regardless of the person's knowledge, intent or attitude with respect to these activities.

The terrorist organisation offences have an extended geographical jurisdiction.⁴⁷ Organisations may be proscribed that are involved in violent political conflicts far removed from Australian territory or interests and without reference to the conditions (of state autocracy, repression, discrimination and so on) that may be driving such conflicts. Members and supporters of these organisations are

⁴⁶ For a classic normative liberal account of the conduct requirement in criminal law see H Packer, *The Limits of the Criminal Sanction* (Stanford, Cal: Stanford University Press, 1968) ch 5.

⁴⁷ Criminal Code s 102.9 provides that extended geographical jurisdiction category D applies to these offences. Under s 15.4, jurisdiction applies whether or not the conduct constituting the offence occurred in Australia and whether or not a result of that conduct occurred in Australia.

liable to punishment under Australian law. The laws are practically unenforceable against most of the people involved with such organisations because they are not resident in Australia and major issues of national sovereignty and the comity of nations would be raised by any attempt at apprehension or extradition.⁴⁸ However, the laws directly affect those persons with an organisational connection who are resident in Australia. They are liable to prosecution under the proscription regime although they may be law-abiding Australian citizens or residents with no grievance against Australia, its government or people.

III. The Listing Provisions in Action

A. Listed Organisations

Nineteen organisations have been and remain listed under the proscription provisions.⁴⁹ Many of these organisations have been re-listed on one or more occasions. No organisation has been de-listed and no organisation has had its status as a terrorist organisation lapse after the two-year sunset period. All the organisations are self-declared Islamic organisations with one exception, the Kurdistan Workers Party (PKK). The PKK is the most recent organisation to be listed for the first time.⁵⁰

Of the 18 other organisations most are acknowledged by the Government to have no links to organisations or activities in Australia. A few have notoriety in Australia and globally, like Al Qa'ida and Jemaah Islamiyah. Most operate within the confines of specific geo-political conflicts, their Islamic ideology being merged in struggles over territory, political power and national rights. The most prominent of these are the Palestinian organisations, the military wing of Hamas (known as Izz al-Din al-Qassam Brigades) and Palestinian Islamic Jihad (PIJ)), and the alleged external wing of the Lebanese organisation, Hizballah (known as Hizballah External Security Organisation).⁵¹ Other groups variously operate in Algeria, Iraq, the Philippines and Kashmir.

Aside from their recourse to politically inspired violence, a trait shared with many organisations and governments around the world, it is not clear why these organisations have been singled out for proscription, other than that (with the exception of the PKK) they are all Islamic revivalist (or fundamentalist) organisations. Quite apart from differences in geo-political focus, some are Sunni

⁴⁸ See the discussion in Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.28].

⁴⁹ A complete list of proscribed organisations is provided on the National Security website of the Attorney-General's Department: <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>>.

⁵⁰ Listed on 17 December, 2005: <<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/28B052FC3CCE4009CA2570DF000FB458?OpenDocument>>.

⁵¹ Hamas and Hizballah were originally proscribed by legislation at a time when the statutory listing criteria were linked to UN Security Council decisions: see above n 10.

and others Shia. It is acknowledged in many instances that they have no direct links with each other or with Al Qa'ida. In fact, the predominant focus of organisations like Hamas and Hizballah on national rights and their participation in local and national elections are anathema to Al Qa'ida.⁵²

Hamas and Hizballah are mass political organisations. Hizballah represents the largest (and poorest) ethno-religious group in Lebanon (the Shi'ites) and constitutes a significant bloc in the Lebanese Parliament. Its popular standing within Lebanon (outside as well as within the Shi'ite community) derives from its role in resisting the Israeli occupation of southern Lebanon between 1982 and 2000, a conflict that was renewed in the second half of 2006.⁵³ It has supporters within the Lebanese community in Australia as evidenced by calls from respected community leaders during the 2006 Israel/Lebanon war for the organisation to be de-listed.⁵⁴ Hamas (a Sunni organisation) won a landslide victory in the January 2006 Palestinian Authority elections, eclipsing the older secular Fatah organisation.

Both organisations have been engaged in long-term territorial and political conflicts with the state of Israel. Both have engaged in suicide bombings within their immediate region. They have also observed ceasefires at different times. It is not their recourse to violence that explains their popular following but, amongst other things, their reputation for honesty and the effective delivery of a range of social, educational and health services to beleaguered local populations in Lebanon and the Palestinian Occupied Territories.⁵⁵

Acts of violence against civilians on both sides of these conflicts deserve condemnation. To define the violence of one side only as 'terrorist', however, serves tacitly to justify the violence of the other. It also obscures the causes of violent conflict and hinders the search for effective political responses to it.

The proscription of Hamas and Hizballah suggests a tendency to assimilate many different forms of political Islam to Al Qa'ida and see it as part of a monolithic

⁵² K Hroub, *Hamas — A Beginner's Guide* (London: Pluto Press, 2006) 99-103; A Crooke, 'The Rise of Hamas', *Prospect* (UK), February 2006; L Deeb, 'Hizballah: A Primer', *Middle East Report Online*, 31 July 2006.

⁵³ Deeb, *ibid.*

⁵⁴ R Kerbaj, 'PM Can't Be Swayed on Hezbollah', *The Australian* (Sydney), 4 August 2006, 8.

⁵⁵ Hroub, *above n 52*; P McGeough, 'Between Hezbollah and Hell', *Sydney Morning Herald* (Sydney), 29-30 July 2006, 29.

global conspiracy against Western values and interests.⁵⁶ This is simplistic.⁵⁷ It is also dangerous. It contributes to the perception that anti-terror laws are a proxy for official anti-Islamism without regard for the particularities of any conflict involving Islamic groups and the justice or otherwise of their cause.

Whilst not recommending disallowance of any listing, the PJC has expressed scepticism regarding several of the listings.

B. Reviews of the Parliamentary Joint Committee on Intelligence and Security

The PJC reviews all decisions to list and re-list terrorist organisations and reports to Parliament with comments and recommendations with respect to each, including a recommendation as to whether the regulation should be disallowed. Its reviews are concerned with the merits of each listing and the adequacy of the process adopted by the executive in each case. The reviews are the major source of information concerning the administration of the executive proscription regime. They are relevant to an empirical assessment of the merits of each listing, the integrity, quality and fairness of the procedures adopted to list organisations and the attitude of the executive to the exercise of the listing powers.

The PJC is a distinctive parliamentary committee. Because it is concerned with national security it adopts a self-consciously conservative and executive-oriented approach to its responsibilities.⁵⁸ Independents and minor parties have not been represented. During the Howard government, members of the Opposition were, if possible, selected from former ministers. It seeks to avoid dividing on party lines.⁵⁹ Unsurprisingly, the PJC has on no occasion recommended disallowance

⁵⁶ This is the way the problem of terrorism is constructed in the government's 2004 White Paper: Australian Government, above n 4, 2. The analysis in the White Paper concentrates on Islamic extremist groups and sees the source of the threat in what it depicts as their underlying religious ideology and goals: 'an ideology that is inaccessible to reason ... with objectives that cannot be negotiated'. The then Australian Foreign Minister described it in his press club launch of the White Paper as 'a terrorist project of limitless ambition, merciless methods and reckless zealotry which is almost incomprehensible to the modern mind': A Downer, 'Transnational Terrorism: the Threat to Australia' (Speech delivered to the National Press Club, Canberra, 15 July 2004). The 'main reason' Australia is a target, we are told in an information sheet produced by DFAT is 'the terrorists feel threatened by us and by our example as a conspicuously successful modern society'. They simply hate our freedoms and want 'to destroy our way of life and, where possible, to destroy us': Department of Foreign Affairs and Trade, *Transnational Terrorism: Why Australia is a Terrorist Target* (2004) <<http://dfat.gov.au/publications/terrorism/is2.html>>.

⁵⁷ See, eg, the special report, 'Forty Shades of Green', *The Economist* (London), 4 February 2006, 22-4. It describes the very different ideologies, goals and methods of Islamic political organisations with their roots in the tradition of the Muslim Brotherhood (eg, Hamas) compared with those of Al Qa'ida. In particular there is a fundamental divergence of view on the use of violence, the former seeing it as justified only in exceptional circumstances like self defence or foreign occupation.

⁵⁸ It has declared its 'cautious approach' on several occasions. See Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [3.47]; Parliament of the Commonwealth of Australia, *Review of the Re-Listing of ASG, JuA, GIA and GSPC* (2007) [2.49].

⁵⁹ Parliament of the Commonwealth of Australia, *Review of the listing of the Kurdistan Workers' Party (PKK)* (2006) Minority Report [1.1].

of a listing regulation. It has, however, expressed misgivings about some of the listings⁶⁰ and been relentlessly critical of the approach and procedures adopted by the Howard government in the listing process. This may seem to expose the limitations, and perhaps inadequacy, of parliamentary review as a mechanism of accountability in relation to proscription. To be fair to the PJC the 'war on terror' creates a difficult political climate for parliamentary scrutiny of executive action and its effectiveness should not be judged by immediate impact. One of the most striking impressions left by the reports of the PJC is of a major tension between the Parliament and the executive on the issue of the proscription regime. This is reflected more concretely in some of the recurrent themes, criticisms and recommendations in the reports of the PJC.

1. The Question of Listing Criteria

Two themes related to the criteria for listing organisations recur in the PJC reports. First, the PJC has frequently observed that the definition of a terrorist organisation in the Criminal Code is so broad as to permit a countless number of organisations throughout the world to be proscribed.⁶¹ It has repeatedly requested that the Attorney-General articulate, and apply, a clear and meaningful set of criteria for listing an organisation.⁶² As it was baldly put in one report: 'The question remains: how and why are some organisations selected for proscription by Australia?'.⁶³

In several reports, the PJC observed that the listed organisation had no known links to Australia, nor presented an apparent threat to Australian interests. It expressed concern that the Attorney-General did not regard these as critical considerations in the decision to list. The Attorney-General's Department responded by pointing to the breadth of the statutory criteria, reminding the PJC that 'the Criminal Code does not require that an organisation have a link to Australia before it can be listed' and stressing that the rationale of the legislation was 'proactive' and preventative.⁶⁴ The PJC countered that this was only 'superficially logical', 'vague' and afforded no explanation of how proscription in Australia of an organisation with no connections to Australia contributed to

⁶⁰ Above n 58, *Review of the Listing of Six Terrorist Organisations* (2005) [3.48]-[3.49]. The recommendations of the majority on the listing of the PKK were also qualified: above n 59.

⁶¹ See, eg, Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.14].

⁶² The issue has been raised, and the request has been made formally or informally, in all or most of the PJC reports. See, eg, Parliament of the Commonwealth of Australia, *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) [3.5] and the comments and formal recommendation in a recent report noting that there has been no response to previous requests, and renewing them: Parliament of the Commonwealth of Australia, *Review of the Re-Listing of Al Qa'ida and Jemaah Islamiyah as Terrorist Organisations* (2006) [1.20] and Recommendation 1.

⁶³ Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.22].

⁶⁴ *Ibid* [2.18].

the prevention of terrorist violence.⁶⁵ The PJC argued that the listing of organisations that have no Australian links is mere ‘symbolism’, ‘with little practical effect’ and is ‘costly in time and effort and possibly distracting for Australia’s anti-terrorism efforts’.⁶⁶

ASIO provided a list of criteria used by it to assess organisations, which included links with Australia,⁶⁷ although the manner in which these criteria are applied has not been clarified.⁶⁸ However, it frequently acknowledged that no link existed or claimed a vague or indirect link. In one instance the only link consisted of the claim that some individuals in Australia shared the ‘ideology’ of the listed organisation.⁶⁹ Sometimes Australian interests were subsumed within an amorphous conception of ‘Western interests’. The PJC described ASIO’s view as being that ‘Australian interests should be considered at threat if they are part of a generalised threat from any organisation which clearly targets Western or foreign interests in a given country or region’.⁷⁰ Elsewhere ASIO claimed that proscription was justified because Australians travelling overseas may fall victim to an indiscriminate attack perpetrated by the organisation, the example given being that ‘there is always the possibility that an Australian or Australians visiting Israel will be involved in an attack’.⁷¹ This invites the riposte that if the same Australians travelled to the Palestinian territories they may be at equal risk of being unlawfully killed by Israeli armed forces, as British citizens have been recently.⁷²

A second theme running through the PJC reports repeats the concerns expressed by the Senate Legal and Constitutional Committee in its report on the original Bill: that there was a need to distinguish terrorism from violence associated with national independence struggles, civil conflicts and similar movements where peace processes should be pursued:

⁶⁵ Ibid [2.19]-[2.20].

⁶⁶ Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [3.50]; *Review of the Re-Listing of ASG, JuA, GIA and GSPC* (2007) [2.48].

⁶⁷ Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.24].

⁶⁸ Parliament of the Commonwealth of Australia, *Review of the Re-Listing of ASG, JuA, GIA and GSPC* (2007) [1.26].

⁶⁹ Parliament of the Commonwealth of Australia, *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) [3.15].

⁷⁰ Parliament of the Commonwealth of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [3.82].

⁷¹ Ibid [3.34].

⁷² ‘Jury Rules Israeli Soldier Murdered British Journalist’, *Sydney Morning Herald* (Sydney), 8-9 April 2006, 19; T Judd, ‘Activist was Unlawfully Killed in Israel, Says Inquest Jury’, *The Independent* (London), 11 April 2006. The story refers to the intentional shooting by an Israeli soldier of 22-year-old British peace activist Tom Hurndell whilst he was sheltering Palestinian children from Israeli military fire in Gaza in April 2003. Hurndell was one of three British civilians killed in a seven-month period by Israeli soldiers. British inquests have found in each case that the shooting was intentional.

[T]he Committee would also note there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances — within an armed conflict — the targeting of civilians should be condemned, and strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and, with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organisations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee: “[When] there is a peace process ... you can unintentionally make things worse if you do not think through the implications of the listing.”⁷³

It is significant that ASIO has acknowledged that proscription may on occasions not only be ineffective but actually ‘make things worse’. It can undermine peace efforts, exacerbate violence and further entrench and broaden conflict. This is a salutary reminder that the listing provisions carry risks to security, and not only to legal and political freedoms. The statutory criteria do not protect against such risks. As ASIO acknowledged it is necessary to ‘think through the implications of the listing’.

2. The Executive and the Listing Process

It was maintained by the Howard government that this responsibility is most effectively undertaken by the executive in conjunction with the Parliament. The Howard government rejected arguments that favour replacing executive proscription with a judicial or quasi-judicial procedure.⁷⁴

[T]he listing of organisations 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 prescribes 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

⁷³ Parliament of the Commonwealth of Australia, *Review of the Listing of the Palestinian Islamic Jihad (PIJ)* (2004) [3.21], also quoted by the Committee in its conclusion to its review of the listing of four organisations, including Hamas and Hizballah, Parliament of the Commonwealth of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [3.87].

⁷⁴ A recommendation made by some members of the Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (2006) [9.8]-[9.19].

members of the executive, who have contact with senior members of the Governments and agencies of other countries, cannot be understated.⁷⁵

The argument that the executive is better placed than a court to consult widely, to draw on relevant expertise and to do so in a timely fashion is persuasive, but whether or not it does so is an empirical question. Far from providing empirical confirmation of the then government's claims, the PJC reviews have been consistently critical of the performance of the executive in relation to the listing process.

Notwithstanding rhetorical affirmations of the important role of the Parliament, the former government on occasions failed to even provide appropriate warning of impending listings to the PJC so that it could effectively meet its responsibilities.⁷⁶ The PJC has repeatedly complained of a failure to provide comprehensive, accurate and balanced information to support listings and validate the process. Information supplied to the Committee and/or published by the then Attorney-General in a press release to support a listing proved on at least two occasions to be inaccurate and was subsequently corrected in private hearings with the Committee.⁷⁷ Some listings have been supported by ASIO assessments that are contradicted by other authoritative sources.⁷⁸ Generally the impression is of a highly formulaic approach to the statement of reasons supporting listings. The re-listing of organisations, in particular, is treated as a mechanical process, with little if any effort to provide updated information.⁷⁹

Within the executive decision-making framework favoured by the former government it would be expected that the broader political implications and foreign policy context of particular listings would be treated as of central importance. Yet the PJC has commented adversely on the frequent abdication of any meaningful role in the process by the Department of Foreign Affairs and

⁷⁵ Joint Submission of the Attorney-General's Department, Commonwealth Director of Public Prosecutions and ASIO to the Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Review of the Listing Provisions of the Criminal Code Act 1995* (2007) [9.5].

⁷⁶ Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.2]-[2.3].

⁷⁷ Parliament of the Commonwealth of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [3.13], [3.39]-[3.40].

⁷⁸ Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [3.32].

⁷⁹ In its reports on re-listing the PJC has repeatedly called for up-to-date information rather than a mere rehearsal of the original statement of reasons for listing the organisation: Parliament of the Commonwealth of Australia *Review of the Listing of Four Terrorist Organisations* (2005) [2.7]-[2.8]; Parliament of the Commonwealth of Australia, *Review of the Re-Listing of Al Qa'ida and Jemaah Islamiyah as Terrorist Organisations* (2006) [1.16]-[1.17]; Parliament of the Commonwealth of Australia, *Review of the Re-Listing of ASG, JuA, GIA and GSPC* (2007) [1.17]-[1.18]. In the last of these reports the PJC requested as one of its formal recommendations that the Attorney-General and ASIO provide the PJC with a set of criteria indicating the circumstances in which an organisation will *not* be re-listed: [1.28] and Recommendation 1.

Trade (DFAT). The sum total of its contribution in some cases was a one line email endorsement of the decision to list,⁸⁰ a decision apparently already taken by the then Attorney-General without consultation.⁸¹

A further recurrent theme is the failure of the Howard government to undertake a community consultation and information program notifying the public of impending listings and according a right to be heard to interested parties.⁸² To publicise a listing the Attorney-General's Department has done no more than issue a press release and post information on the National Security website. This is a grave departure from the principles of administrative law, especially given the serious consequences of listing an organisation.⁸³ No effort is made to ensure affected persons know of their vulnerability to serious criminal charges.

The government at the time responded to some of the criticisms and recommendations relating to the listing process, but it steadfastly ignored the most important of them, those relating to the quality of the information provided in support of listings and community consultation and notification. In sum, the PJC reports point to an abysmal record on the part of the then government so far as its cooperation with and responsiveness to parliamentary processes was concerned. This was in keeping with its dismissive attitude towards all criticism of its anti-terror laws.

The former government also summarily dismissed the major recommendations of the independent external committee appointed by it to review the legislation. The Security Legislation Review Committee (the Sheller Committee) made recommendations for greater accountability and transparency in the listing process, including: provision for notification of affected parties and an opportunity to be heard prior to listing; consideration of a judicial mechanism for proscription in place of executive proscription; amendment of the legal criteria for listing to restrict the meaning of advocacy in the definition of a 'terrorist organisation'; repeal of the offence of associating with a terrorist organisation; and a narrowing of the definition of some of the other terrorist organisation offences to ensure the need to prove a link to an actual or planned

⁸⁰ Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.5]-[2.7]; Parliament of the Commonwealth of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [2.9]-[2.16].

⁸¹ The PJC has listed the factors that should be covered by DFAT advice on proposed listings: Parliament of the Commonwealth of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK)* (2006) [1.18].

⁸² Parliament of the Commonwealth of Australia, *Review of the Listing of Six Terrorist Organisations* (2005) [2.38]-[2.40]; Parliament of the Commonwealth of Australia, *Review of the Listing of Seven Terrorist Organisations* (2005) [2.15]-[2.17]; Parliament of the Commonwealth of Australia, *Review of the Listing of Four Terrorist Organisations* (2005) [2.17]-[2.21]; Parliament of the Commonwealth of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK)* (2006) [1.20]-[1.23].

⁸³ *Kioa v West* (1985) 159 CLR 550.

terrorist act.⁸⁴ Tabling the report in Parliament the then Attorney-General simultaneously issued a press release in which he stated:

The Government believes the current listing process contains sufficient safeguards, including judicial review and parliamentary oversight, and that it is more appropriate for the proscription power to be vested with the executive.⁸⁵

Following the Security Legislation Review Committee the PJC conducted its own general review of the anti-terror legislation and made similar recommendations to restrict the scope of the terrorist organisation offences.⁸⁶ These recommendations appear destined to gather dust along with the others, a worrying sign of executive intransigence in the face of all criticism no matter the source or weight.

IV. The Impact of the Listing Provisions

A. Enforcement

Given the breadth of the proscription regime, comfort could be taken from the fact there have been no prosecutions relating to listed organisations. In one sense this is not surprising given most of the listed organisations are not active in Australia. However, given the global movement patterns that characterise the contemporary world, and settler societies like Australia in particular, significant numbers of immigrants and refugees from many regions of conflict have settled in communities in Australia. As noted earlier, the reach of the terrorist organisation offences are such that members of these communities are at risk of prosecution for connections with listed organisations, although they may be law-abiding citizens or residents of Australia who have no political grievance with the Australian government or people. The listing of organisations may even create a dragnet effect in relation to some ethno-religious communities in Australia (eg, Kurds, Lebanese Shia), with the threat of prosecution hanging over many of their members.

That there have been no prosecutions also does not mean that there has been no relevant enforcement of the laws. A stated rationale of new counter-terrorist measures is to gather intelligence and disrupt terrorist activity. The former Director-General of ASIO described the approach as follows:

it is essential there be a seamlessness in our intelligence and law enforcement counter-terrorism efforts ... When those known to be involved in terrorism are

⁸⁴ *Report of the Security Legislation Review Committee* (2006) [8.10], [9.1], [10.41], [10.42], [10.54], [10.56]-[10.78].

⁸⁵ Attorney-General Media Release 111/2006, 15 June 2006.

⁸⁶ Parliament of the Commonwealth of Australia, *Review of Security and Counter Terrorism Legislation* (2006), Recommendations 14-19. The PJC also conducted a review of the listing provisions. Its report was published too late for consideration in this paper. See Parliament of the Commonwealth of Australia, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007).

taken into custody, is the community best served by an immediate application of law enforcement processes, or is it best served through seeking to obtain, through lawful means, information concerning plans and intentions, and the location of others involved in terrorism?⁸⁷

The question is of course rhetorical and the new laws, with their broad and vaguely defined offences, reflect the priority he stressed. They do not seek to guide citizen conduct but to empower officials, often enabling the threat of prosecution to be used to compel cooperation that escapes legal scrutiny. Listing also supports the use or threat of other less-visible sanctions carrying fewer safeguards. Refusing or cancelling passports can have even more onerous effects on individuals, families and communities than a criminal prosecution. We simply do not know the extent, nature and impact of this type of enforcement activity, but it would be a mistake to assume it is not occurring and occurring in the shadow of the proscription regime.

B. Refugee and Immigration Law

It is a well-established principle of law that politically inspired violence against a foreign government may be justified in a claim for refugee status in Australia or in resisting an extradition order by an Australian court to face criminal charges in another country. The courts have said that the violence needs to be judged by reference to the political context in which it occurred rather than against abstract universal standards of behaviour.⁸⁸

The executive proscription regime contravenes this principle, but it also goes much further insofar as the net cast by listing captures persons and activities with a connection to a listed organisation but no connection to violence. The problem is illustrated by a decision of the Refugee Review Tribunal involving an application for refugee status by a Turkish Kurd. The summary of the decision provided by the Tribunal states:

The Tribunal noted independent evidence to the effect that the security forces continued to torture, beat and otherwise abuse people, particularly Kurds regarded as 'activists'. It found that the applicant's records would show that he had been identified as a Kurd who had admitted to supporting the PKK. The Tribunal accepted that the authorities continued to be highly motivated to identify any Kurd who wanted a separate state for Kurds, or was a supporter of the PKK. It found that laws to protect individual rights existed, but were not properly implemented in practice. The Tribunal accepted that persons merely

⁸⁷ C Richardson (then ASIO Director-General) (Address to the LawAsia Conference, Gold Coast, 23 March 2005).

⁸⁸ *Minister for Immigration and Multicultural Affairs v Singh* (2002) 209 CLR 533; *T v Home Secretary* [1996] AC 742.

suspected of membership of an illegal organisation were handed over to the Anti-Terror Branch of the police where torture was practised systematically.⁸⁹

As a consequence of proscription, legitimate claims for asylum under the Refugee Convention,⁹⁰ like this one, may be prevented for fear that evidence justifying the claim will provide grounds for laying a serious criminal charge under Australian anti-terrorism laws. The effect is to erode seriously refugee law protections. More profoundly, there is the question of who now are the persecutors. The PKK having been proscribed in Australia the applicant in the above case could be handed over to Australia's 'Anti-Terror' police. His reasons, according to an Australian Tribunal, for having a well-founded fear of persecution in Turkey may now be reasons for him to fear prosecution (persecution?) under Australian criminal laws.

C. Putting Australia's Criminal Laws at the Disposal of Foreign Governments

A problem with the current listing process is that it cannot allay the suspicion that decisions may be unduly influenced by foreign governments engaged in long-running civil conflicts with minority populations seeking recognition of their national, political and civil rights. Examples are not hard to find: the Turkish government's conflict with its Kurdish population, Sri Lanka and the Tamils, and Israel and the Palestinians. The Turkish, Sri Lankan and Israeli governments have a manifest political interest in labelling organisations representing these peoples as terrorist and in white-washing their own repressive policies against them.

In late 2005, police raided a Melbourne Tamil group (the Tamils Rehabilitation Organisation) after a Sri Lankan government warning to the Australian government that charity donations to the group for tsunami relief may have been used to fund the Liberation Tigers of Tamil Eelam ('Tamil Tigers'), a political movement engaged in a lengthy and bloody war to establish a separate homeland in northern Sri Lanka. The Tamil Tigers are not currently listed as a terrorist organisation in Australia, but there must be a serious possibility that they will be listed in the future and the raid illustrates the plight of organisations and persons in Australia who have a connection with civil and political conflicts in other countries. The director of the Tamils Rehabilitation Organisation in Australia, a Melbourne doctor, pointed out that it was impossible to avoid cooperating with the Tigers in directing charitable support to those parts of the country effectively controlled by them. He also indicated his support for the

⁸⁹ N04/49229 decision of the Refugee Review Tribunal, 30 September 2004. The summary is taken from the *Refugee Review Tribunal Bulletin* 2/2005, 12.

⁹⁰ *Convention Relating to the Status of Refugees*, 189 UNTS 150 (entered into force 22 April 1954).

political cause of national self-determination for the Tamils, although not necessarily the methods of the Tamil Tigers.⁹¹

There were suggestions that the decision to list the PKK was taken in response to overtures by the Turkish government, a suspicion bolstered by the timing of the proscription to coincide with a visit by the Turkish Prime Minister to Australia in December 2005. The PJC concluded that there was no evidence that the listing had been influenced by an approach from the Turkish government. Yet DFAT acknowledged that such an approach was made in April 2005, coinciding with a visit by then Prime Minister Howard to Turkey. Despite discrepancies in the evidence given by DFAT and ASIO to the PJC it appears that the process leading to proscription did not begin prior to that time. The coincidences hardly dispel suspicions that Turkish representations exercised an influence.⁹²

This illustrates some of the problems with proscription by the executive. Whilst the executive can consult widely and access expertise relevant to a decision to list (much of which may be inaccessible to a court or tribunal, for example), the process lacks transparency. The executive can pick and choose who and what it wants to hear before making a decision to list. Consultations may be broad-ranging and balanced, but equally they may be excessively narrow and characterised by tunnel vision. Any closed executive process lends itself to these problems. Principles of natural justice are designed not only to ensure fairness and protect rights, but to improve decision-making by increasing the range of interests and information represented in the process. Confidence in the outcome is also increased. Listing may cloak a process driven more by political considerations than Australian security interests. Even where this is not the case, the process may often fail to remove the perception that it is.

In other words, the listing provisions may quite understandably be perceived in some minority communities as in effect an agent of foreign governments, extending the arm of authoritarian rule so that it reaches them in Australia, the place to which they have come seeking refuge from it. Ironically, given the preventative rationale of the law, this carries a risk over time of fostering community tensions in Australia and transplanting violence to Australia.

V. Crime and Politics: the Antinomies of Executive Proscription

Although under Australian law it is proof of a political, ideological or religious motive that distinguishes terrorism from ordinary crime, governments, and some

⁹¹ C Stewart and N Robinson, 'Tamil Tigers in Tsunami Funds Row', *The Australian* (Sydney), 25 November 2005, 7.

⁹² Parliament of the Commonwealth of Australia, *Review of the Listing of the Kurdistan Workers' Party (PKK)* (2006) [1.24]-[1.29].

commentators alike, argue that groups like Al Qa'ida 'cannot be engaged politically and must instead be defeated militarily' or presumably by other coercive means, including those provided by the criminal law.⁹³

If actually confined to Osama bin Laden and his confederates the argument may be sound. Even here it would be imprudent to allow a concern to understand the precise character of Al Qa'ida and its political strategy and objectives to be overwhelmed by emotional and moral reactions to extreme acts of terrorist violence.⁹⁴ As regards terrorism generally, history reveals many instances where governments publicly condemned and criminalised groups as terrorists whilst privately negotiating with them.⁹⁵ This merely illustrates that, on occasion, use of the criminal law and the criminal label is (like war)⁹⁶ the continuation of politics by other means.

The concept of 'terrorism' carries heavy moral and emotional freight. In isolating the focus on means — the use of violence — it efficiently closes off any question of the particular political causes, claims, antecedents or contexts surrounding the uses of violence. It also creates a fundamental political and moral asymmetry between perpetrators and victims. The accent on the innocence, ordinariness and essential goodness of civilian victims of terrorist violence (often narrated over and over in highly personalised terms by the media) permits only one judgment on the actions and motives of terrorists: they are monstrous, evil, lacking any possible justification or mitigation. And thus they must be crushed.

This also positions governments to depict themselves as merely reacting to terrorist actions and threats when they adopt repressive methods, like military campaigns, missile attacks, torture, rendition, extra-judicial killings and indefinite detention.⁹⁷ In representations of terrorism, political ends are extinguished by the focus on violence and its human consequences. In counter-terrorist discourse the means/ends relationship is inverted. The cause being just, it dictates the necessity and legitimacy of the means adopted, whose character and effects are pushed into the background. That, like terrorism, this involves killing innocent people is obscured by technical rational language: 'pre-emption', 'counter-measures', 'collateral damage'. The victims not only disappear in a corporeal sense; unlike the victims of terrorism, they also tend to be anonymous,

⁹³ M Ignatieff, *The Lesser Evil — Political Ethics in an Age of Terror*, (Edinburgh: Edinburgh University Press, 2005) 99; also see Australian Government, above n 56.

⁹⁴ M Doran, 'Somebody Else's Civil War' (2002) 81(1) *Foreign Affairs* 22; B Lawrence, *Messages to the World — the Statements of Osama bin Laden* (US: Verso, 2005) xxii; Parliamentary Joint Committee on Intelligence and Security, Parliament of the Commonwealth of Australia, *Review of the Re-Listing of Al Qa'ida and Jemaah Islamiyah as Terrorist Organisations* (2006) [2.7].

⁹⁵ P Neumann, 'Negotiating with Terrorists' (2007) 86(1) *Foreign Affairs* 128.

⁹⁶ C Von Clausewitz, *On War* (UK: Penguin Classics, first published 1832, 1982) 119.

⁹⁷ L Donohue 'Terrorism and Counter-Terrorist Discourse' in V Ramraj, M Hor and K Roach (eds), *Global Anti-Terrorism Law and Policy* (Cambridge, New York: Cambridge University Press, 2005) 13.

divested of individual, moral and cultural identity. Moral sensibilities and psychological inhibitions against the infliction of suffering are thereby blunted. These considerations underline the fact that the terrorist label is a potent and flexible ideological instrument. Its use can rarely if ever be seen as disinterested or without a crucial subjective element.⁹⁸ This is not altered in any significant way by new laws centred on the concept that have been enacted since 9/11. That is, the crux of the problem remains the definitional issue, or more to the point, as Jenny Hocking has asked, 'How does this discourse of terrorism operate?'⁹⁹

Of central importance is the way the executive proscription regime redraws the 'frontiers of criminal law'.¹⁰⁰ There are two aspects to this. One is literal: the abrogation of any requirement for a territorial nexus with Australia or Australian interests.¹⁰¹ Aside from a handful of crimes of universal jurisdiction (piracy, crimes against humanity), criminal law has been local and territorial in character. Its legitimacy has depended upon the relationship it maintains with the values of the community and polity it is designed to protect and serve. Now we are warned the threat of terrorism is global and our laws therefore must have an extended geographical jurisdiction. But this does not mean that standards of political behaviour and the boundaries of acceptable and unacceptable political violence can validly and usefully be drawn for all the world by law-makers in Canberra, without reference to the political cultures, regimes and conditions pertaining in particular states and regions to which in principle they apply. This is manifestly absurd as well as being contrary to well-established principles within our own legal traditions.

A second related aspect involves redrawing the boundary separating crime and politics. The net of criminality is cast so wide as to capture a range of political activities remote in time, space or character from the use of violence. In 1990, Gearty traced the expansionary tendencies in the definitions of terrorism over the 1970s and 1980s: a 'drift from terror to terrorism', from a narrow focus on indiscriminate violence to much looser conceptions encompassing all or most forms of political insurgency.¹⁰² During this time terrorist discourse in its expanded form also migrated from the liberal democracies to places where recourse to political violence presented more difficult ethical questions, as autocratic governments (in Latin America, apartheid South Africa, the Middle

⁹⁸ Ibid; J Hocking, *Terror Laws — ASIO, Counter-terrorism and the Threat to Democracy* (Sydney: University of New South Wales Press, 2004) 2.

⁹⁹ Hocking, *ibid* 5.

¹⁰⁰ I Loveland (ed), *Frontiers of Criminality* (London: Sweet & Maxwell, 1995).

¹⁰¹ B McSherry, 'Terrorism Offences in the *Criminal Code*: Broadening the Boundaries of Australian Criminal Laws' (2004) 27(2) *University of New South Wales Law Journal* 354.

¹⁰² C Gearty, *Terror* (UK: Faber & Faber, 1990) 13.

East and elsewhere) embraced counter-terrorist measures to repress political movements struggling to advance popular national and democratic rights.

These developments saw a further expansionary manoeuvre whereby:

[a]ll the activities of the groups engaged in acts of terror are automatically classed as terrorist, even when many of those activities, such as fund-raising and political campaigning, are conducted in a peaceful manner. In *extreme cases* those who merely share the political goals of subversive groups may find themselves described as terrorists.¹⁰³

Gearty's 'extreme cases' no longer appear so extreme. And the migration has been the other way. These cases now find expression in the contemporary anti-terrorist laws of Australia and other liberal democracies. The precise stratagems Gearty describes can even be detected in the statements of reasons provided by the Australian government to justify listing organisations. Suppressed is any sense that there might be two (often equally brutal) sides to the conflicts in which listed organisations are engaged. Shorn of history and context, we are presented with a solitary image of violence without reason. In the case of organisations like Hamas and Hizballah, for example, there is no reference to the political and historical circumstances conditioning their resort to violence, to their mass following and success in elections, to their recourse to truces and ceasefires, or to the illegal occupation of Lebanon (between 1982 and 2000) and the Palestinian territories by their principal adversary (the state of Israel). Where reference is made to their other political, welfare and fund-raising activities, it is represented through the prism of terrorism: welfare services are undertaken to recruit terrorists, funding is 'channelled into ... terrorist infrastructure' and so on.¹⁰⁴ Rather than being one dimension, one tactic, in a multi-faceted political movement, recourse to political violence appears as their defining characteristic, the sole reason for their existence.

It follows also that these laws, in their extra-territorial effect, endorse the authority of foreign governments without regard to their own policies and methods (killing civilians, use of torture and so on). This is dangerous because it directly aligns Australia with those regimes in the international community. It can also visit the impact of that allegiance on domestic Australian law and politics by placing law-abiding Australian citizens and residents at risk of criminal prosecution for some vaguely specified connection with a listed foreign political organisation regardless of the justice and popular legitimacy of its cause.

¹⁰³ Ibid 3 [emphasis added].

¹⁰⁴ See Australian Attorney-General's Department, National Security Website, Listed Organisations — Hamas's Izz al-Din al-Qassam Brigades
<<http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/CADAB9AC4723C526CA256FCD001BA892?OpenDocument>>.

In seeking to more directly wield the criminal law as an instrument of executive power, governments cloak political decisions in a veneer of legalism. They thereby risk damaging both the legal *and* political capacities of the state to address problems of political conflict and violence. Much criticism has been levelled at the manner in which anti-terror laws violate established legal principle and threaten the legitimacy of the law. Less attention has been accorded to their distorting effects on politics and on the policy instruments available to mitigate or resolve violent political conflicts, like peace initiatives, diplomacy, aid and trade.¹⁰⁵

VI. Conclusion

A major obstacle to a more clear-sighted debate and response on anti-terrorist law and policy stems from the rhetorical power of the term 'terrorist' itself. It was partly by relying on this that the Howard government was able to disdain the reports and recommendations of the PJC and deflect calls for meaningful listing criteria and processes of consultation and deliberation. The PJC reports expose grave inadequacies in the administration of the listing provisions and it is only self-declared deference to the executive on matters of national security that appear to have prevented outright rejection of the case for listing in many instances. In the political and popular climate created by the 'war on terror' the listing of an organisation by the government has inevitably carried its own politically-driven momentum to confirmation and, in practice a strong, perhaps irresistible, presumption against disallowance.

Existing safeguards cannot protect against this but they do offer some advantages compared with executive proscription in other countries. Decisions to list are based on open source materials and the PJC reviews the process in relation to each listing and re-listing. The two-year sunset clause on each listing ensures that there are regular reviews if an organisation is to continue to be listed. Parliamentary processes may be of limited utility once an executive decision has been taken to list an organisation, but the cumulative impact may be more positive, producing benefits over time to the quality of public debate and the policy process. This can affect the political climate so as to encourage more cautious use of the listing power.

The problems exposed by the PJC are a major, legitimate source of concern given the serious implications proscription powers have for individual rights and democratic freedoms. Of equal concern, however, is whether the exercise of these powers has been governed by a coherent conception of Australia's security interests. There is little evidence of it in the reviews of the PJC. The much

¹⁰⁵ R Cooper, *The Breaking of Nations — Order and Chaos in the Twenty First Century* (London: Atlantic, 2004).

vaunted trade-off, or 'balance',¹⁰⁶ between security and freedom, therefore, may be no such thing. Australia's proscription laws and their administration may be putting both in jeopardy. It remains to be seen whether the new government will adopt a different approach to the proscription power.

¹⁰⁶ S Bronitt, 'Constitutional Rhetoric v Criminal Justice Realities: Unbalanced Responses to Terrorism?' (2003) 14 *Public Law Review* 69.