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**Submission to the Parliamentary Joint Committee
on Intelligence and Security**

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

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This submission expresses the concern that:

- The listing provisions are **unnecessary** because their aim of preventing politically and/or ideologically motivated violence is covered by the existing criminal law.
- The listing provisions are **overly broad and vague** which may have the effect of legitimate organizations being captured under the far-reaching definition of ‘terrorist organization’.
- The listing provisions confer **excessive power on the executive** and as such are potentially in breach of the separation of powers doctrine.
- The listing provisions confer **excessive discretion on the Minister** which may lead to inconsistent, arbitrary and discriminatory decision-making.
- The listing provisions do **not provide adequate means of independent review**.
- The provisions can be perceived as **undemocratic and susceptible to political abuse**.
- The provisions likely **breach international human rights law**

Lack of necessity for the listing provisions

The listing provisions of the Criminal Code which empower the Governor General to make regulations labeling particular organizations as ‘terrorist organizations’ and thereby subjecting the listed organizations to criminal liability and various other repercussions under international law are essentially unnecessary in the context of our comprehensive legal system. The purpose behind the listing provisions, namely to prevent politically and/or ideologically motivated violence and acts that intentionally assist such violence, is already covered by existing criminal legislation which makes such violence unlawful. Hence, the removal of the listing provisions overall could be the simplest, yet most effective way of overcoming the problems that the provisions give rise to.

Breadth and vagueness of the provisions

The key problem with the listing provisions lies in their sheer breadth and vagueness. Deriving an enduring and universal definition of ‘terrorist organization’ is undeniably a complex and elusive task. This is illustrated by the fact that to date the UN Member States still have no agreed-upon definition of ‘terrorism’ and subsequently no firm definition of ‘terrorist

organization’.¹ Despite the difficulty of developing a suitable definition, we must resist the temptation of adopting overly broad definitions such as the definition of ‘terrorist organization’ provided by s 102.1(2) of the Criminal Code.

Under s 102.1(2), an organization may be listed as a terrorist organization if an organization 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 if it ‘advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur)’. It is important to note that there is no requirement that the organization’s predominant activities involve the engagement in or promotion of terrorist acts nor is it necessary for the organization to have perpetrated any harm or damage for it to be regarded as a terrorist organization.²

The fact that an organization may be treated as a terrorist organization by ‘**indirectly fostering the doing of a terrorist act**’ is of particular concern because its breadth and vagueness open the door to legitimate organizations being captured under such a wide-spanning definition. In the *Re Guantanamo Detainee Cases*,³ U.S. District Judge Joyce Hens Green, noted a comment made by government counsel that as a result of the very broad definition of “enemy combatant” under the Authorization for Use of Military Force Resolution, ‘[a] little old lady in Switzerland who writes checks to what she thinks is a charity that helps orphans in Afghanistan but [what] really is a front to finance al-Qaeda activities’ could fall under the definition of “enemy combatant”. The same ‘little old lady’ could well be caught under the definition of ‘terrorist organization’ under the Criminal Code by being regarded as ‘indirectly fostering the doing of a terrorist act’. The possibility of such a bizarre outcome clearly illustrates the undesirably far-reaching nature of the listing provisions.

Even more alarming is the breadth of the term ‘advocates’. Under s 102.1(1A)(c), an organization ‘advocates’ a terrorist act and is thereby liable to being listed as a terrorist organization, if it ‘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 (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act’. The breadth of this definition is created by a number of factors. Firstly, there only needs to be ‘**a risk**’, rather than a substantial or real or reasonable risk. Secondly, it is sufficient if the praise ‘**might**’ have the

¹ http://www.unodc.org/unodc/terrorism_definitions.html

² Joo-Cheong Tham, ‘The Perils of countering terrorism by eroding human rights’, Speech at *Human Rights 2006: The Year in Review Conference*, CUB Malthouse, Melbourne, 1 December 2006.

³ 355 F.Supp.2d 443 (D. D.C. 2005).

effect of leading a person to engage in a terrorist act regardless of whether the praise does in fact lead a person to engage in a terrorist act and regardless of the level of likelihood of the praise having such an effect.

Thirdly, the praise need only lead **‘a person’** to engage in a terrorist act. There is no requirement for the person to be reasonable or rational. This raises particular concerns because whether an organization that expresses the relevant praise will be liable to being listed as a terrorist organization will depend on the mindset of another person. Where an organization does express praise for a terrorist act, a rational person will almost certainly have a completely different reaction to a religious extremist. In addition, s 102.1(1A)(c) provides that the person who might be led by the praise to engage in a terrorist act can be of **any age and can even suffer from a mental impairment**. This carries potentially unfair implications for the organization expressing the praise because it is reasonable to assume that minors and persons with limited mental capacity will respond to any expressions of praise in a more irrational and drastic manner compared to mature and mentally capable persons.

More importantly, s 102.1(1A)(c) may be unconstitutional because it potentially compromises a person’s implied freedom of political speech and communication established by a number of High Court cases.⁴ Although it is justifiable to limit the freedom of political expression where the expression amounts to praise for terrorist activities and is likely to incite violence, it is useful to reflect and bear in mind that if this section had been in existence during the times of Mahatma Gandhi or Nelson Mandela, who were considered as terrorists in their day, any praise of their actions would have been caught under this section and thereby subjected the person expressing the praise to various criminal offences.⁵

Excessive power vested in the Executive

Breach of Separation of Powers Doctrine

The conferral of the proscription power on the executive arm of the government carries a number of implications for the separation of powers doctrine. One of the fundamental notions of

⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁵ The Hon Michael McHugh AC QC, “Terrorism Legislation and the Constitution” (2006) 28 *Australian Bar Review* 117, 132.

the separation of powers is that power should not be concentrated in any one arm of the government in order to avoid abuse of the power and to ensure effective review of the exercise of the power. This notion has been seriously undermined by the listing provisions. The listing provisions potentially breach the separation of powers because they confer on the executive the power to both determine the guilt of and impose the punishment on the listed organizations which is a function that has long been regarded as coming within the power of the judiciary⁶. In the case of *Chu Kheng Lim v Minister for Immigration*,⁷ the joint judgment of Brennan, Deane and Dawson JJ included the assertion that “there are some functions which...have become established as essentially and exclusively judicial in character. The most important of them is the adjudgement and punishment of criminal guilt”.⁸

Inadequacy of Judicial Review

In addition to bestowing the power to list and de-list terrorist organizations entirely on the executive, the listing provisions do not provide any adequate means of judicial intervention or review. The circumstances in which judicial review of the decisions to list and de-list terrorist organizations will be available are extremely limited because of ‘the attitude of the courts in relation to matters of **national security**’.⁹ The courts are extremely hesitant in challenging decisions made by the government which are cited by the government as being in the national interest.¹⁰ Judicial review will also be limited by the ‘practical difficulties likely to be encountered by an applicant in trying to garner evidence to support his or her action’¹¹.

Excessive Discretion conferred on Minister

Under s 102.1(2), the Minister must be ‘**satisfied on reasonable grounds**’ that the organization is a terrorist organization. The term ‘reasonable grounds’ presents particular concern in the highly politicized context of terrorism legislation. In light of today’s inflated fear of terrorism, it can be assumed that any alleged step taken by the government to combat terrorism will be readily accepted as reasonable making it extremely easy for the Minister to justify his or her

⁶ Henry Jackson, “The power to proscribe terrorist organizations under the Commonwealth Criminal Code: Is it open to abuse?” (2005) 16 *Public Law Review* 134 at 145-146.

⁷ (1992) 176 CLR 1.

⁸ *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1 at 27.

⁹ Henry Jackson, n 6 at 148.

¹⁰ *Ibid.*

¹¹ *Ibid.*

decision to list any particular organization. Hence, the breadth of the Minister's discretion sets the stage for promoting political agenda, discrimination and personal bias.

Given the breadth of the term 'terrorist organization' and the width of the discretion conferred on the Minister, there is also a great potential for arbitrary and inconsistent decision making. In applying the provisions when deciding whether to list an organization as a terrorist organization, the Minister is not bound by any rules of precedent nor is s/he required to follow any set criteria and as such is free to exercise the power to list terrorist organizations in a politically motivated, inconsistent, selective and discriminatory fashion.

The arbitrary and selective exercise of this power can be illustrated by the following observations. The Criminal Code and the *Charter of United Nations Act 1945* (Cth) are both motivated by the goal of suppressing terrorist organizations, yet there is a 'sharp inconsistency between the organizations that are proscribed under these [two] regimes'.¹² Only 19 organizations have been listed pursuant to the Criminal Code provisions¹³ while over 130 organizations have been listed by the Foreign Minister pursuant to the *Charter of United Nations Act 1945* (Cth).¹⁴ The fact that there is such a significant discrepancy between the views, within Australia alone, on which terrorist organizations should be listed, is a perfect manifestation of the arbitrary nature of the listing provisions.

In addition, 18 out of the 19 organizations listed pursuant to the Criminal Code are Muslim-based organizations.¹⁵ Considering the broad definition of 'terrorist act' and 'terrorist organization' under the Criminal Code, one would expect a variety of terrorist organizations, motivated by a wide array of political and religious causes, to be listed. The fact that all but one of the listed organizations are of one particular religion at the very least indicates the serious potential for discrimination in the exercise of the listing power.

In order to minimize the potential for selective and arbitrary exercise of the listing power, the listing provisions could be amended in the following ways. The provisions could set out criteria that must be satisfied before the Minister can be deemed to be 'satisfied on reasonable grounds' that an organization is a terrorist organization and should be listed. Additionally, the provision

¹² Joo-Cheong Tham, 'Possible Constitutional Objections to the Powers to Ban Terrorist Organisations' (2004) 27 *University of New South Wales Law Journal* 482 at 494.

¹³ <http://www.nationalsecurity.gov.au/agd/www/nationalsecurity.nsf/AllDocs/95FB057CA3DECF30CA256FAB001F7FBD?OpenDocument>

¹⁴ Joo-Cheong Tham, n 12 at 494.

¹⁵ Joo-Chang Tham, n 2.

could specify certain factors that the Minister must take into consideration before being satisfied that an organization is a terrorist organization and factors which the Minister should refrain from taking into consideration in order to create uniformity in the Minister's decision-making. Most importantly, the process followed by the Minister in making his or her decision should be transparent with any evidence relied on by the Minister in making the decision being made public. These safeguards would enhance the Minister's accountability and in turn ensure public confidence in the legal system.

Inadequacy of the de-listing provisions

Under s 102.1(17)(d), an individual or organization may make a de-listing application. The major problem with this section is that the decision as to whether an organization will be de-listed has been placed with the Minister, the same body which has made the original decision to list the organization. Conferring the decision to list and to de-list organizations on the same decision-making entity carries a number of problems. Firstly, where the Minister has made the decision to list an organization, it means the Minister was 'satisfied on reasonable grounds' that the organization was a terrorist organization to begin with and as such it is very unlikely that the Minister will cease to be satisfied of the same. In reality, even if there are valid grounds for de-listing an organization, it is highly unlikely that the Minister will be prepared to depart from his or her earlier decision out of the simple desire to avoid undermining his or her earlier value judgments and competency. Secondly, giving the de-listing power to the Minister undermines the objectivity of the de-listing process because of the perceived lack of independence and impartiality in asking a decision-making body to review its own decisions.

Furthermore, s 102.1(17)(d) provides that an individual or organization may make a de-listing application but only if the application is made on the 'grounds that there is **no basis** for the Minister to be satisfied that' that the organization should continue to be listed. The provision is extremely narrow because requiring an applicant to show that the Minister has absolutely 'no basis' for continuing to list the organization is too onerous and could only be satisfied in very rare cases, with the effect that only a few, if any, de-listing applications will have the chance of succeeding. The section should be amended to reduce the evidentiary burden on the applicant. This could be done by changing the section to read '**no reasonable basis**'.

Another concern with the de-listing process is that under s 102.1(17), if the requirements under (a),(b) and (c) are made out, namely if an organization has been listed and a de-listing application has been made on the grounds that the Minister has no basis for listing the organization, the Minister is obliged under this section to **‘consider’** the de-listing application. This requirement is vague and inadequate because it could potentially be satisfied where the Minister has merely turned his mind to the application by reading it. Instead, this section should be amended to require the Minister to follow a specified process upon receiving a de-listing application, which could include a requirement to obtain advice in relation to the application. In addition, the provision could be further strengthened by requiring the Minister to give reasons in cases where s/he decides to reject a de-listing application. Such a requirement would create accountability and transparency and would clearly indicate to the applicant that the Minister has in fact considered the application.

In light of all of the above mentioned problems associated with conferring the decisions to list and de-list organizations on the Minister – potential for arbitrary and selective decision-making, discrimination, promotion of political agendas, lack of objectivity and independence etc - it would be more desirable to refer at least one of, if not both of the decisions, to judges. Judges have more experience in statutory interpretation and as such are experienced in applying extremely broad provisions, they are bound by strict rules of precedent and they are far less driven by the political agendas of the government. At the very least, the decision to de-list organizations should be allocated to the judicial arm of government. Such a distribution of power between the executive and judicial arms – with the power to list organization being placed with the executive and the power to de-list with the judiciary – would be consistent with the separation of powers and would enhance public confidence in the legal system by allowing the judiciary to act as a check on the executive as intended by the Constitution.

Inadequacy of the Committee review provisions

Under s 102.1A, the Parliamentary Joint Committee on ASIO, ASIS and DSD **‘may’** review the decision to list an organization as a terrorist organization **‘after’** the organization has been listed. There are three significant problems with this section. Firstly, the Committee is not obliged to review any decision. Whether the Committee reviews a decision is entirely within its own discretion. Secondly, even if the Committee does choose to review a decision, it has a choice as to which decision it will review. It is not required to review all of the decisions.

Thirdly, the Committee only has a right to review a decision once the organization has already been listed. The Committee does not have a right to review the decision prior to the organization being publicly listed and subjected to numerous criminal offences and international law restrictions. This section needs to be amended to oblige the Committee to review each decision to list an organization as a prerequisite to the organization being listed.

Undemocratic and political nature of the listing provisions

Some academic opinion suggests that the listing provisions which empower the Governor General to make regulations labeling particular organizations as ‘terrorist organizations’ are inherently inconsistent with our democratic values.¹⁶ It has been proposed that the mere existence of such provisions reflects ‘a fear of democracy’¹⁷ and ‘a desire to exclude political voices and to structure politics in a manner which, by its very design is undemocratic’.¹⁸ Such a proposition is consistent with the view that these listing provisions are predominantly political tools susceptible to abuse by the government. This view is derived from the breadth and all-encompassing nature of the listing power, the absence of effective judicial intervention and the absence of any real threat posed to Australia by the organizations that have been listed pursuant to these listing provisions so far.¹⁹

Considering that the listing provisions can be and widely are perceived as undemocratic and politically motivated and keeping in mind that “it is not merely of some importance but is of fundamental importance, that justice should not only be done, but should manifestly and undoubtedly be seen to be done”,²⁰ the provisions should be amended in accordance with the suggestions made in this submission, to ensure positive public perception of and confidence in the government and its laws and processes.

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¹⁶ Hocking Jenny, “Counter Terrorism and the Criminalisation of Politics” (2003) 49(3) *Australian Journal of Politics and History* 355.

¹⁷ Hocking Jenny, n 16 at 369.

¹⁸ *Ibid.*

¹⁹ Joo-Chang Tham, n 2.

²⁰ *R v Sussex Justices; Ex parte McCarthy* [1924] 1 KB 256 at 259.

The law likely breaches Australia's obligations under the International Covenant on Civil and Political Rights.²¹ Article 22 thereof guarantees freedom of association. While that right can be limited in necessary and proportionate circumstances, the above arguments indicate that the listing provisions are neither necessary nor proportionate.

Furthermore, the overly broad and vague nature of the offences related to listed organizations could be in breach of article 15 of the ICCPR, which requires that the law be sufficiently clear so that people are able to know the extent of their potential criminal liabilities.

Consequences of being listed

The consequences of being listed as a terrorist organization are severe. Besides the symbolic consequences of listing an organization as a terrorist organization, listed organizations face a **number of offences under the Criminal Code** and other repercussions under international law.

Under the Criminal Code, it is an offence to direct the activities, become a member, recruit for, train or receive training from, get funds to, from or for and provide support to a listed terrorist organization. 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 organization. Penalties for these offences are extremely severe, with imprisonment for up to 25 years. The United Nations Security Council (UNSC) Resolutions 1267 and 1373 impose obligations on UN Member States to **freeze assets of terrorists and terrorist organizations**. These obligations are implemented in Australia through Part 4 of the *Charter of the United Nations Act 1945* (UN Act) and the Charter of the United Nations (Terrorism and Dealing with Assets) Regulations 2002 (UN Charter Regulations).

Considering the gravity of the consequences of being listed as a terrorist organization, the government needs to ensure that the provisions outlining the process for listing terrorist organizations are especially clear, fair and proportionate. Hence, the recommended changes contained in this submission should be carefully considered.

²¹ See Joseph Sarah, 'Australian Counterterrorism Legislation and the International Human Rights Framework', (2004) 27 *University of New South Wales Law Journal*, 428 at 436-440.