



New South Wales
Council for
Civil Liberties

Policy: The Proscription of Terrorist Organisations

1. The appropriateness of proscription.

1.1 The power to proscribe an organisation is open to substantial misuse. It creates a manifest risk of arbitrary, and politically motivated abuse. In a severe case, it can be used to ban opposition parties and to suppress dissent. It is too dangerous a power to be entrusted to governments.¹

1.2 The lists are a recipe for arbitrary and politically motivated decision-making. Hundreds of groups and individuals have now been criminalised around the world and the various lists are expanding as states attempt to add all groups engaged in resistance to occupation or tyranny. Amongst them, those exercising what many people around the world see as a legitimate right to self-defence and determination are increasingly being treated - on a global basis - the same way as Osama Bin Laden and Al Qa'ida.

1.3 Proscription of an organisation criminalises those who remain its members. It is tempting to governments, for it is often easier to demonstrate that persons are members of or have supported a proscribed organisation than it is to prove that they have engaged in terrorist actions or in actions in preparation for such actions.

1.4 But ease of conviction is not a good basis for determining legislation, especially for policies which threaten fundamental rights. Proscription of organisations makes it more likely that persons who are innocent of any terrorist intentions will be convicted and punished.

1.5. For the most part, it is possible to protect Australia and Australians against terrorist acts by the use of the laws against murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy and treason, and conspiracy to commit these offences. This list might be supplemented by the inclusion of an offence of mass murder.

1.6 For these reasons, the Council is opposed in principle to the proscription of organisations.

¹ In the words of Professors Bill Bowring and Douwe Koriff, proscription legislation 'is a recipe for arbitrary, secretive and unjust executive decision-making, shielded for the scrutiny of the courts, and equally removed from public debate precisely because of the 'chilling' effect of the use of the term 'terrorism'.' (Bill Bowring and Douwe Koriff, **Statewatch News**, February 2005.)

2. The criteria for proscription.

If proscription is to occur, these principles should apply.

2.1 For proscription to be admissible, the organisation must be engaged in preparing, planning or assisting in terrorist actions, have threatened to perform them or have already committed them.

2.2 An organisation should not be banned unless its commitment to performing terrorist actions is current. It is a reason to resist proscription that the organisation is involved in peace or mediation processes.

2.3 It is also important that the definition of 'terrorism' should not encompass justified armed struggle against tyrannical or repressive regimes, or legitimate struggles against occupation and for self-determination.²

2.4 Since actions in the prosecution of a war, including a war of liberation, are subject to the laws of war and the law of treason, attacks on military targets during a war should not be treated as terrorism.

2.5 Care should be taken lest refugees are criminalised for the same reasons that they are granted asylum.

2.6 Given the consequences which follow from proscription of an organisation, the definition of 'terrorist actions' for the purposes of proscription should be limited to those that are designed cause terror. Where lives are not put at risk, criminal actions that seek to put pressure on governments by attacking property, or communication systems, or transport systems, or the economy, wrong though they may be, do not justify the same precautions nor the same penalties that acts of arbitrary mass murder do.

2.7 Beyond that basic requirement, the definition of 'terrorism' is contentious. The definition of 'terrorism' for the purposes of proscription should take account of the above considerations, and also the following:

terrorist actions often kill at random—there is no attempt to distinguish between those believed to be guilty of some wrong and others;
they may target groups; or target individuals as representatives of groups;
the actions are intended to further political, religious or ideological ends;
the ends are to be furthered through the terror generated by the actions.

Proscription decisions should also take account of the following:

how close the links are between the Australian part of the organisation and those parts involved in terrorist activities;
whether there are links to other terrorism groups or networks;
whether there are threats to Australians;
whether the United Nations has proscribed the organisation.

² 'Whether the Kurdish people have a right to self-determination under international law is an open question. However, the international law has increasingly come to recognise the legitimacy of the struggle of peoples for liberation to use all means, including armed struggle. While this does not justify violence which breaks the rules that apply to armed conflicts of this nature or other violations of human rights, it does acknowledge and reflect the complexity of political violence and the fundamental importance of respect for the rule of law.' Parliamentary Joint Committee (Commonwealth) on Security and Intelligence, quoted in the Sheller Report, p.19.

2.8 It is not acceptable that the members of an organisation should be forced to leave it because of intemperate, provocative or indeed illegal statements by the leaders of the organisation.³ Unless statements are made repeatedly by the acknowledged leader of an organisation, on official stationery or on official occasions, and the other members know of these things and do nothing about it, it should not be taken that the organisation advocates terrorism.

2.9 Advocacy of terrorist actions, and mere declaration of support for terrorism, a particular act of terrorism or a sequence of such acts, should not be a ground for proscription at all. If intentional incitement to violence is involved, those responsible should be dealt with by prosecution for incitement, not by proscription of the organisation within which the incitement took place. Similarly, if the leaders or an organisation plan terrorist attacks and the other members of the organisation are not involved, the leaders should be dealt with under the common law of conspiracy.

3. The process of proscription.

3.1 Proscription should be done by a Federal judge, in open court, on application by the Federal Attorney-General. An appeal should lie with a superior court on the facts as well as the lawfulness of the proscription. This should be the only method by which an organisation may be proscribed.

3.2 The criteria for proscription should be determined by the legislation.

3.3 The process should be transparent, and provide members of the organisation that it is proposed to proscribe, other persons affected and members of the public with notification that it is proposed to proscribe the organisation, and to provide them with the right to be heard and to present evidence in opposition.

3.4 The proscription must be followed by widespread publicity of the fact that it has occurred, and of the reasons for it; sufficient for people who may be associated with the organisation to learn that joining or remaining a member of the organisation may expose them to prosecution.

3.5 In view of the risks of abuse of the process for political or vindictive ends, and in view of the grave consequences for individuals, the use of secret evidence (i.e. evidence that is made available to the court but not to the organisations at risk of proscription) should not be allowed.

4. The consequences of proscription

4.1 A distinction should be made between organisations whose *raison d'être* is terrorist activity, and organisations whose leaders or spokespersons have made terrorist threats. Members of organisations should not be criminalised by the actions of the organisations' leaders. Mere membership of an organisation should not be a crime in itself.

4.2 Active involvement should be required for the commission of a crime. Active involvement might include directing the organisation, recruiting for it (in the knowledge of its terrorist activities), and providing it with support, as restricted below.

³ For example, a mosque or a church should not be shut down because of the sermons of an imam or a clergyman.

4.3 Strict liability should not apply to the offences of active involvement in the terrorist activities of a proscribed organisation. (Proof of knowledge and intention should be a burden of the prosecution.)

4.4 Training the members of an organisation for terrorist actions should be a crime, as should other forms of aid for that purpose. Other forms of assistance should not.⁴ If the associated action of providing money to the organisation is to remain an offence, it should require that the money is intended to be used or is known to be likely to be used to aid terrorism.

4.5 It should be a defence against charges which are dependent on an organisation's having been proscribed, that it was wrongly or mistakenly so proscribed.

4.6 It is sometimes the case that an organisation engages both in terrorist activities and in innocent ones, such as charitable actions. Accordingly, when an organisation is dissolved in consequence of a proscription and its assets are seized, the assets (other than those directly connected to terrorist activities) should be given to a non-proscribed, charitable organisation in accordance with the wishes of the members of the proscribed organisation.

5. Organisations that have not been proscribed.

5.1 Where an organisation is involved in planning or practising terror but it has not been proscribed, mere membership and other forms of support should not be criminalised retrospectively. Instead, those who can be shown to have engaged in the planning or in attacks should be charged using for example the laws against murder, kidnapping, aiding and abetting, attempt, incitement, grievous bodily harm, criminal damage, arson, conspiracy, treason, a possible offence of mass murder and conspiracy to commit these offences.

⁴ Training for innocent purposes might include teaching members of the organisation English, dissuading them from their interpretation of religious texts, or teaching them how to use peaceful means for achieving change. The Sheller Committee recommended repeal of provisions which create the offences of association with a terrorist organisation, and argued that the offence of providing support should be restricted to allow argument in favour of the organisation and its objectives. (Recommendation 14)