

# Beyond the Separation of Powers: Judicial Review and the Regulatory Proscription of Terrorist Organisations

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*Administrative law remains the key defence against an over-zealous executive arm of government, but administrative law needs to be understood in an international context. Perhaps nowhere is this more apparent than in relation to legislation designed to counter terrorist activities. The co-ordination of terrorist activities knows no borders, and state-centred executive action designed to address the threat of terrorism necessarily operates in a broader global environment. An important but controversial part of Australia's counter-terrorism legislation suite is the power to proscribe terrorist organisations. The authors contend that the scope of judicial review available in relation to decisions of the Commonwealth Executive to proscribe terrorist organisations is inadequate and may jeopardise Australia's compliance with international standards, such as those provided in the International Covenant on Civil and Political Rights. Now is an opportune time to reassess the structure and operation of the power to proscribe organisations in Australia.*

## I. INTRODUCTION

The classic doctrine of the separation of powers presupposes a state that is self-contained to a significant extent – a state in which the checking and balancing of an executive by a judiciary and by a parliament, to focus on some key aspects of the separation of powers, is a meaningful ‘internal’ process of equilibrium uncoupled from a state’s relationship with other states. That is to say, despite the recent debate over an ‘international rule of law’<sup>1</sup> with its highlighting of constitutional or

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1. P Allott, *Towards the International Rule of Law: Essays in Integrated Constitutional Theory* (Cambridge: CUP, 2005); B Fassbender, ‘The United Nations Charter as Constitution of the International Community’ (1997) 36 *Columbia Journal of Transnational Law* 529, 567; S Breau, ‘The Constitutionalisation of the International Legal Order’ (2008) 21 *Leiden Journal of International Law* 545. For an approach derived from critical theory, see S Marks, *The Riddle*

quasi-constitutional processes at the international level, the notion of separation of powers remains grounded in the theory of the legal constitution of the state. The 'Westminster' version of the constitutional structure, with its cabinet-based amalgamation of many of the more senior executive and parliamentary powers, is an example of this, as is the United States version.

Yet a larger perspective is now required. This does not mean that structural checks and balances within the confines of the state cease to be of significance, and indeed such mechanisms are the central concern of this paper. International tribunals reviewing domestic decisions may indeed rise in significance, but what is more to the point is the reframing of national processes within an international 'big picture'. For example, it is argued in this paper that it is international perspectives (such as those provided by human rights instruments) that most effectively press the case for judicial review, within the state, of executive power over the proscription of terrorist organisations. In other words, the state-based mechanisms come to be seen as the implementation, or more modestly as the manifestation, of international imperatives and expectations.

It will be argued that judicial review is the single most important 'check and balance' to executive powers relating to the proscription of terrorist organisations, and that international experience (as well as theoretical considerations) in constitutionality and the protection of rights point to the necessity for review mechanisms to be built in to any relevant enactments. In this paper, counter-terrorism legislation enacted by Australia's Commonwealth Parliament is analysed in the interest of clarifying the features of such enactments that call for judicial review.

The Australian Commonwealth Parliament enacted a raft of measures in 2002 specifically addressing the threat of terrorism. Of all the measures contained in this package, one of the most controversial was the conferral of a new power upon the Commonwealth Executive to proscribe organisations on the basis of alleged connections with terrorism.<sup>2</sup> It has been observed that this proscription regime 'raises fundamental questions about public law and the limits of executive power'.<sup>3</sup> In particular, it raises the question of the role that judicial review does, can and should play with respect to such executive decisions. In empowering the Commonwealth Executive in this manner, Australia's Parliament was responding in a similar manner to corresponding democratic convocations around the world to the perceived threat of transnationally co-ordinated violence, and the consequential difficulties are also international ones. Not only are these difficulties international in that they are shared across state borders and across hemispheres;

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*of All Constitutions: International Law, Democracy and the Critique of Ideology* (Oxford: OUP, 2000).

- 2 See Senate Legal and Constitutional Committee, Parliament of Australia, *Consideration of Legislation Referred to the Committee* (Parliamentary Paper No 330/2002) 45, 54, 58.
3. A Lynch, N McGarrity & G Williams, 'The Proscription of Terrorist Organisations in Australia' (2009) 37 *Federal Law Review* 1, 3.

they are international in that a purely state-centred analysis of constitutional interrelationships is clearly inadequate to address them.

This paper focuses on the regulatory proscription provisions contained in Division 102 of the Criminal Code Act 1995 (Cth) (the 'Criminal Code'),<sup>4</sup> and considers the extent to which proscription decisions under that regime are amenable to judicial review. Brief attention is also given to the implications for Australia's human rights obligations under the International Covenant on Civil and Political Rights (the 'ICCPR').<sup>5</sup> Though the ICCPR has not been enshrined in any single piece of Commonwealth legislation and so has no direct domestic effect, Australia's ratification of the ICCPR on 13 August 1980<sup>6</sup> makes the ICCPR binding on Australia at international law vis-à-vis the international community.<sup>7</sup> It is suggested that the proscription provisions (specifically, the Executive decisions that can be taken under them) and the extent to which those decisions are amenable to judicial review place Australia in jeopardy of breaching its obligations under the ICCPR.

In August 2009, the Commonwealth Attorney-General released a Discussion Paper<sup>8</sup> along with a Draft Exposure Bill,<sup>9</sup> setting out the Commonwealth Government's 'comprehensive response'<sup>10</sup> to a number of terrorism and security related reviews between 2006 and 2008.<sup>11</sup> These documents were followed in March 2010 by the introduction of the National Security Legislation Amendment Bill 2010 (Cth) into the Federal Parliament, with amendments affecting the proscription regime among those considered.<sup>12</sup> The Bill passed the House of Representatives on 26 May 2010,

4. As outlined in Part II, an organisation may be a 'terrorist organisation' either (i) as a result of its involvement in terrorist activities pursuant to paragraph (a) of the definition of 'terrorist organisation' in the Criminal Code s 102.1(1), or (ii) as a consequence of specification by regulations pursuant to the Criminal Code ss 102.1(2), (3) and (4). This paper is confined to a discussion of 'regulatory' proscription.
5. *International Covenant on Civil and Political Rights*, opened for signature 16 Dec 1966, 999 UNTS 171 (entered into force 23 Mar 1976).
6. See United Nations, *International Covenant on Civil and Political Rights* (16 Dec 1966, ratified Australia 13 Aug 1980): <<http://treaties.un.org/pages/ParticipationStatus.aspx>> ch IV, 4.
7. See, e.g., *Vienna Convention on the Law of Treaties*, opened for signature 23 May 1969, 1155 UNTS 331 (entered into force 27 Jan 1980), art 26 – embodying the principle of *pacta sunt servanda*: '[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith'. In addition to being enshrined in the *Vienna Convention on the Law of Treaties*, the principle of *pacta sunt servanda* is recognised as a 'fundamental principle of customary treaty law' – see G Triggs, *International Law: Contemporary Principles and Practices* (Sydney: Butterworths LexisNexis, 2006) 506, [9.9].
8. Commonwealth, *National Security Legislation: Discussion Paper on Proposed Amendments* (2009).
9. Draft National Security Legislation Amendment Bill 2009 (Cth).
10. A-G Dept, Australian Government, *National Security Legislation: Public Consultation* (2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews\\_Nationalsecuritylegislation-Publicconsultation\\_Nationalsecuritylegislation-Publicconsultation](http://www.ag.gov.au/www/agd/agd.nsf/Page/Consultationsreformsandreviews_Nationalsecuritylegislation-Publicconsultation_Nationalsecuritylegislation-Publicconsultation)>.
11. See generally Commonwealth, *Parliamentary Debates*. House of Representatives, 12 August 2009, 73–4 (Robert McClelland, Attorney-General).
12. Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) 1; Commonwealth, above n 8, iv.

and its second reading was moved in the Senate on 15 June 2010. However, as the Bill remained before Parliament at the time of its prorogation on 19 July 2010, it has now lapsed – with its future (after the recent 2010 Federal election) uncertain at the time of writing. Against this context, it is timely to reconsider the way in which Australia's proscription regime is structured in terms of the availability of judicial review in relation to decisions to proscribe terrorist organisations.

## II. AUSTRALIAN PROSCRIPTION LEGISLATION

Australia's legislation concerning the proscription of terrorist organisations is contained in Division 102 of the Criminal Code. In this Part, consideration will be given to the origins, scope and operation of this legislation, before the availability of judicial review in relation to proscription decisions is considered in detail in Part III.

### 1. The historical basis of Australia's proscription legislation

The proposal to confer a power on the Commonwealth Executive to proscribe an organisation based on its connections with terrorism was initially contained in the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth) ('SLAT Bill'). The SLAT Bill proposed the insertion of a new Part 5.3 in the Criminal Code.<sup>13</sup> The proposed Part 5.3 contained a series of specific terrorist offences,<sup>14</sup> and also conferred upon the Commonwealth Attorney-General a power to declare an organisation a 'proscribed organisation' where the Attorney-General was 'satisfied on reasonable grounds' that (among other things) the organisation or one of its members 'has committed or is committing' a terrorist offence.<sup>15</sup> The proposed Part 5.3 additionally contained a series of derivative criminal offences related to proscribed organisations.<sup>16</sup>

The SLAT Bill was referred to the Senate Legal and Constitutional Committee in March 2002.<sup>17</sup> The Committee expressed (in its report tabled in Parliament on 8 May 2002) a series of concerns about the proscription provisions in the SLAT Bill. These included: (i) that proscription decisions were effectively unreviewable because of the 'limited scope of available [judicial] review'; and (ii) that the SLAT Bill provided no process by which a proscribed organisation could apply

13. The proposed insertion of a new Part 5.3 into the Criminal Code was partly in response to United Nations Security Council Resolution 1373: see *Threats to International Peace and Security Caused by Terrorist Acts*, SC Res 1373, UN SCOR, 56th session, 4385th meeting, UN Doc S/Res/1373 (2001). The resolution is formally binding on Australia under Chapter VII of the *Charter of the United Nations*.

14. SLAT Bill, proposed ss 101.1, 101.2, 101.3, 101.4, 101.5, 101.6.

15. *Ibid*, proposed s 102.2(1).

16. *Ibid*, proposed ss 102.4(1)(a), 102.4(1)(b), 102.4(1)(c), 102.4(1)(d), 102.4(1)(e), 102.4(2), 102.4(3).

17. Senate Legal and Constitutional Committee, above n 2, 1.

for revocation.<sup>18</sup> Accordingly, the Committee ‘urged the Attorney-General to reconsider the proposed proscription powers and to develop a procedure which does not vest a broad and effectively unreviewable discretion in a member of the Executive’.<sup>19</sup>

While a number of the Committee’s recommendations in relation to the SLAT Bill were adopted and incorporated into what became the Security Legislation Amendment (Terrorism) Act 2002 (Cth), nearly all of the Committee’s specific recommendations concerning enhanced accountability and review of the proscription power were not acted upon. Indeed, in at least one respect, the proscription power, as enacted in the Security Legislation Amendment (Terrorism) Act 2002 (Cth), further restricted judicial review rather than enhanced it.<sup>20</sup> Moreover, many of the deficiencies identified by the Committee with respect to the SLAT Bill are manifest in the current provisions of the Criminal Code.

## 2. Terrorist organisations and terrorist acts

An organisation may be a ‘terrorist organisation’ for the purposes of the Criminal Code on one (or both) of two legal bases – an organisation may be a terrorist organisation ‘in fact’ (ie, based on a factual assessment of the organisation’s activities), and/or through regulatory proscription.

This dual-category classification scheme derives from the definition of ‘terrorist organisation’ contained in the Criminal Code, section 102.1(1), which provides as follows:

*Terrorist organisation* means:

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

The ‘in fact’ limb of this definition refers directly to the notion of a ‘terrorist act’. While that phrase does not appear in the limb concerning regulatory proscription, the concept is similarly relevant in the proscription context given its incorporation into the Criminal Code, section 102.1(2). Therefore, the concept of a terrorist act is (unsurprisingly) central to the identification of an organisation as a terrorist organisation. ‘Terrorist act’ is the subject of its own definition in the Criminal Code, section 100.1(1) – which, relevantly to this paper’s analysis, includes

18. Ibid 58.

19. See generally *ibid*, vii–viii, 19–59.

20. That is, the shift from a conferral of the proscription power on a Minister by way of a Ministerial decision, to proscription by regulation made by the Governor-General, as originally inserted into the Criminal Code by the Security Legislation Amendment (Terrorism) Act 2002 (Cth), Sch 1. This issue is discussed in Part III below.

reference to ‘the intention of advancing a political, religious or ideological cause’.<sup>21</sup> The 2009 Draft Exposure Bill proposed the addition of a new sub-section (ia) to paragraph (c) of the definition, which would have included actions or threats having the intention of ‘coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations’<sup>22</sup> – and while this proposed amendment was not carried through to the National Security Legislation Amendment Bill 2010 (Cth) (and while the prorogation of Parliament has caused that Bill to lapse in any event), it is perhaps notable for emphasising the international context and dimensions of the problems sought to be addressed through the Criminal Code’s counter-terrorism provisions.

### 3. Regulatory proscription and the proscription power

The analysis in this paper specifically concerns the regulatory proscription of terrorist organisations pursuant to paragraph (b) of the definition of terrorist organisation in the Criminal Code, section 102.1(1).

This is not to suggest that the issue of organisations being terrorist organisations ‘in fact’ is unimportant. A number of criminal offences derive from the identification of an organisation as a terrorist organisation, including (i) intentionally or recklessly directing the activities of a terrorist organisation;<sup>23</sup> (ii) membership of a terrorist organisation;<sup>24</sup> (iii) recruiting for a terrorist organisation;<sup>25</sup> (iv) training a terrorist organisation or receiving training from a terrorist organisation;<sup>26</sup> (v) getting funds

21. See paragraph (b) of the definition of ‘terrorist act’ in the Criminal Code, s 100.1(1). Cf G Syrota, ‘The Definition of Terrorist Act in Part 5.3 of the Commonwealth Criminal Code’ (2007) 33 *University of Western Australia Law Review* 307; G Syrota, ‘Australia’s Counter-Terrorism Offences: A Critical Study’ (2008) 34 *University of Western Australia Law Review* 103.

22. Draft National Security Legislation Amendment Bill 2009 (Cth) Sch 2, Pt 1, cl 2; Commonwealth, above n 8, 44. It should be noted that the Draft National Security Legislation Amendment Bill 2009 (Cth) also proposed amendments to the Criminal Code, ss 100.1(2) & (3), which are referred to in paragraph (a) of the definition of ‘terrorist act’ contained in the Criminal Code, s 100.1(1), though these proposed amendments similarly did not feature in the now lapsed National Security Legislation Amendment Bill 2010 (Cth): see Draft National Security Legislation Amendment Bill 2009 (Cth) Sch 2, Pt 1, cl 3–10; Commonwealth, *National Security Legislation*, above n 8, 44.

23. Criminal Code, ss 102.2 (1) and (2) respectively.

24. *Ibid*, s 102.3(1).

25. *Ibid*, s 102.4.

26. *Ibid*, s 102.5. Where the terrorist organisation is a proscribed terrorist organisation, as opposed to an organisation which meets the definition of a terrorist organisation by its activities, the provision of training to the organisation is, in part, a strict liability offence: see Criminal Code, s 102.5(2), (3), (4). For a further discussion of the ramifications of the placing of an onus on the accused with respect to this offence, see P Emerton, ‘Paving the Way for Conviction Without Evidence: A Disturbing Trend in Australia’s “Anti-Terrorism” Laws’ (2004) 4(2) *Queensland University of Technology Law and Justice Journal* 1, 10–14. It should also be noted that the 2009 Draft Exposure Bill proposed amendments to this derivative offence, providing a defence for certain organisations involved in the delivery of humanitarian aid: see Draft National Security Legislation Amendment Bill 2009 (Cth) Sch 2, Pt 2, cl 19–22; Commonwealth, above n 8, 66–73. This defence did not feature in the now lapsed National Security Legislation Amendment Bill 2010 (Cth).

to, from or for a terrorist organisation;<sup>27</sup> (vi) providing support for a terrorist organisation;<sup>28</sup> and (vii) associating with a terrorist organisation.<sup>29</sup> These offences, in the main,<sup>30</sup> require a mens rea of intention<sup>31</sup> or recklessness.<sup>32</sup> They generally attract large maximum penalties,<sup>33</sup> and can be committed anywhere in the world.<sup>34</sup> Importantly, they can be committed whether or not the organisation in question is a terrorist organisation because of paragraph (a) or (b) (or both) of the definition in the Criminal Code, section 102.1(1).

However, the regulatory proscription of terrorist organisations raises some peculiar issues worthy of specific attention. In particular, whether or not an organisation is a terrorist organisation ‘in fact’ can only be authoritatively determined by a court – and if such an issue is raised in litigation, it will be tested before an impartial and independent adjudicator, with reference to admissible evidence, and against the criminal standard of proof. By way of contrast, regulatory proscription is an Executive act which (as will be seen in Part IV below) can have a significant impact on civil liberties – and one which need not be exercised on the basis of admissible evidence to a particular standard of proof. In the context of such Executive acts, judicial review (the focus of this paper’s analysis) is an important oversight mechanism – which is of little or no practical significance in the case of a curial determination at trial as to whether or not an organisation meets the requirements of paragraph (a) of the definition in the Criminal Code, section 102.1(1).<sup>35</sup>

27. Criminal Code, s 102.6.

28. Criminal Code, s 102.7. It should be noted that the amendments to this derivative offence proposed by the 2009 Draft Exposure Bill (see Draft National Security Legislation Amendment Bill 2009 (Cth) Sch 2, Pt 1, cl 17–18; Commonwealth, above n 8, 62 – 65) did not feature in the now lapsed National Security Legislation Amendment Bill 2010 (Cth).

29. Criminal Code, s 102.8.

30. Cf *ibid*, subsection (3) of the offence of ‘associating with terrorist organisations’.

31. See, eg, *ibid*, s 102.4(1).

32. See, eg, *ibid*, s 102.4(2). It should also be noted that there is, however, provision in the Criminal Code for an alternative verdict, where ‘the trier of fact is not satisfied that the defendant is guilty of the offence, but is satisfied beyond reasonable doubt that the defendant is guilty of an offence ... against another subsection of that section’: see s 102.10(2). This would mean, for example, that a person could be found guilty of an offence of providing funds to a terrorist organisation while reckless as to whether the organisation is a terrorist organisation (s 102.6(2)) when prosecuted for an offence of providing funds to a terrorist organisation while knowing that the organisation is a terrorist organisation (s 102.6(1)), in circumstances where the trier of fact is not satisfied beyond reasonable doubt as to the accused’s guilt of the latter offence, but is so satisfied with respect to the former offence.

33. For example, ‘recruiting for a terrorist organisation’ attracts a maximum penalty of 25 years imprisonment: Criminal Code, s 102.4(1). Receiving or providing training to or from a ‘listed terrorist organisation’ may also, if certain other statutory criteria are fulfilled, result in a person being subjected to a judicially ordered ‘control order’ pursuant to the Criminal Code, Div 104. In relation to the definition of ‘listed terrorist organisation’, see the s 100.1(1), which defines a ‘listed terrorist organisation’ as an organisation that is specified by a regulation made pursuant to s 102.1.

34. Criminal Code, ss 15.4, 102.9.

35. In the case of a criminal trial, the determination of whether or not an organisation is ‘in fact’ a terrorist organisation pursuant to paragraph (a) of the definition in the Criminal Code, s 102.1(1) may be made by a jury, as a question of fact, not a judge. Nevertheless, such a determination

The conditions governing the exercise by the Governor-General of the power to proscribe a terrorist organisation are set out in section 102.1(2) of the Criminal Code. As noted above, the proscription power is closely linked to the concept of a 'terrorist act'. As observed by Emerton, 'the consequence of [the] extremely broad definition of a terrorist act is that a very wide range of organisations are liable to proscription as terrorist organisations'.<sup>36</sup>

Section 102.1(2) of the Criminal Code provides as follows:

Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section, the Minister must be satisfied on reasonable grounds that the organisation:

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

The verb 'advocates', an important feature of section 102.1(2), is given an expansive statutory definition in the Criminal Code, section 102.1(1A). As it presently stands, that definition includes (in part) reference to praise of a terrorist act carrying a 'risk' of 'leading a person ... to engage in a terrorist act'.<sup>37</sup> It can be noted that the 2009 Draft Exposure Bill proposed to limit this aspect of the definition by way of reference to a 'substantial' risk,<sup>38</sup> partly in response to a concern 'that the threshold of mere risk raised substantive questions about limits of freedom of expression in Australia'.<sup>39</sup> Unlike the proposed amendments discussed above, this amendment did feature in the now lapsed National Security Legislation Amendment Bill 2010 (Cth).<sup>40</sup> As outlined in the Explanatory Memorandum, '[i]t has always been intended that the risk threshold within the definition of "advocates"

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will have to be made with reference to the criminal standard of proof, with the burden of proof falling upon the prosecution. Importantly, the outcomes of criminal trials, whether before a judge alone, or before a judge and jury, are subject to statutory rights of appeal. Where the decision as to whether an organisation is 'in fact' a terrorist organisation pursuant to paragraph (a) of the definition in the Criminal Code, s 102.1(1), is made by a judge alone, it may also be subject to judicial review (eg, a Federal judge appointed to the Federal Court, the Family Court or the Federal Magistrates' Court is an 'officer of the Commonwealth' for the purposes of s 75(v) of the Australian Constitution) but judicial review of judicial decision-making is of little practical significance (particularly in criminal litigation) given the aforementioned availability of statutory rights of judicial appeal.

36. Emerton, above n 26, 9.

37. See para (c) of the definition of 'advocates' in the Criminal Code, s 102.1(1A).

38. Draft National Security Legislation Amendment Bill 2009 (Cth) Sch 2, Pt 1, cl 12; Commonwealth, *National Security Legislation*, above n 8, 56.

39. Commonwealth, *National Security Legislation*, *ibid*, 57.

40. National Security Legislation Amendment Bill 2010 (Cth) Sch 1, Pt 1, cl 2.



must be substantial', thus the proposed amendment would have 'clarifie[d] that the risk must be real and apparent on the evidence presented'.<sup>41</sup>

#### 4. De-Listing<sup>42</sup>

Where the Minister 'ceases to be satisfied' that a proscribed terrorist organisation meets either of the legislative criteria for proscription contained in paragraphs (a) and (b) of the Criminal Code, section 102.1(2), 'the Minister must, by written notice published in the Gazette, make a declaration to the effect that the Minister has ceased to be so satisfied'.<sup>43</sup> The effect of such a declaration is that 'the regulations, to the extent to which they specify the organisation, cease to have effect when the declaration is made'.<sup>44</sup>

Additionally, and consistently with the recommendations of the Committee in 2002,<sup>45</sup> there is now specific provision for a 'de-listing application' to be made to the Minister.<sup>46</sup> The Criminal Code, section 102.1(17) relevantly provides:

41. Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) 14.

42. For completeness it is noted that, in addition to Ministerial de-listing, a regulation may cease to have effect due to the two year sunset clause in the Criminal Code, s 102.1(3). A perusal of the current list of proscribed organisations indicates that re-listing of organisations is quite common; in fact, a number of organisations have been re-listed three (or even four) times: see the Table of Amendments (as they relate to Pt 2) in Note 1 to the Criminal Code Regulations 2002 (Cth). See also Australian Government, *Listing of Terrorist Organisations* (2010) Australian National Security <[http://www.nationalsecurity.gov.au/agd/WWW/NationalSecurity.nsf/Page/What\\_Governments\\_are\\_doing](http://www.nationalsecurity.gov.au/agd/WWW/NationalSecurity.nsf/Page/What_Governments_are_doing)>. There have been two instances of proscriptions (the proscriptions of the Armed Islamic Group in the former reg 4E, originally effected by the Criminal Code Amendment Regulations 2004 (No 6) (Cth), and Egyptian Islamic Jihad in the former reg 4M, originally effected by the Criminal Code Amendment Regulations 2005 (No. 5) (Cth)) lapsing due to the operation of the two year sunset clause: see Note 2 to the Criminal Code Regulations 2002 (Cth). The 2009 Draft Exposure Bill proposed to increase this sunset period to three years: see Draft National Security Legislation Amendment Bill 2009 (Cth) Sch 2, Pt 1, cl 13; Commonwealth, above n 8, 58. This proposed amendment also featured in the Bill which was being considered by Parliament at the time it was prorogued: see National Security Legislation Amendment Bill 2010 (Cth) Sch 2, Pt 1, cl 3; the rationale being that extending the sunset period to three years 'would offer an adequate level of oversight': see Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) 14. The proposed amendments would also have ensured that the three year sunset clause applied to regulations already in force (though would not have reactivated two year regulations which had already expired): see National Security Legislation Amendment Bill 2010 (Cth) Sch 2, Pt 1, cl 4; see also Explanatory Memorandum, National Security Legislation Amendment Bill 2010 (Cth) 15.

43. Criminal Code, s 102.1(4).

44. Ibid, s 102.1(4). It should be noted that the cessation of a particular proscription regulation's effect does not mean that an organisation cannot still be classified as a terrorist organisation 'in fact' pursuant to paragraph (a) of the definition of terrorist organisation in s 102.1(1).

45. Senate Legal and Constitutional Committee, above n 2, viii, Recommendation 4.

46. The 'de-listing' provisions were inserted into the Criminal Code by the Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth): see Sch 1. It should be noted that, as was the case with de-listing on the basis of the Minister's own cessation of satisfaction with respect to the criteria governing regulatory proscription, de-listing as a result of an interested party's application does not prevent an organisation satisfying the requirements of paragraph (a) of

If:

- (a) an organisation (the *listed organisation*) is specified in regulations made for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section; and
- (b) an individual or an organisation (which may be the listed organisation) makes an application (the *de-listing application*) to the Minister for a declaration under subsection (4) in relation to the listed organisation; and
- (c) the de listing application is made on the grounds that there is no basis for the Minister to be satisfied that the listed organisation:
  - (i) 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
  - (ii) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);
 as the case requires;

the Minister must consider the de listing application.

The implications of the availability of de-listing on the human rights issues raised by regulatory proscription are discussed in Part IV below.

### III. OPTIONS FOR JUDICIAL REVIEW UNDER AUSTRALIAN LAW

#### 1. Avenues of Commonwealth judicial review

The Criminal Code is a Commonwealth enactment which confers a proscription power on the Commonwealth Executive. There are two distinct avenues of judicial review of Commonwealth Executive decision-making – constitutional and statutory review.<sup>47</sup>

The first avenue of judicial review is primarily derived from section 75(v) of the Australian Constitution. Pursuant to section 75(v), writs of mandamus and prohibition (and the equitable remedy of injunction) are available in the original jurisdiction of the High Court against ‘an officer of the Commonwealth’. In exercising its jurisdiction under section 75(v), the High Court has the power to grant ‘ancillary’ remedies, specifically certiorari (to ‘quash’ a decision of an ‘officer of the Commonwealth’),<sup>48</sup> and the making of a declaration.<sup>49</sup> Also, pursuant to the

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the definition of terrorist organisation in the Criminal Code, s 102.1(1) and thus constituting a terrorist organisation ‘in fact’.

47. Following the usage of Cane and McDonald: see P Cane & L McDonald, *Principles of Administrative Law* (Melbourne: OUP, 2008) 69.

48. *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 672–3.

49. Pursuant to the general grant of power to the High Court contained in the Judiciary Act 1903 (Cth) s 32: see generally R Creyke & J McMillian, *Control of Government Action* (Sydney: LexisNexis Butterworths, 2009) 50.

Australian Constitution, section 75(iii), an applicant may be able to obtain certain remedies (such as a writ of certiorari, an injunction, or a declaration) in an action in the original jurisdiction of the High Court where the Commonwealth is party.

Although the High Court's original jurisdiction under the Australian Constitution, section 75, has been identified by the High Court as a distinct 'constitutional' jurisdiction,<sup>50</sup> the principles governing the availability of remedies in the constitutional jurisdiction of the High Court are still largely derived from the common law.<sup>51</sup> An 'analogous' jurisdiction to the High Court's original jurisdiction under the Australian Constitution, section 75(v), has also been conferred on the Federal Court by statute.<sup>52</sup>

The second avenue of judicial review of Commonwealth Executive decision-making is statutory review. The Administrative Decisions (Judicial Review) Act 1977 (Cth) ('ADJR Act') provides a comprehensive statutory system of judicial review in the Federal Court and the Federal Magistrates' Court.<sup>53</sup> Judicial review under the ADJR Act has a number of significant advantages for persons challenging Commonwealth Executive decision-making when compared with constitutional review.

Under the ADJR Act all legal errors are potentially remediable,<sup>54</sup> such that the 'vexing'<sup>55</sup> classification of a legal error by an administrative decision-maker as 'jurisdictional' or 'non jurisdictional' is effectively irrelevant.<sup>56</sup> Under the ADJR Act, the common law requirement that a 'non jurisdictional error' be manifest 'on the face of the record' to be remediable is also irrelevant.<sup>57</sup> Most significantly, in

50. *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82.

51. *Ibid*; *Re Minister for Immigration and Multicultural Affairs. Ex parte Applicant S20/2002* (2003) 77 ALJR 1165, 1191–6 (Kirby J). See generally Cane & McDonald, above n 47, 69–73.

52. See Judiciary Act 1903 (Cth) s 39B(1). Additionally, pursuant to the Judiciary Act 1903 (Cth) s 39B(1A)(c), the Federal Court has original jurisdiction 'in any matter arising under any laws made by [the Commonwealth] Parliament' other than criminal matters. The precise scope of the Federal Court's original jurisdictional, as conferred by the Judiciary Act 1903 (Cth) ss 39B(1) & (1A) has not been defined, but it is broadly coextensive with the High Court's original jurisdiction, and broadly governed by the same principles derived from the common law. The Federal Court's jurisdiction is not, however, constitutionally entrenched, unlike the original jurisdiction of the High Court.

53. See, eg, ADJR Act s 5(1). The authors note that the continued existence of the Federal Magistrates' Court is currently under question, after an announcement by the Commonwealth Attorney-General in May 2009 that the Court was to be abolished: see generally R McClelland, *Rudd Government to Reform Federal Courts* (2009) Attorney-General for Australia <[http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases\\_2009\\_SecondQuarter\\_5May2009-RuddGovernmenttoReformFederalCourts](http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/MediaReleases_2009_SecondQuarter_5May2009-RuddGovernmenttoReformFederalCourts)>.

54. Cane & McDonald, above n 47, 94–5.

55. *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 631 (Kirby J).

56. See, eg, *Jadwan v Department of Health* (2003) 145 FCR 1, 17 (Gray & Downes JJ).

57. See ADJR Act, ss 5(1)(f) & 6(1)(f).

contrast to the position at common law,<sup>58</sup> a potential applicant for judicial review under the ADJR Act can request from the decision-maker ‘a statement in writing setting out the findings on material questions of fact, referring to the evidence or other material on which those findings were based and giving the reasons for the decision’.<sup>59</sup>

## 2. The judicial reviewability of Criminal Code proscription

It is to these two categories of judicial review that we now turn in analysing the judicial reviewability of decisions to proscribe under the Criminal Code.

### (a) Reviewability of decisions under the ADJR Act

There are several potential obstacles to the judicial reviewability of proscription decisions under the ADJR Act.

The first obstacle arises from what has been termed head of state immunity. Under the Criminal Code, section 102.1(2), the decision to proscribe an organisation as a terrorist organisation is now made by the Governor-General. It is not uncommon for the literature to describe the position otherwise, with reference to the Attorney-General. For example, Lynch, McGarrity and Williams refer several times (in their discussion of the legislative framework) to regulations being made by the Attorney-General.<sup>60</sup> Similar references are made by McGarrity in an earlier paper,<sup>61</sup> as well as by Joseph.<sup>62</sup> However, the Attorney-General’s recent Discussion Paper describes proscription regulations as made by the Governor-General;<sup>63</sup> and this position is reflected in the text of the Criminal Code, section 102.1(2). As decisions of the Governor-General are expressly excluded from judicial review under the ADJR Act,<sup>64</sup> the decision to proscribe an organisation as a terrorist organisation under the Criminal Code is *prima facie* judicially unreviewable under the ADJR Act. This is in contrast to the proposed proscription power under the

58. See *Public Service Board of New South Wales v Osmond* (1986) 159 CLR 656; rev’d [1984] 3 NSWLR 447.

59. ADJR Act, s 13; although it should be noted that the ADJR Act, s 14, empowers the Commonwealth Attorney-General to certify that disclosure of information pursuant to the ADJR Act, s 13, would, *inter alia*, ‘prejudice the security, defence or international relations of Australia’: see ADJR Act s 14(1)(a). The Attorney-General’s certificate then either excludes that information from any ADJR Act statement of reasons: see ADJR Act s 14(2)(a); or in certain circumstances, abrogates entirely the requirement to give reasons: see ADJR Act, s 14(2)(b).

60. See Lynch, McGarrity & Williams, above n 3, 5–7.

61. See N McGarrity, ‘Review of the Proscription of Terrorist Organisations: What Role for Procedural Fairness?’ (2008) 16 *Australian Journal of Administrative Law* 45, 47.

62. See S Joseph, ‘Australian Counter-Terrorism Legislation and the International Human Rights Framework’ (2004) 27 *University of New South Wales Law Journal* 428, 436.

63. See Commonwealth, above n 8, 53.

64. See paragraph (c) in the definition of ‘decision to which this Act applies’ in the ADJR Act, s 3.

SLAT Bill<sup>65</sup> which, ironically, was heavily criticised by the Senate Committee in 2002 partially on the grounds that it was subject to inadequate judicial review.<sup>66</sup>

Much of the literature on point assumes that the decision to proscribe an organisation is judicially reviewable under the ADJR Act. For example, Lynch, McGarrity and Williams suggest that 'limited judicial review of a decision of the Attorney-General to make a regulation ... is available under the [ADJR Act]'.<sup>67</sup> McGarrity's earlier paper notes the lack of any express mention of judicial review in Division 102,<sup>68</sup> but cites the Explanatory Memorandum to the SLAT Bill, which suggested that '[t]he lawfulness of the Attorney-General's decision-making process and reasoning is subject to judicial review under the [ADJR Act]'.<sup>69</sup> Joseph has further suggested that '[j]udicial review of proscription decisions will be available under the [ADJR Act] only on questions of law'<sup>70</sup> – citing Hocking, whose paper suggests that 'the proscription process ... is putatively subject to review under the [ADJR Act]'.<sup>71</sup> The underlying premise for all of these assumptions appears to be the view that it is the Attorney-General, and not the Governor-General, who makes the relevant administrative decision. The preferable view, based simply on the text of the Criminal Code, section 102.1(2), is that it is the Governor-General who makes the relevant decision for the purposes of assessing the availability of judicial review. Indeed, this is recognised in the proscription regulations themselves – for example, the Criminal Code Amendment Regulations 2009 (No 16) (Cth) state, 'I, Quentin Bryce, Governor-General of the Commonwealth of Australia, acting with the advice of the Federal Executive Council, make the following regulations under the Criminal Code Act 1995'. On the issue of judicial reviewability pursuant to the ADJR Act, this squarely brings the head of state immunity into play.

There are three possible ways of circumventing this immunity, such that the decision to proscribe under the Criminal Code, section 102.1(2) could become reviewable under the ADJR Act. It may well be the case that none of these strategies have a high likelihood of success in the specific circumstances under consideration. However, as they are important in other respects, it is useful to rehearse them.

First, pursuant to the Criminal Code, section 102.1(2), as a precondition to the Governor-General making a proscription regulation, the Minister must arrive at a requisite state of satisfaction about the organisation's terrorist nature. It could be

65. See Explanatory Memorandum, SLAT Bill 15.

66. See, eg, Senate Legal and Constitutional Committee, above n 2, viii, 54–5, 58–9.

67. Lynch, McGarrity & Williams, above n 3, 10.

68. McGarrity, above n 61, 51.

69. Explanatory Memorandum, SLAT Bill 16, cited in *ibid* 51.

70. Joseph, above n 62, 437.

71. J Hocking, 'Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control' (2003) 49 *Australian Journal of Politics and History* 355, 368; cited in Joseph, above n 62, 437.

argued that this requisite state of ministerial satisfaction is 'conduct related to the making of the decision' which is reviewable under the ADJR Act, section 6(1).

However, as the making of the regulation by the Governor-General is not itself 'a decision to which [the ADJR Act] applies', this would appear to preclude characterising the Minister's requisite state of satisfaction as 'conduct for the purpose of making a decision' within the terms of the ADJR Act, section 6. Additionally, in interpreting the ADJR Act, the High Court has defined 'conduct', as conceptually distinct from 'decision', such that 'conduct' is 'a concept which appears to be essentially procedural in character'.<sup>72</sup> This interpretation of 'conduct' under the ADJR Act as 'essentially procedural' militates against the successful characterisation of what is (in substance) a ministerial 'decision' concerning the terroristic nature of an organisation pursuant to the Criminal Code, section 102.1(2) as 'conduct' for the purposes of ADJR Act review pursuant to its section 6.<sup>73</sup>

The second way of circumventing head of state immunity under the ADJR Act relates to the conventions of responsible government. The Criminal Code, section 102.1(2), in its express reference to a requisite state of ministerial satisfaction as a precondition to the Governor-General making a proscription regulation, implicitly recognises the conventions of responsible government. Although the power to make a proscription regulation is formally the Governor-General's, it is always to be exercised on the basis of ministerial advice. In substance, the decision is one of the Minister (not the Governor-General). Consistent with the conventions of responsible government, head of state immunity from ADJR Act review would not apply if the requisite state of ministerial satisfaction referred to in the Criminal Code, section 102.1(2), could itself be characterised as a reviewable ADJR Act 'decision'.

Mason CJ's canonical formulation of the meaning of 'decision' under the ADJR Act in *Australian Broadcasting Tribunal v Bond*<sup>74</sup> entails 'a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration'.<sup>75</sup> Although, under the Criminal Code, section 102.1(2), the Minister's arrival at the requisite state of satisfaction is not 'final' or 'determinative' in a formal sense (given the conferral of the power on the Governor-General), 'in a practical sense' (to apply the *Bond* formulation) the Minister's state of mind is 'operative and determinative', as the Governor-General will always act on ministerial advice; hence, that ministerial state of mind is arguably reviewable as a 'decision' under the ADJR Act.

72. *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 337 (Mason CJ).

73. See also M Aronson, B Dyer & M Groves, *Judicial Review of Administrative Action* (Sydney: Law Book Co, 4th ed, 2009) 55, n 279.

74. (1990) 170 CLR 321.

75. *Ibid* 337 (Mason CJ).

This way of circumventing the head of state immunity contained in the ADJR Act has been tried unsuccessfully before. In *Steiner v Attorney-General (Cth)*,<sup>76</sup> Beaumont J rejected the argument that ministerial advice to the Governor-General was reviewable under the ADJR Act in circumstances where a power was formally conferred under the Crimes Act 1914 (Cth), section 19A, upon the Governor-General ‘acting on the advice of the Attorney-General’.<sup>77</sup> This was on the basis that the efficacy, purpose and object of the head of state immunity in section 3(1) of the ADJR Act required the exclusion of ministerial advice to the Governor-General from review.<sup>78</sup> *Steiner* was followed by the Full Federal Court in *Thongchua v Attorney-General (Cth)*<sup>79</sup> on indistinguishable facts. Nonetheless, in *Attorney-General (NT) v Minister for Aboriginal Affairs*<sup>80</sup> a ministerial recommendation to the Governor-General was found by the Full Federal Court to be reviewable under the ADJR Act, in circumstances where the relevant legislation expressly referred to the ministerial recommendation, and the power was vested, by operation of the presumption in the Acts Interpretation Act 1901 (Cth), section 16A, in the Governor-General in Council.<sup>81</sup>

The legislative framework created by the Criminal Code, section 102.1(2) exhibits one of the features of the legislation in *Attorney-General (NT) v Minister for Aboriginal Affairs*, but not the other – while, by operation of the presumption in the Acts Interpretation Act 1901 (Cth), section 16A, the power to proscribe in the Criminal Code, section 102.1(2), is vested in the Governor-General acting on the advice of the Federal Executive Council, there is no express reference in the Criminal Code, section 102.1(2), to a ministerial *recommendation*. Rather, section 102.1(2) merely refers to *a state of ministerial satisfaction* as an essential prerequisite to the exercise of the proscription power by the Governor-General. Moreover, in *Attorney-General (NT) v Minister for Aboriginal Affairs*, the Full Federal Court was able to construe the relevant legislative provisions such that the powers and functions reposed by the legislation in the Minister were distinct from the powers and functions reposed by the legislation in the Governor-General in Council.<sup>82</sup> By contrast, section 102.1(2) of the Criminal Code manifests no such distinction, either expressly or impliedly. Once the Minister arrives at the requisite state of satisfaction and chooses to give advice to the Governor-General that a particular organisation should be proscribed, implicitly and by convention, the exercise of the Governor-General’s proscription power inevitably follows.<sup>83</sup>

76. (1983) 11 A Crim R 179.

77. Crimes Act 1914 (Cth) s 19A(14), as extracted in *Steiner*, *ibid* 186 (Beaumont J).

78. *Steiner*, *ibid* 182 (Beaumont J).

79. (1986) 11 FCR 187.

80. (1987) 16 FCR 267.

81. *Ibid* 272–3.

82. *Ibid* 272.

83. It is interesting to note in this respect that, for example, the most recent round of listings under the proscription regime (the re-listing of Al-Qa’ida, Jemaah Islamiyah and Al-Qa’ida in the Islamic Maghreb, and the listing of Al-Qa’ida in the Arabian Peninsula for the first time) were publicised by way of a press release issued by the Attorney-General, indicating that the ‘Government’ had

The third possible way of circumventing the head of state immunity in order to come within the scope of the ADJR Act is to rely on the deeming provision in section 3(3). Section 3(3) provides:

Where provision is made by an enactment for the making of a report or recommendation before a decision is made in the exercise of a power under that enactment or under another law, the making of such a report or recommendation shall itself be deemed, for the purposes of this Act, to be the making of a decision.

Using section 3(3), it could be argued that section 102.1(2) of the Criminal Code makes ‘provision’ for a ministerial ‘report or recommendation’ before the exercise of the proscription power by the Governor-General, by virtue of its express reference to a prerequisite ministerial state of satisfaction.

The problem with this approach is that it relies on an expansive interpretation of section 3(3) of the ADJR Act, whereas the prevailing judicial interpretation of the sub-section is restrictive.<sup>84</sup> First, it is doubtful whether a bare statutory reference to a ministerial state of satisfaction could be characterised as ‘a specific report or recommendation’<sup>85</sup> so as to fall within section 3(3). Secondly, in applying section 3(3) courts have drawn a distinction between a recommendation which precedes a decision (which falls within the scope of section 3(3)) and ministerial advice ‘which is an essential ingredient of the decision itself’<sup>86</sup> (which does not). As put by Aronson, Dyer and Groves, ‘the Act must treat the report or recommendation as preceding the subsequent decision, rather than as constituting an element of the decision itself’.<sup>87</sup> Hence, where an Act has expressly conferred power on the Governor-General ‘acting on the advice’ of the relevant Minister, such ministerial advice has fallen outside the scope of section 3(3).<sup>88</sup> While the Criminal Code, section 102.1(2), does not expressly refer to the Governor-General acting on ministerial ‘advice’, it does so implicitly by referring to the requisite state of ministerial satisfaction as a precondition of the exercise of the power conferred in the Governor-General. The correct characterisation of the decision making power conferred by section 102.1(2) is of *one* decision, of which an essential element is the ministerial arrival at the requisite state of satisfaction: hence section 3(3) of the ADJR Act has no application to section 102.1(2) of the Criminal Code.

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re-listed and listed the respective groups, and omitting any reference to the Governor-General: see R McClelland, *Proscription of Terrorist Organisations*, Media Release (19 Jul 2010).

84. See generally Aronson, Dyer & Groves, above n 73, 71.

85. *Ross v Cosngan* (1982) 59 FLR 184, 198 (Elliott J). See also *Edelsten v Health Insurance Commission* (1990) 27 FCR 56; *Margarula v Minister for the Environment* (1999) 92 FCR 35, 49 (Sundberg J).

86. *Thongchua v Attorney-General (Cth)* (1986) 11 FLR 187, 192 (Neaves & Burchett JJ). See also *Attorney-General for the Northern Territory v Minister for Aboriginal Affairs* (1986) 67 ALR 282, 288 (Wilcox J).

87. Aronson, Dyer & Groves, above n 73, 71.

88. See *Steiner*, above n 76; *Thongchua*, above n 86; *A-G (NT) v Minister for Aboriginal Affairs*, above n 86.



Finally, pursuant to the definition of ‘decision to which this Act applies’ in the ADJR Act, section 3(1), for a ‘decision’ to be reviewable under the ADJR Act it must be ‘of an administrative character’. It is arguable that the ‘decision’ under the Criminal Code, section 102.1(2), relating as it does to the making of a regulation, is a decision, not of an ‘administrative character’, but of a ‘legislative character’. This is a weaker argument for ADJR Act exclusion than the head of state immunity analysed above. Although proscription pursuant to the Criminal Code, section 102.1(2) is by regulation, the regulation is specific to ‘an organisation’.<sup>89</sup> The list of currently proscribed terrorist organisations is consolidated in the Criminal Code Regulations 2002 (Cth);<sup>90</sup> however, each instance of proscription is (generally)<sup>91</sup> effected by an individual amending regulation which amends the consolidated list.<sup>92</sup> Thus (despite the existence of the consolidated list in the Criminal Code Regulations 2002 (Cth)) the relevant proscription regulation applies, in each instance, particularly – regulatory proscriptions are not regulations of general application. While ‘no single factor is dispositive’<sup>93</sup> of the characterisation of a decision as being ‘of an administrative character’, ‘the general distinction between legislation and the execution of legislation is that legislation determines the content of a law as a rule of conduct ... whereas executive authority applies the law in particular cases’.<sup>94</sup> Proscription under section 102.1(2) does not have the effect of changing the content of a law, but rather involves the application of the law by the Executive to a particular case. Hence a regulation which relates specifically to one

89. See the Criminal Code, s 102.1(2), although note that, pursuant to the Acts Interpretation Act 1901 (Cth) s 23(b), ‘words in the singular number include the plural’.

90. See Criminal Code Regulations 2002 (Cth) Pt 2, regs 4A–4X (which, regulation-by-regulation, individually sets out the details of each of the 18 terrorist organisations currently proscribed pursuant to the Criminal Code, Div 2). It should be noted that, at the time of writing, a 19th organisation (Al-Qa’ida in the Arabian Peninsula) had been designated by regulation as proscribed and this proscription will take effect as reg 4Y once the period of disallowance has expired: see Note 3 to Criminal Code Regulations 2002 (Cth) (22 Jul 2010); see also Criminal Code Amendment Regulations 2010 (No. 4) (Cth) reg 3 & Sch 1.

91. It should be noted that while it has *generally* been the case that individual amending regulations are used for each instance of listing and re-listing, there has been one single instance of multiple listings effected through a single amending regulation – the listing of Palestinian Islamic Jihad, HAMAS’ Izz al-Din al-Qassam Brigades and Lashkar-e-Tayyiba through the Criminal Code Amendment Regulations 2005 (No. 13) (Cth): see reg 4 and Sch 1. However, this regulation did repeal three previous regulations (Criminal Code Amendment Regulations 2005 (No 12) (Cth), Criminal Code Amendment Regulations 2005 (No 10) (Cth), and Criminal Code Amendment Regulations 2005 (No 11) (Cth)) which each individually specified the respective organisations.

92. For example, the proscription of Al-Qa’ida is set out in reg 4A of the Criminal Code Regulations 2002 (Cth) (sitting alongside the provisions proscribing the other 17 – and potentially soon to be 18 – relevant organisations), but was effected by a series of specific, individual amending regulations: see Criminal Code Amendment Regulations 2004 (No 2) (Cth), which through its reg 3 and Sch 1 effected the proscription of Al-Qa’ida; the Criminal Code Amendment Regulations 2006 (No 2) (Cth), which through its reg 3 and Sch 1 re-listed Al-Qa’ida; the Criminal Code Amendment Regulations 2008 (No 1) (Cth), which through its reg 3 and Sch 1 re-listed Al-Qa’ida a second time; and the Criminal Code Amendment Regulations 2010 (No 1) (Cth), which, through its reg 3 and Sch 1 re-listed Al-Qa’ida a third time).

93. See Aronson, Dyer & Groves, above n 73, 76.

94. *Commonwealth v Grunseit* (1943) 67 CLR 58, 82. See also *McWilliam v Civil Aviation Safety Authority* (2004) 142 FCR 74 (Latham CJ).

organisation should be characterised as a decision of an administrative, rather than legislative, character.

In contrast to proscription under the Criminal Code, section 102.1(2), a decision with respect to a de-listing application under the Criminal Code, section 102.1(17), does not involve the making of a regulation, and the power to make the decision is formally conferred on the Minister. Thus, a decision made under the Criminal Code, section 102.1(17), is clearly reviewable under the ADJR Act.

## (b) Constitutional review

Although traditionally administrative law remedies were generally unavailable against the Crown, the statutory functions of the Governor-General are now subject to judicial review.<sup>95</sup> While it is unclear whether, in the terms of the Australian Constitution, section 75(v), the Governor-General is her or himself 'an officer of the Commonwealth',<sup>96</sup> the remedies available in the original jurisdiction of the High Court under the Australian Constitution, section 75(v), are available against Commonwealth Ministers of the Crown,<sup>97</sup> including in circumstances where the Crown is the formal repository of the relevant statutory power.<sup>98</sup> Thus, in contrast to the position under the ADJR Act, the constitutional avenue of judicial review lies open to a party with standing to challenge the regulatory proscription of an organisation made under the Criminal Code, section 102.1(2).<sup>99</sup> Also, a ministerial decision with respect to a de-listing application is clearly reviewable in the High Court's original jurisdiction under the Australian Constitution, sections 75(iii) and (v), or the Federal Court's original jurisdiction under the Judiciary Act 1903 (Cth), sections 39B(1) and (1A)(c).

95. *R v Toohey; Ex parte Northern Land Council* (1981) 151 CLR 170.

96. The authors have been unable to find any authority on this point. The fact that at least since 1911 it has been acknowledged that declaratory relief is available against a minister of the Crown (see *Dyson v Attorney-General* [1911] 1 KB 410) has probably meant that this issue has been of little practical significance since the commencement of the Australian Constitution on Federation in 1901.

97. See, eg, *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 498 (Kirby J); *Re v Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128, 135 (Gleeson CJ, McHugh, Gummow & Hayne JJ).

98. See, eg, *Toohey*, above n 95. It is likely also that the same remedies are available in the analogous original jurisdiction of the Federal Court under the Judiciary Act 1903 (Cth) s 39B(1): see Cane & McDonald, above n 47, 73–4.

99. While in principle available, it should not go unobserved that constitutional review has been described as the 'poor cousin' of review under the ADJR Act given, for example, the absence of any right (at common law) to be furnished with reasons for an administrative decision: see J von Doussa, 'Reconciling Human Rights and Counter-Terrorism: A Crucial Challenge' (2006) 13 *James Cook University Law Review* 104, 111.

#### IV. THE EFFECTIVENESS OF AUSTRALIAN JUDICIAL REVIEW

It was the claim of the incumbent Federal Government that Australia's legislative response to the September 11 terrorist attacks 'involved enacting laws that both enhance our national security *and protect our civil liberties*'.<sup>100</sup> Like national security, civil liberties are a matter primarily for domestic legislation but (also likewise) civil liberties have an international dimension that cannot be overlooked. From this point of view, it can be argued that the standard of judicial review of Executive proscription decisions made under Division 102 of the Criminal Code available under Australian law is not the standard required to meet Australia's international human rights obligations.

It is first important to note some general limitations on the scope of judicial review in Australia, and also the specific effect on judicial review proceedings of Commonwealth legislation intended to protect national security information from disclosure. It will be seen, against this background, that the already limited scope of judicial review of proscription decisions does not comport with international expectations.

##### 1. 'Australian exceptionalism' and the ICCPR judicial review standard

Judicial review of administrative action in Australia lacks intensity when compared with other jurisdictions. This 'Australian exceptionalism'<sup>101</sup> has often been expressed as the distinction between 'judicial review' and 'merits review': it is constitutionally impermissible for a court exercising Commonwealth judicial power to engage in a review of administrative decision making 'on the merits' (ie, to 'stand in the shoes'<sup>102</sup> of the original administrative decision-maker and determine what is the 'correct or preferable'<sup>103</sup> decision). This is a function of the strict separation of judicial power, according to the separation of powers as it exists at the Commonwealth level.

This lack of intensity of Australian judicial review appears generally to be inconsistent with the intensity of judicial review required under the ICCPR. For example, in the case of *A v Australia*,<sup>104</sup> Australian migration legislation was drafted in such a way as to limit the judicial reviewability of Executive detention of a class of asylum seekers (labelled 'boat people') under the Migration Act 1958 (Cth) to

100. P Ruddock, 'Australia's Legislative Response to the Ongoing Threat of Terrorism' (2004) 27 *University of New South Wales Law Journal* 254, 254 (emphasis added).

101. As coined by M Taggart, 'Australian Exceptionalism in Judicial Review' (2008) 36 *Federal Law Review* 1.

102. *Re Costello and Secretary, Department of Transport* (1979) 2 ALD 934, 943.

103. *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419.

104. (Unreported, UNHRC, 13 Apr 1997, CCPR/C/59/D/560/1993).

the question of whether a detainee was a 'designated person' within the definition contained in the Migration Amendment Act 1992 (Cth). Once a detainee was so classified, there was no alternative to detention and the court had no discretion to order the person's release. The UN Human Rights Committee found that this limited form of judicial review was insufficient to meet Australia's obligations under Article 9, paragraph 4, of the ICCPR.<sup>105</sup>

## 2. Non-justiciability

The lack of intensity of Australian judicial review is exacerbated by the reluctance of courts to judicially review executive decisions concerning issues of national security on the basis that they are 'non-justiciable'.<sup>106</sup> The position is described as follows by the former High Court Chief Justice Sir Anthony Mason:

[N]on-justiciability is assigned as a ground when a court concludes that the decision making function lies within the province of the executive [or the Parliament] and that it is inappropriate that the courts should trespass into that preserve.<sup>107</sup>

The Criminal Code mandates the briefing of the Leader of the Opposition with respect to proscription decisions,<sup>108</sup> and proscription regulations are formally subject to Parliamentary review.<sup>109</sup> These factors militate in favour of characterising proscription decisions as 'non-justiciable' on the basis of national security considerations.

While the propensity to categorise certain classes of decisions as broadly 'non-justiciable' appears to be diminishing,<sup>110</sup> it appears to be diminishing more in the United Kingdom than Australia. This is almost certainly a consequence of the enactment of the Human Rights Act 1998 (UK) which does not have a Commonwealth domestic equivalent, and likely will not for at least the foreseeable

105. Ibid, esp [9.5]: 'As the State party's submissions in the instant case show that court review available to A was, in fact, limited to a formal assessment of the self-evident fact that he was indeed a "designated person" within the meaning of the Migration Amendment Act, the Committee concludes that the author's right, under article 9, paragraph 4, to have his detention reviewed by a court, was violated'. See also *C v Australia* (unreported, UNHRC, 28 Oct 2002, CCPR/C/76/D/900/1999) esp [8.3]; *Baban v Australia* (unreported, UNHRC, 6 Aug 2003, CCPR/C/78/D/1014/2001).

106. See, eg, *Mimster for the Arts, Heritage and the Environment v Peko-Wallsend Ltd* (1987) 15 FLR 274, 278. For a general discussion of judicial review in the area of national security, see HP Lee, P Hanks & V Morabito, *In the Name of National Security: The Legal Dimensions* (Sydney: LBC, 1995) 182–229; M Head, *Administrative Law: Context and Critique* (Sydney: Federation Press, 2nd ed, 2008) 118–21.

107. A Mason, 'The Importance of Judicial Review of Administrative Actions as a Safeguard of Individual Rights' (1994) 1 *Australian Journal of Human Rights* 3, 8 as extracted in Head, above n 106, 114.

108. See Criminal Code, s 102.1(2A).

109. Ibid, s 102.1A.

110. See, eg, *Hicks v Ruddock* (2007) 156 FCR 574; *Abassi v Foreign Secretary* [2002] EWCA (Civ) 1598.

future if the Human Rights Framework developed under the Rudd Government is to remain current policy.<sup>111</sup> For example, in the United Kingdom, in *A v Secretary for the Home Department*,<sup>112</sup> nine persons were detained under the authority of the UK Home Secretary pursuant to section 23 of the Anti-Terrorism, Crime and Security Act 2001 (UK) on the basis of the risk they posed to national security. These nine detainees sought to challenge both the legality of section 23, and the legality of a derogation order made by the Home Secretary that a ‘threat to the life of the nation’ justified the United Kingdom’s derogation from the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>113</sup> (the ‘European Convention on Human Rights’). In finding for the detainees, the House of Lords rejected the submission of the Home Secretary that the ‘courts must accept that such matters fall within the area of discretionary judgment belonging to the democratic organs of the state’.<sup>114</sup> Instead, the House of Lords referred to the ‘very specific, wholly democratic mandate’<sup>115</sup> conferred upon it by section 6 of the Human Rights Act 1998 (UK) to render unlawful the acts of public authorities which are incompatible with the rights contained in the European Convention on Human Rights,<sup>116</sup> quashed the derogation order and declared that section 23 of the Anti-Terrorism, Crime and Security Act 2001 (UK) was incompatible with the Convention.

In Australia at least, where courts cannot make such bold claims of an express democratic mandate based on domestic legislation, the policy concerns underlying the notion of non-justiciability are likely to preclude the availability of at least some grounds of judicial review with respect to proscription decisions under the Criminal Code. This is most evident in relation to the procedural fairness ground of judicial review, one of the most important and litigated grounds of review. In the *Leghaei* litigation, for example, which concerned an attempt to seek judicial review of an adverse security assessment by the Director-General of Security under the Australian Security Intelligence Organisation Act 1979 (Cth) on the grounds of a denial of procedural fairness, the Federal Court<sup>117</sup> and the High Court<sup>118</sup>

111. See generally R McClelland, ‘Launch of Australia’s Human Rights Framework’ (Speech delivered at the National Press Club, Canberra, 21 April 2010): ‘[I]et me say from the outset, that a legislative charter of rights is not included in the Framework as the Government believes that the enhancement of human rights should be done in a way that, as far as possible, unites rather than divides our community’. It should be noted that at the time of writing, amidst the uncertainty following the 2010 Federal election and the formation of a minority Labor government, the future of this policy is not clear.

112. [2005] 2 AC 68.

113. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 Nov 1950, ETS 5 (entered into force 3 Sep 1953).

114. *A v Secretary for the Home Department* [2005] 2 AC 68, 85.

115. *Ibid* 111.

116. *Convention for the Protection of Human Rights and Fundamental Freedoms*, above n 113.

117. The application was heard and dismissed by Madgwick J of the Federal Court: see *Leghaei v Director-General of Security* [2005] FCA 1576; and then unsuccessfully appealed to the Full Federal Court: see *Leghaei v Director-General of Security* (2007) 97 ALD 516.

118. *Leghaei*’s application for special leave to appeal to the High court was refused: see *Leghaei v Director-General of Security* [2007] HCA Trans 655.

accepted the Director-General ‘was bound to give such degree of procedural fairness as the circumstances could bear, consistent with a lack of prejudice to national security’<sup>119</sup> but found that ‘in the particular circumstances of [the] case’,<sup>120</sup> ‘the balance between any obligation on the part of the Director-General to afford procedural fairness in connection with the making of a security assessment and the protection of the public interest in national security must be struck ... in favour of the public interest’.<sup>121</sup> Given the courts’ professed institutional incompetence in assessing national security risks – explicitly put by Brennan J in *Church of Scientology Inc v Woodward*<sup>122</sup> when His Honour asked ‘how can the gravity of a security risk be evaluated by a court?’<sup>123</sup> – it is hard to imagine the balance ever being struck otherwise.

### 3. National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth)

The National Security Information (Criminal and Civil Proceedings) Act 2004 (Cth) (‘NSI Act’) regulates the disclosure of information in court proceedings where disclosure is likely to prejudice national security.<sup>124</sup> As the term ‘national security’ in the NSI Act is defined in extremely expansive terms<sup>125</sup> and the broad definition of ‘civil proceedings’ in the NSI Act appears to encompass judicial review applications,<sup>126</sup> the NSI Act may operate to severely restrict the effectiveness of judicial review of Executive decisions related to the proscription of terrorist organisations pursuant to Division 102 of the Criminal Code.

The NSI Act places an obligation upon parties to notify the Attorney-General of the prospective disclosure of information which relates to national security in a civil proceeding.<sup>127</sup> Once notice is given,<sup>128</sup> or the Attorney-General determines independently that such disclosure will occur,<sup>129</sup> the Attorney-General may issue a

119. Ibid.

120. Ibid.

121. Ibid.

122. (1982) 154 CLR 25.

123. *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 74.

124. See NSI Act, s 3(1).

125. ‘National security’ is defined in s 8 of the NSI Act as meaning ‘Australia’s defence, security, international relations or law enforcement interests’. The words ‘security’, ‘international relations’ and ‘law enforcement interests’ are each given a statutory definition: see ss 9, 10 & 11 respectively.

126. NSI Act, s 15A, defines a civil proceeding as ‘any proceeding in a court ... other than a criminal proceeding’. For the NSI Act to apply to a civil proceeding, notice must be given: see NSI Act s 6A. The NSI Act was originally enacted as the National Security Information (Criminal Proceedings) Act 2004 and only applied to criminal proceedings. However in 2005 the NSI Act was amended by the National Security Information Legislation Amendment Act 2005 (Cth) to extend the operation of the legislation to civil proceedings, and the title of the NSI Act was duly amended to reflect this extension.

127. NSI Act, ss 38D, 38E.

128. Ibid, ss 38F(1)(a)(i) & (iii).

129. Ibid, s 38F(1)(a)(ii).

‘civil non-disclosure certificate’ which prescribes the circumstances within which any such disclosure may occur<sup>130</sup> or a ‘civil witness exclusion certificate’ which states that a witness may not be called.<sup>131</sup> Where a civil non-disclosure certificate or a civil witness exclusion certificate has been issued, the court must then hold a closed hearing<sup>132</sup> and determine, in the case of a civil disclosure certificate, whether to make an order allowing for some restricted use of the information which has been certified as relating to national security,<sup>133</sup> and in the case of civil witness exclusion certificate, whether a witness can be called.<sup>134</sup> A party, or that party’s legal representative, may be excluded from a part of the closed hearing if they lack a security clearance at the appropriate level.<sup>135</sup> The NSI Act provides a court with a list of factors which it must take into account in exercising its discretion,<sup>136</sup> with the ‘greatest weight’ to be given to the Attorney-General’s certificate and the risk of prejudice to national security.<sup>137</sup>

The NSI Act may also severely limit a legal practitioner’s capacity to advise his or her client, to take instructions, and to discuss the proceedings with possible witnesses. Division 2 of the NSI Act contains a host of offences relating to the disclosure of information in civil proceedings, all of which are punishable by two years imprisonment. These offences include:

- a party’s failure to notify the Attorney-General of the expected disclosure of information relating to or affecting national security in civil proceedings,<sup>138</sup>
- the disclosure of information by a party to a civil proceeding or another person prior to the Attorney-General giving a civil non-disclosure certificate, where

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130. Ibid, s 38F.

131. Ibid, s 38H.

132. The provision for a closed court hearing in relation to a civil non-disclosure certificate is contained in the NSI Act, s 38G, and in relation to a civil witness exclusion certificate in the NSI Act, ss 38H(6), (7) & (8). The requirements of a closed hearing are further detailed in the NSI Act, s 38I.

133. In the case of information contained within a document, the court order may provide for disclosure of a copy of the document with the information deleted: see NSI Act, s 38L(2)(d); or with the information deleted and a summary of the deleted information attached: see NSI Act, s 38L(2)(e), or with the information deleted and ‘a statement of facts, as set out in the order, that the information would, or would be likely to prove attached to the document’: see NSI Act s 38L(2)(f). The copy of the document with the information deleted, and any attached summary or statement of facts order pursuant to s 38L(2) may be admissible in evidence: see NSI Act, s 38L(3). The court may also make further orders restricting the disclosure of information: see NSI Act, s 38L(4).

134. See the NSI Act, s 38L(6).

135. See *ibid*, s 38I(3). A security clearance is granted by the Secretary of the Attorney-General’s Department pursuant to s 39A.

136. *Ibid*, s 38L(7).

137. See *ibid*, s 38L(8).

138. The obligation is contained in the NSI Act, ss 38D and the offence of failure to comply with the obligation is contained in s 46C.

notice has been given by a party to the Attorney-General that the information relates to or affects national security;<sup>139</sup>

- the calling of a witness before the Attorney-General gives a civil witness exclusion certificate where notice has been given by a party to the Attorney-General of an intention to call a witness who will disclose information relating to, or affecting national security;<sup>140</sup>
- the failure of a party to notify the court in circumstances where a witness is asked a question and the party knows or believes that information will be disclosed in a witness's answer which relates to or affects national security;<sup>141</sup>
- the disclosure of information in contravention of the Attorney-General's civil non-disclosure certificate;<sup>142</sup>
- the calling of a witness in contravention of the Attorney-General's civil witness exclusion certificate;<sup>143</sup> and
- the disclosure of information, other than in the course of giving evidence, to a party to a civil proceeding,<sup>144</sup> or to a party's legal representative,<sup>145</sup> or to a person assisting a party's legal representative<sup>146</sup> without a security clearance in circumstances where 'the disclosure is likely to prejudice national security'.<sup>147</sup>

Although an exemption for disclosure in 'permitted circumstances'<sup>148</sup> applies to some of these offences,<sup>149</sup> and these permitted circumstances include disclosure by a legal representative 'in the course of his or her duties in relation to the proceeding',<sup>150</sup> a legal representative can only avail themselves of the exemption if they have been granted an appropriate level of security clearance by the Executive.<sup>151</sup> In judicial review applications, where the applicant bears the onus of

139. *Ibid*, s 46A. The relevant notice is given by the party to the Attorney-General pursuant to the obligation in ss 38D(1)(a) & (b).

140. *Ibid*, s 46B. The relevant notice is given by the party to the Attorney-General pursuant to the obligation in s 38D(1)(c).

141. The obligation is contained in the NSI Act, s 38E and the offence of failure to comply with the obligation is contained in s 46C.

142. *Ibid*, s 46D.

143. *Ibid*, s 46E.

144. *Ibid*, s 46G(a)(i).

145. *Ibid*, s 46G(a)(ii).

146. *Ibid*, s 46G(a)(iii).

147. *Ibid*, s 46G. The term 'likely to prejudice national security' is given a further statutory definition in s 17 which provides '[a] disclosure of national security information is likely to prejudice national security if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security'.

148. Pursuant to the NSI Act s 16.

149. Specifically the offences contained in the NSI Act, ss 46A(1)(d) and 46G(a).

150. *Ibid*, s 16(ac).

151. *Ibid*, s 16(ac)(ii).



proof,<sup>152</sup> these labyrinthine restrictions are likely to have a serious adverse effect on the applicant's presentation and preparation of their case and thus their chances of success.<sup>153</sup>

#### 4. De-listing applications

Section 102.1(17)(b) of the Criminal Code gives a wide range of parties the right to make a de-listing application,<sup>154</sup> and a decision under section 102.1(17) is judicially reviewable under the facultative provisions of the ADJR Act. Hence, it could be argued that the de-listing provisions under section 102.1(17) of the Criminal Code 'cure' any possible problems of compliance with the ICCPR arising from the proscription of an organisation as a 'terrorist organisation' under the Criminal Code, section 102.1(2).

As a matter of general principle, the prospect of a judicially reviewable de-listing application does not, of itself, address the possible human rights infringements which arise in the period between initial proscription, and the outcome of a successful de-listing application. A direct analogy can be drawn with unlawful arrest and pre-trial detention: if an accused is unlawfully arrested and detained pre-trial, the fact that she may ultimately receive a fair trial and be acquitted does not 'cure' the human rights infringements which arise in the period of unlawful detention pending trial. Further, any attempt to judicially review an adverse de-listing application decision would be subject to the restrictions imposed by the NSI Act.

The argument that the de-listing provisions under section 102.1(17) of the Criminal Code adequately address the problems of compliance with the ICCPR arising from the proscription of an organisation as a 'terrorist organisation' under the Criminal Code, section 102.1(2) is, however, buttressed by reference to the situation in the United Kingdom. The United Kingdom under its Terrorism Act 2000 (UK) has similar proscription provisions to Australia's Division 102, with a similarly wide definition of 'terrorism'<sup>155</sup> and a similarly wide executive power<sup>156</sup> to proscribe organisations 'concerned in terrorism'.<sup>157</sup> Furthermore, similarly to the position under Division 102 of the Criminal Code, a number of criminal offences derive from the proscription of an organisation as a 'terrorist organisation' under the Terrorism Act 2000 (UK), such as 'membership of a terrorist organisation',<sup>158</sup> 'supporting a

152. See, eg, G Roberts, *Evidence: Proof and Practice* (Sydney: LBC, 1998) 83–4.

153. It should also be noted that the Attorney-General's decision to issue a certificate under the NSI Act in a civil proceeding is excluded from judicial review under the ADJR Act: see s 9B.

154. Criminal Code, s 102.1(17)(b) provides that 'an individual or an organisation (which may be the listed organisation)' may make an application for de-listing.

155. Terrorism Act 2000 (UK) s 1.

156. Under the Terrorism Act 2000 (UK) s 3(3) the power to proscribe an organisation is reposed in the Secretary of State.

157. *Ibid*, ss 3(4) & (5).

158. *Ibid*, s 11.

terrorist organisation',<sup>159</sup> wearing the 'uniform' of a terrorist organisation,<sup>160</sup> and 'directing a terrorist organisation'.<sup>161</sup>

Under section 4 of the Terrorism Act 2000 (UK) there is an entitlement to make a 'de-proscription application'<sup>162</sup> to a Minister<sup>163</sup> and a ministerial refusal of a de-proscription application is judicially reviewable<sup>164</sup> 'on appeal' to the 'Proscribed Organisations Appeal Commission' ('POAC'), a specialist judicial reviewer established under the Act.<sup>165</sup>

The United Kingdom's proscription provisions contained in the Terrorism Act 2000 (UK) have escaped any adverse comment by the UN Human Rights Committee.<sup>166</sup> There are, however, a number of significant differences between the de-proscription provisions in the Terrorism Act 2000 (UK), and the de-listing provisions in the Criminal Code, section 102.1(17). These differences undermine the argument that Australia's proscription provisions would similarly escape adverse comment by the UN Human Rights Committee.

In comparing the processes of 'de-proscription' under the Terrorism Act 2000 (UK) and 'de-listing' under the Australian Criminal Code, it is important to emphasise the greater intensity of judicial review in the United Kingdom both under the UK common law, and under the Human Rights Act 1998 (UK). At least since the 1970's, courts in the United Kingdom have developed a much more intense approach to judicial review than that existing in Australia. This increased intensity of judicial review in the United Kingdom has involved a much greater recognition of the impact of administrative decision making on the rights of those affected by administrative decisions. Whereas Australian judicial reviewers have been wedded, for example, to a strict form of *Wednesbury* unreasonableness,<sup>167</sup> courts in the United Kingdom have developed a 'variegated approach'<sup>168</sup> to judicial review,

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159. Ibid, s 12.

160. Ibid, s 13.

161. Ibid, s 56.

162. Ibid, s 4.

163. The UK Secretary of State is the minister nominated by the legislation: see *ibid*, s 4.

164. See *ibid*, s 9(3).

165. See *ibid*, s 5(1).

166. See *Concluding Observations of the Human Rights Committee: United Kingdom of Great Britain and Northern Island*, UN Doc CCPR/C/GBR/CO/6 (2008). See also Joseph, above n 62, 439 (written in reference to the Human Rights Committee's 2001 report, which similarly omitted any adverse comment on the matter).

167. See generally *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 230 (Lord Greene MR), explaining that 'if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere'. See also *Prasad v Minister for Immigration and Ethnic Affairs* (1985) 6 FCR 155, 167-8 (Wilcox J) describing this as a 'famous passage', but cf Wilcox J's suggestion that '[t]here may be some question, in the light of more recent authority, as to the correctness of Lord Greene's view that, to make out this ground of invalidity, the case must be "overwhelming"': at 168. See also *R v Minister for Immigration and Multicultural Affairs*, above n 51.

168. Taggart, above n 101, 12.

recognising 'that the graver the impact of the decision upon the individual affected by it, the more substantial the justification that will be required and must be shown':<sup>169</sup> 'the intensity of review in a public law case will depend on the subject-matter in hand; and so in particular any interference by the action of a public body with a fundamental right will require a substantial objective justification'.<sup>170</sup> In the United Kingdom, variable intensity judicial review is now 'a settled principle of the common law'.<sup>171</sup>

The trend towards a greater intensity of judicial review in the United Kingdom has accelerated with the incorporation of the European Convention on Human Rights<sup>172</sup> into the domestic law of the United Kingdom by the Human Rights Act 1998 (UK).<sup>173</sup> The UK common law standard of variable intensity judicial review of the 1990's has 'quickly slid into proportionality review'.<sup>174</sup> As famously put by Lord Steyn in *R (Daly) v Secretary of State for the Home Department*,<sup>175</sup> when contrasting the traditional grounds of review with judicial review under the Human Rights Act 1998 (UK):

There is a material difference between the *Wednesbury* and [variable intensity] grounds of review and the approach of proportionality applicable in respect of review where Convention rights are at stake ... Most cases will be decided on the same way whichever approach is adopted. But the intensity of review is somewhat greater under the proportionality approach ... First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the [variable intensity] test ... is not necessarily appropriate to the protection of human rights .... The differences in approach between the traditional grounds of review and the proportionality approach may therefore sometimes yield different results.<sup>176</sup>

169. Ibid.

170. *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840, 847 - 848. See also *R v Ministry of Defence; Ex parte Smith* [1996] QB 517, 554; *R v Lord Saville of Newdigate; Ex parte A* [2000] 1 WLR 1855, 1867.

171. *Mahmood*, ibid 847.

172. *Convention for the Protection of Human Rights and Fundamental Freedoms*, opened for signature 4 Nov 1950, ETS 5 (entered into force 3 Sep 1953).

173. See M Groves, 'Judicial Review and the Concept of Unfairness in English Public Law' (2007) 18 *Public Law Review* 244.

174. Taggart, above n 101, 24. The case that triggered the slide was *R v Ministry of Defence, Ex parte Smith* [1996] QB 517 which was successfully appealed to the European Court of Human Rights as *Lustig-Prean v United Kingdom (No 1)* (2000) 29 ECHR 548. The appeal to the European Court of Human Rights succeeded on the basis that the variable intensity standard of judicial review applied by UK domestic courts was inadequate to protect rights under the *European Convention on Human Rights*.

175. [2001] 2 AC 532.

176. Ibid, 546-8.

Consequently, where administrative decision making has limited one or more of the rights enshrined in the Human Rights Act 1998 (UK), courts in the United Kingdom, on judicial review, have posed at least three sequential questions to determine whether such a limitation is legal: (i) whether the impugned government action is directed at a legitimate objective which is 'sufficiently important to justify limiting a fundamental right';<sup>177</sup> (ii) whether the impugned administrative action is 'rationally connected'<sup>178</sup> to the legitimate objective; and (iii) whether 'the means used to impair the right or freedom are no more than is necessary to accomplish the legitimate objective'.<sup>179</sup> Given that the European Convention on Human Rights<sup>180</sup> bears similarities to the ICCPR and contains a number of rights which are limited by a decision to proscribe an organisation as a terrorist organisation, such as the rights to freedom of assembly and association,<sup>181</sup> and a right to freedom of expression,<sup>182</sup> one would expect that judicial review under the Human Rights Act 1998 (UK) of Executive proscription decisions made under the Terrorism Act 2000 (UK) would attract the operation of the proportionality principle.

As Taggart has observed, 'proportionality methodology is best powered by a list of enumerated rights'.<sup>183</sup> As Australia lacks a comprehensive national human rights instrument,<sup>184</sup> judicial review based on a principle of proportionality has failed to take hold in Australia. Additionally, 'inasmuch as [proportionality review] may require attention to be directed to the relative weight accorded to interests and considerations',<sup>185</sup> it may be viewed by Australian judges as intruding too much on the 'merits' of administrative decision making,<sup>186</sup> and, hence, transgressing the constitutionally implied separation of powers.<sup>187</sup> It is also important to emphasise that the Terrorism Act 2000 (UK) expressly provides that determination by the POAC 'that an action of the Secretary of State is incompatible with a [European] Convention right' will result in a successful appeal.<sup>188</sup> No similar express incorporation of human rights standards appears in the relevant provisions of the Criminal Code, or in the ADJR Act generally.

177. *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69, 80.

178. *A v Secretary for the Home Department* [2005] 2 AC 68, 103.

179. *de Freitas*, above n 117, 80.

180. *Convention for the Protection of Human Rights and Fundamental Freedoms*, above n 113.

181. *Ibid*, art 11.

182. *Ibid*, art 10.

183. Taggart, above n 101, 25.

184. As indicated above, the then Rudd Government recently signalled its intention not to pursue the introduction of a national human rights instrument: see generally McClelland, above n 111.

185. *R (on the application of Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 547.

186. See, eg, *Bruce v Cole* (1998) 45 NSWLR 163, 185 (Spigelman CJ).

187. See *Attorney-General (NSW) v Quinn* (1990) 170 CLR 1, 35–8 (Brennan J).

188. See Terrorism Act 2000 (UK) ss 9(4)(a) & (b).

The operation of each regime's derivative offences must also be considered. Under both the Terrorism Act 2000 (UK) and the Criminal Code, a person is exposed to criminal liability with respect to the derivative offences until the relevant organisation is de-listed. However, there is a critical difference between the Criminal Code and the Terrorism Act 2000 (UK) in the relationship between de-proscription (or de-listing) and the relevant derivative offences. The Terrorism Act 2000 (UK) expressly provides for a mandatory acquittal<sup>189</sup> with respect to any of the relevant derivative offences<sup>190</sup> where a person has successfully appealed against a refusal to de-list, provided that 'the activity to which the charge referred took place on or after the date of the refusal to de-proscribe against which the appeal ... was brought'.<sup>191</sup> Conversely, under the Criminal Code there is no provision expressly governing the relationship between de-listing applications and the Criminal Code's derivative offences. Within the Australian judicial review framework, a successful judicial review application with respect to a ministerial refusal to de-list under the Criminal Code, section 102.1(17), will normally only lead to the impugned decision being referred back to the ministerial decision maker to be remade 'according to law';<sup>192</sup> thus even if, post-review, the decision is remade in the applicant's favour, de-listing will only operate prospectively.<sup>193</sup> This exposes the ultimately successful de-listing applicant to a much longer period of potential criminal liability than is the case under the Terrorism Act 2000 (UK).

## 5. Compliance with the ICCPR

It can be argued that the ICCPR contains a number of rights potentially infringed by Australia's proscription legislation. These include freedom of association (Article 22).<sup>194</sup> This freedom has the potential to be infringed in particular as a consequence of the wide definition of 'terrorist organisation' in the Criminal Code.<sup>195</sup> Limitations may be imposed which are 'necessary in a democratic society' by reference to the interests specified in paragraph (2) of Article 22, provided those limitations are 'prescribed by law'. But this proviso incorporates a notion of

189. Terrorism Act 2000 (UK) s 7(2).

190. Described as an offence under any of ss 11–13, 15–19 and 56: see Terrorism Act 2000 (UK) s 7(1)(c).

191. Terrorism Act 2000 (UK) s 7(1)(d).

192. *Minister for Immigration and Ethnic Affairs v Guo* (1997) 191 CLR 559. See also *Green v Daniels* (1977) 51 ALJR 463, 470 (Stephen J): 'It is for the foregoing reasons that I conclude that the plaintiff is entitled to declarations of the general nature already indicated. She is not, however, entitled to a declaration that she was, in respect of any period before 22 February 1977, qualified to recover unemployment benefits; any such qualification remains for determination by the Director-General or his delegates'.

193. See Criminal Code, s 102.1(4).

194. In its submission to the Senate Legal and Constitutional Committee in 2002, for example, Australian Lawyers for Human Rights suggested '[t]he power to proscribe organisations violates fundamental rights of association': see Australian Lawyers for Human Rights, *Submission No 424 to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002) 2.

195. Lynch, McGarrity & Williams, above n 3, 17.

proportionality, i.e. any restrictions imposed on the right must be 'proportionate' to the pursuit of a 'legitimate aim'.<sup>196</sup>

Other rights threatened are freedom of expression (Article 19); freedom from arbitrary detention (Article 9); freedom from discrimination (Article 26); and even the right to self-determination (Article 1). Most of these rights are subject to such limitations as are 'proportionate', 'necessary' and 'prescribed by law'.<sup>197</sup> Furthermore, the interference of proscription with one ICCPR right (such as freedom of association) does not preclude interference with another (such as the right to freedom of expression).<sup>198</sup> Given that Australia has adopted an 'executive proscription model', and that 'the legislation may await a future Attorney-General, whose character and wisdom we cannot now know',<sup>199</sup> the availability and effectiveness of judicial review to ensure that such executive decisions are both lawful and not arbitrary is critically important.

It is important to keep in mind that the protection of countervailing rights may justify the infringements identified above: 'states have a positive duty under international human rights law to take reasonable steps to protect the human rights of their people from threats posed by others (such as terrorists), including rights to life and security of the person'.<sup>200</sup> Relevant to the threat posed by terrorism, Article 5 of the ICCPR prohibits interpretation of the Covenant in such a way as to grant rights for people to engage in activities aimed at the destruction or limitation of the ICCPR rights of others.<sup>201</sup>

196. See 'Limitation Clauses', 'General Interpretative Principles Relating to the Justification of Limitations' Arts 10(c) & (d) in the 'Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights' (1985) 7 *Human Rights Quarterly* 3, 4.

197. It is noted that the right to self-determination contained in Art 1 of the ICCPR is an absolute right. It is also noted that while there is no express permission for limitation of the right to freedom from discrimination contained in Art 26 of the ICCPR, General Comment 18 indicates that 'not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]': see HRC, 'General Comment 18' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 146, UN Doc HRI/GEN/1/Rev.7 (2004).

198. See, eg, *MA v Italy* (unreported, UNHRC, 10 Apr 1984, CCPR/C/21/D/117/1981) where the sentencing of MA for the reorganisation of a dissolved Italian fascist political party raised issues concerning the right to freedom of expression, the right to freedom of association (ICCPR, art 22), and the right to political participation (ICCPR, art 25).

199. University of NSW, Faculty of Law, *Submission No 8 to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No 2] and Related Bills* (2002) 5.

200. Joseph, above n 62, 429. The right to life is contained in Art 6 of the ICCPR, and the right to security of the person is contained in ICCPR art 9(1).

201. See, eg, *MA v Italy*, above n 198, [13.3].

### (a) Freedom of expression

Freedom of expression has a broad meaning,<sup>202</sup> and clearly protects political expression.<sup>203</sup> General Comment 10 confirms that the permissible limitations on the right as contained in paragraph 3 must be (i) 'provided by law'; (ii) imposed for one of the purposes set out in subparagraphs (a) and (b) of paragraphs (3); and (iii) justified as 'necessary'.<sup>204</sup> The word 'necessary' 'imports 'an element of proportionality' into [A]rticle 19(3): the law must be appropriate and adapted to achieving one of the ends enumerated in [A]rticle 19'.<sup>205</sup> Only a 'minimum impairment of freedom of expression' would satisfy the test of proportionality.<sup>206</sup> Advocacy of a terrorist act is sufficient to attract proscription. Derivative offences (eg, '[t]raining a terrorist organisation or receiving training from a terrorist organisation')<sup>207</sup> might arise from 'expression' including speech.<sup>208</sup>

### (b) Freedom from arbitrary detention

The right to freedom from arbitrary detention<sup>209</sup> is threatened by the presence of derivative criminal offences under the Criminal Code and the regime of 'questioning and detention warrants' contained in Subdivision C of Division B of Part III of Australian Security Intelligence Organisation Act 1979 (Cth) ('the ASIO Act').

A person charged with one of the derivative criminal offences under the Criminal Code is to be denied bail, unless they can establish 'exceptional circumstances' to justify their release.<sup>210</sup> Moreover, on conviction, a derivative offence is likely to attract an extensive period of imprisonment.

202. General Comment 10 of the United Nations Human Rights Committee (the 'HRC') states that 'the right to freedom of expression ... includes not only freedom to "impart information and ideas of all kinds", but also freedom to "seek" and "receive" them "regardless of frontiers" and in whatever medium, "either orally, in writing or in print, in the form of art, or through any other media of his choice"; see HRC, 'General Comment 10' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 133, UN Doc HRI/GEN/1/Rev.7 (2004).

203. S Joseph, J Schultz & M Castan, *The International Covenant on Civil and Political Rights* (Oxford: OUP, 2nd edn, 2005) 519.

204. HRC, 'General Comment 10' in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 133, UN Doc HRI/GEN/1/Rev.7 (2004). See also *Ballantyne et al v Canada* (359, 385/89) [11.4].

205. Joseph, Schultz & Castan, above n 203, 525.

206. *Ibid* 542. See also, in relation to freedom from arbitrary detention, ICCPR, art. 9; *C v Australia*, above n 105, [8.2]: '[T]he State party has not demonstrated that, in light of the author's particular circumstances, there were not less invasive means of achieving the same ends'.

207. Criminal Code s 102.5.

208. For a brief discussion of this point, see Joseph, above n 62, 440; Hocking, above n 71, 369–70. See also Lynch, McGarrity & Williams, above n 3, 17, suggesting that the wide definition of 'terrorist organisation' in the Criminal Code has the potential to infringe the right to freedom of expression at international law.

209. Popularly referred to as the 'right to liberty'.

210. Crimes Act 1914 (Cth) s 15AA. Once a person has made a bail application, and that application is refused, there is normally no further provision for review of their detention; it is usually the

Under Subdivision C of Division 3 of Part III of the ASIO Act any person (including a person who is not a suspect with respect to a terrorism offence) may be subject to detention pursuant to a questioning and detention warrant for up to a continuous period of 7 days,<sup>211</sup> in circumstances where a Federal Magistrate or Judge appointed as an 'issuing authority'<sup>212</sup> under the ASIO Act 'is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence'<sup>213</sup> – the definition of which includes offences under Part 5.3 of the Criminal Code,<sup>214</sup> which in turn encompass the derivative offences in Division 102.

According to the ICCPR, any such deprivation of liberty must be specifically authorised and sufficiently circumscribed 'by law'. Moreover, neither the law itself, nor its enforcement, may be 'arbitrary'.<sup>215</sup> It has been observed by the UN Human Rights Committee that the curtailing of ICCPR rights in Trinidad and Tobago by imprecise powers to arrest conferred upon a police officer<sup>216</sup> might fail the requirement of 'lawfulness', as the power is insufficiently circumscribed 'by law', and also offend the prohibition on arbitrariness.<sup>217</sup> These observations with respect to the power of arrest bring into question the compatibility of Australia's counter-terrorism regime (and its range of powers to arrest, detain and question) with Article 9 of the ICCPR.

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case that a person who has been refused bail remains in custody until the completion of their trial. For example, the provisions of the Bail Act 1977 (Vic) (which apply to Commonwealth criminal prosecutions under the Criminal Code initiated in Victoria, in the absence of an overriding Commonwealth provision) preclude a further bail application by a person who has been refused bail, unless that person can establish 'new facts and circumstances': see Bail Act 1977 (Vic) s 18(4).

211. See ASIO Act, s 34S.

212. Pursuant to the ASIO Act, s 34AB.

213. See ASIO Act, s 34G(1)(b). Additionally, before a request can be made by the Director-General of Security for a questioning and detention warrant, the Director-General must obtain the Minister's consent. Pursuant to the ASIO Act, the Minister can only consent to the request if the Minister is satisfied, *inter alia*, 'that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person: (i) may alert a person involved in a terrorism offence that the offence is being investigated; or (ii) may not appear before the prescribed authority; or (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce': s 34F(4)(d). A 'prescribed authority' is defined in s 34B of the ASIO Act as a retired superior court judge.

214. *Ibid*, s 4.

215. 'Arbitrariness' has been interpreted more broadly than mere unlawfulness, 'to include elements of inappropriateness, injustice and lack of predictability': *Van Alphen v The Netherlands* (unreported, UNHRC, 23 Jul 1990, CCPR/C/39/D/305/1988) [5.8].

216. See Human Rights Committee, 'Concluding Observations on Trinidad and Tobago' esp [16], extracted in Joseph, Schultz & Castan, above n 203, 309.

217. *Van Alphen v The Netherlands*, above n 215, [5.8]. See also *A v Australia* (560/93) [7.6], [9.2]; *Jalloh v Netherlands* (unreported, UNHRC, 15 Apr 2002, CCPR/C/74/D/794/1998) [8.2].



### (c) Freedom from discrimination

The ICCPR provides for freedom from discrimination either ‘in law or in fact’<sup>218</sup> (and on such grounds as race, religion and ‘political or other opinion’).<sup>219</sup> Differential treatment, which might otherwise violate Article 26, is permissible ‘if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the [ICCPR]’.<sup>220</sup>

Australian counter-terrorism legislation refers to a ‘political, religious or ideological cause’ as one of the elements of a ‘terrorist act’.<sup>221</sup> The Criminal Code’s proscription regime does not provide criteria circumscribing the decision-maker’s discretion in this area.<sup>222</sup> Notably, the preponderance of organisations proscribed since the commencement of Division 102 have been ‘self-identified Islamic organisations’.<sup>223</sup>

### (d) The right to self-determination

With respect to self-determination, the definition of ‘terrorist act’ in the Criminal Code includes acts which are done or threats which are made with the intention of coercing or influencing by intimidation the government of a foreign country.<sup>224</sup> Additionally, any relevant person or property may be outside Australia and the same applies to ‘the public’.<sup>225</sup> Thus, an organisation might fulfil the criterion of a ‘terrorist organisation’ under the Criminal Code if it pursues violent means against an oppressive or tyrannical government overseas, even where the objectives of the organisation relate to the legitimate self-determination of a people.<sup>226</sup>

218. See HRC, ‘General Comment 18’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 146, [12], UN Doc HRI/GEN/1/Rev.7 (2004).

219. ICCPR, art 26.

220. See HRC, ‘General Comment 18’ in *Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies*, 146, [13], UN Doc HRI/GEN/1/Rev.7 (2004).

221. Criminal Code, s 100.1(1).

222. See, eg, Human Rights and Equal Opportunity Commission, *Submission to the Security Legislation Review Committee* (2006) [6.4]–[6.7].

223. Lynch, McGarrity & Williams, above n 3, 14. See also Australian Human Rights Commission, *A Human Rights Guide to Australia’s Counter-Terrorism Laws* (2008) [3.3] <[http://www.humanrights.gov.au/legal/publications/counter\\_terrorism\\_laws.html](http://www.humanrights.gov.au/legal/publications/counter_terrorism_laws.html)>.

224. See sub-paragraphs (i) and (ii) of paragraph (c) of the definition of ‘terrorist act’ in the Criminal Code, s 100.1(1).

225. Criminal Code, ss 100.1(4)(a) and (b).

226. For a general discussion from an international perspective on the relationship between the right to self determination and anti-terrorism legislation, see M Muller, ‘Terrorism, Proscription and the Right to Resist in the Age of Conflict’ (2008) 20 *Denning Law Journal* 111.

## V. CONCLUSION

The definition of ‘terrorist act’ in the Criminal Code is extremely broad and the offences which derive from proscription are both expansive and serious.<sup>227</sup> The successful prosecution of a derivative offence which relates to a proscribed organisation does not require the proof of any criminal aims or activities on the part of the organisation.<sup>228</sup> Mere proscription is enough to prove the requisite element of the derivative offence, and proscription is based on the reasonable belief of the Minister, not proof to a standard of curial satisfaction. Further, the attenuated list of activities which may provide the basis for proscription (such as the ‘indirectly engag[ing] in ... fostering the doing of a terroristic act’),<sup>229</sup> even if they were subject to formal proof, would not necessarily attract criminal liability.

The Criminal Code’s proscription provisions should therefore be subject to effective judicial scrutiny to ensure they do not confer ‘unfettered discretion’ on the Commonwealth Executive, and that proscription decisions comply to a standard of lawfulness. To conform with international human rights standards, that standard of lawfulness should incorporate principles of ‘proportionality’ and notions of ‘necessity’. As stated by the European Court of Human Rights in *Al-Nashif v Bulgaria* in the context of the European Convention on Human Rights:

Even where national security is at stake, the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence, if need be with appropriate procedural limitations on the use of classified information. The individual must be able to challenge the executive’s assertion that national security is at stake. While the executive’s assessment of what poses a threat to national security will naturally be of significant weight, the independent authority must be able to react in cases where invoking that concept has no reasonable basis in the facts, or reveals an interpretation of ‘national security’ that is unlawful or contrary to common sense and arbitrary.<sup>230</sup>

It should also be stressed that, at least with respect to ICCPR rights relating to criminal procedure, the notion of ‘lawfulness’ is not confined to ‘lawfulness’ under domestic law.<sup>231</sup>

227. See generally, M Head, “Counter-Terrorism” Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights’ (2002) 26 *Melbourne University Law Review* 666. For a specific critique of the offence of training with a proscribed terrorist organisation under the Criminal Code, s 102.5; see Emerton, above n 26, 8–14.

228. Emerton, *ibid*, 9–10.

229. See Criminal Code, s 102.1(2)(a).

230. [2002] Eur Court HR 497 [123]–[124]. The jurisprudence of the European Court of Human Rights is not binding on the UN Human Rights Committee in its interpretation of the ICCPR, although it is persuasive authority: see Joseph, above n 62, 438, n 58.

231. *A v Australia*, above n 104, [9.5]. See also the discussion of this point in Joseph, Schultz & Castan, above n 203, 342–4; *C v Australia*, above n 105.

More generally, the UN High Commissioner for Human Rights has identified criteria by which a balance may be struck between the enjoyment of freedoms and legitimate concerns for national security. While the Security Council has asked states to take specific measures against terrorism, states' action in this area should also be guided by human rights principles contained in international law.<sup>232</sup>

It may be argued that the already available avenues of Commonwealth judicial review provide an effective constraint on Commonwealth Executive action pursuant to Division 102 of the Criminal Code, such that Australia's Executive proscription regime does not conflict with international human rights standards. However, as demonstrated in Part III of this paper, judicial review of the proscription of an organisation as a 'terrorist organisation' under the Criminal Code, section 102.1(2), is substantially circumscribed by the unavailability of the facultative provisions of the ADJR Act, and the restriction of constitutional review to 'jurisdictional errors' or 'non-jurisdictional errors on the face of the record' by the decision-maker. The express provision for a 'de-listing' application under the Criminal Code, section 102.1(17), goes some way to address the human rights concerns arising from the executive power to proscribe an organisation, and the provision is enhanced, from the perspective of compliance with the ICCPR, by the judicial reviewability of de-listing decisions under the ADJR Act.

However, the likely effectiveness of judicial review (including the judicial review of de-listing decisions) is undermined by the following factors: first, the lack of intensity of Australian judicial review, when contrasted with the standard expected under the ICCPR; second, a lack of express recognition in the determination of judicial review applications within Australia of the impact of administrative decisions upon rights; and third, the notion of 'non-justiciability' in its application to decisions involving national security. Additionally, there are unresolved issues concerning the relationship between the judicial review of proscription and de-listing decisions under the Criminal Code, and potential liability with respect to derivative criminal offences under the Criminal Code which attract heavy maximum penalties and also carry a presumption against bail.

The authors do not wish to dissent from 'the clear consensus across Australia, the United Kingdom, Canada, New Zealand and the United States, that the executive is the most appropriate body to decide whether an organisation satisfies the definition of a terrorist organisation'.<sup>233</sup> Judicial review is, of course, only one of the means by which the executive can be held to account for its proscription

232. UN Commissioner for Human Rights, *Prospects for 'Further Guidance' for the Submission of Reports Pursuant to Paragraph 6 of Security Council Resolution 1373 (2001): Compliance with International Human Rights Standards*, [55]–[59], UN Doc E/CN.4/2002/18 (27 Feb 2002). It is noted that this document has been described as 'an important and highly relevant statement of criteria for the balancing of human rights protection and the combating of terrorism': Law Council of Australia, *Submission No. 251 to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and Related Bills* (2002) 25.

233. Lynch, McGarrity & Williams, above n 3, 23.

decisions. Nevertheless, the authors maintain that the effectiveness of Australian judicial review of proscription decisions made under Division 102 of the Criminal Code could be enhanced by making the following reforms.

First, to ensure that the decision to proscribe an organisation is judicially reviewable under the ADJR Act, the power to proscribe an organisation should be formally conferred on a decision-maker other than Governor-General. It is almost universally assumed that the decision to proscribe is reviewable under the ADJR Act:<sup>234</sup> this assumption is incorrect. The Criminal Code should be amended to ensure that proscription decisions do not fall within the head of state immunity in the ADJR Act.

Second, consideration should be given to conferring the relevant first instance decision making powers on an independent tribunal, or alternatively, to establishing an independent body to advise the relevant decision maker (presumably the Attorney-General) prior to the decision being made to proscribe an organisation.<sup>235</sup> This would ensure a greater degree of independence from the political process and the 'quasi-judicial' decision making process typical of a tribunal would ensure some degree of procedural fairness.

Third, there is considerable doubt about the extent to which the presumption of natural justice applies to decisions concerning national security matters, and, in the particular context of the Commonwealth's proscription regime, there does not appear to be any right to be heard and apparently no right to even be notified that a decision has already been made.<sup>236</sup> Consequently, with respect to proscription decisions, express legislative provision should be made for some minimum content of natural justice, in a way which balances the rights of persons affected directly by the decision with the need for a degree of executive secrecy in national security matters.<sup>237</sup> Indeed, in 2006 the Security Legislation Review Committee recommended that the proscription process be reformed to 'provide organisations,

234. See above nn 67–71.

235. The establishment of an independent advisory body was one of the recommendations of the Security Legislation Review Committee: see Security Legislation Review Committee, Parliament of Australia, *Report of the Security Legislation Review Committee* (2006) 91.

236. Lynch, McGarrity & Williams, above n 3, 7, adding that it is 'only by convention' that a widely circulated press release is produced the day after a proscription regulation is lodged in the Federal Register of Legislative Instruments. At 16, these authors also point out the fact that the current proscription regime 'does not allow for any involvement by the relevant organisation, its members or other affected persons in the making of the decision' is a 'major deficiency'. Similar observations as to the absence of rights to procedural fairness and natural justice (in relation to the SLAT Bill proposals) were made by the Law Council of Australia: see Law Council of Australia, *Submission No. 251 to the Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] and Related Bills* (2002) 44. But cf McGarrity, above n 61, 56–64, who concludes 'it appears that there is an obligation ... to accord procedural fairness to an organisation, its members and other affected individuals prior to proscription'.

237. Lynch, McGarrity & Williams suggest a confirmation of the right to procedural fairness in the decision to proscribe an organisation should be '[c]entral to any reform of Division 102': see *ibid*, 32.

and other persons affected, with notification ... that it is proposed to proscribe the organisation and with the right to be heard in opposition'.<sup>238</sup>

Fourth, more detailed legislative criteria should be inserted into Division 102 to structure and further regulate the broad discretion conferred under those provisions. It is suggested that such criteria should be inserted into the provisions dealing with both decisions to proscribe, and also de-listing applications.<sup>239</sup> The authors agree with Lynch, McGarrity and Williams that the relatively small number of organisations which have been selected for proscription, when contrasted with the extremely broad legislative definition, 'indicates that the current broad definition is insufficient, of itself, to delimit which organisations should be proscribed'.<sup>240</sup> Given the significance of proscription decisions for human rights, and the dangers inherent in unrestrained executive power, it is incumbent upon the legislature to articulate with a much higher degree of precision the basis upon which an executive proscription power should be exercised, and the conditions which regulate the exercise of that power. The insertion of more detailed legislative criteria would reduce the likelihood of arbitrary decision making, and would also make it easier for applicants to establish many of the grounds of judicial review, such as improper purpose,<sup>241</sup> the taking into account of irrelevant considerations, and the failure to take into account relevant considerations.<sup>242</sup> Some such points might hypothetically be included in a statutory human rights charter, should one be enacted at the Commonwealth level at some point in the future.<sup>243</sup>

In conclusion, detailed consideration of Australia's anti-terror legislation, and comparison to that of the UK, has illustrated the complexities of national judicial review in a globalised epoch. Administrative law remains the key defence against

238. Security Legislation Review Committee, above n 235, 9.

239. As Lynch, McGarrity & Williams point out, the de-listing provisions in Division 102 '[do] not specify the factors or material that the Attorney-General must take into account, the process that the Attorney-General must follow ... or the time-period within which the decision must be made': see Lynch, McGarrity & Williams, above n 3, 10.

240. For a general discussion of this point, see Lynch, McGarrity & Williams, *ibid*, 28.

241. See, eg *Toohy* above n 95; *Schielske v Minister for Immigration and Multicultural Affairs* (1988) 84 ALR 719. The improper purpose ground of judicial review is contained in the ADJR Act, ss 5(2)(c), 6(2)(c).

242. The most cited case on the 'considerations' grounds of judicial review in Australia is *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24. The grounds are stated in the ADJR Act, ss 5(2)(a) & (b) and ss 6(2)(a) & (b).

243. While the intensity of judicial review in Australia is constrained by the Australian Constitution, it is likely that the hypothetical enactment by the Commonwealth of a comprehensive statutory human rights charter would import human rights considerations more explicitly into Federal judicial review, in a similar, but more muted fashion, as has occurred in the United Kingdom under the Human Rights Act 1998 (UK). The Commonwealth Government appointed a National Human Rights Consultation Committee which made recommendations on the appropriateness of a comprehensive statutory human rights instrument for Australia: see National Human Rights Consultation, *Human Rights: Share Your Views* (2009) <<http://www.humanrightsconsultation.gov.au>>. As noted above, the Rudd Government recently indicated it would not seek to enact a Commonwealth human rights instrument in the near future – though the future of the Human Rights Framework policy remains unclear following the 2010 Federal election.

an over-zealous executive arm, but administrative law needs to be understood in an international context.<sup>244</sup> If for no other reasons, this internationalism arises from the fact that human rights instruments refer to considerations that transcend national boundaries, just as the affiliations and the activities of terrorists do. The checks and balances signified by the doctrine of the separation of powers are no less important on the international stage than on the domestic. At the highest level of internationally coordinated decision-making, for example decisions of the United Nations Security Council, appropriate mechanisms for review have yet to be established. More generally, the actions of state executives impinge on the populations of other states. But just as the legitimacy of such state executives is determined nationally, not globally, and just as the threat of terrorism is immediately posed by its local acts rather than by its international ambitions, so the most effective reining-in of executive powers is located 'at home'.

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244. B Kingsbury, N Krisch, & R Stewart, 'The Emergence of Global Administrative Law' (2005) 68 *Law and Contemporary Problems* 15; N Krisch, 'The Pluralism of Global Administrative Law' (2006) 17 *European Journal of International Law* 247.