Law Council
OF AUSTRALIA

Review of the Power to Proscribe Organisations as Terrorist Organisations

Answers to Questions on Notice from the Parliamentary Joint Committee on Intelligence and Security

Date 1 May 2007

Table of Contents

Introduction

On Wednesday 4 April 2007, representatives of the Law Council of Australia ("the Law Council") appeared before the Inquiry into the Terrorist Organisation Listing Provisions currently being conducted by the Parliamentary Joint Committee On Intelligence and Security ('the Committee"). At that hearing, the Law Council undertook to provide to the Committee:

- proposed draft criteria for the proscription of an organisation as a terrorist organisation;

- comments on the implications of applying strict liability to the offence of being a member of a proscribed terrorist organisation;

- clarification of the Law Council's submission on the timeline for considering and advancing the proscription of the Kurdistan Workers' Party ("the PKK").

The following information is provided in fulfilment of that undertaking. It is intended to supplement the Law Council's written submission to the Committee dated 9 February 2007 but does not derogate from anything in that submission in any particular.

Question 1 - Criteria for Listing

The Law Council was asked to propose a framework and draft criteria that it would consider appropriate to guide the exercise of the proscription power.

As the Law Council stated in its written submission and oral evidence before the Committee, criminalising membership of, support for or association with an organisation violates the rights to freedom of association and expression. Both rights are enshrined in the International Covenant on Civil and Political Rights to which Australia is a signatory. Neither right is absolute. Limitations on both rights are permissible provided that they are prescribed by law and are necessary and proportionate to the achievement of a legitimate aim. Proportionality is measured by whether the limitations adopted represent the least restrictive means available to achieve the identified aim. The Government bears the onus of demonstrating that any restrictions it imposes on rights to freedom of association and expression are justified and proportionate in this manner.

The Law Council believes that Australia's obligations under international human rights law demand that the overarching framework guiding the exercise of the proscription power must expressly comply with this test of proportionality. With each proposed proscription, the Government must be required to identify the legitimate aim sought to be pursued and explain why the proscription is necessary to achieving that aim and why it is believed to be the least restrictive means available. This requires criteria for the proscription of an organisation which extend beyond simply presenting evidence that the organisation satisfies the very broad definition of a terrorist organisation, a definition which may capture organisations established for a legitimate and lawful purpose which have never engaged in or planned to engage in violence.

Criteria One – A legitimate aim

The Law Council assumes that the underlying aim of the proscription power, and related investigatory powers and offence provisions, is to prevent acts of terrorism, whether in Australia or abroad, by cutting off support for and preventing the expansion of groups which engage in or facilitate terrorism. However, having identified this *general* objective of the listing regime, the government is not relieved of the need to identify, in the case of each proscription, the objective sought to be achieved by that particular listing.

Therefore, once it is established that an organisation satisfies the definition of a terrorist organisation, the first criteria which should be addressed in the case of every proposed listing is whether there is a legitimate objective sought to be achieved by the proscription of the organisation under the Australian Criminal Code. For example, it may be that the listing is directed at preventing people from being recruited to participate in or provide financial, technical or other material support to aid in the commission of acts of terrorism. The Law Council believes that to be legitimate, the identified objective of the proscription must be more than symbolic condemnation. The identified objective must relate to the enforcement of domestic and/or international law.

Criteria Two - Necessity

If this first criteria is satisfied and it is established that the proscription is directed at achieving a legitimate aim, the second criteria which must be met is whether the proscription of the organisation under the Australian Criminal Code is necessary to achieving that aim? This must require the government to address matters such as:

- whether the listing of the organisation under the Charter of the United Nations Act, thus freezing its assets, is already sufficient to achieve the aim identified;

- whether the availability of terrorist offence provisions under Division 101 of the Criminal Code and a range of other generic criminal offence provisions, none of which are contingent on the defendant having any connection with a designated terrorist organisation, means that law enforcement agencies do not require the organisation to be proscribed in order to pursue the aim identified;

- whether the organisation has a nexus with Australia, (either because it operates or seeks to operate within or draw support from Australia or because it targets or may seek to target Australian interests), such that the proscription of the organisation under Australian criminal law is likely to be more than symbolic and is necessary to assist Australian law enforcement or intelligence agencies to respond to the threat posed by the organisation;

- whether the organisation is already engaged in a peace process or similar dialogue which if successful would neutralize the threat posed by the organisation, such that its listing in the interim is unnecessary and possibly even counter-productive.

Criteria Three – Proportionality

If this second criteria is satisfied and it is established that the listing is directed at a legitimate aim and necessary to the achievement of that aim, the third criteria which must be met is whether proscription of the organisation is proportionate to the achievement of that aim. This will require the government to address matters such as:

- the level and type of the organisation's engagement in terrorism whether actual or planned; (Evidence that the organisation has been listed by the UN and range of other countries may be relevant to demonstrating that the organisation has been assessed as posing a real and substantial threat globally. Although such evidence would have to be supplemented by actual evidence of the organisation's activities.)

- the purpose of the organisation's establishment and ongoing existence as manifest in the organisation's public statements and the range of activities engaged in by its members; (This consideration is important because it will require the government to evaluate the extent to which people may be legitimately associated with the organisation for non-terrorist related purposes and thus the extent to which a more targeted approach directed at particular individuals may be a less restrictive, more proportionate response.)

- The number and range of people likely to be affected by the listing in Australia; (This is related to the consideration above.)

- The extent to which existing laws have in practice been, or have been assessed as, inadequate to counter the threat posed by the organisation. (As indicated above, this may also be considered under criteria 2 which relates to the necessity for the proscription).

Conclusion

The Law Council believes that, regardless of which arm of government exercises the proscription power, criteria of this type should be included in the Criminal Code or Criminal Code Regulations and should be specifically addressed in every statement of reasons prepared in support of a listing decision

The Attorney-General's Department has stated that binding criteria for listing, beyond satisfaction that an organisation fulfils the definition of a terrorist organisation, is unnecessary. The Department has submitted that "the considerations taken into account by the Attorney-General need to be assessed on a case by case basis." The Law Council submits that this asserted need for flexibility should not be allowed to relieve the government of its obligation under international human rights law to demonstrate that any restrictions it imposes on freedom of association and expression are necessary and proportionate to the achievement of a legitimate aim. At present, in the absence of binding criteria, the government is not obliged to discharge this onus.

Question 2 - Strict Liability for Membership Offence

The government has proposed that the offence of membership of a proscribed terrorist organisation be a strict liability offence. The Law Council was asked to comment on that proposal and "the implications of it as opposed to how the law currently is constructed and what difference it would make in practice."

Current Position

Section 102.3(1) of the Criminal Code provides that a person commits an offence if:

(a) the person intentionally is a member of an organisation;
(b) the organisation is a terrorist organisation; and
(c) the person knows the organisation is a terrorist organisation.

Therefore to secure a conviction the prosecution must prove beyond reasonable doubt three things:

1) that an organisation exists of which the defendant is intentionally a member;

2) that the organisation either:
   (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 occurs); or
   (ii) is proscribed as a terrorist organisation under the Criminal Code Regulations ("the regulations"); and

3) that the defendant knew either:
   (i) that the organisation was 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
   (ii) that the organisation was proscribed as a terrorist organisation.[1]

If the relevant organisation has been proscribed under the regulations, then the task of the prosecution with respect to proving the nature of the organisation (set out under 2 above) is significantly less onerous, and consists simply of tendering the regulations.

However, according to the Commonwealth Director of Public Prosecutions (CDPP), proscription of an organisation under the regulations is unlikely to assist the prosecution in discharging its burden with respect to the *mens rea* requirement set out at 3 above.

The CDPP has submitted that the prosecution is unlikely to be able to prove that a defendant knew that the organisation of which he or she was a member was proscribed under the regulations. Therefore, the prosecution will instead have to prove that the defendant knew that the organisation was terrorist in nature, that is, that the

[1] In his submission to the Committee, Dr Patrick Emerton of Monash University has questioned this interpretation of the fault element of the membership offence set out in s102.3(1)(c). Dr Emerton has suggested that in order to prove that a defendant knew the organisation, of which he or she was a member, was a terrorist organisation, the prosecution may only be required to prove that the defendant knew the identity of the organisation and that the organisation was in fact a proscribed terrorist organisation.

The Law Council doubts whether it is reasonably open to construct the section in this way. Firstly, if the section applied in the way suggested with respect to proscribed organisations, there is no reason why it would not be applied in the same way with respect to organisations which are not proscribed, but are nonetheless proven in court by their actions to be terrorist organisations. That is, the prosecution would be required to prove that the defendant knew he or she was a member of an organisation, that the defendant knew the identity of the organisation and that the organisation was, in fact, a terrorist organisation.

Further, if the section was constructed in the way suggested, and s102.3(1)(c) only required the prosecution to prove knowledge of the identity rather than the nature of the organisation, then s102.3(1)(c) may be redundant. Section 102.3(1)(a) already requires the prosecution to prove that the defendant was *intentionally* a member of an organisation. The Law Council believes that in order to prove this element of the offence, it would already be incumbent on the prosecution to prove that the defendant knew he or she was a member of a *particular* organisation. If that were not the case, the Law Council suggests that his or her membership of that organisation could not be categorized as intentional.

organisation was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.[2]

To establish the defendant's knowledge of the organisation's activities, the prosecution will, in turn, be required to establish that the organisation was, in fact, directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. This is because establishing *knowledge* of a fact, as opposed to a *belief* which may possibly be a mistaken belief, requires that the existence of the fact itself be established.

The result is that any benefit derived from simply tendering the regulations as proof that the relevant organisation was a terrorist organisation will be lost.

Government Proposal

The Attorney-General's Department submitted to the Committee that:

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

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

The implications and merits of the Department's proposal are discussed below on the assumption that what is intended is that a new section 102.3(2) might be added to the Criminal Code in the following form:

> *Section 102.3(2) A person commits an offence if:*
>
> *(a) the person intentionally is a member of an organisation;*
> *(b) the organisation is a terrorist organisation that is covered by paragraph (b) of the definition of a terrorist organisation in subsection 102.1(1)* ***{that is, it is proscribed under the Criminal Code Regulations as a terrorist organisation}***
> *(c) strict liability applies to paragraph (2)(b)*

The consequence of strict liability being applied to an offence or an element of an offence is set out in section 6.1 of the Criminal Code. In this case, the consequence would be that if a person was charged with membership of a proscribed terrorist organisation, the prosecution would not be required to prove anything with respect to the defendant's knowledge of the nature of the organisation or its proscription status. Proof of intentional membership of the organisation together with proof of its listing would suffice. However, the defence of mistake of fact would be available to the defendant.

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[2] The Law Council believes that, in these circumstances, knowledge that the organisation "advocates the doing of a terrorist act" would not suffice because while this is grounds for proscription under s102.1(2) it does not bring the organisation within the definition of a terrorist organisation in s102.1(1).

The defence of mistake of fact is set out in Section 9.2 of the Criminal Code, which explains that it is a defence to a charge of strict liability if:

(a) at or before the time of the commission of the offence (in this case *being a member of a proscribed terrorist organisation*)**,** the person considered whether or not facts existed (in this case *whether or not the organisation of which he or she was a member was a proscribed terrorist organisation*), and was under a mistaken but reasonable belief about those facts (in this case *he or she reasonably believed it was not listed)*; **and**

(b) if the facts that the defendant believed existed actually existed, the defendant's conduct would not have constituted a offence. (*In this case, the mistake of fact defence might fail if the defendant believed the organisation was a terrorist organisation in the sense that it was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act but he or she was simply under the mistaken belief that the organisation was not proscribed by regulation*.)

Section 13.3 of the Criminal Code explains that the defendant bears an evidential burden with respect to establishing a mistake of fact. As such the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that he or she considered whether the relevant organisation was proscribed by regulation but was under a mistaken and reasonable belief that it was not. If the defendant can discharge that burden, the onus returns to the prosecution to prove beyond reasonable doubt that the defendant did not hold the mistaken belief claimed or that it was not reasonable for him or her to do so.

The Law Council has a number of serious concerns about applying strict liability to this crucial element of the membership offence.

Law Council comments

Strict Liability offences should not be punishable by imprisonment, particularly where strict liability applies to the key issue of culpability.

The Sheller Committee noted that strict liability already applies to certain terrorism related offences. The Committee did not agree with this approach and recommended that where criminal offences involve heavy penalties of imprisonment, neither the offences nor elements of them should be of strict liability.

This recommendation concurs with the view of the Senate Standing Committee on the Scrutiny of Bills which concluded in 2002 that the framework of Commonwealth policy and practice in relation to strict liability ought to include the principle that "strict liability offences should, if possible, be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties."

The membership offence set out in section 102.3 is a serious offence attracting a maximum penalty of ten years imprisonment. The Law Council believes that no person should be exposed to imprisonment for his or her membership of an organisation when no evidence has been adduced, let alone evidence beyond reasonable doubt, that he or she was aware of or even contemplated the risk that the organisation was, in fact, a terrorist organisation, either by virtue of its listing or its activities.

The Law Council believes that the removal of the fault element in the manner proposed is particularly problematic given that the definition of a terrorist organisation is so broad that an organisation may be proscribed that was not formed for a terrorist related

purpose, has never carried out or planned to carry out a terrorist act nor directly assisted others to carry out such an act. In these circumstances, knowledge of an organisation's proscription as a terrorist organisation should not simply be assumed.

In response to criticism of existing terrorist organisation offences where strict liability already applies to the fact of proscription, the Attorney-General's Department has noted that this strict liability only applies to a specific element of the offence and that the prosecution must prove the relevant fault element for the remaining elements. According to the Attorney-General's Department the "core culpability" that justifies the penalty is not affected by the application of strict liability.

The Law Council disagrees with this assessment of the "core culpability" of terrorist organisation offences. The membership offence, like other terrorist organisation offences, criminalizes behaviour which, but for the fact that it occurs in relation to a terrorist organisation, is otherwise lawful. It is not an offence to be a member of an organisation. It is only the categorization of the organisation as "terrorist" that exposes its members to liability. The Law Council believes that demonstrating that a person was *intentionally* a member of a particular organisation does not establish "core culpability". The culpability clearly attaches to being a member of an organisation in the knowledge that, or reckless to the fact that, it is a terrorist organisation.

To expose a person to liability and the possibility of a lengthy prison sentence without proving their culpability in this respect, offends against the principle that everyone has a right to be presumed innocent until proven guilty.

The Defence of Mistake of Fact is insufficient to safeguard defendants' rights

The Law Council is concerned about how the defence of mistake of fact would operate in relation to an offence directed specifically at membership of a proscribed terrorist organisation.

A mistake of fact must be more than mere ignorance or inadvertence. The defendant must have turned his or her mind to the relevant facts but have honestly and reasonably formed an erroneous belief.

The Law Council is concerned that where a defendant has given no thought to whether or not an organisation has been proscribed, perhaps because he or she is unaware of the existence of the listing provisions, he or she will not be able to rely on the defence of mistake of fact.

The Law Council is concerned that the very matter which has prompted the strict liability proposal, that is public ignorance of the proscription regulations, may render it almost impossible for a defendant to successfully rely on the mistake of fact defence.

It is possible that, even though ignorant of the existence of the proscription regime, if a defendant can adduce or point to evidence which demonstrates that he or she believed the relevant organisation was not directly or indirectly engaged in, preparing, planning, assisting in, fostering or advocating the doing of a terrorist act, this might suffice to enliven the defence. After all, a defendant who held such a belief, even if aware of the proscription regime, may well believe that as there were no grounds for proscription the organisation could not possibly be listed. However, this proposition is uncertain because it unclear whether a mistaken belief as to the organisation's activities, without specific contemplation of its proscription status, will be capable of establishing an honestly held, mistaken belief that the organisation was not proscribed. At any rate, a *reasonably* held mistaken belief about the activities of the organisation and not mere ignorance will be required.

Whatever the position, the Law Council believes that in this case the availability of the defence of mistake of fact should not be regarded as sufficient mitigation for denying a defendant the benefit of the presumption of innocence. The defendant is denied the benefit of this presumption when the prosecution is relieved of the burden of proving that a defendant intended to commit an offence.

It should be emphasized that, even where a defendant is able to meet the evidential burden and raise the mistake of fact defence, the burden does not revert to the prosecution:

- to prove that the defendant knew the organisation was a terrorist organisation, listed or otherwise, or
- to prove that the defendant was recklessness about the nature of the organisation in that he or she was aware of a substantial risk that the relevant organisation was a terrorist organisation and assumed that risk even though it was unjustifiable in the circumstances known to him or her.

On the contrary, the defence of mistake of fact will fail if the prosecution can prove:

- that defendant did not consider whether the organisation was a listed terrorist organisation; or
- that, while the defendant genuinely believed it was not a listed terrorist organisation, such a belief was unreasonable.

Both of these "states of mind" fall well short of establishing recklessness, let alone knowledge.

The Law Council emphasizes this point because two poorly drafted existing terrorist organisation offences create some confusion about the operation of strict liability.

Section 102.5(2), the offence of providing or receiving training from a proscribed terrorist organisation, and section 102.8, the offence of associating with a proscribed terrorist organisation, both purport to apply strict liability.[3]

Although their operation is unclear, both sub-sections appear to attempt to relieve the prosecution of the burden of proving that the defendant knew the organisation was a proscribed terrorist organisation. However, both offence provisions also provide that if the defendant can satisfy an evidential burden that he or she was not reckless as to whether the organisation was a proscribed organisation, then the burden returns to the prosecution to establish that the defendant was in fact reckless. The CDPP has submitted that, as currently drafted, these provisions will almost certainly require the prosecution to prove recklessness in every case, as it will be relatively easy for defendants to satisfy the evidential burden imposed upon them.

In that way, these two existing terrorist organisation offences are not strict liability offences in the usual sense.

It may be that when the Attorney-General's Department proposed that membership of a proscribed terrorist organisation be re-drafted as a strict liability offence, what is envisaged is something more akin to these existing provisions.

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[3] In the case of s102.8, however, while strict liability applies to the relevant organisation's proscription status, the section also explicitly states that the person must know the organisation is a terrorist organisation.

The Law Council does not believe these convoluted provisions should be emulated. The CDPP has submitted that they are ambiguous and require clarification and the Sheller Committee has recommended that they be urgently redrafted.

Strict Liability is not appropriate in these circumstances to overcome the "knowledge of law" problem

The Attorney-General's Department has submitted that: "*Once an organisation is proscribed, then it is a terrorist organisation as a matter of law. As such, the prosecution should not be required to establish that the person knew the law"*

One of the merits of strict liability recognized by the Senate Standing Committee on the Scrutiny of Bills is its usefulness in overcoming the "knowledge of law" problem.

The Law Council believes that this should not be interpreted as an endorsement for employing strict liability in *every* case where ignorance of the content of regulations may make it difficult to establish the fault element of a particular offence. The Law Council believes there are a number of reasons why in this circumstance strict liability should not be relied upon to overcome the "knowledge of law" problem:

- Until an organisation is actually formally proscribed there is no transparency or publicity about the fact that it is under consideration for listing. Prior to listing, there is no public forum in which the listing may be considered and discussed. A press release and other information is made available *after* listing, however, the secrecy of the process prior to that point increases the likelihood of delay between when an organisation is proscribed by regulation and when that information penetrates through to the community.
- The effect of strict liability would be to place an obligation on members of the community to be proactive in considering whether any organisation they associate with is a *proscribed* terrorist organisation. It is not appropriate to impose such a burden on people engaged in general community interaction.

  Strict liability and the obligation it entails to avoid *inadvertently* committing an offence of action or omission can be appropriate where a person or entity voluntarily enters a field of endeavour and takes on responsibilities and privileges.

  For example, a law which provides that it is an offence to dump a prohibited chemical in a river may only require the prosecution to prove that a defendant company intentionally or recklessly dumped a particular chemical in a river[4] but not that the company was aware of the chemical's prohibited status. It is reasonable to expect that a company whose commercial activities produce waste product must know the regulatory status of those products and how they might be disposed of.

  As a further example, a law which provides that it is an offence to sell a prohibited weapon, may only require the prosecution to prove that a defendant intentionally sold a particular weapon and not that he or she was aware that the weapon was listed by law as prohibited. Again, it might be regarded as reasonable to expect that a person engaged in the sale of weapons should know whether those weapons are prohibited or not.

[4] Or in the case of an absolute liability offence, simply the fact that it was dumped in the river by the company, intentionally or otherwise, may suffice.

However, the Law Council believes that it is not appropriate that if a person wants to simply participate in civil society through membership of different organisations, such participation being a right rather than a privilege, he or she should be expected to know what organisations are proscribed by regulation as terrorist organisations.

- Even if, as is currently the case, strict liability does not apply to any element of the terrorist organisation membership offence, defendants can not claim ignorance of the law to subvert the intent of the offence provision.

  Where the prosecution can not prove that a defendant knew that an organisation was proscribed by regulation, it is still open for the prosecution to prove that the defendant knew that that the organisation was directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs). The prosecution does not have to prove that the defendant was aware that activities of this kind rendered the organisation a terrorist organisation according to law, only that he or she was aware of the organisation's activities and that those activities fulfilled the definition. This is the usual sense in which "ignorance of the law" is said to be no excuse.

- Section 102.3(2) currently provides that if a defendant, charged with membership of a terrorist organisation, can prove on the balance of probability that he or she took all reasonable steps to cease to be a member of the relevant organisation as soon as practicable after he or she knew that the organisation was a terrorist organisation, he or she will not be guilty of the offence.

  The availability of this defence clearly indicates that the legislature only intended to target people who were knowingly members of terrorist organisations and that those who inadvertently become involved in such organisations should be given an opportunity to extract themselves. This is consistent with the primary purpose of the legislation which is to shut down support for terrorist organisations by deterring people from becoming or remaining involved with them. Applying strict liability to the offence would not increase the deterrent value of the legislation because it would capture people who had not made a conscious decision to become or remain involved with a terrorist organisation. Strict liability would simply place a duty on people, under threat of prosecution, to be vigilant and informed about who they interact and align themselves with.

- While ignorance of the law is often said to be no excuse, it is not the case that strict liability always applies to knowledge of the content of legislation.

  For example, a number of drug offences under the Criminal Code do not assume that defendants knew whether the substance or plant which they are alleged to have trafficked, sold, grown or manufactured is a "controlled drug" or "controlled plant" as prescribed by the Criminal Code, regulations or ministerial determination.[5] On the contrary the Criminal Code generally requires that the prosecution must prove that the defendant knew or was reckless to the fact that the relevant substance or plant was by law a "controlled drug" or "controlled plant".[6] This means, for example, that if a person is charged with cultivating a controlled plant, the prosecution will not succeed unless it is proven that the

[5] See generally Division 300 of the Commonwealth Criminal Code.

[6] However, the prosecution is not required to prove that the defendant knew the precise identity of the controlled plant or drug he or she was alleged to have trafficked, sold, grown or manufactured. (Criminal Code 300.5)

defendant knew or was aware of a substantial risk that the plant was a "controlled plant". In other words, the defendant is not assumed to know the law.

These provisions demonstrate that it is not an absolute, arbitrary rule that strict liability must be applied to elements of an offence which refer to the content of legislation.

Question 3 - Timeline for PKK Listing

During the hearing, it was suggested that the Law Council submission to the Committee had incorrectly stated that "significant activity directed towards advancing the proscription of the PKK commenced from April 2005 [at or around the time the Prime Minister John Howard visited Turkey]".

Referring to page 8 of the Committee's review of the PKK listing, Senator Ray suggested that in fact, ASIO sent its draft set of reasons for proscribing the PKK to DFAT in November 2004, a full six months before the Prime Minister visited Turkey in 2005.

The Law Council undertook to check its submission.

The Law Council's submission relied on information contained in the Committee's report on the review of the PKK listing.

The timetable for considering, preparing and formally advancing the PKK proscription, as set out in that report, is not entirely clear.

As noted by Senator Ray, the Committee's report records that ASIO gave evidence that the PKK proscription was under consideration from November 2004 and that a draft statement of reasons was sent to DFAT at that time.

However, the Committee's report also records that this evidence was later contradicted when ASIO, in answers given to questions on notice, stated that a request for comment on the draft statement of reasons was first made to DFAT in May 2005.

This was further contradicted by DFAT's evidence which stated that they first received request for comment on the draft statement of reasons in July 2005.

The Committee's report also records that, according to the Attorney General's Department the listing had been under consideration "for six months prior to the announcement or the visit of the Turkish Prime Minister to Australia." That visit was officially announced on 30 November 2005 and occurred in December 2005. Therefore according to the Attorney-General's Department the proscription of the PKK first came under consideration in May or June 2005.

The Committee's report also sets out the timeline provided by ASIO for the development of the statement of reasons on the PKK listing. The first three entries on the timeline all occur in April 2005 and involve sending versions of the statement of reasons to the Attorney-General's Department.

Cognizant of this varied information, the Law Council did not assert in its submission that the listing of the PKK was *first considered* in April 2005 or even that the first steps towards achieving that end were taken at that time. The Law Council submitted that "significant activity directed towards advancing the proscription of the PKK commenced

from April 2005." This statement was based on the timeline provided by ASIO for the development of the statement of reasons on the PKK listing.

After reviewing again the information contained in the Committee's report, the Law Council believes the statement accords with the information contained therein.

The Law Council specifically stated in its written submission that it did not assert that the decision to list the PKK was illegitimate or improper. Further, the Law Council's submission noted that the Committee's majority report found that there was no evidence that the Turkish Government's approach had affected the proscription timetable.

The purpose of the Law Council's focus on the PKK listing, and specifically the timetable for the listing, was to illustrate how, in the absence of clear, transparent criteria for selecting organisations for proscription, the perception of improper influence might arise.

Attachment A

Profile – Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 50,000 Australian lawyers, through their representative bar associations and law societies (the "constituent bodies" of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society of the Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.