

## Introduction

- 1.1 This review is conducted under section 102.1A of the *Criminal Code Act 1995* (the Criminal Code). Section 102.1A provides that the Parliamentary Joint Committee on ASIO, ASIS and DSD (the Committee) may review a regulation specifying an organisation as a terrorist organisation for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1 of the Criminal Code and report the Committee's comments to each house of the Parliament before the end of the applicable disallowance period.
- 1.2 One review was undertaken in the last Parliament under this power, the *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, tabled in June 2004. Another review was undertaken at the beginning of this Parliament, the *Review of the listing of six terrorist organisations*, tabled in March 2005.
- 1.3 The organisation for which the regulation has been made is Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (TQJBR). The organisation is led by Abu Mus'ab al-Zarqawi and is also known as the al-Zarqawi network.
- 1.4 The Attorney-General wrote to the Chairman on 9 February 2005 advising that a regulation specifying TQJBR as a terrorist organisation for the purposes of section 102.1 of the Criminal Code was scheduled for consideration by the Federal Executive Council on 24 February 2005.
- 1.5 The regulation was tabled in the House of Representatives and the Senate on 7 March 2005. The disallowance period of 15 sitting days for the Committee's review of the listing began from the date of the

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tabling. Therefore, the Committee is required to report to the Parliament by 30 May 2005.

- 1.6 The Committee advertised the inquiry in *The Australian* on 4 March 2005. Notice of the inquiry was also placed on the Committee's website and one submission was received from the general public.
- 1.7 Representatives of the Attorney-General's Department, ASIO and the Department of Foreign Affairs and Trade (DFAT) attended a private hearing on the listing on 2 May 2005 in Canberra.
- 1.8 In its first report, *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, the Committee decided that it would test the validity of the listing of a terrorist organisation under the Criminal Code on both the procedures and the merits. This chapter will examine the Government's procedures in listing TQJBR and chapter 2 will consider the merits of the listing.

## The Government's procedures

- 1.9 In a letter sent to the Committee on 23 March 2005, the Attorney-General's Department informed the Committee that it had adhered to the following procedures for the purpose of the listing:
  - An unclassified Statement of Reasons was prepared by ASIO detailing the case for listing the organisation.
  - Chief General Counsel, Mr Henry Burmester QC provided written confirmation on 21 January 2005 that the Statement of Reasons was sufficient for the Attorney-General to be satisfied on reasonable grounds that the organisation is an organisation directly or indirectly engaged in preparing, planning, assisting in or fostering the doing of a terrorist act whether or not the terrorist act has occurred or will occur.
  - The Director-General for Security, Mr Dennis Richardson, wrote to the Attorney-General on 21 January 2005 outlining the background, training activities, terrorist activities, and relevant statements of each organisation.
  - AGD consulted with DFAT in order to identify issues of relevance with respect to that portfolio. In this instance, DFAT expressed support for the continued listing of both organisations by email on 25 January 2005. No further detail was provided.
  - A submission was provided to the Attorney-General on 7 February 2005 including:

- ⇒ copies of the Statements of Reasons from ASIO for the organisation
- ⇒ advice from the Chief General Counsel in relation to the organisation
- ⇒ letter from the Director-General of Security
- ⇒ responses from DFAT in relation to the proposed listing, and
- ⇒ regulations and Federal Executive Council documentation.
- Having considered the information provided in the submission, the Attorney-General signed a statement confirming that he is satisfied on reasonable grounds that each organisation is an organisation directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the act has occurred or will occur. The Attorney-General also signed a regulation in relation to the organisation, and approved associated Federal Executive Council documentation including an explanatory statement, explanatory memoranda, and an executive council minute.
- The Attorney-General wrote to the Prime Minister on 9 February 2005 advising of his intention to list the organisation.
- The Leader of the Opposition was advised of the proposed listing by letter on 9 February 2005 and was offered a briefing in relation to the listing.
- The Attorney-General wrote to the Chairman of the Parliamentary Joint Committee on ASIO, ASIS and DSD on 9 February 2005 advising of his decision to list the organisation.
- On 14 February 2005, the Prime Minister wrote to the Premiers of the States and Chief Ministers of the Territories advising them of the decision to list the organisation. The following responses were received:
  - ⇒ 18 February 2005 from the Premier of SA advising that the SA Government supported the listing. The Premier also requested a briefing from the Director-General of Security. This briefing was arranged by the Department of the Prime Minister and Cabinet. The briefing was provided by the Deputy-Director General of Security, Mr Ian Cousins, on Wednesday, 23 February 2005
  - ⇒ 23 February 2005 from the Premier of Victoria advising that Victoria supported the regulation. The Premier advised that Victoria did not currently intend to seek a

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briefing from the Director-General of Security, but would reconsider its position if there is reason to believe that Al-Zarqawi poses a specific threat to Victoria

- ⇒ 24 February 2005 from the Chief Minister of the ACT advising that the ACT Government concurred with the proposed listing.
- ⇒ 24 February 2005 from the Premier of WA advising that WA had no objections to the listing and that it did not consider it necessary to receive a briefing from ASIO
- ⇒ 24 February 2005 from the Premier of Qld advising that the Premier did not object to the proposed listing
- ⇒ 28 February 2005 from the Chief Minister of the NT advising of the Chief Minister's support for the listing
- ⇒ 2 March 2005 from the Premier of NSW advising that the Premier had no objection to the listing
- The Governor-General made the regulation on 24 February 2005.
- A press release was issued 26 February 2005 and the Attorney-General's Department National Security website was updated.
- The Regulation was lodged with the Federal Register of Legislative Instruments (FRLI) on 1 March 2005 [FRLI Reference Number: F2005L00384]

## Procedural concerns

### Consultation with the States and Territories

- 1.10 The Committee is pleased that consultation on this listing occurred between the Prime Minister and Premiers and Chief Ministers as required under subclause 3.4(6) of the *Inter-Governmental Agreement on Counter-terrorism Laws*.
- 1.11 The States and Territories were advised ten days before the regulation was made and responses were received from the majority of States and Territories. It is worth noting that:
- two responses were received before the regulation was made;
  - three responses were received on the day the regulation was made; and

- two responses were received after the regulation was made.
- 1.12 Subclause 3.4(3) of the *Inter-Governmental Agreement on Counter-terrorism Laws* states that the Commonwealth will provide the States and Territories with the 'text of the proposed regulation and will use its best endeavours to give the other parties reasonable time to consider and to comment on the proposed regulation'.
- 1.13 The Committee is pleased that the States and Territories have been provided with more notice than previous listings. However, given that only two responses were received before the regulation was made, it would appear that ten days notice may still be insufficient time to consider and to comment on the proposed regulation.
- 1.14 Officers from the Attorney-General's Department advised the Committee that:
- You will see with this listing that we have responded to some of your concerns about giving the States a little more notice. I am happy to say that we have got a more comprehensive response from the States as well. I think that we might have struck a period that is a little more satisfactory than it was before. We will endeavour to continue with that.<sup>1</sup>
- 1.15 The Committee appreciates this advice and expects that future consultation with the States and Territories on the listing of organisations under the Criminal Code will give full effect to the *Inter-Governmental Agreement on Counter-terrorism Laws*.

### Consultation with DFAT

- 1.16 The Committee was advised by the Attorney-General's Department that:
- AGD consulted with DFAT in order to identify issues of relevance with respect to that portfolio. In this instance, DFAT expressed support for the continued listing of both organisations by email on 25 January 2005. No further detail was provided.
- 1.17 From this description, DFAT's input on the listing of TQJBR appears to be minimal. At the hearing, officers from DFAT confirmed that the substance of the email was 'basically a one-sentence confirmation that DFAT has no difficulty' with the proposed listing.<sup>2</sup> However, DFAT

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1 Transcript, Private hearing 2 May 2005, p. 1.

2 Transcript, Private hearing 2 May 2005, p. 12.

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noted that they would provide a more detailed response if they had additional information that would be valuable, including if the organisation was engaged in, or entering into, a political process or negotiations.<sup>3</sup> DFAT also advised that there were no negative foreign policy implications in listing TQJBR.<sup>4</sup>

- 1.18 The Committee would encourage DFAT to provide more detailed advice to the Attorney-General's Department in future listings under the Criminal Code. This advice may include an assessment of the foreign policy implications of a listing and any information relating to Australia's obligations to the United Nations on the particular organisation. In particular, DFAT may provide advice on whether the organisation has been included in any of Australia's reports to the United Nations Security Council on the monitoring of financial transactions, people movement or the sale of arms.<sup>5</sup>

#### Community consultation

- 1.19 In its previous report, *Review of the listing of six terrorist organisations*, the Committee recommended that:

a comprehensive information program, that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organisation.<sup>6</sup>

- 1.20 The letter from the Attorney-General's Department does not state whether any community consultation on the listing was conducted.
- 1.21 At the hearing, the Attorney-General's Department advised that they are developing a response to the Committee's recommendation on community consultation.<sup>7</sup> Officers from the Attorney-General's Department noted that they do not have any community consultation prior to a listing.<sup>8</sup>

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3 Transcript, Private hearing 2 May 2005, pp. 12-15.

4 Transcript, Private hearing 2 May 2005, p. 13.

5 Australia is required to report to the United Nations Security Council on measures taken by the Australian Government to implement Security Council resolutions 1267, 1333, 1390, 1455 and 1373. These resolutions oblige member states to suppress terrorism, including freezing terrorist assets, preventing terrorists from entering into or transiting through their territories, preventing the supply, sale and transfer of arms and military equipment and denying safe haven to terrorists.

6 Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, March 2005, p. 20.

7 Transcript, Private hearing 2 May 2005, p. 5.

8 Transcript, Private hearing 2 May 2005, p. 5.

- 1.22 The Committee is pleased that the Attorney-General's Department is developing a process for community consultation in response to the Committee's recommendation. It is the Committee's view that it would be most beneficial if community consultation occurred prior to the listing of an organisation under the Criminal Code.
- 1.23 Overall, the Committee is pleased that the Government's procedure in listing terrorist organisations is developing into a more focused and thorough process.

