

Procedural concerns

Consultations on the listings

- 2.1 So that its review would be both meaningful and expeditious, in the first report, the Committee requested that the Government accompany its notification of a regulation with additional explanatory information, including:
- details of the required consultation between the Government and the States and Territories on the regulation¹;
 - details on the consultations with the Department of Foreign Affairs on any foreign policy implications in relation to the listings;
 - details of the procedures followed in the making of the regulations.²
- 2.2 As the first regulation had been made without prior warning to the Committee, the Committee had also requested that in future it would be given as much warning as possible of an impending listing so that the Committee's work program could accommodate

1 There is an Intergovernmental Agreement on Counter Terrorism, signed on 24 June 2004, by the Prime Minister and the State and Territories leaders on the protocols to be followed in the listing of organisations as terrorist organisations.

2 Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of the Palestinian Islamic Jihad*, June 2004, p. 11.

the review. The Committee also asked the Government to inform it of the impact of the listing on Australia's national interest.

- 2.3 None of these procedures were followed in relation to the first two listings made on 31 August. In relation to the next four, four days notice was given, but the papers sent to the Committee on the listings originally contained no information on the Government's consultations or procedures or the imperatives of Australia's national interest. On 10 December 2004, the Committee received an additional submission containing some information regarding process; however, it is the Committee's view that this additional information was not as comprehensive as it might have been. For example, although this submission noted that the Department of Foreign Affairs had been consulted on 24 August in relation to the first two listings and between 21 and 27 October on the next four, no details of DFAT's views were supplied.
- 2.4 ASIO reported that they consult with the Department of Foreign Affairs, but that it is 'not formalised'³.
- 2.5 The Department of Foreign Affairs was asked at the hearing about this process. Officers described their role very thoroughly, but perhaps theoretically, in the following terms:

[O]f course DFAT are consulted when the Attorney-General's Department, on the basis of information provided by ASIO, considers proposing an organisation for listing by the Attorney-General. The consultation will take the form of the Security Law Branch in the Attorney-General's Department contacting our Counter -Terrorism Branch ... which coordinates responses from the relevant bilateral areas of the Department of Foreign Affairs and Trade, including the geographical desks, intelligence policy liaison areas of the Department of Foreign Affairs and Trade, and the Legal Branch, where that is relevant.

DFAT would see our obligation as one to provide any relevant information to the questions that are asked. We would provide to the Attorney-General's Department or to ASIO directly such information as we had available relating to the entities or the countries with an association with those entities. I would expect that, if there were any bilateral considerations, we would refer to those, but at the end of the

3 ASIO transcript, 1 February 2005, p.10.

day we would respect and recognise the fact that any listing under the Criminal Code is a decision for another agency. We would take every step to ensure that the Attorney-General's [Department] were fully informed of all the relevant information available to our department

If it were relevant, it would be provided in writing.⁴

- 2.6 On the specific organisations under consideration, this elaborate process was achieved, if indeed it happened, in a matter of a few days. DFAT reported that the information provided by the department was 'very short'.⁵ The Committee asked for a copy of the Department's views on the grounds that it was good practice to keep the Committee fully informed, given the Committee's responsibilities in reporting to the Parliament on these listings.
- 2.7 The Department of Foreign Affairs and Trade did not provide copies of the emails advising the Attorney-General's Department of their views on the listings. Instead, they provided the information now available as submission 17.
- 2.8 The submission of 10 December also noted that the Attorney-General had written to the Attorneys of the States and Territories, advising them of his decision. The letters were sent on 30 August 2004 in the case of Al Qa'ida and Jemaah Islamiyah, the day before the regulations were made and on 1 November 2004 for the other four, four days before the regulations were made. Only one government, the government of the Northern Territory, had replied.
- 2.9 To write to the States and Territories within twenty-four hours or even four days of a regulation being made is to provide no opportunity for them to respond. The regulation would have been in place before the Premiers or Chief Ministers even saw the correspondence. It should be noted that under the Intergovernmental Agreement on Counter Terrorism, the States and Territories are to be consulted, through the Prime Minister and Premiers and Chief Ministers, before the making of the regulation and that, 'if a majority of the other parties object to the making of a regulation, ... the Commonwealth will not make the regulation at that time.'⁶

4 Department of Foreign Affairs transcript, 1 February 2005, pp. 7-8.

5 Department of Foreign Affairs transcript, 1 February 2005, p. 8.

6 Intergovernmental Agreement on Counter Terrorism, Paragraph 3.4(2).

- 2.10 The consultation process did not comply with the agreed protocol nor allow it to be given any effect.
- 2.11 Given the nature of the organisations under consideration in these regulations, the Committee does not believe that it was likely that any of the State or Territory governments were likely to dissent from the listings. However, the process was severely truncated and, in other circumstances, this lack of time or meaningful consultation could be, at least, detrimental to the Government's credibility or, at best, embarrassing, particularly if, in future, a State or Territory wished to raise an objection to a listing. The Committee received a letter from the Chief Minister for the ACT, Mr Jon Stanhope, criticising the amount of time given to the Territory Government on the six listings.⁷
- 2.12 The Attorney-General's Department explained that the amount of notice varied 'with circumstances and the urgency of a particular listing'⁸. The Committee understands that there are likely to be circumstances where urgency may shorten the amount of time for consultations; however, on re-listings, where the timetable is set by the legislated review period, the process should encompass sufficient consultation time. With regard to these six re-listings there was no reason for the consultation time to be so short.
- 2.13 The Attorney-General's Department has now supplied the Committee with a table of the re-listings of terrorist organisations that will come forward over the next two years. The Committee appreciates this notice.

Selection of listed entities

- 2.14 One public submission, submission number 8, from Mr Joo-Cheong Tham, raised a number of procedural points in relation to the proscription power. Some of these arguments relate to the more general review that the Committee must conduct in 2007 on the overall operations of this section of the Criminal Code. The Committee intends to consider these arguments at a later time; however, Mr Joo-Cheong did suggest that the criteria used by the Attorney or ASIO in deciding whether or not to list an organisation

7 ACT Government submission, number 16.

8 Attorney-General's Department transcript, 1 February 2005, p.1.

as a terrorist organisation should be made public. He argued that the definition in the Act of a terrorist organisation⁹ is not sufficient to determine which organisations might be selected, being so broad that it could apply to a plethora of organisations. Therefore, some other process of selection must be being used.

- 2.15 A further submission from the Australian Muslim Civil Rights Advocacy Network also commented on the selection processes. They believed that there was a lack of transparency in the process and that 'superficially [it] appear[s] to be both subjective and arbitrary', that it 'has led to the Muslim community feeling isolated and discriminated against'¹⁰. They believed that there was a perception that:

Muslims are being deliberately targeted by the anti-terrorism legislation. So far, all 17 of Australia's proscribed terrorist organisations are Muslim linked. This appears to be something unique to the Australian context: in the United States, for example, at last count [there were] 37 listed terrorist organisations, of which 22 were Muslim linked.¹¹

- 2.16 However, the Committee was informed by the Director-General:

... I have never had any leader of an Australian Islamic community raise proscription as an issue - never. That does not mean that it is not an issue.¹²

- 2.17 The Committee has also sought some guidance on the question of selecting organisations for proscription. In the last report the Committee asked whether, given that the Government had moved away from the UN processes as being too inflexible, an Australian connection might be the appropriate criterion. Both Attorneys-General in the last Parliament argued that the previous, UN-based arrangements did not sufficiently account for or ensure the safety and security of Australia's interests.¹³ The Committee, therefore, asked that the Australian connection of any proposed listing be explained in future.

9 A terrorist organisation is defined as any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.

10 Australian Muslim Civil Rights Advocacy Network submission pp. 1-2.

11 Australian Muslim Civil Rights Advocacy Network submission pp. 1-2

12 ASIO transcript, 1 February 2005, p. 15.

13 It is worth noting that all organisations on the Criminal Code list are also listed on the *Charter of the United Nations Act 1945 Consolidated list*.

Views of the Attorney-General's Department

2.18 This view was rejected by the Attorney-General's Department in its submission. The Department argued that:

The Criminal Code does not require that an organisation have a link to Australia before it can be listed. It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. This will ensure that Australia is well placed to prevent terrorist acts occurring within Australia and discourage these organisations from obtaining a foothold in Australia.¹⁴

2.19 This argument is superficially logical but it does not assist in understanding why some organisations and not others are chosen for listing.¹⁵ The Committee understands that the Criminal Code does not require that an organisation have a link to Australia before it can be listed. However, it is clear from all the evidence taken on this matter that Australia's security and Australia's interests must be at the core of any of the anti-terrorism legislation. At the hearing, officers from the Department affirmed this.

But, ultimately, it is about whether listing is in the security interests of this country.¹⁶ That is what the statutory intention is.¹⁷

2.20 The Committee is seeking to understand how this interest is met by the implementation of the proscription power. Being 'proactive' and 'discouraging these organisations from gaining a foothold in Australia' could apply to any organisation at any time. This is vague and there is no explanation of how a particular proscription achieves this. A general intention to discourage terrorist organisations might be applied to all such organisations. There are over 100 organisations listed as terrorist organisations by the United Nations.

2.21 The Department also argued that Australia's more restrictive list [than the UN list] is evidence of the 'care taken to make sure that these very serious offences are targeted at organisations that present

14 Submission No 7, Attorney-General's Department.

15 The Committee noted that some organisations with no linkages to Australia had been listed and other with none had not.

16 Attorney-General's Department transcript, 1 February 2005, p. 2.

17 Attorney-General's Department transcript, 1 February 2005, p. 3.

a real and present danger.’¹⁸ To whom this danger might apply was not specified. Officers from the Department also stated that proscription ‘may well be useful in supporting the international effort here to deal with that particular organisation’¹⁹. Given the difficulties of applying the proscription legislation to foreign nationals operating entirely overseas, this is a debateable point. There is other legislation which monitors potential terrorists and terrorist organisations under the Charter of the UN Act which may be more effective. There is further comment on this argument below at paragraphs 2.40-2.43.

- 2.22 The question remains: how and why are some organisations selected for proscription by Australia?
- 2.23 Finally, there is some confusion apparent in the evidence from the Attorney-General’s Department, which argued that a link to Australia was unnecessary under the Act (strictly true in the legal sense) and yet that Australia’s security interests were basic to the intention of the statute. There would appear to be a further contradiction between the view of the Attorney-General’s Department and the selection processes of ASIO which lists links to Australia and threats to Australian interests as part of its evaluation processes.

Views of ASIO

- 2.24 At the hearing on 1 February, the Director-General of ASIO outlined ASIO’s evaluation process. Factors included:
- engagement in terrorism;
 - ideology and links to other terrorist groups/networks;
 - links to Australia;
 - threat to Australian interests;
 - proscription by the UN or like-minded countries; and
 - engagement in peace/mediation processes.²⁰

18 Attorney-General’s Department transcript, 1 February 2005, p. 3.

19 Attorney-General’s Department transcript, 1 February 2005, p. 4.

20 Confidential exhibit, ASIO, tabled 1 February 2005.

- 2.25 By way of further explanation, the Director General defined links to Australia as including direct links, that is, that Australian interests are specifically targeted or that the organisation has members who are active in Australia. It could also include indirect links where, through indiscriminate attacks, Australians are affected or where Australians become displacement targets when others are attacked.²¹
- 2.26 It is not clear whether all of the above factors need to be present in any individual evaluation. Moreover, the Committee notes that the first two are so broad as to be axiomatic in the consideration of any organisation accused of terrorism. However, they do reflect the definition of a terrorist organisation in the Act and, in conjunction with the other factors, they are no doubt a baseline consideration.
- 2.27 On dot point three, links to Australia, the Committee agrees and wishes to stress the importance, in the selection of any organisation for proscription, of their being links to Australia, notably through the existence of Australian members, the financing of the terrorist organisation here or abroad by Australians or the supply of Australian personnel to the organisation's activities abroad.
- 2.28 Where the Director-General describes indirect links - inadvertent attacks on Australian interests abroad by foreign nationals - it is less clear how the proscription power will be effective. Although the Act has an extended geographical jurisdiction²², allowing Australia to prosecute any person, anywhere in the world, regardless of citizenship or residence, and not subject to a foreign law defence²³, the Committee believes that there would be enormous practical difficulties in acting on this power.²⁴ It would be both unlikely and difficult for Australia to prosecute foreign nationals who commit offences outside of Australia. National sensitivities about sovereignty, adverse impacts on our foreign relations or lack of
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21 Confidential exhibit, ASIO, tabled 1 February 2005.

22 See *Criminal Code Act 1995*, section 102.9.

23 Parliamentary Library, Bills Digest No. 89 2001-2002, p. 7.

24 Under section 16.1 of the Criminal Code, the Attorney-General's consent is required for a prosecution where the offence occurs wholly in a foreign country and the alleged offender is neither an Australian citizen nor a body corporate incorporated under a law of the Commonwealth or of a State or Territory. The *Commonwealth Criminal Code Guide for Practitioners* issued by the Attorney-General's Department notes at page 365 that the Attorney-General will have regard to 'considerations of international law, practice and comity, international relations, prosecution action that is being or might be taken in another country, and other public interest considerations and decide in his or her discretion whether it is appropriate that a prosecution should proceed'.

extradition arrangements are just some of the hurdles that might impede such action.²⁵ It is, therefore, not clear how selecting for listing organisations which have no direct linkage to individuals in Australia will offer any greater security or effectiveness.

- 2.29 The fourth factor, the threat to Australian interests, again appears to be vague. Are these interests in Australia or abroad? It is unclear how the proscription of an organisation in Australia will facilitate protection unless there is active Australian support, financially or in personnel, for the organisation.
- 2.30 In relation to dot point five, the Committee would also note that proscription by the UN already engages Australia in a number of obligations. These obligations involve matters of financing of terrorism, movement of personnel and the sale of arms. These are discussed below.
- 2.31 The inclusion, in the Director-General's criteria, of
a) a recognition of the role of peace and mediation processes; or
b) the confinement of terrorist actions to targets within domestic or local struggles²⁶ is welcomed by the Committee. It assists in distinguishing international terrorism from national liberation struggles, civil wars and other like conflicts. The Committee believes that this is a useful distinction. As the Committee agreed in its first report, proscription, especially where it applies to only one side of such a dispute, could be counterproductive. Peace processes should be allowed to run their course and actions by any side which target civilians need to be condemned and dealt with under the laws of armed conflict.

Views in public submissions

- 2.32 The Committee received a number of public submissions to this review. Many addressed themselves to the validity and usefulness of the proscription power as a whole, a matter that the Committee will take up in 2007. However, it is worth noting that there was, within these submissions, discussion of the need for clear criteria for the selection of organisations for banning under the Criminal Code. Many of the arguments rested on those outlined above, that the

25 The Bali bombing investigations and prosecutions are an example of effective action through international cooperation which recognised the inherent difficulties of the extended geographical power.

26 The Director-General elaborated on these matters in broad discussions on the process of selection at the hearing. ASIO transcript, 1 February 2005, p. 15.

definitions in the Act relating to terrorism, terrorist organisations and terrorist acts are so broad that they could apply to an unlimited number of organisations and activities. The Committee would direct readers to these submissions on its website for the details of these arguments. While most argued that the proscription power was unnecessary, there was also a general consensus that narrower criteria for selecting organisations for proscription needed to be made public. This is, perhaps, best expressed by submission number 12:

The threat posed to Australia by an organisation, and the involvement of Australians with an organisation, might seem to have greater relevance to the question of whether or not to ban an organisation.²⁷

- 2.33 Mr Emerton went on to argue, however, that even with this criteria, the power should be used with caution, in part because there is a wide differential of activities that could constitute an offence, ranging from peripheral to direct involvement with a listed organisation, and most of the offences do not require a person associated with a listed organisation to have any terrorist intent. All these offences, in his view, attracted severe penalties and potentially triggered action under a variety of other legislation.

Thus, to ban an organisation is to trigger a number of departures from the ordinary rule of law in Australia. Offences are enlivened of involvement with an organisation, which do not require the proof of any terrorist intent or conduct on the part of an accused, and which have maximum sentences comparable to those for manslaughter, rape and serious war crimes.²⁸

- 2.34 Mr Emerton proposed that, in the case that it puts forward, the Government address the following set of criteria for the banning of an organisation under the Criminal Code:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
 - the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
 - the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled
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27 Patrick Emerton, submission, p.6.

28 Patrick Emerton, submission, p.7.

out for criminalisation by Australia in ways that go beyond the ordinary criminal law;

- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
 - ⇒ an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
 - ⇒ an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;
 - ⇒ the way in which the concept of 'membership', and particularly 'informal membership', will be applied in the context of the organisation;
 - ⇒ the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.²⁹

- 2.35 The Committee will take careful note of these suggestions as these reviews proceed.
- 2.36 The Committee would like to stress, as it did in the first report, that without a specific Australian link, the new proscription power would appear to be either unnecessary³⁰ or, at best, poorly focused.
- 2.37 The Committee asks that, in future submissions to it explaining the need for a regulation, the Department address in detail the criteria ASIO has used for the selection.

Informing the public

- 2.38 With the exception of the listing of Hizbollah and Hamas, where a newspaper campaign was conducted, the Attorney-General's Department does not publicise a listing beyond a press release issued by the Attorney-General and the placing of information on the Department's and the Attorney's website.

29 Patrick Emerton, submission, pp. 8-9.

30 See the arguments in the first report, Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of the Palestinian Islamic Jihad(PIJ)*, June 2004, pp.18-20.

- 2.39 The Australian Muslim Civil Rights Advocacy Network, in seeking clarification of the criteria used for the listing of organisations, also argued that:

Doing so would help [per]suade any persons considering involvement in the activities of such an organisation of the reasons why membership of such an organisation should be avoided, rather than seeing it as the subjective decision made by the Australian Government.³¹

- 2.40 The Committee believes that there needs to be continuing sensitivity to the concerns and perceptions of community groups on listings and that, given the severity of the penalties involved, more effort needs to be made to inform the public generally, and vulnerable groups in particular, of a listing.

Recommendation 1

The Committee recommends 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

Australia's obligations under the UNSC; the Consolidated List

- 2.41 Mr Joo-Cheong raised issues which suggest possible confusion or lack of focus arising from the dual processes that appear to apply to Australia's consideration of terrorist organisations. The obligations on Australia as a member of the United Nations continue. The United Nations Security Council (UNSC) requires that member states take action against terrorists and terrorist organisations through a targeted sanctions regime. These sanctions include the freezing of assets, a travel ban on identified individuals and an arms embargo. In Australia, the obligations have been implemented through a range of legislation, including the *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*.

31 Australian Muslim Civil Rights Advocacy Network submission p. 2.

- 2.42 United Nations Resolution 1267, adopted on 15 October 1999, obliges all United Nations members to freeze the assets of individuals and entities associated with the Taliban. This obligation was extended to include individuals and entities associated with Al-Qa'ida³². Resolution 1373, adopted on 28 September 2001, requires members to suppress terrorism, including denying safe haven to terrorists and freezing terrorist assets.
- 2.43 The UN's 1267 Committee has developed a list of terrorist organisations to which Resolution 1267 applies. In August 2004, the list comprised one entity and 143 individual names of persons associated with the Taliban and 111 entities and 174 individuals associated with Al Qa'ida. The individuals and entities on the UN 1267 Committee List are automatically incorporated onto a Consolidated List maintained by DFAT under the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*.³³ The United Nations does not maintain a central list of persons and entities for the purpose of Resolution 1373. Instead, under the *Charter of the United Nations Act 1945* and the *Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002*, the Minister for Foreign Affairs may list a person or entity to be included in the Consolidated List maintained by DFAT.³⁴ It is a criminal offence to deal with the assets of, or make assets available to, individuals or entities on the Consolidated List.
- 2.44 The Committee is concerned that the focus on counter-terrorism measures may be dissipated by the existence of 'dual processes': the Consolidated List under the *Charter of the United Nations Act 1945* and the list under the Criminal Code. The complexities and labour involved in maintaining two separate lists of terrorist entities may cause confusion and detract from Australia's concentration in the fight against terrorism.
- 2.45 The Committee is not recommending that all organisations on the Consolidated List be proscribed.³⁵ The Committee would like to see decisions about proscriptions made with greater focus and clarity and with attention to what proscription is capable of achieving in a legal sense.

32 United Nations Resolution 1390, adopted on 16 January 2002.

33 http://www.dfat.gov.au/icat/freezing_terrorist_assets.html

34 http://www.dfat.gov.au/icat/freezing_terrorist_assets.html

35 There is already legislation that applies to organisations on this list which fulfils UNSC obligations and seeks to control individuals and entities associated with terrorism.

- 2.46 It will be necessary to consider the issue of the Consolidated List in greater detail when the Committee reviews the operation, effectiveness and implications of the Criminal Code listing provisions in 2007.
- 2.47 The Committee is grateful for the contributions from the general public on procedural concerns relating to the Criminal Code's proscription power.