

Procedural matters

Consultation with the States and Territories

- 2.1 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'.
- 2.2 The Attorney-General's Department has advised that:

On 17 May 2005 the Attorney-General wrote to the Attorneys-General of the States and Territories advising of the decision to re-list the organisation. These letters were sent by facsimile on 17 May 2005. No comments were received from the Attorneys-General of the States and Territories.
- 2.3 Consultation on these re-listings occurred between the Attorneys-General rather than the Prime Minister and Premiers and Chief Ministers.
- 2.4 At a previous hearing, the Attorney-General's Department advised the Committee that the Premiers of NSW and Western Australia requested that in accordance with the *Inter-Governmental Agreement on Counter-terrorism Laws*, future listings should be raised directly with the Premier. The Prime Minister responded by letter dated 4 April 2005 advising that the process adopted was consistent with the *Inter-Governmental Agreement on Counter-terrorism Laws* and that 'it is more practical administratively in the

case of re-listings to continue the current practice whereby the Commonwealth Attorney-General liaises with his counterparts in the States and Territories.’

2.5 The *Inter-Governmental Agreement on Counter-terrorism Laws* states:

Approval for regulations specifying terrorist organisations must be sought, and responses from other parties must be provided, through the Prime Minister and Premiers and Chief Ministers.¹

2.6 At the hearing on 2 May 2005, officers from the Attorney-General’s Department advised the Committee:

The States and the Commonwealth have a different view about whether it has to be done at head of government level when you are just talking about a re-listing....The federal government takes the view that the agreement is really only talking about fresh listings and the States are suggesting a wider interpretation. We are investigating that. Practically, we think there is some advantage in doing it at the Attorney-General level for re-listings. At the end of the day it is about consultation and probably the more important issue is making sure we consult them expeditiously.²

2.7 In its report the *Review of the listing of seven terrorist organisations*, it was noted that:

The Committee is not sure that it accepts the distinction made by the Attorney-General’s Department between procedures for listings and re-listings. The Committee expects to be advised of the outcome from discussions on this issue with the States and Territories.

2.8 With reference to the Attorney General’s words ‘are *just* talking about a re-listing’ in paragraph 2.6 above, the Committee asked the Attorney-General’s Department if the department gives less weight to the importance of re-listings than to original listings. The Committee noted that this may explain why the Statements of Reasons are very similar to those provided previously for each organisation and do not include much new or updated information. The Attorney-General’s Department informed the Committee that the department approaches re-listings from the

1 Division 3, subclause 3.4(6).

2 Transcript, private hearing 2 May 2005, p. 7.

perspective that the organisations are still active, albeit that in some cases there have been periods of calm, enabling efforts to get a peace process underway.

Consultation with DFAT

- 2.9 The Attorney-General's Department has advised that the Department consulted with DFAT on the re-listing of each organisation. DFAT provided responses by email dated 11 May 2005.
- 2.10 DFAT does not appear to have provided substantive input on the re-listings. For each re-listing the Attorney-General's Department advised 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 re-listing of the organisation by email on 11 May 2005.'
- 2.11 DFAT also provided the Attorney-General's department with brief comments relating to Hizballah External Security Organisation, Hamas Izz al-Din al-Qassam Brigades and the Palestinian Islamic Jihad. In the case of Lashkar-e-Tayyiba no additional comment was provided.
- 2.12 As with previous re-listings, consultation between the Attorney-General's Department and DFAT appears to have been minimal. At the hearing, the Committee asked officers from DFAT why so little information is forthcoming regarding the re-listings and was advised by DFAT that it is the Attorney General's department which provides most of the necessary information. DFAT sees its role as that of making a legal comment on the Statement of Reasons based on geographic factors if there are any. If DFAT sees any dangers to the national interest, then they would advise the Attorney-General's department accordingly.
- 2.13 The Committee asked the Department of Foreign Affairs if it views re-listings as an automatic process. DFAT responded that the department tries to add value to each process whether it is a new listing or a re-listing.

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- 2.14 As noted in previous Committee reports³, the Committee advised that it expects DFAT to provide more detailed advice to the Attorney-General's Department and to the Committee in future listings under the Criminal Code. In particular, the Committee has asked that, in future, DFAT advise whether circumstances have changed since an organisation was originally listed and whether the re-listing would impact on any efforts to resolve a conflict.
- 2.15 The Committee noted that information in the Statement of Reasons for the Hizballah External Security Organisation differs from Jane's information on the Organisation.⁴ The Committee asked the Director-General of ASIO if he was aware of the discrepancy between Jane's information and ASIO's Statement of Reasons. The Director-General advised the Committee that information is gathered from a variety of publicly available sources and ASIO stands by the accuracy of its Statement of Reasons.
- 2.16 There is a further discussion of the information provided in relation to Hizballah in Chapter Three.

Community consultation

- 2.17 In its 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.⁵
- 2.18 In its report on terrorist listings under the Criminal Code, for the *Review of the listing of seven terrorist organisations*, the Committee noted that the letter from the Attorney-General's Department did not state whether any community consultation on the listings had been conducted. However, at the hearing on 2 May 2005 the Attorney-General's Department advised that they were developing a response to the Committee's previous recommendation on community consultation.⁶

3 Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network)*, May 2005, p. 6 and *Review of the listing of seven terrorist organisations*, June 2005, p.20.

4 See Chapter 3, under sub-heading **Hizballah External Security Organisation**

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

6 Transcript, private hearing 2 May 2005, p. 5.

2.19 In his submission, Mr Emerton makes the important point that:

Community consultation in relation to listings is crucial if these are to be seen by those they affect as legitimate exercises of power within the framework of Australia's democracy, and not simply as anti-democratic interferences with civic and political freedom.⁷

2.20 Mr Emerton goes on to say that:

... it is not sufficient that the Attorney-General or ASIO be satisfied that an organisation is connected to political violence, and that the ordinary criminal law of this or some other country is inadequate to respond to that violence. Steps must be taken to ensure that those who will be directly affected by a listing are likewise satisfied of this.

2.21 The Committee looks forward to the implementation of the Committee's recommendation for future listings under the Criminal Code.

The listing provisions

2.22 The Committee will review the operation, effectiveness and implications of the listing provisions in section 102.1 of the Criminal Code in 2007.⁸ However, both submissions from the public raised concerns about the listing provisions which the Committee will note at this stage.

2.23 The Committee appreciates the public submissions made on these listings. They have been useful in the Committee's consideration of the listings. Both public submissions questioned whether the re-listing of the four organisations is about protecting Australia's security interests or about achieving a foreign policy imperative.

2.24 The Public Interest Advocacy Centre (PIAC) noted that:

... on each of the listed organisations, there is no reference to a security threat to Australian interests at home or abroad or any other policy imperative to justify the proscription and continued proscription of the organisations.⁹

7 Mr P. Emerton, Submission No.4, p.13

8 As required under subsection 102.1A(2) of the Criminal Code.

9 Public Interest Advocacy Centre, Submission No.3, p.3

2.25 PIAC suggested that the Attorney-General should be required to explicitly state why he intends to proscribe an organisation as a terrorist organisation, including why proscription of the organisation is a desirable outcome for Australia and its interests.

2.26 Also commenting on the absence of detailed information about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, Mr Emerton stated:

... that an impression is created that the purpose of these listings is primarily a political one, of supporting the foreign policy goal of targeting militant Islamic organisations as part of the so-called 'war on terrorism'¹⁰.

2.27 Mr Emerton pointed out that most of the activities of these organisations listed by ASIO already constitute serious criminal offences under the law of Australia or the relevant foreign jurisdictions, and therefore:

... it seems reasonable to conclude that the enlivening of ASIO's powers of detention and questioning is one of the principal aims of these listings. If this is so then it should be acknowledged, and the case made as to why ordinary methods of criminal investigation and prosecution are inadequate in relation to the crimes of these organisations.¹¹

2.28 ASIO refuted this statement. The Director-General told the Committee that, on the contrary:

[I]t is certainly not our intention and not our policy to simply use powers so that they appear to have been justified by the exercise. If the argument is that we simply do things in order to make it seem to supervisory authorities and so on that we have been using the resources we have then I can assure the committee that that is not the case. As I said right at the very start, we have a very high degree of transparency and accountability within the system to demonstrate to the inspector-general, this committee, the minister, the parliament and so on that we use the resources we are given in a way that is directed at real problems, not simply ones that justify their existence.¹²

10 Mr P. Emerton, Submission No.4, p.15

11 Mr P. Emerton, Submission No.4, p.20

12 Transcript, classified hearing 8 August 2005.