SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON INTELLIGENCE AND SECURITY'S REVIEW OF THE LISTING PROVISIONS OF THE CRIMINAL CODE ACT 1995

This submission argues that the listing regime established in Division 102 of the *Criminal Code* should be repealed. If it is not repealed, then extensive amendment is needed to bring into line with the parameters of legitimacy for a multicultural, pluralist liberal democracy such as Australia.

The legislative operation of the listing regime

Since the passage of the *Anti-Terrorism Act (No 2) 2005* (Cth) an organisation can be listed as a terrorist organisation on any of the following four grounds:

- It is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur);
- It directly or indirectly counsels or urges the doing of a 'terrorist act' (whether or not a terrorist act has occurred or will occur);
- It directly or indirectly provides instruction on the doing of a 'terrorist act' (whether or not a terrorist act has occurred or will occur);
- It directly praises the doing of a 'terrorist act' in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a 'terrorist act' (whether or not a terrorist act has occurred or will occur).[1]

The first of these grounds is identical to the grounds on which an organisation may be proved to be a terrorist organisation, despite the absence of a listing, during a prosecution for an offence under Division 102.[2] It need hardly be pointed out that an organisation can satisfy this ground, or any of the latter three, although it itself engages in no criminal activity and has no terroristic or other criminal purpose.[3]

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[1] *Criminal Code* s 102.1(1), paragraph (b) of the definition of 'terrorist organisation'; s 102.1(1A),(2). The last three of these grounds are, somewhat misleadingly, characterised as the 'advocacy' of terrorism.

[2] *Criminal Code* s 102.1(1), paragraph (a) of the definition of 'terrorist organisation'. As an exception, the offence created by sections 102.5(2) and 102.8 can only be prosecuted in relation to a listed organisation. This will be discussed further below.

[3] To give one example, a publisher of the *Communist Manifesto*, having nothing but scholarly and/or commercial purposes, would appear to indirectly urge the doing of a terrorist act, in virtue of its reproduction of the following famous passage:

> The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble

If an organisation is listed, then it becomes an offence to direct it; to be a member of it; to recruit for it; to train with it; to give funds to or receive funds from it; to provide it with support or resources that would help it to directly or indirectly engage in, prepare, plan, assist in or foster the doing of a terrorist act; or to meet or communicate with its members or directors intending to support it in it existence or expansion.[4] Each of these offences carries a maximum term of imprisonment of 25 years,[5] with the exception of the membership offence (10 years maximum[6]) and the offence of meeting or communicating (3 years maximum[7]).

The listing of an organisation also triggers the possibility of a control order being issued against an individual, on the grounds that s/he has trained with that listed terrorist organisation.[8]

Most of the above offences can be committed, however, even if an organisation has not been listed. (The exception is the offence of meeting or communicating, which can be prosecuted only in relation to a listed organisation.[9] In addition, if the training offence is prosecuted in relation to a listed organisation it takes on a strict liability aspect, in relation to the status of the organisation, that is absent from prosecutions relating to non-listed organisations.[10]) What, then, is the purpose of listing an organisation?

In its evidence to the Security Legislation Review Committee, the Commonwealth Director of Public Prosecutions suggested that there is virtually *no* point to a listing.[11] The argument was that, in order to prove that an accused either knew or was reckless as to the status of an organisation, the prosecution would have to prove either that the accused knew of the regulation under which the organisation had been listed (unlikely, given that few accused are likely to be familiar with the regulations), or else that the accused knew that the organisation satisfied paragraph (a) of the definition of 'terrorist organisation'. Given that something cannot be known if it is not the case, the second alternative would require proving beyond reasonable doubt that the organisation satisfied paragraph (a) of the definition.

If the Commonwealth DPP is correct in its analysis, then the only way in which a listing expands the scope of criminal liability is by triggering section 102.5(2) and 102.8 – the strict

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> at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE!

Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy*, Fontana/Collins, 1984, p 82.

[4] *Criminal Code* ss 102.2, 102.3, 102.4, 102.5, 102.6, 102.7, 102.8.

[5] If the directing, recruiting, funding or support offence is committed with recklessness as to the status of the organisation, rather than knowledge as to that status, then the maximum penalty is 15 years imprisonment: *Criminal Code* ss 102.2(2),102.4 (2), 102.6(2), 102.7(2).

[6] *Criminal Code* s 102.3(1).

[7] *Criminal Code* s 102.8(1),(2).

[8] *Criminal Code* ss 104.2(2)(b), 104.4(1)(c)(ii).

[9] *Criminal Code* s 102.8(1)(b),(2)(g).

[10] *Criminal Code* s 102.5(2),(3).

[11] Commonwealth Director of Public Prosecutions, *Submission 15 to the Security Legislation Review Committee*, pp 9-11; Security Legislation Review Committee, *Transcript of Evidence*, March 7 2006, Sydney, pp 70-3; both available at < http://www.ag.gov.au/www/agd/agd.nsf/Page/Nationalsecurity_ Reviews_SecurityLegislationReviewCommittee_SecurityLegislationReviewCommittee>.

liability training offence, and the offence of meeting or communicating. It follows from this that listing an organisation on any of the last three of the four possible grounds (that is, the 'advocacy' grounds) would have little point, for unless the listing was known to an accused (or they were reckless as to the possibility of it having taken place) the prosecution would have to prove beyond reasonable doubt that the organisation satisfied paragraph (a) of the definition of 'terrorist organisation'.

Even if this analysis is correct, however, it does not follow that a listing is unimportant. A listing would still constitutes a possible ground for a control order, and (as will be argued below) it would still have a significant political effect.

But the DPP's analysis also seems open to question. In particular, an alternative construction of the fault requirements in relation to an offence pertaining to a listed organisation would be as follows:

- Suppose organization *X* has been listed by regulation;
- Then, to prove that *A* knew that he was (for example) a member of a terrorist organization, it would be sufficient to prove (i) that *A* knew he was a member of an organization, and (ii) that A knew that the organization in question was *X*.

This would be consistent with the general doctrine that ignorance of the law is no excuse.[12]

If this alternative analysis, or something like it, is correct, then the effect of a listing is to significantly broaden the scope of criminal liability, as many prosecutions would require only proving that the accused knew the identity of the organisation with which s/he was involved. This would be particularly significant in the case of a listing on one of the 'advocacy' grounds, as an individual might well be involved with such an organisation and not turn his or her mind to the possibility that it was a terrorist organisation, being confident that it was neither directly nor indirectly engaged in, preparing, planning, assisting in or fostering the doing of any terrorist act.

Political consequences of the listing of an organiation

Besides the consequences for liability to criminal prosecution or a control order identified above, listing an organisation also has political consequences.

Each of the grounds for the listing of an organisation involves the concept of a 'terrorist act'. As defined in section 100.1 of the *Criminal Code*, a 'terrorist act' can be virtually any act of politically, religiously or ideologically motivated violence, provided that it is intended

[12] This was re-affirmed by the High Court in Ostrowski v Palmer [2004] HCA 30, although that case concerned the Western Australian *Criminal Code*; the doctrine in relation to regulations is incorporated into the Commonwealth *Criminal Code* by section 9.4.

to intimidate either some government or other, or some section of some public or other.[13] There need be no connection to, let alone any threat to, Australia.[14]

I support the Committee's recommendation that this definition of 'terrorist act' requires amendment so as to exclude conduct that falls under the law regulating armed conflict;[15] but at present no such amendment has been made, and even if it were made there would still remain a very large number of organisations apt to be listed. Yet to date only nineteen organisations have been listed,[16] all but one of them self-identified Islamic organisations. Listing therefore sends a powerful message from the Commonwealth Government, that certain organisations (and, by implication, certain political and/or religious views) are targets for investigation and prosecution, while others (even if they offer equally valid grounds for prosecution under the *Criminal Code*) are not. There is good reason to thing that the Commonwealth Government is motivated in this respect by foreign policy priorities, and particularly the so-called 'war on terrorism'. Under this rubric, certain organisations and outlooks are declared illegitimate, while others (by not being listed) are implicitly tolerated, although from the legislative point of view all are on a par.

This discriminatory deployment of the techniques of the criminal law is inconsistent both with the traditions, and with the necessary underpinnings, of Australian democracy. Australian democracy is, by tradition, a liberal democracy. Liberal democratic governments ought to be neutral as between their citizens' political and religious convictions, provided that these are consistent with the well-being of the democracy; Australian law should not be used to make criminals, by way of executive fiat, of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day.

The listing regime does not satisfy this requirement of political neutrality, and is apt to pick out certain groups (and thus, by implication, certain individual citizens) as targets of intelligence and policing authorities, although they pose no threat to Australia or Australians. Of the organisations currently listed under the *Criminal Code*, the following have no connection to Australia or Australians (according to the ASIO material supporting their listing[17]):

- Abu Sayyaf Group;
- Jamiat ul-Ansar;
- Armed Islamic Group;

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[13] There is an exception for action which is advocacy, protest, dissent or industrial action that is not intended to cause death or harm, nor to endanger life or cause a risk to the health and safety of the public: *Criminal Code* s 101.1(3).

[14] *Criminal Code* s 101.1(1), paragraph (c) (i) of the definition of terrorist act; s 101(4). Furthermore, offences under Division 102 enjoy Category D extended geographical jurisdiction (*Criminal Code* s 102.9), meaning that any such offence can be committed by anyone, anywhere in the world, with no nexus to Australia required.

[15] Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter Terrorism Legislation*, 2006, Recommendation 12.

[16] *Criminal Code Regulations 2002* (Cth), Part 2.

[17] This point has been elaborated in more detail, in relation to ASIO's material, in my earlier submissions to this Committee in the course of its reviews of these various listings.

- Salafist Group for Call and Combat;
- Asbat al-Ansar;
- Islamic Movement of Uzbekistan;
- Jaish-e-Mohammad;
- Lashkar-e Jhangvi;
- Islamic Army of Aden;
- Hizballah's External Security Organisation;
- Palestinian Islamic Jihad;
- HAMAS' Izz al-Din al-Qassam Brigades;
- Kurdistan Workers Party.

Two of the organisations that have been listed have been linked to Australia only insofar as Australian personnel are present as part of the foreign forces in Iraq (Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn Ansar al-Islam).

Of the nineteen listed organisation, only four have been identified as posing a threat to Australia, three by way of express threat and one by way of the prosecution of alleged members within Australia:

- Al-Qa'ida;
- Jemaah Islamiyah;
- Egyptian Islamic Jihad;
- Lashkar-e-Tayyiba.

Even in the case of these four organisations, however, little detailed information has been provided as to the precise threat that they pose to Australia, and no explanation has been offered as to how listing will facilitate a proper response to this threat.[18]

All of this suggests that the Commonwealth Government, in its approach to the listing of organisations, is not being neutral, and that the criminal law is being (ab)used in pursuit of political advantage. This is a retrograde step for any liberal democracy.

Australia is also a pluralist and multicultural society, whose citizens have the most tremendously diverse relationships with, and interests in, the people, places and politics of other countries. While there is no doubt that Australia's democratically elected government has the right to pursue its foreign policy goals in accordance with its conception of the

[18] Again, this point has been elaborated in more detail in my earlier submissions to this Committee in the course of its reviews of these various listings

country's national interest, the criminal law should not be used as a tool to enforce these foreign policy preferences. Discriminatory application of the listings power, as described above, is particularly unjust, as it creates an impression that the government is labelling certain elements of the Australian community, identified by their religious and/or national background, as criminals, and potential threats to the security of Australia and Australians. This undermines the mutual toleration and respect among people of divergent beliefs and backgrounds that are essential underpinnings of a multicultural democracy.

The rhetoric of terrorism in Australian political and public debate – and in particular, the very frequent linking, or even equating, of terrorism with (elements of) Islam[19] – emphasises the discriminatory and politicised way in which the listing regime has been applied. This is particularly so because, of the violent activity that has actually taken place in Australia and that satisfies the *Criminal Code* definition of 'terrorist act', none of it is Islamist violence. The most obvious example is that of the fire bombings by white supremacists of Chinese restaurants in Perth, in the late 1980s and again in 2004.[20] But this activity – this 'homegrown terrorism', this politically-motivated violence that was actually undertaken (as opposed to merely anticipated) in Australia with the intention of intimidating a section of the public – is typically not described using the language of terrorism either by the media or by the authorities.[21] And no white supremacist groups, either Australian or foreign, have been listed under the *Criminal Code*, despite the fact that the connections (direct or indirect) of some such groups to various hate crimes would make them legitimate targets for listing.

The role of ASIO

The role of the Australian Security Intelligence Organisation in the listing process, as documented by this Committee in its various reviews of particular listings, serves only to compound the impression that listing is motivated by political or foreign policy rationales, rather than by the need to ensure the safety of Australia and Australians.

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[19] See, for example, the *Report of the Security Legislation Review Committee*, 2006, which at paragraph 5.8, under the heading 'The nature of terrorism', cites in evident agreement certain remarks by the former Australian Human Rights Commissioner, Dr Sev Ozdowski, that

> contemporary acts of terrorism [are] premised on an entirely unsustainable concept: namely the total subjugation of non-believers to a specific 'religio-political' ideology.

This casual association of terrorism with a certain type of Islam, completely ignores 'terrorist acts' undertaken by such nationalist organisations as the Tamil Tigers or the PLO, or such secular insurrectionary groups as the Shining Path (an organisation listed under the *Charter of the United Nations Act 1945*). It is far from obviously true even as a description of the motivation of such listed Islamic organisations as PIJ or Hamas, whose rhetoric and apparent goals seem to be far more tightly focused on conflict with Israel.

[20] As per the definition in section 100.1 of the *Criminal Code*, these are ideologically-motivated acts of violence that threaten the safety of the public and are intended to intimidate a section of the public. For information on these acts, see <http://www.abc.net.au/wa/news/200402/s1035658.htm>, <http://www.abc.net.au/pm/content/2004/s1157360.htm>, both available on February 12, 2007.

[21] For example, given his characterisation of terrorism in Australia as cited by the Security Legislation Review Committee, it is apparently not regarded as terrorism by the Director-General of ASIO: *Report of the Security Legislation Review Committee*, 2006, para 10.87. The one exception of which I am aware is a reference to these bombings, and a description of them as terrorist acts, by Assistant Commissioner Luke Cornelius of Victoria Police (at a seminar convened by the Castan Centre for Human Rights on August 25, 2006).

It seems that listing takes place at the initiative of the Australian Security Intelligence Organisation.[22] In relation to a number of organisations, ASIO has included in the rationale for recommending a listing that the organisation is hostile to Western nations or interests; [23] in the case of al-Qa'ida and Hizballah, much is also made by ASIO of these organisations' hostility to the United States.[24] To posit a fundamental coincidence of 'Western' interests (which presumably are understood to include Australia's interests) in opposition to some other interests (Islamic? Eastern in general?) is, however, to fall into the language of ideological polemics or lazy journalism; it is not the terminology of serious analysis of international affairs and foreign relations. It does not instil confidence in ASIO's performance of its role under the listings process.

The former Director-General of ASIO, in a hearing before this Committee's predecessr held on February 1, 2005, stated that in selecting organisations for listing ASIO takes account of the following factors:

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by like-minded countries;
- whether or not the organisation is engaged in a peace or mediation process.[25]

As part of a subsequent inquiry, on May 2, 2005 ASIO informed the Committee that these factors

> are taken as a whole; it is not a sort of mechanical weighting, that something is worth two points and something is worth three points. It is a judgement across those factors, and some factors are more relevant to groups than others.[26]

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[22] As is borne out by the description of the process of listing by this Committee and its predecessor in many reviews of the listings to date. The most detailed account of the role of ASIO in the listing process is given in the discussion of the listing of the PKK: *Review of the listing of the Kurdistan Workers' Party*, April 2006, paragraphs 1.26-1.28.

[23] See the materials prepared by ASIO in relation to the listing of Jemaah Islamiyah, Asbat al-Ansar, Islamic Movement of Uzbekistan, Egyptian Islamic Jihad, Hizballah's External Security Organisation and HAMAS' Izz al-Din al-Qassam Brigades, cited in this Committee and its predecessor's many reviews of the listings to date.

[24] See the material prepared by ASIO and cited in this Committee's predecessor's review of that listing: *Review of the listing of six terrorist organisations*, 2005. This theme was less prominent in the material supporting the re-listing of al-Qa'ida: *Review of the relisting of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations*, 2006.

[25] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, 2005, para 2.3.

When one considers this remark, and then attends to the organisations which have been listed, it is difficult to see that these factors are being applied in any systematic fashion at all. In particular, as has already been pointed out, the questions of a link to Australia, or a threat to Australian interests, seems to be given rather little consideration in most cases.[27]

Part of the difficulty in the application of the factors identified by ASIO may result from the fact that their meaning is not always clear. For example, what is meant by 'engagement in terrorism'? If 'terrorism' in this factor has the meaning of 'terrorist act' as that phrase is defined by the *Criminal Code*, then the factor gives no guidance beyond simply restating the statutory requirement for listing. But if ASIO understands 'terrorism' in this context to have some more narrow meaning – for example, engaging in illegitimate attacks upon civilians – then it is incumbent upon ASIO to make this meaning clear, and to explain how it is being applied. This narrower meaning could then be incorporated into the statutory definition.

What is meant by the 'ideology' of an organisation. Does this refer to the political or religious outlook of its members? Or, given the coupling of ideology with links to other groups, does 'ideology' mean the organisation's conception of itself as a player in the geo-political arena? Until the meaning of this factor is made clear, it is impossible to analyse the way in which it is being applied. If 'ideology' refers to political outlook, then a further question is raised: what sorts of ideology does ASIO regard as illegitimate? After all, it is not a crime, in Australia, to hold any particular ideological view. Nor is an offence, under Australian law, for foreigners to advocate, or even to seek to overthrow, the government of another country.[28]

Presumably, given that the threat posed by the organisation to Australia is listed by ASIO as a separate factor, ASIO does not limit its consideration of ideology to the question of opposition to the Australian state or the Australian people. Some other standard is being applied. In a democracy, it must always be a matter of concern when a necessarily clandestine security agency is given a significant degree of power in determining which political outlooks are legitimate, and which are not, and are liable to lead to criminal prosecution. A democratic culture cannot thrive under such conditions. If only certain ideologies are regarded as criminal by those authorities who actually apply the *Criminal Code*, this could be made explicit, and incorporated into the statutory definition. Of course, to do so would be to concede that the listing regime, as currently operating, is inconsistent with liberal democratic traditions.

To the extent that the factors used by ASIO are clear, they seem to emphasise foreign policy rather than domestic considerations. For example, the concept of 'posing a threat to

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[26] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, 2005, para 2.4.

[27] The Committee has noted this itself in several of its reports: *Review of the listing of six terrorist organisations*, 2005, paras 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, 2005, paras 2.24, 2.28; *Review of the listing of seven terrorist organisations*, 2005, paras 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations*, 2005, paras 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89

[28] The *Crimes (Foreign Incursions and Recruitment) Act 1978* only applies to Australians, or those who have been present in Australia: s 6(2).

Australian interests' is most naturally interpreted in as a foreign-policy concept.[29] Likewise, the proscription of an organisation by the United Nations, the proscription of an organisation by like-minded countries (which is itself a concept belonging to foreign policy), and the engagement of the organisation in a peace process, are all primarily foreign policy matters. Furthermore, this factor pays no attention to the quite different implications of listing within the framework of Australian law.[30] It also does not address the issue of why an organisation should be listed under the *Criminal Code* when it has already been listed under the *Charter of the United Nations Act 1945*, freezing its assets.

ASIO is not involved in the listing process only as an initiator. Given that ASIO is one of the principal agencies investigating politically motivated violence in Australia,[31] listing is plausibly interpreted as an indication of ASIO's investigative priorities. This is a further important consequence of any decision to list an organisation. Offences under Part 5.3 of the *Criminal Code*, which includes Division 102, also trigger ASIO's special questioning and detention powers.[32] There is no guarantee that ASIO accepts the correctness of the DPP's analysis of the interaction between listing and criminal liability; if it were to accept something like the alternative analysis provided above, then listing would also act as a trigger for the possibility of ASIO using these special powers.

Conclusion

I therefore conclude that the listing regime under Division 102 of the *Criminal Code*:

- Has the potential to make criminals of those who have no criminal intention or purposes;
- Permits and even encourages the politicised application of the criminal law;
- Is discriminatory both in potential and in fact;
- Gives excessive power to ASIO, a clandestine security agency, to declare certain political view illegitimate, and to act upon those views in the exercise of its extraordinary powers of questioning and detention.

It should therefore be repealed.

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[29] The Committee's predecessor noted the vagueness of this factor in its *Review of the listing of six terrorist organisations*, 2005, para 2.29.

[30] Acording to the Committee's predecessor, these implications are far more serious than the implications of a ban in the United States: *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, 2004, para 2.4.

[31] The functions of ASIO include obtaining, correlating and evaluating intelligence relevant to security; security is defined as including the protection of Australia from politically motivated violence, which in turn is defined to include offences (even non-violent ones) under Part 5.3 of the *Criminal Code* (*Australian Security Intelligence Act 1979* (Cth), s4, definition of 'terrorism offence', paragraph (ba) of the definition of 'politically motivated violence, paragraph (a)(i) of the definition of 'security'; s 17(1)(a).

[32] *Australian Security Intelligence Act 1979* (Cth), ss 34D(4), 34E(1)(b), together with the definition of 'terrorism offence' in s 4.

If the regime is to be retained, then I suggest the following criteria which, at a minimum, ought to play a role in any decision taken by the Australian government to ban an organisation under section 102.1 of the *Criminal Code*, and against which the merits of any such listing could thereby be tested[33]

The first set of criteria is intended to ensure that the listing of an organisation is warranted on the basis of a genuine need to prevent criminal conduct, and is not merely an exercise in political or foreign policy symbolism, and that better grounds are given for criminalising what would otherwise be lawful conduct,[34] than simply its inconsistency with the government's own foreign policy goals. It would require that a listing be based on evidence of:

- The serious nature and extent of the political violence engaged in, planned by, assisted or fostered by the organisation;
- The serious nature and extent of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- The existence of reasons for believing that an effective response to such political violence, and those who are connected to it via the organisation, requires singling out for criminalisation *by Australian la*w in ways that go beyond the ordinary criminal law;

The third of these third point in particular draws attention to the fact that political violence, and acts preparatory to such violence, are already criminal offences in Australia, and in most legal systems world-wide; there is therefore a significant onus on the government to explain why these existing laws are inadequate and why the extraordinary step of listing is therefore required. It emphasises 'Australian law' because, as this Committee's predecessor has noted, it is inevitable that the operation of Australian criminal law will be primarily confined to Australia.[35] Therefore, to give foremost attention to the criminal law aspects of listing, is to give foremost attention to its domestic impact.

In announcing the relisting of a number of organisations in 2005, the Attorney-General made the following remark:

> Australia's law enforcement agencies will continue to pursue those who commit terrorist offences to the letter of the law.[36]

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[33] These are based on the criteria for evaluating a listing that I have suggested in my previous submissions to this Committee and its predecessor; they were noted by this Committee in its *Review of the listing of the Kurdistan Workers' Party*, 2006, paras 2.7-2.8, and by the Parliamentary Joint Committee on ASIO, ASIS and DSD in its *Review of the listing of six terrorist organisations*, 2005, paras 2.32-2.35; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, 2005, para 2.7; *Review of the listing of seven terrorist organisations*, 2005, para 2.25.

[34] In general, it is not a criminal act to be a member of an organisation. Nor is it a criminal act to direct, or provide support to, or train with, or recruit for, an organisation.

[35] *Review of the listing of six terrorist organisations*, 2005, para 2.28; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, 2005, para 2.27.

[36] Attorney-General The Hon Philip Ruddock MP, *Government Re-Lists Four Terrorist Organisations*, News Release, May 25, 2005.

On its face, this remark is simply untrue. Given the breadth of the concept of 'terrorist act' in Australian law, and the even greater range of conduct that constitutes 'terrorist offences' under the *Criminal Code*, it is obvious to anyone who reflects on it that not all these offences are being pursued. It would be more productive, and more consistent with democratic imperatives and the rule of law, for both the government and the legislation to acknowledge that only a small group of organisations is being singled out for listing and for investigation, and to set about explaining and justifying that selection to those affected. The above criteria are suggested as one way of bringing about this result.

The second set of criteria would also contribute to this sort of explanation. They would require the following sorts of questions to be answered prior to the listing of an organisation:

- What degree of support does the organisation enjoy in and from Australians?
- What degree of opposition to it exists in Australia?
- How will the listing affect Australians?
- Is listing the organisation likely to lead to political or communal tension within Australia?
- By listing the organisation, who is being made a criminal?
- Will some Australian's experience the listing of the organisation as an affront to their civic and political liberties?

These are questions to which ASIO and the Attorney-General's Department should be able to provide answers. Judging from the reports into listings undertaken by this Committee and its predecessor, to date they have not done so. The purpose of requiring answers to these questions is to enable the community to be satisfied that the consequences of listing have been thought through by the government. By making these matters clear in a public fashion, confidence can be better maintained across the Australian community that the power of listing is being exercised in a non-discriminatory manner, to keep Australia safe, and is not being used simply to target political ideas to which the government of the day, or ASIO itself, is opposed.

There has been some discussion[37] as to whether listing should be an executive or judicial process. Even if it were to become a judicial process, it would still remain executive-dominated, as it would be the government which would choose to seek the listing of a particular organisation, and which would lead the evidence in favour of a listing. There is obviously no need for a judicial process to ensure that the current criteria for listing are met: there is no doubt that all the listed organisations have the requisite link to 'terrorist acts'. If the criteria above were adopted, however, a judicial process would perhaps provide a better forum for insuring that they were satisfied, and in particular that the relevant questions were properly answered. On the other hand, a parliamentary forum, such as review by this Committee, in some ways provides a better opportunity for political realities to be canvassed. Whichever approach is adopted, the process ought to be amended such that review of the

[37] For example, in the *Report of the Security Legislation Review Committee*, 2006.

adequacy of the case for a listing takes place *before* a listing occurs, rather than subsequent to a listing (as is currently the case[38]).

In addition to holding listing to tighter criteria, of the sort canvassed above, the Attorney-General should be obliged to provide information to Australians when an organisation is listed, indicating what the government believes the to be the likely impact of the listing on Australia and Australians. Relevant information in such a statement would include, but need not be 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.

Such a statement would enable Australians to understand clearly what the government understands the consequences of listing to be, so that they can assess these consequences against their civil and political rights, including their rights to the security of themselves and their families, and so that, where necessary, they can change their behaviour to bring it into compliance with the law. (It is a basic requirement of the rule of law that the law be able to be known by those to whom it applies.) The point about the meaning of 'membership' and 'informal membership' in the context of a given organisation is particularly important, as the concept of membership is crucial not only for the membership offence[39] but also the association offence[40] – the two offences that seem most likely to have the widest application once an organisation has been listed.

Furthermore, ASIO should be obliged to provide a statement indicate the extent to which it intends to take advantage of the listing of an organisation to use its questioning and detention powers to gather intelligence. There are three important reasons for seeking this information from ASIO. First, it is important these extraordinary powers not be allowed to corrupt the culture of ASIO as an organisation which is sympathetic to, and not hostile to, the values of democracy, nor to lead it into the mentality of being a secret police. Second, it is important that the Australian community be able to retain confidence in ASIO. This requires that ASIO be open about the general nature of its intentions with respect to the exercise of such powers, so that they are not experienced by Australians an attack upon their civil and political liberties. Third, as noted above, ASIO plays a significant role in any decision to ban an organisation, and is also an organisation whose scope of operation is increased by any decision to list an organisation. As a result, there is inevitably the possibility of it appearing to be the case that ASIO supports the banning of an organisation not because it believes that involvement with that organisation ought genuinely to be criminalised, but because it believes that it can further its own operations by increasing the scope of its power to gather intelligence through compulsory questioning and/or detention. One way of dispelling this

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[38] *Criminal Code* s 102.1A.

[39] *Criminal Code* s 102.3.

[40] *Criminal Code* s 102.8.

possible adverse perception of ASIO's motives is for it to be clear from the beginning as to the extent to which it intends to take advantage of the banning of an organisation.

The call for such openness on ASIO's part need not be inconsistent with the an acknowledgement that, to some extent, the success of ASIO operations is dependent upon their secrecy. In a democracy, this need for secrecy cannot always be given the highest priority: other values, including those of open political debate, must come first. Alternatively, provision could be made for this statement to be made to this Committee, which is quite accustomed to the taking of confidential evidence from ASIO, as part of its role in reviewing any decision to list an organisation.

Finally, any decision to list an organisation under the *Criminal Code* ought to be proceeded by, and followed by, community consultation. Although this Committee, as a result of its review work, has had some degree of success in encouraging the Attorney-General's Department to take more seriously its obligations of consulting with other branches of the Commonwealth Government, and with State Governments, in relation to the listing of organisations under the *Criminal Code,*[41] its recommendation that community consultation take place does not seem to have been taken up.[42] Community consultation would also go some way towards meeting the issues of natural justice raised by the Security Legislation Review Committee.[43]

One important purpose of a process of community consultation would be to explain (on the assumption that an explanation is available) why the targeting of particular groups is not in fact discriminatory, and is consistent with the imperatives of criminal law enforcement in Australia. This sort of consultation in relation to listings is crucial if these are to be seen by those they affect as the legitimate exercise of power within the framework of Australia's democracy, and not simply as anti-democratic interferences with civic and political freedom. To relate this point back to the criteria for listing that were argued for above:

- In relation to the first set of criteria, 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;

- In relation to the second set of criteria, the most obvious way for the government to develop an understanding of the impact upon Australians of the listing of an organisation is to talk to them about it.

Consultation with the community would also give the government important information relevant to the decision to list. After all, the greater the number of Australians who are involved with an organisation, or whose friends, associates or family are involved, the greater will be the impact upon Australian citizens, and Australian families, and Australian communities, of any decision to list the organisation. Furthermore, the greater the number of Australians who are involved with, or who support, an organisation, the more politically

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[41] *Review of the relisting of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations,* 2006, paras 1.10-11.

[42] *Review of the relisting of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations,* 2006, paras 1.13-14.

[43] *Report of the Security Legislation Review Committee*, 2006, paras 8.24-8.30.

controversial becomes the judgement that the organisation poses a threat to Australia. It has become almost trite in the context of discussions of terrorism to cite the examples of the African National Congress or of Fretilin. Nevertheless, these example are powerful reminders that political realities can change: what was condemned as terrorist violence by one government may come to be lauded as liberation by a successor government. If a large number of Australians change their minds about the merit of a foreign organisation's cause, it becomes very difficult to sustain a judgement that it is nevertheless in Australia's interests to list that organisation.

It is unhelpful to assume that it is obvious to all Australians that the activities of a listed organisation are beyond the pale, such that involvement with such an organisation is obviously wrong and deserving of criminalisation. Unfortunately, something like this attitude can be detected in the Attorney-General's press release accompanying the listing of the PKK:

> The Government will not tolerate involvement with groups or activities that threaten the safety and security of Australia, and our law enforcement agencies will continue to pursue relentlessly those who commit terrorist offences.[44]

Whatever its own political convictions, a government in a liberal democracy like Australia has a special duty to preserve the integrity of that liberal democracy, including the freedom of political outlook and political dissent that characterises democratic life. The listing of an organisation makes criminal the political activities of some, and impacts more diffusely on the political life of many more. If no serious attempt is made to justify to those people the singling out of their political commitments for targeting by the criminal law, they are likely to experience a listing as nothing more than an anti-democratic attempt to stifle their political freedom. This is not good for the health of Australian democracy.

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[44] 'PKK listed as terrorist organisation', 15 December 2005, available at <http://www.ag.gov.au/agd/www/ministerruddockhome.nsf/page/media_releases_2005_fourth_quarter_15_december_2005_-_pkk_listed_as_terrorist_organisation_-_2382005>.