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Ms Margaret Swieringa
Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

29 July 2005

Dear Ms Swieringa

Submission in relation to the listing of four terrorist organisations under the *Criminal Code*

I would like to thank the Parliamentary Joint Committee on ASIO, ASIS and DSD ('the Committee') for the opportunity to make a submission in relation to the recent re-listing of four organisations as terrorist organisations under the *Criminal Code*. My submission reiterates many of the general points raised in my submission to the Committee's earlier listings inquiries, relating in particular to the proper grounds of exercise of the proscription power under section 102.1, and to the Committee's exercise of its power of review under section 102.1A(1), of the *Criminal Code*. It then goes on to comment on the individual listings under review by the Committee.

Should the Committee have any queries, please do no hesitate to contact me.

Yours sincerely,

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0. INTRODUCTION

Like this Committee's earlier inquiries into the listing of organisations as terrorist organisations, this inquiry raises three principal matters for consideration:

- On what grounds ought the proscription power under the section 102.1 of the *Criminal Code* to be exercised?
- If the power is to be exercised, what process ought to be followed in relation to its exercise?
- With respect to the particular listings under review, in light of the answer to the first two questions, ought the listing to be supported?

The Committee has noted in its reports that the answers to the first two of these questions cannot simply be read from the text of the *Criminal Code*.[1] As I will explain below, and as I have explained in submissions to earlier listings inquiries, the grounds on which organisations may be listed are so broad that there must be hundreds or thousands of organisations in the world eligible to be listed. Nevertheless, to date only eighteen have been listed.[2] This suggests that grounds more narrow than the statutory grounds are being applied in determining whether or not to list an organisation. The principal concern of this submission is that the government once again has failed to clearly articulate the grounds of proscription, leaving open the inference that this invocation of criminal law machinery is principally in the service of foreign policy goals, rather than a genuine interest in the application of domestic criminal law processes.

As I have stressed in my earlier submissions, so I wish to stress in this one: this submission is not written with any intention of supporting the activities of the organisations whose status is under review. Rather, it is written from the point of view of someone who believes that the interaction between political freedom and the

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[1] See, for example, this Committee's *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.1-2.5, 2.8, 2.23.

criminal law in a democracy must be regarded as a very delicate matter. Governments in a democracy of course have the right to pursue their foreign policy goals. This right results from their successful election in a democratic contest. But as liberal theorists since J S Mill have noted, in a democracy the criminal law ought not to be used simply as a tool for enforcing political preferences.[3] This must be particularly true where the political preferences are foreign policy ones, and where the democracy in question is Australia, a multi-cultural community whose citizens have the most tremendous and diverse sorts of relationship with, and interests in, the people, places and politics of other countries.

Unfortunately, as I will argue in the rest of this submission, the grounds for and process of listing these four organisations do not seem to be consistent with these liberal ideals.

1. THE GROUNDS FOR THE EXERCISE OF THE PROSCRIPTION POWER UNDER THE *CRIMINAL CODE*

1.1 Breadth of the definition of 'terrorist organisation' under the *Criminal Code*

As has been observed in many submissions to the Committee, including in my submission to this year's earlier listings inquiries, the definition of 'terrorist act' under the section 100.1 of the *Criminal Code* is extremely broad. It includes any action or threat of action where the following four criteria are met:

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;

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[2] Sections 4A to 4S of the *Criminal Code Regulations 2002*.

[3]

- the action does, or the threatened action would:
    - cause serious physical harm, or death, to a person; or,
    - endanger the life of a person other then the one taking the action; or,
    - create a serious risk to the health and safety of the public, or of a section of the public; or,
    - cause serious damage to property; or,
    - destroy, or seriously interfere with or disrupt, an electronic system;
- the action is, or the threatened action would be:
    - action that is not advocacy, protest, dissent or industrial action; or,
    - intended to cause either serious physical harm, or death, to a person; or,
    - intended to endanger the life of a person other then the one taking the action; or,
    - intended to create a serious risk to the health and safety of the public, or of a section of the public.

This definition includes virtually all actual, attempted or threatened political violence, anywhere in the world, whether undertaken by a government or by private individuals, whether undertaken in support of or in opposition to democracy, whether undertaken aggressively or defensively, and whether undertaken with or without justification.

Before an organisation can be banned pursuant to paragraph (b) of section 102.1, subsection (2) requires that the Minister

> be satisfied on reasonable grounds that the organisation is 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).

Given the breadth of the definition of 'terrorist act', and given the breadth of the concepts of 'direct or indirect assisting in' and 'direct and indirect fostering of' such acts, an extremely wide range of groups is liable to be banned under Australian law.[4]

1.2 The consequences of proscription under the *Criminal Code*

Once an organisation has been listed, virtually any sort of involvement with the organisation, by anyone, anywhere in the world, becomes a serious criminal offence.[5] With the possible exception of section 102.7 of the *Criminal Code*,[6] none of these offences requires as an element of the offence that the offender have any terrorist intention, or that his or her involvement have any connection to terrorist acts.

In addition, these offences of involvement with a listed organisation act as triggers for further elements of Australian law. Thus, those arrested for such offences are liable to a greater-than-usual period of detention without trial;[7] those charged with such offences have a reduced right to be remanded on bail;[8] and those convicted of such offences are subject to minimum non-parole periods.[9] Also, where there are reasonable grounds for believing that detaining and/or questioning someone will substantially assist the collection of intelligence that is important in relation to such an offence, and that other methods of collecting that intelligence would be ineffective, then that person is liable to be detained and/or questioned by ASIO – whether or not

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[4] For further discussion and examples, see Patrick Emerton, *Submission No 12 to the Inquiry into the Listing of Six Terrorist Organisations*, pp 3-5.

[5] *Criminal Code* sections 102.2-102.8. It should be noted that section 102.5 places an evidential burden on the accused to adduce evidence as to his or her innocent state of mind, if he or she is to escape conviction for engaging in training with a banned organisation.

[6] I say 'possible exception' because, although section 102.7 does require that, if the offence is to be committed, then the support to the organisation must help it engaged in terrorism, the grammar of the section does not make it clear whether this assistance be within the scope of the accused's intention.

[7] *Crimes Act 1914* sections 23CA, 23CB, 23DA.

[8] *Crimes Act 1914* section 15AA

[9] *Crimes Act 1914* section 19AG.

they are themselves suspected of engaging in any violation of Australian or other law.[10]

Thus, to list 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. One of these offences – that of training with a banned organisation – places an evidential burden on the accused to lead evidence of his or her innocent state of mind. All of these offences are subject to departures from the ordinary rules relating to pre-trial, remand and post-conviction detention. And all act as triggers for an extra-judicial process of interrogation and detention by ASIO.

To list an organisation is therefore not merely symbolic. It is a serious step, with serious consequences for the application of Australian criminal law. For this reason, an organisation ought not to be listed simply to make a political point. It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. In a democracy, political controversies are to be resolved through political activity, not through the application of the criminal law by way of executive fiat.

1.3 The government's stated grounds for the listing of organisations

In the context of an earlier listing's inquiry by this Committee, the Attorney-General's Department stated that

> It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.[11]

However, a moment's though will indicate that only the tiniest fraction of organisations satisfying this description have been listed under the *Criminal Code*. The most obvious exceptions are all the governments of the world who, through their

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[10] *Australian Security Intelligence Organisation Act 1979* sections 34C, 34D.

military expenditure, preparation and activity are indirectly preparing for the commission of acts of political violence, and all those arms and explosives manufacturers who are likewise directly and indirectly assisting such acts. But even if some would consider as absurd the listing of such organisations – and it again it must be emphasised that such a judgement of absurdity would have no basis in the legislation, which encompasses all such activity and all such organisations – the disparity between the listings under the *Criminal Code* and the listings under the *Charter of the United Nations Act 1945* indicates that some narrower criteria for listing is being applied.

The former Director-General of ASIO, in a hearing before the Committee on February 1, 2005, stated that in selecting organisations for proscription 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.[12]

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

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[11] Attorney-General's Department, *Submission No 7 to the Committee's Inquiry into the listing of six terrorist organisations*, p 1.

[12] *Review of the listing of six terrorist organisations* (2005) at 2.3.

> 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.[13]

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, the questions of a link to Australia, or a threat to Australian interests, seems to be given very little consideration in most cases.

Part of the difficulty in the application of these factors may result from the fact that the meaning of some of them is not entirely 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 very little guidance beyond simply restating the statutory requirement for proscription. 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.

Again, 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? 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.

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[13] *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.4.

Furthermore, 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 Australian interests' is most naturally interpreted in as a foreign-policy concept.[14] 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.

Again, I should re-iterate that this submission does not wish to question the prerogative of a democratically elected government to run its foreign policy in accordance with its conception of the country's national interest. But the criminal law should not be used as a tool to enforce these foreign policy preferences. Better grounds must be given for criminalising what would otherwise be lawful conduct, although conduct inconsistent with the government's own foreign policy goals.

1.4 Sound criteria for proscription under the *Criminal Code*

To list an organisation under the *Criminal Code* is first and foremost to criminalise conduct that otherwise would be lawful. It is this impact of proscription that therefore must be given the foremost consideration. As the Committee has noted, it is inevitable that the operation of Australian criminal law will be primarily confined to Australia.[15] Therefore, to give foremost attention to the criminal law aspects of proscription, is to give foremost attention to its domestic impact.

It is obvious that, 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 – the real legal impact, of the sort identified above – upon Australian citizens, and Australian families, and Australian communities, of any decision to ban the organisation. This is therefore a significant factor to be taken into account. By

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[14] The Committee noted the vagueness of this factor in its *Review of the listing of six terrorist organisations* (2005) at 2.29.

[15] *Review of the listing of six terrorist organisations* (2005) at 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) at 2.27.

banning the organisation, who is being made a criminal? How will this affect Australians? These are questions to which ASIO and the Attorney-General's Department should be able to provide answers. Judging from the Committee's reports, to date they have not done so.

Furthermore, the greater the number of Australians who are involved with, or who support, an organisation, the more politically 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 proscribe that organisation.

In the context of the listing of an organisation, then, it becomes relevant to ask such questions as how many Australian's support the organisation? How many are opposed to it? Is banning the organisation likely to lead to political or communal tension within Australia? Will some Australian's experience it as an affront to their civic and political liberties? Again, there is no evidence that these questions are being considered in a serious way by the government.

It is with these sorts of questions in mind that I reiterate the following criteria suggested in my previous submissions, and noted by the Committee in its reports.[16] At a minimum, any decision taken by the Australian government to ban an organisation under section 102.1 of the *Criminal Code* ought to indicate:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;

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[16] *Review of the listing of six terrorist organisations* (2005) at 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) at 2.7.

- 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 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.

The first three points are intended to enable the Committee to be satisfied that the proscription of the organisation in question 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. It is only if this is made clear in a public fashion that confidence can be maintained across the Australian community that the power of proscription is being exercised in a non-discriminatory manner, and is not being used simply to target political ideas to which the government of the day, or ASIO itself, is opposed. The 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 of justification on the

government to explain why these existing laws are inadequate and why the extraordinary step of proscription is therefore required.

If the Committee is not satisfied in relation to these matters, then it ought to recommend to the Parliament that the listing of the organisation be disallowed.

The various elements of the last point are intended to enable the Committee to be satisfied that the consequences of proscription have been thought through by the government. It is also important that Australians be able to understand clearly what the government understands the consequences of listing to be, 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 (*Criminal Code* section 102.3) but also the association offence (*Criminal Code* section 102.8) – the two offences that seem most likely to have the widest application once an organisation has been listed. Again, if the Committee is not satisfied that the government has had regard to the likely consequences of the listing, or if the Committee is not satisfied that these consequences are consistent with the civil and political rights of Australians, including their rights to the security of themselves and their families, then the Committee ought to recommend disallowance.

There are three important reasons for seeking information from ASIO as to its intentions in relation to the issuing of compulsory questioning and detention warrants consequent upon a listing. 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, ASIO plays a significant role in any decision to ban an organisation.[17] ASIO is also an organisation whose scope of operation is increased by any decision to proscribe (in virtue of the enlivenment of its questioning and detention powers by the suspicion of the commission of an offence under Division 102 of the *Criminal Code*). 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 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; in a democracy, other values, including those of open political debate, must come first. In any even, this Committee is quite accustomed to the taking of confidential evidence from ASIO. Indeed, part of the Committee's role is to represent the interests of the Australian people in dealing with security and intelligence agencies whose business, of necessity, cannot always be made fully public. Thus, even where full public disclosure by ASIO of its intentions would be self-defeating, there is nothing to preclude the Committee from seeking the relevant information and assurances from ASIO, as part of its role in reviewing any decision to proscribe an organisation.

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[17] *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) at 2.1, 2.2, 2.9, 3.11, 3.13-3.16; *Review of the listing of six terrorist organisations* (2005) at 1.11-1.12, 2.4-2.5, 2.23-2.25, 3.8-3.9, 3.15, 3.20, 3.26, 3.31, 3.35, 3.40, 3.48-3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.9, 2.3, 2.19, 2.33.

2. THE PROCESS FOR THE EXERCISE OF THE PROSCRIPTION POWER UNDER THE *CRIMINAL CODE*

As a result of its earlier review work, this Committee appears to have had a 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*.[18] However, the Committee's recommendation that community consultation take place in relation to listings[19] does not seem to have been taken up to date.[20]

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. To relate this point back to the grounds for listing that were argued for above: 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. Of course, this sort of consultation with the community would be a natural consequence of applying the fourth criterion for listing set out above: for the most natural 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.

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 these most recent listings:

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[18] *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.10-1.18.

[19] *Review of the listing of six terrorist organisations* (2005) at 2.38 to 2.40 and Recommendation 1.

[20] *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 1.19-1.21.

> The re-listing [of these four organisations] confirms the Government's commitment to ensuring that involvement in these organisations will not be tolerated.[21]

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.

A further remark by the Attorney-General is also unhelpful. In the same press release, he states that

> Australia's law enforcement agencies will continue to pursue those who commit terrorist offences to the letter of the law.[22]

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. For example, as mentioned earlier, all foreign soldiers seem to be training with organisations that are indirectly fostering political violence (that is, they belong to armies), and therefore are committing terrorist offences.[23] But it is obvious that in most cases they will neither be arrested, nor charged, nor prosecuted by Australian authorities even if the opportunity arises.

It would be more productive 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.

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

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

[23] Australian soldiers are protected by the defence of authority under Commonwealth law: *Criminal Code* s 10.5.

3. CONSIDERATION OF THE FOUR LISTED ORGANISATIONS

Having identified criteria by which the Committee ought to assess the adequacy of a government decision to list an organisation, and to decide whether or not to recommend disallowance of the listing of an organisation, and having discussed the process by which a listing ought to be undertaken, I will now consider the particular listings currently under review by the Committee.

It is worth noting that all the groups to be re-listed have also been banned under the *Charter of the United Nations 1945*. This makes it a serious offence to deal with the assets of these organisations, to finance them, or otherwise to make assets available to them. However, none of the material provided by the government canvasses this existing proscription, nor offers any reason for going beyond such proscription by the far more significant step of listing the organisation under the *Criminal Code*. Nor does the government's material explain why existing criminal law provisions are not adequate to the task of investigating and prosecuting political violence.

In addition, all the listed groups are self-identified Islamic groups (as, indeed, are all of the other organisations that have been proscribed under the *Criminal Code*). In the absence of more detailed information being provided about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, 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'. The merits of such a foreign policy goal obviously fall outside the purview of the Committee's inquiry, and therefore of this submission. But it is within the Committee's purview to insist, for the reasons given above, that such foreign policy goals do not provide an adequate basis for the banning of organisations.

This consistent targeting of Islamic and only Islamic groups can easily create a perception of discriminatory application of the power to list organisations. This is particularly so when one notes that activity undertaken in Australia by non-Muslims, which satisfies the *Criminal Code* definition of terrorism, is typically not described in

that fashion either by the media or the authorities (for example, hate crimes undertaken by white supremacist groups). One 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.

The rest of this submission will consider the reasons given for the listing of each organisation, before stating some general conclusions.

3.1 Hizballah's External Security Organisation

The material presented by the government to justify the listing of this organisation raises a number of matters concerning the exercise of the proscription powers under the *Criminal Code*.

The first of these that I wish to mention is one that I have canvassed in earlier submissions to this Committee's listings inquiries: namely, the reference to an organisation's desire to remove 'Western' influences from a region, as if this were a self-explanatory grounds for listing an organisation. 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 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. Given the multi-cultural character of the Australian polity, and the diverse cultural and political sympathies of Australian's, this sort of language is of little use in stating a widely-acceptable case for the listing of an organisation. It is quite likely to be experienced as alienating by precisely those whom it should be trying to address.

The second matter is also one that I have raised in earlier submissions. That Hizballah has as its goal the creation of an Islamic state in Lebanon is not grounds for proscription. There may be political parties in Australia who have as their goal the creation of a Christian state in this country; they are not for that reason banned from politics. Likewise, that Hizballah is committed to armed resistance to Israel does not

on its own seem to justify proscription. It is not, in general, an offence under Australian law to seek to overthrow another government;[24] furthermore, according to the government case against Hizballah, the aim of the organisation is the 'liberation' of the Palestinian territories and of Jerusalem, rather than the overthrow of Israel as such.

Third, the point is made that the organisation retains the capability to undertake significant terrorist attacks at short notice. This is true of many organisations, including (as I have noted already in this submission) the majority of the world's armed forces. On its own it cannot be grounds for proscription.

What is missing from the case against Hizballah's ESO is an explanation of why, out of all the organisations in the world that have engaged in or attempted bomb attacks against civilians in foreign countries, it has been singled out by the Australian authorities for proscription (it is obvious that the perpetrators of Hizballah's overseas crimes are not going to be prosecuted under Australian law). Reference is made to the attitude of the FBI, and to Hizballah's hostility to the United States; but no reference is made to Australia, to Australians or to their interests. Likewise, reference is made to the influence of the Iranian government upon Hizballah; but no explanation is given of why this should be grounds for proscription.

An additional complexity is added to this listing, by the fact that what is being proscribed is one wing of a multi-faceted political, military and social organisation. Given the extreme breadth of the concept of membership under the *Criminal Code*, the onus is on the government to explain how it understands membership of this particular element of Hizballah to be constituted, and in particular what it takes 'informal membership' to consist in.

Unless further information is provided explaining the relevance of proscription, and in particular the anticipated practical consequences (including the criteria for membership), then sufficient grounds for this listing have not been made out.

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

3.2 HAMAS' Izz al-Din al-Qassam Brigades

The material presented in relation to this organisation raises many of the same issues as that presented in relation to Hizballah's ESO. Again, there is the reference to 'Western interests'; again, there is the discussion of links to Iran; again, there is no attempt to draw any link between the organisation and Australia. Violent crimes are listed (which the government of Israel is, or has already, responded to), but no explanation is offered of the relevance to these crimes of Australia's criminal law; although a particular point is made of emphasising the organisation's failure to discriminate between attacks upon civilians and attacks upon military personnel, there is no attempt made to draw any connection between the listing of the organisation, and the prevention or prosecution of such crimes (which may well already be offences under the war crimes provisions of the *Criminal Code*). And the same issues concerning the meaning of 'membership' and 'informal membership' are raised, given that it is only the military wing of a diverse organisation that is being listed. The material notes the mobility of roles and activities within HAMAS, but does not explain how this will be taken into account in determining what constitutes an offence under the *Criminal Code*.

However, the case against this organisation does raise some distinct issues. For example, it is noted that the organisation provides support to the families of HAMAS members who have been 'martyred' (presumably by way of suicide bombing, or being killed by the Israeli armed forces) or arrested. But it is not made clear whether this is taken to be a ground for proscription or not (it could be seen as the fostering, indirectly if not directly, of political violence). If it is, it once again raises the question of why other groups who provide support to the families of those who have died in the course of political violence are not also being listed.

Ultimately, it is again not made clear why this group has been singled out for proscription in Australia. Nor is it made clear how, if at all, this listing will further the goal of achieving a negotiated settlement to the Israeli-Palestinian conflict. Given the apparent importance of this conflict, and hence of its resolution, to many of the militant Islamic organisations that have been banned under the *Criminal Code*, it

seems odd that the material does not attempt to explain the proscription of HAMAS's Izz al-Din al-Qassam Brigades within this broader context.

Without further explanation, this listing should be opposed.

3.3 Palestinian Islamic Jihad

The same point made in relation to HAMAS' Izz al-Din al-Qassam Brigades apply to Palestinian Islamic Jihad: although violent crimes have been detailed, no explanation has been given as to why these particular acts of violence should be singled out by Australian law.

3.4 Lashkar-e-Tayyiba

Like HAMAS' Izz al-Din al-Qassam Brigades and Palestinian Islamic Jihad, the activities of this organisation as described in the material setting out the case for proscription appear to be confined to a particular political struggle. The material identifies a number of violent crimes (which presumably constitute offences under both Indian and Pakistani law), but does not explain how the listing of this organisation in Australia is relevant to the prevention or prosecution of these crimes. The material does mention connections between Lashkar-e-Tayyiba and the 'Pakistani diaspora', but while it suggests that money flows to the organisation from the United Kingdom and the Gulf states, there is no suggestion of any financial connections to Australia or Australians.

Unlike the other three organisations that have been listed, however, the material does identify a clear link to Australia, namely, the prosecution of two alleged members of Lashkar-e-Tayyiba for planning terrorist activities. It is difficult to comment on the significance of these prosecutions, given that all the details are not known and the matters are still before the criminal courts. It is worth noting, however, that one of the cases referred to is presumably that of Izhar-ul-Haque (although it is hard to be sure; the material refers to arrests in 2003, but Haque, who is generally described as the first person charged with terrorism offences in Australia, was

arrested in 2004[25]). Haque's alleged offence involves training undertaken in Kashmir, and the judge who released him on bail remarked there was nothing to suggest 'this young man poses any threat to anyone in this country.'[26]

Thus, even though a link to Australia is identified, without knowing the details of the charges involved, it is not clear that sufficient grounds have been made out for the listing of this organisation.

3.5 Concluding remarks

With regard to each of these organisations, the material presented by the government does not make out a clear case for proscription. Given the legal consequences that flow from proscription, too many important questions are left unanswered; in particular, nothing is said about the likely impact of such proscription upon Australians, their families and their communities, and no indication has been given of ASIO's intention to use the proscription as a basis for the exercise of its powers. Given that most of the mentioned activities of these organisations already constitute serious criminal offences under the law of Australia or the relevant foreign jurisdictions, 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.

This general lack of detailed information supporting the case for listing is compounded by the fact that it is difficult to see the majority of the arguments for proscription as anything but formulaic. The government may well have reasons for choosing to proscribe these organisations and not others; but these reasons are not being stated in the publicly presented material.

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[25] 'In laws we trust ... don't we?', *The Age*, September 11, 2004, available online at <http://theage.com.au/articles/2004/09/10/1094789683829.html?oneclick=true>.

[26] 'In laws we trust ... don't we?', *The Age*, September 11, 2004, available online at <http://theage.com.au/articles/2004/09/10/1094789683829.html?oneclick=true>.

In particular, the listing of three Islamic organisations engaged in hostilities with Israel raises the question, Why not other organisations, including secular organisations, that are also engaged in such hostilities? The listing only of Islamic organisations, without further explanation of why they and not others have been chosen, only contributes to the appearance that the government is targeting these groups because of their Islamic identity, rather than because of the particular activities that they are engaged in.

In the case against these three organisations, there is also an apparently circular appeal to each of the groups' co-operation with the other two. Thus, it is suggested that a reason for listing Hizballah's ESO is that it co-operates with HAMAS and Palestinian Islamic Jihad, it is suggested that a reason for listing HAMAS' Izz al-Din al-Qassam Brigades is that they have links to Hizballah, and that a reason for listing Palestinian Islamic Jihad is that they co-operate with HAMAS and Hizballah. However, until a strong case is made as to why one of these groups should be listed, it does not seem sufficient to support the listing of any of them that they form some sort of loose network.

Finally, it should not be inferred from either the detailed comments in relation to each organisation, nor from these concluding remarks, that the author of this submission has any sympathy for the activities of the organisations in question, or for militant religious organisations more generally. Rather, the point of this submission is that mere condemnation of the activities of a foreign organisation is not a sufficient grounds for listing that organisation under the *Criminal Code*. The Australian criminal law should operate in a manner that is consistent with Australian democracy, and therefore is not an appropriate vehicle for foreign policy symbolism.