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

This supplementary submission addresses a number of issues raised in the course of the public hearings held on Wednesday April 4, 2007.

The effect on communities of the listing of organisations

In the course of the hearings, Committee members raised questions about the real effect on Australian communities of the listing of organisations under the *Criminal Code*.

One example is the following, which has come to the attention of the Federation of Community Legal Centres Anti-Terrorism Laws Working Group: Some time subsequent to the listing of the PKK as a terrorist organisation in December 2005, members of Melbourne's Kurdish community held a demonstration outside the Turkish consulate in Melbourne. A number of demonstrators were displaying portraits of Abdullah Öcalan, the leader of the PKK Such displays are not uncommon in demonstrations by Kurdish Australians. On this occasion, however, the demonstrators were directed by a member of Victoria Police not to display the portraits, because such displays had become illegal as a result of the PKK being listed as a terrorist organisation.

This episode is important, because it shows that the a listing can impinge directly on the legitimate political activities of Australians, in ways that go beyond the (already broad) reach of the Division 102 offences. There is no offence under Division 102 that makes it unlawful to display portraits of individuals associated with a terrorist organisation – it does not fall under section 102.8 (which requires meeting or communicating with such individuals) nor under section 102.7 (which requires support to the organisation that would help it engage in, prepare, plan for, assist in or foster (whether directly or indirectly) a terrorist act – mere display of a portrait would not constitute such support). But this does not stop police officers, in policing political demonstrations, from going beyond the letter of the law to direct members of the Australian community to refrain from political acts (on this occasion, acts of political communication) that are seen as expressing support, whether directly or indirectly, for the organisation in question, or its members, or its aims. Listing thus has a very real effect on the political activities of Australians.

Communicating with affected communities (response to Senators Ray and Faulkner)

Senators Ray and Faulkner raised with me the question of how effective consultation with affected communities might take place.

Under the current proscription arrangements, there are two principal sources of evidence coming to the Committee as to the effect on communities of the listing of organisations. One is the testimony of community organisations themselves (eg the Australian Muslim Civil Rights Advocacy Network, the Australian-Tamil Rights Advocacy Council). The other is organisations, independent of government, who undertake community consultation and training in relation to anti-terrorism law, and its effect on those communities (eg the Federation of Community Legal Centres, the Human Rights and Equal Opportunity

Commission). It seems clear from the testimony of Mr Geoff McDonald that the Commonwealth government itself is undertaking little consultation.

Some natural steps towards more effective consultation would therefore be:

- To make resources available to representative community organisations, to enable them to carry on and expand the work they are currently undertaking;
- To increase the resources available to independent organisations already engaged in consultation and community education processes;
- To create a listing process in which the outcome of consultation – that is, the testimony of these organisations actually involved in consultation – can be heard *prior* to the decision being taken to list an organisation under Division 102.

The financing of terrorist acts (response to Senator Ferguson)

Senator Ferguson suggested to me that the listing of organisations was the most effective way to criminalise Australians sponsoring terrorist acts abroad. In addition to the evidence I gave during the hearing, I would like to make some additional observations:

- Senator Ferguson's goal could be achieved by narrowing the scope of the financing offence under section 102.6 (perhaps in a similar fashion to section 102.7). Reducing the breadth of the Division 102 offences would reduce to a certain extent the objectionable character of listing.
- In a similar vein, Senator Ferguson's goal could be achieved if the geographic scope of the offence under section 102.6 were reduced from Category D to Category B (thus criminalising Australian citizens and residents who fund overseas terrorism, but not criminalising all such activity wherever it occurs in the world).
- If the aim of listing is to criminalise certain activities undertaken by Australians in relation to political violence in Australia or abroad, then that should be reflected in the criteria for listing. Currently, it is not.

The demands of global citizenship

Senator Ray suggested to a number of witnesses (although not to me) that the listing regime was an expression of Australia's "global citizenship", demonstrating a commitment to protecting civilian life abroad.

As it currently operates, the listing regime does not achieve such ends:

- The listing regime applies only to those organisations put forward for listing by ASIO and listed by the Attorney-General.

- A number of listed organisations, although perpetrating from time to time violent acts against civilians, also engage in non-violent activities, or in military activities that do not target civilians but rather the security forces of those countries where the organisation is engaged (eg Hamas, Hizbollah, the PKK). Listing these organisations is a blunt instrument, criminalising any involvement in their activities. In practical terms (as other witnesses and submissions have suggested), it may be counterproductive, discouraging the engagement of organisations in peace processes, and their evolution towards mainstream political parties. Legally, it is far too broad, criminalising a great deal of activity that is inherently non-criminal.

- Australia already has effective legislation for responding to the sort of activities with which Senator Ray is concerned, such as Divisions 72 and 268 of the *Criminal Code*. If the coverage provided by these offences is regarded as inadequate, further particular offences criminalising violence against civilians could be enacted. This would not require a listing regime, and would not involve ASIO in the current process, of determining the limits of legitimate political activity for Australians.

The link between national security and immigration

The Deputy Director-General of ASIO stated that

> There is no connection between the *Migration Act* requirements, which guide us when we are doing anything to do with any visa—whether it is a temporary visa, whether it is a permanent visa or whether it is a protection visa—and the proscription provisions. (p 64 of the Proof Hansard)

As a statement of law, this is incorrect, as the following analysis demonstrates.

Part 4 of the *Migration Regulations 1994* establishes the following classes of protection, humanitarian and refugee visa; in respect of each of them, Schedule 2, via the indicated sections, requires that the applicant satisfy *public interest criterion 4002*:

Visa Class or Sub-class	*Schedule 2 requirement that public interest criterion 4002 be satisfied*
200 (Refugee)	200.226, 200.229, 200.323
201 (In-country Special Humanitarian)	201.226, 201.229, 201.323
202 (Global Special Humanitarian)	202.227, 202.229, 202.323
203 (Emergency Rescue)	203.226, 203.229, 203.323
204 (Woman at Risk)	204.226, 204.229, 204.323
447 (Secondary Movement Offshore Entry (Temporary))	447.225, 447.227, 447.323
451 (Secondary Movement Relocation (Temporary)	451.225, 451.227, 451.323
785 (Temporary Protection)	785.226
866 (Protection)	866.225

Schedule 4 of the *Regulations* establishes public interest criterion 4002 in the following terms:

> 4002 The applicant is not assessed by the Australian Security Intelligence Organisation to be directly or indirectly a risk to security, within the meaning of section 4 ofthe *Australian Security Intelligence Organisation Act 1979*.

Section 4 of the *ASIO Act* defines "security" as including, among other things, *politically motivated violence* (at paragraph (a)(iii)). The same section defines "politically motivated violence" as including, among other things, *acts that are terrorist offences* (at paragraph (ba)). The same section defines "terrorist offences" as including, among other things, offences against Part 5.3 of the *Criminal Code*. Division 102 falls within this part.

Thus (for example), someone's membership of a listed organisation, which would be an offence under section 102.3, would constitute a terrorism offence, which would in turn constitute an act of politically motivated violence (as defined in the *ASIO Act*), which would in turn be a matter of relevance security, as defined in the *ASIO Act* and incorporated into the *Migration Regulations*.

The statement of the Deputy Director-General is thus mistaken, as far as the relevant law is concerned.

In addition to the relationship between the *Migration Regulations* and the *ASIO Act* explained above, there is also the following relationship: Under section 202(1) of the *Migration Act 1958*, certain permanent residents and New Zealanders may be deported if ASIO furnishes an adverse security assessment in respect of them. As noted in section 37(1) of the *ASIO Act*, security assessments are undertaken pursuant to section 17(1)(c) of the *Act*, which requires ASIO to advise Commonwealth Ministers *in respect of matters relating to security*. As already noted, offences under Division 102 fall under the *Act*'s definition of "security". Thus, involvement with a listed organisation is also, by law, of relevance to these questions of deportation.

On a different issue, but still pertaining to migration, Mr McMahon in his evidence stated that:

> I cannot recall, in the last one to two years, any person whose visa has been revoked as a result of arrival and an adverse assessment having subsequently been made on arrival... In fact, I cannot remember any example where a visa was subsequently revoked. There certainly have been people who have been associated with organisations but on examination it was not a sufficient enough association to result in an adverse assessment taking place. (p 60 of the Proof Hansard)

I would like to remind the Committee that in September 2005 Mr Scott Parkin, a citizen of the United States of America, had his visa revoked on the basis of an adverse security assessment, which drew a link between Mr Parkin and politically motivated violence.[1] As Mr Parkin and his legal team were never provided with a copy of the assessment in question, it is

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[1] Details of the case are set out in the report of the Inspector-General of Intelligence and Security, available at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Media_Releases_2005_Fourth_Quarter_6_December_2005_-_Inspector_General_reports_on_ASIO_security_assessment_of_Scott_Parkin_-_2262005>.

impossible for me to know whether or not it related to Mr Parkin's connection to any terrorist organisation.

Another recent instance of the connection between security assessments and migration matters is provided by the deportation of Sheikh Mansour Leghaei – although in this case, the deportation seems to be based on suspicions of foreign espionage, rather than politically motivated violence[2]

I hope that this additional evidence is of assistance to the Committee in completing its inquiry.

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[2] As reported in *The Age*, available at <http://www.theage.com.au/news/National/Shiite-cleric-fights-deportation-move/2004/11/22/1100972326255.html>.