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

17 April 2005

Dear Secretary

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

Submission in relation to listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn as a terrorist organisation 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 listing of seven 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 inquiry, 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.

I also hope that this submission will be accepted in relation to the Committee's review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn as a terrorist organisation under the *Criminal Code*. I apologise for the lateness of such a submission, but the Committee will be aware that between its own ongoing inquiry into the *Australian Security Intelligence Organisation Act 1979* and the Senate Legal and Constitutional Committee's current inquiry into the provisions of the National

Security Legislation Amendment Bill 2005, it is difficult for those of us with an interest in national security matters to keep up with the pace of activity. In the event that the Committee is unable to accept a late submission into this inquiry, it will wish to disregard section 2.1 of the submission.

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

Yours sincerely,

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1. 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 inquiry, 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;
- 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.[1]

The Attorney-General's Department has 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.[2]

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

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

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 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.[3]

1.2 The consequences of proscription under the *Criminal Code*

Once an organisation has been banned, virtually any sort of involvement with the organisation, by anyone, anywhere in the world, becomes a serious criminal offence.[4] With the possible exception of section 102.7, 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 banned 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;[5] those charged with such offences have a reduced right to be remanded on bail;[6] and those convicted of such offences are subject to minimum non-parole periods.[7] Also, where there are

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[3] The tensions between the quotation in the text, and other remarks of the Attorney-General's Department, and also remarks made by the Australian Security Intelligence Organisation ('ASIO') were noted in the Committee's *Review of the listing of six terrorist organisations* (2005) at 2.23.

[4] *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.

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

[6] *Crimes Act 1914* section 15AA

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

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 they are themselves suspected of engaging in any violation of Australian or other law.[8]

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

The criteria put forward by ASIO for listing emphasise foreign policy rather than domestic considerations, such as the threat posed by an organisation to Australian interests, the proscription of an organisation by the United Nations or by like-minded countries, and the engagement of the organisation in a peace process.[9] In my view, however, it is the domestic impact of proscription that must be given the foremost consideration. 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. Furthermore, the greater the number of Australians who are involved with an organisation, the more politically controversial becomes the judgement that the organisation poses a threat to Australia.

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

[9] *Review of the listing of six terrorist organisations* (2005) at 2.24, 2,28-2.31.

To ban an organisation is not merely symbolic. An organisation ought not to be banned 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 criteria for proscription under the *Criminal Code*

For these reasons, I reiterate the following criteria suggested in my previous submission, and noted by the Committee in its Report.[10] 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;
- 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. 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 so satisfied, 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. 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

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[10] *Review of the listing of six terrorist organisations* (2005) at 2.32-2.35.

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.[11] 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

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[11] *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.

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.

2. APPLICATION OF THESE CRITERIA TO THE PRESENT INQUIRY

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, I will now consider the particular listings currently under review by the Committee.

It is worth noting that all the groups to be listed 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.

In addition, all the listed groups 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.

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

2.1 Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn

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

The material indicates a number of criminal acts of murder and attempted murder by the organisation. With the exception of one attack in Jordan, all these attacks have taken place in Iraq, in the context first of the occupation of that country by invading forces, and then in the context of the continued presence of such forces in the country at the invitation of the interim Iraqi government. Even without a detailed knowledge of Iraqi criminal law, it is virtually certain that these attacks constitute grave criminal offences under that law. They may also constitute offences under international law relating to the rights and responsibilities of occupation authorities. Furthermore, by all accounts both the government of Iraq and the foreign military forces present in that country are engaged in a concerted effort to capture the leaders of this organisation, and to bring their activities to an end. Given all this, it may legitimately be asked whether this proscription serves any purpose that is not symbolic.

The material also indicates certain links between the organisation and Australia; however, all these links are connected to Australia's presence in Iraq as one of the invading powers referred to above. Again, it is not made clear how this listing will materially assist the protection of Australian forces and other Australian personnel in Iraq. What is missing is any account of the activities of the organisation and its supporters in Australia, or even whether or not there are any such activities. If the links between the organisation and Australia are limited to Australian personnel present in Iraq, then no case for proscription has been made out. The domestic criminal law already protects these personnel through laws relating to treason and

subversion, and no case has been made as to why the further step of proscription is necessary nor as to how it will help.

Iraq is not the first time that Australian forces have been involved in combating insurgency in a foreign country. Such involvement raises difficult questions for any government. But these are essentially questions of foreign policy. The domestic criminal law does not seem relevant (and has not been invoked in the case of the Solomon Islands, for example, although there have been politically motivated attacks upon Australian personnel participating in the intervention there). Unless further information is provided explaining the relevance of proscription, and in particular the anticipated practical consequences in relation both to Australians in Iraq, and the Australian community itself, then sufficient grounds for this listing have not been made out.

2.2 Ansar al-Islam

The material presented in relation to this organisation raises many of the same issues as that presented in relation to Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn.

The material makes much of the fact that Ansar al-Islam espouses a fundamentalist and militant Islamic ideology, and that this ideology leads it to opposed various government, including the interim government of Iraq as well as those foreign governments which invaded Iraq and continue to have military forces present in that country. It needs to be reiterated that it is not generally a crime in Australia to hold any particular religious or political view. Nor is it generally a crime to advocate the overthrow of foreign governments (thus, the Prime Minister committed no crime in advocating the overthrow of the Iraqi government, and earlier governments committed no crime in advocating the overthrow of governments to which they were opposed on various political grounds). These point are therefore relevant to the question of whether or not the organisation ought to be listed only in so far as they tend to make out a connection between ideology and violence.

The material indicates a number of criminal acts of murder and attempted murder by the organisation. All these attacks have taken place in Iraq, in the context first of the occupation of that country by invading forces, and then in the context of the

continued presence of such forces in the country at the invitation of the interim Iraqi government. Even without a detailed knowledge of Iraqi criminal law, it is virtually certain that these attacks constitute grave criminal offences under that law. They may also constitute offences under international law relating to the rights and responsibilities of occupation authorities. Furthermore, it seems likely that both the government of Iraq and the foreign military forces present in that country are engaged in efforts to bring the activities of this organisation to an end. Given all this, it may legitimately be asked whether this proscription serves any purpose that is not symbolic.

The material indicates that the organisation is responsible for the murder of an Australian journalist; again, this murder took place in Iraq, and is likely to have been connected to Australia's presence in Iraq as one of the invading powers referred to above. The material also asserts that the organisation is attempting to coerce the government of Australia; it is not clear whether this conclusion is meant to follow from the fact of attacks upon the personnel of other countries allied with Australia, or whether the government has evidence (not listed in the public material) of attempts by the organisation to directly attack Australian personnel.

As with the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn, it is not made clear how this listing will materially assist the protection of Australian forces and other Australians in Iraq. What is missing is any account of the activities of Ansar al-Islam and its supporters in Australia, or even whether or not there are any such activities. If the links between the organisation and Australia are limited to Australian personnel present in Iraq, then no case for proscription has been made out. The domestic criminal law already protects these personnel through laws relating to treason and subversion, and no case has been made as to why the further step of proscription is necessary nor as to how it will help.

Iraq is not the first time that Australian forces have been involved in combating insurgency in a foreign country. Such involvement raises difficult questions for any government. But these are essentially questions of foreign policy. The domestic criminal law does not seem relevant (and has not been invoked in the case of the Solomon Islands, for example, although there have been politically motivated attacks

upon Australian personnel participating in the intervention there). Unless further information is provided explaining the relevance of proscription, and in particular the anticipated practical consequences in relation both to Australians in Iraq, and the Australian community itself, then sufficient grounds for this listing have not been made out.

2.3 Asbat al-Ansar

Attachment A sets out a brief account of the Asbat al-Ansar's activities in Lebanon. However, no connection between Australia and the organisation is made out.

As with the material relating to Ansar al-Islam, much is made of the fact that Asbat al-Ansar espouses a fundamentalist and militant Islamic ideology, and that this ideology leads it to opposed various government, including the Lebanese government. It needs to be reiterated that it is not generally a crime in Australia to hold any particular religious or political view. Nor is it generally a crime to advocate the overthrow of foreign governments. These point are therefore relevant to the question of whether or not the organisation ought to be listed only in so far as they tend to make out a connection between ideology and violence.

It is also suggested (although the language is somewhat vague, referring to 'reports' rather than facts) that the organisation has received funding from al-Qa'ida. It is already a criminal offence under Australian law for anyone anywhere in the world to receive funding from al-Qa'ida because al-Qa'ida has been listed under the *Criminal Code*.[12] The material presented does not explain why the further step of proscribing Asbat al-Ansar is necessary to the investigation and prosecution of these links.

The material states that Asbat al-Ansar has engaged in such criminal activities as murders, bombings, and grenade attacks. These are all serious offences under ordinary criminal law, and it is not clear why their prevention and prosecution requires taking the extraordinary step of banning the organisation in Australia. There

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[12] See section 102.6 of the *Criminal Code*.

are also references to the murder of an American missionary, and also to attacks on 'Western fast food restaurants'. However, these do not suffice to make out any sort of connection to or threat to Australia. In particular, the invocation of such vague concepts as 'Western fast food restaurants' does not seem helpful in any attempt to think seriously about the role of extremist Islamic organisations in a country such as Lebanon: is it the patrons of these restaurants, their owners, the franchisers or the concepts behind them that are being described as 'Western'? 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.

It is difficult to avoid the conclusion that the material presented in Attachment A does not, on its own, make out a case for the proscription of the Ansar al-Islam under the *Criminal Code*.[13]

2.4 Islamic Army of Aden

Many of the same remarks made in relation to Attachment A and Asbat al-Ansar can be made in relation to Attachment B and the Islamic Army of Aden. The only connection to Australia that is indicated is the death of a kidnapped Australian tourist during a rescue attempt. No indication is given of the way in which proscription of the organisation might prevent such deaths in future. Nor is anything said of the impact of this organisation upon Australia, nor of the likely consequences in Australia of its proscription, and no explanation is offered of how proscription of this organisation in Australia will contribute to the prevention of its future crimes or prosecution of its past crimes.

Again, it needs to be reiterated that the involvement of members of this organisation with al-Qa'ida is already an offence under Australian law, in virtue of al-Qa'ida's proscription under the *Criminal Code*. The material presented does not

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explain why the further step of proscribing Islamic Army of Aden is necessary to the investigation and prosecution of these links.

Much is made of the attacks of this organisation upon the Unites States military based in Yemen. Again, it needs to be re-iterated that on their own, such attacks do not make out a case for proscription in Australia: in general, it is not a crime in Australia for the citizens of a foreign country to attack foreign soldiers stationed in their country. The material also refers to 'US supported counter-terrorism efforts in Yemen.' This raises the broader question of whether the Australian government supports these efforts despite some doubts about their consistency with international humanitarian and human rights law.

It must therefore be conclude that the case for proscription of this organisation has not been made out.

2.5 Islamic Movement of Uzbekistan

Many of the same remarks made in relation to Attachment A and Asbat al-Ansar can be made in relation to Attachment C and the Islamic Movement of Uzbekistan. Nothing is said of the impact upon Australia of this organisation, or of the likely consequences in Australia of its proscription. Reference is made to attacks in Kyrgyzstan and Uzbekistan, but no details are given of the organisation's activities in Afghanistan or Pakistan, although it is presumably these activities that are principal motivations for this listing. It is not clear why the prevention and prosecution of this organisation's criminal activities requires taking the extraordinary step of banning the organisation in Australia.

Again, it needs to be reiterated that the involvement of members of this organisation with al-Qa'ida is already an offence under Australian law, in virtue of al-Qa'ida's proscription under the *Criminal Code*. The material presented does not explain why the further step of proscribing Islamic Movement of Uzbekistan is necessary to the investigation and prosecution of these links.

An unhelpful comment is made that 'the IMU's propaganda has always included anti-Western and anti-Israeli rhetoric.' It needs to be emphasised both that the holding

of such beliefs and the production of such rhetoric is not criminal under Australian law, and that the amorphous concept of 'hostility to Western interests' is no substitute for proper analysis of an organisation's motivations, goals and activities, and the likely effect of these upon Australia.

2.6 Jaish-e-Mohammad

Many of the same remarks made in relation to Attachment A and Asbat al-Ansar can be made in relation to Attachment D and Jaish-e-Mohammad. Nothing is said of the impact upon Australia of this organisation, or of the likely consequences in Australia of its proscription. To the extent that the organisation is committed to attacks upon civilians, it is committing what are already serious offences under the laws of India and Pakistan. It is not clear why the prevention and prosecution of these criminal activities requires taking the extraordinary step of banning the organisation in Australia.

Again, it needs to be reiterated that the receipt of funding from al-Qa'ida is already an offence under Australian law, in virtue of al-Qa'ida's proscription under the *Criminal Code*. The material presented does not explain why the further step of proscribing Jaish-e-Mohammad is necessary to the investigation and prosecution of these links.

It is interesting to note that one of the terrorist acts attributed to Jaish-e-Mohammad is the attempted assassination of the Pakistani President. Activity of this sort raises difficult questions about the use of force against the leader of a country who has come to power through non-constitutional means. This submission by no means endorses such attacks upon the Pakistani President. But the example does show the complex issues that are raised by the extreme breadth of the definition of 'terrorist act' under Australian law, as well as the potential perils of linking liability under Australian criminal law to complex and controversial judgements of foreign policy.

2.7 Lashkar-e Jhangvi (LeJ)

Many of the same remarks made in relation to Attachment A and Asbat al-Ansar can be made in relation to Attachment E and Lashkar-e Jhangvi. Nothing is said of the impact upon Australia of this organisation, or of the likely consequences in Australia of its proscription. To the extent that the organisation is committed to atrocities of sort described in the material, such as 'the random killing of hundreds of people', it is committing what are already extremely grave offences under the law of Pakistan. It is not clear why the prevention and prosecution of these criminal activities requires taking the extraordinary step of banning the organisation in Australia.

Again, it needs to be reiterated that the involvement of members of this organisation with al-Qa'ida is already an offence under Australian law, in virtue of al-Qa'ida's proscription under the *Criminal Code*. The material presented does not explain why the further step of proscribing Lashkar-e Jhangvi is necessary to the investigation and prosecution of these links.

The material prepared also notes that 'Pakistani government security crackdowns since late-2001 have had some success' and that 'training facilities in Pakistan have been disrupted by local police.' This raises the question of whether or not the Australian government supports such 'crackdowns' and 'disruption', regardless of the means used and the consistency of those means with international human rights and humanitarian law.

Finally, it is noted that the organisation enjoys support from (among others) 'middle-class urban Sunnis ken to challenge the influence of the Shi'a landed elite.' This suggests that there may be domestic Pakistani political and economic considerations involved in the activities of this organisation, and raises the question of whether Australia should be intervening in the politics of a foreign country through the use of such criminal law mechanisms as proscription under the *Criminal Code*.

2.8 Egyptian Islamic Jihad

Attachment F, which sets out the government's case for the listing of Egyptian Islamic Jihad, raises a number of difficult issues.

First, it must be acknowledge that some attempt is made to identify a connection between the organisation in question and Australia. Once again, general references are made to the Egyptian Islamic Jihad having 'increasingly targeted US and Western interests since 1998.' In addition, however, reference is made to public statements by Ayman al Zawahiri 'calling for and supporting attacks against Western interests, including Australia'.

On its own, however, this does not establish that the mechanism of proscription, with all its criminal law consequences (including adverse consequences for the rule of law), is the appropriate way to try and protect whatever Australian interests are at stake. This may be so, but more detail must be provided.

For example, the government notes the remarks of the Egyptian Interior Minister that 'a number of "sleeper cells" still exist' in Egypt. However, it does not indicate whether any such cells exist in Australia, or whether anyone in Australia has connections to these cells.

The government's material also notes that funding for the organisation is received through charitable networks. No indication is given, however, of whether any such networks are believed to exist in Australia, nor of the attitude or approach that the Australian government and ASIO will adopt to any such charities. These questions are quite important in the context of a decision to list an organisation because of two areas of uncertainty. Uncertainty surrounds the concept of 'informal member' of an organisation, and therefore the nature of conduct that amounts to a commission of the membership under the criminal code.[14] This uncertainty then affects the association offence, because his offence in turn depends upon the meaning of 'membership', including 'informal membership'.[15] It should also be noted that this latter offence can be committed by an individual who opposes an organisation's participation in political violence, but who supports and wishes to expand an organisation's charitable activities. Information about the extent of such behaviour, and the government's

[14] Section 102.3 together with section 102.1(1) (definition of 'member').

[15] Section 102.8.

intended response to it, is important to understanding the likely consequences of any decision to list an organisation.

Not only does the government's material fail to resolve these uncertainties, but it in fact creates further uncertainty of a related sort. The material cites two categories of terrorist attack by Egyptian Islamic Jihad. The first are attacks upon Egyptian political targets. These attacks seem to raise issues first and foremost for the Egyptian government, and also for the Pakistani government in relation to the embassy bombing; there connection to Australia, if any, are not made clear. Second, however, there are mentioned three notorious al-Qa'ida attacks. The reference to these acts sits a little uneasily with the remark in the materials that 'ASIO assesses that EIJ remains active and continues to exist as a separate organisation from al-Qa'ida'. It also raises broader questions as to the way in which the government decides the parameters of identity, membership and attribution of responsibility for a listed organisation. These matters are not clearly explained in the materials presented by the government. (In this regard, it is also interesting to note that there is quite a divergence between Attachment F, and the consolidated list maintained by the Department of Foreign Affairs,[16] in the various names and aliases adopted by Egyptian Islamic Jihad. Such lack of clarity by the government only makes it harder for Australians to comply with their legal obligations.)

(Again, it needs to be reiterated that the involvement of members of this organisation with al-Qa'ida is already an offence under Australian law, in virtue of al-Qa'ida's proscription under the *Criminal Code*. The mere fact of such links therefore does not provide a sufficient basis for the listing of an organisation, and the material presented does not explain why the further step of proscribing Egyptian Islamic Jihad is necessary to the investigation and prosecution of these links.)

Finally, the government's material refers to the fact that '[e]ffective security operations have severely restricted the EIJ's capabilities within Egypt.' Does the Australian government endorses such 'security operations' regardless of the manner in which they are carried out, and their consistency or otherwise with international

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[16] At <http://www.dfat.gov.au/icat/regulation8_consolidated.xls>.

human rights and humanitarian law? The question of the Australian government's knowledge of and attitude towards the activities of Egyptian security agencies is particularly pressing given the allegations by Mamdou Habib both that the Australian government transmitted information to the Egyptian government to assist in his interrogation, and that he was tortured by Egyptian security officers while being interrogated in the presence of an Australian.

It is therefore fair to say that, while Attachment F does draw some connection between the activities of Egyptian Islamic Jihad and Australia, there are still many questions to be asked. To ask these questions, and to insist that they be answered, is only to insist on the government offering an adequate justification of the extraordinary step of proscription, which, once taken, has the very real and adverse consequences for the rule of law in Australia that were spelled out above.

2.9 Concluding remarks

With regard to each of these organisations, the material presented by the government does not adequately make the 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 argument for proscription in relation to most of these organisations 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.

Related to this issue, there is a disturbing tendency to cite proscription by the United Nations, or by other jurisdictions (particularly Canada in relation to Ansar al-Islam and Attachments A to F, the United States in all but Attachments B and D, and the United Kingdom in relation to Ansar al-Islam and Attachments A to D and F) as justification for a listing in Australia. This is disturbing for several reasons. First, it pays no attention to the quite different implications of proscription within the framework of Australian law (which, according to the Committee's *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004), are far more serious than the implications of a ban in the United States[17]). Second, it 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*. Third, it does not explain the apparently deliberate targeting of Muslim and only Muslim organisations under the *Criminal Code*.

Finally, there is a further disturbing tendency of the material offering apparent endorsement of 'crackdowns', 'disruption' and the like against the organisations in question, without asking questions about the human rights violations, or violations of the international laws of war, that such language can conceal. The apparent reluctance to confront these issues, or what might instead be a belief in the priority of 'security' over all other considerations, does not foster confidence in ASIO's commitment to the fundamental values of democracy.

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

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[17] At 2.4.

criminal law should operate in a manner that is consistent with Australian democracy, and therefore it is not an appropriate vehicle for foreign policy symbolism.