

Introduction

- 1.1 This review is conducted under section 102.1A of the *Criminal Code Act 1995* (the Criminal Code). Section 102.1A provides that the Parliamentary Joint Committee on Intelligence and Security (the Committee) may review a regulation specifying an organisation as a terrorist organisation for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1 of the Criminal Code and report the Committee's comments and recommendations to each house of the Parliament before the end of the applicable disallowance period.
- 1.2 The organisation for which the regulation has been made is Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (TQJBR). The organisation has also been known as the al-Zarqawi network as it was led by Abu Mus'ab al-Zarqawi until his death in 2006.
- 1.3 Under subsection 102(3) of the Criminal Code regulations, the listing of an organisation as a terrorist organisation ceases to have effect on the second anniversary of the day on it took effect. The organisation must, therefore, be re-listed if it is to continue to be a listed terrorist organisation for the purposes of the Criminal Code.
- 1.4 This organisation was originally listed by the Attorney-General in March 2005. The Committee reviewed this regulation and reported to Parliament on 25 May 2005. It did not recommend disallowance of the regulation at that time. Then the Committee concluded that:

It is evident from the Attorney-General's statement of reasons that TQJBR has committed violent crimes in pursuit of its objectives. The group has kidnapped and murdered civilians

and attacked Multi-National Forces and members of the Interim Iraqi Government.

The Committee strongly condemns the violent acts of TQJBR. The proscription of TQJBR in Australia is potentially useful insofar as it prevents Australians from assisting the organisation either financially or personally.¹

- 1.5 The Attorney-General wrote to the Chairman on 2 February 2007 advising that he had decided to re-list TQJBR as a terrorist organisation for the purposes of section 102.1 of the Criminal Code.²
- 1.6 The regulation was registered and took effect on 16 February 2007.³ The regulation was tabled in the House of Representatives and the Senate on 26 February 2007. The disallowance period of 15 sitting days for the Committee's review of the listing began from the date of the tabling. Therefore, the Committee is required to report to the House of Representatives by 22 May 2007 and to the Senate by 13 June 2007.
- 1.7 The Committee advertised the inquiry in *The Australian* on 14 February 2007. Notice of the inquiry was also placed on the Committee's website. No submissions were received from the public.
- 1.8 Representatives of the Attorney-General's Department, ASIO and the Department of Foreign Affairs and Trade (DFAT) attended a private hearing on the listing on 23 March 2007 in Canberra.
- 1.9 In its first report, *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, the Committee decided that it would test the validity of the listing of a terrorist organisation under the Criminal Code on both the procedures and the merits. This chapter will examine the Government's procedures in listing TQJBR and chapter 2 will consider the merits of the listing.

1 Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, May 2005, p. 21

2 Submission 1.

3 Criminal Code Amendment Regulations 2007 (No.1).

The Government's procedures

1.10 In a letter sent to the Committee on 5 March 2007, the Attorney-General informed the Committee that it had adhered to the following procedures for the purpose of the listing:

- A separate unclassified Statement of Reasons for TQJBR was prepared by the Australian Security Intelligence Organisation (ASIO), in consultation with the Department of Foreign Affairs and Trade, detailing the case for re-listing TQJBR.
- Mr Henry Burmester QC, Chief General Counsel of the Australian Government Solicitor provided written confirmation on 7 December 2006 that the Statement of Reasons prepared by ASIO was sufficient for the Attorney-General to be satisfied on reasonable grounds of the matters referred to in section 102.1(2) for the re-listing by regulation of TQJBR as a terrorist organisation under the Criminal Code.
- The Director-General of Security, Mr Paul O'Sullivan wrote to the Attorney-General on 11 December 2006 outlining the background, training activities, terrorist activities, leadership and membership of TQJBR and attached a Statement of Reasons in respect of the organisation.
- A submission was provided to the Attorney-General on 23 January 2007 attaching:
 - ⇒ Copy of the Statement of Reasons prepared by ASIO for TQJBR;
 - ⇒ Advice from Chief General Counsel in relation to TQJBR;
 - ⇒ Regulations and Federal Executive Council documentation for TQJBR.
- Having considered the information provided in the submission, the Attorney-General signed a statement confirming that he is satisfied on reasonable grounds that TQJBR is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the act has occurred or will occur.
The Attorney-General also signed regulations with respect to TQJBR and approved associated Federal Executive Council documentation including an Explanatory

Memorandum, Executive Council Minute and Explanatory Statement.⁴

- A letter dated 2 February 2007 from the Attorney-General was sent to the Prime Minister advising of the Attorney-General's intention to re-list TQJBR as a terrorist organisation under the Criminal Code.
- The Attorney-General advised the Leader of the Opposition by letter dated 2 February 2007 of the proposed listing of TQJBR as a terrorist organisation under the Criminal Code. The Leader of the Opposition was offered a briefing in relation to the re-listing of the organisation; however he has not taken up the offer of a briefing.
- The Attorney-General wrote to the Attorneys-General of the States and Territories on 2 February 2007 advising them of the decision to re-list TQJBR as a terrorist organisation under the Criminal Code. A copy of the Statement of Reasons and regulations TQJBR as a terrorist organisation were attached to the letters. To date, no correspondence from the States or Territories has been received in relation to the listing of TQJBR.
- The Attorney-General wrote to the Chairman of the Parliamentary Joint Committee on Intelligence and Security on 2 February 2007 advising of his decision to re-list TQJBR as a terrorist organisation under the Criminal Code.
- The Governor-General made the regulations on 15 February 2007. The regulations were registered with the Federal Register of Legislative Instruments (FRLI) on 16 February 2007 (FRLI Reference Number: F2007L00284).
- A press release was issued on 19 February 2007 and the Attorney-General's Department's National Security web site has been updated.

Procedural concerns

The nature of the information supplied to the Committee

- 1.11 Many of the regulations which currently come to the Committee are for the re-listing of organisations, previously listed and fully reviewed. The Committee has asked that the information presented

4 Submission 2.

to justify this 'fresh exercise of executive discretion' contain a 'sufficient degree of currency in the evidence to warrant the use of the power'.⁵ Therefore, the Committee has asked that the emphasis in the material be on the activities of the organisation in the period since the last listing/review. On this occasion some additional and current information has been supplied on TQJBR and this is appreciated. However, it is still scattered amongst older information relevant to an earlier review and most of the information in the statement of reasons predates the last review.

1.12 Of the 14 paragraphs in the statement of reasons, only three paragraphs and two part paragraphs provide new information relevant to the current period; of the 14 terrorist activities listed, 7 fall within the relevant period, all but two prior to the death of al-Zarqawi.

1.13 The information in the statement of reasons does not as yet address the criteria which ASIO uses to 'select' an organisation for listing, namely:

- Engagement in terrorism;
- Ideology and links to other terrorist groups or networks;
- Links to Australia;
- Threats to Australian interests;
- Proscription by the UN or like minded countries; and
- Engagement in peace/mediation processes.⁶

1.14 The use of these criteria in the statement of reasons would not preclude the Attorney-General from applying the definition of a terrorist organisation from within the act, as this definition is very broad. However, the Committee reiterates that:

a clearer exposition of the criteria would strengthen the Government's arguments, provide greater clarity and consistency in the evidence and therefore increase public confidence in the regime as a whole. Therefore, ... it would

5 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of ASG, JuA, GIA and GSPC*, February 2007, p. 6.

6 Criteria given at a hearing on 1 February 2005. The last factor was seen as an exclusionary factor.

greatly facilitate the Committee's review process if the [statement of reasons addressed these criteria.]⁷

- 1.15 The issue was raised again during the private hearing. Officers from the Attorney-General's Department informed the Committee that the criteria are still under consideration by government.⁸ The issue of whether the statement of reasons should be organised according to the criteria depends on whether the government is formally to adopt the criteria.⁹ The Government might apply the criteria directly or, as is currently the case, as matters that are taken into account. Under either circumstance, the question of organising the statement of reasons according to the criteria would still remain relevant for the convenience of assessment.¹⁰ This issue is to be examined and dealt with in more detail as part of the Committee's general inquiry into the operation, effectiveness and implications of the proscription power.

Consultation within government

- 1.16 Consultation with the States and Territories remains minimal. There were eight working days between the time when the Attorney-General sent letters to the Prime Minister, the Leader of the Opposition, the Attorneys of the States and Territories and the Chairman of the Parliamentary Joint Committee on Intelligence and Security (2 February 2007) and when the Governor General made the regulation (15 February 2007).
- 1.17 The Leader of the Opposition did not seek a briefing on the matter and no State or Territory government replied.
- 1.18 The Committee notes that letters were addressed to the Attorneys General in the States and Territories rather than the Premiers and Chief Ministers as agreed under subclause 3.4(6) of the *Inter - Governmental Agreement on Counter-terrorism Laws*. This subclause states that the Commonwealth will provide the States and Territories with the 'text of the proposed regulation and will use its best endeavours to give the other parties reasonable time to consider and to comment on the proposed regulation'.

7 Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of ASG, JuA, GIA and GSPC*, February 2007, p.8.

8 Transcript, Private hearing, 23 March 2007, p.3.

9 Transcript, Private hearing, 23 March 2007, p.4.

10 Transcript, Private hearing, 23 March 2007, p.4.

1.19 DFAT was consulted at the initial stage of developing the statement of reasons.¹¹ At the hearing, officers told the Committee that DFAT was involved in a lengthy consultative process with the National Threat Assessment Centre (NTAC) and the Attorney General's Department.

Essentially, we are asked to contribute to the statement of reasons. To produce that, we consult with our posts and within our organisations and we provide that written feedback to the statement of reasons and it is incorporated in the final document.¹²

1.20 DFAT also advised that, although there was no direct account taken of Australia's international obligations in respect of this organisation, TQJBR is designated by the UN and appears on the UN 1267 Sanctions Committee List. UNSC Resolution 1267 imposes obligations upon member states to freeze the assets and resources of designated organisations. Those obligations are implemented under the *Charter of the United Nations Act 1948*. It is unclear whether the organisation has been included in any of Australia's reports to the United Nations Security Council on the monitoring of financial transactions, people movement or the sale of arms.¹³

1.21 In response to questions on the listing of TQJBR by comparable jurisdictions, DFAT advised that some jurisdictions regard TQJBR as an integral part of al Qaeda while others view them as two distinct organisations. DFAT subsequently confirmed that:

European Union

TQJBR was appended - in the 41st amendment - to the list attached to the Council Regulation 881/2002 (pursuant to UNSCR 1267). This listing entails a travel ban and freezing of assets. Criminal sanctions flowing from membership of a listed organisation remain the preserve of EU member states. The EU automatically transposes into its law organisations listed as terrorist organisations under UNSCR 1267;¹⁴

11 See Statement of Reasons above.

12 Transcript, Private hearing 23 March 2007, p.5

13 Australia is required to report to the United Nations Security Council on measures taken by the Australian Government to implement Security Council resolutions 1267, 1333, 1390, 1455 and 1373. These resolutions oblige member states to suppress terrorism, including freezing terrorist assets, preventing terrorists from entering into or transiting through their territories, preventing the supply, sale and transfer of arms and military equipment and denying safe haven to terrorists.

14 Response to Question on Notice, 26 March 2007.

United Kingdom

The UK has taken the position that it lists al Qaeda as a whole, and entities such as AQI are subsumed under this listing.¹⁵

Community consultation and information

- 1.22 The submission from the Attorney-General provides no information on the means which the government used to inform the community beyond the last dot point in submission 2:
- A press release was issued on 19 February 2007 and the Attorney-General's Department's National Security web site has been updated.
- 1.23 At previous hearings and in response to recommendations going back to the Committee's second review in March 2005, the Attorney-General's Department has advised that 'they are developing a response to the Committee's recommendation on community consultation'.¹⁶
- 1.24 This clearly has not happened and there is no sign of any intention that it should happen.

15 Response to Question on Notice, 27 March 2007.

16 Transcript, Private hearing 2 May 2005, p. 5.

