

## 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 to each house of the Parliament before the end of the applicable disallowance period.
- 1.2 The Committee is currently conducting a full review of the operations, effectiveness and implications of the proscription powers and expects to report on this matter later in the year. A number of approaches to the proscription process are being examined in the course of this review and it is hoped that procedures may be refined as a result of this review. In particular, the criteria and the way in which they are applied will be addressed. This will no doubt affect the Committee's reports on individual listings. In the mean time, in this review, for the sake of consistency, the Committee has used the criteria and assessment methods which it has used throughout its consideration of listings and re-listings over the last three years.
- 1.3 Under section 102(3) of the Criminal Code regulations, the listing of organisations as terrorist organisations ceases to have effect on the second anniversary of the day on which they took effect. The organisations must, therefore, be re-listed.
- 1.4 This review covers the re-listing of seven organisations. The seven were originally listed in 2003 under legislative arrangements which required that organisations to be listed had to be on the United

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Nations list of terrorist organisations. The seven organisations came up for review under new legislative arrangements, which had been passed by the Parliament in 2004. The Committee, therefore, reviewed the first re-listing of these organisations and reported to Parliament in August 2005. This review is of the second re-listing.

- 1.5 The organisations under consideration are:
- Ansar al-Sunna (formerly Ansar al-Islam);
  - Jaish-e-Mohammad (JeM);
  - Lashkar-e-Jhangvi (LeJ);
  - Egyptian Islamic Jihad (EIJ);
  - Islamic Army of Aden (IAA);
  - Asbat al-Ansar (AAA);
  - Islamic Movement of Uzbekistan (IMU).
- 1.6 The Attorney-General wrote to the Chairman on 2 March 2007 advising that he had decided to re-list Ansar al-Sunna as a terrorist organisation for the purposes of section 102.1 of the *Criminal Code Act 1995*. Further letters were received on 15 March 2007 with similar advice in relation to Jaish-e-Mohammad and Lashkar-e-Jhangvi and on 22 March 2007 with advice on Egyptian Islamic Jihad, the Islamic Army of Aden, Asbat al-Ansar and the Islamic Movement of Uzbekistan.
- 1.7 The regulation in relation to Ansar al-Sunna was tabled in the House of Representatives and the Senate on 26 March 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 Parliament by 12 June 2007. The remaining regulations were not tabled until 8 May 2007 making the end of the disallowance period for these organisations 19 June 2007. However, the Committee resolved to deal with all seven organisations together.
- 1.8 The Committee advertised the inquiry in *The Australian* on 18 April 2007. Notice of the inquiry was also placed on the Committee's website. No submissions were received from the public.
- 1.9 In the absence of submissions and given that these are second re-listings of organisations, which do not raise controversial issues, the

Committee resolved to assess the merits of the re-listings on the papers without holding a hearing.

- 1.10 In past reports the Committee has expressed concern about the value of ASIO's criteria in judging the case for listing or re-listing. This debate is now being considered in an overall review of the proscription power. The Committee does not believe that these criteria are either clear or consistently applied. Nevertheless, in the absence of any other criteria, the Committee will continue to use ASIO's criteria as the basis for its judgements on each organisation. This chapter will examine the Government's procedures in listing the seven organisations and chapter 2 will consider the merits of the listings.

## The Government's procedures

- 1.11 In a letter sent to the Committee on 4 April 2007, the Attorney-General's Department informed the Committee of its procedures in relation to the re-listing of Ansar al-Sunna. Further letters were received on 3 May 2007 regarding the procedures used for the making of the other six regulations. The statement of procedures for each organisation is attached in the appendix containing the statement of reasons for that organisation.

### **Procedural concerns**

- 1.12 The Committee is conscious that a broad review is currently being conducted into the operations, effectiveness and implications of the proscription power. It is also aware that, compared to other jurisdictions which ban terrorist organisations, the procedures adopted in Australia, involving parliamentary review, have a number of merits.
- 1.13 Nevertheless, the Committee remains critical of the Government's procedures for the listing of organisations for the same reasons which have been detailed in numerous reports. These criticisms also apply to the current review. These general criticisms relate to clarity, consistency and coherence of the procedures and the decision making and specifically include:

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- The nature of the information supplied to the committee. In the case of re-listings whether the information is current;
  - The organisation of the information according to the criteria established by ASIO;
  - The extent of consultation with state and territory governments;
  - The extent of consultation with the Department of Foreign Affairs;
  - The extent and nature of an information program with the community.

## The nature of the information supplied to the Committee

- 1.14 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 to justify this 'fresh exercise of executive discretion' contain a 'sufficient degree of currency in the evidence to warrant the use of the power'<sup>1</sup> 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. The statements of reasons for these current reviews do, for the most part, include, under the heading 'Terrorist activities', those activities that have taken place since the last review.
- 1.15 However, it is disappointing that the information in the statements of reasons does not as yet address the criteria which ASIO says it uses to 'select' and 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.<sup>2</sup>
- 1.16 The use of these criteria in the statement of reasons would not preclude the Attorney-General from applying the definition of a

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

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

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 greatly facilitate the Committee's review process if the [statement of reasons addressed these criteria.]<sup>3</sup>

## Consultation within government

- 1.17 Consultation with the States and Territories is still short. There were twelve 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 March 2007) and when the Governor General made the regulation (22 March 2007). In relation to the other six organisations the timing was even shorter, four days in the case of one group and eight days in relation to the second.<sup>4</sup>
- 1.18 The Leader of the Opposition did not seek a briefing on the matter and no State or Territory government replied.
- 1.19 The Committee notes that letters were addressed to Attorneys 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'.
- 1.20 The Department of Foreign Affairs was consulted at the initial stage of developing the statement of reasons.<sup>5</sup> The nature and extent of this consultation is not clear from the statement of reasons.

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

4 The first groups was JeM and LeJ, the second EIJ, IAA, AAA and IMU.

5 See Statement of Reasons in Appendix B.

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## Community consultation

- 1.21 Submission number five<sup>6</sup> of 4 April 2007 from the Attorney-General provides no information on the means which the government used to inform the community beyond paragraph 12.
- A press release was issued on 26 March 2007 and the Attorney-General's Department's National Security web site has been updated.
- 1.22 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.'<sup>7</sup> Not only has this not happened, but the level of communication with the public has been diminished by the removal of the statement of reasons from the Attorney-General's media release and web site.
- 1.23 It remains the Committee's view that it would be most beneficial if a community information program occurred prior to the listing of an organisation under the Criminal Code. This question will be addressed more fully in the current review of the proscription power.

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6 This is the procedural on Ansar al-Sunna. See Appendix B.

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



