

Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

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To the Parliamentary Joint Committee on Intelligence and Security

Review of the re-listing of Hamas' Izz al-Din al-Qassam Brigades, Kurdistan Workers Party, Lashkar-e-Tayyiba and Palestinian Islamic Jihad as terrorist organizations under the *Criminal Code Act 1995*

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About the Federation of Community Legal Centres (Vic) Inc

The Federation is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance;
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged;
- works to build a stronger and more effective community legal sector;
- provides services and support to community legal centres; and
- represents community legal centres with stakeholders.

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About the Anti-Terrorism Laws Working Group

This submission has been prepared for the Federation by members of the Anti-terror Laws Working Group, one of a number of issue-specific working groups comprising workers and volunteers from member centres. This Working Group coordinates the Federation's response to Federal and State anti-terrorism laws by:

- campaigning to improve the laws;
- contributing to various Federal and State inquiries and reviews;
- building links with affected communities and providing support and legal education to those communities;
- building capacity and supporting Community Legal Centres and Federation networks to work on anti-terrorism issues.

About Community Legal Centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

Introduction

The Federation has repeatedly expressed its concerns regarding the listing provisions contained in Division 102 of Schedule 1 of the Commonwealth *Criminal Code Act 1995* ('the Criminal Code') ('the listing provisions') in previous submissions to the Parliamentary Joint Committee on Intelligence and Security ('the Committee').¹ In general, the Federation takes that view that the listing provisions are fundamentally inconsistent with the aspirations for a democratic society and that they compromise fundamental principles of the criminal law. The automatic criminalisation of political affiliations, associations and convictions by executive discretion, in the absence of direct harm to the physical safety of Australian citizens, is dangerous and draconian. Whilst we continue to advocate for repeal of these provisions in their entirety, we will not reiterate these concerns further in this submission.

This submission will articulate our concerns about the re-listing of these four organisations, both in terms of the deficiencies in the process of re-listing, the impact on particular communities in Australia of the re-listings and where we believe that the ASIO guidelines have not been satisfied.

¹ See most recently, Federation of Community Legal Centres (Vic) Inc, Submission to the PJClS: Review of the Re-listing of Six Organisations, May 2009. Federation of Community Legal Centres (Vic) Inc, Submission to the PJClS: Review of the Re-listing of Hizballah's External Security Organisation, June 2009.

Community Consultation

In past submissions to the Committee, the Federation has articulated our continued concerns about the government's repeated failure to engage in any process of community consultation prior to re-listing organisations.²

The Committee itself has repeatedly emphasised the importance of community consultation in the listing process. The Committee has previously recommended that:

A comprehensive information program that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organization.³

Subsequently, in its 2007 *Review of the Re-listing of the Six Organisations*, the PJCIS again expressed the view that 'it would be most beneficial if a community information program occurred prior to the listing of an organisation under the Criminal Code'.⁴

Furthermore, in its 'Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code', the PJCIS acknowledged that the banning of certain political associations is bound to be controversial in a liberal democracy⁵ and it expressed disappointment in the Government's limited efforts to provide community information to date.⁶ In that Inquiry the PJCIS ultimately recommended that 'the Attorney-General's Department develop a communication strategy that is responsive to the specific information needs of ethnic and religious communities'.⁷

Despite all of these remarks and recommendations, we are unaware of any attempt at community consultation or any attempt to provide the community and in particular affected communities with information regarding the re-listing of these four organisations, prior to the decision to re-list. In our view this represents a fundamental procedural flaw in the listing regime, particularly given the significance of some of the organisations that have been re-listed to Australian community members.

We note the Attorney-General Departments release of the pamphlet "Australia's Counter-Terrorism Laws: Questions and Answers". Clearly this document does not constitute an effective program of consultation or information provision in relation to these specific listings.

² See most recently Federation of Community Legal Centres (Vic) Inc, Submission to the PJCIS: Review of the Re-listing of Six Organisations, May 2009, 5. Federation of Community Legal Centres (Vic) Inc, Submission to the PJCIS: Review of the Re-listing of Hizballah's External Security Organisation, June 2009, 6.

³ Joint Parliamentary Committee on ASIO, ASIS and DSD, Review of the listing of six terrorist organisations, March 2005

⁴ Parliamentary Joint Committee on Intelligence and Security, Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EU, IAA, AAA and IMU as terrorist organisations, June 2007, paragraph 1.23

⁵ Parliamentary Joint Committee on Intelligence and Security, Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code, September 2007, paragraph 3.16

⁶ [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 3.24

⁷ [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 3.25

ASIO Guidelines for Listing

It is clear that the Attorney-General relies heavily on the advice of ASIO in determining whether to list or re-list an organisation. In a hearing relating to the *Review of the listing of six terrorist organisations* on 1 February 2005, ASIO informed the Committee about its evaluation process when recommending organisations for listing.⁸ ASIO provided the following criteria in a confidential exhibit, hereafter called the “ASIO guidelines”:

- 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.

Although these guidelines are not statutorily enshrined, the Committee has acknowledged that these guidelines have formed the basis for testing the listings that it has reviewed.⁹

In previous submissions to the Committee, we have argued that the application of these guidelines has been unclear and the Committee itself has on numerous occasions highlighted inconsistencies in the application of the guidelines, in particular noting that the guidelines pertaining to links to Australia and threats to Australia’s interests have been given little consideration in many listings.¹⁰

In September 2005, the Committee requested by recommendation that ASIO and the Attorney General specifically address all of the six guidelines in future Statements of Reasons, particularly for new listings.¹¹ The Committee stated that it ‘would like to stress the need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the Criminal Code’.¹²

In its *Review of the Re-listing of Six Terrorist Organisations* in 2007, the Committee again pointed out that ‘matching information within the statements of reasons with the guidelines has proved to be elusive’ and that Attorney-General had still failed to use the guidelines as the basis of ‘statements of reasons’.¹³ In our view, these comments still apply. ASIO’s Statements of Reasons relating to the re-listing of these four organisations, as provided by the Attorney-General, do not address the ASIO guidelines in any discernible manner. We view this as a grave concern.

Furthermore, the lack of transparency and consistency around the government’s application of the guidelines to individual listings also creates a situation where the public are unable to clearly comprehend the decision-maker’s reasoning. It is our submission that this is an improper exercise of executive power. We urge the Committee to consider the re-listing of these four organisations in light of this inconsistent application of the ASIO guidelines.

⁸ Review of the listing of six terrorist organisations, *ibid*, paragraph 2.24.

⁹ Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers Party (PKK)*, 2006, paragraph 2.3.

¹⁰ Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, *ibid*, paragraphs 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa’idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, May 2005, paragraphs 2.24, 2.28; *Review of the listing of seven terrorist organisations*, August 2005, paragraphs 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations*, September 2005, paragraphs 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89

¹¹ *Review of the listing of four organisations*, *ibid*, 47 Recommendation 1

¹² *Review of the listing of the Kurdistan Workers Party (PKK)*, *ibid*, paragraph 23.8.

¹³ *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations*, *ibid*, paragraph 2.4

The Re-Listing of Hamas' Izz al-Din Qassam Brigades

Inconsistent Application of the Listing Power

As the Committee is well aware, the determinative criteria for listing are whether the Attorney-General is 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 a terrorist act has occurred or will occur); or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

The extremely general nature of these criteria has been widely criticised. Firstly, they hinge on the definition of 'terrorist act' which itself covers an expansive array of acts and threats of acts. Furthermore, the scope of the criteria is extra-territorial and there is no requirement that the terrorist act in question be directed to a non-military target. The definition may therefore include acts or threats of action anywhere in the world, regardless of whether they are directed towards a brutal regime in support of self-determination or are the acts of a national army during a period of armed warfare.

The Committee itself has commented on the breadth of the statutory criteria in prior reports. In its *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations* in June 2007, the Committee commented that:

The definition does not explain why certain organisations who engage in, prepare, plan, assist in or foster the doing of a terrorist act have not been proscribed under the Criminal Code whereas others have.¹⁴

This issue has also been highlighted in Nigel Brew's research note on 'The Politics of Proscription in Australia'.¹⁵

The breadth of the statutory criteria is such that many organisations worldwide could be listed by the Australian Government. This includes many organisations on the Department of Foreign Affairs and Trade's Consolidated List (as maintained pursuant to Resolution 1373 of the UN Security Council). Given that only 20 organisations have been listed to date, the application of the listing provisions is clearly a matter of executive discretion, which we understand to be exercised largely on the basis of ASIO's advice. ASIO is a secret organisation whose functions turn on a great deal of expansive discretion. ASIO's significant role in the decision making process is arguably problematic due to its vested interest in proscribing organisations in order to increase the scope of its operational powers. The factors influencing ASIO's decision to seek the listing of an organisation have remained largely unclear and in many ways, a mystery to the public.

In the case of Hamas, it is unclear why Hamas' Brigades, which are a part of Hamas' military wing, have been classed as a terrorist organisation whereas the military of other elected authorities involved in the same conflict, such as the Israeli government, have not. As noted in the Statement of Reasons, in 2006 Hamas was successful in the Palestinian elections, winning 76 of the 132 seats. Since then, notwithstanding protracted conflict with rival party Fatah, Hamas continues to maintain control over the Gaza Strip.

In the last year alone, there has been significant conflict between Israeli and Palestinian forces, including the devastating Gaza Conflict which took place in December 2008 – January 2009.

¹⁴ Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations, June 2007, paragraph 2.2

¹⁵ Nigel Brew, The Politics of Proscription in Australia, Parliamentary Library Research Note No 63/2003-2004 (2004)

This conflict was recently the subject of a United Nations fact finding mission, established by the UN's Human Rights Council, which released its Report in September 2009. This Mission found significant violations of human rights and of the Geneva Convention by Israeli troops. This included:

- attacks on Palestinian government buildings, authorities and police;
- intentional attacks on hospitals in Gaza (including use of white phosphorous munitions);
- indiscriminate attacks on non-combatants (such as the shelling of a school which was sheltering more than 1300 people);
- deliberate lethal attacks on civilians without any justifiable military objective (such as the shooting of civilians trying to move to safety and waving white flags and the shelling of houses, including a house where Palestinian civilians had been forced to assemble by Israeli troops);
- the use of Palestinian civilians as human shields by Israeli troops; and
- the wilful destruction of industrial infrastructure, food production facilities, water and sewage treatment facilities, and housing.¹⁶

The Mission viewed these events in the context of the systematic economic and political isolation Israel has imposed on the Gaza Strip in its blockade, which has itself created an emergency situation in respect of essential services, food, health, water, agriculture and industry.

The Mission also found violations of human rights and the Geneva Convention by Palestinian military forces. However, due to a complete lack of cooperation by the Israeli government in the investigation, the findings of the Mission in this regard were limited.

The ASIO Statement of Reasons relating to Hamas' Brigades, makes no reference to the actions of the Israeli troops in the Gaza conflict, nor does it mention a 20-month ceasefire maintained by Hamas from early 2005 until it was broken by repeated Israeli armed assaults on Gaza.¹⁷ The Statement of Reasons also fails to mention Israel's military commitment to the 'Dahiya doctrine' which emerged during the 2006 Lebanon War. This involves causing the maximum possible destruction and damage to civilian property and infrastructure and civilian populations, in reprisal for the acts of their leaders. As stated by Israel's Northern Command Chief, Gadi Eisenkrot:

We will wield disproportionate power against every village from which shots are fired on Israel, and cause immense damage and destruction. From our perspective, these are military bases. This isn't a suggestion. This is a plan that has already been authorized.¹⁸

Similarly, the Statement of Reasons mentions a threat made by Hamas' Brigades on their website of a 'harsh and painful' response to any Israeli 'Calm' violations but it fails to mention Israeli leaders threats of retribution against civilians in response to rocket attacks – 'destroy 100 homes for every rocket fired'.¹⁹

While there are many other aspects of the conduct of Israel, the Israeli Defence Force and Hamas that might also have been pertinent to the Statement of Reasons, they have not been provided to the Attorney-General as part of ASIO's Statement of Reasons. While we recognise that the Statement is intended to focus on the conduct of Hamas' Brigades, in our view it is misleading to examine that conduct in isolation without looking also at the conduct of Israeli forces, particularly

¹⁶ See United Nations Human Rights Council, Human Rights In Palestine and Other Occupied Arab Territories: Report of the UN Fact Finding Mission on the Gaza Conflict, September 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/docs/12session/A-HRC-12-48.pdf>

¹⁷ See Hamas threatens to break ceasefire after Israeli airstrikes, The Daily Telegraph, 16 October 2006, available at <http://www.telegraph.co.uk/news/worldnews/1531571/Hamas-threatens-to-break-ceasefire-after-Israeli-air-strikes.html>

¹⁸ See <http://www.haaretz.com/hasen/spages/1026539.html>

¹⁹ UN Human Rights Council, *ibid*, [64]

given the long-standing conflict between the two groups and on-going Israeli occupation of Palestinian territories. It is unclear given that the Attorney-General has not provided his own reasons for the decision as to whether this information was provided to him by the Department of Foreign Affairs and Trade or as part of the legal advice provided by the Australian Government Solicitor.

In these circumstances it would seem that the only thing distinguishing the actions of Hamas' Brigades from actions taken by the Israeli Defence Force is that the latter is regarded on the world stage as a 'state actor' whereas the former is considered a non-state actor. Apart from this, the activities of both groups might equally fall within the expansive definition of 'terrorist organisation' contained in Australia's Criminal Code. The application of the listing power to Hamas' Brigades and not to the Israeli Defence Force entails an inconsistent application of the listing power. In our view, the inconsistent use of this power in this case suggests that the listing regime is driven as much by political and foreign policy considerations as it is by national security considerations. This is clearly a misuse of the listing power that exceeds its legislative intention.

Such inconsistent application of the listing power is also extremely detrimental for the Palestinian diaspora in Australia. The listing of Hamas' Brigades and not their Israeli counterparts indicates that the Australian government views the actions of the latter as legitimate and the former as illegitimate. When both groups are obviously engaged in politically motivated activity that falls within the legislative definition of a 'terrorist organisation', the logical conclusion is that the Australian government supports the political objectives of one group and not the other. Not only does this delegitimize the political aspirations of Palestinians and their struggle against Israeli occupation in the Australian public sphere, but the criminalisation that flows from listing is an added blow to Australia's Palestinian community. In our view, matters of foreign-policy should not be brought to bear on the arena of criminal justice in this manner. Furthermore, we urge to Committee to seriously consider the impact of this listing on Australia's Palestinian community.

Hamas' Brigades and the ASIO Guidelines for Listing

In this section, we will examine those ASIO guidelines that we feel have not been made out in the case of the Hamas' Brigades:

Ideology

In the Statement of Reasons, the ideology of Hamas' Brigades is not distinguished from that of Hamas itself. In fact, the Statement indicates that Hamas' Brigade acts to further the political objectives of Hamas. This criterion is not directly addressed in the Statement of Reasons. The Statement does not include any information regarding the ideology of Hamas to indicate a commitment to terrorism per se and it does not suggest that terrorist activities are an intrinsic part of the political objectives of Hamas.

In any event, given that Hamas is a democratically elected representative of the Palestinian people, it is our view that criminalisation of its political objectives via listing is inappropriate. Furthermore, those democratically-supported political objectives should not render the organisation liable to listing unless the Australian government intends to apply the same reasoning to other democratically elected governments world-wide.

If the ideology of Hamas' Brigades is aligned with that of Hamas, as ASIO's Statement of Reasons seems to presume, then there is the possibility that this ideology may not warrant re-listing. This issue is not explored in the Statement of Reasons and in our submission it is an issue that warrants the Committee's consideration.

Links to Australia

In the *Review of the Listing of Six Terrorist Organisations*, the Committee indicated that the criterion 'links to Australia' includes:

- the existence of Australian members of the entity;
- the financing of the terrorist organisation here or abroad by Australians; or
- the supply of Australian personnel to the organisation's activities abroad.²⁰

The Committee has taken the view that, while direct links to Australia are not a statutory prerequisite for listing an organisation, links to Australia should be an important consideration in selection of an organisation for proscription.²¹ The former Attorney General has also indicated that the aforementioned criterion is a significant factor in deciding whether to list an organisation under the Criminal Code.²²

In several reviews, the Committee has expressed that it was unclear how selecting organisations which have no direct link to individuals in Australia would offer any security or efficacy.²³ The Committee has stated:

The intention of the legislation is to protect Australia's security interests and although the concept is wider than demonstrable links to Australia, it still implies some connection to Australian security.²⁴

Furthermore, the Committee has stressed that:

²⁰ Review of the listing of six organizations, *ibid*, paragraph 2.27

²¹ Review of the listing of the Kurdistan Workers Party (PKK), *ibid*, paragraph 2.35.

²² *Ibid*, paragraph 2.33 citing Review of the listing of the Palestinian Islamic Jihad, *ibid* 19

²³ *Ibid*, paragraph 2.36

²⁴ Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995, *ibid*, paragraph 4.28

[P]articular weight should be placed on the existence of known or suspected links to Australia, the nature of those links and the nature of the threats to Australian interests more generally.²⁵

In the case of Hamas' Brigades the Statement of Reasons does not identify that the organisation has any links to Australia. There is no indication that any of its operations have geographical proximity to Australia and there is no suggestion that Hamas' Brigades has any Australian members, that it receives financing from Australians, or that it has been supplied by Australian personnel.

This criterion does not seem to have been applied in respect of Hamas' Brigades and the organisation does not appear to have any 'links to Australia', as that criterion has been defined by the Committee. In our submission, the listing of organisations with no identifiable links to Australia exceeds the scope of the listing provisions' legislative intent and represents a misuse of the power to list organisations. We urge the Committee to consider this in its deliberations on this particular re-listing.

Threats to Australian Interests

The Explanatory Memorandum to the *Criminal Code Amendment (Terrorist Organisations) Bill 2003*, which made important amendments to the listing regime, stated that:

This Amendment enable[d] the Government to independently identify organisations that are a threat to Australia's national security as terrorist organisations - thereby attracting the full weight of the criminal law - without reference to the United Nations Security Council.²⁶

(Whereas, prior to this amendment an organisation could only be listed if it had been subject of a United Nations Security Council decision.)

Based on this statement, the Minority Report on the listing of the PKK expressed the following interpretation of the purpose of the legislation:

The Explanatory Memorandum to the legislation which introduced the proscription regime appears to support a reading of the statute that would limit the circumstances in which it is legally available, to those where the conduct of the organisation proposed to be banned directly affects Australia's current security interests. Whether the statements in the Explanatory Memorandum could be used to assist in interpreting the statute in such a way remains untested and ASIO's internal legal advice is to the contrary—but, whatever may be the ultimate legal resolution of that question should it be litigated, there is no doubt that the government's own explanatory materials issued to the parliament with the Bill clearly set out that intention. This Parliament is entitled to expect the government to act in accordance with those statements.²⁷

In light of the legislative intent underpinning the listing provisions, it is deeply concerning that according to the Statement of Reasons Hamas' Brigades do not appear to pose any threat to Australian interests. According to the Statement of Reasons, all of the interests arguably threatened in the past by Hamas' Brigades are Israeli. Further, there is no mention of how Hamas' Brigades might pose a threat to Australian interests in the future.

The failure to make out this criterion is concerning for two reasons:

²⁵ Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995, *ibid*, paragraph 4.29

²⁶ Parliament of the Commonwealth of Australian, House of Representatives, Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003, Item 1.

²⁷ Review of the listing of the Kurdistan Workers Party (PKK), *ibid*, Minority Report, paragraph 1.23.

First, it is indicative that in re-listing Hamas' Brigades, the Government has acted beyond the scope of the powers intended by the legislature. This extraordinary power was clearly intended to provide greater protection for Australia. Where no demonstrable threat or potential threat to Australia's national security exists, the listing or re-listing of an organisation is in our view an act that has exceeded that legislative intent.

Second, the re-listing of an organisation that poses no threat to Australian interests but which does threaten Israeli interests, could suggest that the relisting is more about maintaining a policy platform that aligns Australia with those nations than it is about protecting Australia. This was confirmed by ASIO's indication in 2004 that the listing was primarily motivated by the listing of Hamas by other western nations. Again, this was not the intent of the legislation. Furthermore, use of this power to achieve foreign policy goals highlights the highly political nature of the listing process. It also substantiates concerns expressed by various organisations (Muslim and non-Muslim) that this power is exercised in a highly politicised, at times discriminatory manner.²⁸ This kind of discrimination on the part of the Government was highlighted when in July 2006 an Australian citizen was killed fighting for the Israeli Defence Force in Southern Lebanon. While the then Foreign Minister Alexander Downer publicly expressed sadness at the death and offered condolences to the deceased's family, he also indicated that same day that Hizballah needed to be disarmed.²⁹ When it comes to disputes involving Israel it is clear that successive Australian governments are not neutral and rather have chosen a policy position aligned to that of Israel. This in turn raises concerns about motivations for the exercise of the listing power in this particular instance, particularly given that Hamas' Brigades do not seem to pose any threat to Australian interests.

We therefore urge the Committee to consider the application of the ASIO guidelines in the case of Hamas' Brigades. In the event that the Committee finds that the ASIO guidelines have not been made out, disallowance of the listings should be recommended.

Does the law of armed conflict apply?

The Committee's 2006 *Review of Security and Counter-Terrorism Legislation* recommended that 'the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict'.³⁰

While the Committee's recommendation has not been accepted by the Government, Australia maintains a legal obligation to observe international law and the law of armed conflict.

In respect of several listings, the Committee has reiterated the view that, while political violence is not an acceptable means of achieving a political end in a democracy:

... there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances - within an armed conflict - the targeting of civilians should be condemned, and

²⁸ See all prior submissions of the Federation of Community Legal Centres (Vic) Inc to the PJCS, see also Australian Muslim Civil Rights Advocacy Council, Submission to the PJCS Review of the operation, effectiveness and implications of section 102.1(2), (2A), (4), (5), (6), (17) and (18) of the Criminal Code Act, February 2007, available at <http://www.aph.gov.au/house/committee/pjcs/proscription/submissions/sub22.pdf>, pages 5 and 10.

²⁹ See 'Perfect Son' dies at war in Lebanon, *The Age*, 28 July 2006, available at: <http://www.theage.com.au/news/world/perfect-son-dies-at-war-in-lebanon/2006/07/27/1153816320590.html>. See also Israeli airstrike kills 54, *The Age*, 30 July 2006, available at <http://www.smh.com.au/news/world/israeli-air-strike-kills-51/2006/07/30/1154197998127.html?page=fullpage#contentSwap2>

³⁰ Parliamentary Joint Committee on Intelligence and Security, *Review Of Security And Counter Terrorism Legislation*, December 2006, paragraph 65

strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and, with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organisations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee:

[When] there is a peace process ... you can unintentionally make things worse if you do not think through the implications of the listing.³¹

Although the above views have been reiterated in subsequent reviews, direct consideration has never been given by the Committee to a particular listing in the context of Australia's obligations under international law with respect to the laws of armed conflict. Given the protracted and highly militarised nature of the conflict between Hamas and Israel, the fact that most of the 'terrorist activity' referred to in Statement of Reasons relates to military targets, and the fact that Hamas' Brigades are part of the Hamas' military forces (Hamas itself being a democratically elected leadership), we take the view that the participation of Hamas' Brigades in these conflicts should be regulated by the laws of armed conflict. In the Press Conference given by members of the UN Human Rights Council's Fact Finding Mission (discussed above), reference is made to the fact that non-state actors are not immune to the application of international law, even in the case of 'asymmetrical' conflict (ie conflict involving state and non-state actors).³² We therefore suggest that Committee give consideration to this question in its deliberations on the re-listing of the Hamas' Brigades.

³¹ Joint Parliamentary Committee on ASIO, ASIS and DSD, Review of the listing of Palestinian Islamic Jihad, June 2004, paragraph 3.21

³² UN Human Rights Council Fact Finding Mission, Press Conference, 29 September 2009, available at <http://www2.ohchr.org/english/bodies/hrcouncil/specialsession/9/FactFindingMission.htm>

The Re-Listing of the Kurdistan Workers' Party

The Federation does not support the re-listing of the Kurdistan Workers' Party ('the PKK') as a 'terrorist organisation' under Division 102, Schedule 1 of the Criminal Code Act 1995 (Cth) ('the Criminal Code'). Our concerns about the re-listing of the PKK are set out below.

Lack of community consultation

As the Committee is aware, the PKK forms part of a popular Kurdish liberation movement and enjoys broad support for its political goals from the Kurdish diaspora in Australia. It is our understanding that no community consultation has been conducted by the Attorney-General in relation to the current re-listing, nor in relation to the previous listing and re-listing of the PKK, in particular with the Australian Kurdish community. This is of particular concern given the very serious consequences of listing, including prosecution for terrorist organisation offences, and the chilling of freedom of legitimate belief and association. Furthermore it denies this community a right to be heard in accordance with principles of natural justice, prior to decisions being made by government that affect them.

As we have outlined extensively in our submission to the 2006 listing, the Kurdish diaspora have experienced serious repressions, cultural assimilation and continuing human rights violations at the hands of the Turkish state. The expression of Kurdish identity is still subject to severe restrictions, and continues not to be recognised in the Turkish constitution, despite some concessions in recent years. In a multicultural society such as Australia, the dispossession of the Kurds should not be disavowed (or for that matter exacerbated) in the application of administrative decisions and law.

The majority report of the Committee on the listing of the PKK in 2006, while supporting the listing recommended that:

- ... the matter be kept under active consideration and requests, in that process, that the Government take into account:
 - o the number of Australians of Kurdish origin who may support the broad aims of the PKK without endorsing or supporting its engagement in terrorist acts;
 - o whether it would be sufficient to proscribe the PKK's military wing, the Kurdistan Freedom Brigade (Hazen Rizgariya Kurdistan HRK) referred to in the Attorney's Statement of Reasons; and
 - o the fluid state of moves towards possible ceasefires.³³

In our view, each of the three substantive matters in the Committee's recommendation should be the subject of consultation by government with affected communities. We note with great concern that these recommendations were not directly considered in the 2008 re-listing. We urge that this inquiry that revisit previous recommendations of the Committee which recognise that the listing criminalises its civil society wings (such as Kongra Gel) as well as its military wings. As the Committee is aware, this is an exceptional listing - no other listed organisation has its political or civil society wings banned. While we argue that the PKK should be de-listed in its entirety, the Committee must give due consideration to the effects of criminalising the civil society activities of the Kurdish liberation movement.

³³ Parliamentary Joint Committee on Intelligence and Security, Review of the listing of the Kurdistan Workers' Party (PKK), April 2006 Majority Report, 33

The PKK and the ASIO Guidelines for Listing

In our submissions to the Committee regarding the listing of the PKK in 2005 and in 2008, we argued that the application of the ASIO Guidelines has been unclear and that they have been applied inconsistently.

The minority report relating to the original listing of the PKK found, that the guidelines were not met in the case of the PKK. They argued that:

Implicitly accepting that conclusion, those advocating the listing instead argued that the PKK fell within the literal terms of the statutory definition of a terrorist organisation.³⁴

If the Joint Committee accepts justifications for new listings without a proper basis and that are inconsistent with the reasoning of its prior reports and not based on existing (or any) stated policy we invite inconsistency. It would permit ad hoc decisions, incapable of justification on rational grounds to be reached. That would be inconsistent with the Joint Committee's obligations to the Parliament.

In our view this remains the case for this re-listing. We will examine below the application of the ASIO guidelines to the PKK, in particular with respect to those guidelines that we believe have not been made out:

Ideology

In its June 2008 report the Committee identified the PKK's objectives to be greater cultural and political rights for Kurds and constitutional amendment to recognise Kurdish identity; political amnesty for PKK militants and allowing the PKK to participate in political activities.³⁵ The most recent statement of reasons acknowledges that the PKK no longer has separatist aims and its objective is to advance the rights of Kurds within Turkey. We refer the Committee to the PKK's public position on achieving political resolution of the conflict and its goals for democratization of Turkish society.³⁶ The Committee also acknowledged that in Europe the PKK has many thousands of sympathisers, but made no mention of support for the Kurdish liberation movement in Australia, in spite of its previous recommendations. In its last report the Committee did not make an assessment of the 'ideology' criterion, or explain how this criterion was understood and applied in order to support the continued listing. In light of the information provided by ASIO, it is not apparent how this criterion could function in order to justify re-listing the PKK.

We submit that the Committee should take into account the significance of the PKK's present objectives – that is, that these objectives reflect dominant calls in the organisation towards a peaceful, democratic solution to the Kurdish question. Critically, this platform is the basis upon which the PKK has called for involvement in present negotiations for resolutions of the conflict, discussed below.

Engagement in a peace process

The current ASIO Statement of Reasons for this relisting fails to mention that an historic opportunity for achieving resolution of the Kurdish conflict appears to be emerging according to informed observers. Turkish state endorsed negotiations for resolution of the conflict are on foot. In its June 2008 re-listing review, the Committee stated its belief 'that it will be some time before the

³⁴ Ibid, paragraph 1.8

³⁵ Review of the re-listing of the Kurdistan Workers Party (PKK), 2008, paragraph 2.10

³⁶ Abdullah Ocalan, 'War and Peace in Kurdistan Perspectives for a political solution of the Kurdish Question', 2008, 31-41, at <http://www.freedom-for-ocalan.com/english/download/Ocalan-War-and-Peace-in-Kurdistan.pdf>.

appropriate political environment exists for a renewal of the peace process'.³⁷ However In late July 2009, the Justice and Development Party (AK Party) announced historic plans for reconciliation of the Kurdish question described by the Government as the 'democratization initiative', or 'Kurdish initiative'.³⁸ Reportedly, the second phase where concrete negotiations for a road map for settlements will be announced in parliament, is currently unfolding.³⁹ The precise nature and process of the initiative, given the Government is at present reported to be unwilling to accept the PKK as a legitimate party to negotiations, are likely to be highly complex, tentative and contested by multiple actors.

In the 2008 re-listing review, the Committee considered it important that the PKK had renounced violence against civilian targets, or had re-entered into a peace process.⁴⁰ Historically, as the Committee is well aware, the PKK has engaged in unilateral ceasefires. The PKK entered into ceasefire for 6 years between 1998-2004 and subsequently re-entered violent conflict after its requests for resolution were rejected by Turkey. The Turkish state has had a significant role in frustrating the PKK ceasefires.

While the press reports that there are differences of opinion within factions of the PKK about how to respond to the initiative, the imprisoned PKK leader, Abdullah Ocalan has recognised the AK party's steps towards resolution. After the Government's announcement of the initiative, the PKK extended its unilateral ceasefire of 21 March 2009, until September, and it is currently still in place, pledging not to attack as long it is not attacked by the Turkish armed forces.⁴¹ Prime Minister Erdogan and Chief of the General Staff of the Army Ilker Basburg have made repeated public comments that military operations against the PKK will continue, and refuse to renounce military violence.⁴² Since the declaration of the Government initiative, security forces and PKK guerillas have therefore been engaged in clashes. Erdogan has also however indicated that the peace process will not be abandoned in the face of clashes.⁴³ The DTP has called for a cessation of all hostilities by all parties.⁴⁴ The Executive Council of the Democratic Communities of Kurdistan released a statement calling for peace negotiations.⁴⁵

Abdullah Ocalan launched a 'road map' for peaceful resolution of the conflict in August 2009, which has yet to be publically released, as it is in possession of public prosecutors.⁴⁶ Ocalan has been reported to have recently stated that negotiations should begin between the government,

³⁷ Review of the re-listing of the Kurdistan Workers Party (PKK), 2008, paragraph 2.30.

³⁸ Emrullah Uslu, 'AKP Prepares a Comprehensive Plan to Address the Kurdish Question' James Town Foundation Eurasia Daily Monitor Volume 6, Issue 142, 24 July 2009,

[http://www.jamestown.org/single/?no_cache=1&tx_ttnews\[tt_news\]=35317&tx_ttnews\[backPid\]=7&cHash=3f5e0fb62d](http://www.jamestown.org/single/?no_cache=1&tx_ttnews[tt_news]=35317&tx_ttnews[backPid]=7&cHash=3f5e0fb62d)

³⁹ Mumtazer Turkone, 'Second phase of the 'initiative' Today's Zaman, 26 September 2009, at <http://www.todayszaman.com/tz-web/news-188039-second-phase-of-the-initiative-by-mumtazer-turkone.html>

⁴⁰ Review of the re-listing of the Kurdistan Workers Party (PKK), 2008, paragraph 2.8

⁴¹ 'Stop Military Operations and Solve Kurdish Question' Bianet, 16 July 2009, <http://bianet.org/english/minorities/115906-stop-military-operations-and-solve-kurdish-question>; Simon Tisdall, 'Is Turkey preparing for peace?' The Guardian, Tuesday 28 July 2009 accessed a <http://www.guardian.co.uk/commentisfree/2009/jul/28/turkey-kurds-peace-plan>.

⁴² See for example, 'PKK rebels prolong ceasefire in Turkey', Jane's Terrorism and Security Monitor, 5 June 2009. The Turkish parliament passed a motion on the 6th October 2009 extending for another year, a mandate to continue cross-border military operations against the PKK. 'Turkish military ready for "sweeping operations" against PKK', Today's Zaman, 7th October 2009 at, <http://www.todayszaman.com/tz-web/news-189162-103-turkish-military-ready-for-sweeping-operations-against-pkk.html>

⁴³ 'Erdogan: Conflicts will not block the peace process', Bianet, 10 September 2009, at <http://bianet.org/english/minorities/116963-erdogan-conflicts-will-not-block-the-peace-process#>

⁴⁴ 'Erdogan dismisses DTP calls to stop anti-PKK operations', Today's Zaman, 14th September 2009, at <http://www.todayszaman.com/tz-web/news-187036-erdogan-dismisses-dtp-calls-to-stop-anti-pkk-operations.html>

⁴⁵ Democratic Communities for Kurdistan (KCC) Executive Council Statement, 1 September 2009, at <http://www.kurdish-info.eu/News-sid-Democratic-Communities-of-Kurdistan-KCC-Executive-Council-13593.html>.

⁴⁶ Lawyers Applied to Public Prosecutor for Ocalan's Road Map', Bianet, 2 September 2009, at <http://bianet.org/english/minorities/116819-lawyers-applied-to-public-prosecutor-for-ocalans-road-map>

primarily through the DTP and a democratic congress of Kurds in October.⁴⁷ Ocalan has reportedly stated that the PKK is prepared to take an indirect role in negotiations, in favour of the DTP, and has called for the negotiations to be progressed through a parliamentary commission.⁴⁸ How far there will be a real dialogue and what can be achieved depends on the willingness to compromise on all sides. Vested interests, particularly among the military and state functionaries, may still prevent a resolution.

This criterion has been previously considered by the Committee to be significant, and as discussed, ASIO has also acknowledged that where there are negotiations for peace, listing may make things worse.⁴⁹ Mark Muller QC, Chair of the Bar Human Rights Committee of England and Wales, has argued that proscription of the PKK in the EU 'merely fuelled the PKK's eventual return to violence as all avenues for dialogue were closed.'⁵⁰ We submit that the complex and delicate state of negotiations for peace in Turkey should be supported by not re-listing the PKK, in accordance with ASIO's previous advice to the Committee. Given the present evolving state of peace negotiations, it is clear that this fundamentally important criterion could not justifiably provide a reasonable basis with which to support relisting of the PKK.

Engagement in terrorism

Evidence of the perpetration of serious and systematic human rights violations by 'deep state' ultra-nationalist groups operating with state impunity, has emerged in recent years. In our previous submission we raised the incident of the bombing of a Kurdish-owned bookshop in the town of Şemdinli in 2005. The incident has received much international attention for evidence implicating senior military figures in the design and co-ordination of the attack in Şemdinli in November 2005 and pointing to the role of the military in 'deep state' organisations.⁵¹ There are serious questions as to whether some of the incidents referred to in the ASIO Statement of Reasons as attributed to the PKK should be in this category.

The Ergenekon case: In 2008 unprecedented court proceedings in Turkey were launched against alleged members of an underground ultra-nationalist network known as 'Ergenekon', suspected of crimes including extra-judicial killings and bombings. Amongst the 86 people who have been arrested and charged in the case are retired military officers and politicians, as well as high-profile journalists, academics, lawyers and other public figures.⁵² On 18 February 2009, as part of the Ergenekon investigation, Prosecutors agreed to investigate the 1996 Güçlükonak massacre – where 11 Kurdish civilians were killed in an atrocity originally blamed on the PKK.⁵³ It has taken sustained allegations over the last 13 years that the massacre was perpetrated by state forces, and not the PKK, who denied responsibility at the time, for the matter to be investigated. Central to state actions where revelations made early this year by former State Minister Adnan Ekmen, published in the Turkish press, alleging that the massacre was committed by an unoffi-

⁴⁷ 'PKK leader responds to General Staff's Comments' Bianet 26 September 2009, at <http://bianet.org/english/politics/117282-pkk-leader-responds-to-general-staffs-comments>

⁴⁸ 'Öcalan: Demokratik negotiations will progress around the DTP' Kurdish-Info, 5 October 2009, at <http://kurdish-info.eu/News-sid-Ocalan-Demokratik-negotiations-will-progress-around-the-DTP-13727.html>

⁴⁹ Joint Parliamentary Committee on ASIO, ASIS and DSD, Review of the listing of Palestinian Islamic Jihad, June 2004, paragraph 3.21

⁵⁰ Mark Muller QC, 'Terrorism, Proscription and the Right to Resist in the Age of Conflict', KHRP Legal Review, vol 14, 2008 at 60.

⁵¹ KHRP, State Accountability? The Şemdinli Trial Re-Hearing Trial Observation Report, September 2007, at http://www.khrp.org/component/option,com_virtuemart/page,shop.product_details/flypage,shop.flypage/category_id,17/product_id,131/Itemid,36/

⁵² Amnesty International Report 2009 at 330.

⁵³ KHRP Legal Review, vol 15, 2009 at 29. See also the extensive documentation of Turkey's 'cover up' of the massacre, including intimidation and prosecution of independent investigators: Amnesty International, 'Turkey: "Birds or earthworms": the Güclükonak Massacre, its alleged cover-up, and the prosecution of independent investigators' 1998, at <http://www.amnesty.org/en/library/info/EUR44/024/1998>.

cial state security unit known as JİTEM - Jandarma İstihbarat ve Terörle Mücadele (Gendarmerie Intelligence and Counter-terrorism).⁵⁴

The 29 September 2007 incident: In an incident which has been described in the Turkish and Kurdish press as harrowingly similar to the Güçlükonak massacre, the Statement of Reasons, alleges that the PKK massacred 12 Kurdish people in Sirnak province on 29 September 2007. However the Statement of Reasons fails to mention that the massacre was denied by the PKK, who alleged it was committed by JİTEM. Further, eyewitness accounts and evidence collected by NGO's have been reported to corroborate these allegations. On this basis, DTP parliamentarian Hasip Kaplan, has called for state prosecutors to also investigate this massacre.⁵⁵

We do not claim that the PKK has not committed any of the acts of violence which have targeted civilians as outlined in the Statement of Reasons. We do put it to the Committee however, that there are in issue serious claims of state sponsored crime, which have been attributed to the PKK by Turkey. If the decision to re-list the PKK is to be based on the list of violent acts in ASIO's Statement of Reasons, then the Committee must be confident of ASIO's sources and that there is not conflicting evidence of state sponsored crime.

Links to Australia and threat to Australian security/interests

As outlined above, in the *Review of the Listing of Six Terrorist Organisations*, the Committee indicated that the criterion 'links to Australia' includes:

- the existence of Australian members of the entity,
- the financing of the terrorist organisation here or abroad by Australians, or
- the supply of Australian personnel to the organisation's activities abroad.⁵⁶

No such links between the PKK and Australia were evinced in the Statement of Reasons or in evidence presented to the Committee in respect of previous or current re-listing of the PKK. In the 2008 re-listing review, the Committee referred to ASIO's view that Kurds in Australia raised money for charities, and that often those providing charitable relief were unaware that funds were being redirected by the PKK.⁵⁷ ASIO and the Committee did not however indicate any evidence to substantiate this view as an allegation, and indeed, as the Committee indicates, there have been no prosecutions in relation to funding the PKK.⁵⁸

The Committee has previously taken the view that, while direct links to Australia are not a statutory prerequisite for listing and organisation, links to Australia should be an important consideration in selection of an organisation for proscription.⁵⁹ The former Attorney General has also indicated that the aforementioned criterion is a significant factor in deciding whether to list an organisation under the Criminal Code.⁶⁰

In several reviews, the Committee has expressed that it was unclear how selecting organisations which have no direct link to individuals in Australia would offer any security or efficacy.⁶¹ In its most recent inquiry, the Committee stated:

⁵⁴ 'Ergenekon prosecutor accepts Güçlükonak massacre complaint' Today's Zaman. 18 February 2009 at <http://www.todayszaman.com/tz-web/detaylar.do?load=detay&link=167246#>

⁵⁵ See <http://kurdishrights.org/2009/02/16/turkish-minister-confesses-to-massacres-committed-by-turkish-state/>

⁵⁶ Review of the listing of six organizations, *ibid*, paragraph 2.27

⁵⁷ Review of the re-listing of the Kurdistan Workers' Party (PKK) 2008, paragraph 2.15.

⁵⁸ *Ibid*, paragraph 2.17.

⁵⁹ Review of the listing of the Kurdistan Workers Party (PKK), 2006, paragraph 2.35.

⁶⁰ *Ibid*, paragraph 2.33 citing Review of the listing of the Palestinian Islamic Jihad, *ibid* 19

⁶¹ *Ibid*, paragraph 2.36

The intention of the legislation is to protect Australia's security interests and although the concept is wider than demonstrable links to Australia, it still implies some connection to Australian security.⁶²

The minority position of the Committee's 2006 report expressed the following interpretation of the purpose of the legislation:

The Explanatory Memorandum to the legislation which introduced the proscription regime appears to support a reading of the statute that would limit the circumstances in which it is legally available, to those where the conduct of the organisation proposed to be banned directly affects Australia's current security interests. Whether the statements in the Explanatory Memorandum could be used to assist in interpreting the statute in such a way remains untested and ASIO's internal legal advice is to the contrary—but, whatever may be the ultimate legal resolution of that question should it be litigated, there is no doubt that the government's own explanatory materials issued to the parliament with the Bill clearly set out that intention. This Parliament is entitled to expect the government to act in accordance with those statements.⁶³

In our view it would not appear that there are adequate grounds for making out the ASIO guidelines of either links to Australia, or, a threat to Australian security or interests. In the overall context of weighing up all the guidelines, something other than the hypothetical, future threat that Australians visiting Turkey may be harmed, should be required to substantiate banning the PKK.

The listing criminalises Kurdish Australians

In its review of the original listing of the PKK, the Committee were of the view that where substantial links to Australia are apparent through broad support for the organisation, then this is a more serious consideration: 'Then the potential impact of the listing on Australians needs to be weighed carefully, especially when the offences under the legislation are tied into a broad range of activity'.⁶⁴ In particular, the Committee noted that the Criminal Code's terrorist organisation offences are serious and do not require a direct link between the person's activity and actual terrorism.

At the hearing, the Attorney-General's Department was asked whether an independent assessment was made of the impact the listing would have on the Australian diaspora. The Department did not have information on the extent of the diaspora, but, on notice, provided the Committee with statistics similar to those quoted from the Australian Bureau of Statistics in paragraph 2.44. Asked whether the impact on the Australian community was a legitimate question to consider prior to any listing, the departmental officer did not dispute it. However, he believed that it was a question best put to ASIO. When asked about the extent of the support in the community for the PKK or its aspirations for an independent Kurdistan, ASIO responded that that question was outside the legislative tests.⁶⁵

The Committee acknowledged the strong support in the Kurdish diaspora, including in Australia, for the political objectives of the PKK in that many Kurds see the PKK as 'their party'. Furthermore, the Committee acknowledged that the overall aims of the PKK are likely to generate broad sympathy among large numbers of Australians, not only people of Kurdish background.⁶⁶

⁶² Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995, *ibid*, paragraph 4.28

⁶³ Review of the listing of the Kurdistan Workers Party (PKK), 2006, Minority Report, paragraph 1.23.

⁶⁴ Review of the listing of the Kurdistan Workers Party (PKK), 2006, paragraph 2.36

⁶⁵ *Ibid*, paragraph 2.37

⁶⁶ *Ibid*, paragraph 2.38

We submit that in the absence of any evidence that the PKK poses a threat to Australians, its proscription serves to criminalise support, political association and a broad range of legitimate identifications Australians may have with the PKK. In this regard, the listing is inconsistent with Australia's obligations under the International Covenant on Civil and Political Rights, most notably the obligation relating to freedom of association provided for in Article 22.

In considering the impact of the listing of the PKK on Kurds in Australia, we draw the Committee's attention to our detailed discussion in our previous two submissions to the Committee.

Does the law of armed conflict apply?

We refer to the Committee's past position with respect to the law of armed conflict as articulated above in relation to the Hamas' Brigades. The same arguments apply as to the PKK and Hamas in that proscription by Australia may be inconsistent with obligations under international law, and incompatible with efforts for conflict resolution.

There is ample evidence that the PKK is engaged in a protracted civil conflict in furtherance of self-determination by an ethnic minority, subject to the laws of armed conflict and the Geneva Convention. In our submission, this conflict is of a kind which the Committee has previously stated should not necessarily be proscribed. In its review of the original PKK listing the Committee acknowledged that not all political violence need be defined as terrorism. The Committee referred to the United Nation Declaration of Human Rights and in particular, the right to engage in armed struggle against tyranny for self determination and in self defence.⁶⁷ We maintain that it is not justified to continue to list the PKK in the context of the well evidenced political violence and human rights abuses committed by the Turkish state.

In summary we note the evidence which finds continued, systematic abuse of human rights of the Kurdish population in Turkey. The brief overview below provides a select example of extensive findings of sustained as well as increased abuses:⁶⁸

Torture and killings with impunity

Amnesty International found that:

Reports of torture and other ill-treatment rose during 2008, especially outside official places of detention but also in police stations and prisons. People accused of ordinary as well as politically motivated offences were vulnerable to ill-treatment. Countercharges were often brought against individuals who said they had been ill-treated by law enforcement.⁶⁹

Amnesty also reported increased incidents of police shootings, while reports of extrajudicial killings by police, the military and other actors suspected to have connections to state forces over the last few years continue to be exposed in spite of a culture of state impunity.⁷⁰

⁶⁷ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), 2006, paragraph 2.13

⁶⁸ For a discussion of the increased incidents of state torture and extra judicial killings, discrimination and violence see Amnesty International Report 2009, pp 329-333, at <http://thereport.amnesty.org/en/download>

⁶⁹ Amnesty International Report 2009, 331.

⁷⁰ *Ibid*, 331, 332. See also the extensive 'Fact Finding Mission' reports of the Kurdish Human Rights Project (www.khrp.org) on this issue. For example, *Human Rights in the Kurdish Region of Turkey: Three Pressing Concerns*, 2009, at <http://www.khrp.org/content/view/491/2/>.

Violence and discrimination

Amendments in 2006 to Turkish anti-terror legislation brought into effect a series of draconian provisions which in practice been used to violate the human rights of its citizens, and in particular Kurds. Amnesty reported that 'protracted and unfair trials persisted, especially for those prosecuted under anti-terrorism legislation.'⁷¹ Under Turkish anti-terror legislation, children between the ages of 15 and 18 can be tried as adults. Most Kurdish children are imprisoned in adult jails because of allegations that they are the PKK, and abuses such as beatings are reported to be common. The KHRP reported in 2009 that:

...some 500 children between the ages of 12 and 18 have been detained and tried since the start of 2008 in connection with protests in the provinces of Diyarbakır, Sırnak, Cizre, Batman and Adana. They have been charged with offences punishable with over 20 years in prison. Children accused of throwing stones at security officials during such demonstrations, for instance, have faced charges of committing crimes on behalf of a terrorist organisation. Former Turkish Justice Minister Mehmet Ali Şahin has stated that 724 children faced terrorism charges in 2006 and 2007. During the same period, another 413 children were accused of membership of an armed organisation.⁷²

Many of the children prosecuted were arrested for attending pro-Kurdish demonstrations. Extensive police violence against Kurds, such as that deployed against demonstrations in October 2008 against the ill-treatment of PKK leader Abdullah Ocalan also resulted in collective forms of punishment such as the withdrawing of health benefits to the families of those who participated in demonstrations.⁷³

Freedom of expression and Kurdish identity

Despite some improvements such as the lifting of the ban on playing Kurdish music, and allowing Kurdish courses to be taught in universities, arbitrary and widespread restrictions remain on Kurdish language rights and freedom of expression, with severe penalties and prosecutions being pursued. For example, in 2008 a Kurdish children's choir were prosecuted under anti-terror laws for singing a Kurdish song at a world music festival in the United States. Prosecutors argued that the song was associated with the PKK and that singing it amounted to disseminating propaganda on behalf of a terrorist organisation. Of nine children who went to trial in June 2008, three faced proceedings in an adult court. While the children were eventually acquitted, Human Rights Organisations have argued that this case reflects the recent pattern of wide spread prosecutions in order to terrorise the Kurdish population, while ending in acquittals to limit international criticism which may stall the accession process to the EU.⁷⁴

In other recent examples:

- On the 29th September 2009, a lawyer, a writer and an actor were each sentenced to one years imprisonment for saying the words 'Kurds' and 'Kurdistan' at public events, in breach of article 216 of the Turkish Criminal Code concerned with 'inciting hatred and hostility amongst the public and humiliation of the public'.⁷⁵
- The pro-Kurdish Democratic Society Party (DTP) faces closure on the grounds that it engages in activities against the unity and integrity of the country.

⁷¹ Ibid, 331.

⁷² Kurdish Human Rights Project, KHRP Legal Review, vol 15, 2009, 35.

⁷³ Amnesty International Report 2009, 331

⁷⁴ KHRP, A Children's Choir Face Terrorism Charges: Juveniles in the Turkish Justice System, 2008, 14, at http://www.khrp.org/component/option,com_virtuemart/page,shop.product_details/flypage,shop.flypage/category_id,18/product_id,149/Itemid,36/

⁷⁵ 'One Year Imprisonment for Saying "Kurdistan"', Kurdish-Info 6 October 2009, at <http://kurdish-info.eu/News-sid-One-Year-Imprisonment-for-Saying-Kurdistan-13737.html>

Turkey's human rights record is of fundamental relevance to the Committee's deliberations whether the PKK should be re-listed. Banning the PKK, while Turkey's state crimes are perpetrated largely with impunity, will not facilitate a peaceful resolution to the conflict. Rather, proscription of the PKK legitimates the Turkish states military responses and repressions against the Kurdish population.

The Re-Listing of Lashkar-e-Tayyiba

In addition to our general concerns regarding the listing regime and lack of community consultation prior to re-listing, in respect of the re-listing of Lashkar-e-Tayyiba (LeT) the Federation's concerns are that the organisation appears not to conform to all of the ASIO guidelines.

The ASIO Statement of Reasons pertaining to the LeT does not demonstrate that the LeT is a threat to Australian security interests. In fact, based on the Statement of Reasons it is clear that the LeT's political goals primarily relate to the Indian Administered Kashmir and that its activities are based in the region around Pakistan, including Kashmir, India and Afghanistan. There is no indication that the LeT activities have any geographical proximity to Australia or Australian interests. Furthermore, the Statement of Reasons does not argue that there are currently links between the LeT and Australia. While the Statement of Reasons identifies some prior connections between the LeT and Australian citizens or person present in the Australia, it does not suggest that Australians are currently members of the LeT, financing its operations or supplying it with personnel. Based on the Statement of Reasons, it is therefore difficult to comprehend what, if any, benefit this re-listing has for Australian national security.

While the November 2008 attacks in Mumbai have been attributed to LeT, more recently it has been reported that the LeT has stated that it is not pursuing any 'global jihadi' aims and that it will confine its struggle to the Kashmir region. Furthermore, the organisation has also stated that it will pursue a peaceful settlement of the Kashmir problem in future.⁷⁶ This information was not included in ASIO's Statement of Reasons. It is significant in respect of the ASIO guidelines relating to the organisation's ideology and its engagement in terrorism.

⁷⁶ Animesh Roul, Pakistan's Lashkar-e-Taiba Chooses between Kashmir and Global Jihad, available at [http://www.jamestown.org/programs/gta/single/?tx_ttnews\[tt_news\]=34421&tx_ttnews\[backPid\]=26&cHash=47e2147c67%20Pakistan%92s%20Lashkar-e-Taiba%20Chooses%20Between%20Kashmir%20and%20the%20Global%20Jihad](http://www.jamestown.org/programs/gta/single/?tx_ttnews[tt_news]=34421&tx_ttnews[backPid]=26&cHash=47e2147c67%20Pakistan%92s%20Lashkar-e-Taiba%20Chooses%20Between%20Kashmir%20and%20the%20Global%20Jihad), 28 January 2009

The Re-Listing of Palestinian Islamic Jihad

In respect of the re-listing of Palestinian Islamic Jihad (PIJ) the Federation is similarly concerned that the ASIO guidelines have not been made out. In particular, it has not been shown that PIJ has links to Australia or poses a threat to Australian interests.

In June 2004, despite recommending that the listing remain, the Committee's predecessor (the Parliamentary Joint Committee on ASIO, ASIS and DSD) indicated that the case for the listing of Palestinian Islamic Jihad had not been entirely clear. The Committee stated that:

The immediate and threatening aspects of a particular entity, its transnational nature and the perceived threats to Australia or involvement of Australians should be given particular weight when considering a listing. This does not appear to have occurred in this listing. Nevertheless, the Committee does not object to this listing. However, it would like to see a more considered process in any future regulations. Given the serious consequences attached to listing, it should not be taken lightly.⁷⁷

In its 2004 report, the Committee quoted the then-Attorney General in its report when discussing the guidelines for listing organisations:

TONY JONES: Does this organisation have members in Australia about whom you are worried?

PHILIP RUDDOCK: Look it is one of the factors that we've been taking into account. We may move from this, but generally speaking we look to see whether there are linkages in Australia. Those linkages can be in a variety of forms. They can be raising money for organisations, they can be having people who have trained with them, they can be people who are overtly supporting them. There are a range of factors, but we look for linkages.

...

PHILIP RUDDOCK: The aspects that have to be looked at first are – is it a terrorist organisation? Then you establish whether or not before you proscribe that as a terrorist organisation that it has linkages with Australia. I think the United Nations have proscribed - or have suggested proscription for – something like 100 or more organizations and we've proscribed to date 16. You can see that the fact that has been influencing us is whether there is a connection with Australia.⁷⁸

The report indicated that this was consistent with the Committee's view that threats to Australia or involvement of Australians should be given particular weight when considering a listing.⁷⁹

In the same report, but a few paragraphs later, the Committee went on to write:

It appears that the PIJ has no links to Australia. The Attorney-General is quoted as saying that the 'PIJ has no known presence in Australia' and was proscribed 'because of its activities overseas'. This was confirmed by ASIO.⁸⁰

Furthermore, the report indicated that ASIO had acknowledged that PIJ had no links to Australia and that there was no Australian financing of PIJ. Instead, ASIO remarked that some individuals in Australia shared the PIJ's ideology and indicated that the listing was based on the

⁷⁷ Joint Parliamentary Committee on ASIO, ASIS and DSD, [Review of the listing of Palestinian Islamic Jihad](#), June 2004, paragraph 4.11

⁷⁸ Parliamentary Joint Committee on ASIO, ASIS and DSD, Review of Listing of Palestinian Islamic Jihad, June 2004, available at <http://www.aph.gov.au/House/committee/pjcaad/pij/report/chapter3.pdf>, [3.8]

⁷⁹ Ibid [3.5]

⁸⁰ Ibid, [3.11]

listings of other liberal democracies, which ASIO took as its benchmark.⁸¹ Notwithstanding these significant deficiencies in the consideration of this particular listing, the Committee did not object to the listing at that time.

In our view, the deficiencies that became obvious in the Committee's review of the 2004 listing, continue to this day. Since 2004, in respect of each re-listing of PIJ ASIO has not shown that PIJ has any links to Australia or poses any threat to Australian interests. Furthermore, each Statement of Reasons relating to PIJ has expressly pointed out that PIJ confines its activities to the Middle East and that it 'has not deliberately targeted Western interests'. This has again been stated in the current Statement of Reasons.

In our view, this is concerning for two reasons. Firstly, it indicates that this listing does not have any direct security benefit for Australia and secondly, by making a listing that is not necessary to protect Australia's national security, the government has exceeded the scope of the listing power (as discussed above in more detail in respect of the Hamas Brigades).

⁸¹ Ibid, [3.15]

Conclusion

In summary, the Federation's concerns regarding the re-listing of the Hamas Brigades, PKK, LeT and PIJ are as follows:

Hamas Brigades

- The re-listing of Hamas' Brigades evinces an inconsistent application of the listing power.
- The re-listing of Hamas' Brigades is motivated by foreign-policy considerations and not national security concerns.
- The re-listing of Hamas' Brigades is socially damaging to Australia's Palestinian community in that it criminalises that community and their political aspirations.
- Hamas' Brigades do not meet the ASIO guidelines for listing, in particular the guidelines relating to links and threat to Australia and ideology.
- The laws of armed conflict apply to the conflict that Hamas' Brigades are involved in and, as such, listing them as a 'terrorist organisation' is inappropriate.

PKK

- The process for re-listing the PKK has lacked procedural fairness.
- The laws of armed conflict apply to the conflict that the PKK is involved in and as such, designation of the PKK as a 'terrorist organisation' is inappropriate.
- The PKK does not meet the non-statutory ASIO guidelines for listing. In particular, the significant shift of the Turkish state towards negotiations for resolution of the conflict and the PKK's current ceasefire and support for the negotiations requires that the re-listing not be made.
- The listing of the PKK criminalises Kurdish Australians and unduly impinges on freedom of political expression and association.

LeT

- The LeT does not meet the ASIO guidelines for listing, in particular the guidelines relating to links to Australia and threats to Australian interests. There are also questions regarding the LeT's current ideology and engagement in terrorism

PIJ

- The PIJ does not meet the ASIO guidelines for listing, in particular insofar as ASIO are adamant that PIJ's operations are confined to the Middle East and are not aimed at Western targets. The PIJ therefore fails to meet the guidelines requiring links to Australia and threats to Australian interests.