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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600
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Dear Robert

**Submission in relation to the re-listing of four organisation under Division 102 of the
*Criminal Code Act 1995***

I would like to thank the Parliamentary Joint Committee on Intelligence and Security (“the Committee”) for the opportunity to make a submission in relation to the recent re-listing of the Kurdistan Workers Party, of Hamas' Izz al-Din al-Qassam Brigades, of Palestinian Islamic Jihad and of Lashkar-e-Tayyiba.

Should the Committee have any queries, please do not hesitate to contact me.

Yours sincerely,

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1. Introduction

I believe that my general views on the proper approach to the listing of organisations under the *Criminal Code* are well known to the Committee.¹ In summary, those views are that the merits of the listing or re-listing of an organisation ought to be evaluated according to the following criteria:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law;
- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
 - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
 - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;
 - the way in which the concept of ‘membership’, and particularly ‘informal membership’, will be applied in the context of the organisation;
 - the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.²

¹ See, for example, Submission to the Parliamentary Joint Committee on Intelligence and Security in relation to the re-listing of Hizballah's External Security Organisation (ESO) under the Criminal Code Act 1995 (2009) §2.4.

² These criteria, and their potential utility, were noted by the Committee and its predecessor in a number of reports: Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist*

The underlying rationale for these suggested criteria for review is to require that the power to list organisations under Division 102 of the *Criminal Code* be exercised in way that is consistent with Australia’s pluralist, democratic political culture. It is obvious that, of the many hundreds or thousands of organisations worldwide who satisfy the statutory criteria for listing,³ only a small number have actually been listed. To explain and justify these listings to those whom they affect requires taking account of the links (if any) between organisations and Australia. Focussing on links, and especially threats, to Australia is the best way to reduce any appearance that listings are motivated primarily by political, foreign policy considerations, and to make it clear how listings contribute to criminal law enforcement.

On the basis of these criteria, this submission opposes the relisting of the Kurdistan Workers Party (“the PKK”), of Hamas' Izz al-Din al-Qassam Brigades (“the Brigades”) and of Palestinian Islamic Jihad (PIJ). It does not oppose the relisting of Lashkar-e-Tayyiba (“LeT”), but argues that even in respect of this listing the process is flawed.

ASIO has on several occasions identified the following considerations as those which are the most salient in having regard to the listing of an organisation:

- the organisation’s engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation’s links to Australia;
- the threat posed by the organisation to Australian interests;

organisations (2005) at 2.32-2.35; *Review of the listing of Tanzim Qa’idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.7; *Review of the listing of seven terrorist organisations* (2005) at 2.25; Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers’ Party (PKK)* (2006) at 2.7–2.8. These criteria have also been endorsed by several academic and non-government organisations concerned with the operation of the listing regime under the *Criminal Code*: Australian Muslim Civil Rights Advocacy Network, Submission to the Senate Legal and Constitutional Committee's Inquiry into the Anti-Terrorism Laws Reform Bill 2009 (2009), p 16; Gilbert + Tobin Centre of Public Law, Submission to the Senate Legal and Constitutional Committee's Inquiry into the Anti-Terrorism Laws Reform Bill 2009 (2009), Recommendation 10, p 9; Federation of Community Legal Centres (Vic), Submission to Review of the Listing Provisions of the *Criminal Code Act 1995* (2007), p 12; Queensland Council of Civil Liberties, Submission to the Parliamentary Joint Committee on Intelligence and Security’s Review of the Power to Proscribe Organisations as Terrorist Organisations (2007), p 3.

³ *Criminal Code* (Cth), section 102.1(2).

- the proscription of the organisation by the United Nations or by like-minded countries;
- whether or not the organisation is engaged in a peace or mediation process.⁴

In 2007, the Deputy Director of ASIO gave the following evidence to the Committee:

Against the very large number of potential groups that may meet the legislative test, we have to work out where we start from. So the criteria simply have the status internally of a tool – an accountable tool rather than just a haphazard approach – as to where we start and, as we go through, what comes up next as the more likely ones that will meet the test.⁵

To the best of this author’s knowledge, ASIO has not departed from this position – that listing must be undertaken in accordance with an accountable, non-haphazard approach, and that the criteria set out above are the means for it to achieve this end.⁶

In its *Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code* the Committee characterised these as “non-statutory criteria” to guide the listing of organisations.⁷ In its most recent report, however, the Committee appears to reject this description, saying that “these guidelines are indicators only”.⁸ Whether criteria, guidelines, or indicators, this submission argues that when regard is had to these factors, rather than the author’s preferred criteria, the relistings of the PKK, the Brigades and PIJ nevertheless can be seen to be flawed.

⁴ For example, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations* (2005) at 2.24; Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code* (2007) at 4.3; Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Hizballah’s External Security Organisation (ESO) as a terrorist organisation* (2009) at 2.3.

⁵ Evidence to the Parliamentary Joint Committee on Intelligence and Security, Canberra, April 4, 2007, p 67, cited in Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code* (2007) at 4.5.

⁶ ASIO’s *Report to Parliament 2007–08* (2008) states that “ASIO assesses a range of factors when considering organisations for proscription. These may include engagement in terrorism, ideology, links to other terrorist networks, threats to Australian interests, or proscription by the United Nations or other countries” (at p 5).

⁷ Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of ‘terrorist organisations’ under the Australian Criminal Code* (2007) at 4.3

⁸ Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Hizballah’s External Security Organisation (ESO) as a terrorist organisation* (2009) at 2.4.

2. The PKK

The Statement of Reasons for this listing establishes what is any event well-known, that the PKK is involved in a long-running struggle with the Turkish government, comparable in its general character to nationalist revolts in other parts of the world. As well as indicating various attacks perpetrated by the PKK against Turkish soldiers and security forces – “The PKK focuses its attacks on Turkish official and especially security force targets in southeastern Turkey”⁹ – the material indicates alleged PKK attacks against civilians. It does not canvass the equally well-known allegations of human rights abuses committed by the Turkish government,¹⁰ nor suggestions that at least some of the violence against civilians that is attributed to the PKK – including the massacre of September 29, 2007, mentioned in the Statement of Reasons – may have in fact been perpetrated by Turkish security forces.¹¹ Nor does the Statement of Reasons discuss the significance of recent ceasefire announcements by the PKK, nor statements by PKK officials of a desire to resolve the conflict through peaceful dialogue.¹²

The failure of the Statement of Reasons to take account of these last-mentioned matters gives rise to some doubt as to whether the grounds on which the Attorney-General is satisfied that the PKK satisfies the statutory criteria for listing are *reasonable* grounds, as the *Criminal Code* requires.¹³ Certainly, it does not appear that consideration has been given to all the relevant evidence.

If it is the case that the grounds on which the PKK has been listed are reasonable ones, nevertheless the listing is not one which is justifiable, once regard is had to the extra-statutory considerations that must be taken to underpin the legitimacy of singling out particular organisations for listing. Thus, the Statement of Reasons does not indicate any links between the PKK, whatever violence it is connected to, and Australia. Indeed, the fact that there have

⁹ Statement of Reasons, p 8.

¹⁰ Extensive material on these human rights abuses is available from the Kurdish Human Rights Project at <<http://www.khrp.org/>>, the US State Department at <<http://www.state.gov/g/drl/rls/hrrpt/2006/78844.htm>>, Amnesty International at <<http://report2009.amnesty.org/en/regions/europe-central-asia/turkey>> and Human Rights Watch at <<http://www.hrw.org/en/europecentral-asia/turkey>>.

¹¹ “Turkish minister confesses to massacres committed by Turkish State” at <<http://kurdishrights.org/2009/02/16/turkish-minister-confesses-to-massacres-committed-by-turkish-state/>>.

¹² “PKK rebels prolong ceasefire in Turkey”, *Jane's Terrorism and Security Monitor*, June 5, 2009.

¹³ Subsection 102.1(2).

been no prosecutions under either the *Charter of the United Nations Act 1945* (Cth)¹⁴ or the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth)¹⁵ in relation to the PKK suggests that there are no significant links between Australian citizens or residents, and the political violence undertaken by the PKK in Turkey.

Nor does the Statement of Reasons offer any explanation of why the violence undertaken by the PKK should be singled out for special treatment under Australian criminal law, by means of listing of the PKK as a terrorist organisation. No consideration appears to have been given to the effect of the listing upon Kurdish Australians, many of whom identify with the political goals of the PKK whether or not they support the particular violent tactics that have been deployed in pursuit of those goals.¹⁶ These are reasons to oppose the listing.

Furthermore, the ASIO guidelines offer no support for the listing. There is nothing criminal or otherwise objectionable about the PKK's ideology, of pursuing self-determination for the Kurdish people of Turkey (whether within Turkey or by separation from it). Indeed, Australia has a history of supporting claims to national self-determination in that part of the world.¹⁷ And, more importantly, no indication is given of how the listing of the PKK is expected to contribute to the resolution of the "Kurdish question" in Turkey. There is no question that the PKK is more than just a criminal gang – for better or worse, it is also a significant political actor in relation to an ongoing civil conflict within Turkey. Listing the organisation does not seem likely to contribute to the resolution of that conflict. Rather, it takes sides in that conflict, apparently endorsing the position of the Turkish state – including its notorious abuses of Kurdish human rights – while in a practical, if not a legal, sense, declaring criminal the aspirations of Turkish Kurds for national self-determination.

The Committee should therefore recommend disallowance of the listing regulation.

¹⁴ Section 21 of the *Charter of the United Nations Act 1945* (Cth) makes it an offence to make an asset available to a prescribed entity. The PKK is a prescribed entity under this act.

¹⁵ Section 6 of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) makes it an offence for an Australian citizen or resident to engage in hostile activity in a foreign state, or to enter a foreign state with the intent of engaging in hostile activity. "Hostile activity" includes engaging in armed hostilities, or causing by force or violence the public in the foreign State to be in fear of suffering death or personal injury.

¹⁶ As was noted by the Committee in its *Review of the listing of the Kurdistan Workers' Party (PKK)* at 2.38, 2.63. See also the minority report at 1.26.

¹⁷ For example, Australia recognised the independence of Kosovo on February 19, 2008, two days after independence was declared by the government of Kosovo.

3. The Brigades

As is well known, Hamas is the governing authority of the Gaza Strip, having won the Palestinian parliamentary elections in 2006, and consequently having had its authority confined to Gaza following the violent rupture between Hamas and Fatah in 2006 and 2007. There is some evidence that this rupture was (at least in part) the result of Fatah's preparation for the staging of a coup to overturn the results of the election.

The Statement of Reasons describes the Brigades both as "an integral part of Hamas" and as operating "independently of the other sections of Hamas."¹⁸ According to the *Report of the United Nations Fact Finding Mission on the Gaza Conflict* ("UN Report"), members of the Brigades make up most of the Gazan security forces.¹⁹ The Statement of Reasons describes the Brigades as an element of the Executive Force, but the *UN Report* states that

In October 2007, Hamas dissolved the Executive Force and absorbed its personnel into the police.²⁰

According to the *UN Report*, the police in Gaza are a predominantly civilian police force, although having many members who have previously been military or militia personnel.²¹ The Brigades nevertheless continue in operation. The Brigades are, in a sense, the de facto armed forces of the Gaza Strip, although the Gazan authorities claim to have "nothing to do, directly or indirectly" with the Brigades and claim to have "no knowledge of their tactics."²²

There is no doubt that the Brigades satisfy the statutory criteria for listing. It does not follow, however, that the listing of the Brigades is justified. In particular (and here there is a resemblance to the Statement of Reasons in relation to the PKK), the Statement of Reasons gives no explanation of any links between the activities of the Brigades, and Australia or Australians. Nor does it explain why the singling out of the Brigades for special treatment by Australian criminal law is warranted. The Brigades constitutes only one of many military organisations engaged regularly in violence, including violence against civilians, in Israel and

¹⁸ Page 3.

¹⁹ *Human Rights in Palestine and Other Occupied Arab Territories: Report of the United Nations Fact Finding Mission on the Gaza Conflict* (2009) at [214].

²⁰ *Ibid.*

²¹ *Ibid* at [412]–[417], [434].

²² *Ibid* at [439].

the Occupied Palestinian Territories.²³ This in fact gives rise to two distinct impressions of a discriminatory, or politically-motivated, rationale for listing. The first is that only Palestinian organisations, and not Israeli organisations, have been listed, although there are credible claims of criminal attacks upon civilians being undertaken by agencies of the Israeli government,²⁴ and also by Israeli settlers in the Occupied West Bank.²⁵ The second is that, of the Palestinian organisations that have been listed, it is those which are self-identified Islamic groups that have been listed. This suggests that the listing is motivated not be a desire to prevent political violence through the operation of the criminal law, but rather by the foreign policy goal of targeting militant Islamic organisations as part of the so-called “war on terrorism”. These are reasons to oppose the listing.

A consideration of the ASIO guidelines also suggests good reasons to oppose the listing. In particular, the Statement of Reasons does not pay sufficient regard to intermittent truces and ceasefires to which Hamas has been a party, nor to the widely-held belief that any resolution of the status of the Occupied Palestinian Territories will have to involve negotiation with Hamas,²⁶ and hence a political resolution of the status of the Brigades. Listing the Brigades appears to be an obstacle to, rather than a contribution, to this goal. Indeed, given the apparent importance of the Israel/Palestine conflict, and hence of its resolution, to many of the militant Islamic organisations that have been banned under the *Criminal Code*, it seems odd that the Statement of Reasons does not attempt to explain the proscription of the Brigades within this broader context. The listing of the Brigades also appears to legitimate the activities of Israel in fighting the Brigades, despite the finding by the *UN Report* of numerous war crimes committed by the Israeli Defence Forces in the recent fighting in Gaza. Again, this does not seem to be an approach to the conflict apt to contribute to its resolution.

The Committee should therefore recommend disallowance of the listing regulation.

²³ Other such organisations include the Israeli Defence Forces, the al-Aqsa Martyrs’ Brigades (associated with Fatah), the Abu Ali Mustafa Brigades (associated with the Popular Front for the Liberation of Palestine) and the al-Naser Salah ad-Din Brigades (associated with the Popular Resistance Committees: *ibid*).

²⁴ *Ibid*.

²⁵ *Ibid* at [1378].

²⁶ See, for example, “The West and Hamas/Fatah split”, *Jane’s Islamic Affairs Analyst*, July 27, 2009.

4. PIJ

Many of the points made in relation to the Brigades apply also to PIJ. While the PIJ do not have the same connection to an elected governing authority as to the Brigades, they are nevertheless only one of several organisations engaged in violence, including violence against civilians, in the region in which they operate (the Statement of Reasons itself notes the undertaking of violence by other, unlisted groups, such as the al-Aqsa Martyrs' Brigades.²⁷) The same concerns about the lack of any connection to Australia, about a discriminatory focus upon Islamic organisations, and about the failure to explain how this listing will contribute to the overall peaceful resolution of the Israel/Palestine conflict, arise in relation to this listing as the listing of the Brigades.

The Committee should therefore recommend disallowance of the listing regulation.

5. LeT

As indicated in the introduction, this submission does not oppose the listing of LeT.

Like the other three organisations who have been relisted, the activities of this organisation as described in the Statement of Reasons appear to be confined to a particular political conflict. The material identifies a number of violent crimes (which presumably constitute offences under both Indian and Pakistani law), but does not explain how the listing of this organisation in Australia is relevant to the prevention or prosecution of these crimes. Nevertheless, two important differences are discernible.

First, the violent activities of LeT do not appear to be connected to a self-determination struggle in the way that the activities of the other three organisations are. Thus, the issue of a negotiated resolution to an endemic conflict, to which listing might pose an obstacle, does not arise.

Second, the Statement of Reasons does identify some connections between LeT and Australia. While there is no suggestion of any financial connections to Australia or Australians (the Statement of Reasons suggests that money flows to LeT from the United

²⁷ Pages 17–18.

Kingdom and the Gulf states), the Statement of Reasons does note the conviction, in Australia, of at least one person who is alleged to have been connected to LeT. Even here, however, the Statement of Reasons does not go far enough in explaining how the listing of LeT will contribute to the safety of Australia and Australians. Faheem Lodhi's case has been resolved through the ordinary criminal process, and he was neither charged with nor convicted of any terrorist organisation offences. It is incumbent upon ASIO, in its statement of reasons, to offer a better explanation of how listing LeT will facilitate a proper response to whatever threat it is that this organisation poses to Australia and Australians.