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

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Dear Secretary

Submission in relation to listing of al-Qa'ida and other groups as 'terrorist organisations' under the *Criminal Code*

I would like to thank the Parliamentary Joint Committee on ASIO, ASIS and DSD ('the Committee') for the opportunity to make a submission in relation to the listing as terrorist organisations under the *Criminal Code* of al-Qa'ida, Jemaah Islamiyah, the Abu Sayyaf Group, the Armed Islamic Group, Jamiat ul-Ansar and the Salafist Group for Call and Combat. I would also like to thank the Committee for the extension of time granted.

My submission will first consider matters relating in general to the exercise of the proscription power under section 102.1, and to the Committee's exercise of its power of review under section 102.1A(1), of the *Criminal Code*. It will then go on to make points about the particular listings of organisations that are under review by the Committee. Should the Committee have any queries, please do no hesitate to contact me.

Yours sincerely,

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1. THE EXERCISE OF THE PROSCRIPTION POWER UNDER THE *CRIMINAL CODE*

The legislative history of the power to ban organizations under section 102.1 of the *Criminal Code* is succinctly set forth in Chapter One of the Committee's *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) ('PIJ Report'). The PIJ Report notes the breadth of the *Criminal Code*'s definition of a terrorist organisation (at 3.4, 3.5). The PIJ Report also notes some of the consequences under Australian law of the listing of an organisation (at 2.4, 3.4). However, this breadth of definition, as well as the significance of the consequences, are worth re-iterating. It is only with these in mind that a clear view can be formulated as to how the proscription power should be exercised, and thus as to how its exercise should be reviewed.

1.1 The definition of 'terrorist organisation' under the *Criminal Code*

Before an organisation can be banned pursuant to paragraph (b) of section 102.1, subsection (2) requires that the Minister

> be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).

For the purposes of section 102.1, 'terrorist act' is defined by section 100.1 of the *Criminal Code* to mean any action or threat of action where the following four criteria are met:

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- the action does, or the threatened action would:
    - cause serious physical harm, or death, to a person; or,

- endanger the life of a person other then the one taking the action; or,
- create a serious risk to the health and safety of the public, or of a section of the public; or,
- cause serious damage to property; or,
- destroy, or seriously interfere with or disrupt, an electronic system;

- the action is, or the threatened action would be:
  - action that is not advocacy, protest, dissent or industrial action; or,
  - intended to cause either serious physical harm, or death, to a person; or,
  - intended to endanger the life of a person other then the one taking the action; or,
  - intended to create a serious risk to the health and safety of the public, or of a section of the public.

In what follows I will use the term 'political violence' to summarise these constituent elements of a terrorist act.

The consequence of this extremely broad definition of a terrorist act is that a very wide range of organisations are liable to proscription as terrorist organisations. For example, any organisation that offers support to political protestors who clash with police is liable to be banned, on the grounds that it is indirectly fostering politically motivated activity which is intended to intimidate a government, and which both is intended to, and does, create a serious risk to the health and safety of a section of the public (by provoking the police to attack them). Likewise, a charitable organisation, which among its various activities offers succour to the families of those who have been arrested or killed for undertaking acts of political violence, is liable to be banned, on the grounds that it is indirectly fostering such violence, which in turn

constitutes a terrorist act under the legislation. A final example, which might be considered by some as absurd, is nevertheless useful for showing how broad is this definition of a terrorist organisation. The governments of the United States, the United Kingdom and Australia are directly engaged in the planning of politically motivated military activity in Iraq. This action is being undertaken with the intention of coercing a government (namely, the former government of Iraq) and of a section of the public (namely, those Iraqis who continue to oppose the invasion of that country). Furthermore, that action was intended to cause, and indeed has caused, a great deal of danger to health and safety, as well as many deaths. Thus, any of these governments (together with many other governments around the world) is liable to listing as a terrorist organisation.

What these examples show is that, merely from the fact that an organisation satisfies the statutory definition of a terrorist organisation, next to nothing can be known about its moral character, or the criminality of its conduct. Some governments are perhaps criminal – the invasion of Iraq has indeed been predicated upon the claim that the former government of that country was criminal – but very few people would regard the governments of Australia, the United Kingdom or the United States as criminal organisations that ought to be banned. Likewise, some charities may be criminal, but few people would have regarded charities offering succour to the families of resistance fighters in East Timor as criminal organisations deserving to be banned – despite the fact that, as was pointed out above, if they were in operation now they would probably count as terrorist organisations under the *Criminal Code*. And to return to the first example given above, the mere fact that a group supports those who clash with police does not show it to be a criminal group that ought to be banned – what if the group is a group of Iranian students, and the police are Iranian police attempting to enforce the repressive laws of that country?

Reflection on examples such as those offered above also show that it may not always be correct to say, as the Committee says in its PIJ Report, that ‘political violence is not an acceptable means of achieving a political end in a democracy’ (at 3.20). Taken literally, such a statement would preclude the use of force by Australia to defend itself from an invading power; it would likewise preclude the use of force by the police to restrain violent protestors, or by citizens to prevent an attempt at a

coup or other sort of anti-democratic revolution. It is worth remembering that some of the world's great democracies, such as France and the United States, were founded by political violence; that in the case of the United States, the extension of democracy into those states which had hitherto enslaved around a third of their inhabitants was achieved by political violence; that the Basic Law of the Federal Republic of Germany reserves to the individual citizen the final right of resistance against an attack on the constitutional order of that country (article 20(4)); and that the ongoing invasion of Iraq is said to be justified, in part, by the necessity of such violence for the introduction of democracy into Iraq.

Again, the purpose of such examples is to drive home the point that from the mere fact that an organisation satisfies the statutory definition of terrorist organisations, in virtue of the fact that it directly or indirectly is engaged in, plans, assists in or fosters political violence, very little can be concluded about its moral status, its criminal status, and thus whether or not it should be banned.

In light of the extreme breadth of organisations satisfying the definition established by the legislation, the Committee has rightly recognised that, if the proscription of an organisation is to be justified, further criteria must be satisfied. In its PIJ Report, the Committee nominated four such further criteria as having particular weightiness (at 3.5):

- the immediate and threatening aspects of a particular entity;
- the transnational nature of a particular entity;
- the perceived threats to Australia posed by a particular entity;
- the involvement of Australians with a particular entity.

The difficulty with some of these criteria is that they do not necessarily settle the questions that we have seen to be left open by the mere fact that an organisation satisfies the statutory definition. For example, the fact that an organisation engaged in political violence has a transnational operation does not, on its own, offer any reason as to why it should be banned. During the Second World War many transnational organisations (often based in Allied or neutral countries) perpetrated or fostered

political violence in German-occupied Europe. We would not have wanted the Australian government to ban such organisations. Likewise, until more is known about the nature of the threats posed by a particular organisation, and the targets of those threats, it is difficult to say whether or not it should be banned. It seems very likely that the United States government has a number of highly threatening missiles aimed at nuclear silos in Russia and China. It does not therefore follow that the United States government should be banned as a terrorist organisation.

1.2 The consequences of proscription under the *Criminal Code*

The threat posed to Australia by an organisation, and the involvement of Australians with an organisation, might seem to have greater relevance to the question of whether or not to ban an organisation. However, there are difficulties here too, which result from the far-reaching consequences of banning an organisation.

Once an organisation has been banned, virtually any sort of involvement with the organisation, by anyone, anywhere in the world, becomes a serious criminal offence. It becomes an offence to direct the activities of the organisation, to be a member (whether formal or informal) of it, to recruit for it, to train with it, to give funds to it or receive them from it, to provide support to it, or to associate with the directors, promoters or members of the organisation with the intention of supporting the existence of the organisation (*Criminal Code* sections 102.2-102.8). In the context of the training offence, furthermore, a defendant who wishes to escape conviction bears the evidential burden of adducing evidence as to their innocent state of mind (*Criminal Code* section 102.5). It should also be noted that most of these offences do not require, as an element of the offence, that the offender have any terrorist intention. Thus, it is just a much an offence to train the members of a banned organisation in driving a car, or applying first aid, or complying with the international laws of war, as it is to train them in the use of explosives or firearms. Likewise, it is equally an offence to provide an organisation with funds to be used to purchase ambulances, or school books for members' children, as it is to provide the organisation with the funds to buy weapons or combat vehicles.

In addition, these offences of involvement with a banned organisation act as triggers for further elements of Australian law. Thus, those arrested for such offences

are liable to a greater-than-usual period of detention without trial (*Crimes Act 1914* sections 23CA, 23CB, 23DA); those charged with such offences have a reduced right to be remanded on bail (*Crimes Act 1914* section 15AA); and those convicted of such offences are subject to minimum non-parole periods (*Crimes Act 1914* section 19AG). Also, where there are reasonable grounds for believing that detaining and/or questioning someone will substantially assist the collection of intelligence that is important in relation to such an offence, and that other methods of collecting that intelligence would be ineffective, then that person is liable to be detained and/or questioned by ASIO – whether or not they are themselves suspected of engaging in any violation of Australian or other law (*Australian Security Intelligence Organisation Act 1979* sections 34C, 34D).

Thus, to ban an organisation is to trigger a number of departures from the ordinary rule of law in Australia. Offences are enlivened of involvement with an organisation, which do not require the proof of any terrorist intent or conduct on the part of an accused, and which have maximum sentences comparable to those for manslaughter, rape and serious war crimes. One of these offences – that of training with a banned organisation – places an evidential burden on the accused to lead evidence of his or her innocent state of mind. All of these offences are subject to departures from the ordinary rules relating to pre-trial, remand and post-conviction detention. And all act as triggers for an extra-judicial process of interrogation and detention by ASIO.

Given the purpose of the Committee's current inquiry, this submission will not consider in general the arguments against the existence of an executive proscription power in Australia. But it is sufficient to attend to the consequences that flow from proscription to see that an organisation should not lightly be banned. The Committee has already noted, in its PIJ Report, the potential impact on foreign policy concerns – for example, on the progress of a peace process – that a decision to ban an organisation may have (at 3.21). But the domestic impact must also be considered. The greater the number of Australians who are involved with an organisation, or whose friends, associates or family are involved, the greater will be the impact – the real legal impact, of the sort identified above – upon Australian citizens, and Australian families, and Australian communities, of any decision to ban the organisation. The greater the number of Australian who are involved with an

organisation, the more politically controversial becomes the judgement that the organisation poses a threat to Australia.

To ban an organisation, for all these reasons, and as the Committee itself has recognised (PIJ Report 3.23), is a highly serious matter. It is not merely symbolic. An organisation ought not to be banned simply to make a political point. It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. In a democracy, political controversies are to be resolved through political activity, not through the application of the criminal law by way of executive fiat.

1.3 The criteria for proscription under the *Criminal Code*

At a minimum, then, any decision taken by the Australian government to ban an organisation under section 102.1 of the *Criminal Code* ought to indicate:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;
- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law;
- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:
  - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;
  - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;

- the way in which the concept of ‘membership’, and particularly ‘informal membership’, will be applied in the context of the organisation;

- the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.

The reason for insisting on the first three of these points is to enable the Committee, in conducting its inquiry, to be satisfied that the proscription of the organisation in question is warranted on the basis of a genuine need to prevent criminal conduct, and is not merely in exercise in political or foreign policy symbolism. If the Committee is not so satisfied, then it ought to recommend to the Parliament that the listing of the organisation be disallowed.

The reason for insisting on the various elements of the last point is in order to enable the Committee to be satisfied that the consequences of proscription have been thought through by the government. It is also important that Australians be able to understand clearly what the government understands the consequences of listing to be, so that, where necessary, they can change their behaviour to bring it into compliance with the law. The point about the meaning of ‘membership’ and ‘informal membership’ in the context of a given organisation is particularly important, as the concept of membership is crucial not only for the membership offence (*Criminal Code* section 102.3) but also the association offence (*Criminal Code* section 102.8) – the two offences that seem most likely to have the widest application once an organisation has been listed. Again, if the Committee is not satisfied that the government has had regard to the likely consequences of the listing, or if the Committee is not satisfied that these consequences are consistent with the civil and political rights of Australians, including their rights to the security of themselves and their families, then the Committee ought to recommend disallowance.

It might be objected that insisting that ASIO give an indication, however general, of its intention to use its intelligence-gathering powers would be self-defeating, on the grounds that the success of ASIO operations is dependent upon their secrecy. There are three replies to such an objection, however, two of principle and one practical.

The first reply of principle relates to the function of a security service in a democratic country. ASIO is not, and ought not to be, a secret police. It is widely accepted and acknowledged that the powers of compulsory questioning and detention granted by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* are extraordinary in nature, and are not to be used carelessly, and ought not to be perceived by Australians as an attack upon their civil and political liberties. These assurances – which are crucial not only to the Australian people's confidence in the well-being of their democracy, but also to the preservation of ASIO's culture as an organisation which is sympathetic to, and not hostile to, the values of democracy – can only be taken seriously if ASIO is prepared to be open about the general nature of its intentions with respect to the exercise of such powers.

The second reply of principle follows from the first. As is indicated both explicitly and implicitly by the Committee's PIJ Report, in practice ASIO will play a significant role in any decision to ban an organisation (at 2.1, 2.2, 2.9, 3.11, 3.13-3.16). As ASIO is an organisation whose scope of operation is increased by any decision to proscribe (in virtue of the enlivenment of its questioning and detention powers by the suspicion of the commission of an offence under Division 102 of the *Criminal Code*), there is inevitably the possibility of it appearing to be the case that ASIO supports the banning of an organisation not because it believes that involvement with that organisation ought genuinely to be criminalised, but because it believes that it can further its own operations by increasing the scope of its power to gather intelligence through compulsory questioning and/or detention. One way of dispelling this possible adverse perception of ASIO's motives is for it to be clear from the beginning as to the extent to which it intends to take advantage of the banning of an organisation.

The third reply is a practical one, namely, that the Committee is quite accustomed to the taking of confidential evidence from ASIO. Indeed, part of the Committee's role is to represent the interests of the Australian people in dealing with security and intelligence agencies whose business, of necessity, cannot always be made fully public. Thus, even where full public disclosure by ASIO of its intentions would be self-defeating, there is nothing to preclude the Committee from seeking the relevant information and assurances from ASIO, as part of its role in reviewing any decision to proscribe an organisation.

2. APPLICATION OF THESE CRITERIA TO THE PRESENT INQUIRY

Having argued for the general criteria by which the Committee ought to assess the adequacy of a government decision to list an organisation, and to decide whether or not to recommend disallowance of the listing of an organisation, I will now consider the particular listings which constitute the subject matter of the Committee's current inquiry.

Three initial points might be made. The first is that the government does not seem to have had regard to the Committee's statement, made in its PIJ Report, that 'it would like to see a more considered process in any future regulations' (at 3.23). The material relating to each organisation does attempt to demonstrate that it satisfies the definition of 'terrorist organisation' set forth in the *Criminal Code*. But with the exception of the material supporting the listing of Jemaah Islamiyah, little attention seems to have been paid to the connection between the groups being listed and Australia or Australians.

The second initial point is that all the groups to be listed are self-identified Islamic groups (as, indeed, are all of the eleven other organisations that have been proscribed under the *Criminal Code*). In the absence of more detailed information being provided about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, an impression is created that the purpose of these listings is primarily a political one, of supporting the foreign policy goal of targeting militant Islamic organisations as part of the so-called 'war on terrorism'. The merits of such a foreign policy goal obviously fall outside the purview of the Committee's inquiry, and therefore of this submission. But it is within the Committee's purview to insist, for the reasons given in part one of this submission, that such foreign policy goals do not provide an adequate basis for the banning of organisations.

The third point is that all the listed groups have also been banned under the *Charter of the United Nations 1945*, which makes it an offence to deal with their assets or make assets available to them. However, none of the material provided by the government canvasses this existing proscription, nor offers any reason for going

beyond such proscription by the far more significant step of listing the organisation under the *Criminal Code*.

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

2.1 Al-Qa'ida

The material presented in Attachment A sets out a brief history of al-Qa'ida's activities. However, it leaves several questions unanswered. Some of these questions are of a more general political nature. One wonders, for example, and in light of its origins, whether al-Qa'ida would be subject to proscription if its primary target was still Russia, rather than the United States? If the answer to this question is no, then that is a matter of concern, as it shows that proscription and the criminal law are being used as political and foreign policy tools. On the other hand, if the reason for proscription is not al-Qa'ida's attitude towards the United States, but rather its documented attitude towards Australia, then the emphasis in the material upon its hostility to the United States seems misplaced and unnecessary.

Other unanswered questions are more specific:

- When it comes to determining membership of al-Qa'ida (including informal membership, and including for the purposes of the association offence), what is the government's attitude towards those 'other Islamist extremist sources' mentioned on page 1 as making statements about Australia, and towards the 'groups and cells' forming 'a network of Islamic extremists on which bin Laden has drawn or inspired to act in support of his objectives' that are mentioned on page 2?

- Does the government intend to seek the prosecution, under the training offence, of those who 'provide training to al-Qa'ida recruits in … Islamic doctrine' (page 2)?

- If the government intends to seek prosecution only of those who 'provide training to al-Qa'ida recruits in … terrorist techniques

[such as the] manufacture, use and smuggling of explosives, assassinations, and military operations' (page 2), then why is proscription necessary, given that such training could be prosecuted under the *Crimes (Foreign Incursions and Recruitment) Act 1979*?

- If the government wishes to prevent al-Qa'ida from carrying out attacks of the sort mentioned in the list on pages 2 and 3, why is proscription necessary, given that attacks of this sort, and acts undertaken in preparation for them (such as stockpiling munitions) are already offences against the ordinary criminal law in Australia and most other countries, which the police in Australia and overseas have ample authority to investigate and prosecute?

It is important to appreciate that to ask these questions, and to insist that they be answered, is not to offer any support to, or express any sympathy, for al-Qa'ida. It is beyond doubt that al-Qa'ida has done terrible things, for which the organisation stands condemned. But proscription of an organisation under the *Criminal Code* is not a symbolic act of condemnation. It is a definite legal act with definite legal consequences. To ask the questions set out above, and to insist that they be answered, is only to insist on the government offering an adequate justification of the extraordinary step of proscription, which, once taken, has the very real and adverse consequences for the rule of law in Australia that were spelled out above.

2.2 Jemaah Islamiyah

As I noted above, the material presented in Attachment B does attempt to link the proscription of Jemaah Islamiyah to the safety and security of Australia. However, there are still many gaps in the material presented. For example, no indication is given of the likely impact, within Australia, of proscription of the organisation, and one is also left wondering whether the Australian government supports 'security clampdowns' against Jemaah Islamiyah of the sort that paragraph 2 notes took place in the 1980s under the Soeharto dictatorship.

In some places the information provided is very general and vague. For example, Jemaah Islamiyah is said to have been involved 'in a number of terrorist attacks …

targeting Western interests in Indonesia and the Indonesian government' (paragraph 10), but the examples given in paragraph 11 are predominantly of attacks on Filipino interests and on churches in Indonesia. That is not to deny the significance of such attacks, or their potential relevance for the proscription of the organisation in Australia. It is simply to make the point that to explain exactly what it is about Jemaah Islamiyah's conduct that justifies proscription, and to make clear what the goals are that the government believes will be achieved through proscription, more detailed information is required.

Attachment B notes that '[b]ombings appear to be JI's preferred method of attack' (paragraph 4). Given that bombing, and preparation for bombing, is already an offence under Australian law, and presumably under Indonesian and Filipino law, why is the additional step of proscription required in order to investigate and prevent it?

Finally, paragraph 7 refers to the employment by Jemaah Islamiyah of a 'broad network of radical *pesantren* (Islamic boarding schools)'. Has the government considered the implications of the fact that listing Jemaah Islamiyah most likely makes criminals, under one or both of the membership offence and the association offence, of all attendees of these schools, and in addition probably makes criminals, under the training offence, of all teachers at these schools?

2.3 Abu Sayyaf Group

Attachment A sets out a brief account of the Abu Sayyaf Group's activities in the Philippines, and of its activities directed at sites in the Philippines, as well as against United States interests. However, no connection between Australia and the Abu Sayyaf Group is made out.

The material states that the Abu Sayyaf Group often resorts to criminal activities including murders, bombings, extortion and kidnap-for-ransom. These are all serious offences under ordinary criminal law, and it is not clear why their prevention and prosecution requires taking the extraordinary step of banning the Abu Sayyaf Group in Australia.

It is difficult to avoid the conclusion that the material presented in Attachment A does not, on its own, make out a case for the proscription of the Abu Sayyaf Group under the *Criminal Code*.

2.4 Armed Islamic Group

The same remarks made in relation to Attachment A and the Abu Sayyaf Group can be made in relation to Attachment B and the Armed Islamic Group. Nothing is said of the impact upon Australia of this organisation, or of the likely consequences in Australia of its proscription. Attacks upon civilians (pages 1 and 2) are already offences under Australian, French and Algerian law, and no explanation is offered of how proscription of this organisation in Australia will contribute to the prevention or prosecution of such offences.

2.5 Jamiat ul-Ansar

The same remarks made in relation to Attachment A and the Abu Sayyaf Group can be made in relation to Attachment C and Jamiat ul-Ansar. Nothing is said of the impact upon Australia of this organisation, or of the likely consequences in Australia of its proscription.

2.6 Salafist Group for Call and Combat

The same remarks made in relation to Attachment A and the Abu Sayyaf Group can be made in relation to Attachment D and the Salafist Group for Call and Combat. Nothing is said of the impact upon Australia of this organisation, or of the likely consequences in Australia of its proscription. To the extent that the Salafist Group for Call and Combat is intending to undertake ‘murders, kidnappings, bombings, robbery, extortion and looting’ (p 1), and ‘assassination, kidnappings, bombing, robbery, and extortion’ (p 2), it is committing what are already serious offences under the law of Australia, Algeria and the European countries in which the organisation operates. It is not clear why their prevention and prosecution requires taking the extraordinary step of banning the Abu Sayyaf Group in Australia.

2.7 Concluding remarks

With regard to each of these listings, the material presented by the government does not adequately make the case for proscription. Too many important questions are left unanswered, and no indication been given of ASIO's intention to use the proscription as a basis for the exercise of its powers. Yet, given that most of the mentioned activities of all six of these organisations are already serious criminal offences under Australian law, it seems reasonable to conclude that the enlivening of ASIO's powers of detention and questioning is one of the principal aims of these listings. If this is so then it should be acknowledged, and the case made as to why ordinary methods of criminal investigation and prosecution are inadequate to the crimes of these organisations.

In the case of al-Qa'ida and Jemaah Islamiyah, the government has made some attempt to state a case for the banning of those organisations under Australian law. However, given the legal consequences that flow from proscription, that case is inadequate; in particular, nothing is said about the likely impact of such proscription upon Australians, their families and their communities.

In the case of the other four organisations, however, it is difficult to see the argument for proscription as anything but formulaic, following in the footsteps of bans imposed by the United Nations and the United States. When one keeps in mind the implications of proscription within the framework of Australian law (which, according to the Committee's PIJ Report (at 2.4), are far more serious than the implications of a ban in the United States), when one considers the apparently deliberate targeting of Muslim and only Muslim organisations, and when one remembers that financing these organisations is already a serious offence under the *Charter of the United Nations Act 1945*, it must be concluded that, on the basis of the materials presented, no case for the proscription of these four groups has been made out.