

Reports and Activities 2005-2006

Reports

- 2.1 Since the last annual report on the Committee's activities, tabled in May 2005, the Committee has tabled 6 reports: four reviews of terrorist listings under the Criminal Code and two reviews of legislation. Currently, under the requirement of section 29 (1)(a) of the Intelligence Services Act, the Committee is reviewing the administration and expenditure of all six intelligence agencies, with particular reference to recruitment and training. In addition, in order to inform new members of the Committee of the scope and nature of the work of the agencies, the Committee has conducted inspections of various intelligence agency facilities.

Criminal Code Act 1995 – The proscription of terrorist organisations

- 2.2 Four reports were tabled in the reporting period under the requirements of section 102.1A of the *Criminal Code 1995*. This review process has come to constitute a considerable part of the Committee's work load.

Review of the listing of Tanzim Qa'idat al-Jihad al-Rafidayn (the al-Zarqawi Network)

- 2.3 This report was tabled on 25 May 2005.¹ It was the third review of listings of terrorist organisations which the Committee had undertaken. This organisation had not been listed previously. The Governor-General made a regulation listing the al-Zarqawi Network on 24 February 2005. The Committee received notification of the proposed listing on 9 February, advertised an inquiry on 4 March 2005 in *The Australian* and on its web site and conducted a private hearing in Canberra on 2 May 2005. The Attorney-General's Department, the Department of Foreign Affairs and ASIO gave evidence at this hearing. Submissions were received from the Attorney-General's Department, the Department of Foreign Affairs and from a private citizen, Mr Patrick Emerton.
- 2.4 In its report, the Committee raised some concerns about the quality and timeliness of the prelisting consultation that had taken place both within government, with the Department of Foreign Affairs and State Governments, and with relevant community groups.
- 2.5 The Committee considered the listing against the criteria provided by ASIO at an earlier hearing into the listing process. This criteria was:
- Engagement in terrorism;
 - Ideology and links to other terrorist groups/networks;
 - Links to Australia;
 - Threats to Australia's interests;
 - Proscription by the UN or like-minded countries; and
 - Engagement in peace or mediation processes.
- 2.6 The Committee concluded that the al-Zarqawi Network met the criteria in major areas of the criteria supplied and therefore it did not recommend disallowance.

1 The last Annual Report covered the Committee's activities up to the beginning of May 2005. This report, therefore, covers those reports and inquiries not dealt with in that report.

Review of the listing of seven terrorist organisations

- 2.7 On 17 and 23 March 2005, the Attorney-General informed the Committee of the proposed re-listing of seven organisations previously listed in 2003. Under subsection 102.1(3) of the Criminal Code, the regulations cease to have effect on the second anniversary of the regulation being made. The seven organisations under consideration in this review were:
- Ansar al-Islam;
 - Asbat al-Ansar;
 - Egyptian Islamic Jihad;
 - Islamic Army of Aden;
 - Jaish-e-Mohammad;
 - Lashkar-e Jhangvi; and
 - Islamic Movement of Uzbekistan.
- 2.8 The Committee advertised the inquiry on its web site and in *The Australian* on 11 April 2005. A private hearing, involving ASIO the Attorney-General's Department and the Department of Foreign Affairs, was held in Canberra on 2 May 2005. Two submissions were received from the public.
- 2.9 In this report, procedural concerns relating to consultation remained. Public submissions raised broader questions about the need for the banning provisions in the Criminal Code and the appropriateness of the criteria used by ASIO for judging the necessity to ban a particular organisation. These were matters that the Committee will consider in its statutory review of the provision in 2007.
- 2.10 Within the seven organisations considered in this review, there were variations in the extent to which an organisation met the criteria and, in some areas, there was too little information supplied. On a number of occasions connections to Australia appeared to be tenuous. However, on balance, the Committee decided not to recommend disallowance of any of the seven organisations.

Review of the listing of four terrorist organisations

- 2.11 This review covered the re-listing of four organisations which had previously been listed in 2003 and 2004. They were:

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- Hizballah External Security Organisation;
 - Hamas Izz al-Din al-Qassam Brigades;
 - Lashkar-e-Tayyiba;
 - Palestinian Islamic Jihad.
- 2.12 The last of these organisations, the Palestinian Islamic Jihad, had been reviewed by the Committee in 2004, in its first report under section 102.1A of the Criminal Code. The other three organisations had been the subject of specific legislation to ban them on 5 June 2003 in the case of the Hizballah External Security Organisation and on 9 November 2003 in the case of Lashkar-e-Tayyiba and the Hamas Izz al-Din al-Qassam Brigades.
- 2.13 The Committee held one private hearing with ASIO, the Attorney-General's Department and the Department of Foreign Affairs on 8 August 2005. Three public submissions were received.
- 2.14 In its conclusions to this report, the Committee asked that, in future statements of reasons on listings, ASIO and the Attorney-General's Department address each of the six criteria in setting out their reasons for a particular listing. The Committee did not recommend disallowance; however, some reservations were expressed. It was 'mindful of the role that these organisations [both Hamas and Hizballah] are playing, with the support of large numbers of citizens, in the changing political scene in that part of the Middle East.' One member put his view more strongly in saying that there was a lesser case made for the listing of Hamas, Hizballah and the PIJ than for the Lashkar-e-Tayyiba.

Review of the listing of the Kurdistan Workers' Party (PKK)

- 2.15 This review was the fourth review under the Criminal Code in the reporting period and the sixth review since the legislation was enacted in 2004. This was a new regulation made by the Governor-General on the advice of the Attorney-General, not a re-listing.
- 2.16 The Attorney-General wrote to the Committee on 2 December 2005 advising that a regulation specifying the PKK as a terrorist organisation was to be considered by the Federal Executive Council on 15 December 2005. The Governor-General made the regulation on the same day, 15 December.
- 2.17 The Committee advertised the review of this regulation on its web site and in the *Australian* on Wednesday 21 December 2005.

Seventeen submissions were received from both government agencies and the public. The Committee conducted a private hearing on the proposed listing on 6 February 2006, taking evidence from ASIO, the Attorney-General's Department, the Department of Foreign Affairs and the Federation of Community Legal Services (Victoria).

- 2.18 In its report, the Committee noted that the process of consultation between ASIO and the State Governments remained very brief, but that the consultation with the Department of Foreign Affairs had become more extensive. No information was provided to relevant community groups.
- 2.19 Concern raised with the Committee about the influence of foreign policy considerations in the decision to list the PKK was the subject of contradictory evidence from witnesses.
- 2.20 In conclusion, the Committee reiterated arguments it had made in previous reports:

The Committee has expressed concern in past reviews about the intervention by outside forces in complex internal conflicts which pose no direct threat to Australia or Australians and which rightly should be, and can only be, resolved by negotiation between the parties.²

- 2.21 The majority of the Committee supported the listing; however, they asked that the Government keep the matter under active consideration, taking into account:
- 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;
 - 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
 - the fluid state of moves towards possible ceasefires.³

2 Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)*, p. 31.

3 Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)*, p. 33.

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- 2.22 A minority of the Committee argued that the case for the listing had not been made and that the Government should reassess the listing. They argued that ASIO's criteria for a listing had not been met; that there were no direct security benefits from the listing; that, consistent with other listings, it might have been limited to the military wing; and that it had the potential to expose ordinary Australian citizens, unconnected to terrorist activity, to severe criminal penalties.⁴
- 2.23 This report represented the first occasion on which the Committee had been unable to reach consensus.

Review of the Intelligence Services Legislation Amendment Bill 2005

- 2.24 On 16 June 2005, the Minister for Defence, Senator the Hon Robert Hill, referred the *Intelligence Services Legislation Amendment Bill 2005* to the then Parliamentary Joint Committee on ASIO, ASIS and DSD for inquiry and report.
- 2.25 The Bill was a package of measures to amend the *Intelligence Services Act 2001* (ISA), the *Office of National Assessments Act 1977* (the ONA Act), the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) and related legislation. It gave effect to all of those recommendations of the Inquiry into Australian Intelligence Agencies, conducted by Mr Philip Flood AO in 2004 (the Flood Inquiry), which to be implemented required legislative changes.
- 2.26 The Bill also implemented recommendations of a review of the Intelligence Services Act conducted by the Department of the Prime Minister and Cabinet in late 2004. This review incorporated the experience of ASIS' and DSD's operations since the Act was introduced in 2001, including observations from monitoring by Inspector General of Intelligence and Security, both Mr Blick and Mr Carnell. Mr Blick, the previous IGIS, recommended in his 2002 and 2003 annual reports that such a review be undertaken.
- 2.27 In August 2004, the Hon David Jull, the Chair of the then Joint Parliamentary Committee on ASIO ASIS and DSD, also proposed to the Government that it consider a number of changes to the act as it related to the Committee. These proposals included an increase in the size of the Committee and other adjustments to help the PJCAAD

4 Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)*, pp. 35-40.

respond to its increasing workload. The Government agreed to consider these proposals in the context of the review of the ISA.

- 2.28 On the whole, the changes to the Committee's structure and oversight were not contentious and the nature of these changes has been discussed in Chapter 1 of this report. Initially, the Bill required that the new position of Deputy Chair be filled by a Government member. The Committee recommended that that be altered to reflect normal Parliamentary practice of having the deputy chair position filled by a member of the Opposition. The Government agreed with this recommendation so long as, in a prolonged absence of the Chair, an acting chair be selected from the Government members.
- 2.29 Two requests of the Committee for amendments were not agreed or brought forward in the amendments to the act: one was the deletion in section 7 (1) (c) (i) of the words '[matters prejudicial to] the conduct of Australians foreign relations' thereby excluding foreign policy matters from those which Ministers might seek to have excluded from Committee reports prior to tabling; the second request was that the Committee be given access to the classified annual reports of the agencies.
- 2.30 A number of other matters were discussed in more detail in the Committee's report on this Bill. They included:
- **Definition of intelligence:** A broadening of the definition of 'intelligence information' from information about activities *outside* Australia to information that has been 'collected unintentionally in the proper conduct of the functions of the agencies.' Additionally, this re-definition related to a further amendment affecting the communication of intelligence to Commonwealth and State authorities.
 - **Communication of intelligence:** Schedule I Item 29 provided that intelligence 'unintentionally but properly collected' may be passed on to the appropriate authorities, in limited and defined circumstances. This was a widening of the previous limits that applied to the communication of intelligence in that it broadened the range of 'authorities' to which the information could be passed and, given the broader definition of intelligence information, a wider range of information that could be passed to those authorities.
 - **Assistance to Commonwealth and State Authorities:** Schedule 1 items 18, 19 and 20 seek to bring consistency between the agencies'

ability to assist not only the Defence forces in support of military operations but other State and Commonwealth authorities. This assistance is specified in the report.⁵

- **Ministerial authorisation:** Perhaps the most contentious amendment was in Schedule 1 Item 22 of the Bill which deleted the words 'who is overseas' from Part 2 Section 8 (1)(a)(i) and (ii) of the Intelligence Services Act. The Committee was concerned to ensure that this did not represent a weakening of the legislated control over the foreign collection agencies in relation to Australian citizens. The Committee was persuaded that the intention of the provision was to protect Australians in Australia in the same way as the current legislation protects Australians who are overseas. However, the Committee sought additional assurance with the following recommendation:

The Committee recommends that, as the regime moves from Ministerial direction to legislated Ministerial authority as proposed in Item 22, it should generally replicate the provisions of and have identical authorisation provisions to those that apply to ASIO.

This recommendation was not agreed by the Government.

- 2.31 Although other matters were discussed in the review, no other recommendations were made by the Committee. Further amendments to the Bill clarified the powers of the IGIS in respect of access to places where people were being detained under warrants executed under Division 3 Part III of the ASIO Act. They also related to the Inspector General's powers to initiate inquiries in relation to ONA and to consult with the Ombudsman in order to preclude duplication of effort.

ASIO's Questioning and Detention Powers

- 2.32 The most extensive review conducted by the Committee in the last year was the review of Division 3 Part III of the ASIO Act. This review, conducted under Section 29 (1)(bb) of the *Intelligence Services Act 2001*, examined the operation, effectiveness and implications of ASIO's questioning and detention powers in the first three years of its operation. The review also met a timetable under section 34Y of the ASIO Act which provided that these provisions would cease to

5 See Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of Intelligence Services Legislation Amendment 2005*, p. 10.

have effect on 23 July 2006. The Committee's review was designed to precede the lapse of the legislation under the sunset clause and sought to inform consideration by the Parliament and the Government of the need to legislate again for these provisions or some variation of them.

- 2.33 The inquiry was advertised in the *Australian* newspaper on 17 January 2005, as well as on the Committee's website. The Committee received 113 submissions and held hearings over six days. Some hearings were held in public and some in private.
- 2.34 The Committee was required to review the operations of the Act, but expressed concern about possible limitations on the taking of evidence created by the restrictions imposed by the secrecy provisions in 34VAA of the ASIO Act. An opinion sought from Mr Brett Walker, SC, advised 'that the provisions of section 34VAA of the ASIO Act have no effect whatsoever on the activities of persons including members of the Committee, the Committee staff, prospective witnesses, witnesses and persons assisting, for example, agency heads in providing information required by the Committee within lawful limits. So long as those activities comprise part of or are being engaged in for the purposes of conducting or complying with the requirements of the mandatory review entrusted to the Committee by Parliament in subpara 29(1)(bb)(i) of the Intelligence Services Act, those persons will not be committing any offence of the kind created by those provisions [section 34VAA].' However, the Committee was required to operate, in the taking of evidence, within the limits placed on it by the Intelligence Services Act. To allay fears that had been expressed to the Committee about the possible liability of witnesses, the Committee produced a statement to witnesses explaining their position and directing them to the legal opinion on the website.⁶
- 2.35 The Committee reported on 17 November 2005. It made 19 recommendations. A series of recommendations related to the clarity of the legal framework, the transparency of the procedures, particularly some limitations on the secrecy provisions and improved process – rights to legal representation and the supervision of the process by the Prescribed Authority.
- 2.36 The Committee concluded that the regime established by Division 3 Part III had been useful and administered in a professional way.

⁶ See also Chapter 3 of this report.

However, the Committee expressed some reservations about the purpose of the questioning under warrants, particularly if other law enforcement agencies were present and seeking to use the questioning for purposes other than the collection of intelligence in relation to a terrorist offence. The extraordinary nature of the powers given under Division 3 Part III were not subject to the same level of scrutiny as police powers and these needed to be kept separate. Finally, the Committee believed that, given the extent and nature of the powers and the secret nature of their use, scrutiny of the most rigorous kind must remain in place. As they should not be permanent and should be scrutinised as thoroughly as possible, it was the Committee's view that the sunset clause must remain, albeit at a slightly extended period of five and a half years.

- 2.37 The Government disagreed with nine of the nineteen recommendations, particularly those seeking less secrecy in the process. With regard to the major recommendation on the sunset clause, the Government inserted a new sunset clause, but made the applicable period ten years, with the next review of the legislation to take place in 2016.

Notifications under s6A of the *Intelligence Services Act 2001*

- 2.38 Section 6A of the Intelligence Services Act states that:

If the responsible Minister gives a direction under paragraph 6(1)(e), the Minister must as soon as practicable advise the Committee of the nature of the activity or activities to be undertaken.

- 2.39 Section 6(1)(e) states:

(1) The functions of ASIS are:

(e) to undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia.

- 2.40 In the last two years, the Committee has received no notifications under this provision.

Inspections and briefings

Visit to Intelligence Services Facilities

- 2.41 The Committee inspected major intelligence agency facilities in March. This was a general inspection; however, it also played a valuable role in the review of recruitment and training then being undertaken by the Committee.

Private Briefings

- 2.42 The following visitors briefed the Committee in the last twelve months:
- Hon James Sensenbrenner, Chairman, House Judiciary Committee, United States Congress, 31 May 2005;
 - Mr Andrew Metcalfe, Deputy Secretary, Department of Prime Minister and Cabinet; Mr Steve Merchant, Director DSD; Mr Ian McKensie, Director DIGO; Dr Brendon Hammer, Acting Director-General, ONA; Mr David Irvine, Director-General, ASIS; Acting Director-General ASIO; Mr Ian Carnell, Inspector-General of Intelligence and Security; Mr Geoff McDonald, Assistant Secretary, Security Law Branch, Attorney-General's Department, 16 June 2005.
 - Mr Stephen Merchant, Director, DSD, and staff; Mr Cameron Gifford and Ms Catherine Smith, Attorney-General's Department, 8 September 2005.
 - Rt Hon Paul Murphy, (Chair), Rt Hon Michael Mates, Rt Hon James Arbuthnot, Mr Ben Chapman, Mr George Howard, Baroness Ramsay, Intelligence and Security Committee of the United Kingdom and Rt Hon Helen Liddell, High Commissioner for the United Kingdom, 8 September 2005.
 - South African Intelligence Officials delegation: Mr Barry Gilder, Co-ordinator for Intelligence: National Intelligence Co-ordination Committee; Mr Mthuthuzeli Madikiza, Deputy Director General: South African Secret Service; Mr Loyiso LT Jafta, Chief Director: Presidency; Brigadier General Vele Simon Matshatshe, Director Counter Intelligence Collection: Defence Intelligence, Department of Defence; Ms Zodwa Lalli, Chief Director Asia: Department of Foreign Affairs; Ms Sharon Anastasia Thokozile Dennis, Unit

Head: Production and Liaison, National Intelligence Co-ordination Committee; Ms Valerie Maria Sedibelwana, Acting Portfolio Manager: Analysis and Interpretation, Tshwane Metropolitan Municipality, 11 October 2005.

- Defence and Security Committee of the Republic of Vietnam: Major-General Nguyen Kim Khanh MP, Vice Chairman of the Defence and Security Committee (DSC), Head of the Delegation; Lieutenant-General Pham Van Minh MP, Deputy Commander of Military Zone 4, member of the DSC; Major-General Tran Quang Khue MP, Deputy Commander of the Navy Forces, member of the DSC; Major-General Nguyen Van Nghinh MP, Deputy Commander of the Capital Military Zone, Member of the National Assembly of the Socialist Republic of Vietnam, Representative for Hanoi, member of the DSC; Major-General Le Thanh MP, Vice Director of the Police Bureau, Ministry of Public Security, member of the DSC; Senior Colonel Nguyen Huu Tinh MP, Deputy Commander of Military Zone 7, Member of the DSC; HE Mr Nguyen Thanh Tan, Ambassador of the Socialist Republic of Vietnam, 7 December 2005.
- Mr Paul O'Sullivan, Director-General of Intelligence and Security, 9 February 2006.

2.43 In addition, the secretariat met with Mr Richard Evans, Section Head for Terrorism and Insurgency, Jane's, 29 June 2006, and Canadian Officials, from the Middle East International Assessment Staff, 1 March 2006.

Conferences

2.44 Mr Kerr, MP, attended the Australian Law Reform Commission Conference, Sydney, 9 June 2005.