

Introduction

- 1.1 This review is conducted under section 102.1A of the *Criminal Code Act 1995* (the Criminal Code). Section 102.1A provides that the Parliamentary Joint Committee on Intelligence and Security (the Committee) may review a regulation specifying an organisation as a terrorist organisation for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1 of the Criminal Code and report the Committee's comments to each house of the Parliament before the end of the applicable disallowance period.
- 1.2 The regulations under review have specified the following organisations as terrorist organisations for the purposes of section 102.1 of the Criminal Code:
 - Al-Qa'ida;
 - Jemaah Islamiyah.
- 1.3 This is a review of the re-listing of these two organisations. They were originally listed on 21 and 27 October 2002 and re-listed on 31 August 2004, with effect on 1 September 2004. The Committee first considered the listing of Al-Qa'ida and Jemaah Islamiyah in 2004 after the Committee's role in the Criminal Code procedure had been established. In a letter to the Committee on 10 August 2006, the Attorney-General advised that he intended to re-list both organisations prior to the lapsing of their current listing as provided for in section 102.1(3). The Attorney provided statements of reasons for the re-listings. These are accepted as submission number 1 to this review.

- 1.4 At a private meeting on 17 August 2006, the Committee resolved to review these listings on the papers rather than by way of hearings.
- 1.5 The regulations were signed by the Governor-General on 24 August 2006. The Attorney-General issued a media release announcing the decisions to re-list the organisations on the same day. The media release provided open source details on the organisations. This information is the same as the information provided to the Committee in the statements of reasons.
- 1.6 The regulations were tabled in the House of Representatives on 4 September 2006. The disallowance period of 15 sitting days for the Committee's review of the listing began from the date of the tabling. Therefore, the Committee is required to report to the Parliament by 19 October 2006.
- 1.7 Notice of the review by the Committee was also placed on the Committee's website.
- 1.8 In its first report, *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, the Committee decided that it would test the validity of the listing of a terrorist organisation under the Criminal Code on both the procedures and the merits. The Government's procedures in listing the organisations are examined below. Chapter 2 will consider the merits of the listings.

The Government's procedures

- 1.9 In a letter sent to the Committee on 5 September 2006, the Attorney-General's Department informed the Committee that it had adhered to the following procedures for the purpose of listing the organisations:

Al-Qa'ida and Jemaah Islamiyah

- A separate unclassified Statement of Reasons for Al-Qa'ida and Jemaah Islamiyah was prepared by the Australian Security Intelligence Organisation (ASIO), in consultation with the Department of Foreign Affairs and Trade, detailing the case for re-listing Al-Qa'ida and Jemaah Islamiyah.
- Chief General Counsel, Mr Henry Burmester QC provided written confirmation on 27 July 2006 that the Statement of Reasons for both organisations was sufficient for the Attorney-General to be satisfied on reasonable grounds of the matters required under s 102.1(2) for the re-listing by

regulation of both organisations as terrorist organisations under the *Criminal Code Act 1995* (the Criminal Code).

- The Director-General for Security, Mr Paul O'Sullivan, wrote to the Attorney-General on 31 July 2006 outlining the background, training activities, terrorist activities, and attaching separate Statements of Reasons for Al-Qa'ida and Jemaah Islamiyah.
- A submission was provided to the Attorney-General on 8 August 2006 attaching:
 - ⇒ copies of the Statement of Reasons from ASIO for Al-Qa'ida and Jemaah Islamiyah
 - ⇒ advice from the Chief General Counsel in relation to Al-Qa'ida and Jemaah Islamiyah; and
 - ⇒ separate regulations and Federal Executive Council documentation for Al-Qa'ida and Jemaah Islamiyah.
- Having considered the information provided in the submission, the Attorney-General signed separate statements for both Al-Qa'ida and Jemaah Islamiyah confirming that he is satisfied on reasonable grounds that the organisations are directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whether or not the act has occurred or will occur.
- The Attorney-General also signed separate regulations with respect to Al-Qa'ida and Jemaah Islamiyah, and approved associated Federal Executive Council documentation including Explanatory Memoranda, and Executive Council Minutes and Explanatory Statements.
- The Attorney-General wrote to the Prime Minister on 10 August 2006 advising of his intention to re-list Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code.
- The Attorney-General advised the Leader of the Opposition by letter dated 10 August 2006 of the proposed re-listing of Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code. The Leader of the Opposition was offered a briefing in relation to the re-listing of each organisation.
- The Attorney-General wrote to the Attorneys-Generals of the States and Territories on 10 August 2006 advising them of the decision to re-list Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code. A copy of the Statements of Reasons for each organisation was attached to the letters.
- The Attorney-General wrote to the Chairman of the Parliamentary Joint Committee on Intelligence and

Security on 10 August 2006 advising of his decision to re-list Al-Qa'ida and Jemaah Islamiyah as terrorist organisations under the Criminal Code.

- The Governor-General made the regulations on 24 August 2006.
- The Regulations were lodged with the Federal Register of Legislative Instruments (FRLI) on 24 August 2006 with the following reference numbers:
 - ⇒ Re-listing of Al-Qa'ida:
Criminal Code Amendment Regulations 2006 (No. 2)
(FRIL Reference Number: F2006L02639).
 - ⇒ Re-listing of Jemaah Islamiyah:
Criminal Code Amendment Regulations 2006 (No. 3)
(FRIL Reference Number: F2006L02640).
- A press release was issued on 24 August 2006 and the Attorney-General's Department's National Security website will be updated.

Procedural matters

Consultation with the States and Territories and DFAT

- 1.10 Information about consultations on these listings and the consultations themselves appear to have been mechanical rather than meaningful. Contact with the States was at the level of Attorneys-General rather than at the level of Premiers and Prime Minister as stipulated in the *Inter-Governmental Agreement on Counter-Terrorism Laws*.¹ The submission gives no indication as to whether the disagreement between the States and the Commonwealth about the level of consultation on re-listings has been resolved and in what way.²

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- 1 Subclause 3.4(3) of the *Inter-Governmental Agreement on Counter-terrorism Laws* states that the Commonwealth will provide the States and Territories with the 'text of the proposed regulation and will use its best endeavours to give the other parties reasonable time to consider and to comment on the proposed regulation' and Subclause 3.4(6) 'Approval for regulations specifying terrorist organisations must be sought, and responses from other parties must be provided, through the Prime Minister and Premiers and Chief Ministers'.
 - 2 At a previous hearing, the Attorney-General's Department advised the Committee that the Premiers of NSW and Western Australia requested that in accordance with the *Inter-Governmental Agreement on Counter-terrorism Laws*, future listings should be raised directly with the Premier. The Prime Minister responded by letter dated 4 April 2005 advising that the process adopted was consistent with the *Inter-Governmental Agreement on Counter-terrorism Laws* and that 'it is more practical administratively in the case of re-listings to continue the current practice whereby the Commonwealth Attorney-General

- 1.11 The time frame for State responses, 14 days, has been more reasonable than on previous listings; however no indication of what, if any, responses have been made by the States is given in the submission. It is unclear how seriously the States are taking their role in the process.
- 1.12 Similarly with regard to consultation with DFAT, the Attorney-General's Department has noted in passing that the statements of reasons were prepared in consultation with the Department of Foreign Affairs and Trade.

Community consultation

- 1.13 The Committee has asked in the course of a number of reviews what information is provided to the community in relation to the listing of organisations. Laws or regulations with severe penalties must be clearly understood, particularly by those who might be directly affected by them. Recommendations about such information programs were made in previous reports in March, May, August and September last year. The Attorney-General's Department has assured the Committee that such programs were being developed.
- 1.14 However, the procedural submission dealing with the listing of Al-Qa'ida and Jemaah Islamiyah makes no reference at all to any information program, except for the media release on the making of the regulation on 24 August 2006. This does not appear to be sufficient to inform the community properly.

Re-listings and the statement of reasons

- 1.15 The Committee has completed one whole round of reviews of terrorist listings beginning with the first review under section 102.1 of the Criminal Code which considered the listing of the Palestinian Islamic Jihad in March-June 2004. Since that time the Committee has reviewed the regulations for all 19 organisations listed by the Australian Government. Under section 102(3) the regulations cease to have effect on the second anniversary on the day on which they took effect. The organisations must, therefore, be re-listed or the regulation will lapse.

liaises with his counterparts in the States and Territories.' See also discussion in the Committee's reviews of August 2005, *Review of the listing of seven terrorist organisations*, and September 2005, *Review of the listing of four terrorist organisations*.

We are now in the process of considering the re-listing of organisations under the Criminal Code procedure.

- 1.16 For the purpose of the re-listing the Attorney-General must be satisfied on the same grounds as for the original listing, that is '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).³ The Attorney-General explains his reasons for the regulation in a statement of reasons provided to the Committee and publicly released by media release. These statements of reasons explain by open source material his reasons for making the regulation. To comply with the Act the statements of reasons cover the terrorist activity of the organisation which is the subject of the regulation. In the initial consideration of the listing of organisations the statement of reasons canvassed activity over a period of many years.
- 1.17 However, for the purpose of a re-listing it would be preferable, from the Committee's perspective, to see arguments about the activities of the organisation in the period since the last listing. Information about contemporaneous activities, rather than historical activities already considered in previous reviews, would appear to be the more material. Background information about the history of the terrorist activities of an organisation is useful, but the Committee believes that the arguments for a re-listing should concentrate on recent activities and information about what has changed since the last review, whether that be an increase or a decrease in terrorist activity. Over time information becomes stale. The re-listing of an organisation is a fresh exercise of executive discretion and the Committee believes that there must, therefore, be a sufficient degree of currency in the evidence to warrant the use of the power.

Criteria for listings and the statement of reasons

- 1.18 The legal test for the listing of an organisation is set out in the Criminal Code. The Attorney-General must 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

3 *Criminal Code Act 1995*, section 102.2

occur).⁴ The Committee noted in previous reviews the breadth of this definition and sought advice from ASIO as to why some organisations which fitted the definition have not been proscribed while others have. ASIO's response was to provide the Committee with a set of criteria which it used to determine which entities it sought to proscribe. These criteria were:

- 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.⁵

1.19 There has been considerable discussion about the validity of these criteria in public submissions put to the Committee in reviews over the last two years. There has also been a continuing discussion with ASIO about the way the criteria might logically be applied, whether holistically or not. This has not been resolved. Nevertheless, the Committee has found the criteria useful as a means of assessing the arguments provided by the Government in each statement of reasons.

1.20 In two previous reports, in May 2005 and September 2005, in order to make greater sense of the decision-making process, the Committee asked the Government to address these criteria in future statements of reason. The Government has not responded formally to the recommendation which dealt with this request in the *Review of the listing of four terrorist organisations*, nor has it altered the structure or the content of the subsequent statements of reasons. A clearer exposition of the criteria would strengthen the Government's arguments, provide greater clarity and consistency in the evidence and therefore increase public confidence in the regime as a whole. It would greatly facilitate the Committee's review process if this change occurred.

4 *Criminal Code Act 1995*, section 102.2

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

Recommendation 1

The Committee renews its request that the Attorney-General and ASIO incorporate the criteria ASIO has provided for determining which organisations should be listed in future statements of reason.