

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 This is the nineteenth organisation to be listed under this legislation.¹ Over the last two Parliaments, the Committee has conducted six reviews, some listing multiple groups. Sixteen organisations have been re-listings of organisations originally listed under previous legislative arrangements. Thirteen organisations were listed by regulation of the Attorney-General under the 2002 Terrorism Act; all were already on lists established by the UN 1267 Committee;² three

1 The other 18 listed organisations are as follows: originally from the UN lists – Al Qa'ida; Jemaah Islamiya; Abu Sayyaf Group; Armed Islamic Group (GIA); Harakat Ul-Mujahideen (HuM); Salafist Group for Call to Combat (GSPC); Ansar Al-Islam; Asbat Al-Ansar; Egyptian Islamic Jihad; Islamic Army of Aden; Islamic Movement of Uzbekistan; Jaish-I-Mohammed; Lashkar I Jhangvi: originally from specific legislation – Hizballah External Security Organisation; Hamas and Lashkar-e-Tayyiba: new listings under the current Criminal Code legislation – Palestinian Islamic Jihad; the Al Zarqawi Network.

2 There was a requirement under the *Security Legislation Amendment (Terrorism) Act 2002* that, in making a regulation to proscribe an organisation as a terrorist organisation, under the Criminal Code, the Attorney-General needed to be satisfied on reasonable grounds that the Security Council of the United Nations has made a decision relating wholly or partly to terrorism. In introducing further amendments to the Criminal Code in October 2003 (finally agreed in 2004), the Attorney-General sought and gained the removal of the clause relating to the United Nations as too restrictive. See the *Review of*

organisations were banned by specific legislation passed by the Australian Parliament. Two reviews have considered the listing of two new organisations, the Palestinian Islamic Jihad and the Al-Zarqawi Network.

- 1.3 The organisation for which the current regulation has been made is the Kurdistan Workers' Party (PKK). It is also listed under the following names: Peoples Congress of Kurdistan, Kongra Gel, Kongra GeleKurdistan, Partiya Karkeren Kurdistan, New PKK, Freedom and DemocraticCongress of Kurdistan, Kurdistan Freedom and Democracy Congress, KADEK, Kurdistan Halk Kongresi, KHK, Kurdistan Labor Party, Kurdistan Peoples Congress, Kurdish Freedom Falcons, Kurdish Liberation Hawks, Kurdistan Ozgurluk Sahinleri, Teyrbazln Azadiya Kurdistan, TAK.
- 1.4 The Attorney-General wrote to the Chairman on 2 December 2005 advising that a regulation specifying the PKK as a terrorist organisation for the purposes of section 102.1 of the Criminal Code was to be made and that it was scheduled for consideration by the Federal Executive Council on 15 December 2005.
- 1.5 The regulation was tabled in the House of Representatives and the Senate on Tuesday 7 February 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 9 May 2006.
- 1.6 The Committee advertised the inquiry in *The Australian* on Wednesday 21 December 2005. Notice of the inquiry was also placed on the Committee's website and seventeen submissions were received from the general public.
- 1.7 Representatives of the Attorney-General's Department (AGD), ASIO and the Department of Foreign Affairs and Trade (DFAT) attended a private hearing on the listing on 6 February 2006 in Canberra.
- 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. This chapter will examine the Government's procedures in listing PKK and chapter 2 will consider the merits of the listing.

The Government's procedures

1.9 In a letter sent to the Committee on 25 January 2006, the Attorney-General's Department informed the Committee that it had adhered to the following procedures for the purpose of the listing:

- An unclassified Statement of Reasons was prepared by ASIO, and endorsed by DFAT, detailing the case for listing the organisation.
- Chief General Counsel, Mr Henry Burmester QC provided written confirmation on 14 November 2005 that the Statement of Reasons was sufficient for the Attorney-General to be satisfied on reasonable grounds of the matters required under s 102.1(2) for the listing by regulation of an organisation as a terrorist organisation.
- The Director-General for Security, Mr Paul O'Sullivan, wrote to the Attorney-General on 23 November 2005 outlining the background, training activities, terrorist activities, and relevant statements of the organisation.
- A submission was provided to the Attorney-General on 30 November 2005 including:
 - ⇒ copies of the Statement of Reasons from ASIO for the organisation
 - ⇒ advice from the Chief General Counsel in relation to the organisation; and
 - ⇒ regulations and Federal Executive Council documentation.
- Having considered the information provided in the submission, the Attorney-General signed a statement confirming that he is satisfied on reasonable grounds that the organisation is an organisation 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 a regulation in relation to the organisation, and approved associated Federal Executive Council documentation including an explanatory statement, explanatory memorandum, and executive council minute.
- The Attorney-General wrote to the Prime Minister on 2 December 2005 advising of his intention to list the PKK as a terrorist organisation.
- The Attorney-General advised the Leader of the Opposition of the proposed listing of the PKK as a terrorist organisation by letter on 2 December 2005 and was offered a briefing in relating to the listing.

- On 9 December 2005 the Prime Minister wrote to the Premiers of the States and Chief Ministers of the Territories advising them of the decision to list the PKK as a terrorist organisation. All States and Territories agreed to the listing of the PKK on the following dates:
 - ⇒ SA – 13 December 2005
 - ⇒ NT – 13 December 2005
 - ⇒ NSW – 14 December 2005
 - ⇒ QLD – 14 December 2005
 - ⇒ ACT – 14 December 2005
 - ⇒ VIC – 14 December 2005
 - ⇒ TAS – 15 December 2005
 - ⇒ WA – 15 December 2005
- The Attorney-General wrote to the Chairman of the Parliamentary Joint Committee on ASIO, ASIS and DSD on 2 December 2005 advising of his decision to list the PKK as a terrorist organisation.
- The Governor-General made the regulation on 15 December 2005.
- The Regulation was lodged with the Federal Register of Legislative Instruments (FRLI) on 16 December 2005 (FRLI Reference Number: F2005L04036).
- A press release was issued on 15 December 2005 and the Attorney-General's Department's National Security website was updated.

Procedural concerns

Consultation with the States and Territories

- 1.10 The Committee is pleased that consultation on this listing occurred between the Prime Minister and Premiers and Chief Ministers as required under subclause 3.4(6) of the *Inter –Governmental Agreement on Counter-terrorism Laws*. However, 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'. Given the dates outlined in the Attorney-General's letter of 25 January 2006, the timing of the consultation is too short to be meaningful. The States and Territories were advised only six days before the regulation was made.

- 1.11 This was a new listing. ASIO informed the Committee that consideration of the listing began in November 2004. The Committee was not informed of any urgency which would require the timing of the process to be so brief. For this process to work, all participants must give proper consideration to the listing.
- 1.12 On the matter of the timing and the seriousness with which the Department approached the process, officers from the Attorney-General's Department advised the Committee that:
- It is a serious process in that we give them [the States] all the details. I can't recall a situation where we have had what I would call objections to a listing from the states.³
- 1.13 Asked at the hearing what 'all the details' meant, the Department responded that it meant the statement of reasons.⁴ The Committee also notes that on past listings there have been objections about the process from the ACT Government.

Consultation with DFAT

- 1.14 The Committee was advised by the Attorney-General's Department that:
- An unclassified Statement of Reasons was prepared by ASIO, and endorsed by DFAT, detailing the case for listing the organisation.
- 1.15 No date of the consultation or information about the form of that consultation was provided in the procedural submission from the Attorney-General's Department. In the past, DFAT's input on the listing of organisations has been minimal. At the hearing, officers from the Attorney-General's Department reported that DFAT was now consulting directly with ASIO on a listing.⁵ However, the AGD official did note that, in addition, there were meetings between DFAT, AGD and ASIO on prospective listings.⁶
- 1.16 Asked whether at these meetings there was discussion about or consideration of the potential community impact of a listing, officers from the AGD could not recall such a discussion.⁷ ASIO did not report any discussion with the community on this listing nor did they

3 Classified transcript, private hearing 6 February 2006, p. 10.

4 Classified transcript, private hearing 6 February 2006, p. 10.

5 Classified transcript, private hearing 6 February 2006, p. 12.

6 Classified transcript, private hearing 6 February 2006, p. 12.

7 Classified transcript, private hearing 6 February 2006, p. 14.

believe there was a need for an assessment of the community's views under the legislative test for a listing.⁸

- 1.17 The Department of Foreign Affairs and Trade detailed for the Committee an upgraded procedure for consideration of a listing. The Department provided comment to ASIO on a draft of the statement of reasons at an early stage, the initial request for comment coming to the Department on 26 July 2005.⁹ Four posts, covering areas where Kurds lived, were consulted, only one of which responded. DFAT provided no date for this consultation; however ASIO gave evidence at the hearing that they consulted with posts in May 2005.¹⁰ The Europe Branch within the Department also provided comment.¹¹ DFAT told the Committee they provided broader and more substantive comment than they had in the past.¹²
- 1.18 The Committee appreciates the more substantial advice that was given to it by DFAT in the course of this listing. It wishes to reiterate what it has stated in previous reports. In future listings under the Criminal Code, the Committee would encourage DFAT to continue to provide this detailed advice to the Attorney-General's Department and ASIO and to the Committee. The Committee believes that it is important to understand the whole context in which a listing has been made; the circumstances which have given rise to the activities of the organisation proposed for listing; any assessment of the foreign policy implications of a listing; any information relating to Australia's obligations to the United Nations on the particular organisation. In particular, DFAT should provide advice on whether the organisation has been included in any of Australia's reports to the United Nations Security Council on the monitoring of financial transactions, people movement or the sale of arms.¹³

8 Classified transcript, private hearing 6 February 2006, p. 36.

9 Classified transcript, private hearing 6 February 2006, p. 16. ASIO told the Committee it believed that the draft went to DFAT in November 2004. Classified transcript, private hearing 6 February 2006, p. 26

10 Classified transcript, private hearing 6 February 2006, p. 27.

11 Classified transcript, private hearing 6 February 2006, p. 16.

12 Classified transcript, private hearing 6 February 2006, p. 16.

13 Australia is required to report to the United Nations Security Council on measures taken by the Australian Government to implement Security Council resolutions 1267, 1333, 1390, 1455 and 1373. These resolutions oblige member states to suppress terrorism, including freezing terrorist assets, preventing terrorists from entering into or transiting through their territories, preventing the supply, sale and transfer of arms and military equipment and denying safe haven to terrorists.

- 1.19 Finally, the Committee wishes to understand the potential impact on Australian citizens and residents of a listing.

Community consultation

- 1.20 In its previous report, *Review of the listing of six terrorist organisations*, the Committee recommended that:

a comprehensive information program, that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organisation.¹⁴

- 1.21 The letter from the Attorney-General's Department does not state whether any community consultation on this listing was conducted.

- 1.22 At the hearing, the Chairman asked Attorney-General's Department whether there had been any contact with or advice to any Kurdish organisation that the listing was to be made. Officers from AGD advised that there was none. The Attorney-General's Department noted that there had not been as much progress as they would have liked in this area; however, they also clarified that there had never been any intention to conduct community consultations prior to a listing. Rather they intended to notify, in several languages, what organisations were listed under the Criminal Code.¹⁵ The Committee notes that, in the second reading speech on 29 May 2003, the Attorney-General, Mr Williams, stated that 'any such announcement will be widely publicised in both print and electronic media.'

- 1.23 Numerous submissions to the review were critical of the failure of ASIO or the Attorney-General's Department to conduct any community consultation prior to the listing of the PKK, especially as the nature of the PKK and the struggle of the Kurds for self-determination had attracted such broad support in the Kurdish Community.¹⁶ Those submissions emphasized that offences under the provision are both vague and broad and the penalties severe. The implications of the listing for the Kurds in Australia are, therefore, very serious.

If no serious attempt is made to justify to those people the singling out of their political commitments for targeting by the criminal law, they are likely to experience a listing as

14 Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, March 2005, p. 20.

15 Classified transcript, private hearing 6 February 2006, p. 10.

16 See Chapter 2 for a complete discussion on this issue.

nothing more than an anti-democratic attempt to stifle their political freedom.¹⁷

- 1.24 A number of submissions also questioned the timing of the announcement of the listing as it coincided with the visit of the Turkish Prime Minister to Australia. Liberty Victoria said that ‘there were grounds for suspecting that the banning has been motivated by foreign policy considerations.’¹⁸

The dangerous possibility is that the proscription power, instead of being genuinely used to prevent political violence, has been put to the aid of foreign policy goals.¹⁹

- 1.25 The Australian Muslim Civil Rights Advocacy Network also noted:

We are concerned that the listing of an organisation with seemingly no security threat to Australia illustrates a proscription regime that is primarily dictated by foreign policy considerations rather than the more appropriate ends of protecting Australian citizens from the threat of terrorism.²⁰

- 1.26 The Committee asked witnesses about the timing of the decision to list the PKK, particularly whether the visit of the Turkish Prime Minister in December 2005 had influenced the decision. ASIO said the final and formal case for the listing was put forward in late 2005; however, the proscription was under consideration since November 2004 and they had sent the draft statement of reasons to DFAT in November 2004.²¹ The AGD said that the listing had been under consideration for six months prior to the announcement or the visit of the Turkish Prime Minister to Australia.²² DFAT confirmed that they received the draft statement of reasons on 26 July 2005.²³ During its confidential hearings, the Committee sought from DFAT information about whether the Government of Turkey had made any relevant representations to the Prime Minister during his visit in April 2005 to that country. The Committee was provided with all relevant

17 Mr Patrick Emerton Submission No. 18, p. 9.

18 Liberty Victoria, Submission No.6, p.2.

19 Liberty Victoria, Submission No.6, p.6. Other submissions making the same point were: submission numbers 3, 5, 7, 8, 9, 11, 12, and 13.

20 AMCRAN, Submission No. 14, p.1.

21 Classified transcript, private hearing 6 February 2006, pp. 24-26.

22 Classified transcript, private hearing 6 February 2006, pp. 24, 26 and 13. Classified transcript, private hearing 6 February 2006, p. 16.

23 Classified transcript, private hearing 6 February 2006, p. 16.

information. Whether there were such representations and if so what was conveyed by them has not been included in this report because DFAT has advised that the publication of such detail might prejudice Australia's relations with another government. It is a matter of open record that, in other forums, the Government of Turkey has strongly urged the proscription of the PKK by the international community.

1.27 ASIO reported that it did not receive any formal advice in connection with proscribing the PKK from DFAT or any other part of government concerning the discussions between the Australian Prime Minister and the Turkish Prime Minister Erdogan.²⁴ ASIO provided the following timeline for the development of the statement of reasons on this listing:

- 4 April 2005 – Draft statement of reasons sent to AGD for comment;
- 20 April 2005 – Revised draft statement of reasons sent to AGD for comment;
- 21 April 2005 – Revised draft statement of reasons sent to AGD for comment;
- 12 May 2005 – Revised draft statement of reasons sent to DFAT for comment;
- 19 August 2005 – PKK declared ceasefire for one month;
- 19 September 2005 – Revised draft statement of reasons sent to DFAT for comment;
- 22 September 2005 – DFAT sent cables to relevant posts requesting comments on revised draft statement of reasons;
- PKK ceasefire extended from September to 3 October 2005;
- 4 November 2005 – Revised draft statement of reasons sent to DFAT for comment;
- 8 November 2005 – Revised (DFAT endorsed) final statement of reasons sent to AGD for comment.²⁵

1.28 Some discrepancies in the evidence remained after answers to questions on notice were received. ASIO's evidence that they sent the original draft statement of reasons to DFAT in November 2004²⁶ was

24 ASIO supplementary submission, 2 March 2006, p. 1.

25 ASIO supplementary submission, 2 March 2006, p. 2.

26 Classified transcript, private hearing 6 February 2006, p. 24.

contradicted by their answer to questions on notice that the first request for comment was made to DFAT in May 2005. However, DFAT's evidence was that they received the request for comment on 26 July 2005. This varies from ASIO's timeline that DFAT was asked for comment on 12 May and 19 September 2005. DFAT provided the Committee with a copy of their comments on the listing, a single document, dated 29 September 2005. DFAT's evidence that a request was made by the Government of Turkey for consideration of the listing in April and that this was conveyed to both the AGD and ASIO in May 2005 was not endorsed by ASIO.²⁷

- 1.29** The Committee found no evidence that the Turkish Government's approach had affected the proscription timetable. Had there been evidence, the Committee would have viewed such foreign intervention with concern.

27 Classified transcript, private hearing 6 February 2006, p. 19.

