

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:
 - Abu Sayyaf Group (ASG);
 - Jamiat ul-Ansar (JuA);
 - Armed Islamic Group (GIA);
 - Salafist Group for Call and Combat (GSPC).
- 1.3 Under section 102(3) of the Criminal Code regulations, the listing of organisations as terrorist organisations ceases to have effect on the second anniversary of the day on which they took effect. The organisations must, therefore, be re-listed or the regulation will lapse.
- 1.4 These organisations were originally listed in 2002 under the *Criminal Code Act* following their listing by the United Nations Security

Council. Prior UNSC listing was a requirement under the Act up to 10 March 2004, when amendments to the *Criminal Code Act* came into force, removing that pre-condition.¹

- 1.5 The Committee first considered the listing of Abu Sayyaf Group, Jamiat ul-Ansar, the Armed Islamic Group, and the Salafist Group for Call and Combat in 2004 after the Committee's role in the Criminal Code procedure had been established. The four organisations under review were re-listed on 5 November 2004. This is a review of the second re-listing of these four organisations.
- 1.6 The Committee Chair received a letter on 16 October 2006 from the Attorney-General, advising that he intended to re-list the four organisations prior to the lapsing of the current listing, as provided for in section 102.1(3). The Attorney provided statements of reasons for the re-listings. The letter and attached statements of reasons are accepted as submission number 1 to this review (see Appendix A).
- 1.7 The regulations were tabled in the Senate on 7 November 2006 and in the House of Representatives on 27 November 2006. The disallowance period of 15 sitting days for the Committee's review of the listings began from the date of the first tabling. Therefore the Committee is required to report to the Parliament by 26 February 2007.
- 1.8 At a Committee meeting on 19 October 2006, it was resolved to hold hearings to review these listings and to invite public submissions.
- 1.9 The Committee advertised the inquiry in *The Australian* on Wednesday, 15 November 2006. Notice of the inquiry was also placed on the Committee's website. No submissions were received from the general public.

1 The Attorney-General introduced the Criminal Code Amendment (Terrorist Organisations) Bill in 2003. The purpose of this bill was to revisit the proscription regime and to reinstate the provisions removed by Senate amendment in 2002. This effectively reintroduced the proscription power of the Attorney-General and severed the connection between listing and the UN Security Council. The amendments also required that there be consultation with the Leader of the Opposition prior to the listing of an organisation, and it introduced a delisting provision by which an individual or organisation might make an application to the Minister to the effect that it no longer is directly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. The Minister is required to consider such applications. The delisting provision is not subject to parliamentary review and it is not a disallowable instrument. The amendment also inserted a review mechanism for both individual listings and for the listing process itself. This provision, 102.1A, enabled the Parliamentary Joint Committee on ASIO, ASIS and DSD (now the Parliamentary Joint Committee on Intelligence and Security) to review a regulation as soon as possible after the making of the regulation and report the Committee's comments and recommendations to Parliament before the end of the applicable disallowance period.

- 1.10 Representatives of the Attorney-General's Department, ASIO and the Department of Foreign Affairs and Trade (DFAT) attended a private hearing on the listings on 27 November 2006 in Canberra.
- 1.11 Since its first report, *Review of the listing of the Palestinian Islamic Jihad (PIJ)*, the Committee has tested the validity of the listing (and re-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 of this report will consider the merits of the listings.

Selecting Organisations for listing

- 1.12 Before discussing the specific re-listings being considered in this report, it is worth noting that during the private hearing, the Committee discussed the process of discrimination between choosing those organisations which are selected for proscription and those which are not. This process has been touched upon in previous reviews but some Committee members noted that they continue to be unconvinced as to the robustness of the process.
- 1.13 It was noted by a Committee member that while some organisations which 'seem to be now concentrating their activities locally' and demonstrate no links to Australia, Australians or Australian interests are proscribed, others such as the LTTE, which has membership and links to Australia, have not been proscribed.²
- 1.14 The Committee heard from ASIO that many of the organisations currently proscribed in Australia belong to 'a Jihadist network which is global' and thus while there may not be current evidence of connections to Australia, they 'can work into Australia' through networks which 'can lead to people being brought into Australia'³.
- 1.15 The Committee was assured that other more prominent groups have not been ignored and they are being kept under constant review.

2 Private hearing transcript.

3 Private hearing transcript.

Government's procedures for specific listings

1.16 In a submission received by the Committee on 24 November 2006 (see Appendix B), the Attorney-General outlined his Department's procedures in the making of the regulations for the four organisations under consideration, as follows:

- An unclassified Statement of Reasons was prepared by ASIO in relation to each organisation detailing the case for listing with respect to each organisation.
- Special Counsel of the Australian Government Solicitor, Mr George Witynski, provided written confirmation on 4 October 2006 (in respect of ASG and GSPC) and 6 October 2006 (in respect of GIA and JuA) that each Statement of Reasons was sufficient for the Attorney-General to be satisfied on reasonable grounds that each 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 terrorist act has occurred or will occur.
- The Director-General for Security, Mr Paul O'Sullivan, wrote to the Attorney-General on 5 October 2006 (in respect of ASG and GSPC) and 9 October 2006 (in respect of GIA and JuA) outlining the background, training activities, terrorist activities, and attaching separate Statements of Reasons for each organisation.
- On 10 October 2006, the Attorney-General's Department provided to the Attorney-General a submission attaching:
 - ⇒ copies of the Statements of Reasons from ASIO for each organisation;
 - ⇒ advice from the Special Counsel in relation to each organisation;
 - ⇒ separate regulations and Federal Executive Council documentation for each organisation.
- Having considered the information provided in each submission, the Attorney-General signed separate statements for each organisation confirming that he is satisfied on reasonable grounds that each organisation is 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 each organisation, and approved associated Federal Executive Council documentation including an explanatory memorandum, Executive Council minutes and explanatory statements.

- A letter from the Attorney-General was delivered to the Prime Minister on 16 October 2006 advising of the Attorney-General's intention to re-list each organisation as a terrorist organisation under the Criminal Code.
- The Attorney-General advised the Leader of the Opposition by letter dated 16 October 2006 of the proposed re-listings of the organisations 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.
- On 13 October 2006, the Attorney-General wrote to the Attorneys-General of the States and Territories advising them of the decision to re-list the organisations. 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 16 October 2006 advising of his decision to re-list the organisations.
- The Governor-General made the regulations on 1 November 2006.
- The regulations were lodged with the Federal Register of Legislative Instruments (FRLI) on 2 November 2006.
- A press release was issued on 3 November 2006 and the Attorney-General's Department's National Security website was updated.⁴

Procedural matters

Re-listing an Organisation

1.17 For the purpose of the re-listing the Attorney-General must be satisfied on the same grounds as for the original listing, that is '(a) 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 a terrorist act has occurred or will occur) or (b) advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).⁵

4 Attorney-General's Department submission No 2.

5 *Criminal Code Act 1995*, section 102.1(2).

- 1.18 The Attorney-General explains his reasons for the regulation in a statement of reasons provided to the Committee and publicly released by media release. The statement of reasons uses open source material to examine 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. More recently, the Committee has advised the Attorney-General's Department that, 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. While background information about the history of the terrorist activities of an organisation is useful, the Committee believes that the arguments for a re-listing should concentrate on recent activities including information about what has changed since the last review, whether that be an increase or a decrease in terrorist activity. 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.

Consultations

- 1.19 The Attorney-General wrote to the Attorneys-General of the states and territories on 13 October 2006, advising of his intention to re-list the organisations. The Attorney-General received no responses disagreeing with the re-listings from the states and territories. In fact, only one state acknowledged the communication and no states or territories commented on the re-listings themselves.
- 1.20 The Committee asked the Attorney-General's Department if it was satisfied, in view of the lack of responses, that the states and territories did not disagree with the re-listing. The Committee was advised that it has been the experience of the Attorney-General's Department that the states and territories are quick to communicate if they have a problem or disagree with an action the Department plans to take, so their silence was taken as agreement with the re-listings.
- 1.21 The Attorney-General's Department noted that ASIO prepared the statements of reasons in consultation with DFAT and the Attorney-General's Department did not have specific discussions with DFAT on the re-listing of these four groups.
- 1.22 The procedural submission dealing with the re-listing of the four organisations makes no reference to any consultations with the

community and it was therefore noted that, except for the Attorney-General's Department's media release on the making of the regulation on 3 November 2006, no actions were taken to inform the community of the re-listings.

- 1.23 The Committee reiterates its previous concerns⁶ that lack of adequate community consultation means that the community is not properly informed of its obligations with regard to the re-listed organisations.

Criteria for listings

- 1.24 The legal test for the listing of an organisation is set out in the Criminal Code. As mentioned above, 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 occur).⁷
- 1.25 ASIO has provided the Committee with a set of criteria which it uses to determine which organisations it seeks to proscribe. These criteria are:
- 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.⁸
- 1.26 Previous reports by this Committee have noted that there has been considerable discussion about the validity of these criteria in public submissions put to the Committee in past reviews. The Committee has never resolved to its satisfaction through a continuing discussion with ASIO, how the criteria might logically be applied. Nevertheless, the Committee has found the criteria useful as a means of assessing the arguments provided by the Government in each statement of reasons.

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

7 *Criminal Code Act 1995*, section 102.2

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

- 1.27 In previous reports, in order to make greater sense of the decision-making process, the Committee has asked the Government to address these criteria in future statements of reasons. The Government has not altered the structure or the content of the subsequent statements of reasons although the Committee continues to argue that 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. Therefore, the Committee reiterates that it would greatly facilitate the Committee's review process if this change occurred.
- 1.28 While considering the second re-listing of the four terrorist organisations being reviewed in this report, the Committee found evidence (discussed in Chapter 2) that at least one of the organisations has become much less active in the last two years, even to the point where the Australian Strategic Policy Institute has stated that the group can be 'considered to be essentially defunct'⁹. To further facilitate future Committee review processes, the Committee would find it useful to receive a set of criteria from the Attorney-General and ASIO outlining under what circumstances an organisation will not be relisted.

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.**
- **The Committee requests that the Attorney-General and ASIO provide the Committee with a set of criteria outlining under what circumstances an organisation will not be relisted.**

⁹ Australian Strategic Policy Institute *'Local Jihad: Radical Islam and terrorism in Indonesia'*, September 2005, p.55.