

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
ATTORNEY-GENERAL'S PORTFOLIO

Program: Australian Security Intelligence Organisation

Question No. SBE16/075

Senator McKim asked the following question at the hearing on 18 October 2016:

Senator McKIM: Mr Lewis, I want to revisit a matter I raised with you in February last year. That is the Tehrik-i-Taliban, the TTP, an organisation that claimed responsibility for the Peshawar school shooting in December 2014. I asked you why, at that time, it was not listed as a proscribed terrorist organisation and you said you would have a look at it. It is still not listed. We are the only one of the Five Eyes countries that have not listed it. Can you please explain why?

Mr Lewis: Last February, if that is indeed when it was—I do recall our discussion about this—I explained to you the process by which organisations are identified for listing and that that process had not been completed or, indeed, we had not arrived at a position where we drew a conclusion with regard to the organisation you raised. That, still, has not changed. That remains the case.

Senator McKIM: Since then they have been linked to bombings in Lahore that killed 75 people on Easter Sunday this year. As I said in my preliminary question, we were the only one of the Five Eyes countries that has not listed this organisation as a proscribed organisation, or what is the equivalent in the other countries. Is there something that is holding this up? Is it a resourcing issue for ASIO? Are there complexities that you do not wish to go into here for reasons of national security?

I raised this with you six months ago. 'Nothing's changed' is it what you have said to me today—or, at least, that you have not changed your view. I presume you have not changed the fact that you have not advised the Attorney to list the organisation. Are you able to provide any further information to the committee that would just explain what would appear to be, on the face of it, an anomaly: we are the only one of the Five Eyes countries that has not listed this organisation as a terrorist or a proscribed organisation?

Mr Lewis: I understand the point of your question. I cannot comment on the judgements made by the other Five Eyes countries. We make our own judgments here, quite clearly. It is very common that we do share information about agencies between the Five Eyes countries, but I am not in a position to talk to you about the detailed consideration that we make on the various organisations that are not on the list, of which there are a number. There are a number of organisations that are always under consideration for adding to the list. The list is, of course, public; you are aware of which organisations have been listed. The ones that have not or that are under contemplation is not something that we discuss publically. But, having said that, the circumstances about the TTP have not changed since I spoke to you last, from our point of view.

Senator McKIM: In the context of whether or not you would advise the minister to list them?

Mr Lewis: That is right, and we have not advised the minister that he should take any further action.

Senator McKIM: To the best of your knowledge, were they responsible for the bombings in Lahore that killed 75 people on Easter Sunday?

Mr Lewis: I do not know. I would have to check our holdings on that.

Senator McKIM: Could you or the Attorney suggest any way forward here. I raised this issue six months ago. I was basically fobbed off—and I do not mean that critically. I did not place it on notice, because it was clear that you did not want me to. I have raised it again. There has been no rationale given at all to this committee as to why this organisation has not been listed. On the face of it, they claimed responsibility for the Peshawar school shooting. That was an extremely

serious terrorist action. I am just wondering whether you can assist here Attorney—

Senator Brandis: I can assist.

Senator McKIM: On the face of it, it just seems like an anomaly.

Senator Brandis: Although, ultimately, it is for the minister to sign off on these listings, I—and, I think, any prudent minister—would always follow the judgement of intelligence specialists. ASIO and other members of the Australian intelligence community do keep these issues under review constantly. However, given that you have raised the issue and Mr Lewis and I have heard you what have to say, ASIO will have another look. We will conduct another assessment of this organisation, with a view to assessing it against the statutory listing criteria.

Senator McKIM: I appreciate that.

Mr Lewis: I hope you understand that there are many organisations in the world that are not proscribed. We are not in the businesses of responding to each one of those that has popped up. We are constantly keeping the situation under review, as the Attorney said. When an organisation meets a certain threshold for proscription, then we will go forward and recommend that to the Attorney. You can assume that silence means that that organisation has not met a threshold. I am happy to have a look at it, but we cannot enter into some sort of extended discussion about which organisations are and which organisations are not proscribed. The ones that are proscribed you can read on a list—that is a public list.

Senator McKIM: The ones that are not proscribed—

Mr Lewis: We cannot get into a running dialogue about those organisations.

Senator McKIM: I am aware of that. I have tried to address this as sensitively as I could. Nevertheless, I accept the commitment that both you and the Attorney have given, and we will see whether that emerges or not on to the publicly available list of proscribed organisations.

The answer to the honourable senator's question is as follows:

As noted in the response provided at the Estimates hearing on 18 October 2016 (and previously on 9 February 2016), ASIO can confirm that the Tehrik-e-Taliban Pakistan (TTP) is **not** a proscribed terrorist organisation listed by Australia under the *Criminal Code 1995*.

There are a number of entities and groups around the world that might be considered for listing under Australia's terrorist proscription regime. This process involves not only ASIO's assessment but cross-government consultation prior to a formal determination by the Attorney-General.

It is not appropriate to comment publicly on whether groups such as the TPP that are not listed may have been considered, or are being considered.

It may be useful however, to outline the process for listing of a terrorist organisation and ASIO's role in that process.

Terrorist groups are listed by the Australian Government under Division 102 of the *Criminal Code*. ASIO provides security advice in the form of a Statement of Reasons (SoR), which outlines the security intelligence case to help determine whether the organisation meets the legislative requirements for listing.

In order for an organisation to be listed it must meet the legislative requirements in the *Criminal Code*, which states the organisation:

- a) is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- b) advocates the doing of a terrorist act.

In addition, the process for listing is informed by the 'Protocol for listing terrorist organisations' which is located on the Australian Government's *Australian National Security* website [a copy is attached at **Annex A**].

ASIO notes that it is not a pre-requisite that a group be listed as a terrorist organisation under the *Criminal Code* for the prosecution of an individual in Australia under Part 5.3 of the *Criminal Code*. Similarly whether a group is listed or not has no impact on ASIO's ability to conduct security intelligence investigations where it assesses there are matters relevant to security.

While the listing of an organisation by other nations and the United Nations (UN) is a factor considered in whether to list the organisation in Australia, each nation operates under different regimes with their own legislative requirements and each nation will make a determination about the listing of the group with reference to its own experience and security requirements. The fact that a group is listed by another nation or the UN is not relevant to whether it meets the legislative requirements for listing in Australia.



Protocol—Listing terrorist organisations under the Criminal Code

This protocol is a guide to assist the public to understand the process and requirements that apply when the Government decides to list terrorist organisations under Division 102 of the Commonwealth *Criminal Code*. The protocol complements the Australian Government's pamphlet on *Australia's counter-terrorism laws*. Both resources are available on the publications page of the Australian Government National Security website at: www.nationalsecurity.gov.au.

How organisations may be found to be terrorist organisations

There are two ways that an organisation may be found to be a terrorist organisation under the Criminal Code:

- by a court, as part of the prosecution of a terrorist organisation offence; or
- by being 'listed' by the Government under the Criminal Code Regulations.

The courts can only consider whether an organisation is a terrorist organisation during a prosecution for a terrorist organisation offence. It is not the role of the courts to consider this as a stand-alone matter. The listing process enables the Government to identify terrorist organisations as a separate matter to any offences.

Purpose of listing

The listing process provides a mechanism for the Australian Government to identify terrorist organisations and put the organisation and members of the public on notice that the organisation is a terrorist organisation under Australian law.

Notification is important to help people avoid engaging in activities such as becoming a member of or providing support or money to a terrorist organisation.

Under Division 102 of the *Criminal Code*, it is an offence to do things such as direct the activities of, be a member of, recruit for, provide training to, receive training from, provide funds to or receive funds from or provide support to, a terrorist organisation. It is also an offence to associate with a member of a listed terrorist organisation in certain circumstances where such association intentionally provides support to that organisation.

A listing can also provide the basis for establishing the fact that an organisation is a terrorist organisation in a criminal proceeding.

Legislative test for deciding to list a terrorist organisation

Before listing an organisation, the Attorney-General must be satisfied on reasonable grounds that the organisation:

- is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

For more information on the legislative test and the terrorist organisation offences, refer to the Australian Government's pamphlet on *Australia's counter-terrorism laws*.

Role of Commonwealth agencies

The Australian Security Intelligence Organisation (ASIO) and the Attorney-General's Department (AGD) have lead roles in providing support to the Attorney-General in relation to the listing of terrorist organisations, as outlined below. Other Australian Government agencies, including the Department of Foreign Affairs and Trade, the Department of the Prime Minister and Cabinet, and the Australian Federal Police, have more limited roles and are consulted about listing decisions at appropriate times in accordance with their portfolio responsibilities.

ASIO's role

The Attorney-General must be satisfied on reasonable grounds that an organisation meets the legislative test for listing. In making his decision, the Attorney-General considers advice provided by ASIO.

Selection of organisation for consideration

In considering the possible listing of an organisation, ASIO will evaluate the organisation against the legislative requirements for listing in subsection 102.1(2) of the *Criminal Code*.

ASIO will consider whether there is information indicating that the organisation:

- is directly or indirectly engaged in the doing of a terrorist act;
- is directly or indirectly preparing the doing of a terrorist act;
- is directly or indirectly planning the doing of a terrorist act;
- is directly or indirectly assisting in the doing of a terrorist act;
- is directly or indirectly fostering the doing of a terrorist act; or
- advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

There are a large number of organisations that could be considered for possible listing. To guide and prioritise the selection of organisations for consideration, ASIO may also have regard to a range of other factors, often referred to as the non-legislative factors. The key non-legislative factors are:

- the organisation's engagement in terrorism;
- the organisation's ideology;
- links to other terrorist groups;
- links to Australia;
- threats to Australian interests;
- listing by the United Nations or like-minded countries; or
- engagement in peace or mediation processes.

Depending on available information, some factors may carry more weight than others in selecting organisations for consideration. For example, information indicating links to Australia or threats to Australian interests may tend to prioritise consideration of listing a particular group as a terrorist organisation. However, a lack of information with respect to one or more factors will not preclude an organisation from being considered for listing.

Form of advice

ASIO provides advice to the Attorney-General in the form of a Statement of Reasons that outlines the organisation's involvement in terrorism. The Statement of Reasons will outline why, in ASIO's view, the organisation meets the legislative test for listing.

The Statement of Reasons may also include information that relates to any of the non-legislative factors outlined above. The inclusion of information relevant to the non-legislative factors is not required for the Attorney-General to be satisfied whether or not the organisation meets the legislative test for listing. However, it may provide useful contextual information about the organisation for the Attorney-General and for the general public.

Whenever possible, the Statement of Reasons will be prepared as a stand-alone document, based on unclassified information about an organisation, which is corroborated by classified information. This enables the Statement of Reasons to be made available to the public, and provides transparency as to the basis on which the Attorney-General's decision is made.

If there is insufficient unclassified information about an organisation, ASIO may provide a classified briefing to the Attorney-General.

Role of the Attorney-General's Department

The role of AGD is to facilitate the listing process. AGD scrutinises the draft Statement of Reasons before it is provided to the Attorney-General, and obtains advice from the Australian Government Solicitor as to whether the Statement of Reasons contains sufficient information for the Attorney-General to be satisfied on reasonable grounds that the organisation meets the legislative criteria for listing.

AGD also assists in ensuring the requirements to brief the Leader of the Opposition and consult with states and territories are met.

Once the Attorney-General has decided that an organisation meets the legislative criteria for listing and the necessary consultation requirements have been met, the Governor General may make regulations to list the organisation. AGD assists in preparing the formal documentation required for the listing.

Regulations are tabled in both Houses of Parliament, and can be disallowed by the Parliament.

Once a listing has been made, AGD liaises with the Parliamentary Joint Committee on Intelligence and Security, which has a role in reviewing the listings and providing advice to Parliament as to whether the listing regulations should be disallowed.

Monitoring, re-listing and de-listing of terrorist organisations

Monitoring terrorist organisations

Consistent with ASIO's functions under the *Australian Security Intelligence Organisation Act 1979*, ASIO monitors the relevance to security of all listed terrorist organisations.

If circumstances arise which cause ASIO to form a view that a listed terrorist organisation no longer meets the legislative requirements for listing, ASIO will advise the Attorney-General. If the Attorney-General ceases to be satisfied that an organisation meets the legislative criteria to remain listed, the Attorney-General must make a written declaration to this effect. The regulation listing that organisation will cease to have effect when that declaration is made.

Re-listing terrorist organisations

Regulations listing a terrorist organisation cease to have effect three years after they commence. This ensures that there is regular review and re-evaluation as to whether the organisation continues to meet the legislative criteria for listing.

Before a listing expires, ASIO will evaluate the organisation against the legislative requirements. If it considers the organisation continues to meet the legislative criteria, ASIO will prepare a new Statement of Reasons for the Attorney-General's consideration.

ASIO's Statement of Reasons for an organisation being considered for re-listing will provide information, as far as possible, indicating the organisation's involvement in the doing, preparing, planning, assisting, fostering or advocating of terrorism since the time it was last listed. This will enable the Attorney-General to assess whether the organisation continues to meet the legislative criteria for listing.

De-listing applications

Any person or organisation is entitled to make a de-listing application to the Attorney General. If a de-listing application is made on the grounds that there is no basis for the Attorney-General to be satisfied that the organisation satisfies the legislative criteria, the Attorney-General is required to consider the de-listing application.

If the Attorney-General receives a de-listing application, the Attorney-General may request advice from ASIO. The advice provided by ASIO in relation to a de-listing application may take any form and is not required to be in the form of a Statement of Reasons.

Notification of decision to de-list or not re-list an organisation

When an organisation is listed or re-listed, it is the Attorney-General's practice to issue a media release advising of this fact. The media release will include the Statement of Reasons for the decision.

Similarly, where an organisation is not re-listed or is de-listed, the Attorney-General will issue a media release advising of this fact and will outline the reasons why the organisation has not been re-listed or has been de-listed in general terms.

A decision to de-list or not re-list an organisation will not prevent the organisation from being re-listed in future, should circumstances change and the Attorney-General be satisfied that the organisation does meet the legislative criteria.

Review and oversight

Reviews by the Parliamentary Joint Committee on Intelligence and Security (PJCIS)

After an organisation has been listed, the PJCIS may review the listing, and report comments and recommendations to Parliament before the end of the Parliamentary disallowance period. Should the PJCIS consider that there are insufficient grounds for an organisation to be listed or have other concerns with the listing, it is open to the PJCIS to recommend that Parliament disallow a listing regulation so that it ceases to have effect.

Review by the PJCIS provides openness, transparency and accountability in the listing process. The PJCIS has expertise in reviewing security and intelligence matters and is well-placed to consider listing decisions, including where classified information may need to be examined.

Review by the PJCIS also provides an avenue for members of the public to raise any concerns and provide information to the PJCIS with respect to the listing of particular terrorist organisations. The manner in which inquiries are undertaken and advertised is a matter for the PJCIS.

Further information about the PJCIS is available on the Parliament of Australia website at:

www.aph.gov.au/house/committee/pjicis

Judicial review by the courts

Judicial review of the legality of a decision to list an organisation is available in the courts under the *Administrative Decisions (Judicial Review) Act 1977*, section 75(v) of the Constitution and section 39B of the *Judiciary Act 1903*. The general principles of administrative law require that the Minister's decision be made on the basis of logically probative evidence. The decision must also be a proper exercise of power, not flawed by irrelevant considerations, improper purpose or exercised in bad faith.

Oversight by the Inspector-General of Intelligence and Security (IGIS)

The IGIS is an independent statutory office holder who monitors and reviews the legality and propriety of the activities of Australia's intelligence and security agencies, including ASIO.

The IGIS has own motion inquiry powers and can also conduct inquiries in response to complaints from any person or requests from Ministers. Should the IGIS decide to conduct an inquiry into ASIO's role in the terrorist listing of any particular organisation, the IGIS would consider whether ASIO had followed appropriate processes when considering the organisation for listing and when providing advice to the Attorney-General.

Further information about the IGIS is available at: www.igis.gov.au.

Where to find the list of terrorist organisations and further information

Listed terrorist organisations are set out in Part 2 of the *Criminal Code Regulations 2002*, available on the ComLaw website at: www.comlaw.gov.au

The list of terrorist organisations and the current Statements of Reasons for each organisation are also available on the Australian Government National Security website at: www.nationalsecurity.gov.au

List of terrorist entities for anti-terrorism financing purposes

The Minister for Foreign Affairs is responsible for a separate list of 'terrorist entities' under the *Charter of the United Nations Act 1945*. This is a different process to the Criminal Code listing process, and relates to Australia's anti-terrorism financing obligations under the United Nations

Security Council Resolution 1373 (2001). Information on this separate process is available on the Department of Foreign Affairs and Trade's website at: www.dfat.gov.au

Pamphlet on Australia's counter-terrorism laws

The Australian Government has also produced a pamphlet on Australia's counter-terrorism laws. This pamphlet is available on the publications page of the Australian Government National Security website www.nationalsecurity.gov.au in English, Arabic, Chinese, French, Indonesian, Malaysian, Spanish, Turkish and Vietnamese. Hard copies may be requested by writing to: