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Committee Secretary
Parliamentary Joint Committee on Intelligence and Security
Parliament House
Canberra ACT 2600

11 June 2009

Dear Secretary

Submission in relation to the re-listing of Hizballah's External Security Organisation (ESO) under the *Criminal Code Act 1995*

I would like to thank the Parliamentary Joint Committee on Intelligence and Security ('the Committee') for the opportunity to make a submission in relation to the recent re-listing of Hizballah's External Security Organisation as a terrorist organisation under the *Criminal Code*. This submission reiterates many of the general points raised in my submissions to earlier listings inquiries undertaken by this Committee and its predecessor (the Parliamentary Joint Committee on ASIO, ASIS and DSD), relating in particular to the proper grounds of exercise of the proscription power under section 102.1, and to the Committee's exercise of its power of review under section 102.1A(1), of the *Criminal Code*. The submission then goes on to comment on the individual listings under review by the Committee.

Should the Committee have any queries, please do no hesitate to contact me.

Yours sincerely,

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0. INTRODUCTION

Like earlier inquiries by this Committee and its predecessor into the listing of organisations as terrorist organisations, this inquiry raises three principal matters for consideration:

- On what grounds ought the proscription power under the section 102.1 of the *Criminal Code* to be exercised?
- If the power is to be exercised, what process ought to be followed in relation to its exercise?
- With respect to the particular re-listing under review, in light of the answer to the first two questions, ought the listing to be supported?

This Committee and its predecessor have both noted in their reports that the answers to the first two of these questions cannot simply be read from the text of the *Criminal Code*.[1] As I will explain below, and as I have explained in submissions to earlier listings inquiries, the grounds on which organisations may be listed are so broad that there must be hundreds or thousands of organisations in the world eligible to be listed. Nevertheless, to date only nineteen have been listed.[2] It follows that grounds more narrow than the statutory grounds are being applied in determining whether or not to list an organisation. The principal concern of this submission is that there is an ongoing failure on the part of the government to articulate the rationale for proscription in a way that is consistent with the values of legality and democracy. This leaves open very strongly the inference that this invocation of criminal law machinery is a mere device in the service of foreign policy goals.

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[1] See, for example, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.1-2.5, 2.8, 2.23; Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 2.34, 4.43..

[2] Sections 4A to 4W of the *Criminal Code Regulations 2002*. I note that in correspondence to the Committee (dated October 21, 2008, and undated but received March 10, 2009) the Attorney-General has indicated that he is not satisfied on reasonable grounds that either the Armed Islamic Group or Egyptian Islamic Jihad satisfies the statutory criteria for listing, and hence that those listings will sunset on November 2, 2008 and March 30, 2009, respectively. Nevertheless, the compilation of the Regulations dated May 16, 2009 (which in its Table of Amendments notes the re-listing of Hizballah's ESO pursuant to SLI 2009 No. 77) lists both groups (sections 4E and 4M, respectively). The significance of this apparent oversight will be returned to later in this submission.

As I have stressed in many earlier submissions, so I wish to stress in this one: this submission is not written with any intention of supporting the activities of Hizballah or its External Security Organisation, or militant religious organisations more generally. Rather, it is written from the point of view of someone who believes that the interaction between political freedom and the criminal law in a democracy must be regarded as a very delicate matter. Governments in a democracy of course have the right to pursue their foreign policy goals. This right results from their successful election in a democratic contest. But mere condemnation of the activities of a foreign organisation is not a sufficient basis for listing that organisation under the *Criminal Code*. Australian criminal law should operate in a manner that is consistent with Australia's pluralist democracy. As liberal theorists since J S Mill have noted, in a democracy the criminal law ought not to be used simply as a tool for enforcing political preferences.[3] This must be particularly true where the political preferences are foreign policy ones, and where the democracy in question is Australia, a multi-cultural community whose citizens have the most tremendous and diverse sorts of relationship with, and interests in, the people, places and politics of other countries.

Unfortunately, as I will argue in the rest of this submission, in this instance the grounds for and process of listing do not seem to be consistent with these liberal ideals.

1. THE STATUTORY REGIME SURROUNDING THE PROSCRIPTION POWER UNDER THE *CRIMINAL CODE*

1.1 Breadth of the definition of 'terrorist organisation' under the *Criminal Code*

As has been observed in many submissions to the Committee by myself and others, the definition of 'terrorist act' under the section 100.1 of the *Criminal Code* is extremely broad. It includes any action or threat of action where the following four criteria are met:

- the action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;

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[3] "[T]he only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others": J S Mill, *On Liberty* (1859, Everyman's Library edition with *Utilitarianism* and *Representative Government*, 1910) 73.

- the action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- the action does, or the threatened action would:
    - cause serious physical harm, or death, to a person; or,
    - endanger the life of a person other then the one taking the action; or,
    - create a serious risk to the health and safety of the public, or of a section of the public; or,
    - cause serious damage to property; or,
    - destroy, or seriously interfere with or disrupt, an electronic system;
- the action is, or the threatened action would be:
    - action that is not advocacy, protest, dissent or industrial action; or,
    - intended to cause either serious physical harm, or death, to a person; or,
    - intended to endanger the life of a person other then the one taking the action; or,
    - intended to create a serious risk to the health and safety of the public, or of a section of the public.

This definition includes virtually all actual, attempted or threatened political violence, anywhere in the world, whether undertaken by a government or by private individuals, whether undertaken in support of or in opposition to democracy, whether undertaken aggressively or defensively, and whether undertaken with or without justification.

Before an organisation can be banned pursuant to paragraph (b) of section 102.1, subsection (2) requires that the Minister 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 a terrorist act has occurred or will occur);

- Directly or indirectly counsels or urges the doing of a ‘terrorist act’ (whether or not a terrorist act has occurred or will occur);

- Directly or indirectly provides instruction on the doing of a ‘terrorist act’ (whether or not a terrorist act has occurred or will occur);

- Directly praises the doing of a ‘terrorist act’ in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a ‘terrorist act’ (whether or not a terrorist act has occurred or will occur).[4]

Given the breadth of the definition of ‘terrorist act’, and given the breadth of the concepts of ‘direct or indirect assisting in’, ‘direct and indirect fostering of’,[5] ‘direct or indirect counselling or urging of’ and ‘directly praising’ such acts, an extremely wide range of groups is liable to be banned under Australian law. It need hardly be pointed out that an organisation can satisfy any of these grounds although it itself engages in no criminal activity and has no terroristic or other criminal purpose.[6]

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[4] *Criminal Code* s 102.1(1), paragraph (b) of the definition of ‘terrorist organisation’; s 102.1(1A),(2). The last three of these grounds are, somewhat misleadingly, characterised as the ‘advocacy’ of terrorism.

[5] It seems that juries are relying on ordinary English dictionaries in order to give meaning to the notion of “fostering”: Senator Scott Ludlam, *Transcript of Estimates Hearings* (February 23, 2009), available at <http://scott-ludlam.greensmps.org.au/content/transcript/questions-attorney-general%E2%80%99s-department>.

[6] To give one example, a publisher of the *Communist Manifesto*, having nothing but scholarly and/or commercial purposes, would appear to indirectly urge the doing of a terrorist act, in virtue of its reproduction of the following famous passage:

> The communists disdain to conceal their views and aims. They openly declare that their ends can be attained only by the forcible overthrow of all existing social conditions. Let the ruling classes tremble at a communistic revolution. The proletarians have nothing to lose but their chains. They have a world to win. WORKINGMEN OF ALL COUNTRIES, UNITE!

Lewis S Feuer (ed), *Marx & Engels: Basic writings on politics and philosophy*, Fontana/Collins, 1984, p 82.

1.2 The consequences of proscription under the *Criminal Code*

Once an organisation has been listed, virtually any sort of involvement with the organisation, by anyone, anywhere in the world, becomes a serious criminal offence.[7] With the possible exception of section 102.7 of the *Criminal Code*,[8] none of these offences requires as an element of the offence that the offender have any terrorist intention, or that his or her involvement have any connection to terrorist acts.

In addition, these offences of involvement with a listed organisation act as triggers for further elements of Australian law. Thus, those arrested for such offences are liable to a greater-than-usual period of detention without trial;[9] those charged with such offences have a reduced right to be remanded on bail;[10] and those convicted of such offences are subject to minimum non-parole periods.[11] Also, where there are reasonable grounds for believing that detaining and/or questioning someone will substantially assist the collection of intelligence that is important in relation to such an offence, and that other methods of collecting that intelligence would be ineffective, then that person is liable to be detained and/or questioned by ASIO – whether or not they are themselves suspected of engaging in any violation of Australian or other law.[12]

Thus, to list an organisation is to trigger a number of departures from the ordinary rule of law in Australia. Offences are enlivened of involvement with an organisation, which do not require the proof of any terrorist intent or conduct on the part of an accused or the organisation, and which have maximum sentences comparable to those for manslaughter, rape and serious war crimes. One of these offences – that of training with a banned

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[7] *Criminal Code* sections 102.2-102.8. It should be noted that section 102.5 places an evidential burden on the accused to adduce evidence as to his or her innocent state of mind, if he or she is to escape conviction for engaging in training with a banned organisation.

[8] I say 'possible exception' because, although section 102.7 does require that, if the offence is to be committed, then the support to the organisation must help it engage in, prepare, plan, assist in or foster the doing of a terrorist act, the grammar of the section does not make it clear whether this assistance be within the scope of the accused's intention: see the discussion in the *Report of the Inquiry into the Case of Dr Mhoamed Haneef* (2008) §5.6.

[9] *Crimes Act 1914* sections 23CA, 23CB, 23DA.

[10] *Crimes Act 1914* section 15AA

[11] *Crimes Act 1914* section 19AG.

organisation – places an evidential burden on the accused to lead evidence of his or her innocent state of mind. All of these offences are subject to departures from the ordinary rules relating to pre-trial, remand and post-conviction detention. And all act as triggers for an extra-judicial process of interrogation and detention by ASIO.

Listing an organisation is therefore a serious matter, having serious consequences for the application of Australian criminal law. For this reason, an organisation ought not to be listed simply to make a political point. It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day. In a democracy, political controversies are to be resolved through political activity, not through the application of the criminal law by way of executive fiat. Some Australian politicians have expressed a contrary view,[13] but this submission urges the Committee to uphold, and not to repudiate, the fundamentals of democracy in Australia.

For the reasons given in the previous paragraph, to list an organisation is not merely symbolic. As the next section will argue, however, there is strong evidence that the listing regime is being approached in a purely symbolic fashion. Indeed, to a significant extent the regime has the appearance of political posturing adopting a mere facade of legality.

2. THE ACTUAL PROCESS FOR THE EXERCISE OF THE PROSCRIPTION POWER UNDER THE *CRIMINAL CODE*

2.1 Lack of Community Consultation

As a result of its ongoing review work, this Committee appears to have had a degree of success in encouraging the Attorney-General's Department to take more seriously its

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[12] *Australian Security Intelligence Organisation Act 1979* sections 34E–34G.

[13] For example, the Member for Moncrieff Mr Steve Ciobo has stated that

> I feel that the executive, and government in the executive sense of the word as well, have taken a decision about what we believe is appropriate ideology and what is inappropriate ideology and that the legislation reflects the decision that we have taken.

Transcript of Hearings of the Parliamentary Joint Committee on Intelligence and Security, Parliament of Australia, Canberra, 4 April 2007, 36.

obligations of consulting with other branches of the Commonwealth Government, and with State Governments, in relation to the listing of organisations under the *Criminal Code*. However, the Committee's ongoing recommendation that community consultation take place in relation to listings does not seem to have been taken up in any serious fashion despite several years of reiteration.[14]

Community consultation in relation to listings is crucial for two reasons, one legal and one political. As the Security Legislation Review Committee noted,[15] natural justice in the context of administrative decision-making demands a right to be heard. The present process does not adhere to this requirement of administrative law.

More significantly, perhaps, consultation is essential if the listing of an organisation is to be seen by those whom it affects as a politically legitimate exercise of power within the framework of Australia's democracy, rather than simply as an anti-democratic interference with civic and political freedom. It is unhelpful to assume that it is obvious to all Australians that the activities of each listed organisation are beyond the pale, such that involvement with such an organisation is obviously wrong and deserving of criminalisation. Whatever its own political convictions, a government in a liberal democracy like Australia has a special duty to preserve the integrity of that liberal democracy, including the freedom of political outlook and political dissent that characterises democratic life. The listing of an organisation makes criminal the political activities of some, and impacts more diffusely on the political life of many more. 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 nothing more than an anti-democratic attempt to stifle their political freedom. This is not good for the health of Australian democracy.

The need to preserve the integrity of Australian democracy becomes all the more urgent because – given the breadth of the concept of 'terrorist act' and 'terrorist organisation' in

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[14] See, for example, Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations* (2005) at 2.38 to 2.40 and Recommendation 1; Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 3.13 and Recommendation 1. No mention is made of any community consultation in the Committee's *Review of the re-listing of Abu Sayyaf Group, Jamiat ul-Ansar and Al-Qa'ida in Iraq* (2009).

[15] *Report of the Security Legislation Review Committee* (2006) at 8.24–8.30.

Australian law – it is obvious to anyone who reflects that not all eligible organisation are being listed under Division 102. In the context of an early listings inquiry undertaken by this Committee's predecessor, the Attorney-General's Department stated that

> It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.[16]

A moment's thought, however, will indicate that only the tiniest fraction of organisations satisfying this description have been listed under the *Criminal Code*. The most obvious exceptions are all the governments of the world who, through their military expenditure, preparation and activity are indirectly preparing for the commission of acts of political violence, and all those arms and explosives manufacturers who are likewise directly and indirectly assisting such acts. But even if some would consider as absurd the listing of such organisations – and it again it must be emphasised that such a judgement of absurdity would have no basis in the legislation, which encompasses all such activity and all such organisations – the disparity between the listings under the *Criminal Code* and the listings under the *Charter of the United Nations Act 1945* indicates that some narrower criteria for listing is being applied.

Consider further the most straightforward of the above examples: all foreign soldiers seem to be training with organisations that are indirectly fostering and directly praising political violence (that is, they belong to armies which issue medals), and hence are potential criminals under Division 102.[17] But it is obvious that in most cases the organisations to which they belong will never be listed, and their members will neither be arrested, nor charged, nor prosecuted by Australian authorities, even were the opportunity to arise. In the context of the current listing, this is not a merely academic or theoretical point: during the course of the 2006 conflict between Israel and Lebanon, at the same time that Hizballah's External Security Organisation was a proscribed organisation under Australian law, an Australian Israeli was killed fighting with the Israeli military,[18] and the then Minister for

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[16] Attorney-General's Department, *Submission No 7 to the Committee's Inquiry into the listing of six terrorist organisations* (2005), p 1.

[17] Australian soldiers are protected from the operation of Division 102 by the defence of authority under Commonwealth law: *Criminal Code* s 10.5.

[18] Assaf Namer's death was widely reported in the Australian media: see, for example, Emma Griffiths, "Israel mulls wider offensive after soldiers' deaths", *ABC News Online*, 27 July 2006 <http://www.abc.net.au/news/newsitems/200607/s1698921.htm> at 3 July 2007.

Foreign Affairs offered his condolences to the man's family.[19] As this submission has already noted, it is of course the prerogative of the democratically elected government of Australia to run its foreign policy in accordance with its conception of the country's national interest. But the criminal law should not be used as a tool to enforce these foreign policy preferences. To make criminals of those who take a different, even an opposing, view – including , potentially, large numbers of Australians – is to do something extraordinary, and quite at odds with liberal democratic tradition. It is therefore essential, if legitimacy is to be preserved, that the government openly that only a small group of organisations is being singled out for listing and for investigation, and that it set about explaining and justifying that selection to those affected.

Unfortunately, to date, this has not been done. There has been no serious attempt by the government at public justification. And nor has there been any serious attempt to adhere to stable public criteria in the exercise of the listing power.

2.2 The government's failure to adhere to the stated grounds for its listing of organisations

The former Director-General of ASIO, in a hearing before the Committee on February 1, 2005, stated that in selecting organisations for proscription ASIO takes account of the following factors:

- the organisation's engagement in terrorism;
- the ideology of the organisation, and its links to other terrorist groups or networks;
- the organisation's links to Australia;
- the threat posed by the organisation to Australian interests;
- the proscription of the organisation by the United Nations or by like-minded countries;

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[19] Ibid.

- whether or not the organisation is engaged in a peace or mediation process.[20]

As part of a subsequent inquiry, on May 2, 2005ASIO informed the Committee that these factors

> are taken as a whole; it is not a sort of mechanical weighting, that something is worth two points and something is worth three points. It is a judgement across those factors, and some factors are more relevant to groups than others.[21]

On April 4, 2007, the Deputy Director-General of ASIO further explained that:

> Against the very large number of potential groups that may meet the legislative test, we have to work out where we start from. So the criteria simply have the status internally of a tool – an accountable tool rather than just a haphazard approach – as to where we start and, as we go through, what comes up next as the more likely ones that will meet the test.[22]

When one considers these remarks, and then attends to the organisations which have been listed, it is difficult to see that these factors are being applied in any systematic fashion at all. In particular, the questions of a link to Australia, or a threat to Australian interests, seems to have been given very little consideration in most cases. This can be seen by a consideration of Statements of Reasons supporting their listings, and the Committee's comments thereupon.[23] Of the organisations currently listed under the *Criminal Code*, no connection at all is drawn to Australia or Australians in respect of the following five:

- Al-Qa'ida in the Lands of the Islamic Maghreb;
- HAMAS' Izz al-Din al-Qassam Brigades;
- Hizballah's External Security Organisation;

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[20] *Review of the listing of six terrorist organisations* (2005) at 2.3.

[21] *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.4.

[22] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 4.5.

[23] As found on the website of the Committee (with respect to Ansar al-Islam, Asbat al-Ansar, Hizballah's External Security Organisation, Islamic Army of Aden, Islamic Movement of Uzbekistan, Jaish-e-Mohammad and Lashkar-e Jhangvi) and in the following reports of this Committee: *Review of the re-listing of three terrorist organisations* (2007) (with respect to HAMAS' Izz al-Din al-Qassam Brigades, Lashkar-e-Tayyiba and Palestinian Islamic Jihad); *Review of the re-listing of the Kurdistan Workers' Party (PKK)* (2008); *Review of the re-listing of Al-Qa'ida, Jemaah Islamiyah and Al-Qa'ida in the Lands of the Islamic Maghreb* (2008); *Review of the re-listing of Abu Sayyaf Group, Jamiat ul-Ansar and Al-Qa'ida in Iraq* (2009).

- Lashkar-e Jhangvi;
- Palestinian Islamic Jihad.

In respect of the following three organisations, the only connection drawn is that the organisation might engage in acts of violence in a part of the world to which Australians might travel, whether as tourists, sportspeople or for other work purposes:

- Abu Sayyaf Group (kidnap of Australians);
- Jamiat ul-Ansar (Australian cricket tour to Pakistan);
- Kurdistan Workers Party (tourists).

In respect of the following four organisations, the only connection drawn is that the organisation might engage in acts of violence in a part of the world in which Australian soldiers are fighting:

- Asbat al-Ansar;
- Islamic Movement of Uzbekistan;
- Jaish-e-Mohammad;
- Islamic Army of Aden;

In respect of the following two organisations, the only connection drawn is that the organisation has engaged in acts of violence against Australians in a context in which Australian soldiers are fighting:

- Ansar al-Islam;
- Al-Qa'ida in Iraq.

Thus, of the listed organisations, only three have been identified as posing some sort of distinct non-military threat to Australia or Australians:

- Al-Qa'ida (vague threats, soldiers, tourists);
- Jemaah Islamiyah (no specific threats);

- Lashkar-e-Tayyiba.

Even in the case of these organisations, however, the Committee has found no specifically identifiable threat presently to be posed by Al-Qa'ida[24] or Jemaah Islamiyah.[25] The threat said to be posed by Lashkar-e-Tayyiba, on the other hand, concerns individuals allegedly connected to Willie Brigitte,[26] and these matters have now been resolved through the ordinary legal process. Even in respect of these three organisation, then, no explanation has been offered as to how listing will facilitate a proper response to whatever threat they pose.

The evident failure to have regard to these criteria concerning connections to Australia and Australians is particularly significant, given the purpose of the listing power as stated in the Explanatory Memorandum accompanying the legislation which introduced it into the *Criminal Code*:[27]

> This amendment enables the Government to independently identify organisations that are a threat to Australia's national security as terrorist organisations – thereby attracting the full weight of the criminal law …[28]

Contrary to the suggestion of some former members of this Committee,[29] failure to have regard to this legislative purpose does not, per se, go to the legality of any of the listings. But those same former members are correct to assert that it goes very strongly to the question of political legitimacy.

Part of the difficulty in identifying any consistent application of the other factors identified by ASIO may result from the fact that the meaning of some of them is not entirely clear. For example, what is meant by 'engagement in terrorism'? If 'terrorism' in this factor has the meaning of 'terrorist act' as that phrase is defined by the *Criminal Code*, then the factor gives

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[24] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Al-Qa'ida, Jemaah Islamiyah and Al-Qa'ida in the Lands of the Islamic Maghreb* (2008) at 2.25–2.26.

[25] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Al-Qa'ida, Jemaah Islamiyah and Al-Qa'ida in the Lands of the Islamic Maghreb* (2008) at 2.49–2.52.

[26] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of three terrorist organisations* (2007), Appendix A.

[27] *Criminal Code Amendment (Terrorist Organisations) Act 2004*, repealing the previous requirement that only organisations identified by the United Nations could be listed under Division 102.

[28] Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003, p 3.

[29] Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)* (2006), Minority Report at 1.23.

very little guidance beyond simply restating the statutory requirement for proscription. But if ASIO understands 'terrorism' in this context to have some more narrow meaning – for example, engaging in illegitimate attacks upon civilians – then it is incumbent upon ASIO to make this meaning clear, and to explain how it is being applied.

Similarly, what is meant by the 'ideology' of an organisation. Does this refer to the political or religious outlook of its members? Or, given the coupling of ideology with links to other groups, does 'ideology' mean the organisation's conception of itself as a player in the geo-political arena? Until the meaning of this factor is made clear, it is impossible to analyse the way in which it is being applied. If 'ideology' refers to political outlook, then a further question is raised: what sorts of ideology does ASIO regard as illegitimate? Presumably, given that the threat posed by the organisation to Australia is listed by ASIO as a separate factor, ASIO does not limit its consideration of ideology to the question of opposition to the Australian state or the Australian people. Some other standard is being applied. In a democracy, it must always be a matter of concern when a necessarily clandestine security agency is given a significant degree of power in determining which political (or religio-political) outlooks are legitimate, and which are not, and are liable to lead to criminal prosecution. A democratic culture cannot thrive under such conditions.

Without being party to the counsels of ASIO, one cannot know exactly what the standard is by which it judges ideologies as legitimate or otherwise, but one might strongly infer (given the self-professed Islamic identity of all the listed organisations except for the PKK) that ASIO regards a certain sort of Islamic ideology as dangerous. This consistent targeting of Islamic and (almost) only Islamic groups can easily create a perception of discriminatory application of the power to list organisations. This is particularly so when one notes that activity undertaken in Australia by non-Muslims, which satisfies the *Criminal Code* definition of terrorism, is typically not described in that fashion either by the media or the authorities (for example, hate crimes undertaken by white supremacist groups). One purpose of a process of community consultation would be to explain (on the assumption that an explanation is available) why the targeting of particular groups is not in fact discriminatory, and is consistent with the imperatives of criminal law enforcement in Australia.

A final point on the ASIO criteria: to the extent that the factors used by ASIO are clear, they seem to emphasise foreign policy rather than domestic considerations. For example, the

concept of 'posing a threat to Australian interests' is most naturally interpreted in as a foreign-policy concept.[30] Likewise, the proscription of an organisation by the United Nations, the proscription of an organisation by like-minded countries (which is itself a concept belonging to foreign policy), and the engagement of the organisation in a peace process, are all primarily foreign policy matters. Better grounds must be given for criminalising what would otherwise be lawful conduct, however, than that the conduct in question is inconsistent with the government's own foreign policy goals. The criminal law is not an appropriate vehicle for foreign policy symbolism.

2.3 Further evidence of inadequate process

The failure to engage in serious community consultation, despite repeated calls both from this Committee, and from members of affected communities, is one piece of evidence that the government does not take seriously its responsibilities in relation to the listing of organisations under Division 102 of the *Criminal Code*.

A second piece of evidence in favour of the same conclusion is the failure, documented in the preceding sub-section, to apply in any systematic fashion the criteria for listing that have been promulgated by ASIO.

Two further pieces of evidence in favour of the same conclusion have recently become available. The first consists in the following curious remarks made by the Attorney-General's Department in its supplementary submission to this Committee's recent inquiry into the re-listing of six organisations as terrorist organisations:

> The Committee requested copies of the non-public Statements of Reasons prepared by ASIO. For the Committee's information, copies are attached to this letter. In future there will no longer be two different versions of Statements of Reasons for future listings…
>
> ASIO provides the Attorney-General's Department with both a public and non-public version of each Statement of Reasons. In the past the Attorney-General's Department has provided the Committee with a non-public version of the Statement of Reasons. On this occasion there was confusion about the procedure and the Committee was only sent the public version of the Statement of Reasons.

[30] The Committee noted the vagueness of this factor in its *Review of the listing of six terrorist organisations* (2005) at 2.29.

These remarks cast grave doubt over the integrity of both the listing process and the review process that the Committee undertakes. In its report into the listing process under Division 102, the Committee emphasised that:

> The Australian Security Intelligence Organisation (ASIO) is responsible for providing security advice to government and provides advice on the proscription of entities under the Criminal Code…
>
> ASIO's advice is provided in the form of a Statement of Reasons. The assessment is based on publicly available details about an organisation, which are corroborated by classified information…[31]
>
> There has been a clear commitment to ensure that the power to proscribe an organisation is based, to the maximum extent possible, on publicly available information. The Statement of Reasons is a stand alone document and its publication at the time a listing comes into effect ensures public notification of the listing. The Statement of Reasons also enables an entity to know the case against it and to pursue a remedy if it believes that proscription is unlawful…[32]
>
> The Australian model provides strong safeguards against the arbitrary use of the proscription power. For example, there is a clear commitment to base proscription decisions to the maximum extent possible on publicly available information. The Statement of Reasons is a form of public notification and recognises that a listed entity needs to know the case against it… [P]arliamentary review provides an opportunity to have all the relevant material considered.[33]

In these remarks the Committee very plainly states that the publicly available Statement of Reasons (itself corroborated by secret information) is the basis for the Attorney-General's decision, and for the Committee's own review of that decision. The recent remarks from the Attorney-General's Department, however, very strongly imply that there is in fact a different, secret Statement of Reasons which forms the basis of the Attorney-General's decision, but of which those who participate in the Parliamentary review process remain ignorant.

If this implication is in fact true, it makes a mockery of that review process, and makes fools of those (including me) who have participated in it. It also reveals as a mere charade the apparent adherence by the government to standards of openness and legality in the undertaking of a public process of Parliamentary review of listings decisions.

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[31] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 2.10–2.11.

[32] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 2.40.

[33] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 5.27.

The second new piece of evidence that the government does not take its responsibilities seriously in relation to the listing of organisations, and that listing is in the end regarded merely as political posturing, is the failure to promulgate accurate versions of the *Criminal Code Regulations 2002* (Cth) on ComLaw,[34] as required under the *Legislative Instruments Act 2003* (Cth). As it currently stands, the *Criminal Code Regulations* available on ComLaw continue to include sections 4E and 4M, listing the Armed Islamic Group and Egyptian Islamic Jihad respectively. This is despite the fact that (as the Table of Amendments to the Regulations indicates) no new regulation in respect of either organisation has been promulgated since November 1, 2006[35] or March 29, 2007[36] respectively, which regulations have since lapsed by operation of section 102.1(3) of the *Criminal Code* (Cth). Section 22 of the *Legislative Instruments Act* deems the register "unless the contrary is proved, to be a complete and accurate record of that legislative instrument as amended and in force at the date specified in the compilation." Therefore any person who engages in activities with either of these organisations whose listing has lapsed would bear the burden of proving, in the event of investigation, arrest or prosecution, that the regulations in question had in fact lapsed.

Oversight in the promulgation of accurate compilations of the law can perhaps be forgiven when what is at stake is comparatively slight. In this case we are talking, ostensibly at least, about extremely serious criminal matters carrying maximum penalties of up to 25 years. Promulgating versions of the *Criminal Code* containing this sort of error is inexcusable.

The failure of the government to engage seriously in community consultation in respect of the listing of organisations; the failure of the government to adhere to any coherent criteria for listing (other than the apparent foreign-policy goals associated with the so-called "war on terror"); the apparent existence of secret Statements of Reasons on which listing, and the review of listings, is based; and the failure to maintain an accurate public register of the relevant law: all these considerations point to the conclusion that, as far as the values of legality and liberal democracy are concerned, the government is not at all serious about the process of listing organisations. From the point of view of those values the entire process is in disarray. Any appearance of legality seems to be mere charade. All that is discernible is

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[34] <http://www.comlaw.gov.au/>.

[35] *Criminal Code Amendment Regulations 2006 (No. 6)* (Cth).

[36] *Criminal Code Amendment Regulations 2007 (No. 6)* (Cth).

political posturing, and the use of the criminal law as a device for such posturing regardless of the implications this has for the enjoyment, by many Australians, of their civil and political freedoms in a democratic and multicultural polity. Until there is a change in the government's approach to the listing of organisations under Division 102 of the *Criminal Code*, it is likely that those members of the Australian community whose social, cultural and political life is adversely affected by such listings will continue to experience them not as legitimate steps taken in order to keep Australians safe from harm, but as politically motivated and discriminatory. It is for this reason that I believe that the current approach to the listing of "terrorist organisations" is damaging to Australia's democratic political culture.

It might be though that this submission should end at this point. Despite the government's apparent lack of seriousness, however, this Committee has shown a resolute commitment to the process of taking public submissions in relation to listings, of taking evidence from the government and government agencies, and of producing reports that engage in a serious and committee fashion with the issues raised. The Committee deserves support in these undertakings.

2.4 Sound criteria for proscription under the *Criminal Code*

When proscription is taken seriously, what must be noted is that to list an organisation under the *Criminal Code* is first and foremost to criminalise conduct that otherwise would be lawful. It is this impact of proscription that therefore must be given the foremost consideration. As the Committee has noted, it is inevitable that the operation of Australian criminal law will be primarily confined to Australia.[37] Therefore, to give foremost attention to the criminal law aspects of proscription, is to give foremost attention to its domestic impact.

It is obvious that, the greater the number of Australians who are involved with an organisation, or whose friends, associates or family are involved, the greater will be the impact – the real legal impact, of the sort identified above – upon Australian citizens, and Australian families, and Australian communities, of any decision to ban the organisation.

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[37] *Review of the listing of six terrorist organisations* (2005) at 2.28; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.27.

This is therefore a significant factor to be taken into account. By banning the organisation, who is being made a criminal? How will this affect Australians? These are questions to which ASIO and the Attorney-General's Department should be able to provide answers. Judging from the Committee's reports, to date they have not done so.

Furthermore, the greater the number of Australians who are involved with, or who support, an organisation, the more politically controversial becomes the judgement that the organisation poses a threat to Australia. It has become almost trite in the context of discussions of terrorism to cite the examples of the African National Congress or of Fretilin. Nevertheless, these example are powerful reminders that political realities can change: what was condemned as terrorist violence by one government may come to be lauded as liberation by a successor government. If a large number of Australians change their minds about the merit of a foreign organisation's cause, it becomes very difficult to sustain a judgement that it is nevertheless in Australia's interests to proscribe that organisation.

In the context of the listing of an organisation, then, it becomes relevant to ask such questions as how many Australian's support the organisation? How many are opposed to it? Is banning the organisation likely to lead to political or communal tension within Australia? Will some Australian's experience it as an affront to their civic and political liberties? Again, there is no evidence that these questions are being considered in a serious way by the government.

It is with these sorts of questions in mind that I reiterate the following criteria suggested in numerous previous submissions, and noted by this Committee and its predecessor in their reports.[38] At a minimum, any decision taken by the Australian government to ban an organisation under section 102.1 of the *Criminal Code* ought to address:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;

[38] Parliamentary Joint Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations* (2005) at 2.32-2.35; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation* (2005) at 2.7; *Review of the listing of seven terrorist organisations* (2005) at 2.25; Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK)* (2006) at 2.7–2.8.

- the nature of the political violence likely to be engaged in, planned by, assisted or fostered by the organisation in the future;

- the reasons why such political violence, and those who are connected to it via the organisation, ought to be singled out for criminalisation by Australia in ways that go beyond the ordinary criminal law;

- the likely impact, in Australia and on Australians, of the proscription of the organisation, including, but not limited to:

  - an indication of the sorts of training Australians may have been providing to, or receiving from, the organisation;

  - an indication of the amount and purpose of funds that Australians may have been providing to, or receiving from, the organisation;

  - the way in which the concept of 'membership', and particularly 'informal membership', will be applied in the context of the organisation;

  - the extent to which ASIO intends to take advantage of the proscription of an organisation to use its detention and questioning power to gather intelligence.

The first three points are intended to enable the Committee to be satisfied that the proscription of the organisation in question is warranted on the basis of a genuine need to prevent criminal conduct, and is not merely an exercise in political or foreign policy symbolism. It is only if this is made clear in a public fashion that confidence can be maintained across the Australian community that the power of proscription is being exercised in a non-discriminatory manner, and is not being used simply to target political ideas to which the government of the day, or ASIO itself, is opposed. The third point in particular draws attention to the fact that political violence, and acts preparatory to such violence, are already criminal offences in Australia, and in most legal systems world-wide; there is therefore a significant onus of justification on the government to explain why these existing laws are inadequate and why the extraordinary step of proscription is therefore required.

If the Committee is not satisfied in relation to these matters, then it ought to recommend to the Parliament that the listing of the organisation be disallowed.

The various elements of the last point are intended to enable the Committee to be satisfied that the consequences of proscription have been thought through by the government. It is also important that Australians be able to understand clearly what the government understands the consequences of listing to be, so that, where necessary, they can change their behaviour to bring it into compliance with the law. (It is a basic requirement of the rule of law that the law be able to be known by those to whom it applies.)

The point about the meaning of 'membership' and 'informal membership' in the context of a given organisation is particularly important, as the concept of membership is crucial not only for the membership offence (*Criminal Code* section 102.3) but also the association offence (*Criminal Code* section 102.8) – the two offences that seem most likely to have the widest application once an organisation has been listed. Again, if the Committee is not satisfied that the government has had regard to the likely consequences of the listing, or if the Committee is not satisfied that these consequences are consistent with the civil and political rights of Australians, including their rights to the security of themselves and their families, then the Committee ought to recommend disallowance.

There are three important reasons for seeking information from ASIO as to its intentions in relation to the issuing of compulsory questioning and detention warrants consequent upon a listing. First, it is important these extraordinary powers not be allowed to corrupt the culture of ASIO as an organisation which is sympathetic to, and not hostile to, the values of democracy, nor to lead it into the mentality of being a secret police.

Second, it is important that the Australian community be able to retain confidence in ASIO. This requires that ASIO be open about the general nature of its intentions with respect to the exercise of such powers, so that they are not experienced by Australians an attack upon their civil and political liberties.

Third, ASIO plays a significant role in any decision to ban an organisation.[39] ASIO is also an organisation whose scope of operation is increased by any decision to proscribe (in virtue of the enlivenment of its questioning and detention powers by the suspicion of the commission of an offence under Division 102 of the *Criminal Code*). As a result, there is inevitably the possibility of it appearing to be the case that ASIO supports the banning of an organisation not because it believes that involvement with that organisation ought genuinely to be criminalised, but because it believes that it can further its own operations by increasing the scope of its power to gather intelligence through compulsory questioning and/or detention. One way of dispelling this possible adverse perception of ASIO's motives is for it to be clear from the beginning as to the extent to which it intends to take advantage of the banning of an organisation.

The call for such openness on ASIO's part need not be inconsistent with the an acknowledgement that, to some extent, the success of ASIO operations is dependent upon their secrecy. In a democracy, this need for secrecy cannot always be given the highest priority; in a democracy, other values, including those of open political debate, must come first. In any even, this Committee is quite accustomed to the taking of confidential evidence from ASIO. Indeed, part of the Committee's role is to represent the interests of the Australian people in dealing with security and intelligence agencies whose business, of necessity, cannot always be made fully public. Thus, even where full public disclosure by ASIO of its intentions would be self-defeating, there is nothing to preclude the Committee from seeking the relevant information and assurances from ASIO, as part of its role in reviewing any decision to proscribe an organisation.

To relate this point back to the grounds for listing that were argued for above: it is not sufficient that the Attorney-General or ASIO be satisfied that an organisation is connected to political violence, and that the ordinary criminal law of this or some other country is inadequate to respond to that violence. Steps must be taken to ensure that those who will be directly affected by a listing are likewise satisfied of this. Of course, this sort of consultation with the community would be a natural consequence of applying the fourth criterion for listing set out above: for the most natural way for the government to develop an

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[39] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007) at 2.10.

understanding of the impact upon Australians of the listing of an organisation, is to talk to them about it.

3. CONSIDERATION OF THE RE-LISTING OF HIZBALLAH' EXTERNAL SECURITY ORGANISATION

Having discussed the process by which a listing ought to be undertaken, and having identified criteria by which the Committee ought to assess the adequacy of a government decision to list an organisation, and to decide whether or not to recommend disallowance of the listing of an organisation, I will now consider the particular re-listing under review by the Committee.

The Statement of Reasons presented by the government to justify the listing of Hizballah' External Security Organisation raises a number of matters concerning the exercise of the proscription powers under the *Criminal Code*.

First, it is worth noting that Hizballah has also been banned under the *Charter of the United Nations Act 1945* (Cth). This makes it a serious offence to deal with the assets of these organisations, to finance them, or otherwise to make assets available to them. However, none of the material provided by the government canvasses this existing proscription, nor offers any reason for going beyond such proscription by the far more significant step of listing the organisation under the *Criminal Code*. Nor does the government's material explain why existing criminal law provisions are not adequate to the task of investigating and prosecuting political violence.

Second, a great deal of the material in the Statement of Reasons is devoted to foreign policy matters that do not even go to the statutory grounds for listing, let alone adequate grounds of the sort canvassed in the previous section of this submission. Thus, the following elements of the Statement of Reasons have little or no bearing on whether or not Hizballah's External Security Organisation ought to be proscribed:

> Hizballah, including ESO, receives substantial support from Iran, in the form of financial, training, weapons, political and military assistance. Syria is also a significant supporter, particularly in the provision of political and military assistance.
>
> In the 2006 conflict with Israel, Hizballah utilised Iranian-supplied military resources including Unmanned Aerial Vehicles (UAV) and a wide variety of short to long range rockets. As part of

> Hizballah, and given ESO's direct contact with Iran, these or similar resources would be available to ESO…
>
> Hizballah has an international infrastructure including cells; charitable organisations; and business enterprises (both legal and illegal) in the Middle East, Asia, Africa, Europe and North and South America, from which it derives significant financial support. In the Tri-Border area of South America alone it is estimated Hizballah has raised millions of dollars through activities such as drug and arms smuggling and product piracy. ESO is likely to have access to this funding…
>
> Hizballah aims to create a Shia Islamic state in Lebanon and remove all Western and Israeli influences in the region…
>
> Given its close links to Iran and Syria, ESO has the capability to execute its terrorist objectives.

The availability of resources, the capability to engage in acts of political or religious violence, affiliations with Iran and Syria, engagement in non-violent crime (even serious crime such as drug smuggling) and the desire to establish a religious state free of certain sorts of political cultural influences do not indicate that an organisation satisfies the statutory criteria for listing. In particular, even if Hizballah has as its goal the creation of an Islamic state in Lebanon (an apparently controversial claim[40]), this is not relevant to its status as a terrorist organisation. There may be political organisations in Australia who have as their goal the creation of a Christian state in this country, and/or the elimination of all Chinese and Indonesian influence in the South-Western Pacific region; such organisations are not for that reason banned from politics, let alone subject to serious criminal sanction.

The *use* of rockets (regardless of who supplied them) and trading in arms (whether or not lawfully) are both matters that do go to the statutory requirements, but no reason is given as to why Hizballah, of all the hundreds and thousands of organisations in the world engaged in such activity (including the majority of the world's armed forces), should be singled out for listing. Moreover, there is little in the Statement of Reasons that identifies *contemporary* acts of engagement in or support for political violence, of the sort that might lead to reasonable satisfaction that the statutory grounds for listing are made out (since the conflict with Israel in 2006 the only occurrences are identified are certain *statements* welcoming war that were made in 2008 – such statements probably do not make out any of the statutory grounds). The Statement of Reasons exhibits a significant degree of tension in relation to the External Security Organisation's engagement in acts of political violence. It states that:

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[40] Parliamentary Joint Committee on Intelligence and Security, *Review of the relisting of Hizballah's External Security Organisation (ESO)* (2007) at 2.20.

> Due to the secretive nature of ESO, it is difficult to gather information on its role and activities. However, ESO still exists as a discrete organisation under the umbrella of Hizballah but with a separate leadership and direct links to Iran. ESO has a history of terrorist activity and as terrorism is such a fundamental part of its *raison d'être*, there is nothing to suggest its terrorist purposes have changed

These remarks suggest hypothesis and speculation, rather than reasonable grounds for being satisfied that the organisation continues to have terrorist purposes. The Statement of Reasons also states, however, that:

> ESO continues to operate on a global basis gathering intelligence to be used in terrorist attack planning, collecting money by both legal and illegal methods, recruiting and training terrorists and acquiring weapons. There is reporting to indicate ESO is planning attacks against Israeli or Jewish targets outside Israel to avenge the death of Mughniyah.

Such activity may well constitute planning or preparing for terrorist acts. But the contrast between this firm assertion, and the other passage expressing much less confidence, tends to undermine the notion that there is sufficient material to permit satisfaction on reasonable grounds that the statutory criteria for listing are made out. These doubts are reinforced by the suggestion in the Committee's previous report into External Security Organisation's re-listing that the Organisation may in fact no longer exist at all as a distinct wing of Hizballah.[41]

That Hizballah is committed to armed resistance to Israel does *suggest* that it may be directly or indirectly fostering terrorist acts (that is to say, various sorts of politically motivated violence). It does not on its own seem to justify proscription, however. Firstly, on its own it probably does not create *reasonable grounds* for being satisfied that the statutory criteria are made out. But even if those grounds are made out, the mere commitment of an organisation to armed resistance to a foreign state does not on its own justify a listing of that organisation under Division 102. It is not, in general, an offence under Australian law to seek to overthrow another government;[42] furthermore, according to the Statement of Reasons, the aim of the organisation is the 'liberation' of the Palestinian Territories and of Jerusalem (the eastern half of which is also part of the Occupied Palestinian Territories), rather than the overthrow of Israel as such.

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[41] Parliamentary Joint Committee on Intelligence and Security, *Review of the relisting of Hizballah's External Security Organisation (ESO)* (2007) at 2.13–2.14.

[42] The *Crimes (Foreign Incursions and Recruitment) Act 1978* only applies to Australians, or those who have been present in Australia: s 6(2).

The use of scare quotes around 'liberate' and 'occupation' in the Statement of Reasons is also very strange. Is ASIO suggesting that there is no Israeli occupation of the West Bank, and (highly arguably at least) Gaza also? Although it is the official view of the government of Israel that the West Bank and Gaza are *disputed*, rather than *occupied*, territories,[43] the government of Israel does not appear to deny that those territories have been subject to Israeli occupation.[44] The goal of ending Israeli rule of those territories is not an obviously illegitimate one – it is the goal of anyone who supports a two-state solution. That this goal should be achieved by military means is of course a further matter, but a commitment to the use of military means to resolve international conflict does not seem to be a sufficient criteria for the listing of an organisation as a terrorist one. For example, the governments of the United States and the United Kingdom have not been listed as terrorist organisations, although they are obviously committed to the resolution of certain international conflicts (for example, in Afghanistan) by the use of military means. (The government of the United States has also been implicated in acts of kidnapping and torture, but it has not been listed, and nor has the particular agency that carried out those acts, namely, the Central Intelligence Agency.)

The re-listing of Hizballah's External Security Organisation, in a context where two other Islamic organisations engaged in hostilities with Israel are also listed, raises the question, Why not other organisations, including secular organisations, that are also engaged in such hostilities? (In the Statement of Reasons there is an apparently circular appeal to its cooperation between these three groups. Thus, it is suggested that a reason for listing Hizballah's External Security Organisation is that it co-operates with HAMAS' Izz al-Din al-Qassam Brigades and Palestinian Islamic Jihad. Until a strong case is made as to why any one of these groups should be listed, however, it does not seem sufficient to support the listing of any one of them simply that they may form some sort of loose network - Hamas is, after all, the democratically elected government of the Palestinian territories, and enjoys largely uncontested control of Gaza.) The Statement of Reasons fails to make clear the relationship between the matters it discusses – particular political goals, combined with particular means for realising them, such as the use of military tactics, kidnapping and attacks

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[43] As per the discussion at <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2003/2/DISPUTED%20TERRITORIES-%20Forgotten%20Facts%20About%20the%20We> accessed June 11, 2009.

upon civilians, and combined also with particular religious beliefs – and the criteria for the listing of an organisation. The listing of Islamic organisations, without further explanation of why they and not others have been chosen, only contributes to the appearance that the government is targeting these groups because of their Islamic identity, rather than because of the particular activities that they are engaged in. In the absence of more detailed information being provided about why these particular groups have been listed, and how their listing relates to the needs, rights and interests of Australians, an impression is created that the purpose of these listings is primarily a political one, of supporting the foreign policy goal of targeting militant Islamic organisations as part of the so-called 'war on terrorism', rather than the prevention of political violence either in Australia or overseas (this perception is only strengthened by the failure of the statement of reasons to identify any links between the External Security Organisation and Australia or Australian interests). The merits of such a foreign policy goal obviously fall outside the purview of the Committee's inquiry, and therefore of this submission. But it is within the Committee's purview to insist, for the reasons given above, that such foreign policy goals do not provide an adequate basis for the banning of organisations.

Besides its apparent betrayal of an underlying foreign policy rationale for the re-listing, the reference in the Statement of Reasons to Hizballah's desire to remove 'Western' influences from its region is objectionable for a further reason. To posit a fundamental coincidence of 'Western' interests (which presumably are understood to include Australia's interests) in opposition to some other interests (Islamic? Eastern in general?) is to fall into the language of ideological polemics or lazy journalism; it is not the terminology of serious analysis of international affairs and foreign relations, let alone the way in which to explain the rationale for listing an organisation as terrorist under Australian law. Given the multi-cultural character of the Australian polity, and the diverse cultural and political sympathies of Australians, this sort of language is of little use in stating a widely-acceptable case for the listing of an organisation. It is likely to be experienced as alienating – even racist – by precisely those whom it should be trying to address.

What is missing from the case against Hizballah's ESO is an explanation of why, out of all the organisations in the world that have engaged in or attempted violent attacks against

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[44] See the argument for the international legality of Israeli occupation of the West Bank and Gaza, ibid.

civilians in foreign countries, it has been singled out by the Australian authorities for proscription (it is obvious that the perpetrators of Hizballah's overseas crimes are not going to be prosecuted under Australian law). Given the legal consequences that flow from proscription, too many important questions are left unanswered; in particular, nothing is said about the likely impact of such proscription upon Australians, their families and their communities, and no indication has been given of ASIO's intention to use the proscription as a basis for the exercise of its powers. Given that most of the mentioned activities of these organisations already constitute serious criminal offences under the law of Australia or the relevant foreign jurisdictions, it seems reasonable to conclude that enlivening ASIO's powers of detention and questioning is one of the principal aims of these listings. If this is so then it should be acknowledged, and the case made as to why ordinary methods of criminal investigation and prosecution are inadequate in relation to the crimes of these organisations. An additional complexity is added to these matters by the fact that what is being proscribed is one wing of a multi-faceted political, military and social organisation which continues to play a central role in the life of Lebanese polity, a polity to which many Australians have deep and ongoing connections. Given the extreme breadth of the concept of membership under the *Criminal Code*, the onus is on the government to explain how it understands membership of this particular element of Hizballah to be constituted, and in particular what it takes 'informal membership' to consist in.

This general lack of detailed information supporting the case for listing is compounded by the fact that it is difficult to see the majority of the points made in the Statement of Reasons as anything but formulaic. The government may well have reasons for choosing to proscribe this organisation and not others; but those reasons are not being stated in the publicly presented material. As sufficient grounds for this listing have not been made out – there are serious doubts even that the statutory criteria are satisfied – the Committee should therefore recommend disallowance. Indeed, for the Committee to recommend disallowance on the grounds put forward in this submission would be to make a strong statement in support of the values of legality and democracy in Australia.