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Procedural concerns

Consultation with the States and Territories

2.1 Subclause 3.4(3) of the *Inter–Governmental Agreement on Counter-terrorism Laws* states that the Commonwealth will provide the States and Territories with the 'text of the proposed regulation and will use its best endeavours to give the other parties reasonable time to consider and to comment on the proposed regulation'.

2.2 The Committee is pleased that, for five of the organisations, the States and Territories were provided with approximately three weeks' notice to consider the listings.[1] However, the States and Territories were provided with less than one week to consider the re-listing of Ansar al-Islam. The Committee is particularly concerned about the amount of notice provided to the States and Territories for the re-listing of the Islamic Army of Aden. The Attorney-General's Department has advised that:

> On 31 March 2005 the Attorney-General wrote to the Attorneys-General of the States and Territories advising of the decision to re-list the organisation. These letters were sent by facsimile on 6 April 2005.

2.3 Given that the regulation was made on 7 April 2005, it would appear that the States and Territories were given just one days' notice of this listing. At the hearing, the Attorney-General's Department stated that:

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1 The States and Territories were advised by letters dated 17 March 2005 of the proposed re-listing of Asbat al-Ansar, Egyptian Islamic Jihad, Islamic Movement of Uzbekistan, Jaish-e-Mohammad and Lashkar-e Jhangvi. The regulations were made on 7 April 2005.

> You will see with this listing that we have responded to some of your concerns about giving the States a little more notice…I think that we might have struck a period that is a little more satisfactory than it was before. We will endeavour to continue with that. On occasion there will be situations where, through problems outside our control, we might not be able to perform as well, but I can assure you that we will attempt to ensure that that continues to be addressed.[2]

2.4 The Committee appreciates that there may be difficulties in the process of listing organisations under the Criminal Code. However, it is disappointing that the States and Territories were provided with insufficient time to consider and comment on the listing of Ansar al-Islam and the Islamic Army of Aden. The Committee expects that future listings will give full effect to the *Inter–Governmental Agreement on Counter-terrorism Laws* and provide the States and Territories with a reasonable time to consider the listing.

2.5 Consultation on these re-listings occurred between the Attorneys-General rather than the Prime Minister and Premiers and Chief Ministers.

2.6 The Attorney-General's Department has advised the Committee that the Premiers of NSW and Western Australia requested that in accordance with the *Inter–Governmental Agreement on Counter-terrorism Laws*, future listings should be raised directly with the Premier. The Prime Minister responded by letter dated 4 April 2005 advising that the process adopted was consistent with the *Inter–Governmental Agreement on Counter-terrorism Laws* and that 'it is more practical administratively in the case of re-listings to continue the current practice whereby the Commonwealth Attorney-General liaises with his counterparts in the States and Territories.'

2.7 The *Inter–Governmental Agreement on Counter-terrorism Laws* states:

> Approval for regulations specifying terrorist organisations must be sought, and responses from other parties must be provided, through the Prime Minister and Premiers and Chief Ministers.[3]

2.8 It is not clear how consultation between the Attorneys-General is consistent with the agreement. At the hearing on 2 May 2005, officers from the Attorney-General's Department advised the Committee:

> The States and the Commonwealth have a different view about whether it has to be done at head of government level when you

2 Transcript, private hearing 2 May 2005, p. 1.

3 Division 3, subclause 3.4(6).

> are just talking about a re-listing….The federal government takes the view that the agreement is really only talking about fresh listings and the States are suggesting a wider interpretation. We are investigating that. Practically, we think there is some advantage in doing it at the Attorney-General level for re-listings. At the end of the day it is about consultation and probably the more important issue is making sure we consult them expeditiously.[4]

2.9 The Committee is not sure that it accepts the distinction made by the Attorney-General's Department between procedures for listings and re-listings. The Committee expects to be advised of the outcome from discussions on this issue with the States and Territories.

Consultation with DFAT

2.10 The Attorney-General's Department has advised that the Department consulted with DFAT on the listing of each organisation. DFAT provided responses by emails dated 9, 14, and 23 March 2005.

2.11 DFAT does not appear to have provided substantive input on the re-listings. At the hearing, officers from DFAT advised that they took the following steps to evaluate the organisations:

> In this case we went to the relevant geographic area in the department and sought their view. Independently, we also consulted out own records and our own information.[5]

2.12 In response to questions on notice regarding the amount of time spent, DFAT advised the Committee that 'the combined amount of time so spent by officers of the various areas of DFAT involved would not have exceeded a few person-hours per organisation.'[6]

2.13 The Committee asked whether an assessment had been conducted of the foreign policy implications of the re-listings and officers from DFAT advised:

> On the foreign policy implications, in each of these cases there is no negative foreign policy implication in listing them. We have looked at that, and in each case we have assessed that the host government of these organisations would not be offended by our listing. If anything, they are more threatened than we are by these

4 Transcript, private hearing 2 May 2005, p. 7.

5 Transcript, private hearing 2 May 2005, p. 11.

6 DFAT submission, No. 11, p.1.

> organisations, and our assessment is that it is foreign policy neutral to list them.[7]

2.14 As noted in the Committee's previous report, *Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network)*,[8] the Committee expects DFAT to provide more detailed advice to the Attorney-General's Department and to the Committee in future listings under the Criminal Code. In particular, the Committee has sought from the Department of Foreign Affairs and Trade information about the strategic circumstances in which the potentially proscribed organisations operate. In view of the fact that one of the criteria which ASIO uses in deciding to list an organisation is whether peace processes are in place, it would be useful to the Committee for DFAT to address these matters. For example, what are the circumstances which led to the conflict or terrorism in which the organisation is involved; to what extent might the violence be being directed towards localised struggles or form part of international terrorism; and what might be the impact of a listing, if any, on efforts to resolve a conflict.

Community consultation

2.15 In its earlier report, *Review of the listing of six terrorist organisations*, the Committee recommended that:

> a comprehensive information program, that takes account of relevant community groups, be conducted in relation to any listing of an organisation as a terrorist organisation.[9]

2.16 The letter from the Attorney-General's Department does not state whether any community consultation on the listings was conducted. At the hearing, the Attorney-General's Department advised that they are developing a response to the Committee's recommendation on community consultation.[10]

2.17 The Committee looks forward to the implementation of this recommendation for future listings under the Criminal Code.

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7 Transcript, private hearing 2 May 2005, p. 13.

8 Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of Tanzim Qa'idat al-Jihad fi Bilad al-Rafidayn (the al-Zarqawi network)*, May 2005, p. 6.

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

10 Transcript, private hearing 2 May 2005, p. 5.

The listing provisions

2.18 The Committee will review the operation, effectiveness and implications of the listing provisions in section 102.1 of the Criminal Code in 2007.[11] However, both of the submissions from the public raised general concerns about the listing provisions which the Committee will note at this stage.

2.19 Mr Emerton again raised with the Committee concerns about the breadth of the definition of a terrorist act in section 100.1 of the Criminal Code. The sentences for offences under the Act are very heavy, comparable to those for manslaughter, rape or war crimes and the evidential burden is placed on the accused to establish his innocent state of mind. He also noted that only a tiny fraction of organisations which satisfy this definition are selected for proscription. Submissions from both Mr Patrick Emerton and the Federation of Community Legal Services (Vic) are concerned that the criteria put forward by ASIO for listing emphasise foreign policy rather than domestic considerations. These submissions both suggest that the banning of selected organisations may be simply an attempt 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[12].

2.20 Another key concern of both submissions is that the listing power itself moves away from one of the fundamental principles of criminal law which assigns criminal responsibility to individuals 'based on their actions and intentions in causing harm to the community'.[13]

2.21 The submissions both argue that the banning of certain organisations is not serving Australian democratic principles because it places a:

> greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security in light of the threat of ideological and political violence[14].

2.22 Australia already has the power to prosecute any criminal activity of any member of a terrorist organisation. However, once an organisation has

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11 As required under subsection 102.1A(2) of the Criminal Code.

12 Submission No 8, Mr Patrick Emerton, p.5.

13 Submission No 10, Federation of Community Legal Centres (Vic) Inc, p. 3.

14 Submission No 10, Federation of Community Legal Centres (Vic) Inc., p. 4.

been banned, virtually any sort of involvement with the organisation, by anyone, anywhere in the world, becomes a serious criminal offence[15]

2.23 Concern was also expressed that the exercise of the listing power is inconsistent with Australia's international obligations in relation to freedom of association under article 22 of the International Covenant on Civil and Political Rights.

2.24 The apparent increase in ASIO's powers was also raised as a matter of concern in both submissions. It was pointed out that there is presently no publicly available means of testing the reliability of the supporting information obtained and relied on by ASIO and it was suggested that, as ASIO's powers are increased with listing of organisations, ASIO may develop a vested interest in recommending listing:

> It is important that 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.[16].

2.25 Mr Emerton believed the Committee should test the proposed listings against criteria which establish whether there is a genuine need to prevent criminal conduct that is not already encompassed by the existing criminal law.[17] All the proscribed organisations are also listed under the Charter of

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15 *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

16 Submission No 8, Mr P Emerton, p.7.

17 The criteria, outlined in the Committee's last report are as follows:

- the nature of the political violence engaged in, planned by, assisted or fostered by the organisation;
- 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 UN Act, and he noted that the material provided by the Government makes no case for going beyond this existing proscription to one under the Criminal Code. It is his view that if the Committee is not satisfied that these criteria are met and that the consequences are consistent with the civil and political rights of Australians, then the Committee ought to recommend disallowance.

2.26 The Committee appreciates the public submissions made on these listings and the suggested criteria have been very useful in the Committee's consideration of the listings to date.

⇒ 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.