Submission

THIS SUBMISSION WAS PREPARED BY THE FEDERATION OF COMMUNITY LEGAL CENTRES (VIC) INC, IN CONSULTATION WITH MEMBER CENTRES

May 2009

Submission to the Parliamentary Joint Committee on Intelligence and Security

Review of the re-listing of six organisations:

- **Ansar al-Islam**
- **Asbat al-Ansar**
- **Islamic Army of Aden**
- **Islamic Movement of Uzbekistan**
- **Jaish-e-Mohammed**
- **Lashkar-e Jhangvi**

as terrorist organisations under the Criminal Code Act 1995

Suite 11, Level 1
54 Victoria Street
Carlton South
Victoria 3053

Tel: 03-9652 1500
Fax: 03-9654 5204
administration@fclc.org.au
www.communitylaw.org.au

Federation of Community Legal Centres (Vic) Incorporated
Registration A0013713H
ABN 30 036 539 902

This submission was prepared by Marika Dias of the Anti-Terrorism Laws Working Group on behalf of the Federation of Community Legal Centres (Vic) Inc

Inquiries to:

Sarah Nicholson
Policy Officer
Federation of Community Legal Centres (Vic) Inc
03 9652 1511
Sarah_nicholson@clc.net.au

Contents

About the Federation of Community Legal Centres 2

1. General Concerns Regarding the Listing of Organisations 4

2. Lack of Community Consultation 5

3. The Statutory Criteria for Listing 6

4. The Non-Statutory Criteria for Listing 9

About the Federation of Community Legal Centres (Vic) Inc

The Federation of Community Legal Centres (Vic) Inc ('the Federation') is the peak body for fifty two community legal centres across Victoria. The Federation leads and supports community legal centres to pursue social equity and to challenge injustice.

The Federation:

- provides information and referrals to people seeking legal assistance;
- initiates and resources law reform to develop a fairer legal system that better responds to the needs of the disadvantaged;
- works to build a stronger and more effective community legal sector;
- provides services and support to community legal centres; and
- represents community legal centres with stakeholders.

The Federation assists its diverse membership to collaborate for justice. Workers and volunteers throughout Victoria come together through working groups and other networks to exchange ideas and develop strategies to improve the effectiveness of their work.

About Community Legal Centres

Community legal centres are independent community organisations which provide free legal services to the public. Community legal centres provide free legal advice, information and representation to more than 100,000 Victorians each year.

Generalist community legal centres provide services on a range of legal issues to people in their local geographic area. There are generalist community legal centres in metropolitan Melbourne and in rural and regional Victoria.

Specialist community legal centres focus on groups of people with special needs or particular areas of law (eg mental health, disability, consumer law, environment etc).

Community legal centres receive funds and resources from a variety of sources including state, federal and local government, philanthropic foundations, pro bono contributions and donations. Centres also harness the energy and expertise of hundreds of volunteers across Victoria.

Community legal centres provide effective and creative solutions to legal problems based on their experience within their community. It is our community relationship that distinguishes us from other legal providers and enables us to respond effectively to the needs of our communities as they arise and change.

Community legal centres integrate assistance for individual clients with community legal education, community development and law reform projects that are based on client need and that are preventative in outcome.

Community legal centres are committed to collaboration with government, legal aid, the private legal profession and community partners to ensure the best outcomes for our clients and the justice system in Australia.

About the Anti-Terrorism Laws Working Group

The Anti-Terrorism Laws Working Group is one of a number of issue-specific working groups within the Federation comprising workers from member centres. This Working Group supports CLC's to provide targeted community legal education programs for communities affected by the State and Commonwealth counter-terrorism laws and supports CLC lawyers to provide up-to-date legal advice to clients affected by the State and Commonwealth counter-terrorism laws. The Working Group also works to monitor the impact of State and Commonwealth counter-terrorism laws on affected communities and individuals.

1. General Concerns Regarding the Listing of Organisations

The Federation has repeatedly expressed its concerns regarding the listing provisions contained in Division 102 of Schedule 1 of the Commonwealth *Criminal Code Act 1995* ('the Criminal Code') ('the listing provisions') in previous submissions to the Parliamentary Joint Committee on Intelligence and Security ('the Committee'). In general, the Federation takes that view that the listing provisions are fundamentally inconsistent with the aspirations for a democratic society, fundamental human rights and that they compromise fundamental principles of the criminal law. The automatic criminalisation of political affiliations, associations and convictions by executive discretion, in the absence of direct harm to the physical safety of Australian citizens, is dangerous and draconian. We continue to advocate for repeal of these provisions in their entirety.

More specifically, our concerns regarding the listing provisions are as follows:

1.1 The Listing of Organisations contravenes fundamental principles

The practice of listing organisations undermines fundamental principles of our criminal law system and fundamental human rights.

The practice of listing organisations creates offences in relation to an organisation regardless of the specific activities of that organisation in Australia at a given point in time. Once listed as a terrorist organisation, the consequences of being a listed organisation continue regardless of the activities an organisation does or does not undertake. This effectively functions as a black list', giving rise to two major concerns. First, organisations which use force may be blacklisted even where use of force is in furtherance of self determination and recognised under international law. Second, organisations and individuals which do not use force and do not engage in any serious criminal activity are blacklisted merely because they are associated (even tenuously) with groups that do use force, whether or not the use of force by those other groups is recognised under international law as legitimate.

In our view, listing is not an appropriate executive practice in a democratic society because it is association that is criminalised rather than an actual criminal activity. The practice of listing organisations removes the nexus between criminal prosecution and actual criminal activity. For example, a person who provides training to a listed organisation will have committed an offence, regardless of whether that organisation has been involved in some sort of criminal activity under Australian law and regardless of whether the training provided relates to any criminal activity. In this regard the listing power moves away from a fundamental principle of the criminal law of assigning criminal responsibility to individuals based solely on their actions and intentions in causing harm to the community. Instead, once an organisation has been listed, an associated individual may attract criminal liability based solely upon the activities of that organisation prior to the listing.

We are also concerned that the listing provisions are inconsistent with Australia's international obligations under the *International Covenant on Civil and Political Rights* ('ICCPR'),[1] most notably those obligations relating to freedom of association (Article 22). We suggest that the listing power places a greater restriction on the right to freedom of association than is necessary in a democratic society to maintain national security, particularly in light of the current threat level of ideological and political violence, the terrorism alert level having remained at medium for some years now.[2]

[1] Adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entered into force 23 March 1976, in accordance with Article 49.
[2] Article 22(2), *International Covenant on Civil and Political Rights*.

1.2 The Listing Provisions do not enhance Australia's counter-terrorism response

The Federation also submits that the practice of listing organisations does not assist to pre-emptively combat ideologically motivated violence that may cause harm in Australia or elsewhere. Firstly it would seem unlikely that listing an organisation would actually have a deterrent effect where serious violence is concerned and given the inherently extra-legal nature of the activity. Second, it is our view that existing criminal law offers sufficient protection against ideologically motivated violence. If listed organisations are responsible for the kinds of ideologically motivated violence alleged, then the offences reasonably required to protect the public from such actions are already available to law enforcement authorities, in the following ways:

1. Through 'ordinary' criminal law. Murder, kidnapping, intentionally causing serious injury and robbery *inter alia* are already serious offences. Division 72 of the *Criminal Code Act 1995* also provides for offences relating to use of explosive devices. Deliberately preparing or assisting in any of these acts would fall under inchoate offences such as conspiracy or attempt to commit such acts.
2. Through the terrorism offences set out in Division 101 of the *Criminal Code Act 1995*, which also include a number of offences designed to capture conduct preparatory to terrorism.
3. If the organisation is not listed, under the terrorist organisation offences (provided that the prosecution is able to show that an organisation meets the definition of 'terrorist organisation' under Division 102.1 of the *Criminal Code Act 1995*).

It is, therefore, difficult to see how listing an organisation would assist matters other than in cases where the link between the accused or the relevant organisation and the 'terrorist act' could not be established to the satisfaction of a court. In such cases we submit that the imposition of criminal liability is not justified.

We also note that there is no evidence to suggest the practice of listing organisations was necessitated by an inability to prosecute those involved with these organisations in Australia, as would be evidenced by failed prosecutions.

2. Lack of Community Consultation

On 10 March 2009 the Attorney-General notified the Committee that it had decided to re-list Ansar al-Islam, Asbat al-Ansar, Islamic Army of Aden, Islamic Movement of Uzbekistan, Jaish-e-Mohammad and Lashkar-e Jhangvi ('the six organisations') as terrorist organisations.

The Federation is concerned that, as has been the case with all previous listings and re-listings, the government has failed to engage in any process of community consultation in respect of the re-listing of the six organisations. Furthermore, there has been no attempt to provide the community with information regarding the re-listing prior to the decision to re-list. Setting aside our general objections to the listing provisions, in our view this represents a fundamental procedural flaw in the listing regime.

In respect of the listing of terrorist organisations, the Committee has repeatedly emphasised the importance of community consultation. The Committee has previously 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 organization.*[3]

In fact, in its previous review of the relisting of the same organisations whose listing the Committee is currently reviewing (except for Egyptian Islamic Jihad), the Committee again expressed the view that 'it would be most beneficial if a community information program occurred prior to the listing of an organisation under the Criminal Code'.[4]

Furthermore, in its 'Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code', the Committee acknowledged that the banning of certain political associations is bound to be controversial in a liberal democracy[5] and it expressed disappointment in the Government's limited efforts to provide community information to date.[6] In that Inquiry the Committee ultimately recommended that 'the Attorney-General's Department develop a communication strategy that is responsive to the specific information needs of ethnic and religious communities'.[7]

We are concerned that, despite all of these remarks and recommendations, the Government has not undertaken any specific community consultation or community information program in respect of the re-listing of the six organisations. Given the inherently undemocratic nature of the listing provisions it is imperative that communities be notified in advance when this power is to be exercised, particularly communities with links to the organisations that are being listed/re-listed. Community consultation should seek to ascertain the views and effect of listing upon particular affected communities so that this can be taken into account in decision-making.

Community consultation and information can potentially play a role of countering (to some degree) the extraordinary exercise of executive power facilitated by the listing provisions. Without consistent practices of informing and consulting communities and considering community views, the listing regime arguably amounts to an unfettered exercise of executive discretion. In our view, the Committee is open to finding that listings or relistings made in these circumstances have not been made with due process.

3. The Statutory Criteria for Listing

In our previous submissions to the Committee, the Federation has repeatedly expressed concerns regarding the statutory criteria for listing.

3.1 Breadth of the Statutory Criteria

The determinative criteria for listing as outlined in the listing provisions are whether the Attorney-General is satisfied on reasonable grounds that the organisation:

- is directly or indirectly engaged in, preparing, planning, assisting in or fostering the dosing 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).

---

[3] Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, March 2005

[4] Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations*, June 2007, paragraph 1.23

[5] Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, September 2007, paragraph 3.16

[6] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, ibid, paragraph 3.24

[7] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, ibid, paragraph 3.25

The extremely general nature of these criteria has been widely criticised. Firstly, they hinge on the definition of 'terrorist act' which itself covers an expansive array of acts and threats of acts. Furthermore, the scope of the criteria is extra-territorial and there is no requirement that the terrorist act in question be directed to a non-military target. The definition may therefore include acts or threats of action anywhere in the world, regardless of whether they are directed towards a brutal regime in support of self-determination or are the acts of a national army during a period of armed warfare.

The fact that an organization may be listed for simply 'advocating' the doing of a terrorist act is also concerning, particularly given the breadth of the definition of 'terrorist act'. In this context 'advocates' may include directly or indirectly counselling or urging a terrorist act or directly praising the doing of a terrorist act where this *might* have the effect of leading a person to engage in a terrorist act.[8] In our view, this broad definition exposes an inordinately large number of organisations to proscription. Furthermore, it removes a nexus between the organisation to be listed and any actual terrorist activity. As a 'terrorist act' may itself be constituted by a mere threat, an organisation with simply advocates the making of such a threat may be listed. In this way, organisations with very tenuous links to actual terrorist activities may be proscribed.

The Committee itself has commented on the breadth of the statutory criteria in prior reports.[9] In its 'Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations' in June 2007, the Committee commented that:

> *The definition does not explain why certain organisations who engage in, prepare, plan, assist in or foster the doing of a terrorist act have not been proscribed under the Criminal Code whereas others have.[10]*

This issue has also been highlighted in Nigel Brew's research note on 'The Politics of Proscription in Australia'.[11]

The breadth of the statutory criteria is such that many organisations worldwide could be listed by the Australian Government. This includes a significant proportion of the United Nations 1267 Committee's Consolidated List of terrorist organisations as well as many organisations on the Department of Foreign Affairs and Trade's Consolidated List, which is maintained pursuant to Resolution 1373 or the UN Security Council. Given that only 19 organisations have been listed to date, the application of the listing provisions is clearly a matter of executive discretion, which we understand to be exercised largely on the basis of ASIO's advice. As Patrick Emerton argued in his submission to the Committee's 'Inquiry into the proscription of "terrorist organisations" under the Australian Criminal Code', ASIO's advice to government does seem to arise out of particular ideological/political perspectives regarding overseas conflicts and the acts of overseas organisations.[12] It is never stated, however, precisely what these perspectives are and therefore the factors triggering listing remain, in many ways, a mystery to the public.

In our submission, the degree of discretion afforded to the executive by the listing provisions is grossly excessive. The statutory criteria are so broad that the listing power may be exercised in a purely politically-motivated or discriminatory manner. The fact that 18 of the 19 organisations listed to date are Muslim organisations would suggest that this power is being exercised in a discriminatory manner and

---

[8] Paragraph 9, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*

[9] As cited in *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations*, ibid, paragraph 2.2

[10] Ibid, paragraph 2.2

[11] Nigel Brew, *The Politics of Proscription in Australia*, Parliamentary Library Research Note No 63/2003-2004 (2004)

[12] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code,* ibid, paragraph 4.17

many have perceived it as such.[13] The Government has taken pains to stress that the listing provisions are not applied in a discriminatory manner and the Committee has itself has stated that 'it does not accept that the preponderance of militant Islamic groups on the current list is a form of discrimination.[14] In its Submission to the Committee's 'Inquiry into the proscription of "terrorist organisations" under the Australian Criminal Code' the Attorney-General's Department acknowledged that the threat of terrorism 'also comes from a range of non-Islamic groups which, espousing varying ideologies, have all undertaken threat [sic] or acts of violence or unlawful harm that are intended or likely to achieve a political objective.'[15] If this is indeed the case, it is reasonable to expect that more than 1 out of the 19 listed organisations would be non-Islamic. We therefore maintain our concern that the power to list organisations is being exercised in a discriminatory manner.

As the primary mechanism of review of this executive discretion, we encourage the Committee to ensure that the statutory criteria are applied appropriately and consistently with human rights principles including non-discrimination.

3.2 Failure to Make Out Statutory Criteria

In spite of their remarkable breadth, the listing provisions do, however, require that the Attorney-General must be satisfied that at least one of the above criteria is made out at the time of listing or re-listing. In his letter to this Committee on 10 March 2009, the Attorney-General stated that the re-listings were all based on a finding that the six organisations are 'directly or indirectly engaged in, preparing, planning, assisting on or fostering the doing of a terrorist act'.[16] That is, the Attorney-General has not relied on the 'advocacy' criterion. In our submission, the Statements of Reasons in respect of the six organisations, even if accepted as entirely true, do not all provide grounds which support the Attorney-General's finding. In particular:

1. In the case of Asbat al-Ansar (AAA) the most recent engagement in terrorist activities alleged in the Statement of Reasons occurred in mid-2007, almost 2 years ago. There is reference to charges brought in January 2008 against a person 'believed to be associated with AAA' but even those charges pertain to activity that allegedly occurred in 2002 and 2003. The Statement of Reasons refers to an attack on Lebanese armed forces in June 2008 by Jund al-Sham but it indicates that AAA has distanced itself from that kind of activity and there is no suggestion that AAA was involved in that attack in any way. There is, therefore, nothing in the Statement of Reasons to suggest engagement in, preparation for, planning of, assisting in or fostering of a terrorist act on the part of AAA at the present time.
2. In the case of Islamic Army of Aden (IAA) the most recent terrorist activity alleged in the Statement of Reasons occurred in March/April 2006. Furthermore, the activity which allegedly occurred at that time is simply that IAA members were arrested on suspicion of *making plans* to travel to Iraq to fight foreign forces. There is no indication in the Statement of Reasons that these charges were made out or even whether they proceeded to trial. Presumably some 3 years later, this information should be available to ASIO. Furthermore, apart from these arrests, the most recent IAA engagement in terrorist activity alleged in the Statement of Reasons dates back to October 2003.

In our view, therefore, the Committee recommendations regarding the re-listing of AAA and IAA should reflect the fact that the statutory criteria for listing have not been made out on the information provided.

---

[13] See for example, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, ibid, paragraph 3.3

[14] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, ibid, paragraph 3.17

[15] *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*, ibid, paragraph 4.18

[16] The Hon Robert McClelland MP, Attorney-General, Submission No 1, page 1

4. The Non-Statutory Criteria for Listing

It is clear that the Attorney-General relies heavily on the advice of ASIO in determining whether to list or re-list and organisation. In a hearing relating to the *Review of the listing of six terrorist organisations* on 1 February 2005, ASIO informed the Committee about its evaluation process when recommending organisations for listing.[17] ASIO provided the following criteria in a confidential exhibit:

- engagement in terrorism;
- ideology and links to other terrorist groups or networks;
- links to Australia;
- threats to Australian interests;
- proscription by the UN or like minded countries; and
- engagement in peace/mediation processes.

Although these criteria are not statutorily enshrined, the Committee has acknowledged that these criteria have formed the basis for testing the listings that it has reviewed.[18]

4.1 The Non-Statutory Criteria are Applied Inconsistently

In previous submissions to the Committee, we have argued that the application of these criteria has been unclear. That is, it is not clear that the criteria have been applied in any systematic fashion and, rather, it seems that they have been applied inconsistently.

The Committee itself has on numerous occasions highlighted inconsistencies in the application of the criteria, in particular noting that the criteria pertaining to links to Australia and threats to Australia's interests have been given little consideration in many listings.[19] For example, despite recommending that the listing remain, the Committee indicated that the case for the listing of Palestinian Islamic Jihad had not been entirely clear. The Committee stated that:

> *The immediate and threatening aspects of a particular entity, its transnational nature and the perceived threats to Australia or involvement of Australians should be given particular weight when considering a listing. This does not appear to have occurred in this listing. Nevertheless, the Committee does not object to this listing. However, it would like to see a more considered process in any future regulations. Given the serious consequences attached to listing, it should not be taken lightly.* [20]

In September 2005, the Committee requested by recommendation that ASIO and the Attorney General specifically address all of the six criteria in future Statements of Reasons, particularly for new listings.[21] The Committee stated that it 'would like to stress the need for clear and coherent reasons explaining why it is necessary to proscribe an organisation under the Criminal Code'.[22]

---

[17] *Review of the listing of six terrorist organisations*, ibid, paragraph 2.24.

[18] Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers Party (PKK),* 2006, paragraph 2.3.

[19] Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of six terrorist organisations*, ibid, paragraphs 3.22, 3.26, 3.35, 3.45, 3.49; *Review of the listing of Tanzim Qa'idat al-jihad fi Bilad al-Rafidayn (the al-Zarqawi network) as a terrorist organisation*, May 2005, paragraphs 2.24, 2.28; *Review of the listing of seven terrorist organisations*, August 2005, paragraphs 3.12, 3.17, 3.38, 3.41, 3.50, 3.52, 3.61, 3.73, 3.74, 3.82, 3.83; *Review of the listing of four terrorist organisations*, September 2005, paragraphs 3.33, 3.37, 3.62, 3.64, 3.66, 3.80, 3.81, 3.82, 3.89

[20] Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of Palestinian Islamic Jihad*, June 2004, paragraph 4.11

[21] *Review of the listing of four organisations*, ibid, 47 Recommendation 1

[22] *Review of the listing of the Kurdistan Workers Party (PKK),* ibid, paragraph 23.8.

In its review of re-listing of the six organisations in 2007, the Committee again pointed out that 'matching information within the statements of reasons with the criteria has proved to be elusive' and that Attorney-General had still failed to use the criteria as the basis of 'statements of reasons'.[23] Two years later, these comments still apply. The Statements of Reasons relating to the six organisations' re-listing, as provided by the Attorney-General, do not address the non-statutory criteria in any discernible manner. In our view, this is quite possibly because the non-statutory criteria have not been applied in any discernible manner. It would seem that some of the criteria have been applied in respect of some of the organisations and others have not. Where the non-statutory criteria have been applied, the Statements of Reasons make it clear. Where the non-statutory criteria have not been made out, the Statements of Reasons are silent on those points. This strongly suggests that there has either been selective disregarding of some of the criteria or a failure to comprehensively report on the application of the criteria in the Statements of Reasons. We view this as a grave concern, particularly given the extraordinary breadth of the statutory criteria and the wide discretion afforded to the executive by the listing provisions.

We note the minority report relating to the original listing of the PKK, which found that the non-statutory criteria were not met in the case of the PKK. There the minority argued that:

> *Implicitly accepting that conclusion, those advocating the listing instead argued that the PKK fell within the literal terms of the statutory definition of a terrorist organisation.*
>
> *If the Joint Committee accepts justifications for new listings without a proper basis and that are inconsistent with the reasoning of its prior reports and not based on existing (or any) stated policy we invite inconsistency. It would permit ad hoc decisions, incapable of justification on rational grounds to be reached. That would be inconsistent with the Joint Committee's obligations to the Parliament.*[24]

In our submission, these comments should equally apply to re-listings and in particular to the re-listing of the six organisations.

Furthermore, the lack of transparency and consistency around the government's application of the criteria to individual listings also creates a situation where the public are unable to clearly comprehend the decision-maker's reasoning. It is our submission that this is an improper exercise of executive power. We therefore urge the Committee to consider these re-listings in light of the inconsistent application of the non-statutory criteria.

We will examine 2 criteria which we have identified as being inconsistently applied in that , in relation to these six organisations, it seems that they have not been applied at all.

4.2 Links to Australia

In the *Review of the Listing of Six Terrorist Organisations*, the Committee indicated that the criterion 'links to Australia' includes:

- the existence of Australian members of the entity;
- the financing of the terrorist organisation here or abroad by Australians; or
- the supply of Australian personnel to the organisations activities abroad.[25]

The Committee has taken the view that, while direct links to Australia are not a statutory prerequisite for listing and organisation, links to Australia should be an important consideration in selection of an

[23] *Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations*, ibid, paragraph 2.4

[24] Parliamentary Joint Committee on Intelligence and Security, *Review of the listing of the Kurdistan Workers' Party (PKK),* April 2006 Minority Report, paragraph 1.8

[25] *Review of the listing of six organizations*, ibid, paragraph 2.27

organisation for proscription.[26] The former Attorney General has also indicated that the aforementioned criteria are a significant factor in deciding whether to list an organisation under the Criminal Code.[27]

In several reviews, the Committee has expressed that it was unclear how selecting organisations which have no direct link to individuals in Australia would offer any security or efficacy.[28] In its most recent inquiry, the Committee stated:

> *The intention of the legislation is to protect Australia's security interests and although the concept is wider than demonstrable links to Australia, it still implies some connection to Australian security.*[29]

Furthermore, the Committee has stressed that:

> *[P]articular weight should be placed on the existence of known or suspected links to Australia, the nature of those links and the nature of the threats to Australian interests more generally.*[30]

In the case of the six organisations, the Statements of Reasons do not identify that any of the organisations in question have any links to Australia. All of the six organisations are geographically remote from Australia and there is not suggestion that any of the organisations have Australian members, receive financing from Australians or have been supplied by Australian personnel.

This criterion does not seem to have been applied in respect of the six organisations and they do not appear to have any 'links to Australia', as that criterion has been defined by the Committee. In our submission, the listing of organisations with no identifiable links to Australia exceeds the scope of the legislative intent behind the listing provisions and represents a misuse of the power to list organisations.

4.3 Threats to Australian Interests

In relation to the listing of the PKK, the Minority Report expressed the following interpretation of the purpose of the legislation:

> *The Explanatory Memorandum to the legislation which introduced the proscription regime appears to support a reading of the statute that would limit the circumstances in which it is legally available, to those where the conduct of the organisation proposed to be banned directly affects Australia's current security interests. Whether the statements in the Explanatory Memorandum could be used to assist in interpreting the statute in such a way remains untested and ASIO's internal legal advice is to the contrary—but, whatever may be the ultimate legal resolution of that question should it be litigated, there is no doubt that the government's own explanatory materials issued to the parliament with the Bill clearly set out that intention. This Parliament is entitled to expect the government to act in accordance with those statements.*[31]

In light of the legislative intent underpinning the listing provisions, it is deeply concerning that some of the six organisations that have been re-listing do not appear to pose any threat to Australian interests.

---

[26] *Review of the listing of the Kurdistan Workers Party (PKK),* ibid, paragraph 2.35.
[27] Ibid, paragraph 2.33 citing *Review of the listing of the Palestinian Islamic Jihad*, ibid 19
[28] Ibid, paragraph 2.36
[29] *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, ibid, paragraph 4.28
[30] *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, ibid, paragraph 4.29
[31] *Review of the listing of the Kurdistan Workers Party (PKK)*, ibid, Minority Report, paragraph 1.23.

In particular, there is no indication in the Statements of Reasons that the following organisations pose any threat to Australian interests:

- AAA
- Jaish-e-Mohammad (JeM)
- Lashkar-e Jhangvi (LeJ).

In the case of Ansar al-Islam (AaI) and the Islamic Movement of Uzbekistan (IMU) the Statements of Reasons indicate that those organisations may pose some threat to Australian defence forces abroad, in particular in Iraq and Afghanistan. In both of those countries Australian troops are at war. By this reasoning it would make sense to list any foreign governments and armies against which Australian troops are engaged in combat. In our view, a threat to Australian forces engaged in armed combat overseas is not sufficient to amount to a 'threat to Australian interests' for the purposes of listing. Furthermore, it is difficult to imagine how listing an organisation in Australia under domestic law will in anyway lessen the risks faced by Australian troops abroad.

In the case of the IAA, the Statement of Reasons does refer to the abduction of 16 Western tourists in 1998, which included at least 1 Australian who was killed in a rescue attempt. Without diminishing the seriousness of this incident in any way, we would point out that this occurred some 11 years ago and, as noted above, the Statement of Reasons does not provide current information to suggest that IAA meets the statutory criteria for listings. Furthermore, the Statement of Reasons indicates that membership of this group is in all likelihood no more than 30 core members. We would therefore question the extent to which it can be said that IAA poses a threat to Australian interests at present.

We are concerned that, on the information provided by the Attorney-General, the six organisations do not appear to meet the non-statutory criteria relating to 'links to Australia' and 'threat to Australian interests'. We view this as extremely significant. Where these criteria are not met, the listing or re-listing of an organisation is an exercised of the listing power that has exceeded the scope intended by the legislature. Furthermore, inconsistent application of the non-statutory criteria indicates that this extraordinary power is not being exercised only where necessary. It also suggests that listing really is a matter of political/ideological motivations and possibly discrimination.

We would therefore urge the Committee to consider the application of the non-statutory criteria in the case of each of the six organisations. Where the Committee finds that the non-statutory criteria have not been made out, we would support recommendations of disallowance of the listings.