

Submission

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

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Submission to the Parliamentary Joint Committee on Intelligence and Security

Review of the re-listing of Hizballah's Ex- ternal Security Organisation as a terrorist organization under the Criminal Code Act 1995

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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 particu-

lar 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. It comprises workers from member centres, members of other community organisations and academics. The 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 the view that the listing provisions are fundamentally inconsistent with the aspirations of a democratic society 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.

As outlined in previous submissions to the committee, 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

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.

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

1.2 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. 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 Article 22(2), *International Covenant on Civil and Political Rights*.

2. Lack of Community Consultation

2.1 General Concerns

On 8 May 2009 the Attorney-General notified the Committee that he had decided to re-list Hizbullah's External Security Organisation ('the ESO').

In our most recent submission to this Committee, the Federation expressed our concerns about the government's repeated failure to engage in any process of community consultation prior to deciding to re-list organisations.³ In the case of the re-listing of the ESO, there has again 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.

As we have previously noted, the Committee has repeatedly emphasised the importance of community consultation in the listing process. 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.*⁴

Subsequently, in its 2007 Review of the Re-listing of the Six Organisations, 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'.⁵

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 democracy⁶ and it expressed disappointment in the Government's limited efforts to provide community information to date.⁷ 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'.⁸

Once again we are concerned that, despite all of these remarks and recommendations, the Government has not attempted any community consultation or community information provision in respect of the re-listing of the ESO. 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. That this has not occurred in this instance is of added concern because, in our view, the Government should be abundantly aware that certain communities in Australia have an interest in this re-listing.

³ Federation of Community Legal Centres (Vic) Inc, *Submission to the PJCS: Review of the Re-listing of Six Organisations*, May 2009, 5

⁴ Joint Parliamentary Committee on ASIO, ASIS and DSD, [Review of the listing of six terrorist organisations](#), March 2005

⁵ 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

⁶ Parliamentary Joint Committee on Intelligence and Security, [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), September 2007, paragraph 3.16

⁷ [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 3.24

⁸ [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 3.25

2.2 Lack of Community Consultation Regarding the Re-Listing of the ESO

In January 2008 the Department of Foreign Affairs and Trade estimated that there were 300 000 Australians of Lebanese origins and that approximately 20 000 - 25 000 Australian passport holders were resident in Lebanon. As noted in the Statement of Reasons provided by the Australian Security and Intelligence Organisation ('ASIO') in respect of the ESO ('the Statement of Reasons'), Hizballah is a recognised political party in Lebanon with representation in the Lebanese parliament and in cabinet.⁹ After the Lebanese elections earlier this week, Hizballah has maintained its hold of 11 seats in the Lebanese parliament.

As the Committee may be aware, in August 2006 the head of the Federal Government's Muslim Advisory Group, Dr Ameer Ali, called for the de-listing of the ESO on the basis that Hizballah should be recognised as a legitimate part of Lebanese politics.¹⁰ This request was rejected out of hand by the then-Prime Minister. Nonetheless, the fact that the head of a group selected by the Government to advise on terrorism and 'extremism' made such a call, is in itself an indication that there is support for the de-listing of the ESO in the broader community. Dr Ali made this clear when he was asked by a reporter whether Hizballah is widely regarded as a legitimate organisation among Australia's Muslims. He stated:

Yes, it is wide... very, very widespread, not only in Australia. If you take a poll in the entire Muslim world, they will tell you this is not a terrorist group, this is part of the Lebanese politics, and this is the Israeli propaganda that makes the world believe that they are terrorists.¹¹

In July 2006 following the Israeli invasion of southern Lebanon, there were significant protests in several Australian capital cities against the conduct of the Israeli Defence Force, including a protest of an estimated 15 000 people in Sydney on 22 July 2006. By all accounts, most protesters were of Lebanese origins. This war was described by the Department of Foreign Affairs and Trade (DFAT) as being an 'Israeli-Hezbollah conflict' and at the time Israel indicated that their aim was to force Hizballah out of southern Lebanon (which Hizballah has effectively controlled since Israel ended its 22 year occupation of the region in May 2000).¹² There is, therefore, potentially a significant connection between the numbers seen at these protests and the level of support for Hizballah. As stated in an article written for the Middle East Report in July 2006:

Outrage at Israel's actions trumps ideological disagreement with Hizballah for many Lebanese at this point, and as such, it is likely that support for the party will continue to grow.¹³

While clearly not all protesters in Australia would support Hizballah or all of its activities, in our estimation the numbers at these protests do suggest that at least some parts of Australia's Lebanese community would have an interest in the re-listing of the ESO.

⁹ ASIO, Statement of Reasons, May 2009, as annexed to the submission of the Attorney-General, available at http://www.aph.gov.au/house/committee/pjicis/hizballah_eso/subs/sub%201.pdf, page 1

¹⁰ *Calls to Remove Hezbollah from terrorist list rejected by Australian Government*, ABC PM, 2 August 2006, available at <http://www.abc.net.au/pm/content/2006/s1704339.htm>

¹¹ *Muslim Advisory Group wants Hezbollah taken off terrorist list*, ABC The World Today, 2 August 2006, available at <http://www.abc.net.au/worldtoday/content/2006/s1704179.htm>

¹² Hassan M Fatah & Steven Erlinger, *Israel attacks Beirut airport and set up naval blockade*, New York Times, available at <http://www.nytimes.com/2006/07/13/world/middleeast/13cnd-mideast.html>, 13 July 2006; *Regional war feared as Lebanon crisis worsens*, ABC News Online, available at <http://www.abc.net.au/news/newsitems/200607/s1687596.htm>; *Israelis seize control of southern Lebanon town, find weapons cache*, FoxNews.Com, available at <http://www.foxnews.com/story/0,2933,205093,00.html>, 22 July 2006.

¹³ Lara Deeb, *Hizballah: A Primer*, Middle East Report, 31 July 2006, available at <http://www.merip.org/mero/mero073106.html>

It is widely accepted that Hizballah resists the state of Israel and that it aims to liberate Palestinian territories, as is noted in the Statement of Reasons.¹⁴ Currently, there exists a significant number of community organisations formed and registered in Australia which support the Palestinian cause. Without commenting on the views of these organisations in respect of all of Hizballah's activities, it would seem highly likely that such groups would have something to say about the re-listing of the ESO as a terrorist organisation. Similarly, there are many Lebanese community organisations which if called upon would probably have views about this re-listing and its impact upon their communities.

In light of all of these circumstances, the Federation views the Government's failure to conduct a process of community consultation prior to re-listing the ESO as a grave procedural deficiency. Without information from relevant communities, the government has made a decision based on an uncontested set of arguments.

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 or re-listed. The manner of informing communities must take into account the fact that such groups may struggle to engage with parliamentary processes and may not have the resources to respond with written submissions. For example, in its report on the 2007 review of the ESO's re-listing the Committee noted that it had placed an advertisement in *The Australian* calling for submissions but had only received two submissions from academics.¹⁵ This was counter-posed to the desirability of community consultation. In our view, a call for written submissions made via one newspaper is insufficient. Groups with a potential interest should be identified and directly provided with advance notification of the re-listing and given the opportunity to comment either in writing or orally. Advertising should be conducted through a variety of media that reflect news sources regularly utilised by the relevant community and should be in community languages. The timeframes for comment should take into account the limited resources of most community groups, which are often staffed by volunteers from the relevant community. Furthermore, we take the view that this process of consultation should be wholly the responsibility of the Government (not the body reviewing a re-listing) and should be conducted before a decision to re-list is made.

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 communities, consulting and considering community views, the listing regime amounts to an unfettered exercise of executive discretion, highly prone to abuse and misuse. It is our view, therefore, that the Government should implement a process of community consultation that precedes all listings and re-listings. Where there has been no such community consultation, as is the case with the re-listing of the ESO, it is our submission that any listings or re-listings made in these circumstances have not been made with due process and should be disallowed. We strongly urge the Committee to closely examine this aspect of the re-listing of the ESO. We submit that the Government's listing procedure has been notably deficient in this regard and that the Committee should therefore recommend disallowance of the re-listing.

¹⁴ *Statement of Reasons*, *ibid*, page 2

¹⁵ Parliamentary Joint Committee on Intelligence and Security, *Review of the re-listing of Hizballah's External Security Organisation (ESO)*, July 2007, available at <http://www.aph.gov.au/house/committee/pjicis/hizballah/report.htm>, paragraph 1.16.

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 General Concerns Regarding the Statutory Criteria

The determinative criteria for listing 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 doing of a terrorist act (whether or not a terrorist act has occurred or will occur); or
- Advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

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 advocacy 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.¹⁶ 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 which 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.¹⁷ 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.*¹⁸

This issue has also been highlighted in Nigel Brew's research note on 'The Politics of Proscription in Australia'.¹⁹

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, as well as many organisations on the Department of Foreign Affairs and Trade's Consolidated List (as maintained pursuant to Resolution 1373 of 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

¹⁶ Paragraph 9, Schedule 1, *Anti-Terrorism Act (No 2) 2005 (Cth)*

¹⁷ 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

¹⁸ *Ibid*, paragraph 2.2

¹⁹ Nigel Brew, *The Politics of Proscription in Australia*, Parliamentary Library Research Note No 63/2003-2004 (2004)

largely on the basis of ASIO's advice. As Dr 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.²⁰ 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 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 highlights, at the very least, the discriminatory impact of this power. Many take this further and argue that the power is exercised in a discriminatory manner.²¹ The Government has taken pains to stress that the listing provisions are not applied in a discriminatory manner and the Committee has itself stated that 'it does not accept that the preponderance of militant Islamic groups on the current list is a form of discrimination.'²² 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.'²³ 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. Our concern remains that the power to list organisations is at minimum indirectly discriminatory.

3.2 Unclear what material is relied on by the Attorney-General in making the decision to re-list the ESO

In the course of the Committee's most recent inquiry into the re-listing of six organisations, the Attorney-General Department provided the Committee with some 'follow-up' material after its appearance before the Committee. That material was prefaced with a cover letter that stated the following:

*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.*²⁴

Following this letter were a series of Statements of Reasons pertaining to the six organisations, however, with various pages missing. It is therefore unclear whether these are indeed the 'non-public' Statements of Reasons referred to in the cover letter (and the Attorney-General's Department has chosen to make them public) or whether these are 'public' statements of reasons and the 'non-public' versions were forwarded to the Committee separately, although this is not what the cover letter suggests. A comparison of the two sets of Statements of Reasons suggests that they are the same as those originally provided by the Attorney-General, apart from the fact that there are pages missing from the latter set.

²⁰ [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 4.17

²¹ See for example, [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 3.3

²² [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 3.17

²³ [Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code](#), *ibid*, paragraph 4.18

²⁴ Attorney-General's Department, *Submission to the PJCIS Review of the re-listing of six terrorist organisations under the Criminal Code Act 1995*, Submission No 4, May 2009, available at <http://www.aph.gov.au/house/committee/pjicis/six%20terrorist/subs/sub%204.pdf>, page 1

The Attorney-General's Department's cover letter goes on to state:

*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.*²⁵

We note that in his original letter to the Committee regarding the re-listing of the six organisations, the Attorney-General did not indicate that any classified information had been relied upon in making the decision to re-list and in fact he suggested that the decision to re-list was based only on unclassified information enclosed with that letter. He stated that:

*My decision to re-list Ansar al-Islam, AAA, IAA, Islamic Movement of Uzbekistan, JeM and LeJ was made following careful consideration of unclassified intelligence information provided by ASIO in consultation with the Department of Foreign Affairs and Trade, as well as legal advice provided to me by the Australian Government Solicitor.*²⁶

The letter further states:

*To assist the Committee, I enclose a copy of the Statements of Reasons provided by ASIO, in relation to Ansar al-Islam, AAA, IAA, Islamic Movement of Uzbekistan, JeM and LeJ, **upon which my decision to re-list these organisations was based.***²⁷ (emphasis added)

In respect of the most recent re-listing of ESO, the Attorney-General's letter to this Committee included equivalent statements in respect of the ESO listing and thereby similarly indicated that only the unclassified information enclosed with that letter was relied upon in making the decision to re-list.²⁸ Furthermore, the Committee's website calling for submissions does not indicate that the Committee has been forwarded additional classified information relating to this re-listing.

As a result of this seemingly contradictory information, it is unclear whether the Statement of Reasons included in the Attorney-General's submission to this Committee in respect of the re-listing of the ESO is indeed the complete document relied on by the Attorney-General in making the decision to re-list or whether it is an abridged 'public' version. This uncertainty makes it difficult for the public to fully participate in the review process and to make complete submissions as to the merits of the re-listing. We ask the Committee to consider this issue. We urge the Committee to make recommendations that reflect the difficulty this contradictory information creates for participants in the review process.

3.3 Unclear Whether the Statutory Criteria Have Been Made Out

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 the Committee of 8 May 2009, the Attorney-General stated that the re-listing of ESO is based on a finding that ESO is 'directly or indirectly engaged in, preparing, plan-

²⁵ Ibid

²⁶ Attorney-General, *Submission to the PJCIS Review of the re-listing of six terrorist organisations under the Criminal Code Act 1995*, Submission No 1, May 2009, available at: <http://www.apf.gov.au/house/committee/pjicis/six%20terrorist/subs/sub%201.pdf>, page 1

²⁷ Ibid

²⁸ Attorney-General, *Submission to the PJCIS Review of the Re-Listing of Hizballah's External Security Organisation*, ibid, page 1

ning, assisting in or fostering the doing of a terrorist act'.²⁹ That is, the Attorney-General has not relied on the 'advocacy' criterion.

Our examination of ASIO's Statement of Reasons pertaining to the ESO and the material presented for prior reviews, suggests that there is a key factor which could have precluded the Attorney-General from reasonably making such a finding. That is, the question of whether the ESO continues to exist and to be active.

In its 2007 review of the re-listing of the ESO, the Committee noted that there is some debate as to whether the ESO still actually exists.³⁰ At that time ASIO told the Committee that it had been difficult to confirm the existence of ESO but that 'there was no reason to believe that the ESO had relinquished its worldwide capability even though this is hard to prove using open source material'.³¹ In its most recent Statement of Reasons, ASIO have not identified any specific activity additional to that referred to in the 2007 Statement of Reasons.³² Given that there are doubts surrounding the very existence of the ESO and no activity attributable to the group in recent years, it is difficult to comprehend how the Attorney-General could be satisfied on reasonable grounds that the statutory criteria have been met. Furthermore, if the Committee expressed concerns regarding the existence of the ESO through its questioning of ASIO in 2007, surely those concerns should be heightened now that it is two years later and ASIO have not furnished any further proof of the group's on-going existence or activity.

In its 2007 review of the re-listing of the ESO the Committee noted its prior request that 'information presented to justify each relisting contain a sufficient degree of currency in the evidence to warrant the use of its power of executive discretion'.³³ The Committee also reiterated the view that the emphasis on material should 'be on the activities of the organisation in the period since the last listing'.³⁴ In contrast, ASIO's Statement of Reasons contains limited information regarding the activities of the ESO in the last 2 years. Mention is repeatedly made of the death of former ESO leader Imad Mughniyah in February 2008 but the Statement of Reasons does not identify any specific activities that are attributable to the group in recent years. While clearly stating that '[l]ittle is known about ESO', ASIO proffer the view that ESO is planning attacks against Israeli targets and gathering intelligence on a global basis.³⁵ This view is not elaborated on and, in light of the fact that such scant information is available about the ESO, we would suggest that more information regarding how ASIO have identified that the ESO is active in this way should be provided by ASIO (at least to the Committee).

Similarly, the Statement of Reasons also claims that 'Hizballah uses a separate terrorist arm to conduct attacks and accordingly recent terrorist activity generally attributed to Hizballah is likely to have been conducted by ESO, either wholly or as a major contributor'.³⁶ The Statement of Reasons does not, however, elaborate on exactly what 'recent terrorist activity' has been attributed to Hizballah. This is significant. If, as suggested by ASIO, the ESO are conducting terrorist activity on behalf of Hizballah, it would seem logical that there would be clear evidence that these terrorist acts had indeed taken place and were, as ASIO states, attributed to Hizballah. In our view, it is therefore important that ASIO specifically identify the 'recent activity' that it is referring to in order that the public can properly assess the merits of this re-listing. Given the complex organisational

²⁹ The Hon Robert McClelland MP, Attorney-General, *Review of the Re-Listing of Hizballah's External Security Organisation (ESO) under the Criminal Code Act 1995*, Submission No 1, available at: http://www.aph.gov.au/house/committee/picis/hizballah_eso/subs/sub%201.pdf, page 1

³⁰ *Review of the re-listing of Hizballah's External Security Organisation (ESO)*, *ibid*, paragraph 2.13

³¹ *Ibid*, paragraph 2.14

³² *Statement of Reasons*, *ibid*

³³ *Review of the re-listing of Hizballah's External Security Organisation (ESO)*, *ibid*, paragraph 2.1

³⁴ *Ibid*

³⁵ *Statement of Reasons*, *ibid*

³⁶ *Ibid*, page 3

structure of Hizballah (it has multiple branches to deal with the group's multiple functions³⁷) and the potential that the ESO simply no longer exists, it is also important that ASIO identify demonstrable connections between the ESO and these recent activities.

We urge the Committee to consider the material provided by ASIO in light of these questions about the existence of the ESO and whether it is an active organisation. In our submission, these questions are so fundamental to the decision to re-list that ASIO should be required to provide material that convincingly demonstrates the existence of the group and its ongoing activity. In the absence of such material, the Committee should consider recommending disallowance of the listing.

3.4 Material in the Statement of Reasons that does not demonstrate the statutory criteria

In forming a view about whether the ESO meets the statutory criteria, it is important that the Committee consider material relevant to those criteria and that it not be swayed by material that seems damning but actually does nothing to make out the statutory criteria. In our view, the Statement of Reasons contains a significant amount of prejudicial material that does not concern the statutory criteria.

For example, the Statement of Reasons repeatedly refers to the capabilities of the group in terms of the resources potentially available to it. It states that the ESO is likely to have access to funding derived from criminal activity in South America and access to resources provided by Syria and Iran.³⁸ In our submission, this is not sufficient to make out the statutory criteria, none of which refer to a group's capacity to commit a terrorist act. The fact that a group potentially has access to the resources to commit terrorist acts is not enough to indicate that the group is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, particularly where the very existence of that group is in question. If this were the case, all state governments with defence forces would be open to listing. Furthermore, the suggestion that Hizballah is involved in drug/arms smuggling and product piracy is also irrelevant to the question of whether the ESO should be re-listed.³⁹

The Statement of Reasons alludes to Hizballah's willingness to use force to pursue its aims of liberating Palestinian territories from Israeli occupation.⁴⁰ Again, if this alone were sufficient to justify listing it would logically follow that the governments of the United States, United Kingdom and Australia, would all be liable to be listed, as all have demonstrated a willingness to use force to intervene in overseas conflicts in Iraq and Afghanistan. Similarly, the repeated references to Hizballah's political goals in respect of Palestinian territories and southern Lebanon are also not evidence of the grounds for re-listing.

In considering this re-listing we urge the Committee to focus only on material contained in the Statement of Reasons that is actually relevant to the statutory criteria. We also suggest that future Statements of Reasons be confined to material relevant to the legislative criteria for listing.

³⁷ It is our understanding that Hizballah is comprised of a number of tiers or branches which each focus on different aspects of the group's functioning, including social services, military, political, financial. See *American Perspectives on Hezbollah*, Middle East Institute, 26 July 2006, available at: <http://www.mideasti.org/summary/american-perspectives-hezbollah>. See also, *Hizballah: A Primer*, *ibid*.

³⁸ *Statement of Reasons*, *ibid*, pages 1-3

³⁹ *Ibid*, page 2

⁴⁰ *ibid*

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 an 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.⁴¹ 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.⁴²

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.⁴³ 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.*⁴⁴

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.⁴⁵ 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'.⁴⁶

In its review of the re-listing of 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'

⁴¹ [Review of the listing of six terrorist organisations](#), *ibid*, paragraph 2.24.

⁴² Parliamentary Joint Committee on Intelligence and Security, [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), 2006, paragraph 2.3.

⁴³ 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

⁴⁴ Joint Parliamentary Committee on ASIO, ASIS and DSD, [Review of the listing of Palestinian Islamic Jihad](#), June 2004, paragraph 4.11

⁴⁵ [Review of the listing of four organisations](#), *ibid*, 47 Recommendation 1

⁴⁶ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 23.8.

and that the Attorney-General had still failed to use the criteria as the basis of Statements of Reasons.⁴⁷ Now, in 2009, these comments still apply. The Statements of Reasons relating to the ESO's 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 to this re-listing. 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.

This concern was also expressed in 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.⁴⁸

In our submission, these comments should equally apply to re-listings including the ESO, the subject of this review.

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 urge the Committee to consider the re-listing of the ESO in light of the inconsistent application of the non-statutory criteria.

4.2 Applying the Non-Statutory Criteria to the ESO

In this section, we will examine those non-statutory criteria that we feel have not been made out in the case of the ESO.

4.2.1 Engagement in Terrorism

We understand that the non-statutory criteria are intended as a supplement to the very broad statutory criteria. The criterion 'engagement in terrorism' appears on one interpretation to contradict the statutory criteria. 'Engagement in terrorism' appears to require more than mere 'planning' or 'preparation' for 'terrorist acts', but rather actual engagement in acts of terrorism (as commonly defined). If that definition is accepted, ASIO's Statement of Reasons fails to make out this criterion in respect of the ESO. The Statement of Reasons attributes a number of specific terrorist acts to the ESO, however, these acts date back to the 1980's and 1990's.⁴⁹ The only other activity specifically referred to in the Statement of Reasons is the 2006 war between Israel and Hizballah. This is referred to by ASIO as a 'military confrontation' and the Statement of Reasons does not suggest that the ESO was involved in this confrontation nor in any events that preceded it and, according to some, precipitated it. Furthermore, ASIO maintain that the ESO is a

⁴⁷ [Review of the re-listing of Ansar al-Sunna, JeM, LeJ, EIJ, IAA, AAA and IMU as terrorist organisations](#), *ibid*, paragraph 2.4

⁴⁸ Parliamentary Joint Committee on Intelligence and Security, [Review of the listing of the Kurdistan Workers' Party \(PKK\), April 2006](#) Minority Report, paragraph 1.8

⁴⁹ *Statement of Reasons*, *ibid*, pages 2-3

'distinct terrorist wing' of Hizballah. If that is indeed the case, the activity of Hizballah's military would be irrelevant to the drawing of any conclusions about the ESO's engagement in terrorism.

In our submission, therefore, ASIO's Statement of Reasons does not contain any information to demonstrate that this criterion is satisfied in the case of the ESO.

4.2.2 Ideology

The ideology of the ESO is not directly addressed in the Statement of Reasons except via allusions to the political goals of Hizballah. There is also a clear indication by ASIO that the ESO's terrorist activity (if any) will be 'in accordance with the strategic priorities of ESO's parent organisation, Hizballah, or its state sponsors'. If ASIO's view in this regard is accepted, then it would follow that the ideology of Hizballah would be replicated in the ESO. The Statement of Reasons does not, however, include any information regarding the ideology of Hizballah to indicate a commitment to terrorism per se.

Also problematic is the fact that the Statement of Reasons does not explore Hizballah's role in the Lebanese democracy. In the early 1990's Hizballah chose to participate in the Lebanese state structure by participating in elections and it has operated as a part of this structure since then. This shift in the aims/ideology of Hizballah was referred to by the Committee in its report on the 2007 review of the re-listing of the ESO. That report also indicated that Hizballah had adopted 'a stance of relative passivity'.⁵⁰ This view is confirmed by Lara Deeb at various junctures in 'Hizballah: A Primer' as published in the Middle East Report Online.⁵¹ It also seems to have been confirmed in the statement of Hizballah MP, Hassan Fadlallah, in response to the defeat of Hizballah and its allies in the June 2009 elections:

*We consider that Lebanon is ruled by partnership and whatever the results of the elections are, we cannot change the standing delicate balances or repeat the experiences of the past which led to catastrophes on Lebanon and showed the inability of one party monopolizing power. Whoever wants political stability, the preservation of national unity and the resurrection of Lebanon will find no choice but to accept the principle of consensus.*⁵²

If the ESO's ideology is aligned with that of Hizballah, as ASIO's Statement of Reasons seems to presume, then there is the possibility that that ideology may not warrant re-listing.

In this regard it is also important to consider that as a political party Hizballah enjoys a significant degree of popular domestic support. Shi'i Muslims make up approximately one third of Lebanon's population and, after the latest Lebanese elections, Hizballah holds 11 seats in the parliament (as it has done for some years). If indeed the ESO's activities are aligned with the 'strategic priorities' of Hizballah, this raises questions about whether those activities should be viewed by outsiders as acts of terrorism or simply as legitimate acts in defence of the nation state. For example, the Ta'if Agreement, the signing of which marked the end of the Lebanese civil war, allowed Hizballah to maintain its military campaign against Israel in southern Lebanon. This suggests then, that activities which formed part of that campaign may reasonably be viewed as democratically legitimate rather than as the acts of a rogue militia. This issue is not explored in the Statement of Reasons and in our submission is an issue that warrants the Committee's consideration.

⁵⁰ Review of the re-listing of Hizballah's External Security Organisation (ESO), *ibid*, paragraph 2.21

⁵¹ Hizballah: A Primer, *ibid*

⁵² Hizballah camp loses election, Reuters (On Line), 7 June 2009, available at: <http://www.reuters.com/article/newsOne/idUSTRE5561XN20090607>

4.2.3 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 organisation's activities abroad.⁵³

The Committee has taken the view that, while direct links to Australia are not a statutory prerequisite for listing an organisation, links to Australia should be an important consideration in selection of an organisation for proscription.⁵⁴ 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.⁵⁵

In several reviews, the Committee has stated that it was unclear how selecting organisations which have no direct link to individuals in Australia would offer any security or efficacy.⁵⁶ In its most recent inquiry, the Committee stated that:

*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.*⁵⁷

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.*⁵⁸

In the case of the ESO the Statement of Reasons does not identify that the ESO has any links to Australia. There is no indication that any of its operations have geographical proximity to Australia and there is no suggestion that the ESO has any Australian members, that it receives financing from Australians or has been supplied by Australian personnel.

The criterion of 'links to Australia', as that criterion has been defined by the Committee, does not seem to have been applied in respect of the ESO. On the material publicly presented the ESO does not appear to have any 'links to Australia'. In our submission, the listing of organisations with no identifiable links to Australia exceeds the scope of the listing provisions' legislative intent and represents a misuse of the listing power. We urge the Committee to consider this in its deliberations on this particular re-listing.

4.2.4 Threats to Australian Interests

The Explanatory Memorandum to the *Criminal Code Amendment (Terrorist Organisations) Bill 2003* made important amendments to the listing regime. Here it was stated that:

This Amendment enable[d] the Government to independently identify organisations that are a threat to Australia's national security as terrorist

⁵³ *Review of the listing of six organizations*, *ibid*, paragraph 2.27

⁵⁴ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, paragraph 2.35.

⁵⁵ *Ibid*, paragraph 2.33 citing *Review of the listing of the Palestinian Islamic Jihad*, *ibid* 19

⁵⁶ *Ibid*, paragraph 2.36

⁵⁷ [Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995](#), *ibid*, paragraph 4.28

⁵⁸ [Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995](#), *ibid*, paragraph 4.29

*organisations - thereby attracting the full weight of the criminal law – without reference to the United Nations Security Council.*⁵⁹

(Whereas prior to this amendment an organisation could only be listed if it had been the subject of a United Nations Security Council decision.)

Based on this statement, the Minority Report on the listing of the PKK 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.*⁶⁰

In light of the legislative intent underpinning the listing provisions, it is deeply concerning that, according to the Statement of Reasons, the ESO does not appear to pose any threat to Australian interests.

In the Statement of Reasons, all of the interests arguably threatened in the past by the ESO are either US or Israeli. Further, there is no mention of how the ESO might pose a threat to Australian interests in the future.

The failure to make out this criterion is concerning for two reasons:

First, it is indicative that in re-listing the ESO, the Government has acted beyond the scope of the powers intended by the legislation. This extraordinary power was clearly intended to provide greater protection for Australia. Where no demonstrable threat or potential threat to Australia’s national security exists, the listing or re-listing of an organisation is in our view an act that has exceeded that legislative intent.

Second, the re-listing of an organisation that poses no threat to Australian interests but which does threaten US and Israeli interests, suggests that the relisting is more about maintaining a policy platform that aligns Australia with those nations than it is about protecting Australia. Again, this was not the intent of the legislation. Furthermore, use of this power to achieve foreign policy goals highlights the highly political nature of the listing process. It also substantiates concerns expressed by various organisations (Muslim and non-Muslim) that this power is exercised in a highly politicised and at times discriminatory manner.⁶¹ This kind of discrimination on the part of the Government was highlighted when in July 2006 an Australian citizen was killed fighting for the Israeli Defence Force in Southern Lebanon. While the then Foreign Minister Alexander Downer publicly expressed sadness at the death and offered condolences to the deceased’s fam-

⁵⁹ Parliament of the Commonwealth of Australia, House of Representatives, *Explanatory Memorandum to the Criminal Code Amendment (Terrorist Organisations) Bill 2003*, Item 1.

⁶⁰ [Review of the listing of the Kurdistan Workers Party \(PKK\)](#), *ibid*, Minority Report, paragraph 1.23.

⁶¹ See all prior submissions of the Federation of Community Legal Centres (Vic) Inc to the PJCIS, see also Australian Muslim Civil Rights Advocacy Council, *Submission to the PJCIS Review of the operation, effectiveness and implications of section 102.1(2), (2A), (4), (5), (6), (17) and (18) of the Criminal Code Act*, February 2007, available at <http://www.aph.gov.au/house/committee/pjcis/proscription/submissions/sub22.pdf>, pages 5 and 10.

ily, he also indicated that same day that Hizballah needed to be disarmed.⁶² When it comes to the dispute between Hizballah and Israel it is clear that successive Australian governments are not neutral, but rather have chosen a policy position aligned to that of the US and Israel. This in turn raises concerns about motivations for exercising of the listing power in this particular instance, especially given that on the information publicly available the ESO does not seem to pose any threat to Australian interests.

4.2.5 Proscription by the US or like-minded countries

The Statement of Reasons points out that the ESO has been listed by the United Kingdom and that Hizballah in its entirety and has been designated as a terrorist organization by the United States, Canadian and Israeli governments. It fails to point out that Hizballah has not been listed as a terrorist organization by Council of the European Union, despite pressure from the US.⁶³

4.2.6 Engagement in peace/mediation processes

As accepted by the Committee in its 2007 review of the relisting of the ESO, the relevant participation in peace processes to consider here would be that of Hizballah, not the ESO itself. That being the case, the Statement of Reasons should report on any engagement by Hizballah in peace/mediation processes in recent years. The Statement of Reasons does not address this criterion at all and makes no mention of Hizballah's engagement in peace processes in recent years, for example, the prisoner exchange deal struck in July 2008.⁶⁴ Of course, any consideration of Hizballah's willingness to engage in peace processes should also be accompanied by an examination of the willingness of its opponents to engage in those processes – an organization cannot engage in peace processes by itself – and the history of the conflict between the relevant parties. This Statement of Reasons does neither and in our submission, ASIO should be called upon to make such a detailed examination.

We are concerned that, on the information provided by the Attorney-General, the ESO does not appear to meet all of the non-statutory criteria. We view this as extremely significant. Where these criteria are not met, the listing or re-listing of an organisation is an exercise 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 being exercised in circumstances beyond absolute necessity. It also leaves open the suggestion that the listing objectives include foreign policy or political /ideological motivations.

We urge the Committee to consider the application of the non-statutory criteria in the case of the ESO. In the event that the Committee finds that the non-statutory criteria have not been made out, disallowance of the listing should be recommended.

⁶² See 'Perfect Son' dies at war in Lebanon, The Age, 28 July 2006, available at:

<http://www.theage.com.au/news/world/perfect-son-dies-at-war-in-lebanon/2006/07/27/1153816320590.html>. See also Israeli airstrike kills 54, The Age, 30 July 2006, available at <http://www.smh.com.au/news/world/israeli-air-strike-kills-51/2006/07/30/1154197998127.html?page=fullpage#contentSwap2>

⁶³ Council Common Position 2009/67/CFSP, Official Journal of the European Union, 26 January 2009, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:023:0037:0042:EN:PDF>.

See also US view of Hezbollah 'unchanged', BBC News, 10 March 2005, available at http://news.bbc.co.uk/2/hi/middle_east/4337903.stm

⁶⁴ Andrew Lee Butters, *After Hizballah's Party*, Time, 17 July 2008 available at <http://www.time.com/time/world/article/0,8599,1824027,00.html>

5. Does the law of armed conflict apply?

The Committee's 2006 'Review of Security and Counter-Terrorism Legislation' recommended that 'the definition of terrorism be amended to include a provision or a note that expressly excludes conduct regulated by the law of armed conflict'.⁶⁵

In respect of several listings, the Committee has reiterated the view that, while political violence is not an acceptable means of achieving a political end in a democracy:

... there are circumstances where groups are involved in armed conflict and where their activities are confined to that armed conflict, when designations of terrorism might not be the most applicable or useful way of approaching the problem. Under these circumstances - within an armed conflict - the targeting of civilians should be condemned, and strongly condemned, as violations of the Law of Armed Conflict and the Geneva Conventions. The distinction is important. All parties to an armed conflict are subject to this stricture. Moreover, these circumstances usually denote the breakdown of democratic processes and, with that, the impossibility of settling grievances by democratic means. Armed conflicts must be settled by peace processes. To this end, the banning of organisations by and in third countries may not be useful, unless financial and/or personnel support, which will prolong the conflict, is being provided from the third country. ASIO acknowledged this point to the Committee:

'[When] there is a peace process ... you can unintentionally make things worse if you do not think through the implications of the listing'.⁶⁶

Although the above views have been reiterated in subsequent reviews, direct consideration has never been given to the question of whether a conflict is governed by the laws of armed conflict and if listing therefore conflicts with Australia's obligations under international law. Given the protracted and highly militarised nature of the conflict between Hizballah and Israel and the matters raised in Section 4.2.2 above, in particular that the military defence of southern Lebanon by Hizballah is state sanctioned, we suggest that the Committee give consideration to this question in its deliberations on the re-listing of the ESO.

⁶⁵ Parliamentary Joint Committee on Intelligence and Security, [Review Of Security And Counter Terrorism Legislation](#), December 2006, Recommendation 12

⁶⁶ Joint Parliamentary Committee on ASIO, ASIS and DSD, *Review of the listing of Palestinian Islamic Jihad*, June 2004, paragraph 3.21

6. Conclusion

In summary, our concerns regarding the re-listing of the ESO are as follows:

- The practice of listing is itself problematic;
- The listing provisions are inconsistent with Australia's obligations under the ICCPR;
- The listing regime does not enhance Australia's counter-terrorism response;
- There was no community consultation and no information was provided to communities before the decision to re-list the ESO was made;
- The breadth of the statutory criteria for listing permits excessive executive discretion and the discriminatory and politically-motivated exercise of the power to list organisations;
- The public has difficulty commenting on the validity of the decision to re-list the ESO because it is unclear what information has been relied upon by the Attorney-General in making that decision;
- The statutory criteria may not have been made out by ASIO in that there is doubt that the ESO exists as an active organisation;
- The non-statutory criteria are applied inconsistently;
- The non-statutory criteria have not been adequately addressed in respect of the ESO;
- The listing of the ESO may conflict with Australia's obligations in international law, particularly in respect of the laws of armed conflict;

We trust that the Committee will duly consider these concerns and we thank the Committee for its attention. We would welcome the opportunity to elaborate on this submission or to furnish the Committee with further information if that would assist the Committee.