

Protocol

Listing terrorist organisations under the Criminal Code

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

How organisations may be found to be terrorist organisations

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

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

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

Purpose of listing

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

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

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

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

Legislative test for deciding to list a terrorist organisation

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

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

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

Role of Commonwealth agencies

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

ASIO's role

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

Selection of organisation for consideration

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

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

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

(whether or not a terrorist act has occurred or will occur).

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

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

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

Form of advice

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

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

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

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

Role of the Attorney-General's Department

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

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

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

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

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

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

Monitoring terrorist organisations

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

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

Re-listing terrorist organisations

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

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

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

De-listing applications

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

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

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

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

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

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

Review and oversight

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

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

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

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

Further information about the PJCIS is available on the Parliament of Australia website at: www.aph.gov.au/house/committee/pjcis

Judicial review by the courts

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

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

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

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

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

Where to find the list of terrorist organisations and further information

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

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

List of terrorist entities for anti-terrorism financing purposes

The Minister for Foreign Affairs is responsible for a separate list of ‘terrorist entities’ under the *Charter of the United Nations Act 1945*. This is a different process to the Criminal Code listing process, and relates to Australia’s anti-terrorism financing obligations under the United Nations Security Council Resolution 1373 (2001). Information on this separate process is available on the Department of Foreign Affairs and Trade’s website at: www.dfat.gov.au

Pamphlet on Australia’s counter-terrorism laws

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

Security Law Branch
Attorney-General’s Department
3-5 National Circuit
BARTON ACT 2600