



INFORMATION, ANALYSIS
AND ADVICE FOR THE PARLIAMENT

INFORMATION AND RESEARCH SERVICES

Bills Digest
No. 87 2002–03

Criminal Code Amendment (Terrorist Organisations) Bill 2002

ISSN 1328-8091

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Published by the Department of the Parliamentary Library, 2003

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Criminal Code Amendment (Terrorist Organisations) Bill
2002

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21 January 2002

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Criminal Code Amendment (Terrorist Organisations) Bill 2002

Date Introduced: 23 October 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: 23 October 2002

Note: The Bill was passed by Parliament on 23 October 2002 and received Royal Assent on 23 October 2002 (Act No. 89, 2002).

Purpose

To enable the speedier proscription of terrorist organisations under the *Commonwealth Criminal Code*

Background

Criminal Code proscription

History of Criminal Code proscription provision

The listing of terrorist organisations as part of the definition of a terrorist organisation to be used in the new Criminal Code terrorist offences was introduced by the Security Legislation Amendment (Terrorism) Bill 2002.¹ That Bill, which proposed new provisions for the *Criminal Code*, was first introduced on 12 March 2002.² An amended version of the Bill was passed on 27 June 2002, and was assented to on 5 July 2002.³ The Bill, as first introduced, provided for the Attorney-General to make a declaration in writing that an organisation is a proscribed organisation if he or she was satisfied on reasonable grounds that:

- the organisation has committed or is committing a terrorist act,
 - the declaration is reasonably appropriate to give effect to a Security Council decision,
- or,

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- the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country.⁴

The Senate Legal and Constitutional Legislation Committee's [report](#) on the Bill noted that these proposed proscription powers raised the most concern in submissions and during public hearings.⁵

In particular, the Committee noted the following criticisms:

- the breadth of the discretion, especially by reference to a perceived threat to 'integrity'
- that the declarations were effectively unreviewable
- that a proscribed organisation could not apply for revocation, and
- that proposed offences were excessively broad, especially that of assisting such an organisation, in light of the strict liability element.⁶

The Committee also noted suggestions that were made to it including:

- calling them 'terrorist', rather than 'proscribed' organisations
- giving the Parliament the power to decide, or to at least disallow the declarations.⁷

The Committee's recommendations included:

- restricting the grounds of proscription, and
- narrowly defining proposed offences in relation to proscribed organisations.⁸

Current proscription provision

The Government and Labor Opposition reached a compromise on Opposition amendments and revised the Bill to take into consideration some of the concerns noted above.

The provisions of the original Bill were thus narrowed. Accordingly, the definition of terrorist organisation in the *Criminal Code* is:

- an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs), or
- an organisation that is specified by the regulations.⁹

Before the Governor-General can make a regulation, the Minister (currently the Commonwealth Attorney-General) must be satisfied on reasonable grounds that:

- the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and

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- the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and
- the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur).¹⁰

In practice, the definition of terrorist organisation was narrowed, at the Labor Opposition's insistence, to a requirement that a connection between an organisation and a terrorist act is proven or that a United Nations decision relating to terrorism with regard to that organisation is required before any regulation prescribing an organisation could be tabled.

Process for proscription

Special regulations were set up in order to list these terrorist organisations. These are called the Criminal Code Regulations 2002.¹¹ At the time of writing, there are 6 organisations listed: Al Qaida was listed on 21 October 2002, Jemaah Islamiya on 23 October 2002,¹² and 4 other organisations were listed on 14 November.¹³ Each regulation ceases to have effect after 2 years.¹⁴ A regulation also ceases to have effect if it is repealed or the UN decision ceases to have effect.¹⁵ Identical regulations can be remade at any time.¹⁶

What follows from the proscription

If an organisation is listed in the Criminal Code Regulations 2002 made under Division 102 of *Criminal Code*, it means that the prosecution does not need to prove that organisation's engagement in a terrorist act in court. This is because the Minister (the Attorney-General) is already required to be satisfied that the organisation is the subject of a Security Council decision and is involved in the doing of a terrorist act (whether or not it has occurred) prior to listing. In theory, this listing could be challenged in a judicial review application. However, the existence of a Security Council decision would tend to eliminate this possibility.

The Government has stated that the listing of organisations serves a number of purposes including that it puts people on notice not to deal with the listed organisation and facilitates the investigation and prosecution of those engaged in supporting or carrying out the activities of terrorist organisations.¹⁷

The offences in Subdivision 102B of the *Criminal Code* relating to terrorist organisations are that it is an offence to be an individual who knows, or is reckless as to whether, the organisation is a terrorist organisation when he or she:

- directs,
- recruits for,
- trains or is trained by,

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- gets funds to or from, or
- provides support or resources to

a terrorist organisation.

The penalty for persons who know the organisation is a terrorist organisation is 25 years, and for those reckless as to whether the organisation is a terrorist organisation is 15 years.¹⁸

It is also an offence to be a member of a terrorist organisation if the person knows the organisation is a terrorist organisation. The penalty is 10 years. This offence will not apply if a person can demonstrate that he or she took all reasonable steps to cease to be a member of the organisation as soon as practicable after finding out the organisation was a terrorist organisation.

Charter of the United Nations proscription

There is a separate list of terrorist persons and organisations that are proscribed to ensure that their assets are not used or dealt with. Anybody that knows of or holds assets in relation to any of those persons or organisations is obliged to freeze them and not deal with the assets or organisations, nor allow them to be dealt with or used. The penalty for these offences is 5 years imprisonment. As of 13 December 2002, these obligations arise under Part 4 of the *Charter of the United Nations Act 1945* (the UN Act) which sets out offences to give effect to Security Council resolutions.¹⁹

It is important to note that any organisations proscribed here, apart from the 6 presently proscribed above, are not proscribed terrorist organisations for the purposes of the *Criminal Code*. This does not mean that there can be no prosecution for being a member of such an organisation under the *Criminal Code*, but that any such prosecution would need to establish separately that the organisation is directly or indirectly engaged in or supporting the doing of terrorist acts (whether or not the act actually occurs). In other words, prosecution for terrorist organisation offences relying upon the first arm of the definition of terrorist organisation.

The UN Act implements the Security Council Resolution 1373. Sub-paragraph 1(c) of the UN Security Council Resolution 1373 states that

...States shall ... Freeze without delay funds and other financial assets or economic resources of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; of entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities;²⁰

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Since 15 October 2001, the Minister (the Minister for Foreign Affairs and Trade) could prescribe the organisations in accordance with the [Charter of the United Nations \(Anti-terrorism Measures\) Regulations 2001](#). On 13 December 2002, these Regulations were repealed and are replaced by Part 4 of the UN Act and through the operation of the [Charter of the United Nations \(Terrorism and Dealings with Assets\) Regulations 2002](#).²¹

Under the *Criminal Code*, a penalty of life imprisonment is also available for a person who provides or collects funds and is reckless as to whether the funds will be used to facilitate or engage in a terrorist act.²²

Reserve Bank Listing

It is worth noting that the Reserve Bank of Australia had also used a list of terrorist persons and entities for the purposes of prohibiting transactions involving persons or entities identified by the United Nations and the United States as being linked to terrorism. This was done under the Banking (Foreign Exchange) Regulations 1959. On 2 September 2002, these measures were revoked and are now replaced by the UN Act proscription noted above.²³

Main Provisions

Before the passage of this Bill, the *Criminal Code* included a delayed commencement for any regulations made listing terrorist organisations:

Regulations for the purposes of paragraph (c) of the definition of *terrorist organisation* in this section may not take effect earlier than the day after the last day on which they may be disallowed under section 48 of the *Acts Interpretation Act 1901*. That section has effect subject to this subsection.²⁴

This meant that any regulations made could not come into force until the end of the disallowance period which is 15 Parliamentary sitting days in both Houses of Parliament. This was unusual for the regulation making process in so far as it delays commencement until the end of the disallowance period. **Item 2 of Schedule 1** removes this requirement for a delayed commencement for the proscriptions. As a result, an organisation could be proscribed in Australia under the *Criminal Code* immediately following a Security Council decision relating to terrorism which named the organisation.

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Endnotes

- 1 For further information about this Bill, and in particular, further discussion of proscription generally, the reader is referred to the Bill's Digest No. 126, 2001-02 at: <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd126.htm>. The *Criminal Code Act 1995* is available: <http://scaletext.law.gov.au/html/pasteact/1/686/0/PA000110.htm>.
- 2 The Bill was withdrawn on 13 March 2002 and reintroduced on that day as the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2].
- 3 Although the Bill has now passed, it is described here as a 'Bill' for ease of reference.
- 4 See: proposed section 102.2 of the Bill as introduced on 12 March 2002 [here](#).
- 5 Senate Legal and Constitutional Committee, Report into the Terrorist package of Bills, May 2002, available at: http://www.aph.gov.au/senate/committee/legcon_ctte/terrorism/report/Security.pdf
- 6 *ibid.*, p. 58.
- 7 *ibid.*
- 8 *ibid.*
- 9 *Criminal Code*, para 102.1(1)(c)
- 10 *ibid.*, paras. 102.1(3)(a-c)
- 11 These Regulations can be found at <http://scaletext.law.gov.au/html/pastereg/3/1737/top.htm>
- 12 The United Nations Security Council listed Jemaah Islamiya as a terrorist organisation on 25 October 2002.
- 13 The list can be found at: <http://scaletext.law.gov.au/html/pastereg/3/1737/0/PR000110.htm>. The numbers for each regulation, and the dates for the listings can be found at: <http://scaletext.law.gov.au/html/pastereg/3/1737/0/PR000110.htm>
- 14 Criminal Code Act 1995, section 102.1(5)
- 15 *ibid.*, paras 102.1(5)(a-b)
- 16 *ibid.*, para. 102.1(5)(c)
- 17 The Hon Daryl Williams AM QC MP, Second Reading Speech to the Criminal Code Amendment (Terrorist Organisations) Bill 2002, House of Representatives, *Debates*, 23 October 2002, p. 8449. For a deeper examination of the role of proscription see Bills Digest No. 126, 2001-02 available at <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd126.htm>.
- 18 It is worth noting that wherever a penalty is specified and no contrary intention is expressed, according to section 4D of the *Crimes Act 1914*, it is to be assumed that these are maximum penalties.
- 19 *Charter of the United Nations Act 1945*, sections 20-22. This list of persons and organisations is to be found at: http://www.dfat.gov.au/icat/persons_entities/pe_consolidated_list.pdf
- 20 Security Council Resolution 1373 of 28 September 2001 is available at: http://203.6.171.3/icat/persons_entities/UN%20Security%20Council%20Resolution%201373

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[%20\(2001\).pdf](#). Further information about these listings to freeze terrorist assets is available at http://www.dfat.gov.au/icat/freezing_terrorist_assets.html.

- 21 Part 4 of the UN Act was inserted by Schedule 3 of the *Suppression of the Financing of Terrorism Act 2002*
- 22 *Criminal Code Act 1995*, section 103.1.
- 23 Reserve Bank of Australia, *Changes to Financial Sanctions*, Media Release, 2 September 2002, available at: http://www.rba.gov.au/MediaReleases/mr_02_16.html
- 24 *Criminal Code Act 1995*, section 102.1(4) as inserted by Schedule 3 of the *Suppression of the Financing of Terrorism Act 2002*.

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