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## Criminal Code Amendment (Terrorism) Bill 2002

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Criminal Code Amendment (Terrorism) Bill 2002

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21 January 2003

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# Criminal Code Amendment (Terrorism) Bill 2002

**Date Introduced:** 12 December 2002

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The substantive provisions commence on proclamation.

## Purpose

To remedy any constitutional deficiencies in the coverage of Part 5.3 (Terrorism) of the Criminal Code by re-enacting it in accordance with State references of power under section 51(xxxvii) of the Commonwealth Constitution.

## Background

### Section 51(xxxvii), Commonwealth Constitution

The Commonwealth Constitution divides power between the Commonwealth and the States. Section 51(xxxvii) provides one means of redistributing that power. It empowers the Commonwealth Parliament to make laws with respect to:

Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

Section 51(xxxvii) thus contains two powers—a reference power and an adoption power. The reference power enables a State or States to refer matters to the Commonwealth Parliament and the Commonwealth Parliament to make laws on those matters. The adoption power enables a non-referring State to subsequently adopt the Commonwealth law.<sup>1</sup>

The Territories are not mentioned in section 51(xxxvii). The Commonwealth can make laws about the Territories, including the self-governing territories, by virtue of its plenary power in section 122 of the Constitution. It can also use its section 51 powers to pass laws applying to the Territories.

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Section 51(xxxviii) has received little judicial attention and had comparatively little use. It provides a way of achieving statutory uniformity (at least in referring or adopting jurisdictions) while avoiding the difficulties experienced with constitutional referendums under section 128 or the potential constitutional hazards of cooperative legislative schemes. This does not mean that other ways of harmonising the law do not exist. The Commonwealth, the States and the Territories could if they wished, agree to model laws and enact them in each jurisdiction.<sup>2</sup> Nor does it mean there are no unanswered questions or different views about the use of section 51(xxxvii). For instance, it has been said that at least three questions arise about section 51(xxxvii):

- (a) whether or not a State retains power to legislate on a matter which it has referred to the Commonwealth;
- (b) whether or not a reference of power can be made subject to conditions as to its exercise, or its duration; and
- (c) whether or not the referral of power can be revoked.<sup>3</sup>

And, according to Professor Cheryl Saunders:

In earlier times, the difficulty was thought to lie in uncertainty about whether a referring State retained the power to legislate in relation to the matter; whether a reference could be limited in time, or terminable; whether an apparently absolute reference could be revoked. For the most part, these questions have been resolved in a manner that is satisfactory to the States. In *Board of Examiners under the Mines Safety and Inspection Act 1994 (WA) v Lawrence*, French J described the question as to whether an unlimited reference can be revoked as “open”. Several other lines of authority suggest that revocation should be possible in principle ...

In the wake of the negotiations over the corporations reference, however, it is possible to see that the real problem from the standpoint of the States lies deeper — in the very qualities that make the reference power a relatively simple and transparent co-operative technique. A Commonwealth law pursuant to a reference has all the usual qualities of a head of a Commonwealth law. ... A State law that is inconsistent with a Commonwealth law enacted pursuant to a reference will be invalid to the extent of the inconsistency, pursuant to the usual operation of s 109. There is some chance that the principle of paramountcy might preclude revocation of an otherwise unlimited reference; in any event there is a question about the effect of lapse or revocation on a previously valid Commonwealth law. Genuine consultation and co-operation in relation to a regulatory scheme may be even more difficult to achieve where the Commonwealth is exercising its own power ...<sup>4</sup>

Different approaches have been used in the legislation that refers power to the Commonwealth. In some cases, a general reference of a subject matter or matters is used. For instance, the Commonwealth Powers (Family Law—Children) Acts enacted by all States, except Western Australia, in the late 1980s and early 1990s, referred enumerated matters to the Commonwealth—child maintenance, child bearing expenses, custody,

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guardianship and access to children, and determination of parentage.<sup>5</sup> They also effectively excluded some matters from the references—for example, adoption<sup>6</sup> and child protection.

Text reference, containing the terms of the reference in the form of a Bill, is another approach, one that has been taken in mutual recognition and corporations legislation. It is also the referral method in relation to terrorism. Such references may also include provisions enabling the text to be amended and specifying pre-conditions that must be met before an amendment can occur.

More detailed information about referrals of power can be found at in [Bills Digest No. 140 of 2000-01](#) (Corporations Bill 2001). As that Bills Digest points out, a list of State referral legislation is reproduced as a [note](#) to the Commonwealth of Australia Constitution Act. Since Federation, 45 State referral Acts have been passed: NSW has passed nine referral Acts, Victoria has passed eight such Acts, Queensland, seven; South Australia six; Western Australia, eight; and Tasmania, seven.

While, as stated earlier, there is no express mention in section 51(xxxvii) of whether a State can terminate a reference of power or whether referrals can be time-limited, the States have clearly acted on the assumption that they can do—with State referral Acts including provisions that enable references to be terminated or which state that they will expire on a certain date, or both.<sup>7</sup> At present, there are 26 State referral Acts in force. The earliest of these date from 1931<sup>8</sup> and the most recent from 2001.<sup>9</sup> More referrals are likely.<sup>10</sup> On 8 November 2002, the Standing Committee of Attorneys-General agreed to refer powers over de facto relationship property matters to the Commonwealth.<sup>11</sup>

## Responses to terrorism

The Coalition Government's policy for the 2001 General Election, *A Safer and More Secure Australia* said that, if re-elected, the Coalition would convene a Leaders Summit to seek outcomes on:

Ways to improve Australia's ability to combat transnational crime and terrorism;

Options for reforming or replacing the National Crime Authority to ensure we have a national body fully equipped to deal with future transnational criminal activities;

A reference of constitutional power to the Commonwealth to support an effective national response to threats of transnational crime and terrorism.

At the Leader's Summit on 5 April 2002, the Commonwealth, the States and the Territories negotiated an Agreement on Terrorism and Multi-Jurisdictional Crime. In relation to terrorism, this included a decision to:

... take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation,

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including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those which apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in legislation.<sup>12</sup>

In 2002, the Commonwealth Parliament passed a number of counter-terrorism laws. The most important of those laws were the *Security Legislation (Terrorism) Act 2002*, the *Suppression of Terrorist Bombings Act 2002* and the *Suppression of the Financing of Terrorism Act 2002*.<sup>13</sup>

The Commonwealth Parliament is endowed with powers that, for the most part, are enumerated in the Constitution. It does not have any express powers over matters like terrorism or criminal law. Instead, it relied on a raft of legislative powers to enact its counter-terrorism statutes. Some laws, like the *Suppression of Terrorist Bombings Act 2002* appear to have a secure foundation in the external affairs power. With others, like the *Security Legislation (Terrorism) Act 2002*, there are concerns that available Commonwealth powers do not supply a constitutionally comprehensive and secure base for the legislation. For instance, the Attorney-General has suggested that there might be gaps in Commonwealth legislative power where ‘terrorist activity was entirely state-based and did not have any Commonwealth element in it or foreign element in it.’<sup>14</sup>

On 8 November 2002, the Standing Committee of Attorneys-General finalised the details of legislation to refer State constitutional power over terrorism to the Commonwealth in order to strengthen the Commonwealth’s counter-terrorism laws by plugging any constitutional gaps that might exist in those laws and thus creating uniform coverage throughout Australia.<sup>15</sup>

### State referrals of power relating to terrorism offences and terrorist organisations

At the time of writing, referral statutes had been enacted in New South Wales<sup>16</sup>, South Australia<sup>17</sup>, Tasmania<sup>18</sup>, and Western Australia.<sup>19</sup> Neither Queensland nor Victoria has, as yet, introduced referral bills.

In each case, the State referral legislation contains a Schedule in the same terms as **new Part 5.3** of the Criminal Code (Terrorism). State referral legislation also contains common provisions that:

- describe the matters being referred to the Commonwealth (in similar terms to the Commonwealth Bill).<sup>20</sup> These matters are the text of Part 5.3 and an amendment reference.

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- contain termination provisions. For instance, the NSW Act enables the Governor to fix a day as the day on which the references will terminate (this date must allow for a three month notice period). The Governor will be able to revoke a termination proclamation (so long as this is done before the termination date takes effect).<sup>21</sup> The South Australian and Tasmanian Acts are along similar lines.<sup>22</sup> Western Australian legislation is different in one regard. During debate in the Legislative Assembly, it was amended so that the Governor's proclamation can only be made if recommended by resolution passed by both Houses of Parliament.<sup>23</sup>

Additionally, State referral legislation passed in South Australia, differs from that passed in NSW, Tasmania and Western Australia in one important aspect. During debate in the South Australian Parliament, the South Australian legislation was amended to insert a specific reference to the amendment mechanism agreed upon by all Governments. Thus:

- subsection 4(6) of the South Australian legislation states that amendments to terrorism and criminal responsibility legislation will not come within the scope of the referral unless made in terms approved by a majority of States, the ACT and the Northern Territory and at least four States. A similar provision is found in the Commonwealth Bill.
- subsection 4(7) of the South Australian legislation provides that a Gazette notice published by a designated person<sup>24</sup> for a State or Territory, stating that the State or Territory has approved the terms of the amendment, is conclusive evidence of that approval.

In moving the amendment, the South Australian Attorney-General, Michael Atkinson MP, said that it was designed to protect the position of the State and referred to differences between the State's legal advice and the Commonwealth's legal advice about how constitutional certainty could best be achieved in this regard.<sup>25</sup> More detail is provided in the Main Provisions section of this Digest (see **new section 100.8**).

## Main Provisions

### Commencement

**Clause 2** provides that the substantive parts of the legislation will commence on a day to be fixed by Proclamation. Commencement provisions in Commonwealth legislation often have a default commencement mechanism—for example, six months after Royal Assent, if not commenced earlier by Proclamation. This ensures that the will of the Parliament is not frustrated by Executive inaction. However, the Bill's Explanatory Memorandum explains:

Due to the uncertain timing of the passage of State reference legislation, this may not be within six months after the Bill receives Royal Assent. The Bill therefore does not

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provide for commencement on the earlier of proclamation or six months after Royal Assent.<sup>26</sup>

While States whose referral statutes are delayed could later adopt the Commonwealth law under section 51(xxxvii) of the Constitution, it may be that this is seen as a less than optimal course. For instance, an adopting State might have to enact its own legislation to reflect any changes to the Commonwealth law whereas amendments approved by referring States will automatically apply in those jurisdictions.

## Schedule 1—Amendment of the *Criminal Code Act 1995*

**Item 1 of Schedule 1** repeals existing Part 5.3 (Terrorism) of the Criminal Code and substitutes a **new Part 5.3**, in the following terms.

### Definitions

Existing section 100.1 of the Commonwealth Criminal Code was inserted by the *Suppression of the Financing of Terrorism Act 2002* and contains definitions that apply to Part 5.3 of the Code.

**New section 100.1** reproduces those definitions and adds two new definitions required because the Bill deals with a referral of powers from the States to the Commonwealth. The first is a definition of the term, ‘express amendment’ (see below), the second is a definition of the term, ‘referring State’. The latter ‘has the meaning given by new section 100.2.’

### Referring States

According to **new section 100.2**, a State will be a ‘referring State’ if its Parliament has referred to the Commonwealth Parliament:

- matters that enable the Commonwealth Parliament to enact **new Part 5.3**, as it relates to matters within State legislative competence. This is the text reference, and
- the ‘matter of terrorist acts, and of actions relating to terrorist acts’ to the extent of making ‘express amendments’ to **new Part 5.3** and to Chapter 2 of the Commonwealth Criminal Code (as it specifically relates to Part 5.3). (Chapter 2 of the Criminal Code deals with principles of criminal responsibility and is integral to matters of proof in relation to offences.) This is the amendment reference.

A State may terminate either the text reference or the amendment reference, or both [**new subsection 100.2(5)**]. **New subsection 100.2(4)** provides, however, that:

A State is a referring State even if a law of the State provides that the reference to the Commonwealth Parliament of either or both of the matters covered by subsections (2) and (3) is to terminate in particular circumstances.

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### Constitutional bases for new Part 5.3 of the Criminal Code and application of provisions

**New section 100.3** sets out the constitutional bases relied on for the operation of **new Part 5.3** (Terrorism).

In a ‘referring State’, the operation of **new Part 5.3** will be based on both the Commonwealth’s legislative powers and the supplementary powers conferred on the Commonwealth as a result of the references of power under section 51(xxxvii).

In a ‘non-referring State’, the operation of **new Part 5.3** will be based on Commonwealth legislative powers contained in section 51 of the Constitution. The particular powers relied on are set out in **new subsection 100.4(5)**. They are said to include, without being limited to, such things as actions or threats affecting the Commonwealth, its authorities or constitutional corporations; actions or threats made by constitutional corporations; threats or actions involving the use of postal services or electronic communications; or actions disrupting constitutional trade or commerce, constitutional banking or insurance etc. With the exception of references to matters physically external to Australia<sup>27</sup>, this is the same list that appears in existing subsection 100.2(2) of the Criminal Code.<sup>28</sup>

In the ACT, the Northern Territory or an external territory, the operation of the law will be based on the Commonwealth’s constitutional power over territories (section 122) and on its section 51 powers.

Outside Australia and its external territories, the operation of the law will be based on the external affairs power [section 51(xxix)] and any other relevant legislative power found in section 51 of the Constitution.

### Application of provisions

**New subsection 100.4(1)** provides that **new Part 5.3** applies to:

- actions or threats of action that involve terrorist acts, and
- ‘preliminary acts’ that ‘relate to terrorist acts but do not themselves constitute terrorist acts’.

### Operation of the *Acts Interpretation Act 1901* (Cwlth)

**New section 100.5** provides that in interpreting the referred text, the *Acts Interpretation Act 1901* (Cwlth) is to be used as in force on the day that **Schedule 1** of the Bill commences. This provisions gives certainty to the application of the Acts Interpretation Act to **new Part 5.3** because State referral Acts will commence on a variety of dates. In terms of any amendments that might be made in the future to the Acts Interpretation Act, the Explanatory Memorandum remarks:

... it is envisaged that changes to that Act could be applied to the interpretation of the legislation by an appropriate amendment of section 100.5 in reliance on the amendment reference.<sup>29</sup>

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### Preservation of concurrent State and Territory laws

In part, **new section 100.6** is designed to take account of section 109 of the Commonwealth Constitution, which states:

When the law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

Section 109 operates to invalidate State laws that are directly inconsistent with a valid Commonwealth law or which are indirectly inconsistent because the Commonwealth law ‘covers the field.’ **New section 100.6** takes account of the fact that **new Part 5.3** might ‘inadvertently cover an unsought State field’<sup>30</sup> and so it expressly preserves the concurrent operation of State laws.

Section 109 does not apply to the Territories. However, by reason of its position as a paramount legislature, Commonwealth laws will override inconsistent Territory laws. So **new section 100.6** also preserves the concurrent operation of Territory laws.

**New section 100.6** also ensures that, if a person has been punished under State or Territory law for an act or omission that is also a Commonwealth terrorism offence, the person cannot be punished again under Commonwealth terrorism laws. Such a person is thus protected against double jeopardy.

### Modification of the interaction between the Commonwealth law and State and Territory laws

**New section 100.7** addresses the possibility that unintended direct inconsistency may arise between the Commonwealth law and State and Territory laws. Its aim is to ensure that regulations can be made modifying (rolling back) the operation of **new Part 5.3**—to provide that Part 5.3 does not apply to a matter dealt with by a State or Territory law or so that no inconsistency arises between the operation of **new Part 5.3** and State and Territory law. This is contemplated in State referral legislation which provides that terrorism legislation or criminal responsibility legislation can have its operation affected, otherwise than by express amendment, ‘by provisions of instruments authorised by that legislation.’<sup>31</sup>

**New section 100.7** is a Henry VIII clause—that is, it enables primary legislation to be amended by an Executive instrument. Henry VIII clauses are often, but not universally, frowned upon. In 1992, the Administrative Review Council commented:

... it is clearly inappropriate for a body subordinate to Parliament to amend or alter an Act made by Parliament. This is particularly so when changes affect the essential elements of a scheme, alter the ambit of legislation, place restrictions on rights, or alter obligations.<sup>32</sup>

One of functions of the Senate Scrutiny of Bills Committee is to look at whether legislative power has been inappropriately delegated in proposed Commonwealth

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legislation. In relation to the Corporations Bill 2001, which contained a similar clause, the Committee remarked:

By virtue of clause 5I, regulations may be made which would modify the operation both of this bill, and other related bills. Specifically, regulations may modify the operation of the Corporations legislation so that its provisions do not apply to a matter that is dealt with by a State or Territory law, or so that no inconsistency arises between its operation and the operation of a provision of a State or Territory law.

The Explanatory Memorandum observes that this provision is necessary to ensure the constitutional validity of the legislation.

*In these circumstances, the Committee makes no further comment on this provision.*<sup>33</sup>

### Approval for changes to or affecting new Part 5.3

**New section 100.8** provides that ‘express amendments’:

- to **new Part 5.3**, or
- to Chapter 2 that apply only to Part 5.3 (whether or not expressed to apply only to Part 5.3)

cannot be made unless a majority of States, the ACT and the Northern Territory agree and at least 4 States agree.

The term, ‘express amendments’, means ‘direct amendments’ by insertions, omissions, repeals, substitutions or relocation of words or matter (see the definition in **new section 100.1**). **New section 100.8** does not apply to the making of regulations under **new section 100.7** (a process reserved for the Commonwealth alone).

Chapter 2 of the Criminal Code is important because it deals with matters such as the burden of proof that is placed on a defendant, the criminal responsibility of minors, whether fault elements apply to offences and defences. The constitutional and policy reasons for strictly limiting the role of the States and Territories in amending Chapter 2 of the Commonwealth Criminal Code are clear. However, the wording of **new paragraph 100.8(1)(b)** may have unintended, albeit unlikely consequences.

Would it stop the Commonwealth Parliament from substantially amending the application of Chapter 2 to **new Part 5.3**, even if the amendments primarily affected **new Part 5.3** and little else? Other Commonwealth terrorism offences, apart from those in Part 5.3, exist. Part 5.3 appears in Chapter 5 of the Criminal Code.<sup>34</sup> Chapter 4 of the Criminal Code<sup>35</sup> contains two terrorist bombing offences.<sup>36</sup> Would **new paragraph 100.8(1)(b)** enable the Commonwealth to use the amendment reference to unilaterally amend the application of Chapter 2 to **new Part 5.3** offences if, for instance, it amended Chapter 2 to change the rules about the culpability of minors<sup>37</sup> for terrorist bombing and Part 5.3 offences or to provide that a person accused of one of those offences bore a legal burden of proof?<sup>38</sup> Of

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course if a State objected it could terminate its reference, but it would need to give three months' notice.

Another matter which has been raised is the effectiveness of **new section 100.8** in a constitutional sense. During debates on the Commonwealth Powers (Terrorism) Bill 2002 in the South Australian Parliament, the State Attorney-General said:

... there is a question as to whether the Commonwealth can fetter its legislative power in this way. Therefore, there is still debate between the Commonwealth and the States about whether the States should enact a further provision in referral legislation. If the Commonwealth and other States agree that a provision should be included in the referral Bill, we will amend this Bill at a later stage. The alternative is to record this agreement in an intergovernmental agreement. The inter-governmental agreement would have political value only. It would not be enforceable in the Courts or any tribunal. There would be no legal sanctions for contravention of the agreement.<sup>39</sup>

The South Australian legislation was amended, as foreshadowed by Attorney-General Atkinson and described in the Background section of this Digest, to include details of the amendment mechanism in the State referral Act. In moving the amendment the South Australian Attorney-General said:

Our advice is that section 100.8 is ineffective, but that the same rule in the referral bill would be effective.

I will not hide from the house that the commonwealth does not think the same rule in the referral bill is desirable or effective. I am of the opinion that the question of desirability is for the state and not the commonwealth. So far, the commonwealth has not given me access to its legal advice that the amendment I now propose is ineffective. If it does so, I will have that advice examined. I want to preserve the position of the state, so I seek to insert it now.<sup>40</sup>

In his Second Reading Speech for the Terrorism (Commonwealth Powers) Bill 2002, NSW Premier, Bob Carr MP, said:

I note that there is still debate between the Commonwealth and other States as to whether this amendment provision should be enacted by legislation or by an intergovernmental agreement. New South Wales has decided to go ahead with this bill on the assumption that it will be done by way of an intergovernmental agreement. However, if the Commonwealth and other States agree that it must be done by legislation, we will amend this bill at a later stage.

I am introducing the bill today because I do not want to delay this important legislation over one technicality.<sup>41</sup>

South Australia's concerns relate to the suggestion that **new section 100.8** might be constitutionally invalid and, if found to be so by the High Court and severed from the rest of the Commonwealth's legislation, the States might be in a position where the Commonwealth law could be amended without their approval.<sup>42</sup>

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## Terrorism offences

Terrorism offences are found in existing Division 101 of the Criminal Code. These provisions were inserted by the *Security Legislation Amendment (Terrorism) Act 2002*, which created the following terrorist offences:

- engaging in terrorist acts (section 101.1)
- providing or receiving training connected with a terrorist act (section 101.2)
- possessing a thing connected with a terrorist act (section 101.4)
- collecting or making documents connected with a terrorist act (section 101.5)
- doing anything in preparation for, or planning, a terrorist act (section 101.6).

**New sections 101.1, 101.2, 101.4, 101.5 and 101.6**, respectively, replicate these provisions.

## Terrorist organisations

Provisions relating to terrorist organisations are found in Division 102 of the Criminal Code and were inserted by the *Security Legislation Amendment (Terrorism) Act 2002* and amended by the *Criminal Code Amendment (Terrorist Organisations) Act 2002*.

Section 102.1 of the Criminal Code provides that a ‘terrorist organisation’ is an organisation that:

- is directly or indirectly engaged in preparing, planning for, assisting in or fostering terrorist acts, or
- has been declared to be a terrorist organisation by way of a regulation made by the Governor-General. Before the Governor-General can make such a regulation the Attorney-General must be satisfied of a number of things. These are that the UN Security Council has made a decision relating to terrorism and has identified the organisation in that decision. The Attorney-General must also be satisfied that the organisation is directly or indirectly engaged in preparing, planning for, assisting in or fostering terrorist acts.

If not repealed earlier, regulations identifying an organisation as a terrorist organisation cease to have effect on the second anniversary after they are made.

**New section 102.1** replicates existing section 102.1, apart from two minor changes. The first is some re-numbering.<sup>43</sup> The second is an additional subsection, **new subsection 102.1(6)**. The new subsection provides that, for the purpose of making regulations declaring an organisation to be a terrorist organisation, it does not matter whether the UN Security Council decision was made prior to or after 6 July 2002. The date, 6 July 2002, is the commencement date of item 5 of Schedule 1 of the *Security Legislation Amendment*

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*(Terrorism) Act 2002*. Item 5 states that, for the purposes of declaring an organisation to be a terrorist organisation, it does not matter whether a UN Security Council decision on which the regulation was based occurred before or after the commencement of item 5. **New subsection 102.6(6)** will ensure that there is no gap in legislative coverage.

Division 102 of the Criminal Code also creates offences relating to terrorist organisations. These offences are:

- directing the activities of a terrorist organisation (section 102.2)
- being a member of a terrorist organisation which is the subject of a regulation made by the Governor-General (section 102.3)
- recruiting a person to join a terrorist organisation (section 102.4)
- giving training to or receiving training from a terrorist organisation (section 102.5)
- receiving funds from or giving funds to a terrorist organisation (section 102.6)
- providing support or resources that would assist a terrorist organisation engage in terrorist activity (section 102.7).

These provisions are reproduced in **new sections 102.2-102.7**, respectively.

### Financing of terrorism offence

Division 103 of the Criminal Code creates a financing of terrorism offence and was inserted by the *Suppression of the Financing of Terrorism Act 2002*. This provision is replicated by **new section 103.1**.

### Transitional provisions

**New section 106.1** preserves the effect of regulations made by the Governor-General declaring certain organisations to be terrorist organisations. These organisations are:

- Al Qa'ida/ Islamic Army
- Jemaah Islamiyah, the network in southeast Asia, founded by the late Abdullah Sungkar
- Abu Sayyaf Group
- Harakat Ul- Mujahideen
- Armed Islamic Group
- Salafist Group for Call and Combat/ GSPC.<sup>44</sup>

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## Schedule 2—Amendment of the *Security Legislation Amendment (Terrorism) Act 2002*

### Review of terrorism legislation

Section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* requires a review of specified counter-terrorism statutes<sup>45</sup> to take place as soon as practicable after the third anniversary of its commencement. It establishes a committee to review the operation, effectiveness and implications of the legislation. Public submissions and public hearings are mandated. The review will report to the Attorney-General and the Parliamentary Joint Committee on ASIO, ASIS and DSD and must be tabled in Parliament (subject to any deletions on safety, criminal justice or security grounds).

**Item 1 of Schedule 2** adds the *Criminal Code Amendment (Terrorism) Act 2002* to the list that will be reviewed.

## Endnotes

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- 1 It might then be necessary for that State to enact legislation adopting any Commonwealth amendments before those amendments apply in the State. James A Thomson, 'Adopting Commonwealth laws: Section 51(xxxvii) of the Australian Constitution', *Public Law Review*, 4(3), September 1993, pp. 153-7. An example of an adoption statute is the *Child Support (Adoption of Laws Act 1990* (WA)—a law that adopts two Commonwealth statutes, the *Child Support (Registration and Collection) Act 1988* and the *Child Support (Assessment) Act 1989*, dealing with child maintenance, to the extent that they do not already apply to Western Australia.
- 2 This was the purpose of the Model Criminal Code project.
- 3 Constitutional Commission, *Final Report of the Constitutional Commission*, Volume Two, 1988, p. 754.
- 4 Cheryl Saunders, 'A new direction for intergovernmental arrangements', *Public Law Review*, 12(4), December 2001, p. 282.
- 5 See, for example, section 3, *Commonwealth Powers (Family-Law Children) Act 1986* (NSW). The South Australian and Tasmanian Acts were entitled, *Commonwealth Powers (Family Law) Act 1986* (SA) and *Commonwealth Powers (Family Law) Act 1987* (Tas).
- 6 'Adoption' is not explicitly excluded by the Victorian reference. Stephen Parker, Patrick Parkinson & Juliet Behrens, *Australian Family Law in Context. Commentary and Materials*, 2<sup>nd</sup> ed, LBC Information Services, 1999.
- 7 For example, the *Commonwealth Powers (War) Act 1915* (NSW) provided that the State Act and the reference it made would only apply for the duration of World War I and for 12 months thereafter. The *Corporations (Commonwealth Powers) Act 2001* (NSW) states that the two references made by that Act can terminate in a number of ways. Thus both references terminate five years after the commencement of the Corporations legislation or on a later day

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- proclaimed by the State Governor. The amendment reference alone can be terminated on an earlier day proclaimed by the State Governor.
- 8 *Debt Conversion Agreement Act 1931 (No.2)* (Vic) and *Commonwealth Legislative Power Act 1931* (SA).
  - 9 In 2001, each State passed legislation referring certain powers over corporations to the Commonwealth.
  - 10 They may become increasingly attractive given concerns about cooperative legislative schemes that have arisen since the High Court's decisions in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 and *R v. Hughes* (2000) 202 CLR 535.
  - 11 Attorney-General, 'Commonwealth wins de facto property powers', *Media Release*, 8 November 2002. Some jurisdictions also wanted to refer powers over same sex relationships but the Commonwealth refused to agree. See Attorney-General, 'Doorstop, Fremantle', *Transcript*, 8 November 2002.
  - 12 Attorney-General, *Media Release*, '[National Move to Combat Terror](#)', 7 April 2002 (accessed 20 January 2003).
  - 13 Another counter-terrorism statute passed in 2002 was the *Telecommunications Interception Legislation Amendment Act 2002*. Information about the major Commonwealth counter-terrorism statutes (prior to amendment and passage) can be found in Bills Digests for the [Criminal Code Amendment \(Suppression of Terrorist Bombings\) Bill 2002](#), [Security Legislation Amendment \(Terrorism\) Bill 2002](#), [Suppression of the Financing of Terrorism Bill 2002](#), and [Telecommunications Interception Legislation Amendment Bill 2002](#). The report of the Senate Legal and Constitutional Legislation Committee on [8 May 2002](#) is also relevant. Background information about terrorism and the law can be found in two Parliamentary Library Research Papers: [Terrorism and the Law in Australia: Legislation, Commentary and Constraints](#) and [Terrorism and the Law in Australia: Supporting Materials](#) (accessed 20 January 2003).
  - 14 Attorney-General, 'Doorstop, Fremantle', *Transcript*, 8 November 2002.
  - 15 Attorney-General, 'Reference of terrorism power', *Media Release*, 8 November 2002.
  - 16 *Terrorism (Commonwealth Powers) Act 2002* (NSW). The Act commenced on 13 December 2002.
  - 17 *Terrorism (Commonwealth Powers) Act 2002* (SA). At the time of writing the Bill had received Royal Assent but not been proclaimed to commence.
  - 18 *Terrorism (Commonwealth) Powers Act 2002* (Tas). The Act commenced on 1 January 2003.
  - 19 *Terrorism (Commonwealth Powers) Act 2002* (WA). The legislation received Royal Assent on 14 January 2003 but at the time of writing had not been proclaimed to commence.
  - 20 See, for example, section 4, *Terrorism (Commonwealth Powers) Act 2002* (NSW). See also section 4 of the South Australian and Western Australian Acts and section 5 of the Tasmanian Act.
  - 21 See, for example, section 5, *Terrorism (Commonwealth Powers) Act 2002* (NSW).

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- 22 See section 5 of the South Australian Act and section 6 of the Tasmanian Act.
- 23 See subsection 5(6), *Terrorism (Commonwealth Powers) Act 2002* (WA).
- 24 The expression, ‘designated person’, is defined as the Governor or Premier of a State, the Chief Minister of the ACT and the Administrator or Chief Minister of the Northern Territory. Subsection 4(8).
- 25 South Australia, Legislative Assembly, *Hansard*, 27 November 2002, p. 2049.
- 26 Explanatory Memorandum, p. 3.
- 27 Paragraphs 100.2(2)(n)-(o) of the Criminal Code (inserted by the *Security Legislation Amendment (Terrorism) Act 2002*).
- 28 Inserted by the *Security Legislation Amendment (Terrorism) Act 2002*.
- 29 Explanatory Memorandum, p. 5.
- 30 Saunders, *op.cit.*, p. 284.
- 31 See, for example, paragraph 4(4)(b), *Terrorism (Commonwealth Powers) Act 2002* (NSW). Also paragraph 4(4)(b) of the South Australian Act, paragraph 5(4)(b) of the Tasmanian Act and paragraph 4(4)(b) of the Western Australian Act.
- 32 Administrative Review Council, *Rule Making by Commonwealth Agencies, Report No.35*, AGPS, Canberra, 1992, p. 18.
- 33 *Alert Digest No. 6*, 23 May 2002, p. 16.
- 34 Chapter 5 is entitled ‘The security of the Commonwealth.’
- 35 Chapter 4 is entitled ‘The integrity and security of the international community and foreign governments.’
- 36 Subsections 72.3(1) and 72.3(2).
- 37 Chapter 2 provides that children under 10 years cannot be criminally responsible for an offence. Children over the age of 10 but under the age of 14 years can only be criminally responsible for an offence when they know that their conduct is wrong. The burden of proving this lies with the prosecution.
- 38 Section 13.4 of the Criminal Code provides that a legal burden of proof is only imposed on a defendant if the law does so expressly.
- 39 Second Reading Speech, *Terrorism (Commonwealth Powers) Bill*, South Australia, Legislative Assembly, *Hansard*, 21 November 2002, p. 1955. (It may be noted that there is no equivalent to proposed section 100.8 in the Corporations Act 2001 which was also largely based on the a referral of power from the States. In that case, the requirements for amendment are set forth in an [intergovernmental agreement](#).)
- 40 South Australia, Legislative Assembly, *Hansard*, 27 November 2002, p. 2049. No capitalisation in original.
- 41 NSW, Legislative Assembly, *Hansard*, 13 November 2002, p. 6696.

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- 42 See also Western Australia, Legislative Council, Standing Committee on Uniform Legislation and General Purposes, *Report of the Standing Committee on Uniform Legislation and General Purposes in relation to the Terrorism (Commonwealth Powers) Bill 2002, Report 6*, December 2002.
- 43 And, it appears, the correction of a drafting error in existing paragraph 102.1(6)(a).
- 44 Schedule 1, Criminal Code Regulations 2002.
- 45 These statutes are the *Security Legislation Amendment (Terrorism) Act 2002*, *Border Security Legislation Amendment Act 2002*, *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*, *Suppression of the Financing of Terrorism Act 2002* and the *Telecommunications Interception Legislation Amendment Act 2002*.

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