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## Criminal Code Amendment ( Hamas and Lashkar-e-Tayyiba) Bill 2003

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I N F O R M A T I O N   A N D   R E S E A R C H   S E R V I C E S

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No. 60 2003–04

Criminal Code Amendment ( Hamas and  
Lashkar-e-Tayyiba ) Bill 2003

Morag Donaldson and Nigel Brew  
Law and Bills Digest and the Foreign Affairs, Defence and Trade  
Groups  
6 November 2003

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# Criminal Code Amendment ( Hamas and Lashkar-e-Tayyiba ) Bill 2003

**Date Introduced:** 5 November 2003

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** 5 November 2003

## Purpose

To create a mechanism to identify and list the military wing of Hamas<sup>1</sup> ('Izz al-Din al-Qassam Brigades') and the Lashkar-e-Tayyiba organisation as terrorist organisations under Australian law. The proposed legislation enables the Governor-General to make regulations specifying each of the organisations as a 'terrorist organisation' where the Attorney-General is satisfied on reasonable grounds that the organisation is engaged in terrorism, rather than waiting for the United Nations Security Council ('UN Security Council') to identify the organisation as a terrorist organisation.

(The name of the Lashkar-e-Tayyiba organisation is spelt in a variety of ways, including 'Lashkar-e-Taiba' —pronounced 'toy-ba'. The name is sometimes shortened to 'LeT').

## Background

The Commonwealth Criminal Code provides that an organisation can be determined to be a 'terrorist organisation' in two ways. A court may find that an organisation falls within paragraph (a) of the definition of 'terrorist organisation' in subsection 102.1(1) of the Criminal Code when a terrorist organisation offence is prosecuted. Additionally, a terrorist organisation may be listed by a regulation made by the Governor-General if the UN Security Council has declared it to be such an organisation, or if it is a Hizballah organisation.

An extensive background to the terrorist organisation 'listing' arrangements under the Criminal Code can be found in the Bills Digests for the:

- *Security Legislation Amendment Act 2002*<sup>2</sup>

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- *Criminal Code Amendment (Terrorist Organisations) Act 2002*,<sup>3</sup> and
- *Criminal Code Amendment (Hizballah) Act 2003*.<sup>4</sup>

The Hamas and Lashkar-e-Tayyiba Bill seeks to amend Part 5.3 of the Commonwealth Criminal Code. Part 5.3 deals with terrorism. It contains provisions creating terrorist act offences (Division 101), terrorist organisation offences (Division 102) and financing of terrorism offences (Division 103). As indicated above, Division 102 also provides for the making of regulations for the listing of an organisation as a terrorist organisation in certain circumstances. ‘Listing’ an organisation effectively bans the organisation. This is because anyone who:

- directs the activities of a terrorist organisation<sup>5</sup>
- is a member of such an organisation<sup>6</sup>
- undertakes recruiting for such an organisation<sup>7</sup>
- gives training to or receives training from such an organisation<sup>8</sup>
- receives from, or makes funds available to such an organisation,<sup>9</sup> or
- provides support of the sort that would help the organisation engage in terrorist activities (as defined).<sup>10</sup>

commits a criminal offence and is liable, on conviction, to considerable penalties —up to 25 years’ imprisonment.

Since the commencement of the *Criminal Code Amendment (Terrorist Organisations) Act 2002* (on 23 October 2002), the operation of terrorist organisation regulations made by the Governor-General is no longer postponed to the end of the disallowance period.<sup>11</sup> The regulations commence on gazettal or as otherwise specified.

The Hamas and Lashkar-e-Tayyiba Bill is specifically designed to ban Hamas’ military wing and the Lashkar-e-Tayyiba organisation in Australia. Neither group has been identified by the UN Security Council as a terrorist organisation, but the Lashkar-e-Tayyiba organisation has been proscribed (or banned) in the United States of America, Canada, the European Union and the United Kingdom and Pakistan. Whilst the United States of America and Canada have proscribed Hamas in its entirety, the European Union and the United Kingdom have proscribed only its military wing.

In relation to Hamas, the Attorney-General has said that while there has been no direct linkages with Australia, it is ‘a matter of prudence’ to take action in relation to this organisation. In relation to the Lashkar-e-Tayyiba, the Attorney-General has stated that

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advice indicates the Lashkar-e-Tayyiba has links with Australia and therefore poses a threat to Australia and its interests.<sup>12</sup>

The Bill was passed by the House of Representatives on 5 November 2003.

### **Press commentary**

Hamas' military wing and the Lashkar-e-Tayyiba organisation have been the subject of recent media coverage, particularly since the deportation of French terrorist suspect, Willie Brigitte, who is considered to have links to the Lashkar-e-Tayyiba organisation. On 12 December 2001, the Attorney-General claimed that Australian terrorist suspect, David Hicks, had trained with the Lashkar-e-Tayyiba organisation.<sup>13</sup>

On 4 November 2003, the Attorney-General issued a press release indicating that the Government proposed to 'move in the Parliament to create the basis for the listing of two organisations as terrorist organisations to overcome a deficiency in the law'. The Lashkar-e-Tayyiba organisation and the military arm of Hamas are named in the press release as the two organisations which are the subject of the Bill.<sup>14</sup>

### **Responses of political parties**

On 5 November 2003, *The Australian* reported that the Opposition (following an ASIO briefing) has agreed with the Government to ban the two organisations.

Both the Australian Democrats and the Greens have expressed doubts about whether the issue is of such urgency as to justify recalling the Senate to debate the Bill.<sup>15</sup>

### **The military wing of Hamas (Izz al-Din al-Qassam Brigades)**

It is beyond the scope of this Digest to discuss in any detail the nature and activities of the Palestinian group, Hamas. It must be noted, however, that the Bill is only concerned with the military wing of the organisation, known as Hamas-Izz al-Din al-Qassam Brigades.

Similar to Hizballah/Hezbollah, whilst Hamas is internationally known for its terrorist attacks (predominantly suicide bombings), it also operates local welfare and education programmes, without which, it is reported, many Arab citizens would have little or no access to social security, medical treatment or schooling:

Hamas prospers in particular among poor refugees and city dwellers. In spite of its perception as a primarily murderous organisation, its main energies and activities have been focused on providing social and communal services through a well-administered system of institutions, including clinics, kindergartens and schools, a

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blood bank, and welfare services such as food and other basic commodities for the needy.<sup>16</sup>

### Proscription as a Terrorist Group

Several countries and international bodies have proscribed Hamas in some form or another. The following countries have banned Hamas outright, in its entirety:

- the United States of America
- Canada.

The following countries have distinguished between the military wing and the charitable wing of Hamas, and banned only the military wing (Hamas-Izz al-Din al-Qassem):

- the European Union
- the United Kingdom.

Under the provisions of UN Security Council Resolution 1267, the UN maintains a list of entities deemed to be associated with the Taliban and/or Osama bin Laden and/or al-Qaeda, and Member States are obliged to 'freeze the assets, prevent the entry into or the transit through their territories, and prevent the direct or indirect supply, sale and transfer of arms and military equipment with regard to the individuals/entities included on the list'.<sup>17</sup> Significantly, the United Nations has **NOT** included Hamas on this list as at 4 November 2003.

Under the provisions of Part 4 of the *Charter of the United Nations Act 1945* (Cth) and the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002, Australia can list an organisation for the purposes of freezing its assets, if the Foreign Minister is satisfied that the group is engaged in terrorist acts. It is hoped, of course, that freezing an organisation's assets and source of funds will have the effect of shutting down the organisation. This listing makes it an offence for persons who hold assets that are owned or controlled by listed entities to use or deal with those assets, and for anyone to fund or resource listed entities in any way. Australia included Hamas on this list, in its entirety, on 21 December 2001.

### Lashkar-e-Tayyiba

Likewise, it is beyond the scope of this Digest to discuss in any detail the nature and activities of the Lashkar-e-Tayyiba organisation.

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The Lashkar-e-Tayyiba is a Pakistan-based radical Islamist group which primarily operates in the disputed Jammu and Kashmir region. Its overall aim is to liberate Muslims within Jammu and Kashmir and to merge it with Pakistan. Whilst sources would seem to indicate that the Lashkar-e-Tayyiba is known for its attacks on Indian politicians and other Indian authority figures, Indian civilians and Israeli tourists have also been the targets of attack in the past. The Lashkar-e-Tayyiba is reported to be the armed wing of Markaz Da'wa wa'I Irshad (MDI), a Pakistani organisation of Wahhabi sects. MDI is said to have been founded with the support of Osama bin Laden, and to be a member of his International Islamic Front for Jihad against the United States of America and Israel. The Lashkar-e-Tayyiba is suspected of involvement in an attack on the Indian Parliament on 13 December 2001.<sup>18</sup>

The Lashkar-e-Tayyiba is currently proscribed by Canada, the United Kingdom, the United States of America, the European Union and Pakistan. It is not a proscribed organisation in Australia, but two other extremist groups in the Pakistan region, Jaish-I-Mohammed<sup>19</sup> and Harakat Ul-Ansar,<sup>20</sup> with which the Lashkar-e-Tayyiba is said to be associated, are. This is similar to the United Nations, which has listed both Jaish-I-Mohammed and Harakat Ul-Ansar, but not the Lashkar-e-Tayyiba, on the list pertaining to UN Security Council Resolution 1267 as at 4 November 2003.

Australia included the Lashkar-e-Tayyiba on its list of organisations, the assets of which must be frozen, on 29 March 2002 under the provisions of Part 4 of the *Charter of the United Nations Act 1945* (Cth) and the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002.

A recent media report suggested that the Lashkar-e-Tayyiba is unlikely to have established itself in Australia:

A Western Australian academic, Dr Samina Yasmeen, said yesterday there was no evidence that Lashkar-e-Taiba had established itself in Australia, but there was potential for it to do so...Australian Pakistanis number between 15,000 and 20,000 people. Bashir Malik, former president of the Pakistan Community Association of Australia, said there were "not many fanatics or extreme elements in Australia", and he would be surprised if anybody associated with Lashkar-e-Taiba turned up here.<sup>21</sup>

## **Main Provisions**

**Clause 2** of the Bill provides that the Act commences on 5 November 2003 ie retrospectively.

**Item 1** of the Schedule inserts a definition of ' Hamas organisation ' into subsection 102.1(1) of the Criminal Code. A ' Hamas organisation ' means the Hamas' Izz

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al-Din al-Qassam Brigades (by whatever name that organisation is known from time to time) and a derivative organisation.

**Item 2** of the Schedule inserts a definition of ‘Lashkar-e-Tayyiba organisation’ into subsection 102.1(1) of the Criminal Code. A ‘Lashkar-e-Tayyiba organisation’ means the Lashkar-e-Tayyiba organisation (by whatever name that organisation is known from time to time) and a derivative organisation.

**Item 3** of the Schedule enables the Governor-General to make regulations listing a Hamas organisation or a Lashkar-e-Tayyiba organisation or derivative organisations as terrorist organisations.

**Item 4** of the Schedule sets out the pre-conditions for the making of such regulations and describes how they are to operate [**proposed subsection 102.1(7)**]. The effect of proposed subsection 102.1(7) is that before the Governor-General can make a regulation specifying a Hamas organisation or a Lashkar-e-Tayyiba organisation as a terrorist organisation, ‘the Minister must be 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 the terrorist act has occurred or will occur)’.

**Item 5** of the Schedule extends the operation of the sunset clause in subsection 102.1(8) of the Criminal Code to regulations made in relation to listing a Hamas organisation or a Lashkar-e-Tayyiba organisation as terrorist organisations.

**Item 6** of the Schedule amends paragraph 102.1(8)(b) of the Criminal Code by extending the circumstances where regulations made for the purposes of listing a Hamas organisation or a Lashkar-e-Tayyiba organisation as terrorist organisations cease to have effect (ie where the Minister ceases to be satisfied that the organisation is a terrorist organisation).

**Item 7** of the Schedule inserts subsections 102.1(10A), (10B), (10C) and (10D) into the Criminal Code. **Proposed subsection 102.1(10A)** effectively allows a Hamas organisation to be ‘de-listed’ if the Minister ‘ceases to be satisfied’ that the organisation is directly or indirectly engaged in or assisting in (etc) terrorist acts. The way the de-listing works is that the Minister must publish a declaration in the *Gazette*. When the declaration is made, the regulations cease to have effect. Where a Hamas organisation has been de-listed, it can be re-listed if the Minister again becomes satisfied that the organisation is a terrorist organisation [**proposed subsection 102.1(10B)**].

**Proposed subsections 102.1(10C) and (10D)** provide mirror arrangements for the de-listing of a Lashkar-e-Tayyiba organisation.

**Item 8** of the Schedule inserts **proposed subsections 102.1(11A) and (11B)** into the Criminal Code. Respectively, these provisions effectively permit the retrospective listing of a ‘Hamas organisation’ and a ‘Lashkar-e-Tayyiba organisation’ where:

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- on a particular day, the Minister is satisfied on reasonable grounds that a Hamas organisation is engaged in (etc) a terrorist act (whether or not the terrorist act has occurred or will occur)
- later that particular day, the Minister makes a public announcement to the effect that a regulation will be made specifying a particular organisation as a terrorist organisation and that the regulation will take effect at the time of announcement, and
- the regulation is made within 60 days after the day on which the *Criminal Code (Hamas and Lashkar-e-Tayyiba) Act 2003* receives Royal Assent.

**Item 9** amends subsection 102.1(12) of the Criminal Code to provide that an announcement for the purposes of proposed subsections 102.1(11A) and (11B) must be published on the Internet and in a newspaper circulating in each State and the Northern Territory.

**Item 10** amends subsection 102.1(13) of the Criminal Code to provide that where a Hamas organisation or a Lashkar-e-Tayyiba organisation is de-listed, the regulations specifying it as a terrorist organisation cease to have effect and section 50 of the *Acts Interpretation Act 1901* applies as if the regulations had been repealed. Section 50 of the *Acts Interpretation Act* provides:

Where an Act confers power to make regulations, the repeal of any regulations which have been made under the Act shall not, unless the contrary intention appears in the Act or regulations effecting the repeal:

(a) affect any right, privilege, obligation or liability acquired, accrued or incurred under any regulations so repealed; or

(b) affect any penalty, forfeiture or punishment incurred in respect of any offence committed against any regulations so repealed; or

(c) affect any investigation, legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment;

and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing Act or regulations had not been passed or made.

**Item 11** amends section 102.1 of the Criminal Code to add **proposed subsections 102.1(15) and (16)**. These provisions ensure that the power to list a Hamas organisation and/or a Lashkar-e-Tayyiba organisation as a ‘terrorist organisation’ does not limit the power to make regulations specifying these organisations as ‘terrorist organisations’ where the UN Security Council has decided the organisation is a terrorist organisation.

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**Item 12** of the Schedule extends the offence of being a member of a terrorist organisation in subsection 102.3 of the Criminal Code to a member of a Hamas organisation or a Lashkar-e-Tayyiba organisation.

## Concluding Comments

### The Constitution

For a discussion of constitutional issues, see the Digest to the *Criminal Code Amendment (Hizballah) Act 2003*.<sup>22</sup>

### Retrospectivity

There is a presumption against the retrospective operation of statutes.<sup>23</sup> The principle of non-retrospectivity for criminal laws is enshrined in international as well as domestic law.<sup>24</sup> One view of the reasons for the presumption against retrospectivity was expressed by Toohey J in *Polyukhovich v Commonwealth*:

Protection against retroactive laws protects a particular accused against potentially capricious state action. But the principle also represents a protection of a public interest. This is so, first, in the sense that every individual is, by the principle, assured that no future retribution by society can occur except by reference to rules presently known; and secondly, it serves to promote a just society by encouraging a climate of security and humanity.<sup>25</sup>

However, this is not to say that retrospective laws cannot be made within constitutional limits<sup>26</sup> or that their passage is never justified.<sup>27</sup>

Reference has already been made to the fact that **proposed subsections 102.1(11A) and (11B)** enable regulations listing a ‘Hamas organisation’ or a ‘Lashkar-e-Tayyiba organisation’ to operate retrospectively from the date of a public announcement by the Minister. Criminal penalties may then attach to persons who fall within the terrorist organisation offences under Division 102 of Criminal Code. The Bill contemplates that a public announcement could be made prior to the passage of the Bill and will be effective to backdate the operation of a proscription regulation so long as the regulation is made within 60 days after the Bill receives Royal Assent.

It is unclear whether the press release issued by the Attorney-General on 4 November 2003 is a public announcement for the purposes of the retrospective operation of any regulations made by the Governor-General listing a ‘Hamas organisation’ or a ‘Lashkar-e-Tayyiba organisation’. While the Attorney-General’s comments have been noted by the press, it is also unclear whether a copy of the announcement has been published in a

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newspaper circulating in each State and the Northern Territory (as required by Item 9 of the Bill).

## Necessity for the Bill

The key issue for Parliament is whether proscription of Hamas' military wing and the Lashkar-e-Tayyiba is justified by the threat posed by these organisations to Australia and its interests. It is not the role of this Digest to comment on the threat that these organisations may pose.

## Endnotes

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- 1 HAMAS is a rough acronym of **H**arakat **A**l-**M**uqawama **A**l-**I**slamiya ('Islamic Resistance Movement').
- 2 Nathan Hancock, Security Legislation Amendment (Terrorism) Bill 2002, [Bills Digest No. 126, 2001-02](#).
- 3 Sudip Sen, Criminal Code Amendment (Terrorist Organisations) Bill 2002, [Bills Digest No. 87, 2002-03](#).
- 4 Jennifer Norberry, Criminal Code Amendment (Hizballah) Bill 2003, [Bills Digest No. 170, 2002-03](#).
- 5 Section 102.2.
- 6 Section 102.3.
- 7 Section 102.4.
- 8 Section 102.5.
- 9 Section 102.6.
- 10 Section 102.7.
- 11 The usual procedure is set out in Part XII of the *Acts Interpretation Act* 1901, which contains gazettal and tabling requirements that apply to Commonwealth regulations and contains disallowance provisions. These normally work in the following way. Regulations made under a primary statute must be notified in the *Gazette* and laid before each House of Parliament within 15 sitting days of being made. If the tabling requirements are not complied with, the regulations cease to have effect. There is then a further period of 15 sitting days in which a notice of motion can be given to disallow the regulations. If either House (normally the Senate) passes a resolution within this timeframe disallowing the regulations, then it ceases to have effect. Disallowance can also be deemed to have occurred. This happens if a notice of motion, given within the 15 sitting day period, is not withdrawn or called on within a further 15 sitting days. In this case, the regulations are deemed to have been disallowed. In other

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words, the disallowance period runs for as little as 15 sitting days after tabling to as much as 30 sitting days after tabling (if deemed disallowance occurs).

- 12 *House Hansard*, 4 November 2003, p21843.
- 13 Attorney-General, *News Release*, 'Capture of Australian by Northern Alliance', 12 December 2001.
- 14 Attorney-General, *News Release*, 'Government Prepares to List Terrorist groups', 4 November 2003.
- 15 Steve Lewis, 'Ruddock can't be trusted: ALP', *The Australian*, 6 November 2003, Brendan Nicholson, 'Labor set to back terror laws', *The Age*, 6 November 2003.
- 16 'HAMAS', *Jane's Terrorism Intelligence Centre* online, <http://jtic.janes.com>, (23 September 2003).
- 17 <http://www.un.org/Docs/sc/committees/1267/1267ListEng.htm>, (23 September 2003).
- 18 'Lashkar-e-Tayyiba', *Jane's Terrorism Intelligence Centre* online, <http://jtic.janes.com>, (6 November 2003).
- 19 Criminal Code Amendment Regulations 2003 (SR No. 7 of 2003).
- 20 Criminal Code Amendment Regulations 2002 (SR No. 5 of 2002).
- 21 *The Sydney Morning Herald* online, 31 October 2003, <http://www.smh.com.au/articles/2003/10/30/1067233327303.html>, (31 October 2003).
- 22 Jennifer Norberry, Criminal Code Amendment (Hizballah) Bill 2003, [Bills Digest No. 170, 2002-03](#).
- 23 In relation to regulations that retrospectively affect rights and liabilities see subsection 48(2), *Acts Interpretation Act 1901*.
- 24 For instance, article 15(1) the International Covenant on Civil and Political Rights, to which Australia is a party, states that 'No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.'
- 25 (1991) 172 CLR 501 at 688–689.
- 26 See *Polyukhovich v Commonwealth* (1991) 172 CLR 501.
- 27 (1991) 172 CLR 501 at 689 per Toohey J.

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