



SENATE STANDING COMMITTEE

FOR THE

SCRUTINY OF BILLS

FIFTEENTH REPORT

OF

2003

3 December 2003

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MEMBERS OF THE COMMITTEE

Senator T Crossin (Chair)
Senator B Mason (Deputy Chairman)
Senator G Barnett
Senator D Johnston
Senator J McLucas
Senator A Murray

TERMS OF REFERENCE

Extract from **Standing Order 24**

- (1) (a) At the commencement of each Parliament, a Standing Committee for the Scrutiny of Bills shall be appointed to report, in respect of the clauses of bills introduced into the Senate, and in respect of Acts of the Parliament, whether such bills or Acts, by express words or otherwise:
 - (i) trespass unduly on personal rights and liberties;
 - (ii) make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers;
 - (iii) make rights, liberties or obligations unduly dependent upon non-reviewable decisions;
 - (iv) inappropriately delegate legislative powers; or
 - (v) insufficiently subject the exercise of legislative power to parliamentary scrutiny.
- (b) The Committee, for the purpose of reporting upon the clauses of a bill when the bill has been introduced into the Senate, may consider any proposed law or other document or information available to it, notwithstanding that such proposed law, document or information has not been presented to the Senate.

SENATE STANDING COMMITTEE FOR THE SCRUTINY OF BILLS

FIFTEENTH REPORT OF 2003

The Committee presents its Fifteenth Report of 2003 to the Senate.

The Committee draws the attention of the Senate to clauses of the following bills which contain provisions that the Committee considers may fall within principles 1(a)(i) to 1(a)(v) of Standing Order 24:

Age Discrimination Bill 2003

Criminal Code (Hamas and Lashkar-e-Tayyiba) Act 2003

Age Discrimination Bill 2003

Introduction

The Committee dealt with this bill in *Alert Digest No. 8 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 16 September 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 8 of 2003

[Introduced into the House of Representatives on 26 June 2003. Portfolio: Attorney-General]

The bill prohibits age discrimination in key areas of public life including employment, education, accommodation, administration of Commonwealth laws and programs, and requests for information.

The bill also provides exemptions for circumstances where distinctions are legitimately based on age. These include positive discrimination, superannuation, insurance, pensions, and acts done in compliance with specified Commonwealth, state and territory laws, awards and agreements.

The bill also confers related functions on the Human Rights and Equal Opportunity Commission, contains a regulation-making power, and binds the states and territories.

Delegation of powers

Paragraph 55(c)

Paragraph 55(c) of this bill would permit the Human Rights and Equal Opportunities Commission to delegate 'all or any of the powers and functions conferred on it' by this measure to 'another person or body of persons.' The Explanatory Memorandum does not provide any reason for this provision.

The Committee has regularly commented on provisions such as this which grant to a statutory body the unfettered discretion to delegate all or any of its powers to anyone at all. Generally, the Committee would expect to see a limit set either on the sorts of powers that might be delegated, or on the categories of people to whom those powers might be delegated. The Committee therefore **seeks the Attorney-General's advice** as to the reason for the breadth of the discretion contained in this provision.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provision, as it may be considered to make rights, liberties or obligations unduly dependent upon insufficiently defined administrative powers, in breach of principle 1(a)(ii) of the Committee's terms of reference.

Relevant extract from the response from the Minister

I refer to the Committee's letter of 14 August 2003 concerning comments made in the Scrutiny of Bills Alert Digest No. 8 of 2003 (13 August 2003) about the breadth of the discretion in paragraph 55(c) of the Age Discrimination Bill 2003 (the Bill).

Clause 55 of the Bill permits the Human Rights and Equal Opportunity Commission to delegate all or any of the powers conferred on it to certain persons, including to a member of the Commission or a member of the staff of the Commission (cl. 55(a) and (b) of the Bill). Paragraph 55(c) permits the Commission to delegate all or any of its powers to 'another person or body of persons'.

The breadth of paragraph 55(c) is intended to expand the circumstances where the Commission may delegate its powers beyond the specific circumstances mentioned in clause 55 in appropriate cases. It is important that the Commission has sufficient flexibility to delegate its powers to persons with particular expertise. This will enable the Commission to undertake its responsibilities in the most effective manner. A similar delegation power is present in all existing Commonwealth anti-discrimination laws and has been used by the Commission in the performance of its functions under those laws.

For example, the Commission has used its delegation powers in s. 19(1) and (2) of the *Human Rights and Equal Opportunity Act 1986* (HREOC Act) to delegate some of the Commission's (and President's) powers to specialists in child psychology to assist with the Commission's Inquiry into Children in Detention. These specialists are not members of the Commission or members of the Commission's staff but their expertise in child psychology has been particularly valuable to the Commission.

The Committee should also be aware that one of the reforms proposed in the Australian Human Rights Commission Legislation Bill 2003 is the consolidation of

the Commission's delegation powers under the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and *Disability Discrimination Act 1992* into section 19(1) of the *Human Rights and Equal Opportunity Commission Act 1986* by inserting the words 'or any other law' at the end of section 19(1) of the HREOC Act; and the repeal of the delegation provisions in the other Commonwealth anti-discrimination laws (see items 28, 95, 124 and 143 in the Australian Human Rights Commission Legislation Bill). It is proposed that the Commission's delegation powers in clause 55 of the Bill will also be consolidated into the HREOC Act following commencement of both the Bill and the Australian Human Rights Commission Legislation Bill (item 17 of the Age Discrimination (Consequential Provisions) Bill 2003).

I trust this information is of assistance.

The Committee thanks the Attorney-General for this response. The Committee considers that it would have been helpful if this explanation had been included in the Explanatory Memorandum to this bill.

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

Introduction

The Committee dealt with the bill for this Act in *Alert Digest No. 14 of 2003*, in which it made various comments. The Attorney-General has responded to those comments in a letter dated 27 November 2003. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Minister's response are discussed below.

Although this bill has been passed by both Houses (and received Royal Assent on 7 November 2003) the response may, nevertheless, be of interest to Senators. A copy of the letter is attached to this report. An extract from the *Alert Digest* and relevant parts of the Attorney-General's response are discussed below.

Extract from Alert Digest No. 14 of 2003

[Introduced into the House of Representatives on 5 November 2003. Portfolio: Attorney-General]

The bill proposes to amend the *Criminal Code Act 1995* to create a basis for the identification and listing of Hamas' military wing (Izz al-Din al Qassam Brigades) and Lashkar-e-Tayyiba as terrorist organisations under Australian law, if the Minister is satisfied that either or both organisations are engaged in terrorist activity. This measure would avoid the existing requirement that the organisations be first identified in, or pursuant to, a decision of the United Nations Security Council as terrorist organisations.

The bill also inserts a provision to enable a listing in a regulation of either or both of the Hamas' Izz al-Din al Qassam Brigades and the Lashkar-e-Tayyiba Organisation to operate retrospectively from the time at which a public announcement is made by a Minister stating the Government's intention to specify the organisations in regulations.

Retrospective commencement

Clause 2

By virtue of clause 2, this bill is to commence on 5 November 2003, the day on which it was introduced into the House of Representatives. In view of the fact that the Senate was not sitting on that day, it is proposed that this bill commence retrospectively. The purpose of the bill is to allow regulations to be made (and made retrospectively) declaring the Hamas organisation, and the Lashkar-e-Tayyiba organisation, to be terrorist organisations for the purposes of the *Criminal Code*. The possible retrospective nature of the proposed regulations is considered in the next paragraph, but it is difficult to see the reason for the proposed retrospectivity of this bill. Despite the proposal for retrospective regulations, it is presumed that such regulations could not be made until this bill has been assented to. Once it is assented to, any regulations having retrospective effect must be made within 60 days of either the Attorney-General or another Minister making a public announcement to the effect that such regulations are going to be made. It appears that the Attorney-General could make such a public statement on 5 November 2003 (for instance) and, provided that the bill was assented to within the next 60 days, regulations could be made immediately after Assent, having retrospective effect to that date, and such regulations would be valid by virtue of proposed new subsections 102.1(11A) and (11B) of the *Criminal Code*. The Committee **seeks the Attorney-General's advice** as to the reason for the retrospectivity proposed by clause 2.

Pending the Attorney-General's advice, the Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

The Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (the Act) was passed on 7 November 2003 and commenced by gazettal on 8 November 2003. The Regulations to list these two organisations as terrorist organisations were made on 8 November 2003 and commenced by gazettal on 9 November 2003.

The speed with which the legislation was passed and the regulations commenced meant that the Government did not need to rely on the retrospective operative provision of the Act. The regulations commenced after the passage and commencement of the Act and are, as with all regulations, subject to the 15 day disallowance period.

I hope the above information alleviates the Committee's concern.

The Committee thanks the Attorney-General for this response.

Criminal liability by public announcement

Proposed new subsections 102.1(11A) and (11B)

Proposed new subsections 102.1(11A) and (11B) of the *Criminal Code*, to be inserted by item 8 of the Schedule to this bill, would permit the making of regulations having effect retrospectively to the day on which the Attorney-General or another Minister makes an announcement to the effect that such regulations will be made. It appears that the regulations will have the effect of imposing criminal liability on members of the Hamas organisation or of the Lashkar-e-Tayyiba organisation, and the bill will therefore create criminal liability by public announcement. It is suggested that these provisions may be regarded as trespassing on personal rights and liberties, but that whether such a trespass would be undue is a matter to be left for decision by the Senate as a whole.

The Committee has always been alert to legislation by press release. The Senate should be aware that the provision has some of these characteristics.

The Senate should also be aware that criminal liability will be rolled as a consequence of the proposed definition of the organisations in items 1 and 2 of Schedule 1.

The Committee draws Senators' attention to the provision, as it may be considered to trespass unduly on personal rights and liberties, in breach of principle 1(a)(i) of the Committee's terms of reference.

Relevant extract from the response from the Attorney-General

Response same as above for Clause 2.

The Committee thanks the Attorney-General for this response.

Trish Crossin
Chair



ATTORNEY-GENERAL
THE HON DARYL WILLIAMS AM QC MP

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17 SEP 2003

Senate Standing C'ttee
for the Scrutiny of Bills

16 SEP 2003

03/234121; 03/5347

Senator T Crossin
Chair
Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Dear Senator

I refer to the Committee's letter of 14 August 2003 concerning comments made in the Scrutiny of Bills Alert Digest No. 8 of 2003 (13 August 2003) about the breadth of the discretion in paragraph 55(c) of the Age Discrimination Bill 2003 (the Bill).

Clause 55 of the Bill permits the Human Rights and Equal Opportunity Commission to delegate all or any of the powers conferred on it to certain persons, including to a member of the Commission or a member of the staff of the Commission (cl. 55(a) and (b) of the Bill). Paragraph 55(c) permits the Commission to delegate all or any of its powers to 'another person or body of persons'.

The breadth of paragraph 55(c) is intended to expand the circumstances where the Commission may delegate its powers beyond the specific circumstances mentioned in clause 55 in appropriate cases. It is important that the Commission has sufficient flexibility to delegate its powers to persons with particular expertise. This will enable the Commission to undertake its responsibilities in the most effective manner. A similar delegation power is present in all existing Commonwealth anti-discrimination laws and has been used by the Commission in the performance of its functions under those laws.

For example, the Commission has used its delegation powers in s. 19(1) and (2) of the *Human Rights and Equal Opportunity Act 1986* (HREOC Act) to delegate some of the Commission's (and President's) powers to specialists in child psychology to assist with the Commission's Inquiry into Children in Detention. These specialists are not members of the Commission or members of the Commission's staff but their expertise in child psychology has been particularly valuable to the Commission.

The Committee should also be aware that one of the reforms proposed in the Australian Human Rights Commission Legislation Bill 2003 is the consolidation of the Commission's delegation powers under the *Racial Discrimination Act 1975*, *Sex Discrimination Act 1984* and *Disability Discrimination Act 1992* into section 19(1) of the *Human Rights and Equal Opportunity Commission Act 1986* by inserting the words 'or any other law' at the end of section 19(1) of the HREOC Act; and the repeal of the delegation provisions in the other Commonwealth anti-discrimination laws (see items 28, 95, 124 and 143 in the Australian Human Rights Commission Legislation Bill). It is proposed that the Commission's delegation powers in clause 55 of the Bill will also be consolidated into the HREOC Act

following commencement of both the Bill and the Australian Human Rights Commission Legislation Bill (item 17 of the Age Discrimination (Consequential Provisions) Bill 2003).

I trust this information is of assistance.

Yours sincerely

A handwritten signature in cursive script, appearing to read 'Daryl Williams'.

DARYL WILLIAMS



ATTORNEY-GENERAL
THE HON PHILIP RUDDOCK MP

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2 DEC 2003

Senate Standing C'ttee
for the Scrutiny of Bills

03/236572
03/10704

27 NOV 2003

Senator Trish Crossin
Chair of the Standing Committee for the Scrutiny of Bills
Parliament House
CANBERRA ACT 2600

Trish
Dear Senator Crossin

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

Thank you for your correspondence dated 7 November 2003.

The Criminal Code Amendment (Hamas and Lashkar-e-Tayyiba) Act 2003 (the Act) was passed on 7 November 2003 and commenced by gazettal on 8 November 2003. The Regulations to list these two organisations as terrorist organisations were made on 8 November 2003 and commenced by gazettal on 9 November 2003.

The speed with which the legislation was passed and the regulations commenced meant that the Government did not need to rely on the retrospective operative provision of the Act. The regulations commenced after the passage and commencement of the Act and are, as with all regulations, subject to the 15 day disallowance period.

I hope the above information alleviates the Committee's concern.

Yours sincerely

Philip Ruddock

