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## Criminal Code Amendment (Hizballah) 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. 170 2002-03

Criminal Code Amendment (Hizballah) Bill 2003

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Law and Bills Digest Group  
11 June 2003

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# **Criminal Code Amendment (Hizballah) Bill 2003**

**Date Introduced:** 29 May 2003

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** 29 May 2003

## **Purpose**

To create a mechanism whereby the Hizballah External Security Organisation and derivative organisations can be listed as terrorist organisations.

## **Background**

The Commonwealth Criminal Code provides that an organisation can be determined to be a 'terrorist organisation' in two ways. A court may decide that an organisation falls within paragraph (a) of the definition of 'terrorist organisation' found in subsection 102.1(1) of the Criminal Code when a terrorist organisation offence is prosecuted. Additionally, a terrorist organisation may be 'listed'<sup>1</sup> (proscribed) by way of a regulation made by the Governor-General. The Background section of this Digest describes the evolution of the latter—the provisions that the Criminal Code Amendment (Hizballah) Bill 2003 (the Hizballah Bill) seeks to amend.

The Background section also contains information about State referrals of power over terrorism to the Commonwealth, Commonwealth Government action against organisations considered to be terrorist organisations and the move to ban the Hizballah External Security Organisation and its derivative organisations. The alternative spelling, 'Hezbollah', is sometimes used.

## ***Security Legislation Amendment (Terrorism) Act 2002***

The Hizballah 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),

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terrorist organisation offences (Division 102) and financing of terrorism offences (Division 103). As indicated above, Division 102 also contains provisions which enable regulations to be made listing an organisation as a terrorist organisation in certain circumstances.

Part 5.3 was originally inserted into the Criminal Code by the *Security Legislation Amendment (Terrorism) Act 2002* (the Terrorism Act 2002). This legislation was part of a package introduced by the Government to ‘strengthen Australia’s counter-terrorism capabilities.’<sup>2</sup> Other Bills in the package were the Suppression of the Financing of Terrorism Bill 2002, the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, the Border Security Legislation Amendment Bill 2002 and the Telecommunications Interception Legislation Amendment Bill 2002. All were subsequently enacted, with amendments.

As originally introduced, the Security Legislation Amendment (Terrorism) Bill 2002 [No.2]<sup>3</sup> (the Terrorism Bill) would have enabled the Attorney-General to proscribe an organisation if he or she was satisfied on reasonable grounds that:

- the organisation or one of its members had committed or was committing a terrorist offence, irrespective of whether a charge had been laid or conviction obtained; or
- the declaration was reasonably appropriate to give effect to a United Nations Security Council (UNSC) decision that the organisation was an international terrorist organisation; or
- the organisation posed a danger to the security or integrity of the Commonwealth or another country.

Ministerial proscriptions would have had an immediate effect. There was no provision for parliamentary scrutiny. Offences were then provided relating to proscribed organisations. For instance, it would be an offence to be a member of such an organisation, direct its activities, provide or receive training or otherwise provide assistance.

The Terrorism Bill, together with the other four Bills in the legislative package, was considered by the Senate Legal and Constitutional Legislation Committee. The Committee submitted a final report in May 2002, which contained a number of recommendations. The Committee noted:

... the concerns expressed by many organisations and individuals about whether the legislative package, particularly the Security Bill, is necessary. [And] serious reservations about the breadth of the proposed legislation in relation to constitutional issues, potential breaches of international law and possible adverse effects on particular groups within the Australian community.<sup>4</sup>

There was cross-party support for the view that the proscription provisions should be rejected.<sup>5</sup> The Senate Committee recommended:

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- (i) that proposed Division 102 in the Bill in relation to the proscription of organisations with a terrorist connection not be agreed to; and
- (ii) that the Attorney-General review the proscription provisions with a view to developing a statutory procedure which:
  - does not vest a broad and effectively unreviewable discretion in a member of the Executive;
  - restricts the proposed ground under which an organisation may be proscribed if it has endangered or is likely to endanger the 'security or integrity' of the Commonwealth or any country, by defining 'integrity' as meaning 'territorial integrity';
  - provides detailed procedures for revocation, including giving a proscribed organisation the right to apply for review of that decision;
  - provides for adequate judicial review of the grounds for declarations of proscription;
  - more appropriately identifies and defines the proposed offences in relation to proscribed organisations, particularly in relation to the offence of 'assisting' such an organisation; and
  - does not create offences with elements of strict liability, given the very high proposed penalties.<sup>6</sup>

On 25 June 2002, the Government introduced a number of amendments to the Terrorism Bill. Among them were amendments that replaced the proscription regime with provisions that enabled the Governor-General (in Council) to make a regulation specifying that an organisation was a terrorist organisation.<sup>7</sup> For instance, the Government's amendments provided that an organisation would be a terrorist organisation if:

- the Governor-General made a regulation identifying the organisation as a terrorist organisation—on the basis that the Minister was satisfied on reasonable grounds that the organisation was directly or indirectly engaged in, preparing, fostering, assisting or planning the doing of a terrorist act, or
- the Governor-General made a regulation identifying the organisation as a terrorist organisation—on the basis that the Minister was satisfied on reasonable grounds that UNSC had made a decision relating to terrorism that identified the organisation and the organisation was directly or indirectly engaged in, preparing, fostering, assisting or planning the doing of a terrorist act.

The regulations would have been subject to the usual disallowance procedure set out in the *Acts Interpretation Act 1901*<sup>8</sup> but contained an additional safeguard. Proposed subsection 102.1(4) of the Government's amendments provided that regulations would not take effect until the disallowance period had expired.<sup>9</sup>

Senator Faulkner (ALP, NSW) successfully moved amendments to the Government's amendments.<sup>10</sup> As a result, the first type of 'listing' by regulation—that is, if the Minister

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was satisfied on reasonable grounds that the organisation was involved in terrorist activity—was removed. This left one way in which a regulation could be made listing a terrorist organisation—if the Minister was satisfied on reasonable grounds about three things. First, that the UNSC had made a decision relating to terrorism; second, that the organisation was identified in that decision as ‘an organisation to which the decision relates’; and third that the organisation was directly or indirectly involved in terrorist activity.<sup>11</sup>

The deferred commencement provisions for regulations were enacted and became subsection 102.1(4) of the Criminal Code.

The Attorney-General recently explained the reasons for enacting legislation enabling terrorist organisations to be listed:

Listing of organisations sends a clear and unequivocal message to those who might involve themselves with those organisations that if they do so they will face the full weight of the law.

Listing also facilitates the investigation and prosecution of those engaged in supporting or carrying out the activities of terrorist organisations.

Given the delay and uncertainty that could be involved in waiting to prove an organisation's engagement in a terrorist act in court, listing organisations by regulation is a more effective method of specifying terrorist organisations in most cases.

Listing of organisations serves a number of purposes.

It puts people on notice not to deal with the listed organisation.

And it provides certainty to law enforcement agencies that they can act against the organisation immediately, without the significant delay that is likely in completing a criminal prosecution.<sup>12</sup>

‘Listing’ an organisation by way of regulation made under section 102.1 of the Terrorism Act effectively bans the organisation. This is because anyone who:

- directs the activities of such an organisation<sup>13</sup>
- is a member of such an organisation<sup>14</sup>
- undertakes recruiting for such an organisation<sup>15</sup>
- gives training to or receives training from such an organisation<sup>16</sup>
- receives from, or makes funds available to such an organisation, or<sup>17</sup>

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- provides support of the sort that would help the organisation engage in terrorist activities (as defined)<sup>18</sup>

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

Section 102.1 of the Terrorism Act—the banning provision—did not remain in its original form for long. The *Criminal Code Amendment (Terrorist Organisations) Act 2002*, which commenced on 23 October 2002, repealed subsection 102.1(4). As a result, terrorist organisation regulations made by the Governor-General no longer have their operation postponed to the end of the disallowance period. They commence on gazettal or as otherwise specified.

## Referrals of State power over terrorism

The Coalition policy for the 2001 General Election, *A Safer and More Secure Australia*, committed a re-elected Coalition Government to convening a Leaders' Summit to seek outcomes on:

- improving Australia's ability to combat transnational crime and terrorism, and
- a reference of constitutional power to the Commonwealth using section 51(xxxvii) of the Constitution to support 'an effective national response to threats of transnational crime and terrorism.'<sup>19</sup>

At the Leaders' Summit on 5 April 2002, the Commonwealth, the States and the Territories negotiated an Agreement on Terrorism and Multi-Jurisdictional Crime which included an agreement for a 'reference of power of specific, jointly agreed legislation.'<sup>20</sup> It was said that the reference of power was needed to remove any uncertainties about the scope of the Commonwealth's constitutional power over terrorism and to obtain secure and 'comprehensive national application of the federal counter-terrorism offences.'<sup>21</sup>

On 12 December 2002, the Criminal Code Amendment (Terrorism) Bill 2002 was introduced into the Commonwealth Parliament. Subsequently enacted as the *Criminal Code Amendment (Terrorism) Act 2003* (the Terrorism Act 2003), it re-enacted Part 5.3 of the Criminal Code in order to attract the support of State references of power.<sup>22</sup> In other words, the reference of power covers the terrorist act offences in Division 101 of the Criminal Code, the terrorist organisation offences and banning provisions found in Division 102 and the financing of terrorism offences contained in Division 103.

In the period since December 2002, each of the States have passed referral legislation<sup>23</sup> which:

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- states that certain matters are referred to the Commonwealth—effectively, the text of Part 5.3 of the Commonwealth Criminal Code and an amendment reference, and
- includes termination provisions.

Each State Act contains, as a Schedule, the words of Part 5.3 of the Commonwealth Criminal Code. Each State Act also contains a provision stating that it is the intention of the State Parliament that Part 5.3 can be amended ‘by provisions of Commonwealth Acts the operation of which is based on the legislative powers that the Parliament of the Commonwealth has apart from under the references.’<sup>24</sup>

State legislation was passed and commenced over a period of several months. Commencement dates of each State’s Terrorism (Commonwealth Powers) Act are as follows:

- NSW—13 December 2002
- Tasmania—1 January 2003.
- South Australia—3 April 2003
- Queensland—28 April 2003
- Western Australia—3 May 2003
- Victoria—7 May 2003.

The Commonwealth’s Terrorism Act 2003, the Act which accepted the referrals and re-enacted Part 5.3 of the Criminal Code, commenced on 29 May 2003.

## Government action against terrorist organisations

### Listing under the *Terrorism Act 2002*

The terrorist organisation provisions of the Terrorism Act 2002 commenced operation on 6 July 2002. Since that time, the banning power found in section 102.1 has been used to list 13 groups identified as terrorist organisations by the UNSC. The first regulation<sup>25</sup>—identifying Al Qa’ida/ Islamic Army— was made on 21 October 2002. The most recent<sup>26</sup>—identifying Abat al-Ansar, Egyptian Islamic Jihad, the Islamic Army of Aden, the Islamic Movement of Uzbekistan, Jaish-i-Mohammed and Lashkar I Jhangvi—was made on 11 April 2003.

As the Attorney-General has remarked, the UNSC has ‘only ever operated as a mechanism for identifying terrorist organisations linked to al-Qaeda and the Taliban under resolutions 1267 and 1333.’<sup>27</sup>

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## Listing under the *Charter of the United Nations Act 1945*

UNSC Resolution 1373 (2001) imposes a number of obligations on Member States to suppress terrorism. Sub-paragraph 1(c) of the Resolution requires them to:

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.

Australia has implemented this obligation via the *Charter of the United Nations Act 1945* and the Charter of the United Nations (Terrorism and Dealings with Assets) Regulations 2002. This legislation makes it an offence for a person to hold assets that are owned or controlled by persons or entities listed by the Minister for Foreign Affairs in the *Gazette*. Hizballah is one of those entities.

## Hizballah/Hezbollah

It is beyond the scope of this Digest to discuss in any detail the nature and activities of the Hezbollah or the Hezbollah External Security Organisation. Readers of this Digest should consult a *Research Note* produced by the Parliamentary Library, '[Hezbollah in Profile](#)'. As the *Research Note* points out:

Hezbollah as a whole is listed as a banned terrorist organisation in the US and Canada, whereas the UK has specifically only proscribed Hezbollah's 'External Security Organisation', presumably affording some legitimacy to Hezbollah's political wing.

The European Union has to date not proscribed Hezbollah, despite lobbying by the UK and Germany to do so. France, Sweden, Greece, Spain and Belgium have apparently opposed the idea. The UN, too, has not included Hezbollah on its list of terrorist organisations, additions to which must have a demonstrated link with the Taliban and/or al-Qaeda in order to qualify.

Lebanon refused to freeze Hezbollah's assets in response to a request by the US to do so in November 2001, claiming that Hezbollah is a legitimate resistance group.<sup>28</sup>

In recent weeks, the Government and the Opposition have debated the proscription regime. In a press release issued on 27 May 2003 the Opposition Leader, Simon Crean MP, stated that the Prime Minister had written to him on 2 April 2003 'seeking to remove the requirement in Australian law that the listing of terrorist organisations in Australia be predicated by listing in the United Nations Security Council.' It has been reported that the

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Prime Minister lobbied the States earlier in the year hoping to secure their support for these changes.<sup>29</sup>

Both the Government and the Labor Opposition maintain that the Hezbollah External Security Organisation should be banned. However, Mr Crean said Labor would not support the Government's proposal for a general banning power but would instead introduce a private member's bill naming the Hezbollah External Terrorist Organisation as a terrorist organisation under the Criminal Code.<sup>30</sup> The media reported that Mr Crean had secured the support of the NSW, Queensland and Victorian Premiers for his approach.<sup>31</sup> However, the Government rejected the ALP model for two reasons. First, as constitutionally suspect on the basis of the High Court's decision in the *Communist Party case*.<sup>32</sup> Second, on the ground that a more broadly based power was needed to 'list' terrorist organisations in order to respond to threats as they emerge.<sup>33</sup>

On 27 May 2003 the Government introduced two Bills into the House of Representatives—the Hizballah Bill and the Criminal Code Amendment (Terrorist Organisations) Bill 2003 (see below). The Attorney-General remarked that the Hizballah Bill would enable the 'immediate issue of the security threat represented by the terrorist wing of Hezbollah'<sup>34</sup> to be dealt with. Further, he said, the Government's model 'does not give rise to the same constitutional uncertainties that plague the opposition's proposal.'<sup>35</sup>

On 2 June 2003, Mr Crean introduced a Private Member's Bill, the Criminal Code Amendment (Hezbollah External Terrorist Organisation) Bill 2003. Apart from things such as spelling, the name by which the relevant wing of Hizballah is identified and the long title of the Bill, this Bill is identical in substance to the Government's Hizballah Bill.

Much of the public response to the proposal to ban Hezbollah—in editorials and opinion pieces—has been positive.<sup>36</sup> The Attorney-General has said that ASIO has 'regularly reported that there are within Australia supporters of external terrorist organisations. Hezbollah is an external terrorist organisation.'<sup>37</sup> Mr Crean was given a security briefing about Hezbollah and, although unable to disclose the contents of the briefing, has said that 'Groups such as the Hezbollah External Security Organisation do represent a clear and present danger to the values and freedoms that we all hold dear.'<sup>38</sup> However, Michael Organ MP (Greens, Cunningham) stated during debate on the Hezbollah Bill that he was concerned that 'sufficient evidence has not been presented to this parliament or to the Australian people with regard to why this organisation needs to be black-listed ...'<sup>39</sup> And some segments of the Australian Lebanese community are concerned that the Government's claims are alarmist.<sup>40</sup> Professor Rohan Gunaratna,<sup>41</sup> a commentator on international terrorist organisations, remarks that:

[Hezbollah] has raised funds and disseminated propaganda, both in South East Asia and in Australia, but its scale of activity has been reduced since 1999.

...

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Hezbollah poses a significant threat to international security, and I think Australia, as a democracy, should take that into consideration in the proscription of groups, not look at only Australian interests.<sup>42</sup>

Hezbollah has denied that it poses a threat to Australians, calling Australian assertions about it ‘baseless and untrue.’ It says its ‘only concern’ is ‘the resistance of the Israeli occupation of Lebanon.’<sup>43</sup>

## The Hizballah Bill and the Criminal Code (Terrorist Organisations) Bill 2003

As stated above, on the same day that the Hizballah Bill was introduced into the Parliament, the Attorney-General also introduced the Criminal Code Amendment (Terrorist Organisations) Bill 2003 (Terrorist Organisations Bill 2003). The latter is designed to give the Government a broad power to ‘list’ organisations as terrorist organisations and to remove the current requirement that the UNSC must first have identified an organisation as a terrorist organisation before a proscription regulation can be made by the Governor-General. However, the Government does not expect the Terrorist Organisations Bill 2003 to pass the Parliament. The Attorney-General remarked in his Second Reading Speech for that Bill:

... the opposition has indicated that it will not support the ... bill.

In such circumstances, the government is introducing a second bill, the Criminal Code Amendment (Hizballah) Bill 2003 that will allow the terrorist wing of Hezbollah to be listed in regulations, providing the statutory criteria for listing is met.

...

This bill [the Terrorist Organisations Bill] is intended to be complementary, not an alternative to the ... [Hizballah] bill.

Together they create a legislative framework that deals with the immediate issue of the security threat represented by the terrorist wing of Hezbollah, and the longer term issue of how Australia can act independently of the Security Council in relation to our domestic criminal laws.

While we support the opposition’s indication that it will support the government’s Hezbollah specific bill, the opposition has indicated that it will continue to obstruct passage of our first bill.

The government intend to vigorously pursue passage of our first bill.<sup>44</sup>

The fate of the Terrorist Organisations Bill is yet to be decided, so whether it could become a double dissolution trigger is a matter of speculation. It is noteworthy, however, that four potential double dissolution bills already exist.<sup>45</sup> Should the Government wish to

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take all or some of these to a double dissolution election, Parliament would have to be dissolved by 11 August 2004.<sup>46</sup> The latest date for a double dissolution election is 16 October 2004.<sup>47</sup>

## Main Provisions

**Clause 3** of the Bill provides that the Schedule commences on 29 May 2003 ie retrospectively.

**Item 1** of the Schedule inserts a definition of ‘Hizballah organisation’ into subsection 102.1(1) of the Criminal Code. A ‘Hizballah organisation’ means the Hizballah External Security Organisation or a derivative organisation.

**Item 2** enables regulations to be made by the Governor-General which list the Hizballah External Security Organisation and derivative organisations as terrorist organisations.

**Item 3** sets out pre-conditions for the making of such regulations and describes how they are to operate [**proposed subsections 102.1(7)-(14)**]. For instance, it inserts **proposed subsection 102.1(7)** into the Criminal Code. The effect of **proposed subsection 102.1(7)** is that before the Governor-General can make a regulation that lists a ‘Hizballah 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).’

**Proposed subsection 102.1(8)** provides that regulations listing a ‘Hizballah organisation’ expire two years after they take effect, unless earlier repealed. However, new regulations can be made.

**Proposed subsection 102.1(9)** effectively allows a ‘Hizballah 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 that de-listing works is that the Minister publishes a declaration in the *Gazette*. Once the declaration is made, the regulations cease to have effect. The Minister’s de-listing is not subject to parliamentary review ie it is not a disallowable instrument. An organisation that has been ‘de-listed’ can be re-listed by a Hizballah specific regulation ie one made under proposed paragraph (c) of the definition of ‘terrorist organisation’ [**proposed subsection 102.1(10)**].

**Proposed subsection 102.1(11)** effectively allows the retrospective listing of a ‘Hizballah organisation’, triggered by a public announcement. This can happen so long as:

- a regulation is made within 60 days after the *Criminal Code Amendment (Hizballah) Act 2003* receives Royal Assent, and

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- the Minister is satisfied that a ‘Hizballah organisation’ is a terrorist organisation, and
- a public announcement is made by the Minister or another Minister that a ‘listing’ regulation will be made, and
- the announcement includes a statement that the regulation will be back-dated to the date of the announcement.

The public announcement must be published on the Internet and in a newspaper circulating in each State and Territory [**proposed subsection 102.1(10)**]. The timeframe for publication is not specified. **Proposed subsection 102.1(11)** and the commencement date in **clause 3** (29 May 2003) contemplate that a public announcement will be made before the passage of the Hizballah Bill. On 5 June 2003, the Attorney-General made a public announcement for the purposes of **proposed subsection 102.1(11)** in relation to the Hezbollah External Security Organisation. Among other things the announcement states:

ASIO advises that the terrorist wing of Hizballah is an organisation with global reach which poses a security threat to Australian interests. It is also well known that the Hizballah External Security Organisation has been responsible for numerous terrorist attacks against Western and other interests dating back to the 1980s.

ASIO advises that it continues to have the capacity and support necessary for further operations, and is assessed to have global reach. ASIO also advises that there is evidence to suggest that it has links into Australia.<sup>48</sup>

If the Hizballah Bill is passed by the Parliament and regulations listing the Hizballah External Security Organisation as a terrorist organisation are made within 60 days after the Bill receives Royal Assent then the Organisation will be banned from 5 June 2003. However, a public announcement alone in the absence of legislation does not empower the Executive to undertake coercive activity in relation to a ‘Hizballah organisation.’

**Proposed subsection 102.1(13)** deals with what occurs if a regulation ceases to have effect because it has been repealed or the organisation has been ‘de-listed’ under **proposed subsection 102.1(9)**. Any penalty or punishment incurred will stand and investigations and legal proceedings can be continued or enforced.

**Proposed subsection 102.1(14)** ensures that a ‘Hizballah organisation’ can be listed either in the fashion described above or by way of a regulation made after the existing process, predicated on a UNSC decision, has occurred.

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## Concluding Comments

### The Constitution

The Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], as originally introduced, enabled the Attorney-General to declare an organisation to be a proscribed organisation in certain circumstances.

Many organisations and individuals who appeared before the Senate Legal and Constitutional Legislation Committee opposed the proposed proscription powers in the Terrorism Bill 2002 as anti-democratic, contrary to international human rights standards, contrary to the rule of law and effectively unreviewable.<sup>49</sup> There were also suggestions that the proscription provisions could be constitutionally unsound. Thus, it was said that proscription could be unconstitutional because it offended the doctrine in the *Communist Party case*. Further, it was suggested that the Bill might offend constitutional guarantees—such as the implied freedom of political communication.

The *Communist Party Dissolution Act 1950* did a number of things. Its recitals stated that the Communist Party and its members engaged in activities designed to overthrow government and compromise the defence of Australia. It declared the Australian Communist Party unlawful and dissolved it.<sup>50</sup> Further, it empowered the Governor-General in Council to declare certain associations to be unlawful associations, if the body fell within the statutory definition<sup>51</sup> and if its continued existence ‘would be prejudicial to the security and defence of the Commonwealth or to the execution and maintenance of the Constitution or of the laws of the Commonwealth.’<sup>52</sup> An association so declared had 28 days from the date of the declaration’s gazettal to apply to a court to have the declaration set aside.<sup>53</sup> Certain consequences automatically flowed from the Governor-General’s declarations—for instance, an unlawful association was dissolved by force of the Act.<sup>54</sup> The Act also created a number of offences. Thus, it was an offence to be a member of an unlawful association, contribute to it or participate in or direct its activities.<sup>55</sup>

The Commonwealth has no head of power over communism or criminal laws or terrorism for that matter. In the *Communist Party case*, the High Court struck down the Communist Party Dissolution Act for lack of constitutional power. In particular, the Court held that the legislation could not be supported under the executive power (section 61) combined with the express incidental power in section 51(xxxix). Nor could it be supported by the defence power in a time of ostensible peace or under an implied power giving the Commonwealth power to make laws for its own preservation. Submissions were also made to the High Court that the legislation infringed the separation of powers but this argument was not considered in detail by the Court.

As stated above, it is the Government’s view that the Hizballah Bill does not raise the same *Communist Party case* uncertainties that ‘plague[d] the opposition’s [original] proposal’ to introduce legislation specifically listing Hezbollah as a terrorist organisation.<sup>56</sup> Do any constitutional questions remain?

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There are both differences and similarities between the Hizballah Bill and the Communist Party Dissolution Act. It can be argued that problems associated with the *Communist Party case* and any other potential constitutional difficulties have been overcome in the case of the Hizballah Bill in various ways. For instance:

- the scope of the defence power, a constitutionally elastic power, has expanded due to the current international situation
- the external affairs power and other constitutional powers also support the legislation
- a regulation banning a ‘Hizballah organisation’ is judicially reviewable in ways that a declaration under the Communist Party Dissolution Act was not. In the *Communist Party case*, the High Court was concerned that judicial review of the Governor-General’s opinion was not available. In contrast, decisions of the Attorney-General about whether an organisation is a terrorist organisation can be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* and the regulations themselves may be reviewable on limited grounds. Further, unlike the Communist Party Dissolution Act, the Hizballah Bill does not itself directly impose penalties on particular organisations or individuals. Terrorist organisations are not dissolved by the Hizballah Bill and their members are not excluded from public employment by legislative fiat. The determination of criminal liability for terrorist organisation offences is a matter for the courts.
- in any event, if the States approve the Hizballah amendments, as contemplated by referral of power arrangements, any constitutional deficits in Commonwealth constitutional power will be cured. If necessary, given the commencement date of the Hizballah Bill, State approval might, presumably, be back-dated.

In response to these arguments, it might be said that:

- if the operation of the defence power has expanded it has not expanded sufficiently to support the Hizballah Bill
- judicial review under the *Administrative Decisions (Judicial Review) Act* provides an unsatisfactory way of scrutinising the Attorney-General’s decisions because it does not encompass merits review. Further, as with the offences in the Communist Party Dissolution Act, terrorist organisation offences give the courts little work to do. For instance, the offence of being a member of a terrorist organisation will only require the issue of ‘membership’ to be made out.
- approval of the Hizballah amendments by the States and Territories (if that is needed) cannot save legislation which offends constitutional prohibitions on Commonwealth power—for example, it will not save Commonwealth legislation that infringes the separation of powers (for instance, legislation that usurps federal judicial power by acting as an Act of Attainder<sup>57</sup>) or impermissibly restricts the implied constitutional freedom of political communication

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As indicated earlier in this Digest, amendments to Part 5.3 of the Criminal Code need the approval of a majority of States and Territories (and at least four States). This does not stop the Commonwealth from legislating, within its own constitutional capacities, to amend Part 5.3 but does mean that any curable deficits in constitutional power that should be plugged will need State/Territory approval. An Intergovernmental Agreement determining processes for State/Territory approval of Part 5.3 amendments is yet to be finalised.<sup>58</sup> At the time of writing, it did not appear that State/Territory approval had been obtained.

## The Hizballah External Security Organisation and derivative organisations

The Hizballah Bill enables regulations to be made about the Hizballah External Security Organisation and organisations ‘derived from that organisation’. A number of questions might be asked about these provisions. First, is it possible to easily distinguish between a person who might have associations with Hizballah and a person with relevant associations with the Hizballah External Security Organisation? Further, the meaning of ‘derived’ is uncertain. Might it encompass organisations once associated with the Hizballah External Security Organisation or with similar philosophical or political roots but which no longer have those associations? How widely does this arm of the definition of ‘Hizballah organisation’ extend the range of organisations that can be listed?

## Retrospectivity

There is a presumption against the retrospective operation of statutes.<sup>59</sup> The principle of non-retrospectivity for criminal laws is enshrined in international as well as domestic law.<sup>60</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>61</sup>

However, this is not to say that retrospective laws cannot be made within constitutional limits<sup>62</sup> or that their passage is never justified.<sup>63</sup>

Reference has already been made to the fact that **proposed subsection 102.1(11)** and **clause 3** enable regulations listing a ‘Hizballah 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

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the Criminal Code. The Bill contemplates that a public announcement could be made prior to the passage of the Bill<sup>64</sup> and will be effective to backdate the operation of a proscription regulation so long as the regulation is made within 60 days after the Hizballah Bill receives Royal Assent. As stated earlier, the Attorney-General made a public announcement on 5 June 2003.

## Endnotes

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- 1 The expressions 'listing', 'proscription' and 'banning' are used interchangeably throughout this Digest.
- 2 Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, p. 1041.
- 3 The numbering of the Terrorism Bill, '[No.2]', resulted from the fact that the original Bill, introduced on 12 March 2002, was withdrawn the following day and the [No. 2] Bill substituted. The reason was a problem with House of Representatives Standing Orders, which arose because the title of the original Bill and that referred to in the Attorney-General's presentation notice differed. See Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, pp. 1138–9.
- 4 Senate Legal and Constitutional Legislation Committee, *Consideration of Legislation Referred to the Committee. Security Legislation Amendment (Terrorism) Bill 2002 [No.2], Suppression of the Financing of Terrorism Bill 2002, Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002, Border Security Legislation Amendment Bill 2002, Telecommunications Interception Legislation Amendment Bill 2002*, May 2002, pp. 28–9.
- 5 With the Coalition and Opposition party members outlining the framework of an alternative model, and Democrat Senator Brian Greig stating, 'The Australian Democrats strongly recommend that this power [proscription] be removed from the legislation entirely.' *ibid.*, p. 85.
- 6 *ibid.*, pp. vii–viii.
- 7 See *Senate Journals*, 26 June 2002, p. 470.
- 8 The *Acts Interpretation Act 1901* 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 regulation. If either House (normally the Senate) passes a resolution within this timeframe disallowing the regulation, 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 regulation is deemed to have been disallowed. In other words, the disallowance period run for as little as

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- 15 sitting days after tabling to as much as 30 sitting days after tabling (if deemed disallowance occurs).
- 9 See Senate *Journals*, 25 June 2002, pp. 469–71.
- 10 See Senate *Journals*, 25 June 2002, p. 471 & Senate *Journals*, 26 June 2002, p. 478.
- 11 Subsection 102.1(3).
- 12 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003, House of Representatives, *Hansard*, 23 October 2002, p. 8449.
- 13 Section 102.2.
- 14 Section 102.3.
- 15 Section 102.4.
- 16 Section 102.5.
- 17 Section 102.6.
- 18 Section 102.7.
- 19 *A Safer and More Secure Australia*.
- 20 Attorney-General, *News Release*, ‘National Move to Combat Terror’, 7 April 2002.
- 21 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorism) Bill 2002, House of Representatives, *Hansard*, 12 December 2002, p. 10263.
- 22 *ibid*.
- 23 *Terrorism (Commonwealth Powers) Act 2002* (NSW), *Terrorism (Commonwealth Powers) Act 2002* (Tas), *Terrorism (Commonwealth Powers) Act 2003* (WA), *Terrorism (Commonwealth Powers) Act 2002* (SA), *Terrorism (Commonwealth Powers) Act 2002* (Qld), *Terrorism (Commonwealth Powers) Act 2003* (Vic). The Northern Territory has passed the *Northern Territory (Terrorism) Request Act 2003*, although it is not constitutionally necessary for it to do so, given the Commonwealth’s plenary power in section 122 of the Constitution.
- 24 See, for example, subsection 4(4), *Terrorism (Commonwealth Powers) Act 2003*.
- 25 Criminal Code Amendment Regulations 2002 (No. 2), Statutory Rules 2002 No. 249.
- 26 Criminal Code Amendment Regulations 2003 (No. 8), Statutory Rules 2003 No. 64.
- 27 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003, House of Representatives, *Hansard*, 29 May 2003, p. 14929.
- 28 Nigel Brew, ‘Hezbollah in Profile’, *Research Note*, No. 42 2002-03, 2 June 2003.
- 29 ‘PM and Labor at odds on outlawing Hezbollah’, *The Australian*, 27 May 2003.
- 30 Leader of the Opposition, ‘Labor acts to ban the terrorist wing of Hezbollah’, *Media Release*, 27 May 2003.
- 31 ‘Dockyard brawling over outlawing Hezbollah’, *The Australian*, 28 May 2003.

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- 32 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1. Presumably, the Attorney-General's view is based on similarities between any proposal to enact legislation simply proscribing a named organisation as a terrorist organisation and the *Communist Party Dissolution Act 1950*, struck down by the High Court for want of constitutional power. Among other things, the *Communist Party Dissolution Act 1950* contained recitals stating that the Australian Communist Party and communists were working to overthrow established government in Australia by revolutionary means and engaging in criminal acts designed to dislocate industries vital to the security and defence of Australia and then a provision declaring the Australian Communist Party to be an unlawful association and dissolving it by force of the Act (section 4).
- 33 See, for example, 'Attorney-General moves to ban Hezbollah in Australia', *AM*, 27 May 2003. And also 'Government gives in principle support to bill listing Hezbollah as terrorist organisation', *The World Today*, 29 May 2003.
- 34 Daryl Williams MP, House of Representatives, *Hansard*, 29 May 2003, p. 14931.
- 35 Ibid.
- 36 See, for example, 'Bars to the power of one', *The Australian*, 27 May 2003; 'Hezbollah ban justified, urgent and necessary', *The Australian*, 29 May 2003; 'The wrong way to fight terrorism', *The Age*, 30 May 2003; 'Australia is right to ban Hezbollah. Here's why', *The Age*, 2 June 2003.
- 37 'Australia wants new power to list Hezbollah as terror group', *Associated Press*, 27 May 2003.
- 38 Simon Crean MP, House of Representatives, *Hansard*, 3 June 2003, p. 15190.
- 39 Michael Organ MP, House of Representatives, *Hansard*, 3 June 2003, p. 15216.
- 40 'Hezbollah threats alarmist: Lebanese community', *The World Today*, 27 May 2003.
- 41 Former principal investigator of the United Nations' Terrorism Prevention Branch and chairman of NATO's working group on terrorism.
- 42 'Hezbollah more likely to use Australia as support base than target', *The World Today*, 28 May 2003.
- 43 United Press International, 'Hezbollah blasts Australian move to ban it', 29 May 2003.
- 44 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003, House of Representatives, *Hansard*, 29 May 2003, pp. 14930–1.
- 45 Workplace Relations (Fair Dismissal) Bill 2002 [No. 2]; Trade Practices Amendment (Small Business Protection) Bill 2002 [No. 2]; National Health Amendment (Pharmaceutical Benefits—Budget Measures) Bill 2002 [No. 2]; and Workplace Relations (Secret Ballots for Protected Action) Bill 2002 [No. 2].
- 46 A double dissolution cannot occur less than 6 months from the date of expiry of the House of Representatives (in the case of the 40<sup>th</sup> Parliament—11 February 2005).
- 47 See Rob Lundie, 'Timetable for the Next Commonwealth Election', *Research Note*, No. 37 2001-02, 14 May 2002.

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- 48 Attorney-General, 'Listing of the Hizballah External Security Organisation as a terrorist organisation', *News Release 64/03*, 5 June 2003.
- 49 Senate Committee, *op. cit.*, pp. 46–51.
- 50 Subsection 4(1), *Communist Party Dissolution Act 1950*. There were also provisions that enabled the Governor-General to make a declaration that a person was a Communist. A limited appeal mechanism was provided for. See section 9.
- 51 Affiliates of the Australian Communist Party, bodies supporting communism or bodies whose policies were wholly or substantially directed, shaped or influenced by communists who used the body to advocate or carry out communist objectives—subsection 5(1), *Communist Party Dissolution Act 1950*.
- 52 Subsections 5(1) & (2), *Communist Party Dissolution Act 1950*.
- 53 Subsection 5(4), *Communist Party Dissolution Act 1950*. This appeal could be made only on one ground—that the body was not encompassed by the statutory description of organisations under communist control found in subsection 5(1). The ground of declaration that the organisation was a body whose existence was prejudicial to the security and defence of the Commonwealth etc could not be appealed.
- 54 Section 6, *Communist Party Dissolution Act 1950*.
- 55 Subsection 7(1), *Communist Party Dissolution Act 1950*.
- 56 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003, House of Representatives, *Hansard*, 29 May 2003, p. 14931.
- 57 There is a variety of views in Australian jurisprudence about what might constitute an Act of Attainder. In *Polyukhovich v. Commonwealth* (1991) 172 CLR 501 at 537, Mason CJ suggested that for legislation to constitute an Act of Attainder it would need to include an express declaration of the guilt of an individual or individuals (at 537). There are also suggestions in that case that if the legislature itself, expressly or impliedly, determines guilt or innocence, then this is an interference with the judicial process. See Dawson J at 685-6. For a discussion of Acts of Attainder see Leslie Zines, *The High Court and the Constitution*, 4<sup>th</sup> ed, 1997 and Fiona Wheeler, 'The Separation of Federal Judicial Power. A Purposive Analysis', PhD Thesis, 1999.
- 58 However, the South Australian referral legislation explicitly states how approval for amendments to Part 5.3 (and Chapter 2 of Criminal Code) can be signified. It provides that a gazette notice published by a designated person for a State or Territory, such as the Governor, Premier or Chief Minister, that the State or Territory has approved an amendment of Part 5.3 is conclusive evidence that State or Territory has approved the amendment.
- 59 In relation to regulations that retrospectively affect rights and liabilities see subsection 48(2), *Acts Interpretation Act 1901*.
- 60 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.'

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- 61 (1991) 172 CLR 501 at: 688–9.
- 62 See *Polyukhovich v. Commonwealth* (1991) 172 CLR 501.
- 63 (1991) 172 CLR 501 at: 689 per Toohey J.
- 64 But not before 29 May 2003. Note that a public announcement alone in the absence of the passage of the Bill and the making of regulations would not support coercive action by the Executive Government or its agencies in relation to ‘Hizballah organisations’ or their members.

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