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## Criminal Code Amendment (Terrorist Organisations) 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

Bills Digest  
No.174 2002-03

Criminal Code Amendment (Terrorist Organisations)  
Bill 2003

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Law and Bills Digest Group  
16 June 2003

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# Criminal Code Amendment (Terrorist Organisations) Bill 2003

**Date Introduced:** 29 May 2003

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** Royal Assent.

## Purpose

To create a mechanism whereby organisations can be listed as terrorist organisations, relying on the Attorney-General rather than the United Nations Security Council.

## Background

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

- *Security Legislation Amendment (Terrorism) Act 2002*<sup>1</sup>
- *Criminal Code Amendment (Terrorist Organisations) Act 2002*,<sup>2</sup> and
- Criminal Code Amendment (Hizballah) Bill 2003 (Hizballah Bill).<sup>3</sup>

## Listing Arrangements

For present purposes, it is sufficient to note that the present Bill and the Hizballah Bill both seek 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). Division 102 also contains provisions which enable regulations to be made listing an organisation as a terrorist organisation in certain circumstances.

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## History of the Proscription Provision

### Originally Introduced

As originally introduced in the Security Legislation Amendment (Terrorism) Bill 2002, the 'listing' arrangements 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 it was an international terrorist organisation, or
- the organisation posed a danger to the security or integrity of the Commonwealth or another country.

### 102.2 Attorney-General may make declarations

- (1) The Attorney-General may make a declaration in writing that an organisation is a proscribed organisation if the Attorney-General is satisfied on reasonable grounds that one or more of the following paragraphs apply in relation to the organisation:
  - (a) if the organisation is a body corporate—the organisation has committed, or is committing, an offence against this Part (whether or not the organisation has been charged with, or convicted of, the offence);
  - (b) a member of the organisation has committed, or is committing, an offence against this Part on behalf of the organisation (whether or not the member has been charged with, or convicted of, the offence);
  - (c) the declaration is reasonably appropriate to give effect to a decision of the Security Council of the United Nations that the organisation is an international terrorist organisation;
  - (d) the organisation has endangered, or is likely to endanger, the security or integrity of the Commonwealth or another country.

### Government Amendments

These arrangements were substantially altered in the Bill's passage through Parliament. First, the ministerial declaration process was replaced with a regulation making power, based on the satisfaction of the Attorney-General as to the matters outlined above. The regulations would have been subject to the usual disallowance procedure set out in the *Acts Interpretation Act 1901*<sup>4</sup> but contained an additional safeguard. Proposed subsection 102.1(4) provided that regulations would not take effect until the disallowance period had expired.<sup>5</sup> Second, the 'danger to security or integrity' formula was removed from the regime.

The Government amendments in the Senate allowed for both Ministerial and UNSC listing and took this form:<sup>6</sup>

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**terrorist organisation** means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
  - (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2) and (4)); or
  - (c) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (3), (5) and (6)).
- (2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of terrorist organisation in this section, 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).
- (3) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (c) of the definition of terrorist organisation in this section, the Minister must be satisfied on reasonable grounds that:
- (a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and
  - (b) the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and
  - (c) 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).
- (4) Regulations for the purposes of paragraph (b) or (c) of the definition of terrorist organisation in this section may not take effect earlier than the day after the last day on which they may be disallowed under section 48 of the *Acts Interpretation Act 1901*. That section has effect subject to this subsection.

#### Opposition/Senate Amendments

Third, the ministerial discretion was effectively removed, forcing a reliance on decisions, or resolutions, by the UNSC on terrorism or terrorist organisations. This regime was enacted and became section 102.1 of the Criminal Code:

**terrorist organisation** means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
  - (c) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (3), (5) and (6)).
- (3) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (c) of the definition of **terrorist organisation** in this section, the Minister must be satisfied on reasonable grounds that:

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- (a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and
- (b) the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and
- (c) 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).

*So, paragraph (b) of the definition of terrorist organisation was removed, along with corresponding subsection (2), the ministerial discretion provision. The provisions were not renumbered.*

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>7</sup>

The reason for removing 'paragraph (b)' was stated by Senator Faulkner as follows:

In response to strong objections to the government's proposed proscription regime ... we have before the chamber now a proposal which puts forward a regime with three alternative limbs ... limb 1 is an organisation found by a court to be engaged in a terrorist act, limb 2 is an organisation which is the subject of a decision by the United Nations Security Council that it is an international terrorist organisation, and limb 3 is an organisation which the Attorney-General is satisfied on reasonable grounds is engaged in a terrorist act. Of those, limbs 2 and 3 require that the Attorney-General make a regulation and do not take effect until the disallowance period has expired. The government has said that such a decision would also be open to judicial review. I indicated earlier...the very serious concerns the opposition has that the government's approach still includes *an executive discretion to proscribe organisations*.<sup>8</sup>

Clearly, the focus of concern was the 'executive discretion to proscribe organisations':

That proposal remains unacceptable to the opposition and we are moving for it to be deleted. We do not support giving such wide powers, such arbitrary powers, to any minister of any government. We say ... that such powers are open to abuse. While we do have a very strong in principle objection to executive proscription, we have said that we are prepared to accept listing of an organisation declared to be a terrorist organisation by the United Nations Security Council. I want to point out ... that there is a fundamental need in the war against terrorism to have international cooperation. We say that in the same way that this parliament and the Australian people should expect Australia to cooperate with the United Nations committee processes in relation to human rights issues, whether it is refugee or environmental issues or the whole raft of other important questions, Australia should cooperate as best as we can with the international community and the United Nations effort to target and destroy terrorist organisations. This is an international struggle, and if the international community

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through the United Nations Security Council declares an organisation to be a terrorist organisation we do accept that such an organisation should be banned.<sup>9</sup>

### Jemaah Islamyah

Section 102.1 of the Criminal Code 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.

The reason behind removing subsection 102.1(4) was stated by the Attorney-General:

Under the act, in its present form, regulations made now that list an organisation as a terrorist organisation will not come into operation until after the parliamentary disallowance period has ended, in 2003. This is because there are insufficient sitting days in the remainder of the sitting schedule to satisfy the required waiting period.

This means that the government cannot ... complete the listing of a terrorist organisation—such as a terrorist organisation believed to be involved in the Bali bombing—until next year. As a result, even though there may be known members of a terrorist organisation here in Australia, this will limit the ability of authorities to investigate them and, if there is enough evidence, to prosecute them, until well into 2003. This is totally unacceptable. We need to be able to act swiftly ...<sup>10</sup>

### Referral of Power and Renumbering of Part 5.3

The Bills Digest to the Hizballah Bill contains a discussion of the reference of State powers on terrorism to the Commonwealth under section 51(xxxvii) of the Constitution.

In the process of referrals, and the subsequent re-enactment of Part 5.3 of the Criminal Code under the *Criminal Code Amendment (Terrorism) Act 2003*, section 102.1 was renumbered, such that paragraph (c) is paragraph (b) and subsection (3) is subsection (2):

***terrorist organisation*** means:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act occurs); or
  - (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).
- (2) Before the Governor-General makes a regulation specifying an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in this section, the Minister must be satisfied on reasonable grounds that:
- (a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and

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- (b) the organisation is identified in the decision, or using a mechanism established under the decision, as an organisation to which the decision relates; and
- (c) 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). [...]

### Machinery Provisions

Finally, it is necessary to trace through the machinery provisions in section 102.1 which govern the duration and expiry of regulations made under subsection 102.1(2):

- (3) Regulations for the purposes of paragraph (b) of the definition of **terrorist organisation** in this section cease to have effect on the second anniversary of the day on which they take effect. To avoid doubt, this subsection does not prevent:
  - (a) the repeal of those regulations; or
  - (b) the cessation of effect of those regulations under subsection (4); or
  - (c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).
- (4) A regulation specifying an organisation for the purposes of paragraph (b) of the definition of **terrorist organisation** in this section ceases to have effect when:
  - (a) the decision mentioned in paragraph (2)(a) ceases to have effect; or
  - (b) the organisation ceases to be identified as described in paragraph (2)(b).
 The regulation does not revive even if the organisation is again identified as described in paragraph (2)(b).
- (5) To avoid doubt, subsection (4) does not prevent:
  - (a) the repeal of a regulation; or
  - (b) the making of a regulation that is the same in substance as a regulation that has ceased to have effect because of that subsection.
- (6) For the purpose of making regulations specifying an organisation for the purposes of paragraph (b) of the definition of **terrorist organisation** in this section, it does not matter whether the relevant decision of the Security Council of the United Nations was made before or after 6 July 2002.

So, regulations which implement a decision of the United Nations Security Council have a two-year sunset clause but may cease earlier if the regulations are repealed or if the basis for the regulations, in the decision of the United Nations Security Council, falls away. Otherwise, the regulations can be remade at any time.

Regulations may also provide their own time limits or expiry dates.

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## Hizballah Bill

For completeness, it is also worth noting that the present Bill was introduced into the Parliament on the same day as the Criminal Code Amendment (Hizballah) Bill 2003. The latter is designed to give the Government a power to 'list' organisations as terrorist organisations provided they fit the definition of 'Hizballah External Security Organisation', or a derivative organisation, and provided the Attorney-General is satisfied that the organisation is directly or indirectly engaged in terrorism.

While the Opposition has supported the Hizballah Bill, the Government does not expect the present Bill to pass the Parliament. The Attorney-General said in his Second Reading Speech that:

... the opposition has indicated that it will not support the [terrorist organisation] 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>11</sup>

The fate of the present 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>12</sup> Should the Government wish to take all or some of these to a double dissolution election, Parliament would have to be dissolved by 11 August 2004.<sup>13</sup> The latest date for a double dissolution election is 16 October 2004.<sup>14</sup>

## Overseas Precedents

### UK, US and Canada

In the United Kingdom, United States and Canada, proscription is controlled by the Parliament or Executive.

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Under the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK) an organisation could be proscribed either by legislative amendment or by legislative instrument. The Secretary of State was empowered to add any organisation '*that appears to him* to be concerned in terrorism ... or in promoting or encouraging it'.<sup>15</sup> Under the Terrorism Act 2000 (UK) the Secretary of State is empowered to add any organisation 'if he *believes* that it is concerned in terrorism',<sup>16</sup> subject to an application-based power to revoke<sup>17</sup> and a right of appeal to a judicial review-based appeal body,<sup>18</sup> and, by leave, to a superior court.<sup>19</sup>

Under the Anti-terrorism and Effective Death Penalty Act of 1996 (US) the Secretary of State was empowered to designate any foreign organisation 'if he *finds* that' it is engaged in terrorist activity,<sup>20</sup> subject to a power to revoke,<sup>21</sup> a codified judicial review process<sup>22</sup> and disallowance by an Act of Congress.<sup>23</sup>

Under the Anti-Terrorism Act 2002 (CA) the Canadian Governor-in-Council may proscribe an organisation if satisfied that there are 'reasonable grounds to believe' that it is knowingly involved in terrorism or is knowingly acting on behalf of or at the direction of or in association with such an entity.<sup>24</sup> This is subject to an application based power to revoke and a partially codified judicial review process.<sup>25</sup>

Thus, in the United Kingdom, United States and Canada, while the Executive has a primary role, supervisory control is vested in the Judiciary (to varying degrees). Clearly, attempts to establish effective proscription processes have had to grapple with the need to balance the roles of the Parliament, Executive and Judiciary.

#### New Zealand

The [Terrorism Suppression Act 2002](#) (NZ) enables organisations to be designated as terrorist or associated entities. Among other things, is an offence to participate in such groups or undertake financial dealings with such groups.

The Act enables the Prime Minister to make interim and final designations that a group is a terrorist or associated entity. The grounds on which such designations can be made and the procedure for making them are set out in the Act. The designation must be publicly notified and must be notified to the organisation if a representative of that organisation is in New Zealand. Designations expire 3 years after they have been made—unless earlier revoked by the Attorney-General or have been successfully challenged on judicial review grounds or have had their operation extended via a High Court decision. In order for the High Court to extend the operation of the designation the Attorney-General must apply to the Court for the designation to remain in force. The application must be served on any person the Court directs it to be served on.

The High Court cannot make an extension order unless the grounds set out in section 37 are made out. These include that the Attorney-General satisfies the Court on the balance of probabilities that the organisation is the subject of domestic or international criminal proceedings, has been convicted, or has acted knowingly in relation to certain principal or ancillary terrorist offences (terrorist acts, facilitating terrorist acts, or assisting such acts).

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These provisions also extend to organisations that are, on the balance of probabilities, wholly owned, or effectively controlled, directly or indirectly, by such an organisation.

### Northern Territory

Also, it is worth noting the struggle played out in the Northern Territory in respect of the anti-terrorism provisions in the *Criminal Code* (NT). Originally, these provisions applied to 'proscribed organisations'. These were identified by the Administrator, acting on the advice of the Executive Council, with a simple parliamentary tabling requirement.<sup>26</sup> Early drafts of these provisions 'contained no criteria or procedures relating to such proscription'.<sup>27</sup> As enacted, they simply required, in the opinion of the Administrator, the organisation 'has as its object or one of its objects the use of violence to achieve its end' or that the members have 'demonstrated a propensity to use violence to achieve the organisation's ends'. The power to 'proscribe organisations' was strongly criticised on the basis that it had 'potential implications for interference with a number of civil rights'<sup>28</sup> and, on that basis, should be 'the subject of impartial judicial consideration'.<sup>29</sup> The response at the time was that an appeal to the courts would take a sensitive issue out of the Parliament. It would be 'an extraordinary, novel and dangerous precedent'<sup>30</sup> and would 'politicise the judiciary'.<sup>31</sup> But, within a year the issue was reviewed and, pursuant to an agreement between the Commonwealth and the Northern Territory,<sup>32</sup> control was surrendered to the courts.<sup>33</sup>

## Main Provisions

Apart from obvious differences regarding the range of terrorist organisations covered, the main provisions of the present Bill correspond fairly closely to those of the Hizballah Bill.

### Listing Provisions

**Item 1** repeals subsection 102.1(2) of the Criminal Code and replaces it with **proposed subsection 102.1(2)**. The effect of **proposed subsection 102.1(2)** is that the UNSC basis for listing terrorist organisations is replaced by the ministerial discretion that was once proposed by the Government in the Senate.

*In effect, the version of 'paragraph (b)' of the definition, and the corresponding subsection (2), that was removed by Opposition amendments in the Senate in June 2002,<sup>34</sup> is reinstated and exiting 'paragraph (c)', and corresponding subsection (3), is removed.*

In short the original proposal is reinstated and the connection with the UNSC is severed.

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## Machinery Provisions

Item 2 deals with the machinery provisions.

**Proposed subsection 102.1(4)** effectively allows a 'terrorist 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 [**proposed subsection 102.1(5)**].

## Endnotes

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- 1 Nathan Hancock, Security Legislation Amendment (Terrorism) Bill 2002, [\*Bills Digest No. 126, 2001–02\*](#).
- 2 Sudip Sen, Criminal Code Amendment (Terrorist Organisations) Bill 2002, [\*Bills Digest No. 87, 2002–03\*](#).
- 3 Jennifer Norberry, Criminal Code Amendment (Hizballah) Bill 2003, [\*Bills Digest No. 170, 2002–03\*](#).
- 4 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 15 sitting days after tabling to as much as 30 sitting days after tabling (if deemed disallowance occurs).
- 5 See: Senate *Journals*, 25 June 2002, pp. 469–71.
- 6 Senator Chris Ellison, Security Legislation Amendment (Terrorism) Bill 2002, Senate, *Debates*, 25 June 2002, p. 2602.
- 7 Subsection 102.1(3).
- 8 Senator John Faulkner, Security Legislation Amendment (Terrorism) Bill 2002, Senate, *Debates*, 25 June 2002, p. 2606 (emphasis added).
- 9 Senator John Faulkner, Security Legislation Amendment (Terrorism) Bill 2002, Senate, *Debates*, 26 June 2002, p. 2624.

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- 10 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2002, House of Representatives, *Debates*, 23 October 2002, p. 8450.
- 11 Attorney-General, Second Reading Speech, Criminal Code Amendment (Terrorist Organisations) Bill 2003, House of Representatives, *Debates*, 29 May 2003, pp. 14930–1.
- 12 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].
- 13 A double dissolution cannot occur less than 6 months from the date of expiry of the House of Representatives (in the case of the 40th Parliament—11 February 2005).
- 14 See Rob Lundie, 'Timetable for the Next Commonwealth Election', *Research Note*, No. 37 2001-02, 14 May 2002.
- 15 Subsection 1(3).
- 16 Subsection 3(4).
- 17 Section 4.
- 18 Section 5. The body is the Proscribed Organisations Appeal Commission.
- 19 Subsection 6.
20. [Pub. L. 104-132](#), section 302, inserting 8 U.S.C. 1189.
- 21 8 U.S.C. 1189(a)(6).
- 22 8 U.S.C. 1189(b).
- 23 8 U.S.C. 1189(a)(5).
- 24 Anti-Terrorism Act (CA), section 4, inserting subsection 83.05(1) into the *Criminal Code*.
- 25 Anti-Terrorism Act (CA), section 4, inserting subsection 83.05(5) into the *Criminal Code*.
26. *Criminal Code Act 1983* (NT), section 51 (amended).
27. David Weisbrot, 'Criminal Law: NT Prepares for War', *Legal Service Bulletin*, Vol. 7(4), August 1982, p. 184.
28. 'Concerns have been expressed that this section [original section 51] has potential implications for interference with a number of civil rights, which Australia has international obligations to protect including the right to freedom of expression, the right to freedom of association and the right to peaceful assembly': Letter from the Prime Minister to the Chief Minister of the Northern Territory, 17 November 1983 reproduced in Senator Gareth Evans, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 18 November 1983, Answer to Question on Notice, p. 2856.
29. 'The proscribing of organisations under the terrorism provision in the code is in the hands of the executive and is thus a political decision. In our view it is inappropriate that this be so. Such decisions should be the subject of impartial judicial consideration': Mr Bob Collins,

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- MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 31 August 1983, p. 981.
30. Letter from the Chief Minister of the Northern Territory to the Prime Minister tabled by Senator Bernie Kilgariff in Adjournment, '[Northern Territory Criminal Code-Presentation of Petitions](#)', Senate, *Debates*, 15 December 1983, p. 3932.
  31. J.M. Robertson, MLA, Legislative Assembly of the Northern Territory, *Parliamentary Record*, 31 August 1983, p. 981.
  32. Senator Gareth Evans, '[Northern Territory Criminal Code](#)', Senate, *Debates*, 29 March 1984, Answer to Question Without Notice, p. 877.
  33. The provisions on 'proscribed organisations' were replaced with the current provisions on 'unlawful organisations' by section 5 of the *Criminal Code Amendment Act 1984*.
  34. For a fuller discussion see the Background section of this Digest at p. 4.

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