

Background to the listing of terrorist entities

Security Legislation Amendment (Terrorism) Act 2002

- 1.1 The original listing arrangements for terrorist organisations were made under the *Security Legislation Amendment (Terrorism) Act 2002*, which amended the Commonwealth Criminal Code by inserting into the Code, Part 5.3, which contained provisions creating terrorist offences. The passage of this and related bills through the Parliament is illustrative of many of the issues relating to all security legislation – the tension between security and civil liberties and between executive and parliamentary and judicial power.
- 1.2 The original Bill outlined the powers of the Attorney-General. He/she could declare an organisation to be a terrorist organisation on being satisfied on any one of a number of tests set out in the legislation. This declaration power was replaced by a regulation making power. The difference was important. If achieved through regulations, the listings would be subject to a disallowance period and, in addition, subsection 102.1(4) provided that the regulation would not take effect until the disallowance period had expired. The original Bill also allowed for both Ministerial and United Nations Security Council (UNSC) listing.

- 1.3 As finally amended, the 2002 Act allowed for the listing of terrorist organisations by regulations made by the Governor-General on advice from the Attorney-General, if the Minister was satisfied on reasonable grounds that:
- (a) the Security Council of the United Nations has made a decision relating wholly or partly to terrorism; and¹
 - (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).
- 1.4 The amendments made during the passage of the Bill had effectively removed the ministerial discretion to make regulations in relation to listings, forcing a reliance on decisions or resolutions of the UN Security Council. This bill came into effect on 5 July 2002.

Criminal Code Amendment (Terrorist Organisations) Act, 2002

- 1.5 Soon after, in October 2002, a further amendment was made to the Criminal Code through the *Criminal Code Amendment (Terrorist Organisations) Act 2002*. This Act repealed section 102.1(4). It ensured that the regulations would have immediate effect and would not be postponed until the end of the disallowance period.
- 1.6 Throughout 2002-2003, the States each passed legislation which referred State powers to the Commonwealth using section 51 (xxxvii) of the Constitution to ‘support an effective national response to threats of transnational crime and terrorism.’² State legislation incorporated, as a schedule, Part 5.3 of the Commonwealth Criminal Code.
- 1.7 Thirteen organisations were listed by regulation under the 2002 legislation between October 2002 and April 2003. All had previously

1 Emphasis added.

2 Quoted from Bills Digest No 170 2002-03, Parliamentary Library, p. 5.

been listed by the UNSC and all were related to the Taliban or Al-Qaeda.

Criminal Code Amendment (Hizballah) Act 2003

- 1.8 Government Ministers argued that the limitations the UNSC prerequisite applied to terrorist listings diminished their ability to deal effectively with the threat of terrorist organisations within Australia. In April 2003, the Prime Minister, Mr John Howard, wrote to the then Leader of the Opposition, Mr Simon Crean, seeking Labor Party support for the removal of this requirement. Labor did not support a general banning power and instead proposed the introduction of a private member's bill to ban Hizballah specifically. The Government pre-empted this on 27 May 2003 with the introduction of the Criminal Code Amendment (Hizballah) Bill 2002.
- 1.9 Banning terrorist organisations through specific legislation was used again in relation to Lashkar-e-Taiba and the terrorist wing of Hamas. On 5 November 2003, the Government introduced the Criminal Code Amendment (Hamas and Lashkar-e-Taiba) Bill 2003. This Bill had terms similar to the previously passed Hizballah Bill.

Criminal Code Amendment (Terrorist Organisations) Act, 2003

- 1.10 Simultaneously with the introduction of the Hizballah bill, the Attorney-General introduced the Criminal Code Amendment (Terrorist Organisations) Bill, 2003. The purpose of this bill was to revisit the proscription regime and to reinstate the provisions removed by Senate amendment in 2002. This effectively reintroduced the proscription power of the Attorney-General and severed the connection between listing and the UN Security Council. The amendments also required that there be consultation with the Leader of the Opposition prior to the listing of an organisation.
- 1.11 Further, it introduced a delisting provision, by which an individual or organisation might make an application to the Minister to the effect that it no longer was directly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. The Minister was required to consider such applications. The delisting provision was

not subject to parliamentary review. It was not a disallowable instrument.

- 1.12 Finally, the amendment inserted a review mechanism for both individual listings and for the listing process itself. This provision, 102.1A, enabled the Parliamentary Joint Committee on ASIO, ASIS and DSD to review a regulation as soon as possible after the making of the regulation and report the Committee's comments and recommendations to Parliament before the end of the applicable disallowance period – a period of 15 sitting days. It also asked the Committee to review, as soon as possible after the third anniversary of the commencement of this section, the operation, effectiveness and implications of the listing procedure.
- 1.13 As amended, the Criminal Code Amendment (Terrorist Organisations) Bill passed both Houses of Parliament and gained assent on 10 March 2004, becoming the *Criminal Code Amendment (Terrorist Organisations) Act, 2004*.