

When is an organisation a 'terrorist organisation'?



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After much controversy, the *Criminal Code Amendment (Terrorist Organisations) Act 2004 (Cth) (Terrorist Organisations Act)* was passed by federal Parliament on 4 March 2004 and received royal assent on 10 March 2004. The *Terrorist Organisations Act* amends the *Criminal Code Act 1995 (Criminal Code)* to dispense with the requirement for a decision by the United Nations Security Council before a regulation can be made to proscribe an organisation as a "terrorist organisation". The effect of listing an organisation as a "terrorist organisation" is to engage a host of offences in the *Criminal Code* punishable by terms of imprisonment varying between 10 years and 25 years.

The *Terrorist Organisations Act* follows the enactment of specific legislation proscribing the Hamas, Hizballah and Lashkar-e-Tayyiba organisations. Following its enactment, s102.1(2) of the *Criminal Code* now empowers the Governor-General to proscribe an organisation by regulation, provided that the Attorney-General is "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)". There is no longer a requirement that an organisation be identified, directly or indirectly, in a UN Security Council decision as being involved, directly or indirectly, in the commission of a terrorist act. According to the explanatory memorandum for the Bill, the Attorney-General will form his opinion on the basis of information provided by the Australian Security Intelligence Organisation. Further, before an organisation may be proscribed the leader of the opposition must be briefed in relation to the proposed regulation.¹

Offences

Once an organisation is listed as a "terrorist organisation", the various offences in Division 102 of Part 5.3 of the *Criminal Code* are enlivened. When it is determined by regulation that an organisation is a "terrorist organisation", it is an offence to intentionally:

1. direct the activities of the organisation;
2. be a member of the organisation;
3. recruit persons to the organisation;
4. receive training from or provide training to the organisation;
5. receive funds from or make funds available to the organisation; or
6. provide support or resources to the organisation.²

Definition of 'terrorist organisation'

An "organisation" is defined in s100.1 of the *Criminal Code* to mean a "body corporate or an unincorporated body" based anywhere, which may consist of non-Australian members, and which may be part of a larger organisation. A "terrorist organisation" in addition to Hizballah, Hamas and Lashkar-e-Tayyiba 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 ...³

An organisation may be specified by the regulations under para (b) of the definition, that is, based on the Attorney-General's satisfaction on reasonable grounds of certain matters specified in para (b), even if it does not fall within the scope of para (a). Listings of terrorist organisations by regulation under para (b) of the definition cease two years after they take effect, but new regulations "the same in substance" as the original regulations may be made before or after such cessation.⁴

"Terrorist act"

As noted, the Attorney-General's satisfaction turns on a specific connection with a terrorist act. The cryptic definition of a "terrorist act" in s100.1, in turn, has elements of both intention and causation, as well as a limited exclusion of certain "advocacy, protest, dissent or industrial action".⁵ To constitute a "terrorist act", there must be an action done, or a threat made, with the "intention of advancing a political, religious or ideological cause" and the intention of either:

1. coercing, or influencing by intimidation, the government of the Commonwealth or a state, territory or foreign country (or part thereof); or
2. intimidating the public or a section of the public.⁶

Further, the action or threat must cause death, serious physical harm or property damage, endanger a person's life, create a serious risk to public health or safety, or seriously interfere with/disrupt or destroy an electronic system.⁷

Cessation

The amendments introduced by the *Terrorist Organisations Act* also provide for a ministerial declaration published in the *Commonwealth Gazette* where the Attorney-General ceases to be satisfied that an organisation which is listed as a "terrorist organisation" within the meaning of para (b) is

engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act.⁸ The relevant part of the listing regulation then ceases to have effect, however, this does not prevent the organisation from being relisted under para (b).⁹ The amendments also introduce a procedure for a delisting application to be made in relation to certain terrorist organisations.

The grounds for such an application must be that there is "no basis" for the Attorney-General to be satisfied as required by s102.1(2).¹⁰

Review

The *Terrorist Organisations Act* also makes provision for parliamentary review of individual listing regulations, as well as the statutory listing provisions. The review of each listing regulation is to be undertaken by the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) as soon as possible after a regulation is made.¹¹ The PJCAAD must then report its comments and recommendations to each House of Parliament before the end of the applicable disallowance period for that house.¹²

There are also provisions for extending the applicable disallowance period in certain circumstances where the report of the PJCAAD is tabled late.¹³ The first use of regulations pursuant to the amendments under the *Terrorist Organisations Act* was the listing of Palestinian Islamic Jihad announced on 3 May 2004.¹⁴ Overall, a total of 17 organisations have been listed to date by both legislation and regulation.¹⁵ The PJCAAD has also been given the function under the new amendments of reviewing the operation of the new provisions after three years, and to report its comments and recommendations to each House and to the Attorney-General.¹⁶ Listing decisions are also amenable to judicial review, although the efficacy of this right is probably limited. ■

1. Section 102.1(2A).

2. These offences are set out at ss102.2-102.7 of the *Criminal Code*.

3. Section 102.1.

4. Section 102.1(3).

5. Section 100.1(3).

6. Section 100.1(1).

7. Section 100.1(2).

8. Section 102.1(4).

9. Section 102.1(4) and (5).

10. Section 102.1(17).

11. Section 102.1A(1)(a).

12. Section 102.1A(1)(b). The length of the applicable disallowance period depends on whether the disallowance period under the *Acts Interpretation Act 1901 (Cth)* or the new regime under the *Legislative Instruments Act 2003 (Cth)* applies.

13. Section 102.1A(3).

14. Media release 055/2004 by federal Attorney-General, Philip Ruddock, 3 May 2004.

15. According to the Attorney-General's Department National Security website at www.nationalsecurity.gov.au accessed on 29 April 2004.

16. Section 102.1A(2).