

TERRORISM (COMMONWEALTH POWERS) BILL 2002

EXPLANATORY NOTES

GENERAL OUTLINE

Objectives of the Legislation

The object of the Bill is to refer certain matters relating to terrorist acts to the Commonwealth Parliament in accordance with section 51 (xxxvii) of the Commonwealth Constitution, so as to enable the Commonwealth Parliament to make laws about those matters.

The Bill operates by reference to the text in Schedule 1 containing the proposed text of the amendments to the Commonwealth Criminal Code.

Reasons for the objectives and how they will be achieved

Following the terrorist attacks of 11 September 2001 the Prime Minister and State and Territory leaders agreed (on 5 April 2002) that a new national framework was need to meet the challenge of combating terrorism and trans-national crime.

Among other matters the Prime Minister, State and Territory Leaders issued a communiqué where they recorded their agreement:

- ... *to take whatever action is necessary to ensure that terrorists can be prosecuted under the criminal law, including a reference of power of specific, jointly agreed legislation, including roll back provisions to ensure that the new Commonwealth law does not override State law where that is not intended and to come into effect by 31 October 2002. The Commonwealth will have power to amend the new Commonwealth legislation in accordance with provisions similar to those that apply under Corporations arrangements. Any amendment based on the referred power will require consultation with and agreement of States and Territories, and this requirement is to be contained in the legislation.*

A package of Commonwealth Bills to enhance the capacity of the Commonwealth to deal with terrorism was passed by the Commonwealth Parliament on 27 June 2002. Included in this package was the *Security Legislation Amendment (Terrorism) Act 2002*.

The *Security Legislation Amendment (Terrorism) Act 2002* inserted a new Part 5.3 (Terrorism) into Chapter 5 of the Commonwealth Criminal Code. Part 5.3 now includes a series of offences in relation to terrorism which are all linked to the commission of a 'terrorist act'. As the Commonwealth Parliament does not have a specific constitutional power to legislate for terrorism the new Part 5.3 relies on a 'patchwork' of Constitutional powers. However, any legal complexity or uncertainty may become the focus for litigation into the effectiveness of the new Commonwealth terrorism offences. Problems of this kind may be avoided by removing doubts about the extent of the Commonwealth's constitutional power to enact Federal terrorism offences by the States making a constitutional 'reference' to the Commonwealth Parliament in accordance with section 51 (xxxvii) of the Constitution.

The effect of the *Terrorism (Commonwealth Powers) Bill 2002* is to refer certain matters relating to terrorist acts to the Commonwealth Parliament, in accordance with section 51(xxxvii), to enable the Commonwealth Parliament to make laws about these matters. The reference of power will also enable the Commonwealth to amend the terrorism offences (and the associated criminal responsibility provisions). An inter-Governmental agreement will provide that the Commonwealth will not amend the terrorism offences (or associated criminal responsibility provisions) without the agreement of the majority of the States and Territories (with the agreement of at least 4 States).

The *Terrorism (Commonwealth Powers) Bill 2002* includes a termination provision (clause 5) that permits the Governor to, at any time, by proclamation published in the Gazette to fix a day on which references under the Act may terminate. The proclamation can only take effect three months after the publication of a proclamation.

The *Terrorism (Commonwealth Powers) Bill 2002* follows the form of the Corporations reference in that the State does not refer a general 'terrorism' power but refers the 'text' of the proposed Commonwealth legislation together with a power to amend those offences. The 'text' of the proposed Commonwealth legislation is annexed in schedule 1 of the Bill. The proposed part 5.3 included in the Schedule essentially re-enacts the present terrorism offences (passed 27 June 2002). The Commonwealth

have advised that when the first State passes reference legislation they will re-enact these terrorism offences.

Administrative cost to Government of implementation

The Bill will not impose any additional financial burdens on the Government.

Consistency with Fundamental Legislative Principles

Does the Bill have sufficient regard to the institution of Parliament?

This Bill permits the termination of the reference of power by the Governor issuing a proclamation. Consequently, it is arguable that clause 5 of the Queensland Bill has insufficient regard to the institution of Parliament because clause 5 contemplates the amendment of an Act (the revocation of the reference) by an instrument other than an Act.

The Bill is drafted by the Parliamentary Counsel's Committee and is consistent with other State reference legislation introduced in other State Parliaments. The Legislative Assembly of Western Australia passed the equivalent of the Queensland Bill on 26 November 2002. In that Bill clause 5 was amended to provide that a proclamation could only be made if a resolution recommending the proclamation was passed by both Houses of Parliament of that State.

This amendment has not been incorporated into this Bill. The only circumstances where it is envisaged a reference of this sort would be terminated would be of such an extraordinary kind (for example, passing of oppressive Commonwealth amendments to the terrorism offences) that it is submitted the present terminating provision, permitting rapid Executive action, is warranted.

CONSULTATION

This *Terrorism (Commonwealth Powers) Bill 2002* was prepared through the Standing Committee of Attorneys-General. Both the Special Committee of Solicitors-General and the Parliamentary Counsel's Committee have been consulted about the drafting of the Bill.

New South Wales and Western Australia have introduced Bills identical to the Queensland Bill into their Parliaments. South Australia passed its legislation (with amendment to clause 4) on 27 November 2002.

Tasmania passed its legislation (in the form of the Queensland Bill) on 28 November 2002. Victoria, after their State election, is also expected to introduce State reference legislation.

When the original *Security Legislation Amendment (Terrorism) Act 2002* was introduced into the Senate it was referred to the Legal and Constitutional Legislation Committee for inquiry. That Senate Legal and Constitutional Legislation Committee identified a number of significant problems with the Bill, many of which were rectified by the Commonwealth before the Act was finally passed by the Commonwealth Parliament. This Committee received public testimony and submissions on the proposed terrorism offences.

NOTES ON PROVISIONS

PART 1—PRELIMINARY

Clause 1 sets out the short title and purpose of the Act.

Clause 2 provides for the commencement of the Act on a day fixed by proclamation of the Governor.

Clause 3 defines terms used in the Act. In particular ***terrorism legislation*** is defined to mean the provisions of Part 5.3 of the Commonwealth Criminal Code enacted in the terms, or substantially the terms of the text set out in Schedule 1 and in force from time to time. ***Criminal responsibility legislation*** is defined to mean the provision of Chapter 2 of the Commonwealth Criminal Code enacted in the terms, or substantially in the terms, of the text set out in Schedule 1 and as in force from time to time.

Clause 4 refers the following matters to the Parliament of the Commonwealth:

- (a) the matters to which the provisions of the text set out in Schedule 1 relate, but only to the extent of the making of laws with respect to those matters by including those provisions in the Commonwealth Criminal Code in the terms, or substantially in the terms, of that text, and

- (b) the matter of terrorist acts or of actions relating to terrorist acts, but only to the extent of the making of laws with respect to that matter by making express amendment of the terrorism legislation or the criminal responsibility legislation.

Clause 5 enables the State to terminate the reference by proclamation at any time (with three months notice).

SCHEDULE 1

This schedule contains the text of the proposed Commonwealth legislation that is to be enacted in pursuance of the reference of powers made by the States.

The main offences in proposed new Part 5.3 of the Commonwealth Criminal Code are as follows:

- (a) engaging in a terrorist act (proposed section 101.1) or doing any act in preparation for or planning a terrorist act (proposed section 101.6),
- (b) providing or receiving training connected with a terrorist act (proposed section 101.2),
- (c) possessing things connected with a terrorist act (proposed section 101.4),
- (d) collecting or making documents likely to facilitate a terrorist act (proposed section 101.5),
- (e) directing the activities of a terrorist organisation (proposed section 102.2)
- (f) membership of a terrorist organisation (proposed section 102.3),
- (g) recruiting for a terrorist organisation (proposed section 102.4),
- (h) training, or receiving training from, a terrorist organisation (proposed section 102.5),
- (i) getting funds to or from a terrorist organisation (proposed section 102.6),
- (j) providing support to a terrorist organisation (proposed section 102.7), and

(k) financing a terrorist act (proposed section 103.1).

The proposed offences carry penalties ranging from 10 years to life imprisonment.

Proposed section 100.1 defines a ***terrorist act*** as an action or threat of action done or made with the intention of advancing a political, religious or ideological cause, and coercing or influencing by intimidation a government or intimidating the public. Action falls within the definition if it causes serious physical harm or death, serious damage to property, endangers another person's life, creates a serious risk to the health or safety of the public or a section of the public or seriously interferes with, disrupts or destroys an electronic system. Action constituting advocacy, protest, dissent or industrial action that is not intended to cause serious physical harm or death, endanger another person's life or create a serious risk to the health or safety of the public or a section of the public is excluded from the definition.