



SECOND SESSION OF THE THIRTY-SIXTH PARLIAMENT

**REPORT OF THE
STANDING COMMITTEE ON UNIFORM
LEGISLATION AND GENERAL PURPOSES
IN RELATION TO THE
TERRORISM (COMMONWEALTH POWERS)
BILL 2002**

Presented by Hon Adele Farina MLC (Chairman)

Report 6
December 2002

STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL PURPOSES

Date first appointed:

April 11 2002

Terms of Reference:

The following are extracts from Schedule 1 and Standing Order 230A of the Legislative Council Standing Orders:

“7. Uniform Legislation and General Purposes Committee

- 7.1 A Uniform Legislation and General Purposes Committee is established.
- 7.2 The Committee consists of 3 members with power in the Committee to co-opt 2 additional members for a specific purpose or inquiry.
- 7.3 The functions of the Committee are –
 - (a) to consider and report on bills referred under SO 230A;
 - (b) of its own motion or on a reference from a minister, to consider or review the development and formulation of any proposal or agreement whose implementation would require the enactment of legislation made subject to SO 230A;
 - (c) to examine the provisions of any instrument that the Commonwealth has acceded to, or proposes to accede to, that imposes an obligation on the Commonwealth to give effect to the provisions of the instrument as part of the municipal law of Australia;
 - (d) to consider and report on any matter referred by the House.
- 7.4 For a purpose relating to the performance of its functions, the Committee may consult with a like committee of a House of the parliament of the Commonwealth, a state or a territory, and New Zealand and similarly, may participate in any conference or other meeting.”

Members as at the time of this inquiry:

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**REPORT OF THE STANDING COMMITTEE ON UNIFORM LEGISLATION AND GENERAL
PURPOSES**

IN RELATION TO THE

TERRORISM (COMMONWEALTH POWERS) BILL 2002

1 REFERENCE AND PROCEDURE

- 1.1 On November 28 2002 the Terrorism (Commonwealth Powers) Bill 2002 (Bill) stood referred to the Uniform Legislation and General Purposes Committee (Committee) pursuant to Standing Order 230A(3). Standing Order 230A(4) ordinarily requires that the Committee report to the Legislative Council (Council) within 30 days of the first reading of the Bill, being December 28 2002.
- 1.2 On December 4 2002 the Council passed a motion requiring the Committee to report the Bill back to the Council before its adjournment on December 12 2002.
- 1.3 Pursuant to Standing Order 230A(5) the policy of the Bill is not a matter for inquiry by the Committee.

2 INQUIRY PROCEDURE

- 2.1 The Committee first considered the Bill at its meeting on the morning of December 4 2002. At that meeting the Committee resolved to place an advertisement in *The West Australian* newspaper calling for written submissions on the Bill. It also resolved to seek written submissions from the Law Society of Western Australia (Inc) and the Criminal Lawyers' Association, organisations that it considered could be expected to have an interest in the Bill's subject matter.
- 2.2 At its meeting on December 4 2002 the Committee also resolved to conduct a hearing with representatives from the Attorney General's office on December 11 2002.
- 2.3 Committee staff prepared the advertisement, drafted the letters to stakeholders and arranged the hearing.
- 2.4 Time constraints imposed by the Council's resolution of December 4 2002 resulted in it being impossible for the Committee to place the advertisement, seek submissions from the stakeholders, or conduct the hearing with a view to information being received in time for the reporting date.
- 2.5 However the Committee did write to the Attorney General by way of facsimile letter dated December 5 2002 seeking information about a number of aspects of the Bill.

The Committee received a response from the Attorney General by way of facsimile letter dated December 5 2002.

2.6 Details of the inquiry were also placed on the parliamentary website on the Internet.

3 COMMONWEALTH LEGISLATION

3.1 On March 12 2002 the Security Legislation Amendment (Terrorism) Bill 2002 was introduced, together with four related bills, into the House of Representatives.

3.2 A discrepancy was discovered between the title of the Security Legislation Amendment (Terrorism) Bill 2002 as introduced and its title as referred to in the notice of presentation given on March 11 2002. It was considered that the discrepancy meant that the introduction of the bill was inconsistent with the standing orders and that it should be withdrawn.

3.3 The Security Legislation Amendment (Terrorism) Bill 2002 was withdrawn on March 13 2002 and replaced with the Security Legislation Amendment (Terrorism) Bill 2002 [No.2].

3.4 Schedule 1 of the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] inserts in the Commonwealth Criminal Code a new Chapter 5 titled “The security of the Commonwealth” which, among other things, creates new terrorism offences, allows the Governor General to proscribe as a ‘terrorist organisation’ an organisation that has a specified terrorist connection or is likely to endanger the security or integrity of the Commonwealth, and makes membership of or links with such organisations an offence.

3.5 The new offences are:

- engaging in a terrorist act (proposed section 101.1);
- providing or receiving training for a terrorist act (proposed section 101.2);
- directing organisations concerned with a terrorist act (proposed section 101.3);
- possessing things connected with a terrorist act (proposed section 101.4);
- collecting documents likely to facilitate a terrorist act (proposed section 101.5); and
- acts in preparation for a terrorist act (proposed section 101.6).¹

¹ Report of the Senate Legal and Constitutional Legislation Committee, May 2002, paragraph 3.79.

- 3.6 The House of Representatives passed the Security Legislation Amendment (Terrorism) Bill 2002 [No.2], together with the four related bills, on March 13 2002. On March 14 2002 the five bills were introduced into the Senate, the second reading debate was adjourned, and the bills were referred to the Senate Legal and Constitutional Legislation Committee (Senate Committee) for inquiry and report.
- 3.7 The Senate Committee report on the bills, dated May 2002, can be viewed on the Commonwealth Parliament's website at <http://www.aph.gov.au/>. The Committee advises that of the five bills considered in the Senate Committee report, the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] only is relevant to the Bill currently before the House.
- 3.8 The Security Legislation Amendment (Terrorism) Bill 2002 [No.2] was assented to on July 5 2002 and operation of Part 5.3 of the Commonwealth Criminal Code commenced on July 6 2002. The Commonwealth legislation is the *Security Legislation Amendment (Terrorism) Act 2002*.

4 BACKGROUND TO THE BILL

- 4.1 After the events in the United States of America on September 11 2001 and its aftermath, the Commonwealth Government convened a meeting of the Council of Australian Governments on the subject of Terrorism and Transnational Crime. The meeting was held on April 5 2002.
- 4.2 Among the resolutions passed at the meeting, the Commonwealth, State and Territory leaders agreed:

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 which apply under Corporations arrangements. Any amendments based on the referred power will require consultation with and agreement of States and Territories, and this requirement to be contained in the legislation.²

- 4.3 As noted above, the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] was introduced into the Commonwealth Parliament on March 12 2002 and assented to on July 5 2002.

² Summit Communique - Commonwealth and States and Territories Agreement on Terrorism and Transnational Crime, April 5 2002, Resolution 3.

4.4 It is noted that the Security Legislation Amendment (Terrorism) Bill 2002 [No.2] had passed the House of Representatives and stood referred to the Senate Committee for inquiry and report some three weeks prior to the Council of Australian Governments meeting on April 5 2002.

4.5 The Committee notes that as of December 6 2002 similar bills have been passed in Queensland, South Australia and Tasmania, and are awaiting assent. The New South Wales bill received assent on December 6 2002.

5 STRUCTURE AND PURPOSE OF THE BILL

5.1 The Bill contains five clauses and a schedule which incorporates Part 5.3 of the Commonwealth Criminal Code.

5.2 Section 51 of the *Commonwealth Constitution* enacts —

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to

(xxxvii) Matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

Clause 4 of the Bill proposes to refer “matters” to the Commonwealth under section 51(xxxvii). The effect of ¶xxxvii on the Commonwealth and a referring State was explained by McTiernan J —

The effect of this provision is that a new power arises in the Commonwealth Parliament when a State Parliament refers a matter to it. It is a power to make laws for the peace, order and good government "of the Commonwealth." The power is subject to the restrictions imposed by the Constitution on legislative power and to the special conditions stated in s.51 (xxxvii.). One special condition is that the operation of a law passed under the new power is confined to the referring State.³

The Commonwealth Powers Act [a 1943 Qld enactment] could not upon the terms of s.51 (xxxvii) cause any power to vest in the Commonwealth Parliament other than a power to make laws with respect to the referred matters for the peace, order and good government of the Commonwealth.

³ To similar effect see *Luton v Lessels* [2002] HCA 13, at p 19 per Kirby J.

A power which is defined in these terms cannot be a State legislative power that has become vested in the Commonwealth. It is truly a Commonwealth power. It is subject to all the restrictions imposed by the Commonwealth Constitution upon the exercise of Commonwealth legislative power. It is a power concurrent with the power of the State to legislate with respect to the referred matters. It is not that power itself. Having regard to the terms of s. 51 (xxxvii) and s. 107 it could not be that power.

Graham v Paterson (1950) 81 CLR 1, at p 22.

Clause 4(2) is a restatement of the existing law, viz, the referral does not duplicate any pre-existing unrelated legislative capacity of the Commonwealth Parliament with respect to the matters referred and the referral is made to the extent that the State Parliament has an original capacity to legislate under section 107 of the *Commonwealth Constitution*.⁴ But, as the abovesited judgment shows, it is not the case that the Commonwealth is exercising a referring State's legislative powers. What is referred are "matters" subject to section 107. A referral enables the Commonwealth Parliament to enact **Commonwealth law** that operates, concurrently with that State's own laws on those "matters" (if any), within that State's borders.

- 5.3 What, precisely, are the "matters referred" by the Bill? Clause 4(1) defines matters referred in the sense that it legislates by reference to definitions found in clause 3 and they, in turn, only have meaning when read in context of Schedule 1 which is Part 5.3 of the Commonwealth Criminal Code.
- 5.4 The statutory intent is stated clearly enough in clause 100.3 of Schedule 1. The note at the end of the clause states —

The State reference fully supplements the Commonwealth's other [section 51] powers by referring the matters to the Commonwealth Parliament to the extent to which they are not otherwise included in the legislative powers of the Commonwealth Parliament.

The statutory intent in clause 100.3 raises questions about *terrorist acts* as defined in clause 100.1(1) of Schedule 1 but fails to throw any light on the actual content of what is being referred. The bulk of what is defined in clause 100.1(1) as *terrorist acts* would already constitute discrete offences under State law, which probably explains the reason for clause 100.6. (cf ¶5.6).

⁴ 107. Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of a State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be.

- 5.5 The Committee has formed the opinion that the “matters referred” is the power to legislate in relation to *terrorist acts* that are wholly confined within the State’s borders – “intra State terrorist acts” – and thus outside the Commonwealth’s legislative capacity. Commonwealth law that is framed regardless of whether the acts are committed “inter State” or “intra State” is made possible by the reference in the Bill. The precise limits of the matter referred have yet to be identified.
- 5.6 Clause 100.6 recites the law laid down in *Graham v Paterson (supra)* – a relevant State law continues to operate alongside a referred provision that has effect under Part 5.3. It has an additional effect, viz, the Commonwealth legislation is not intended to “cover the field” and thus trigger section 109 of the Commonwealth Constitution in cases where concurrent Commonwealth and State laws have effect. While it may be open to the Commonwealth and State Parliaments to attempt to ward off the application of section 109 by express statutory provision – the Committee has no view on this issue – they cannot negate the application of covering clause 5 of the *Commonwealth of Australia Constitution Act 1900 (Imp)* –

This Act, and all laws made by the Parliament of the Commonwealth under the Constitution [covering clause 9], shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State;...

In the time available the Committee has not been able to explore the application (if any) that covering clause 5 may have on a State law that arguably, is at odds with a Commonwealth law enacted in reliance on the State’s reference under the Bill. When the Commonwealth enacts legislation based on a State reference, it is nonetheless, a law of the Commonwealth and operates as such; that is, as a law made under the *Commonwealth Constitution* having paramount force by reason of covering clause 5.

The Committee is prepared to accept that outright inconsistency would be decided by section 109. Whether clause 100.6 is effective to prevent section 109’s application remains to be seen.

- 5.7 Section 51(xxxvii) allows a State to refer a power or adopt another State’s referral law. The Committee has considered two interrelated issues in this context.
- 5.8 The first is clause 5’s making provision for termination of the reference.

Clause 5 does not render the referral as one of temporary duration; it merely enacts the conditions that are to govern termination of the referral, viz, a proclamation made by the Governor fixing a date that is not less than three months from the day on which the proclamation is gazetted, and the making of the proclamation has been recommended by resolution of both the Council and the Assembly. The analogy may be drawn between the holder of an office “at pleasure” of the Crown, and the Commonwealth holding the power to legislate under the referral “at pleasure” of the referring State. In

both cases a state of affairs is created of indefinite duration but capable, nonetheless, of unilateral termination at will.

- 5.9 Second, the Committee has been unable to locate any explanation for the three months' "notice to terminate the referral" that clause 5 provides. The question here is whether the requirement for notice to terminate the referral is reasonable or appropriate. If the Council finds the requirement unduly restrictive, it may choose to delete clause 5(2). The alternative, as section 51(xxxvii) permits, is to make the referral by adopting another State's referral enactment. An adopting Act would terminate a referral by the simple expedient of repealing it.

6 SCOPE OF THE REPORT

- 6.1 Time constraints imposed by the Council curtailed a proper consideration of and full inquiry into the Bill. The Committee draws the Council's attention to the Senate Committee report and the recommendations that relate to the Bill which are set out in Appendix 1.

7 FURTHER ISSUES RAISED BY THE BILL

- 7.1 The Committee raises the following issues for consideration by the Council:
- a) The referral of powers to the Commonwealth relates to the text of the Commonwealth legislation. The question then arises as to the mechanism by which the Commonwealth Criminal Code, once the Bill is enacted, can be amended. Section 100.8 of the Commonwealth Criminal Code requires amendments to the Commonwealth Criminal Code (whether those amendments are based on State referred powers or not) to be approved by a majority of States and Territories (including at least four states).

This issue was raised by the South Australian Attorney General in his second reading speech in the following manner:

...there is a question as to whether the Commonwealth can fetter its legislative powers in this way. Therefore, there is still debate between the Commonwealth and the States about whether the States should enact a further provision in the referral legislation. If the Commonwealth and other States agree that a provision should be included in the referral Bill, we will amend this Bill at a later stage. The alternative is to record this agreement in an intergovernmental agreement. The intergovernmental [agreement] would have political value only. It would not be enforceable in the Courts or any

*tribunal. There would be no legal sanctions for contravention of the agreement.*⁵

The Committee raises for the Council's consideration the question whether the intent of section 100.8 of the Commonwealth Criminal Code is sufficiently protected in the Bill. That is, the Committee queries to what extent the provision for the consent of four States to amendments to Schedule 1 of the Bill is a safeguard so far as preserving the original intent of the reference.

The Committee also queries whether the consent of all the States (as opposed to a majority of the States) should be required.

- b) The Committee notes that section 4 of the *Security Legislation Amendment (Terrorism) Act 2002* provides for a review of the operation, effectiveness and implications of amendments made by, among other things, the *Security Legislation Amendment (Terrorism) Act 2002*, to be undertaken "...as soon as practicable after the third anniversary of the commencement of the amendments."⁶

The review is to be undertaken by a committee appointed in accordance with sections 4(3) and (4) of the *Security Legislation Amendment (Terrorism) Act 2002*. The Governor General must table a copy of the review in each House of the Commonwealth Parliament within 15 sitting days of receipt of the review from the committee.

Section 4(8) of the *Security Legislation Amendment (Terrorism) Act 2002* provides that before tabling the review, the Commonwealth Attorney General may remove information from it if he or she is satisfied that the information may endanger a person's safety, prejudice an investigation or prosecution, or compromise the operational activities or methodologies of the security and defence organisations set out in section 4(8)(c).

The Committee raises for the Council's consideration the question whether the Bill should be amended to provide that the Commonwealth review be tabled in both Houses of State Parliament by the State Minister.

- 7.2 The issues raised in this report are those immediately apparent to the Committee on reading the Bill. They are not intended to be an exhaustive list or comprehensive review of the issues raised by the Bill.

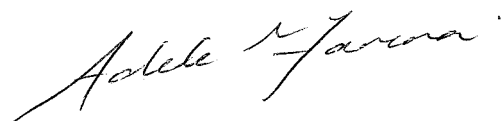
⁵ Parliament of South Australia, Legislative Assembly, Terrorism (Commonwealth Powers) Bill 2002, Second Reading speech, Hon MJ Atkinson MLA, November 21 2002.

⁶ *Security Legislation Amendment (Terrorism) Act 2002*, s4(2).

7.3 The Committee has not had an opportunity to consider the validity of these issues.

8 CONCLUSION

8.1 The Committee has no recommendation to make in relation to the passage or otherwise of the Bill but in accordance with the order of the House now reports it back.



Hon Adele Farina MLC
Chairman

December 12 2002

APPENDIX 1
SENATE LEGAL AND CONSTITUTIONAL LEGISLATION
COMMITTEE REPORT: MAY 2002.
RECOMMENDATIONS 2, 3 AND 4

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Senate Recommendation 2

The Committee recommends that the definition of ‘terrorist act’ in proposed section 100.1 in the Bill be amended to include a third element, namely that the action or threat of action is designed to influence government by undue intimidation or undue coercion, or to unduly intimidate the public or a section of the public.

Senate Recommendation 3

The Committee recommends that:

- (i) The Bill be amended to remove proposed sections 101.2(2), 101.4(2) and 101.5(2), which impose absolute liability in respect of certain elements of those offences; and*
- (ii) the offences in proposed sections 101.2(1), 101.4(1) and 101.5(1) be amended to provide that they are committed if the person knew or was reckless as to the required element in 101.2(1)(b), 101(4)(1)(b) and 101.5(1)(b).*

Senate Recommendation 4

The Committee recommends:

- (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.*