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Counter-terrorism Laws: Offences and Powers

CHAPTER CONTENTS

Introduction	2
What is a Terrorist Act?	2
Preparatory and Group-based Terrorism Offences	3
Coercive Powers to Investigate and Prevent Terrorism	4
Government Responses to Foreign Fighters	6
Encryption Laws	6
State Laws Addressing Terrorism Offences	7
Legal Notices	8

Introduction

The Australian government has introduced a wide range of criminal offences in response to terrorism, including offences relating to terrorist acts and terrorist organisations. In addition to these offences, counter-terrorism laws provide authorities with many coercive powers to investigate and prevent terrorism. These include preventative detention orders, control orders, and the powers of the Australian Security Intelligence Organisation to detain individuals for coercive questioning.

Australia's counter-terrorism law regime was expanded in response to the rise of Islamic State and the threat of 'foreign fighters' returning from Iraq and Syria, as well as to related home-grown terrorism. New laws introduced include an offence for advocating terrorism (s 80.2C *Criminal Code Act 1995* (Cth) (Criminal Code)), an offence for entering or remaining in a 'declared area' (s 119.2 Criminal Code) and a power to strip the Australian citizenship of dual citizens involved in terrorism (s 35A *Australian Citizenship Act 2007* (Cth)).

Most recently, the Australian government has introduced new powers to allow police and intelligence agencies access to encrypted communications (*Telecommunications Act 1997* (Cth)).

What is a Terrorist Act?

Division 101 of the Criminal Code details terrorist act offences under Commonwealth law.

A terrorist act is an action or a threat of action that is intended to coerce a government, influence a government by intimidation or intimidate a section of the public. There must also be an intention to advance a political, religious or ideological cause (this is commonly referred to as a 'motive requirement', which distinguishes terrorism from other crimes). Conduct falls within the definition of a terrorist act where it would:

- cause serious physical harm or death to a person
- cause serious damage to property
- endanger another person's life
- create a serious health or safety risk to the public
- seriously interfere with, disrupt or destroy electronic systems (including but not limited to telecommunications and financial systems).

An exemption is included for action that is advocacy, protest or industrial action and is intended only to cause serious property damage.

Preparatory and Group-based Terrorism Offences

Division 101 of the Criminal Code includes serious criminal offences relating to terrorist acts. The basic offence is that of doing a terrorist act (s 101.1 Criminal Code), which is punishable by life imprisonment. However, in practice this offence has proved less important than a range of other offences relating to the preparatory and ancillary (i.e. related) activities. These include offences for:

- providing or receiving training connected with terrorist acts (s 101.2)
- possessing things connected with terrorist acts (s 101.4)
- collecting or making documents likely to facilitate terrorist acts (s 101.5)
- doing any other act in preparation for a terrorist act (s 101.6).

The last of these is punishable by life imprisonment. Several individuals have been successfully prosecuted for conspiracies to commit this offence, receiving sentences of up to 40 years imprisonment.

Another major category of offences relates to terrorist organisations. The Australian government maintains a list of terrorist organisations for this purpose. These are set out in Regulations made under the Criminal Code, and the list includes al-Qaeda, Islamic State and other known terrorist organisations. Alternatively, a court may decide that a group of individuals is a terrorist organisation if the group is ‘... directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act’.

The offences relating to terrorist organisations are:

- directing the activities of a terrorist organisation (s 102.2)
- membership of a terrorist organisation (s 102.3)
- recruiting for a terrorist organisation (s 102.4)
- training involving a terrorist organisation (s 102.5)
- getting funds to or from a terrorist organisation (102.6)
- providing support to a terrorist organisation (s 102.7)
- associating with a terrorist organisation (s 102.8).

Exemptions to the last offence are available where the association is between family members for family or domestic purposes, or where it is for the purpose of religious worship, providing humanitarian aid or providing legal advice.

Other offences in the Criminal Code address the financing of terrorism (div 103) and using explosive or lethal devices for terrorist activities (div 72).

Coercive Powers to Investigate and Prevent Terrorism

In addition to the criminal offences set out above, significant powers have been given to federal police and the Australian Security Intelligence Organisation to investigate and prevent terrorist acts.

Preventative detention orders

The law relating to Preventative Detention Orders (PDOs) is set out in div 105 of the Criminal Code. These orders allow the Australian Federal Police (AFP) to detain individuals for up to 48 hours in order to prevent a terrorist act or preserve evidence relating to a terrorist act. The period of detention can be extended up to 14 days under state legislation. A PDO cannot be issued in relation to a person under the age of 16, and special protections apply where a PDO is issued in relation to a person between the ages of 16 and 18.

For a PDO to be issued, a senior member of the AFP must apply to an issuing authority (usually a judge or retired judge). The AFP member must suspect on reasonable grounds that the person:

- will engage in a terrorist act
- possesses a thing connected with preparation for a terrorist act
- has done an act in preparation for a terrorist act (s 105.4(4) Criminal Code).

In any of these cases, the terrorist act must be imminent and expected to occur within the next 14 days. Alternatively, the AFP member may be satisfied that a terrorist act has occurred within the last 28 days, and it is reasonably necessary to detain the person to preserve evidence relating to the terrorist act (s 105.4(6) Criminal Code). The issuing authority must then be satisfied of the reasons for which the order was sought. No questioning of the person by police is permitted under a PDO (s 105.42 Criminal Code).

Control orders

Division 104 of the Criminal Code enables a senior member of the AFP, after seeking consent from the Home Affairs Minister, to apply to a federal court for a control order. A control order imposes restrictions on an individual's liberty, such as requiring the person to remain in their home during specified times of day, report to police at regular intervals, or wear an electronic monitoring bracelet. The restrictions are similar to those available for conditional release on bail or parole, but they do not require evidence of criminal behaviour or the person to be charged with an offence.

A senior AFP member may apply for a control order if they suspect, on reasonable grounds, that the order would substantially assist in preventing a terrorist act or the support or facilitation of terrorism. This means that the person may (but need not necessarily) be suspected of involvement in terrorism. The grounds on which a control order may be sought include reasonable suspicion that the person has (s 104.4(1)(c) Criminal Code):

- provided, received or participated in training with a listed terrorist organisation
- engaged in hostile activity in a foreign country
- been convicted in Australia of a terrorism offence
- been convicted of an offence in a foreign country for conduct that would have constituted a terrorism offence if prosecuted in Australia.

For a control order to be issued, the issuing court must be satisfied on the balance of probabilities that one or more of these grounds are satisfied. The issuing court must also be satisfied that each of the conditions contained in the order is proportionate and reasonably necessary.

Powers of the Australian Security Intelligence Organisation

Under the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act), the Australian Security Intelligence Organisation (ASIO), Australia's domestic intelligence collection agency, has many intelligence-gathering powers that can assist in preventing terrorism. These include powers to search private premises (s 27D), inspect postal articles (s 27) and install listening devices (s 26C).

One of ASIO's most controversial powers allows it to detain people for questioning. A person may be questioned in eight-hour blocks up to a maximum of 24 hours (s 34R ASIO Act) where this would substantially assist the collection of intelligence that is important in relation to a terrorism offence (s 34E ASIO Act). A person may be detained for up to a week for questioning where there are reasonable grounds to believe that they will alert another person involved in a terrorism offence, not appear for questioning, or destroy evidence (s 34G ASIO Act).

It is an offence punishable by five years imprisonment to fail to answer ASIO's questions (s 34L ASIO Act). There is no requirement that the person themselves be suspected of terrorism, meaning that a questioning and detention warrant could be issued in relation to non-suspects, family members of terrorist suspects and innocent bystanders. These warrants can be issued against children as young as 16, though extra procedural protections apply to children between the years of 16 and 18.

Government Responses to Foreign Fighters

The federal parliament introduced a wide range of offences and powers in response to Islamic State and the threat of foreign fighters.

The declared area offence (s 119.2 Criminal Code) provides a maximum penalty of 10 years imprisonment where a person enters or remains in an area of a foreign country declared by the Foreign Minister to be a 'declared area'. There are no other elements to this offence such as an intention to engage in hostile activity or terrorism. There is a list of specified exemptions such as for visiting family members, providing humanitarian aid and producing professional news reports. However, this list does not include a range of other legitimate reasons why somebody might travel to a foreign country such as to visit friends, conduct business or commercial transactions, or participate in a religious pilgrimage.

The offence of advocating terrorism (s 80.2C Criminal Code) provides a maximum penalty of five years imprisonment where a person '... counsels, promotes, encourages or urges the doing of a terrorist act or the commission of a terrorism offence'. This goes beyond the ordinary law of incitement, as it extends to the promotion of unlawful acts, and it does not require that the person advocating terrorism intends anyone to rely on their words to commit an unlawful act.

The *Australian Citizenship Act 2007* (Cth) allows the Australian citizenship of dual nationals involved in terrorism to be revoked. The person's citizenship will be revoked automatically if they engage in a range of terrorism-related conduct overseas, including fighting for a declared terrorist organisation. The Minister for Immigration may also declare that a dual national ceases to be an Australian citizen if the person has been convicted of certain offences relating to terrorism and sentenced to a period of imprisonment of six years or more.

In addition to these specific measures targeting foreign fighters, many other offences and powers were introduced or updated around this time. Existing offences for intelligence officers who disclose classified information were strengthened, and telecommunications companies must now retain customer metadata for a period of two years. That metadata, which includes the time, date and location of every telephone call, SMS or email, can be accessed by ASIO and enforcement agencies, including police, without a warrant.

Encryption Laws

There are controversial laws that allow Australia's police and intelligence agencies (including ASIO) to access the content of encrypted communications. While police and intelligence agencies can bypass basic forms of encryption (such as the passwords protecting email accounts), they cannot bypass 'end-to-end' encryption. End-to-end encryption is freely available on many smartphone applications, including WhatsApp, Facebook Messenger and Apple's iMessage. This

type of encryption is so secure that even the companies that built the applications cannot access the content of the messages sent by its users.

The *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) inserted a new industry assistance scheme into the *Telecommunications Act 1997* (Cth). That scheme allows police and intelligence agencies to request technical assistance from technology companies, including large multinationals such as Facebook and Apple, so that the content of secure messages can be accessed. Police and other investigative agencies can require mandatory assistance, and the companies are subject to significant fines if they refuse to comply.

The scheme has been heavily criticised by the technology industry, both in Australia and globally, for creating risks to users' privacy and cyber-security. This is partly because the powers are not strictly limited to accessing encrypted communications, as they could require technology companies to modify or introduce other vulnerabilities into their products. During a parliamentary inquiry into the laws, Apple warned the Australian Government that the new powers could require it to install eavesdropping capability in its speakers. Many local technology companies have also expressed concern that Australian technology companies will no longer be trusted by overseas buyers, given the wide scope of these powers.

State Laws Addressing Terrorism Offences

Responsibility for enacting criminal laws ordinarily lies with state parliaments, but the state governments decided against enacting their own comprehensive counter-terrorism law regimes in response to terrorism. Instead, the state parliaments referred their law-making powers in relation to terrorism to the Commonwealth. State parliaments have therefore enacted a much smaller number of counter-terrorism laws, with the major offences and powers being provided by federal legislation. For this reason, state human rights Acts, like the recently enacted *Human Rights Act 2019* (Qld), cannot be used to challenge the scope and impact of most counter-terrorism laws.

A smaller number of laws grant state police forces special powers to investigate and prevent terrorism. These include additional powers to search persons and vehicles, seize and detain evidence, and search premises without a warrant. State police forces also have special powers to covertly search premises where doing so would substantially assist in preventing or responding to a terrorist act.

In Queensland, the Crime and Corruption Commission may also investigate terrorism-related conduct through its powers to investigate major crime. This includes powers to compel witnesses and their testimony in public hearings, and to execute search warrants.

Legal Notices

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