



Presenter Paper

A Summary of Counter-Terrorism Laws in Australia

This presentation provides a thorough overview of counter-terrorism statutes in Australia and recent developments in the courts.

Discussion Includes

- Overview of anti-terrorism laws
- Types of laws introduced in Australia
- Key provisions of the *Criminal Code 1995* (Cth)
- Recent case law

Presenter Paper

A Summary of Counter-Terrorism Laws in Australia

1. In this edition of BenchTV, Caroline Dobraszczyk (Barrister, Trust Chambers, Sydney) and Ian Benson (Solicitor, AR Conolly & Company) discuss counter-terrorism laws in Australia.

Overview of Anti-Terrorism Laws

2. On 12 March 2002, the Commonwealth government's main package of anti-terrorism legislation was introduced, as a direct response to 9/11. A United Nations resolution had called upon States to ensure that terrorism acts are established as serious criminal offences, and that the punishment duly reflects the seriousness of the acts. Since this time, over 60 pieces of legislation relating to anti-terrorism and related issues have been introduced.
3. The types of legislation/laws can be said to fall into the following main categories:
 - Actual offences for terrorism and terrorism related acts, e.g. *Criminal Code Act 1995* (Cth) ("the Criminal Code").
 - Specific powers given to law enforcement agencies to deal with terrorism and terrorism related investigations, e.g. *Crimes Act 1914* (Cth) (delayed notification search warrants; search, information gathering, arrest and related powers); *Australian Security Intelligence Organisations Act 1979* (Cth) (which, amongst other things, empowers ASIO to obtain warrants for the purpose of conducting surveillance and to detain and question a person who may have information in relation to terrorist activity); *Telecommunications (Interception and Access) Act 1979* (Cth) (which allows ASIO to obtain a warrant for intelligence gathering purposes in relation to threats of terrorism); and the *Surveillance Devices Act 2004* (Cth) (which allows law enforcement officers to obtain warrants, emergency authorisations and tracking device authorisations for the installation and use of surveillance devices).
 - Laws in relation to evidentiary issues, e.g. *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) (regulating how courts are to deal with national security documents and issues); amendments to the *Foreign Evidence Act 1994* (Cth) (prescribing great discretion to a court in deciding whether to admit evidence from overseas in relation to terrorism related proceedings); and Part 1AE of the *Crimes Act 1914* (Cth) (provides laws for video link evidence in terrorism and related offences).
 - Laws in relation to bail and sentencing, e.g. s15AA of the *Crimes Act 1914* (Cth) (which creates a test of "exceptional circumstances" needed to get bail when

charged with certain terrorism offences); other amendments to the *Bail Act 2013* (NSW); and s 19AG of the *Crimes Act 1914* (Cth) (which sets out certain non-parole periods for certain terrorism offences, in some cases three-quarters of the sentence).

- Laws dealing with security concerns, e.g. *Maritime Transport Security Act 2003* (Cth); *Aviation Transport Security Act 2004* (Cth); amendments to the *Customs Act 1901* (Cth) (which allow Customs officers to detain a person where the officer has reasonable grounds to suspect that the person is intending to commit a Commonwealth offence or is a threat to national security or the security of a foreign country). In addition, the Minister for Immigration can, under the *Migration Act 1958* (Cth), cancel the visa of a person who is offshore where ASIO suspects that the person might be a risk to the security of the Commonwealth (and or States and Territories). The Minister for Foreign Affairs will be able to temporarily suspend a passport to prevent a person who is in Australia from travelling overseas where ASIO has security concerns about that person, under the *Australian Passports Act 2005* (Cth). There is also the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth) which deals with amongst other things, strict reporting obligations in relation to sending/transferring money.

Key Provisions of the *Criminal Code 1995* (Cth)

4. The *Criminal Code Act* contains a range of offences in relation to terrorism and terrorism related acts, specifically:
 - Division 72, Subdivision A: International terrorist activities using explosive or lethal devices.
 - Part 5.1: Treason, urging violence and advocating terrorism offences
 - Part 5.2: offences relating to espionage and similar activities
 - Part 5.3: this is the main part which deals with the terrorism and counter terrorism acts. The offences deal with terrorist acts, terrorist organisations and financing terrorism. This part also deals with control orders and preventative detention orders.
 - Part 5.4: this Part deals with murder, manslaughter or intentionally or recklessly causing serious harm to an Australian outside of Australia.
 - Part 5.5: Foreign incursions and recruitment
 - Part 10.5: Postal offences-offences relating to the sending of explosives, dangerous, or harmful substances by post.
5. The main offences are contained within Pt 5.3 of the Code. Many of the offences deal with criminalising acts done in preparation of a terrorism act or connected to such a preparation

that are necessary before any terrorist act actually happens. This is quite different to the majority of criminal law which focuses on criminalizing certain acts which are done by the defendant and persons are punished because they have done the particular criminal act.

6. The only offence that deals with the actual commission of a terrorist act is s 101.1, which provides that a person commits an offence if they engage in a terrorist act. The penalty is imprisonment for life. Section 101.2, for example, is an offence for providing or receiving training connect with a terrorist act. Under this section, a person can commit an offence even if a terrorist offence does not occur, and there does not have to be any particular place or building marked as a target of a terrorist act.
7. Other key provisions include:
 - s 101.4: Possessing things connected with terrorist acts.
 - s 101.5: Collecting or making documents likely to facilitate terrorist acts.
 - s 101.6: Other acts done in preparation for, or planning, terrorist acts. This section captures any acts done in preparation for, or planning, a terrorist act. An offence is established even if a terrorist act does not occur, or there is no specific terrorist act proven.
8. "Terrorist act" has a complex definition and is defined in s 100.1 as an action or threat of action where:
 - (a) *the action falls within subsection (2) and does not fall within subsection (3); and*
 - (b) *the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and*
 - (c) *the action is done or the threat is made with the intention of:*
 - (i) *coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or*
 - (ii) *intimidating the public or a section of the public.*

(2) *Action falls within this subsection if it:*

 - (a) *causes serious harm that is physical harm to a person; or*
 - (b) *causes serious damage to property; or*
 - (d) *causes a person's death; or*
 - (e) *endangers a person's life, other than the life of the person taking the action; or*
 - (f) *creates a serious risk to the health or safety of the public or a section of the public; or*
 - (g) *seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:*
 - (i) *an information system; or*

- (ii) a telecommunications system; or
- (iii) a financial system; or
- (iv) a system used for the delivery of essential government services; or
- (v) a system used for, or by, an essential public utility; or
- (vi) a system used for, or by, a transport system.

(3) Action falls within this subsection if it:

- (a) is advocacy, protest, dissent or industrial action; and
- (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

9. Key aspects of the definition include the intention to advance a political or religious cause, and the intention of coercing or influencing a government or section to the public, making these provisions unique to terrorism laws.

10. Recently, in *R v Al Kutobi; R v Kiad* [2016] NSWSC 1760, Garling J said the following of this definition:

"The definition is complex but, in essence, a terrorist act is an act which causes serious harm or damage to a person, property or the public and which, importantly, is accompanied by a particular kind of intention. That particular intention is to advance a political, religious or ideological cause, either by coercing or intimidating a government or by intimidating the public or a section of the public. It is the presence of this intention that distinguishes terrorism offences from other serious criminal offences."

11. Division 102 deals with terrorist organisations. A terrorist organisation is defined in s 102.1 to mean:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act; or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

12. In the *Criminal Code Regulations 2002* (Cth), the government has specified a complete list of terrorist organisations that would satisfy this provision. This list is updated as needed.

13. Key offences relating to terrorist organisations include:

- s 102.2: Directing the activities of a terrorist organisation. This offence applies even in circumstances where a person is reckless as to whether the organisation is a terrorist organisation.
- s 102.3: Membership of a terrorist organisation. This section requires the person to know that the organisation was a terrorist organisation.
- s 102.4: Recruiting for a terrorist organisation.
- s 102.5: Training involving a terrorist organisation. An offence is committed if a person intentionally provides, receives or participates in training with an organisation, if the person is reckless as to whether the organisation is a terrorist organization.
- s 102.6: Getting funds to, from or for a terrorist organisation.
- s 102.7: Providing support to a terrorist organization. A person commits an offence if they intentionally provide support or resources that would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. "Support" is not defined, but is likely to be broad.
- s 102.8: Associating with a terrorist organisation. A person associates with another person if the person meets or communicates with the other person (see s 102.1). Exceptions are contained in s 102.8(4) and include close family members and several other categories.

14. Division 103 deals with financing terrorism. Key offences include:

- s 103.1: Financing terrorism. A person commits an offence if they provide or collect funds and are reckless as to whether the funds will be used to facilitate or engage in a terrorist act.
- s 103.2: Financing a terrorist. This section creates an offence if a person intentionally makes funds available to another person, or collects funds for or on their behalf, and is reckless as to whether the other person will use the funds to engage in a terrorist act.

15. Part 5.1 is headed "Treason, urging violence and espionage". Section 80.2C was introduced relatively recently and creates an offence of "advocating terrorism". A person commits an offence if they advocate the doing of a terrorist act or commission of a terrorism offence, and is reckless as to whether another person will in fact engage in that act. "Advocates" as defined in the section: a person advocates the doing of a terrorist act or the commission of a terrorism offence if the person counsels, promotes, encourages or urges the doing of the terrorist act.

16. Part 5.5 deals with foreign incursions and recruitment. The consent of the Attorney-General is required for prosecutions under this Division (see s 119.11). Key provisions include:

- s 119.1: Incursions into foreign countries with the intention of engaging in hostile activities. "Engaging in a hostile activity" includes conduct undertaken with one of a number of objectives (whether or not the objective is actually achieved), such as the overthrow by force or violence of the government, terrorist acts, intimidating the public, causing the death or injury of a head of state or public official, and unlawfully destroying or damaging real or personal property belonging to the government.
- s 119.2: Entering, or remaining in, declared areas. Declared areas are declared by the Minister for Foreign Affairs. Exceptions exist for providing humanitarian aid, appearing before a court, performing an official duty, news reporting, bona fide visits to family members, and various other legitimate purposes. Section 119.3 provides for the declaration of an area for the purposes of s 119.2, and enables the Foreign Affairs Minister to declare an area if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country. Before making a declaration, the Foreign Affairs Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed declaration.
- s 119.4: Preparations for incursions into foreign countries for purpose of engaging in hostile activities.
- s 119.5: Allowing use of buildings, vessels and aircraft to commit offences.
- s 119.6: Recruiting persons to join organisations engaged in hostile activities against foreign governments.
- s 119.7: Recruiting persons to serve in or with an armed force in a foreign country.

Recent Case Law

17. In *Lodhi v R* [2006] NSWCCA 121, Lodhi was charged with collecting a document connected with preparation for a terrorist act (s 101.5); doing an act in preparation for a terrorist act (s 101.6); making a document connected with preparation for a terrorist act (s 101.5); and possessing a thing connected with preparation for a terrorist act (s 101.4).

18. The main challenges to the indictment was that the Crown had failed to specify a particular terrorist act, and that it failed to state the essential elements of the offence. The Court held that the Crown is not required to specify any particular terrorist act for which preparation was made. Further that it was the clear intention of Parliament to create an offence where the offender has not decided precisely what he or she intends to do. There is no ambiguity

in the meaning of "terrorist act" in the sections. The NSWCCA cited with approved the remarks of Whealy J (the trial Judge):

"The wide range of activities made significantly criminal is itself postulated on the possibility that the criminal offence will or may occur long before any terrorist act itself is carried out. Indeed, apart from the offence of engaging in a terrorist act, each of ss101.2, 101.4, 101.5 and 101.6 makes it clear that the offence is committed even if 'the terrorist act does not occur [...]' Preparatory acts are not often made into criminal offenses. The particular nature of terrorism has resulted in a special, and in many ways unique, legislative regime. It was, in my opinion, the clear intention of Parliament to create offences where an offender has not decided precisely what he or she intends to do. A policy judgment has been made that the prevention of terrorism requires criminal responsibility to arise at an earlier stage than is usually the case for other kinds of criminal conduct eg well before an agreement has been reached for a conspiracy charge. The courts must respect that legislative policy."

19. *Lodhi v R* [2006] NSWCCA 101 dealt with the issue as to what approach is to be taken when an application is made to close the court in the interests of national security, during a trial for a terrorist offence. Whealy J made orders inter alia that the court be closed when ASIO witnesses gave evidence, when information was disclosed or evidence is heard which disclosed ASIO's dealings with any of its sources or its relationship with any foreign agency; that ASIO officers be referred to by pseudonym; and that certain ASIO officers be screened from all persons other than judge, Judge's associate, jury and legal representatives. The appeal from these orders was dismissed.
20. In *Lodhi v Regina* [2007] NSWCCA 360, the Court considered the constitutionality of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth), a law concerned with protecting national security by empowering judges to make non disclosure law. It was submitted that the requirement of the Court to give "greatest" weight to the risk of prejudice to national security meant that the Parliament had usurped the judicial function. The Court held that the section was valid as the use of the word "greatest" meant no more than that greater weight must be given to the risk of prejudice to national security than to any other circumstances.
21. In *R v Touma* [2008] NSWSC 1475, Touma was charged with 4 offences: (1) acquire substantial quantities of firearm ammunition, in preparation of a terrorist act or acts; (2) do an act, namely attempted to make one or more improvised explosive devices, in preparation for a terrorist act or acts; (3) possess a thing, namely a collection of items including lengths of copper pipe, gun powder, 165 railway detonators, instructional notes and dismantled firearm ammunition, connected with preparation for a terrorist act or acts; and (4) possess a thing, namely a collection of documents, including electronic documents,

images, videos and audio files, connected with preparation for a terrorist act or acts, knowing of that connection.

22. He pleaded guilty to each of the charges. At [73], Whealy J stated that the common law concepts that are especially important are punishment, deterrence and incapacitation (protection of the community). He referred to *R v Martin* (1999) 1 Cr App R, Lord Bingham CJ as the Senior Law Lord then was, said:

"In passing sentence for the most serious terrorist offences, the object of the Court will be to punish, deter and incapacitate: rehabilitation is likely to play a minor (if any) part." HH also noted at [74] that "there is also a need to consider the nature and purpose of the anti-terrorism laws, the reasons for their enactment andthe maximum penalties.."

23. He also referred to *R v Barot* (2007) EWCA Crim 1119 at [45] where the court said:

"Terrorists who set out to murder innocent citizens are motivated by perverted ideology. Many are unlikely to be deterred by the length of the sentence that they risk, however long this may be. Indeed some are prepared to kill themselves in order to more readily kill others. It is, however, important that those who might be tempted to accept the role of camp followers of the more fanatic are aware that, if they yield to that temptation, they place themselves at risk of very severe punishment."

24. In *Benbrika v DPP* (2010) 29 VR 593, Benbrika was charged with being in possession of a thing connected with preparation for a terrorist act. The thing was a CD containing an archive of documents which had sections like "Jihad", suicide bombings, an article written by Osama bin Laden on the 'lies of the Kuffar regarding Muslim youth and jihad', transcripts of interviews with various people including Mujahid commanders, other articles which glorified war and martyrdom and 'The Mujahid' Handbook'. Given the facts the Court of Appeal said the test for "connected with" was:

- A terrorist act is proposed or contemplated (whether or not a decision has been made as to what kind of terrorist act it will be);
- Some activity in preparation for that terrorist act is under way, or is proposed, or contemplated (whether or not a decision has been made as to what kind of activity that will be); (preparatory activity) and
- The thing is being used, or is intended to be used, in aid of that preparatory activity.

25. *DPP (Cth) v Karabegovic* [2013] VSCA 380 also considered the definition of "connected with".

26. In *Thomas v Mowbray* [2007] HCA 33; 233 CLR 307, the High Court considered the constitutional validity of a control order made under the *Criminal Code* against the plaintiff. Gleeson CJ agreed with Gummow and Crennan JJ that the legislation was supported by the defence power and the external affairs power. Gleeson CJ said that:

"The power to make laws with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth, is not limited to defence against aggression from a foreign nation; it is not limited to external threats; it is not confined to waging war in a conventional sense of combat between forces of nations; and it is not limited to protection of bodies politic as distinct from the public, or sections of the public. Professor Greenwood wrote:

'Since the events of 11 September showed, -if, indeed, the matter were ever in doubt- that a terrorist organization operating outside the control of any state is capable of causing death and destruction on a scale comparable with that of regular military action by a state, it would be a strange formalism which regarded the right to take military action against those who caused or threatened such consequences as dependant upon whether their acts should somehow be imputed to a state...' "

27. In *R v Sevdet Besim* [2016] VSC 537, the defendant was charged with one offence under s101.6(1), doing acts in preparation for or planning a terrorist act. The defendant was 18 yrs old at the time of the offence and planned to drive a car into and kill and behead a police officer on ANZAC day. He received a sentence of 10 years imprisonment with non-parole period of 7.5 years.
28. In *R v Amin Mohamed* [2016] VSC 581, the defendant was charged with three offences of engaging in preparatory acts to an incursion into a foreign state with the intention to engage in hostile activity in that state, under s 7(1)(a) of the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Cth) (the that pre-date the amendments to the *Criminal Code*). The defendant had applied for a New Zealand passport from Melbourne, booked plane tickets from Melbourne for Istanbul and Turkey from where he intended to enter Syria, and obtained contact details of someone who was to act as a guide ensuring safe passage from Turkey to Syria. He received a sentence of 5 years and 6 months and a non-parole period of 3 years and 6 months.

BIOGRAPHY

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Caroline Dobraszczyk was admitted as a lawyer in 1989 before being called to the NSW Bar in 2011. She has presented various papers for CLE and CPD College of Law seminars on criminal law, evidence and bail laws. She has also written for the Law Society Journal on areas of criminal responsibility and confiscation legislation.

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Ian Benson is a solicitor at AR Conolly & Company and has a First Class Honours degree in law.

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