



Anti-Terrorism Bill 2005

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Law and Bills Digest Section

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Anti-Terrorism Bill 2005

Date Introduced: 2 November 2005

House: House of Representatives

Portfolio: Attorney-General

Commencement: Sections 1 to 4 commence on the day which Act receives Royal Assent. Schedule 1 commences the day after the Act receives Royal Assent.

Purpose

The *Anti-Terrorism Bill 2005* ('the Bill') amends the terrorism offences in Divisions 101 and 102 of the *Criminal Code Act 1995* (Cth) ('the Criminal Code') to expand the offences relating to training, possessing a thing or document, and financing terrorism.

Background

Basis of policy commitment

The provisions of this Bill were contained in Schedule 1 of the [Draft-in-Confidence Anti-Terrorism Bill 2005](#) ('Draft Bill'). Version 28 of the Bill was posted the website of the ACT Chief Minister on 14 October 2005.

The Prime Minister made the following [announcement](#) on the 2 November 2005:¹

Today the Government will introduce into the House of Representatives an urgent amendment to Australia's counter-terrorism legislation and seek the passage of the amendment through all stages tonight. The President of the Senate will recall the Senate for 2pm tomorrow. It is the Government's wish that the amendment be law as soon as possible.

The Government has received specific intelligence and police information this week which gives cause for serious concern about a potential terrorist threat. The detail of this intelligence has been provided to the Leader of the Opposition and the Shadow Minister for Homeland Security.

The Government is satisfied on the advice provided to it that the immediate passage of this bill would strengthen the capacity of law enforcement agencies to effectively respond to this threat.

The Government is acting against the background of the assessment of intelligence agencies that a terrorist attack in Australia is feasible and could well occur. In ASIO's

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recently released annual report a warning is contained that specifically cites the threat of home-grown terrorism. ASIO also warned that attacks without warning are feasible.

The Prime Minister also announced:

...item 10 clarifies that, when determining whether an organisation satisfies the definition of a terrorist organisation, it is not necessary to prove the organisation is preparing, planning, assisting in or fostering 'the' particular terrorist act. It will be sufficient if the prosecution can show the organisation is preparing, planning, assisting in or fostering 'a' terrorist act.

This amendment was item 7 in the Draft Bill. It does not appear in the current Bill.

Australian Security and Intelligence Organisation Report to Parliament 2004-2005

The Australian Security and Intelligence Organisation Report to Parliament 2004-5([ASIO Report](#)) referred to in the Prime Minister's announcement of 2 November makes the following assessment of a domestic risk of terrorism:²

Most extremists are influenced by foreign events – some in Australia view the Coalition action in Iraq as an attack on all Muslims. Others believe they do not fit into Australian society or into the society of their parents. Despite a strong cultural sense of the importance of community and family, some individuals choose to lean heavily on their perceptions of conflict as a battle between Muslims and infidels. This perception engenders a sense of isolation and rejection which is difficult for moderate elements in the Australian Muslim community to counteract – and the moderates are perceived to be part of the problem by the extremists.

Extremists in Australia come from a variety of ethnic backgrounds. Some of the more extreme individuals ASIO has identified and investigated are Australian-born. Some have participated in terrorist training overseas while others have never travelled abroad.

COAG Proposals

On 8 September 2005, Prime Minister John Howard [announced](#) a number of proposed changes to Australia's counter-terrorism laws with the aim of enabling Australia to 'better deter, prevent, detect and prosecute acts of terrorism'.

At a special meeting of the Council of Australian Governments (COAG) on 27 September 2005, State and Territory leaders unanimously agreed to a series of counter-terrorism measures. Those measures are set out in the [COAG Communiqué](#).

The Parliamentary Library regularly updates an E-Brief [Proposals to further strengthen Australia's counter-terrorism laws—2005](#) which compiles commentary on the Draft Bill.

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The Parliamentary Library also regularly updates a [Law Internet Resource Guide](#), which features the key existing terrorism legislation, a chronology and commentary.

The Parliamentary Library has prepared a [comparative table](#) comparing measures contained in the Prime Minister's media release on 8 September, the COAG Communiqué and the Draft Bill. A table contrasting this Bill with Schedule 1 of the Draft Bill is attached as an [Appendix](#).

Main Provisions

Subclause 4(1) refers to an agreement by the Council of Australian Governments made on 27 September to review the amendments in Schedule 1.

Subclause 4(2) provides that **if** a copy of the report in relation to the review is given to the Attorney-General, the Attorney-General must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the Attorney-General receives the copy of the report.

Schedule 1—Amendments to the Criminal Code Act 1995

Schedule 1 **items 1 to 5** amend the *Criminal Code Act 1995* to widen the scope of the following offences:

- providing or receiving **training** connected with terrorist act (**item 2**, clause 101.2(3))
- possessing a '**thing**' connected with terrorist act (**item 3**, clause 101.4 (3)).
- collecting or making **documents** likely to facilitate terrorist acts (**item 4**, clause 101.5(3))
- other acts done in preparation for or planning terrorist act (**item 5**, clause 101.6 (3))
- **financing terrorism** (**item 22**, clause 103.2).

In each case the scope of the offence is **expanded** by the amendments which clarify that the offence is committed even if:

- a terrorist act does not occur; or
- the training (possession of a thing, making documents or financing terrorism etc) is not connected with a specific terrorist act; or
- is connected with more than one terrorist act.

A 'terrorist act' does not include advocacy, protest, dissent or industrial action; which is not intended:

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- to cause serious harm that is physical harm to a person; or
- to cause a person's death; or
- to endanger the life of a person, other than the person taking the action; or
- to create a serious risk to the health or safety of the public or a section of the public. (section 100.1)

The effect of the amendments is to widen the scope of each offence and ensure existing provisions are not read down to require a more specific connection to an identifiable act of terrorism. The Prime Minister's media release of 2 Nov states:³

Items 2 to 5 clarify that, in a prosecution for a terrorism offence, it is not necessary to identify a particular terrorist act. The existing offences contain a subsection that provides that a person commits the offence even if 'the' terrorist act does not occur. When the offences were originally drafted, it was not the intention that the prosecution would be required to identify a 'particular' terrorist act.

The amendments will clarify that it is not necessary for the prosecution to identify a specific terrorist act. It will be sufficient for the prosecution to prove that the particular conduct was related to 'a' terrorist act.

The [*Explanatory Memorandum*](#) gives examples:

The amendments will ensure the relevant offences will be available where a person is considering a range of activities that are still in formative stages and not advanced to the point of the details being decided upon. For example, a person or group of persons may be considering a range of activities such as killing persons or detonating a bomb. However, that person or group may not have decided which of the activities will be carried out, nor the time, date or method of such activities. In other words, in proving one of the amended offences it will not be necessary to establish that the person has settled on a particular target, time or date or other specific particulars of the action or threat of action said to constitute the terrorist act. For example, where the person has settled on an action such as destroying a Government building but has not decided on a particular building, time or date this would fall within the concept of a terrorist act.

Section 100.4 of the Criminal Code already states that an extremely wide range of antecedent conduct:

- (1) Subject to subsection (4), this Part applies to the following conduct:
- (a) all actions or threats of action that constitute terrorist acts (no matter where the action occurs, the threat is made or the action, if carried out, would occur);
 - (b) all actions (*preliminary acts*) that relate to terrorist acts but do not themselves constitute terrorist acts (no matter where the preliminary acts occur and no matter where the terrorist acts to which they relate occur or would occur).

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Concluding Comments

The pressing issue that arises from this Bill is one of overlapping review mechanisms.

The [*Explanatory Memorandum*](#) states:

This clause ensures that the COAG agreement to a five-year review of these new laws is enshrined in the legislation. It also ensures that any report on the review of these new laws will be made public.⁴

It is not self-evident upon reading clause 4 that a review must take place. The provision itself does not set up the review process. Similarly, subclause 4(2) is qualified that **if** the Attorney-General is given a report, he or she must table it. It is not clear whether the Attorney-General must be given any report.

Divisions 101 and 103 were introduced by the *Security Legislation Amendment (Terrorism) Act 2002* which included a statutory review provision. An Independent Committee to assess the operation and effectiveness of these provisions (amongst others) was announced by the Attorney-General on 12 October 2005.⁵

The Security Legislation Review Committee will be chaired by the Honourable Simon Sheller AO QC, a recently retired NSW Supreme Court judge.

The committee comprises former ACT Chief Police Officer John Davies APM OAM; Inspector General of Intelligence and Security Ian Carnell; Privacy Commissioner Karen Curtis; Human Rights Commissioner Dr Sev Ozdowski OAM; Commonwealth Ombudsman Professor John McMillan; and representatives of the Law Council of Australia, Gillian Braddock SC and Dan O’Gorman.

In announcing the composition of the Security Legislation Review Committee, the Attorney-General stated:⁶

The review will focus on existing legislation and will not cover the Government’s new counter-terrorism initiatives, which will be reviewed by the Federal Parliament as well as State and Territory Governments as part of the process agree to by the Council of Australian Governments before they are enacted.

Parliament may wish to consider whether it would be preferable for the Independent Committee to review the provisions as a whole.

The Parliamentary Joint Committee on ASIO, ASIS and DSD will also review these Divisions of the Criminal Code in 2007. If the Bill is passed, Parliament may wish to consider whether the amended legislation should also be subject to that review.

Provisions which impose criminal liability are narrowly construed by courts. Parliament may wish to consider in this light item 2 which deals with possession of a ‘thing’. This

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provision might benefit from the insertion of a non-exhaustive list of possible items that would constitute a ‘thing’. This would clarify the intent of the legislature and serve as an aid to interpretation.

Endnotes

- 1 The Hon. J. Howard MP, Prime Minister, [Anti-Terrorism Bill](#), *media release*, Parliament House, Canberra, 2 November 2005.
- 2 ASIO, [Report to Parliament 2004-2005](#), AGPS, Canberra, September 2005, at p. 17.
- 3 Explanatory memorandum, at p. 3.
- 4 Explanatory memorandum, at p. 2.
- 5 The Hon Phillip Ruddock (Attorney-General), ‘[Independent Committee to review security legislation](#)’, *media release*, 12 October 2005.
- 6 *op. cit.*

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Appendix

Comparison of Anti-terrorism Bill 2005 with the Draft Bill

	Anti-Terrorism Bill 2005 (introduced 2 November 2005)	Draft Bill (posted by ACT Chief Minister Jon Stanhope on 14 October 2005)
Clause 4, Review of anti-terrorism laws		Not in the Draft Bill
Schedule 1	Title: Amendments to terrorism offences	Title: Definition of terrorist organisation etc.
Schedule 1	Commences the day after Royal Assent.	To commence 28 days after Royal Assent.
Items 1–4		Item 1, amending the <i>Crimes (Foreign Incursions and Recruitment) Act 1978</i> , has been deleted from the Bill introduced, and items 2–5 have been accordingly renumbered as 1–4.
		Items 6–21 of the Draft Bill are not in the Bill as introduced: all of these dealt with amendments to section 102.1 of the <i>Criminal Code</i> , ‘Definitions of terrorist organisations’
Item 5		Item 22 of the Draft Bill.
		Items 23–24 of the Draft Bill do not appear.

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