



Anti-terrorism Act 2004

No. 104, 2004

An Act to amend the law relating to foreign incursions and recruitment, terrorism offences and proceeds of crime, and for related purposes

Note: An electronic version of this Act is available in SCALEplus
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No. 104, 2004

An Act to amend the law relating to foreign incursions and recruitment, terrorism offences and proceeds of crime, and for related purposes

[Assented to 30 June 2004]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *Anti-terrorism Act 2004*.

2 Commencement

This Act commences on the day after the day on which it receives the Royal Assent.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

4 Application of amendments

(1A) The amendment made by item 1B of Schedule 1 applies:

- (a) to a person convicted of an offence on or after the commencement of this Act (whether or not the person was charged with the offence before the commencement of this Act); and
- (b) to a person charged with an offence on or after the commencement of this Act.

(1B) The amendments made by items 1C, 1D and 1E of Schedule 1 apply in relation to minimum non-parole offences of which persons are convicted on or after the commencement of this Act, whether the offences were or are committed before, on or after that commencement.

(1) The amendments of the *Proceeds of Crime Act 2002* apply to any application made under that Act after the commencement of this Act, including an application in relation to:

- (a) conduct that occurred before the commencement of this Act; or
- (b) proceeds derived or realised before the commencement of this Act; or
- (c) literary proceeds derived or transferred to Australia before the commencement of this Act.

(2) The amendment made by item 17 of Schedule 1 does not apply to proceedings for offences alleged to have been committed before the commencement of this Act.

Schedule 1—Amendments

Crimes Act 1914

1A Subsection 3(1)

Insert:

terrorism offence means:

- (a) an offence against Division 72 of the *Criminal Code*; or
- (b) an offence against Part 5.3 of the *Criminal Code*.

1B After section 15

Insert:

15AA Bail not to be granted in certain cases

- (1) Despite any other law of the Commonwealth, a bail authority must not grant bail to a person (the *defendant*) charged with, or convicted of, an offence covered by subsection (2) unless the bail authority is satisfied that exceptional circumstances exist to justify bail.
- (2) This subsection covers:
 - (a) a terrorism offence; and
 - (b) an offence against a law of the Commonwealth, if:
 - (i) a physical element of the offence is that the defendant engaged in conduct that caused the death of a person; and
 - (ii) the fault element for that physical element is that the defendant intentionally engaged in that conduct (whether or not the defendant intended to cause the death, or knew or was reckless as to whether the conduct would result in the death); and
 - (c) an offence against a provision of Division 80 or Division 91 of the *Criminal Code*, or against section 24AA of this Act, if:
 - (i) the death of a person is alleged to have been caused by conduct that is a physical element of the offence; or

- (ii) conduct that is a physical element of the offence carried a substantial risk of causing the death of a person; and
 - (d) an ancillary offence against a provision of Division 80 or Division 91 of the *Criminal Code*, or against section 24AA of this Act, if, had the defendant engaged in conduct that is a physical element of the primary offence to which the ancillary offence relates, there would have been a substantial risk that the conduct would have caused the death of a person.
- (3) To avoid doubt, the express reference in paragraph (2)(d) to an ancillary offence does not imply that references in paragraphs (2)(a), (b) or (c) to an offence do not include references to ancillary offences.
- (4) To avoid doubt, except as provided by subsection (1), this section does not affect the operation of a law of a State or a Territory.

Note: Subsection (1) indirectly affects laws of the States and Territories because it affects section 68 of the *Judiciary Act 1903*.
- (5) In this section:

ancillary offence has the meaning given in the *Criminal Code*.

bail authority means a court or person authorised to grant bail under a law of the Commonwealth, a State or a Territory.

primary offence has the meaning given in the *Criminal Code*.

1C After section 19AF

Insert:

19AG Non-parole periods for sentences for certain offences

- (1) This section applies if a person is convicted of one of the following offences (each of which is a *minimum non-parole offence*) and a court imposes a sentence for the offence:
 - (a) an offence against section 24AA;
 - (b) a terrorism offence;
 - (c) an offence against Division 80 or 91 of the *Criminal Code*.

Note: A sentence for a minimum non-parole offence is a federal sentence, because such an offence is a federal offence.

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- (2) The court must fix a single non-parole period of at least $\frac{3}{4}$ of:
- (a) the sentence for the minimum non-parole offence; or
 - (b) if 2 or more sentences have been imposed on the person for minimum non-parole offences—the aggregate of those sentences.

The non-parole period is in respect of all federal sentences the person is to serve or complete.

- (3) For the purposes of subsection (2):
- (a) a sentence of imprisonment for life for a minimum non-parole offence is taken to be a sentence of imprisonment for 30 years for the offence; and
 - (b) it does not matter:
 - (i) whether or not the sentences mentioned in that subsection were imposed at the same sitting; or
 - (ii) whether or not the convictions giving rise to those sentences were at the same sitting; or
 - (iii) whether or not all the federal sentences mentioned in that subsection are for minimum non-parole offences.

- (4) If the person was subject to a recognizance release order, the non-parole period supersedes the order.

- (5) Sections 19AB, 19AC, 19AD, 19AE and 19AR have effect subject to this section.

Note: The effects of this include preventing a court from:

- (a) making a recognizance release order under paragraph 19AB(1)(e) or (2)(e), 19AE(2)(e) or 19AR(2)(e); or
- (b) confirming (under paragraph 19AD(2)(d)) a pre-existing non-parole period; or
- (c) confirming (under paragraph 19AE(2)(d)) a recognizance release order; or
- (d) declining (under subsection 19AB(3) or 19AC(1) or (2) or paragraph 19AD(2)(f)) to fix a non-parole period.

1D At the end of section 20

Add:

- (6) Paragraph (1)(b) does not apply in relation to a minimum non-parole offence mentioned in section 19AG, or offences that
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include one or more such minimum non-parole offences. This subsection has effect despite subsection (1) and sections 19AB, 19AC, 19AE and 19AR (which permit or require a court to make a recognizance release order in certain circumstances).

Note: If the court sentences the person to imprisonment for a minimum non-parole offence, it must fix a non-parole period under section 19AG.

1E At the end of section 20AB

Add:

- (6) Subsection (1) does not permit a court (including a federal court) to pass a sentence, or make an order, that involves detention or imprisonment, in respect of the conviction of a person before the court of a minimum non-parole offence mentioned in section 19AG.

Note: If the court sentences the person to imprisonment for the minimum non-parole offence, it must fix a non-parole period under section 19AG.

1 Subsection 23B(1) (definition of *investigation period*)

Repeal the definition, substitute:

investigation period means the investigation period prescribed by section 23C or 23CA, as the case requires.

3 Subsection 23C(1)

After “Commonwealth offence”, insert “(other than a terrorism offence)”.

Note: The heading to section 23C is replaced by the heading “**Period of arrest if arrested for non-terrorism offence**”.

4 Subsection 23C(6)

Repeal the subsection, substitute:

- (6) If the person has been arrested more than once within any period of 48 hours, the investigation period for each arrest other than the first is reduced by so much of any of the following periods as occurred within that 48 hours:
- (a) any earlier investigation period or periods under this section;

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- (b) any earlier investigation period or periods under section 23CA.

5 After section 23C

Insert:

23CA Period of arrest if arrested for terrorism offence

- (1) If a person is arrested for a terrorism offence, the following provisions apply.
- (2) The person may be detained for the purpose of investigating either or both of the following:
- (a) whether the person committed the offence;
 - (b) whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed;
- but must not be detained for that purpose, or for purposes that include that purpose, after the end of the investigation period prescribed by this section.
- (3) The person must be:
- (a) released (whether unconditionally or on bail) within the investigation period; or
 - (b) brought before a judicial officer within that period or, if it is not practicable to do so within that period, as soon as practicable after the end of that period.

Note: For *judicial officer*, see subsection (10).

- (4) For the purposes of this section, but subject to subsections (6) and (8), the investigation period begins when the person is arrested, and ends at a time thereafter that is reasonable, having regard to all the circumstances, but does not extend beyond:
- (a) if the person is or appears to be under 18, an Aboriginal person or a Torres Strait Islander—2 hours; or
 - (b) in any other case—4 hours;
- after the arrest, unless the period is extended under section 23DA.

- (5) In ascertaining any period of time for the purposes of this section, regard shall be had to the number and complexity of matters being investigated.
- (6) If the person has been arrested more than once within any period of 48 hours, the investigation period for each arrest other than the first is reduced by so much of any of the following periods as occurred within that 48 hours:
 - (a) any earlier investigation period or periods under this section;
 - (b) any earlier investigation period or periods under section 23C.
- (7) However, in relation to each first arrest, disregard subsection (6) for any later arrest if:
 - (a) the later arrest is for a Commonwealth offence:
 - (i) that was committed after the end of the person's period of detention under this Part for the first arrest; or
 - (ii) that arose in different circumstances to those in which any Commonwealth offence to which the first arrest relates arose, and for which new evidence has been found since the first arrest; and
 - (b) the person's questioning associated with the later arrest does not relate to:
 - (i) a Commonwealth offence to which the first arrest relates; or
 - (ii) the circumstances in which such an offence was committed.
- (8) In ascertaining any period of time for the purposes of subsection (4) or (6), the following times are to be disregarded:
 - (a) the time (if any) that is reasonably required to convey the person from the place at which the person is arrested to the nearest premises at which the investigating official has access to facilities for complying with this Part;
 - (b) any time during which the questioning of the person is suspended or delayed to allow the person, or someone else on the person's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter or other person as provided by this Part;
 - (c) any time during which the questioning of the person is suspended or delayed to allow such a legal practitioner,

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- friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place;
- (d) any time during which the questioning of the person is suspended or delayed to allow the person to receive medical attention;
 - (e) any time during which the questioning of the person is suspended or delayed because of the person's intoxication;
 - (f) any time during which the questioning of the person is suspended or delayed to allow for an identification parade to be arranged and conducted;
 - (g) any time during which the questioning of the person is suspended or delayed in order to allow the making of an application under section 3ZQB or the carrying out of a prescribed procedure within the meaning of Division 4A of Part IAA;
 - (h) the time (if any) that is reasonably required in connection with making and disposing of an application under section 23CB, 23DA, 23WU or 23XB;
 - (i) any time during which the constable is informing the person of matters specified in section 23WJ;
 - (j) any reasonable time during which the questioning of the person is suspended or delayed to allow the person to rest or recuperate;
 - (k) any time during which a forensic procedure is being carried out on the person by order of a magistrate under Division 5 of Part ID;
 - (l) any time during which the questioning of the person is suspended or delayed, if section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section;
 - (m) any reasonable time that:
 - (i) is a time during which the questioning of the person is reasonably suspended or delayed; and
 - (ii) is within a period specified under section 23CB.
- (9) In any proceedings, the burden lies on the prosecution to prove that:
- (a) the person was brought before a judicial officer as soon as practicable; or
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- (b) any particular time was covered by a provision of subsection (8).

(10) In this section:

judicial officer means any of the following:

- (a) a magistrate;
- (b) a justice of the peace;
- (c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

23CB Specifying time during which suspension or delay of questioning may be disregarded

- (1) This section applies if the person mentioned in paragraph 23CA(8)(m) is detained under subsection 23CA(2) for the purpose of investigating whether the person committed a terrorism offence.

Note: The person may be detained under subsection 23CA(2) for the purpose of investigating whether the person committed a terrorism offence, whether the person was arrested for that terrorism offence or a different terrorism offence.

Application for specification of period

- (2) At or before the end of the investigation period, an investigating official may apply for a period to be specified for the purpose of subparagraph 23CA(8)(m)(ii).
 - (3) The application must be made to:
 - (a) a magistrate; or
 - (b) if it cannot be made at a time when a magistrate is available—a justice of the peace employed in a court of a State or Territory or a bail justice; or
 - (c) if it cannot be made when any of the foregoing is available—any justice of the peace.
 - (4) The application may be made:
 - (a) in person before the magistrate, justice of the peace or bail justice; or
 - (b) in writing; or
 - (c) by telephone, telex, fax or other electronic means.
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However, before making the application by means described in paragraph (c), the investigating official must inform the person that the person, or his or her legal representative, may make representations to the magistrate, justice of the peace or bail justice about the application.

- (5) The application must include statements of all of the following:
- (a) whether it appears to the investigating official that the person is under 18;
 - (b) whether it appears to the investigating official that the person is an Aboriginal person or a Torres Strait Islander;
 - (c) the reasons why the investigating official believes the period should be specified, which may, for example, be or include one or more of the following:
 - (i) the need to collate and analyse information relevant to the investigation from sources other than the questioning of the person (including, for example, information obtained from a place outside Australia);
 - (ii) the need to allow authorities in or outside Australia (other than authorities in an organisation of which the investigating official is part) time to collect information relevant to the investigation on the request of the investigating official;
 - (iii) the fact that the investigating official has requested the collection of information relevant to the investigation from a place outside Australia that is in a time zone different from the investigating official's time zone;
 - (iv) the fact that translation is necessary to allow the investigating official to seek information from a place outside Australia and/or be provided with such information in a language that the official can readily understand;
 - (d) the period that the investigating official believes should be specified.
- (6) The person, or his or her legal representative, may make representations about the application.

Decision about specifying period

- (7) The magistrate, justice of the peace or bail justice may, by signed instrument, specify a period starting at the time the instrument is signed, if satisfied that:
- (a) it is appropriate to do so, having regard to:
 - (i) the application; and
 - (ii) the representations (if any) made by the person, or his or her legal representative, about the application; and
 - (iii) any other relevant matters; and
 - (b) the offence is a terrorism offence; and
 - (c) detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
 - (d) the investigation into the offence is being conducted properly and without delay; and
 - (e) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

Instrument specifying period

- (8) The instrument must:
- (a) specify the period as a number (which may be less than one) of hours; and
 - (b) set out the day and time when it was signed; and
 - (c) set out the reasons for specifying the period.
- (9) The magistrate, justice of the peace or bail justice must:
- (a) give the investigating official a copy of the instrument as soon as practicable after signing it; and
 - (b) if the instrument was made as a result of an application made by means described in paragraph (4)(c)—inform the investigating official of the matters included in the instrument.

Evidentiary provisions if application was made by telephone, fax etc.

- (10) As soon as practicable after being informed of those matters, the investigating official must:
- (a) complete a form of the instrument and write on it the name of the magistrate, justice of the peace or bail justice and the particulars given by him or her; and
 - (b) forward it to the magistrate, justice of the peace or bail justice.
- (11) If the form of the instrument completed by the investigating official does not, in all material respects, accord with the terms of the instrument signed by the magistrate, justice of the peace or bail justice, the specification of the period is taken to have had no effect.
- (12) In any proceedings, if the instrument signed by the magistrate, justice of the peace or bail justice is not produced in evidence, the burden lies on the prosecution to prove that the period was specified.

6 Subsection 23D(1)

After “serious offence”, insert “(other than a terrorism offence)”.

Note: The heading to section 23D is replaced by the heading “**Extension of investigation period if arrested for non-terrorism offence**”.

7 After section 23D

Insert:

23DA Extension of investigation period if arrested for terrorism offence

- (1) If a person is under arrest for a terrorism offence, an investigating official may, at or before the end of the investigation period, apply for an extension of the investigation period.
- (2) The application must be made to:
 - (a) a magistrate; or

- (b) if it cannot be made at a time when a magistrate is available—a justice of the peace employed in a court of a State or Territory or a bail justice; or
- (c) if it cannot be made when any of the foregoing is available—any justice of the peace.

The magistrate, justice of the peace or bail justice to whom the application is made is the ***judicial officer*** for the purposes of this section and section 23E.

- (3) The application may be made before the judicial officer, or in writing, or as prescribed by section 23E, and the person or his or her legal representative may make representations to the judicial officer about the application.
- (4) Subject to subsection (7), the judicial officer may extend the investigation period, by signed written authority, if satisfied that:
 - (a) the offence is a terrorism offence; and
 - (b) further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence; and
 - (c) the investigation into the offence is being conducted properly and without delay; and
 - (d) the person, or his or her legal representative, has been given the opportunity to make representations about the application.
- (5) The authority must set out:
 - (a) the day and time when the extension was granted; and
 - (b) the reasons for granting the extension; and
 - (c) the terms of the extension.
- (6) The judicial officer must give the investigating official a copy of the authority as soon as practicable after signing the authority.
- (7) The investigation period may be extended any number of times, but the total of the periods of extension cannot be more than 20 hours.

8 Subsection 23E(1)

After “23D”, insert “or 23DA”.

9 At the end of subsection 23E(3)

Add “or 23DA(5) (as the case requires)”.

10 Subsection 23WD(4) (note)

Omit “(see subsection 23C(7))”.

11 Subsection 23WM(4) (note)

Omit “(see subsection 23C(7))”.

12 Paragraph 23XGD(2)(h)

Repeal the paragraph, substitute:

- (h) any time that is to be disregarded under subsection 23C(7) or 23CA(8).

Crimes (Foreign Incursions and Recruitment) Act 1978**13 Subsection 6(1) (penalty)**

Omit “14 years”, substitute “20 years”.

14 Paragraph 6(2)(b)

Omit “during the period of one year immediately preceding”, substitute “before”.

15 At the end of section 6

Add:

(5) Paragraph (4)(a) does not apply if:

- (a) a person enters a foreign State with intent to engage in a hostile activity in that foreign State while in or with an organisation; and
- (b) the organisation is a prescribed organisation at the time of entry.

(6) Paragraph (4)(a) does not apply if:

- (a) a person engages in a hostile activity in a foreign State while in or with an organisation; and
- (b) the organisation is a prescribed organisation at the time when the person engages in that hostile activity.

- (7) For the purposes of subsections (5) and (6), ***prescribed organisation*** means:
- (a) an organisation that is prescribed by the regulations for the purposes of this paragraph; or
 - (b) an organisation referred to in paragraph (b), (c), (d) or (e) of the definition of ***terrorist organisation*** in subsection 102.1(1) of the *Criminal Code*.
- (8) Before the Governor-General makes a regulation prescribing an organisation for the purposes of paragraph (7)(a), the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering:
- (a) a serious violation of human rights; or
 - (b) armed hostilities against the Commonwealth or a foreign State allied or associated with the Commonwealth; or
 - (c) a terrorist act (as defined in section 100.1 of the *Criminal Code*); or
 - (d) an act prejudicial to the security, defence or international relations of the Commonwealth.

16 Paragraph 7(2)(b)

Omit “during the period of one year immediately preceding”, substitute “before”.

17 After subsection 11(3)

Insert:

- (3A) In a proceeding against a person for an offence against this Act, a certificate by a Minister, stating that an organisation specified in the certificate was not, on a specified day or during a specified period, an armed force, or part of an armed force, of the government of a foreign State specified in the certificate is prima facie evidence of the matters stated in the certificate.

18 At the end of the Act

Add:

12 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Criminal Code Act 1995

19 Paragraph 102.3(1)(b) of the *Criminal Code*

Repeal the paragraph, substitute:

- (b) the organisation is a terrorist organisation; and

20 Section 102.5 of the *Criminal Code*

Repeal the section, substitute:

102.5 Training a terrorist organisation or receiving training from a terrorist organisation

(1) A person commits an offence if:

- (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
- (b) the organisation is a terrorist organisation; and
- (c) the person is reckless as to whether the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

- (a) the person intentionally provides training to, or intentionally receives training from, an organisation; and
- (b) the organisation is a terrorist organisation that is covered by paragraph (b), (c), (d) or (e) of the definition of ***terrorist organisation*** in subsection 102.1(1).

Penalty: Imprisonment for 25 years.

(3) Subject to subsection (4), strict liability applies to paragraph (2)(b).

- (4) Subsection (2) does not apply unless the person is reckless as to the circumstance mentioned in paragraph (2)(b).

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3)).

Proceeds of Crime Act 2002

21 Paragraph 20(1)(d)

Repeal the paragraph, substitute:

- (d) there are reasonable grounds to suspect that a person has committed an *indictable offence or a *foreign indictable offence, and that the person has derived *literary proceeds in relation to the offence; and

22 Paragraphs 20(3)(b) and (c)

Repeal the paragraphs, substitute:

- (c) that the authorised officer suspects that the suspect derived *literary proceeds in relation to the offence; and

23 Paragraph 152(2)(c)

Omit “in *Australia”.

24 Paragraph 153(1)(a)

After “resulting”, insert “, directly or indirectly,”.

25 After subsection 153(3)

Insert:

- (3A) If the offence is a *foreign indictable offence, then a *benefit is not treated as *literary proceeds unless the benefit is derived in *Australia or transferred to Australia.

26 After section 337

Insert:

337A Meaning of *foreign indictable offence*

- (1) If:

- (a) an application (the ***current application***) is made for a *restraining order or *confiscation order in relation to conduct that constituted an offence against a law of a foreign country; and
- (b) if the conduct had occurred in Australia at the testing time referred to in subsection (2), the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment;

then, for the purposes of the current application, the conduct is treated as having constituted a ***foreign indictable offence*** at all relevant times.

Example: X commits an offence against a law of a foreign country at a time when the conduct is not an offence against Australian law. X then derives literary proceeds in relation to the offence and transfers the proceeds to Australia. After the proceeds are transferred, a new Commonwealth offence is created that applies to the type of conduct concerned. An application is then made for a literary proceeds order. For the purposes of the proceedings for that order, the original conduct is treated as having constituted a foreign indictable offence at all relevant times and accordingly an order can be made in respect of those proceeds.

(2) The ***testing time*** for the current application is:

- (a) if the current application is an application for a *restraining order—the time when the current application was made; or
- (b) if the current application is an application for a *confiscation order (other than a *literary proceeds order) in relation to a restraining order—the time when the application for the restraining order was made; or
- (c) if:
 - (i) the current application is an application for a literary proceeds order; and
 - (ii) an earlier restraining order has been made in respect of the same offence;
 the time when the application was made for that earlier restraining order; or
- (d) if the current application is an application for a literary proceeds order but paragraph (c) does not apply—the time when the current application was made.

(3) In this section:

offence against a law of a foreign country includes an offence triable by a military commission of the United States of America established under a Military Order of 13 November 2001 made by the President of the United States of America and entitled “Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism”.

27 Section 338 (definition of *foreign indictable offence*)

Repeal the definition, substitute:

foreign indictable offence has the meaning given by section 337A.

*[Minister's second reading speech made in—
House of Representatives on 31 March 2004
Senate on 15 June 2004]*

(52/04)