

CHAPTER 2

Overview of the bills

2.1 This chapter briefly describes some of the main provisions in the NS Bill and the LE Bill.

National Security Legislation Amendment Bill 2010

2.2 The NS Bill comprises 10 schedules of amendments. Each schedule addresses a specific set of reforms and these are:

- Schedule 1 – treason and urging violence;
- Schedule 2 – terrorism;
- Schedule 3 – investigation of Commonwealth offences;
- Schedule 4 – powers to search premises in relation to terrorism offences;
- Schedule 5 – re-entry of premises in an emergency situation;
- Schedule 6 – amendments relating to bail;
- Schedule 7 – listings under the *Charter of the United Nations Act 1945*;
- Schedule 8 – amendments relating to the disclosure of national security information in criminal and civil proceedings;
- Schedule 9 – functions of the Inspector-General of Intelligence and Security; and
- Schedule 10 – consequential amendments relating to the establishment of the PJC-LE.

2.3 Some of these provisions are lengthy and quite detailed. Accordingly, Chapter 2 highlights only the background, objectives and key amendments of those schedules subsequently discussed in Chapters 3 and 4.

Treason and urging violence

2.4 Part 1 of Schedule 1 repeals existing offences in the Crimes Act and amends existing treason and sedition (now called 'urging violence') offences in Division 80 of the Criminal Code. Part 2 of Schedule 1 inserts new offences of urging violence against groups and members of groups into the Criminal Code.

2.5 The proposed amendments are the Australian Government's response to the recommendations from various reviews¹ and take into account input received as a result of public consultation on the exposure draft NS Bill.²

Summary of key amendments

2.6 The key amendments to be made under Part 1 of Schedule 1 are the:

- insertion of new section 80.1AA of the Criminal Code, creating new offences for treason (for example, materially assisting enemies);
- repeal and replacement of subsection 80.2(1) of the Criminal Code, creating the offence of urging the overthrow of the Constitution or government by force or violence;
- repeal and replacement of subsection 80.2(3) of the Criminal Code, creating the offence of urging interference in parliamentary elections or constitutional referenda by force or violence; and
- addition of new subsection 80.3(3) of the Criminal Code, providing additional matters to which a court may have regard when considering a defence under subsection 80.3(1) to the urging violence offences in Subdivision C (Urging Violence) of Division 80.³

2.7 The key amendments to be made under Part 2 of Schedule 1 are the:

- insertion of new section 80.2A of the Criminal Code, creating new offences for urging violence against groups; and
- insertion of new section 80.2B, creating new offences for urging violence against members of groups.⁴

Terrorism

2.8 Parts 1-2 of Schedule 2 primarily amend Part 5.3 (Terrorism) of the Criminal Code. Part 1 focuses on Division 102 (Definitions), and Part 2 focuses on definitions in Division 105 (Preventative detention orders), Division 390 (Criminal associations and organisations) and the Dictionary of the Criminal Code. Part 3 of Schedule 2 contains a related amendment that is contingent upon enactment of the LE Bill.

1 Australian Law Reform Commission, *Fighting Words: A Review of Sedition Laws in Australia*, September 2006, Recommendations 10-1 to 10-5; Security Legislation Review Committee (Sheller Committee), *Report of the Security Legislation Review Committee*, June 2006; and Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation*, December 2006.

2 Explanatory Memorandum, National Security Legislation Amendment Bill 2010, p. 5.

3 Items 15, 18, 20 and 28, respectively, of Schedule 1 of the NS Bill.

4 Item 35 of Schedule 1 of the NS Bill.

2.9 The proposed amendments in Parts 1-2 comprise the Australian Government's response to a recommendation from the Parliamentary Joint Committee on Intelligence and Security⁵ and amendments agreed by the majority of state and territory governments in the Inter-governmental Agreement on Counter-Terrorism Laws.⁶

2.10 The Explanatory Memorandum to the NS Bill additionally explains that the Part 2 amendments implement the Australian Government's policy of ensuring equality of same-sex partnerships in Commonwealth legislation:

The proposed amendments ensure that the definitions in the *Acts Interpretation Act 1901* of de facto partner, child, step-parent and step-child apply or are replicated in the Criminal Code. These definitions are important in the Criminal Code as they apply to the terrorist organisation association offence in section 102.8 and to the preventative detention regime in Division 105 of Part 5.3 of the Criminal Code.⁷

Summary of key amendments

2.11 The key amendment to be made under Part 1 of Schedule 2 is the amendment of subsection 102.1(3) to extend the period of a regulation listing a terrorist organisation from two to three years.⁸

2.12 The key amendments to be made under Part 2 of Schedule 2 are the:

- addition of new subsection 100.5(3) of the Criminal Code, enabling application of the *Acts Interpretation Act 1901* to the Part;
- amendment of the definition of 'close family member' to align paragraph 102.1(1)(a) of the Criminal Code with the *Acts Interpretation Act 1901*;
- amendment of the definition of 'family member' to align paragraph 105.35(3)(a) of the Criminal Code with the *Acts Interpretation Act 1901*; and
- repeal of the definitions of 'child', 'de facto partner', 'parent', 'step-child' and 'step-parent' in subsection 390.1(1) of the Criminal Code and insertion of new definitions into the Dictionary of the Criminal Code.⁹

5 Parliamentary Joint Committee on Intelligence and Security, *Inquiry into the Terrorist Organisation Listing Provisions of the Criminal Code Act 1995*, September 2007, Recommendation 6.

6 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 4.

7 Explanatory Memorandum, National Security Legislation Amendment Bill 2010, p. 13.

8 Item 3 of Schedule 2 of the NS Bill.

9 Items 7, 8, 11, 13-18 and 19-23 of Schedule 2 of the NS Bill.

Investigation of Commonwealth offences

2.13 Schedule 3 amends Part 1C (Investigation of Commonwealth offences) of the Crimes Act. The amendments are the Australian Government's direct response to the findings of the Inquiry by the Hon. John Clarke QC into the case of Dr Mohamed Haneef.¹⁰

2.14 According to the Explanatory Memorandum to the NS Bill, the proposed amendments will clarify the original policy intent of the terrorism investigation powers, which were inserted into the Crimes Act by the *Anti-Terrorism Act 2004*, and will improve the practical operation of Part 1C of the Crimes Act by:

- clarifying the interaction between the power of arrest without warrant under section 3W and the powers of investigation under Part 1C;
- setting a maximum seven day limit on the amount of time that can be specified by a magistrate and disregarded from the investigation period when a person has been arrested for a terrorism offence;
- clarifying how the investigation period and time that is disregarded from the investigation period are calculated; and
- clarifying the procedures that apply when making an application to extend the period of investigation or apply for a period of specified disregarded time, including the enhancement of safeguards.¹¹

Summary of key amendments

2.15 The key amendments to be made to Part 1C of the Crimes Act are:

- insertion of new Subdivision A (Non-terrorism offences) and new Subdivision B (Terrorism offences) into Division 2, creating two distinct categories of Commonwealth offences;¹²
- repeal and replacement of subsection 23C(7), by replicating the existing categories of time that may be disregarded from the investigation period (maximum 12 hours), reinforcing that the time may only be disregarded if it is a reasonable period during which questioning of the person is suspended or delayed, and clarifying how disregarded time may be calculated;¹³
- repeal and replacement of sections 23CA to 23E, covering:
in relation to non-terrorism offences

10 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 4.

11 Explanatory Memorandum, National Security Legislation Amendment Bill 2010, pp 20-21.

12 Item 8 of Schedule 3 of the NS Bill.

13 Item 13 of Schedule 3 of the NS Bill.

- applications to extend the investigation period and extension of the application period, with the key differences between the existing and new process being that only a magistrate (as opposed to a justice of the peace or bail justice) will be able to grant an extension of the investigation period and the inclusion of several amendments to ensure that sufficient procedural safeguards are in place;¹⁴

and in relation to terrorism offences

- the period of investigation if arrested, which is modelled on existing section 23CA with some modifications, including proposed subsection 23DB(11) which sets a cap of seven days on the amount of time that can be disregarded for the investigation period under proposed paragraph 23DB(9)(m);
- the time during which suspension or delay of questioning may be disregarded (both the application process and the time period) which are modelled on existing section 23CB with some modifications; and
- applications may be made for extensions of investigation periods, and magistrates may extend investigation periods, which are similar to the non-terrorism provisions but include the additional requirement for a written application and the written approval of an authorising officer.¹⁵

Powers to search premises in relation to terrorism offences

2.16 Schedule 4 amends Division 3A of Part 1AA (Search, Information Gathering, Arrest and Related Powers) of the Crimes Act. The proposed amendments will provide police with a new power to enter premises without a warrant in emergency circumstances relating to a terrorism offence where there is material present that may pose a risk to the health or safety of the public.

2.17 In the second reading speech, the Attorney-General stated:

This is not a general search warrant power. The provisions are appropriately limited in terms of what police may do once they have entered the premises.¹⁶

14 Item 15 of Schedule 3 of the NS Bill; and Explanatory Memorandum, National Security Legislation Amendment Bill 2010, p. 27.

15 Items 8-10 and 16 of Schedule 3 of the NS Bill.

16 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 4.

Summary of key amendments

2.18 The key amendment to be made under Schedule 4 is the insertion of new section 3UEA which includes provisions:

- enabling a police officer to enter premises without a warrant providing strict criteria are met;
- limiting the proposed power to searching the premises for a particular thing and seizing a particular thing;
- allowing a police officer to secure the premises for a period that is reasonably necessary to apply for a search warrant over the premises if, in the course of searching for a particular thing, the police officer finds another thing that they reasonably suspect is relevant to an indictable offence or a summary offence;
- allowing a police officer to seize another thing, or do anything necessary to make the premises safe, if, in the course of searching for a particular thing, the police officer suspects on reasonable grounds that it is necessary to do so to protect a person's life, health or safety and without the authority of a search warrant because the circumstances are serious and urgent; and
- providing that a police officer may use assistance in exercising a power under the new section, including the use of force against persons and things.¹⁷

Amendments relating to bail

2.19 Schedule 6 amends section 15AA (Bail not to be granted in certain cases) of the Crimes Act. The new provisions will ensure that both the prosecution and the defendant have a right to appeal the decision to grant or refuse bail for persons charged with terrorism or other national security offences.

2.20 At present, the relevant state and territory laws governing bail proceedings apply in Commonwealth criminal matters (through the application of the *Judiciary Act 1903*). The objective of the Schedule 6 amendments is therefore to:

...establish a nationally consistent right of appeal to overcome limitations and inconsistencies under state and territory bail laws.¹⁸

Summary of key amendments

2.21 The key amendments to be made by Schedule 6 are the insertion of:

17 Item 4 of Schedule 4 of the NS Bill.

18 The Hon. Robert McClelland MP, Attorney-General, *House Hansard*, 18 March 2010, p. 4. Also see Explanatory Memorandum, National Security Legislation Amendment Bill 2010, p. 48.

- new subsection 15AA(3A), providing a specific right of appeal for both the prosecution and the defence;
- new subsection 15AA(3C), providing for a stay of the court order granting bail if the prosecution formally indicates an intention to appeal the bail decision immediately after the decision is made; and
- new subsection 15AA(3D), providing that the stay will only last until a decision on the appeal is made, or the prosecution notifies the court they do not intend to pursue an appeal, or until 72 hours has passed, whichever is the least period of time.¹⁹

Amendments relating to the disclosure of national security information in criminal and civil proceedings

2.22 Schedule 8 amends Parts 1 (Preliminary), 2 (Interpretation), 3 (Protection of Information whose Disclosure in Federal Criminal Proceedings is Likely to Prejudice...National Security), 3A (Protection of Information whose Disclosure in Civil Proceedings is Likely to Prejudice...National Security), 4 (Security Clearances) and 5 (Offences) of the NSI Act.

2.23 According to the Explanatory Memorandum to the NS Bill, the proposed amendments aim to improve the practical operation of the NSI Act and ensure the appropriate protection and disclosure of national security information in criminal and civil proceedings.²⁰ These provisions fall into five general categories:

- application of the NSI Act to legal representatives
Several provisions clarify the application of the NSI Act to the defendant's legal representative in criminal proceedings and a party's legal representative in civil proceedings, including:
 - amendments to ensure that the requirement to give notice to the Attorney-General about the possible disclosure of national security information in a proceeding applies to a defendant's or party's legal representative; and
 - amendments to clarify the application of the NSI Act to a defendant's or party's legal representative;
- the role of the Attorney-General under the NSI Act
Some provisions clarify that the Attorney-General, or representative of the Attorney-General:
 - has the ability to attend and be heard during federal criminal or civil proceedings; and

¹⁹ Item 1 of Schedule 6 of the NS Bill. These provisions are similar to some existing state laws, for example, section 25A of the *Bail Act 1978* (NSW) and section 16 of the *Bail Act 1985* (SA).

²⁰ Explanatory Memorandum, National Security Legislation Amendment Bill 2010, p. 52.

- be able to be a party to consent arrangements made in relation to the protection of national security material;
- flexibility and efficiency in the conduct of court proceedings

A number of the provisions clarify court procedures to ensure processes are flexible and efficient, including:

- clarification that the NSI Act does not exclude or modify the general power of a court to uphold a claim of public interest immunity, to make an order under section 93.2 of the Criminal Code or to make other protective orders such as closed hearings and non-publication orders;
- clarification that pre-trial hearings may be held at any stage of a proceeding, and that pre-trial hearings may be used to consider issues relating to the disclosure, protection, storage, handling or destruction of national security information;
- clarification the application of the NSI Act to proceedings once the NSI Act has been invoked; and
- defining 'court official' to clarify who can be present as a court official in closed hearings under sections 29 and 38I of the NSI Act;
- facilitation of agreements under sections 22 and 38B

Agreements under sections 22 and 38B of the NSI Act concern arrangements about the disclosure of national security information in proceedings. The proposed provisions are intended to facilitate better agreement-making by clarifying:

- the policy intention behind the NSI Act: that is, if possible, that it is preferable that parties enter into a section 22 arrangement, compared to the court issuing a certificate;
- who is permitted to enter into a section 22 arrangement; and
- section 22 arrangements cover the disclosure of national security information and may also cover the protection, storage, handling and destruction of national security information;

- avoidance of unnecessary procedures

A number of amendments are designed to streamline procedures and minimise unnecessary processes, including clarification that:

- for the purposes of the NSI Act, re-trials should be considered to be part of the same proceeding as the trial;
- once the Attorney-General is aware of a potential disclosure of national security information, it is not necessary to provide notice again through other processes; and

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- it is only necessary to adjourn those parts of the proceedings which may involve a disclosure of national security information.²¹

Parliamentary Joint Committee on Law Enforcement Bill 2010

2.24 The LE Bill comprises three Parts: Part 1 deals with preliminary matters; Part 2 contains the substantive provisions of the bill; and Part 3 sets out one miscellaneous provision. For the purposes of the inquiry, only Part 2 of the LE Bill is examined in detail.

Key provisions of the LE Bill

2.25 There are five key provisions in Part 2 of the LE Bill:

- clause 5, setting out the administrative arrangements for establishing the PJC-LE and its membership for each Parliament;
- clause 6, providing for all matters relating to the powers and proceedings of the PJC-LE to be determined by resolution of both Houses of Parliament;
- clause 7, setting out the functions of the PJC-LE and identifying the limitations on its functions;²²
- clause 8, requiring the Chief Executive Officer of the ACC (CEO) to comply with a request from the PJC-LE to provide information in relation to ACC operations and investigations, including those which have been concluded. Upon request, and at such other times as appropriate, the CEO must also inform the PJC-LE about the general performance of the ACC's functions. Subclause 8(2) provides the CEO with discretion not to comply with a request from the PJC-LE if satisfied that the information is 'sensitive information' (as defined) and the public interest in giving the information to the PJC-LE would be outweighed by certain prejudicial consequences;
- clause 9, replicating clause 8 in relation to the Commissioner of the AFP; and
- clause 10, providing that the PJC-LE must meet in private at least once in each calendar year to receive a briefing from the Commonwealth Ombudsman about the involvement of the ACC and AFP in controlled operations under Part IAB of the *Crimes Act 1914*.

21 Explanatory Memorandum, National Security Legislation Amendment Bill 2010, pp 52-53.

22 These functions and limitations are identical to those currently set out in subsections 55(1)-(2) of the *Australian Crime Commission Act 2002*, except that the LE Bill extends the functions to the AFP.