

## CHAPTER 2

### PROVISIONS

1.1 This chapter summarises the main provisions contained in the Bill, the content of the law as it stands, and the changes the proposed amendments represent. For ease of reference, a comparative table of the proposed changes is contained in Appendix 3.

#### **Schedule 1- Criminal Code Act 1995**

1.2 Items 1 and 2 would repeal the offence of sedition under section 80.2 of the CCA.

1.3 Items 3 and 4 relate to the definition of 'terrorist act' in section 100.1. At present, the term is defined as follows:

**terrorist act** means 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

(c) causes a person's death; or

(d) endangers a person's life, other than the life of the person taking the action; or

(e) creates a serious risk to the health or safety of the public or a section of the public; or

(f) 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.

(4) In this Division:

- (a) a reference to any person or property is a reference to any person or property wherever situated, within or outside Australia; and
- (b) a reference to the public includes a reference to the public of a country other than Australia.

1.4 The amendments would remove reference to the advancement of a political, religious or ideological cause in existing paragraph (b), but would also remove any threat to commit a terrorist act from the terms of the offence.

1.5 Item 4 would repeal existing subsections (2) and (3), which serve to elaborate on the types of offences that fall within the definition of 'terrorist act' (in the case of subsection 2) and do *not* fall within the definition (subsections 3). The replacement provisions would allow that:

- (2) Action falls within this subsection if it:
  - (a) causes a person's death; or
  - (b) endangers a person's life, other than the person taking the action;  
or
  - (c) causes serious harm that is physical harm to a person; or
  - (d) involves taking a person hostage; or
  - (e) creates a serious risk to the health or safety of the public or a section of the public.
- (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 involve taking a person hostage.

(3A) Action falls within this subsection if it takes place in the context of, and is associated with, an armed conflict (whether or not an international armed conflict).

1.6 The Explanatory Memorandum summarises the intention of the replacement provisions as:

- Limiting action that can be considered a terrorist act to action that causes a person's death; endangers a person's life (other than the person taking the action); causes serious physical harm to a person; involves taking a person hostage or creates or a serious risk to the health or safety of the public;

- Removing references to the damage of property and interference, disruption or destruction of information, telecommunication, financial, transport, or essential public utility systems or the delivery of essential government services as action that can be considered a terrorist act; and
- providing that an action will not fall within the definition of a terrorist act if the action is advocacy, protest, dissent or industrial action *and* is not *intended* either to cause a person's death, to cause serious physical harm to a person, to endanger another person's life, or to involve the taking of a person hostage.<sup>1</sup>

1.7 One noteworthy aspect of the proposed amendments is the inclusion within the definition of a terrorist act of taking a person hostage, which is not currently explicitly included within the definition.

1.8 Item 5 would repeal section 101.4 of the CCA, which prohibits the possession of things connected with the preparation for, the engagement of a person in, or assistance in, terrorist acts. Subsection (2) prohibits recklessness in respect of the connection between the item they possess and the uses for which it is intended. Subsection (3) provides that an offence occurs even if the terrorist act does not take place.

1.9 In defining 'terrorist organisation' in section 102.1, item 7 would remove reference to organisations that assist or foster the doing of a terrorist act from the class of organisations covered by the definition.

1.10 Items 6, 8 and 10 deal with the proscription of terrorist organisations through regulation, currently covered by subsection 102.1(2). The provisions detail steps to be taken by the Minister in specifying an organisation as a terrorist organisation for the purposes of the section. They include a requirement that the Minister be satisfied on reasonable grounds that an organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (even where such an act has not occurred or will not occur), or are advocating the doing of such an act. Other requirements include a briefing on the proposed regulation to the Leader of the Opposition, and a 'sunset' clause limiting the listing of an organisation by regulation to no more than 2 years, notwithstanding that it may be subsequently re-listed. Lastly, the current provisions allow for a listed organisation or individual to make application to be de-listed, and that the Minister must consider the application. The Minister may take any matter into consideration when considering the application to be de-listed.

1.11 These provisions would be repealed under Item 8, and replaced with new subsections 102.1(1AA), (2), (2AA), (2AB), (2AC), (2AD), and (2AE). In summary, the new subsection provide that before the Governor-General makes a regulation specifying an organisation as a terrorist organisation, the Minister must ensure the organisation is notified, if it is practical to do so, of the proposed listing and the organisation and its members are notified of their right to oppose the proposed listing. The Minister must also cause to be published, on the internet, in newspapers, in the

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1 Explanatory Memorandum, p. 3. Emphasis added.

Gazette and in any other way required by regulation, a notice that the regulation has been made and the consequences of the listing for the members of the organisation.

1.12 They would also provide that an organisation has the right to oppose the proposed listing. The Minister must also be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in preparing, planning, assisting in the doing of a terrorist act or advocates the doing of a terrorist act. The decision to list an organisation would also be reviewable by the Administrative Appeals Tribunal, under procedures to be defined by regulation. The public notice would also state the time in which such an application can be made, who can apply for the review and where the application for review can be made.

1.13 New subsection (2AA) would require the Minister to seek advice and take into account recommendations of an Advisory Committee, established under new section 102.1AB, in making a decision whether the Minister is satisfied on reasonable grounds that the organisation is directly or indirectly engaged in preparing, planning, assisting in the doing of a terrorist act or advocates the doing of a terrorist act. The Advisory Committee would also be empowered to publicise its role, engage in public consultations or do anything else it considers necessary in carrying out its function.

1.14 The Committee would consist of at least 5 members appointed by the Minister, holding office on a part-time basis for a specified period of no more than 3 years. The Minister would not be permitted to appoint a person to the Advisory Committee unless satisfied the person is not otherwise connected to the process of listing an organisation and unless the Minister is satisfied that the person has knowledge of or experience in human or civil rights, security analysis, public affairs, public administration, legal practice or a field specified in regulations. The Minister would be required to terminate the appointment of a member in writing, and a member would resign in the same way.

1.15 Item 10 would substitute the current strict liability offence of receiving training from, or providing training to, a terrorist organisation, regardless of their knowledge of that fact. It would substitute new section 102.5 which provides for an offence if training is given or received when the organisation is known to be a terrorist organisation, or when the person is reckless about whether the organisation is a terrorist organisation.

1.16 Item 11 to 15 would amend section 102.7 of the CCA to replace the word 'support' with the term 'material support' and define the latter term to exclude the mere publication of views that appear to be favourable to an organisation or its objectives. These items implement a recommendation by the Parliamentary Joint Committee on Intelligence and Security made in their *Review of Security and Counter-Terrorism Legislation* in December 2006.<sup>2</sup>

1.17 Item 16 would repeal section 102.8, which provides for an offence where a person 'intentionally associates' on 2 or more occasions with a member or promoter of a terrorist organisation, where the association provides support to the organisation,

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2 [www.aph.gov.au/house/committee/pjcis/securityleg/report/chapter5.pdf](http://www.aph.gov.au/house/committee/pjcis/securityleg/report/chapter5.pdf), p. 79.

and that the person intends for that support to take place. The section also provides for a separate offence, requiring only 1 occasion of association, where a person has previously been convicted under the section.

### **Schedule 2 – Crimes Act 1914**

1.18 Item 1 would repeal current section 15AA of the Crimes Act (CA), which provides for offences in respect of which a bail authority should grant bail only in 'exceptional circumstances'. The offences include:

- Terrorism offences (except those dealing with association with terrorist organisations)
- Commonwealth offences causing death, regardless of intention to do so;
- Treason, sedition, treachery or espionage (or similar), including ancillary offences defined under the Criminal Code, where a person's death is alleged to have been caused by the conduct or where the conduct carried a substantial risk of causing the death;<sup>3</sup>

1.19 Items 2 to 7 relate to the powers of detention for a person suspected of a terrorism offence. They would insert a specific requirement that the person be informed of their rights, at least in substance if not in comprehensive technical terms, at all material times.

1.20 They would also repeal some existing provisions which set out the circumstances in which a person being held on suspicion of a terrorism offence can be detained for longer than the maximum period specified in the CA, for any 'reasonable time' that 'questioning of the person is reasonably suspended or delayed'.<sup>4</sup>

### **Schedule 3 – Australian Security Intelligence Organisation Act 1979**

1.21 Items 1 to 4 concern requests from the relevant Minister for warrants to detain and question a person suspected of being connected with a terrorism offence.

1.22 Subsection 34F(6) currently requires the Minister, when considering a request for a warrant in respect of a person previously detained under the same part of the ASIO Act, to consent to the request for another warrant only if satisfied that new or materially different information has come to hand that would justify the new warrant. The Bill would insert two new paragraphs (c) and (d) to provide that a warrant may not be issued unless the issuing authority is satisfied that the offence in relation to which the warrant is sought was committed after the end of the person's previous period of detention and arose in different circumstances to those in the offence to which any earlier warrants arose. New paragraph (d) would provide that the questioning of the person under the warrant requested must not relate to the offence to which any earlier warrant relates or the circumstances in which such an offence was committed.

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3 Paragraph 15AA(2)(c), referring to Divisions 80 and 91 of the Criminal Code, and section 24AA of the CA.

4 Paragraph 23CA(8)(l) and (m).

1.23 Item 6 would repeal existing subsection 34K(10) which prohibits a detained person from contacting anybody at any time while in detention. The provision is subject to subsection 11, which prescribes various classes of persons with whom contact may be made. These include, for example, any person identified in the arrest warrant, the Ombudsman, the Australian Federal Police, and the Inspector-General of Intelligence and Security. Item 6 would repeal the blanket prohibition, while retaining the provisions in subsection 11. The practical effect of the amendment is further discussed in chapter 3.

1.24 Items 5 and 7 would reduce the maximum period a person can be detained in connection with a terrorism offence under the ASIO Act from 168 hours to 24 hours.

1.25 Item 8 would repeal section 34ZP of the Act, which clarifies that a detained person may be questioned in the absence of a lawyer of the person's choice. The Bill would not amend the section 34ZO, which gives serves to constrain the detained person making contact with a lawyer of their choice.

1.26 Item 9 would repeal provision for the parent, guardian or other representative of a detained person to be removed if they are considered unduly disruptive to the questioning of the person. This would mean that provisions allowing contact with a parent or guardian under section 34ZE would not be constrained by authorities forming the view that the parent, guardian or other representative was unduly disrupting the questioning of the person.

1.27 Item 10 would repeal subsection 34ZS(2), which provides than an offence is committed if certain operational information is disclosed by a person in the 2 years following the expiry of a warrant for questioning and detention. The amendment would see secrecy provisions about warrants limited to the term of the warrant.

1.28 Item 11 would repeal section 34ZT, which provides for regulations prohibiting or regulating access to information by lawyers acting for a person who is or was the subject of a warrant under the Act.

#### **Schedule 4 – *National Security Information (Criminal and Civil Proceedings) Act 2004***

1.29 The Bill would repeal the *National Security Information (Criminal and Civil Proceedings) Act 2004*. The Act protects information from disclosure during Commonwealth criminal or any civil proceedings where the disclosure is likely to prejudice Australia's national security. The Act originally applied only to criminal proceedings, before its amendment in 2005 to cover federal, state and territory civil matters also. The summary description of the operation of the Act applies most accurately to criminal matters, and while civil matters are dealt with similarly under the 2005 amendments, a number of distinctions exist.<sup>5</sup>

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5 Key differences in the Act's treatment of civil proceedings include, for example, broader circumstances for permitted disclosure of information, and broader application of security clearance provisions for legal representatives. For detailed description of the difference between criminal and civil cases under the Act, refer to the National Security Information Legislation Amendment Bill 2005, Revised Explanatory Memorandum, pp 1–2.

1.30 Specifically, the Act aims to protect information whose disclosure is likely to prejudice Australia's defence, security, international relations, law enforcement interests or national interests. The compromise of this information could possibly affect the security of the nation.

1.31 At the time the Bill was tabled, the Government argued that existing rules of evidence and procedure did not provide adequate protection for information related to national security where that information may be adduced or otherwise disclosed during the course of court proceedings.<sup>6</sup>

1.32 The Act provides for a procedure in cases where information relating to, or the disclosure of which may affect, national security could be introduced during a federal criminal or any civil proceeding, including interlocutory and discovery proceedings. The Act also covers a proceeding that is the subject of certain applications under section 39B of the *Judiciary Act 1903* and the *Extradition Act 1988*.

1.33 The Act provides for information to be introduced in such a form so as to facilitate the prosecution of an offence without prejudicing national security and the rights of the defendant to a fair trial.

1.34 A party must notify the Attorney-General at any stage of a proceeding where that party expects to introduce information that relates to, or the disclosure of which may affect, national security. This includes information that may be introduced through a document, a witness's answer to a question or the presence of a witness.

1.35 Upon notification, the Attorney-General considers the information and determines whether disclosure of the information is likely to prejudice national security. If so, the Attorney-General may issue a certificate which prevents the disclosure of the information or allows the information to be disclosed in a summarised or redacted form.

1.36 In the case of a trial, any certificates that have been issued must be considered at a closed hearing of the trial court prior to commencement. The Attorney-General may intervene in the proceeding. The court rules on the admissibility of the original information and considers the certificate. The court may:

- agree with the Attorney-General, that the information not be disclosed or disclosed other than in a particular form, in which case the trial continues or the defendant appeals; or
- disagree with the Attorney-General and order disclosure of the information in which case the trial continues or the prosecution appeals.

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6 National Security Information (Criminal Proceedings) Bill 2004, Explanatory Memorandum, p. 1.





