National Security Legislation

Discussion Paper on Proposed Amendments

July 2009

DISCUSSION PAPER

NATIONAL SECURITY LEGISLATION

INTRODUCTION

The Australian Government is committed to ensuring Australia has strong counter-terrorism legislation that protects the values and freedoms that are part of Australia's way of life. It is important, however, that Australia's national security legislation reflects Australian democratic standards and is enacted and enforced in an accountable way.

An effective legal framework relating to national security and counter-terrorism is fundamental to our ability to address Australia's security environment. This framework supports Australia's law enforcement and intelligence agencies in deterring, investigating, apprehending and prosecuting perpetrators of terrorism and threats to Australia's national security.

The key terrorism offences are contained in the Commonwealth *Criminal Code Act 1995* (Criminal Code). Other legislation governs the powers, obligations and oversight of the Australian Federal Police (AFP) along with the State and Territory police and the Australian Security Intelligence Organisation (ASIO).

The amendments proposed in this Discussion Paper seek to achieve a balance between the Government's responsibility to protect Australia, its people and its interests and instilling confidence in the community that the national security and counter-terrorism laws will be exercised in an accountable way, protecting key civil liberties and the rule of law. As the Prime Minister outlined in Australia's first National Security Statement, this balance represents a continuing challenge of all modern democracies seeking to prepare for the complex national security challenges of the future.[1] It is a balance that must remain a conscious part of the national security policy process. The Government is committed to ensuring that Australia's national security legislation achieves this balance.

In line with this commitment, on 23 December 2008, I tabled in Parliament the Government's comprehensive response to a number of independent and bipartisan parliamentary committee reviews of Australia's national security and counter-terrorism legislation over the past three years.

These reviews are:

- Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (November 2008);[2]
- Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code by the PJCIS (September 2007);[3]
- Review of Security and Counter-Terrorism Legislation by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) (December 2006);[4] and

[1] http://www.pm.gov.au/media/Speech/2008/speech_0659.cfm
[2] http://www.haneefcaseinquiry.gov.au
[3] http://www.aph.gov.au/house/committee/pjcis/proscription/report.htm
[4] http://www.aph.gov.au/house/committee/pjcis/securityleg/report.htm

- Review of Sedition Laws in Australia by the Australian Law Reform Commission (July 2006).[5]

In responding to these reviews, the Government adopted most of the recommendations.[6] Those recommendations largely dealt with the need to provide clarification and in some cases additional safeguards in relation to the exercise of law enforcement and investigatory powers.

The measures outlined in this Discussion Paper include the majority of measures recommended by the reviews above. In addition, the measures ensure the focus of Australia's national security and counter-terrorism laws remains on preventing a terrorist attack from occurring in the first place – not just waiting to punish those who would commit these heinous crimes after they occur.

The proposals contained in this Discussion Paper will improve:

- the treason, sedition and terrorism offences (Chapter 1);
- law enforcement powers to investigate terrorism and serious crime (Chapter 2);
- the terrorist organisation listing regimes in both the Criminal Code and *Charter of the United Nations Act 1945* (Chapters 1 and 3);
- the protection of national security information in court proceedings to ensure such protection does not cause undue delay in proceedings (Chapter 4); and
- oversight of the AFP (Chapter 5).

The Australian Government is also introducing improved review mechanisms for national security legislation by establishing a National Security Legislation Monitor. The National Security Legislation Monitor will review the national security and counter-terrorism legislation on an annual basis. An independent review mechanism for national security legislation was recommended by the Sheller Committee in April 2006[7], the PJCIS in December 2006, and most recently by Mr Clarke. Legislation to establish the National Security Legislation Monitor is not part of the Discussion Paper as it is being progressed separately.

The Australian Government is committed to working constructively with the community to ensure a secure and resilient Australian society. The Government recognises that countering terrorism in Australia requires enhanced engagement with the community on national security issues to build public confidence in the operation of the national security legislation framework. The reforms outlined in this Discussion Paper are designed to give the Australian community confidence that our law enforcement and security agencies have the tools they need to fight terrorism, while ensuring the laws and powers are balanced by appropriate safeguards and are accountable in their operation.

The Australian Government is committed to developing legislation in a careful, transparent and consultative manner. This Discussion Paper provides the community with the opportunity to participate in the process for amending Australia's national security laws.

---

[5] http://www.alrc.gov.au

[6] A copy of the Government's comprehensive response can also be accessed at http://www.ag.gov.au

[7] See page 1 for further information on the Sheller Committee Report.

Format of the Discussion Paper

The Discussion Paper has been designed to clearly identify how the current legislation is proposed to be amended. The proposed changes to the legislation are highlighted in bold with strikethrough formatting and appear on the left hand side pages within the Discussion Paper. The proposed changes are accompanied by explanatory material and commentary on the right hand side pages.

The Discussion Paper is divided into Chapters which include all proposed amendments for a particular piece of legislation. For example Chapter 1 deals with proposed amendments to the Commonwealth Criminal Code. Each Chapter is divided into Parts which include specific amendments.

There is an introduction to each Chapter to provide background and an overview of the legislative proposals in each Part to assist the reader to identify the main changes that are proposed in each Chapter.

Providing a submission to the Government

Public comment is welcome on the proposed amendments outlined in this Discussion Paper. If you would like to make a submission, please forward it to:

Discussion Paper – National Security Legislation
Assistant Secretary
Security Law Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Submissions may also be submitted electronically to CTconsultation@ag.gov.au or by facsimile to (02) 6141 3048. All submissions and the names of persons or organisations who make a submission will be treated as public, and may be published on the Department's website, unless the author clearly indicates to the contrary. A request made under the *Freedom of Information Act 1982* for access to a submission marked confidential will be determined in accordance with that Act.

I commend this Discussion Paper to you and look forward to progressing this work in consultation with you.

Yours sincerely

Robert McClelland

ATTORNEY-GENERAL

TABLE OF CONTENTS

Preliminary

Introduction

Table of Contents

Index – Commonly used acronyms

Chapter 1 Amendments to Chapter 5 of the Criminal Code 1

Part 1 Amendments to the treason offences in Division 80 of the Criminal 3 Code 3

Part 2 Amendments to the urging violence offences in Division 80 of the Criminal Code 11

Part 3 Amendments to the terrorist act definition and offences in Division 100 and 101 of the Criminal Code 43

Part 4 Amendments to the terrorist organisation listing provisions and offences in Division 102 of the Criminal Code 53

Part 5 Miscellaneous amendments to Part 5.3 of the Criminal Code 75

Chapter 2 Amendments to the *Crimes Act 1914* 85

Part 1 Amendments to the investigation regime for terrorism offences in Part 1C of the *Crimes Act 1914* 87

Part 2 Amendments to the search warrant provisions in Part 1AA, Divisions 1 and 2 of the *Crimes Act 1914* to allow re-entry in emergency situations 147

Part 3 New provision in Division 3A of Part 1AA of the *Crimes Act 1914* to allow entry without warrant in emergency situations when investigating terrorism 151

Part 4 Inserting a right of appeal for the prosecution and defendant in the bail provisions in national security cases in section 15AA of the *Crimes Act 1914* 157

Chapter 3 Amendments to the *Charter of the United Nations Act 1945* 163

Chapter 4 Amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* 171

Chapter 5 Amendments to improve oversight of the Australian Federal Police 323

Appendix 1 Draft National Security Legislation Amendment Bill 2009 351

Appendix 2 Draft Parliamentary Joint Committee on Law Enforcement Bill 2009 431

INDEX

COMMONLY USED ACRONYMS

ALRC	Australian Law Reform Commission
Clarke Inquiry	Inquiry by the Hon. John Clarke QC into the case of Dr Mohamed Haneef
PJCIS	Parliamentary Joint Committee on Intelligence and Security
PJC-LE	Parliamentary Joint Committee on Law Enforcement
PJC-ACC	Parliamentary Joint Committee on the Australian Crime Commission
Sheller Committee	Security Legislation Review Committee
ALRC Report	*Fighting Words: A Review of Sedition Laws in Australia*
Clarke Report	*The Report of the Clarke Inquiry into the case of Dr Mohamed Haneef*
2006 PJCIS Report	*Review of Security and Counter-Terrorism Legislation*
2007 PJCIS Report	*Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code*
Gibbs Committee Report	*Review of Commonwealth Criminal Law—Final Report, Sir Harry Gibbs, Chairman* (1991)
Sheller Committee Report	*Report of the Security Legislation Review Committee* (June 2006)
Criminal Code	*Criminal Code Act 1995* (Commonwealth)
UN Charter Act	*Charter of the United Nations Act 1945* (Commonwealth)
Crimes Act 1914	*Crimes Act 1914* (Commonwealth)
NSI Act	*National Security Information (Criminal and Civil Proceedings) Act 2004* (Commonwealth)
SLAT Act	*Security Legislation Amendment (Terrorism) Act 2002* (Commonwealth)
Anti-Terrorism Act	*Anti-Terrorism Act (No 2) 2005* (Commonwealth)

Chapter 1 Amendments to Chapter 5 of the *Criminal Code*

Chapter 1 contains proposed amendments to Chapter 5 of the *Criminal Code Act 1995* (Criminal Code) including:

- amendments to the treason offences in Division 80;
- amendments to the sedition offences in Division 80;
- amendments to the terrorist act definition and offences in Divisions 100 and 101;
- amendments to the terrorist organisation listing provisions and offences in Division 102; and
- amendments to definitions throughout Part 5.3 to ensure consistency of definitions with the *Acts Interpretation Act 1901*.

The terrorism offences and current treason offences were originally enacted by the *Security Legislation Amendment (Terrorism) Act 2002* (SLAT Act). Amendments were made to the terrorism and treason offences by the *Anti-Terrorism Act (No. 2) 2005* (Anti-Terrorism Act), which also inserted the sedition offences into the Criminal Code and repealed the old sedition offences in the *Crimes Act 1914*.[8] The legislation has been subject to the following reviews.

In accordance with section 4 of the SLAT Act, the Security Legislation Review Committee (Sheller Committee) conducted a public and independent review of the operation, effectiveness and implications of the amendments made by that Act and other legislation which was enacted in response to the threat of terrorism in Australia in the wake of the events of 11 September 2001. The Sheller Committee tabled its report, *Report of the Security Legislation Review Committee* (Sheller Committee Report), in Parliament in June 2006.

In 2006, in accordance with subparagraph 29(1)(ba) of the *Intelligence Services Act 2001*, the Parliamentary Joint Committee on Intelligence and Security (PJCIS) conducted a similar review into the operation, effectiveness and implications of the amendments made by the SLAT Act and related legislation. The PJCIS tabled its report, *Review of Security and Counter-Terrorism Legislation* (2006 PJCIS Report) in Parliament in December 2006.

Following the passage of the Anti-Terrorism Act, the Australian Law Reform Commission (ALRC) was given a reference by the then Attorney-General to conduct a review of the sedition offences in section 80.2 of the Criminal Code as well as a review of related law. The ALRC report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report) was tabled in Parliament in September 2006.

[8] The report produced by the Security Legislation Review Committee, *Report of the Security Legislation Review Committee* (June 2006), and the report produced by the Parliamentary Joint Committee on Intelligence and Security, *Review of Security and Counter-Terrorism Legislation* (December 2006), provide a detailed history of the legislation which enacted the treason, sedition and terrorism offences in the Criminal Code.

With the exception of the measures outlined in Part 5 of this Chapter, the proposed amendments contained in Chapter 1 are part of the Government's response to the above reviews.

Part 5 of this Chapter contains amendments to definitional provisions within Part 5.3 of the Criminal Code to implement the Government's policy of ensuring no discrimination against same sex partnerships in Commonwealth legislation. These proposed amendments ensure that the definitions in the *Acts Interpretation Act 1901* of defacto partner, child, step-parent and step-child apply to, or are replicated in, the Criminal Code.

Part 1 Amendments to the treason offences in Division 80 of the Criminal Code

Part 1 contains proposed amendments to the treason offences in Division 80 of the *Criminal Code Act 1995* (Criminal Code).

Section 80.1 of the Criminal Code contains the offence of treason. The treason offence makes it an offence to:

- kill, harm or imprison the Queen, Governor-General or Prime Minister;
- kill the heir or consort of the Queen;
- levy war or prepare for war against the Commonwealth;
- intentionally engage in conduct that assists by any means whatever an enemy specified by Proclamation to be an enemy at war with the Commonwealth;
- intentionally engage in conduct that assists by any means whatever another country or organisation engaged in armed hostilities against the Australian Defence Force; or
- instigate an armed invasion of the Commonwealth or a Territory of the Commonwealth.

Treason carries a maximum penalty of life imprisonment. There is a humanitarian aid exception within the treason offences.

The treason offences in section 80.1 of the Criminal Code were reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2006 following the review undertaken by the Security Legislation Review Committee (Sheller Committee). The Sheller Committee tabled its report, *Report of the Security Legislation Review Committee* (Sheller Committee Report), in Parliament in June 2006. The PJCIS tabled its report, *Review of Security and Counter-Terrorism Legislation* (2006 PJCIS Report) in Parliament in December 2006.

The treason offences were also reviewed by the Australian Law Reform Commission (ALRC) in 2006 as part of its review of sedition and related laws in Australia. The ALRC report, *Fighting Words: A Review of Sedition Laws in Australia* (ALRC Report), was tabled in Parliament in September 2006.

In recommendation 6 of the 2006 PJCIS Report, the PJCIS made four recommendations regarding the treason offence, namely that:

(a) the offence of treason should be restructured so that conduct constituting treason apply only to persons who owe allegiance to Australia or who have voluntarily placed themselves under Australian's protection;
(b) the conduct of others, which falls within the scope of paragraphs 80.1(1) (a), (b) and (c), should be dealt with separately;
(c) the offence of assisting the enemy under paragraph 80.1 (e) and (f) should be clarified to cover 'material assistance'; and
(d) paragraph 80.1(f) should be amended to require knowledge of the existence of armed hostilities.

Amendments to the treason offence

80.1 Treason

(1) A person commits an offence~~, called treason,~~ if the person:

(a) causes the death of the Sovereign, the heir apparent of the Sovereign, the consort of the Sovereign, the Governor-General or the Prime Minister; or

(b) causes harm to the Sovereign, the Governor-General or the Prime Minister resulting in the death of the Sovereign, the Governor-General or the Prime Minister; or

(c) causes harm to the Sovereign, the Governor-General or the Prime Minister, or imprisons or restrains the Sovereign, the Governor-General or the Prime Minister; or

(d) levies war, or does any act preparatory to levying war, against the Commonwealth; or

~~**(e) engages in conduct that assists by any means whatever, with intent to assist, an enemy:**~~

~~**(i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and**~~

~~**(ii) specified by Proclamation made for the purpose of this paragraph to be an enemy at war with the Commonwealth; or**~~

~~**(f) engages in conduct that assists by any means whatever, with intent to assist:**~~

~~**(i) another country; or**~~

~~**(ii) an organisation;**~~

~~**that is engaged in armed hostilities against the Australian Defence Force; or**~~

(g) instigates a person who is not an Australian citizen to make an armed invasion of the Commonwealth or a Territory of the Commonwealth; or

(h) forms an intention to do any act referred to in a preceding paragraph**, or in section 80.1AA,** and manifests that intention by an overt act.

Penalty: Imprisonment for life.

~~**(1A) Paragraphs (1)(e) and (f) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.**~~

~~**Note 1 A defendant bears an evidential burden in relation to the matter in subsection (1A). See subsection 13.3(3).**~~

~~**Note 2: There is a defence in section 80.3 for acts done in good faith.**~~

(1B) Paragraph (1)(h) does not apply to formation of an intention to engage in conduct that:

(a) is referred to in ~~**paragraph (1)(e) or (f)**~~ **section 80.1AA**; and

(b) is by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1B). See subsection 13.3(3).

The Government responded to the PJCIS Report in December 2008 and supported sub-recommendations (a) and (c).

In recommendations 11-2 and 11-4 of the ALRC Report, the ALRC also concluded that amendments should be made to the treason offence to clarify its scope and operation. In recommendation 11-2, the ALRC recommended that the treason offences in s 80.1(1)(e)–(f) of the Criminal Code be amended to:

(a) remove the words 'by any means whatever';
(b) provide that conduct must 'materially' assist an enemy, making it clear in a note to the section that mere rhetoric or expressions of dissent are not sufficient;
(c) provide that assistance must enable an enemy 'to engage in war' with the Commonwealth or must enable a country, organisation or group 'to engage in armed hostilities' against the Australian Defence Force; and
(d) provide that the Proclamation under s 80.1(1)(e)(ii) must have been made before the relevant conduct was engaged in.

In addition, in recommendation 11-4, the ALRC recommended that section 80.1 of the Criminal Code should be amended to apply only to a person who, at the time of the alleged offence, is an Australian citizen or resident.

The Government responded to the ALRC Report in December 2008 and supported recommendations 11-2 and 11-4 of the Report.

Amendments to the treason offence

It is proposed that the offences in paragraphs 80.1(1)(e) and (f) be repealed and replaced by new offences in section 80.1AA. The new offences in section 80.1AA implement a number of recommendations made by the PJCIS and ALRC concerning the offences in paragraphs 80.1(1)(e) and (f).

80.1 (5) On the trial of a person charged with treason on the ground that he or she formed an intention to do an act referred to in paragraph (1)(a), (b), (c), (d)**~~, (e), (f) or (g)~~ or (g), or in section 80.1AA,** and manifested that intention by an overt act, evidence of the overt act is not to be admitted unless the overt act is alleged in the indictment.

Note: There is a defence in section 80.3 for acts done in good faith.

80.1AA Treason—materially assisting enemies etc.

Assisting enemies at war with the Commonwealth

(1) A person commits an offence if:

(a) the Commonwealth is at war with an enemy (whether or not the existence of a state of war has been declared); and

(b) the enemy is specified, by Proclamation made for the purpose of this paragraph, to be an enemy at war with the Commonwealth; and

(c) the person engages in conduct; and

(d) the person intends that the conduct will materially assist the enemy to engage in war with the Commonwealth; and

(e) the conduct assists the enemy to engage in war with the Commonwealth; and

(f) when the person engages in the conduct, the person:

(i) is an Australian citizen; or

(ii) is a resident of Australia; or

(iii) has voluntarily put himself or herself under the protection of the Commonwealth; or

(iv) is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Penalty: Imprisonment for life.

(2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, a Proclamation made for the purpose of paragraph (1)(b) of this section may be expressed to take effect from a day:

(a) before the day on which the Proclamation is registered under the *Legislative Instruments Act 2003*; but

(b) not before the day on which the Proclamation is made.

(3) The fault element for paragraph (1)(f) is intention.

Note: For intention, see subsection 5.2(2).

Assisting countries etc. engaged in armed hostilities against the ADF

(4) A person commits an offence if:

(a) a country or organisation is engaged in armed hostilities against the Australian Defence Force; and

(b) the person engages in conduct; and

(c) the person intends that the conduct will materially assist the country or organisation to engage in armed hostilities against the Australian Defence Force; and

(d) the conduct assists the country or organisation to engage in armed hostilities against the Australian Defence Force; and

Proposed new treason offences

Requiring an allegiance element

The traditional underpinning of the concept of treason is a breach of a person's obligations to the Crown and loyalty to Australia.[9] Currently, the treason offences under paragraphs 80.1(1)(e) and (f) can be committed by anyone acting anywhere in the world. The 2006 PJCIS Report noted that these offences apply to people who have no allegiance and do not benefit from the protection of the Australian State.[10]

The Government supports recommendation 6(a) of the 2006 PJCIS Report and recommendation 11-4 of the ALRC Report in relation to providing an allegiance or duty requirement within the treason offence. These recommendations are implemented in proposed paragraphs 80.1AA(1)(f) and (4)(e), which provide that, in order to commit the offences in section 80.1AA, the person must be a citizen of Australia or a resident of Australia, or must have voluntarily placed himself or herself under the protection of the Commonwealth, or must be a body corporate incorporated under a law of a State or Territory or the Commonwealth.

Subsection 80.1AA(3) makes it clear that the fault element for paragraph 80.1AA(1)(f) is 'intention,' as defined in subsection 5.2(2). It will be necessary, therefore, to prove that, at the time of committing the offence, the person intended to be an Australian citizen or resident, or intended to voluntarily place himself or herself under the protection of the Commonwealth, or intended to be a body corporate incorporated under a law of a State or Territory or the Commonwealth – that is, he/she believed this to be the case.[11]

Clarifying providing assistance to the enemy

The Government supports recommendations 6(c) of the 2006 PJCIS Report and 11-2(a), (b) and (c) of the ALRC Report. Both the PJCIS and the ALRC noted it was possible that the term 'assists' could be given a broad interpretation. The ALRC Report considered that a broad interpretation was inappropriate.[12] Given the seriousness of this offence, it should be clarified so that the offence only applies when a person provides *material* assistance to the enemy.[13]

These recommendations are implemented in proposed paragraphs 80.1AA(1)(d) and (e) and proposed paragraphs 80.1AA(4)(c) and (d). Clarifying that the conduct standard in the newly drafted offences in section 80.1AA must be conduct that will materially assist the enemy reflects the intended operation of the offence by making it clear that, in order to commit the offence, a person must provide assistance to the enemy that is real or concrete.

[9] 2006 PJCIS Report paragraph 4.20 at page 44.
[10] 2006 PJCIS Report paragraph 4.20 at page 44.
[11] Subsection 5.2(2) of the Criminal Code states that a person has intention with respect to a circumstance (for example, being an Australian citizen or resident) 'if he or she believes that it exists or will exist'.
[12] ALRC Report paragraph 11.28 at page 232.
[13] 2006 PJCIS Report paragraph 4.9 at page 41.

(e) when the person engages in the conduct, the person:

(i) is an Australian citizen; or

(ii) is a resident of Australia; or

(iii) has voluntarily put himself or herself under the protection of the Commonwealth; or

(iv) is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Penalty: Imprisonment for life.

(5) The fault element for paragraph (4)(e) is intention.

Note: For intention, see subsection 5.2(2).

Humanitarian aid

(6) Subsections (1) and (4) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (6). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

Ensuring a Proclamation of an enemy is not retrospective

Proposed subsection 80.1AA(2) clarifies that a Proclamation, made for the purposes of paragraph 80.1AA(1)(b), declaring an enemy to be an enemy at war with the Commonwealth may not be expressed to take effect before the day on which it is made. This proposed amendment implements recommendation 11-2(d) of the ALRC Report. Proposed subsection 80.1AA also provides that a Proclamation may take effect from a day before the day on which it is registered under the *Legislative Instruments Act 2003*, but not before the day on which it is made.

This is important from a national security perspective. In a national security emergency situation, where a decision is made to declare an enemy to be an enemy at war with the Commonwealth by a Proclamation under subsection 80.1AA(1)(b), it may be desirable for this Proclamation to take effect immediately. This means that the act of assisting an enemy specified in a Proclamation could become an offence under subsection 80.1AA(1) from the time that the Proclamation is made, rather than the time that the Proclamation is registered, which can be several days after the Proclamation has been made.

Consequential amendments to the existing treason offence

A number of consequential amendments to section 80.1 are proposed.

Consequential amendments to paragraph 80.1(1)(h), subsections 80.1(1A), 80.1(1B) and 80.1(5) are proposed as a result of replacing paragraphs 80.1(e) and (f) with new offences in section 80.1AA. In addition, to simplify the offence of treason, the proposed amendments remove the words ‘called treason’ from subsection 80.1(1) and place a new definition of treason defined as ‘an offence against subsection 80.1(1) or section 80.1AA’ in the Dictionary to the Criminal Code.

After the proposed amendments, the offence of treason will comprise the acts contained in existing paragraphs 80.1(1)(a), (b), (c), (d), (g) and (h), and the new offences contained in subsections 80.1AA(1) and (2).

THIS PAGE IS INTENTIONALLY BLANK

Part 2 Amendments to the urging violence offences in Division 80 of the Criminal Code

Part 2 contains proposed amendments to the sedition offences in section 80.2 of the *Criminal Code Act 1995* (Criminal Code) and to Part IIA of the *Crimes Act 1914* (Crimes Act).

The sedition offences in section 80.2 include the offences of urging the overthrow of the Constitution or Government, urging interference in Parliamentary elections and urging violence within the community. The offences carry a maximum penalty of 7 years imprisonment.

A good faith defence set out in section 80.3 of the Criminal Code applies to both the treason offences and sedition offences. Section 80.5 of the Criminal Code requires that, in relation to a prosecution of a person under the treason or sedition offences, the Attorney-General must consent to the prosecution.

The sedition offences in section 80.2 of the Criminal Code were reviewed by the Australian Law Reform Commission (ALRC) in 2006. The ALRC also considered the treason offences and the offences within Part II and Part IIA of the Crimes Act as part of this review. The ALRC Report was tabled in Parliament in September 2006.

In its report, the ALRC made numerous recommendations to clarify and improve the offences to ensure greater understanding of their operation. The primary finding of the ALRC was that the term 'sedition' should be removed from the Criminal Code and replaced with the phrase 'urging political or inter-group force or violence'.

The Government announced its support for the ALRC recommendations in December 2008. The amendments outlined in this Part honour the Government's election commitment to implement the recommendations of the ALRC. These proposals include removing references to 'sedition', clarifying and modernising the elements of the offence, and repealing obsolete and little-used provisions enacted in the 1920s for the proscription of 'unlawful associations'.[14]

The proposed amendments will also provide for an offence of urging violence against a group or individual on the basis of race, religion, nationality, national origin or political opinion.

[14] H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report (1991),* paragraphs 38.2 to 38.9.

Amendments to the sedition offences

80.2 ~~**Sedition**~~ **Urging violence against the Constitution etc.**

~~*Urging the overthrow of the Constitution or Government*~~

~~(1) A person commits an offence if the person urges another person to overthrow by force or violence:~~

~~(a) the Constitution; or~~

~~(b) the Government of the Commonwealth, a State or a Territory; or~~

~~(c) the lawful authority of the Government of the Commonwealth.~~

~~Penalty: Imprisonment for 7 years.~~

Urging the overthrow of the Constitution or Government by force or violence

(1) A person commits an offence if:

(a) the person intentionally urges another person to overthrow by force or violence:

(i) the Constitution; or

(ii) the Government of the Commonwealth, of a State or of a Territory; or

(iii) the lawful authority of the Government of the Commonwealth; and

(b) the first person does so intending that force or violence will occur.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) Recklessness applies to the element of the offence under subsection (1) that it is:

(a) the Constitution; or

(b) the Government of the Commonwealth, a State or a Territory; or

(c) the lawful authority of the Government of the Commonwealth;

that the first~~-mentioned~~ person urges the other person to overthrow.

Amendments to the sedition offences

Amending the offence of urging the overthrow of the Constitution or Government

Subsection 80.2(1) contains the offence of urging the overthrow of the Constitution or Government which is currently known as 'sedition'. It provides that a person commits an offence if the person urges another person to overthrow, by force or violence: the Constitution; the Government of the Commonwealth, of a State or of a Territory; or the lawful authority of the Government of the Commonwealth.

Proposed Amendments

The proposed amendments repeal the existing sedition offence in subsection 80.2(1) and replace it with a new offence called 'Urging the overthrow of the Constitution or Government by force or violence'.

A person would commit the offence in proposed subsection 80.2(1) if the person:

- intentionally urges another person to overthrow by force or violence the Constitution, the Government of the Commonwealth, of a State or of a Territory, or the lawful authority of the Government of the Commonwealth; and
- intends that force or violence will occur.

While section 5.6 of the Criminal Code makes it clear that the sedition offences include the fault element of intention by virtue of section 5.6 of the Criminal Code, it is important that the fault elements are clearly stated within the offence to ensure clarity and understanding of the operation of the offence.

Therefore, the fault element of intention is expressly stated within proposed paragraph 80.2(1)(a). In addition, the offence has been redrafted to include the extra element in paragraph 80.2(1)(b), which requires the person to intend that force or violence will occur as a result of the person intentionally urging the force or violence.

Intention is defined in section 5.2 of the Criminal Code. It is also proposed that a note be inserted below the offence to draw a reader's attention to the definition of intention in section 5.2.

The proposed amendments to subsection 80.2(1) implement recommendations 8-1, 9-1 and 9-2 of the ALRC Report.

Urging interference in Parliamentary elections ***or constitutional referenda by force or violence***

80.2 (3) A person commits an offence if:

(a) the person intentionally urges another person to interfere, by force or violence, with lawful processes for:

(i) an election of a member or members of a House of the Parliament; or

(ii) a referendum; and

(b) the first person does so intending that force or violence will occur.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

~~Urging interference in Parliamentary elections~~

~~(3) A person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament.~~

Penalty: Imprisonment for 7 years.

(4) Recklessness applies to the element of the offence under subsection (3) that it is lawful processes for an election of a member or members of a House of the Parliament**, or a referendum, that the first** ~~that the first-mentioned~~ person urges the other person to interfere with.

Note: There is a defence in section 80.3 for acts done in good faith.

Urging interference in Parliamentary elections or constitutional referenda by force or violence

Subsection 80.2(3) of the Criminal Code contains the offence of urging interference in Parliamentary elections by force or violence. It provides that a person commits an offence if the person urges another person to interfere, by force or violence, with the lawful processes for an election of a member or members of a House of the Commonwealth Parliament.

Subsection 80.2(4) provides that a person will commit the offence if they are reckless as to whether the process against which they are urging interference by force or violence is a lawful process.

The proposed amendments repeal the existing sedition offence in subsection 80.2(3) and replace it with a new offence called '*Urging interference in Parliamentary elections or constitutional referenda by force or violence*'. The proposed amendments will extend the offence to include urging interference by force or violence with lawful processes for a referendum. In addition, the proposed amendments add an additional fault element to the offence.

A person would commit the offence in proposed subsection 80.2(3) if the person:

- intentionally urges another person to interfere, by force or violence, with lawful processes for a Commonwealth election or referendum;
- intends that force or violence will occur; and
- is reckless as to whether the process is a lawful process for an election or referendum.

While section 5.6 of the Criminal Code makes it clear that the offence in section 80.2(3) includes the fault element of intention by virtue of section 5.6 of the Code, it is important in this context that the fault elements are clearly stated within the offence to ensure clarity and understanding of the operation of the offence.

Intention is defined in section 5.2 of the Criminal Code. It is proposed that a note be inserted below the offence to draw a reader's attention to the definition of intention in section 5.2.

There is a consequential amendment to subsection 80.2(4), to reflect the fact that that the proposed offence in subsection 80.2(3) extends to cover urging interference with lawful processes for Commonwealth referenda, as well as Commonwealth elections.

In addition, a definition of 'referendum' will be inserted in the Dictionary of the Criminal Code to ensure consistency with the definition of 'referendum' in the *Referendum (Machinery Provisions) Act 1984*.

The proposed amendments to subsection 80.2(3) implement recommendations 8-1, 9-4, 9-5 and 9-6 of the ALRC Report.

~~*Urging violence within the community*~~

~~(5) A person commits an offence if:~~

~~(a) the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished); and~~

~~(b) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.~~

~~Penalty: Imprisonment for 7 years.~~

~~(6) Recklessness applies to the element of the offence under subsection (5) that it is a group or groups that are distinguished by race, religion, nationality or political opinion that the first-mentioned person urges the other person to use force or violence against.~~

Offences regarding urging violence within the community

Subsection 80.2(5) contains the offence of urging violence within the community. It provides that a person commits an offence if the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished), and the use of the force or violence would threaten the peace, order and good government of the Commonwealth. Subsection (6) provides that a person will commit an offence, if in urging a group or groups to use force or violence against another group or groups, they are reckless as to whether the targeted group is distinguished by race, religion, nationality or political opinion.

Proposed Amendments

It is proposed that subsection 80.2(5) be repealed and replaced with new sections 80.2A and 80.2B. Together, sections 80.2A and 80.2B implement recommendations 10-1, 10-2(a) and (b), 10-3, and 10-4(a) and (b) made by the ALRC with respect to subsection 80.2(5).

The ALRC recommended that section 80.2(5) be amended to:

- insert the word 'intentionally' before the word 'urges' to clarify the fault element applicable to urging the use of force or violence
- add 'national origin' to the distinguishing features of a group for the purpose of the offence
- extend the offence to cover circumstances in which a person urges another person (as distinct from a group) to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion, and
- extend the offence to cover circumstances in which a person urges a group that lacks any of the specified distinguishing characteristics to use force or violence against a group in the community that is distinguished by race, religion, nationality, national origin or political opinion.

The ALRC favoured strengthening the inter-group violence aspect of these offences, consistent with the findings of the Gibbs Committee in 1991. The Gibbs Committee recognised that urging of violence of this nature is very destructive to the life of the nation.[15]

To ensure Australia has robust offences to deal with urging violence within the community, the Government considers it may be necessary to expedite the introduction of the amendments proposed in this Part of the Discussion Paper, ahead of the larger package of reforms. The offences will still be the subject of public consultation, but may be introduced into Parliament earlier than the other reforms contained in this Paper.

[15] H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991)

80.2A Urging violence against groups

Offences

(1) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a group (the *targeted group*); and

(b) the first person does so intending that force or violence will occur; and

(c) the targeted group is distinguished by race, religion, nationality, national origin or political opinion; and

(d) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a group (the *targeted group*); and

(b) the first person does so intending that force or violence will occur; and

(c) the targeted group is distinguished by race, religion, nationality, national origin or political opinion.

Penalty: Imprisonment for 5 years.

Note: For intention, see section 5.2.

(3) The fault element for paragraphs (1)(c) and (2)(c) is recklessness.

Note: For recklessness, see section 5.4.

Alternative verdict

(4) Subsection (5) applies if, in a prosecution for an offence (the *prosecuted offence*) against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of the offence; but

(b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the *alternative offence*) against subsection (2).

(5) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note: There is a defence in section 80.3 for acts done in good faith.

Urging violence against groups

The proposed new section 80.2A strengthens the urging violence offences proposed by the ALRC. The proposed offence adopts a broader definition of who may commit the offence, whether as an individual or part of a group.

To commit the offence, a person must:

- intentionally urge another person, or a group, to use force or violence against a group (the targeted group);
- intend that force or violence will occur, and
- be reckless as to whether the targeted group is distinguished by race, religion, nationality, national origin or political opinion.

In addition, to be guilty of an offence under proposed subsection 80.2A(1), the use of force or violence must threaten the peace, order and good government of the Commonwealth. Importantly, if this element cannot be proved, there is the option of an alternative verdict against subsection 80.2A(2), which provides for a lesser penalty of 5 years as opposed to 7 years.

Subsection 80.2A(2) contains an offence similar to the offence in subsection (1), but omits the final element of the offence that the use of force or violence would threaten the peace, order and good government of the Commonwealth. As a result, it carries a lower penalty of 5 years, compared with 7 years for subsection 80.2A(1).

Section 80.2A also contains notes cross-referencing section 5.2, which defines 'intention' as a fault element, and section 5.4, which defines 'recklessness' as a fault element. The inclusion of these notes ensures greater clarity regarding the operation of the fault elements within the offence.

Subsections 80.2A(4) and (5) together provide for the possibility of an alternative verdict of an offence against subsection (2) in the prosecution of an offence against subsection (1). This means that, where the prosecution is unable to prove the final element of the offence under subsection (1) – which carries a maximum of seven years imprisonment – that the use of force or violence would threaten the peace, order and good government of the Commonwealth – the defendant may still be found guilty of an offence against subsection (2) which carries a maximum penalty of 5 years imprisonment. Subsection (5) also contains a note cross-referencing section 80.3, which contains a defence for acts done in good faith. The good faith defence is discussed at page 27-29 of this Discussion Paper.

80.2B Urging violence against members of groups

Offences

(1) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a person (the *targeted person*); and

(b) the first person does so intending that force or violence will occur; and

(c) the first person does so by reason of his or her belief that the targeted person is a member of a group (the *targeted group*); and

(d) the targeted group is distinguished by race, religion, nationality, national origin or political opinion; and

(e) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a person (the *targeted person*); and

(b) the first person does so intending that force or violence will occur; and

(c) the first person does so by reason of his or her belief that the targeted person is a member of a group (the *targeted group*); and

(d) the targeted group is distinguished by race, religion, nationality, national origin or political opinion.

Penalty: Imprisonment for 5 years.

Note: For intention, see section 5.2.

(3) For the purposes of paragraph (1)(c) and (2)(c), it is immaterial whether the targeted person actually is a member of the targeted group.

(4) The fault element for paragraphs (1)(d) and (2)(d) is recklessness.

Note: For recklessness, see section 5.4.

Alternative verdict

(5) Subsection (6) applies if, in a prosecution for an offence (the *prosecuted offence*) against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of the offence; but

(b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the *alternative offence*) against subsection (2).

(6) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note: There is a defence in section 80.3 for acts done in good faith.

Urging violence against members of groups

Proposed section 80.2B contains offences in relation to urging violence against individual members of groups, as opposed to groups as a whole. This offence complements the proposed offences against groups in section 80.2A.

To commit the proposed new offences in section 80.2B, a person must:

- intentionally urge another person, or a group, to use force or violence against a person (the targeted person)
- intend that force or violence will occur, and
- urge the force or violence by reason of his or her belief that the targeted person is a member of a group distinguished by race, religion, nationality, national origin or political opinion.

In addition, to be guilty of an offence under proposed subsection 80.2B(1), the use of force or violence must threaten the peace, order and good government of the Commonwealth.

Subsection 80.2B(2) creates a similar offence to subsection 80.2B(1), but omits the final element of the offence that the use of force or violence would threaten the peace, order and good government of the Commonwealth. It carries a lower penalty of 5 years, compared with 7 years for subsection 80.2B(1). The lower penalty reflects the fact that, unlike an offence against subsection 80.2B(1), an offence against subsection 80.2B(2) does not pose a threat to peace, order and good government of the Commonwealth.

Subsection 80.2B(3) clarifies that, for the purposes of the offences in both subsections 80.2B(1) and (2), it is immaterial whether the targeted person actually is a member of the targeted group, just that the person urging force or violence believes they are. This means that a person may be guilty of an offence under subsection 80.2B(1) or (2) where the person mistakenly believes that the targeted person is a member of the targeted group.

Subsection 80.2B(4) clarifies that, with respect to an offence under either subsection 80.2B(1) or (2), recklessness is the applicable fault element. This means that a person will commit an offence, if in urging force or violence, they are reckless as to whether the targeted group is distinguished by race, religion, nationality, national origin or political opinion.

Section 80.2B also contains notes cross-referencing section 5.2, which defines 'intention' as a fault element, and section 5.4, which defines 'recklessness' as a fault element. The inclusion of these notes ensures greater clarity regarding the operation of the fault elements within the offence.

Subsections 80.2B(5) and (6), 'Alternative verdict', together provide for the possibility of an alternative verdict of an offence against subsection (2) in the

THIS PAGE IS INTENTIONALLY BLANK

prosecution of an offence against subsection (1). This means that, where the prosecution is unable to prove the final element of the offence under subsection (1) – that the use of force or violence would threaten the peace, order and good government of the Commonwealth – the defendant may still be found guilty of an offence against subsection (2), so long as the defendant has been afforded procedural fairness in relation to that finding of guilt Subsection (6) also contains a note cross-referencing section 80.3, which contains a defence for acts done in good faith.

In addition to the amendments recommended by the ALRC, new section 80.2B extends the offence of urging violence to cover where force or violence is urged against a member of a group and not just the group as a whole. Subsections 80.2A(2) and 80.2B(2) extend the offence of urging violence further to cover where force or violence is urged against a group or member of a group, even when the force or violence does not threaten the peace, order and good government of the Commonwealth. These amendments ensure that criminal sanctions apply to any urging of force or violence against a person or group on the basis of race, religion, nationality, national origin or political opinion.

Urging a person to assist the enemy

(7) A person commits an offence if:

(a) the person urges another person to engage in conduct; and

(b) the first-mentioned person intends the conduct to assist an organisation or country; and

(c) the organisation or country is:

(i) at war with the Commonwealth, whether or not the existence of a state of war has been declared; and

(ii) specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth.

Penalty: Imprisonment for 7 years.

Urging a person to assist those engaged in armed hostilities

(8) A person commits an offence if:

(a) the person urges another person to engage in conduct; and

(b) the first-mentioned person intends the conduct to assist an organisation or country; and

(c) the organisation or country is engaged in armed hostilities against the Australian Defence Force.

Penalty: Imprisonment for 7 years.

Defence

(9) Subsections (7) and (8) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (9). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

Repealing the offence of urging a person to assist the enemy or those engaged in armed hostilities against the Australian Defence Force

Subsections 80.2(7) and (8) of the Criminal Code contain the offences of urging another person to assist an organisation or country at war with the Commonwealth or urging a person to assist an organisation or country engaged in armed hostilities with the Australian Defence Force. Subsection 80.2(9) provides for a defence to these offences in relation to humanitarian aid.

It is proposed that these sections be repealed because the treason offences in the amended section 80.1 and proposed section 80.1AA adequately criminalise action taken by a person to assist an enemy engaged in hostilities against Australia and the Australian Defence Force.

The proposed amendments will repeal subsections 80.2(7), (8) and (9) to implement recommendation 11-1 of the ALRC Report.

80.3 Defence for acts done in good faith

(1) ~~Sections 80.1 and 80.2~~ **Subdivisions B and C** do not apply to a person who:

(a) tries in good faith to show that any of the following persons are mistaken in any of his or her counsels, policies or actions:

(i) the Sovereign;

(ii) the Governor-General;

(iii) the Governor of a State;

(iv) the Administrator of a Territory;

(v) an adviser of any of the above;

(vi) a person responsible for the government of another country; or

(b) points out in good faith errors or defects in the following, with a view to reforming those errors or defects:

(i) the Government of the Commonwealth, a State or a Territory;

(ii) the Constitution;

(iii) legislation of the Commonwealth, a State, a Territory or another country;

(iv) the administration of justice of or in the Commonwealth, a State, a Territory or another country; or

(c) urges in good faith another person to attempt to lawfully procure a change to any matter established by law, policy or practice in the Commonwealth, a State, a Territory or another country; or

(d) points out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or

(e) does anything in good faith in connection with an industrial dispute or an industrial matter; or

(f) publishes in good faith a report or commentary about a matter of public interest.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

(2) In considering a defence under subsection (1), the Court may have regard to any relevant matter, including whether the acts were done:

(a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth; or

(b) with the intention of assisting an enemy:

(i) at war with the Commonwealth; and

(ii) specified by Proclamation made for the purpose of ~~paragraph 80.1(1)(e)~~ **paragraph 80.1AA(1)(b)** to be an enemy at war with the Commonwealth; or

(c) with the intention of assisting another country, or an organisation, that is engaged in armed hostilities against the Australian Defence Force; or

(d) with the intention of assisting a proclaimed enemy of a proclaimed country (within the meaning of subsection 24AA(4) of the *Crimes Act 1914 1914*); or

(e) with the intention of assisting persons specified in paragraphs 24AA(2)(a) and (b) of the *Crimes Act 1914 1914*; or

(f) with the intention of causing violence or creating public disorder or a public disturbance.

Amending the good faith defence

Section 80.3 contains a defence to the offences of treason and urging violence in Division 80 of the Criminal Code for acts done in good faith.

Subsection 80.3(2) lists a number of matters the Court may have regard to when considering a defence under subsection 80.3(1).

Recommendation 12-1 of the ALRC Report recommended that the good faith defence in section 80.3 not apply to the urging violence offences in section 80.2. Instead the ALRC proposed under recommendation 12-2 that section 80.2 be amended to provide that, in determining whether a person intends that the urged force or violence will occur, the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:

- in the development, performance, exhibition or distribution of an artistic work
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest
- in connection with an industrial dispute or an industrial matter, or
- in the dissemination of news or current affairs.

However, the Government considers this would overly complicate the urging violence offences, and instead proposes to implement recommendation 12-2 of the ALRC report by expanding the good faith defence to urging violence offences to take into account the ALRC's concerns.

The proposed amendments also make consequential amendments to section 80.3 as a result of the redrafting of the offences within Division 80, as discussed earlier in this Discussion Paper.

(3) Without limiting subsection (2), in considering a defence under subsection (1) in respect of an offence against Subdivision C, the Court may have regard to any relevant matter, including whether the acts were done:

(a) in the development, performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in the dissemination of news or current affairs.

Proposed new subsection 80.3(3) lists a number of additional matters to which a Court may have regard when considering a defence under subsection 80.3(1) to the urging violence offences in Division 80.

Recommendation 12-2 of the ALRC Report proposed that section 80.2 should be amended to provide that, in determining whether a person intends that the urged force or violence will occur, the trier of fact must have regard to the context in which the conduct occurred, including (where applicable) whether the conduct was done:

- in the development, performance, exhibition or distribution of an artistic work
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest
- in connection with an industrial dispute or an industrial matter, or
- in the dissemination of news or current affairs.

The Government supports in principle this recommendation. However, to provide for these elements within the offences would overly complicate the newly drafted urging violence offences. From a general criminal law perspective, the issues identified by the ALRC in recommendation 12-2 are best dealt with as a defence to the offences. Therefore, it is more appropriate to implement the recommendation through expanding the good faith defence.

Proposed subsection 80.3(3) provides that the Court may have regard to any relevant matter, including whether the acts were done:

- in the development, performance, exhibition or distribution of an artistic work
- in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest, or
- in the dissemination of news or current affairs.

It is not necessary to include 'in connection with an industrial dispute or an industrial matter' in subsection 80.2(3) as recommended by the ALRC, as acts done in good faith in connection with an industrial dispute or industrial matter are already a complete defence under paragraph 80.3(1)(e) of the Criminal Code.

In the spirit of the ALRC recommendation, the expanded good faith defence as provided for in new subsection 80.3(3) will apply not only to the redrafted urging violence offences but also to the former sedition offences currently in section 80.2 of the Criminal Code. This ensures that anyone charged under the sedition offences before the commencement of the new provisions will still have the benefit of the expanded good faith defence.

80.5 Attorney-General's consent required

(1) Proceedings for an offence against this Division must not be commenced without the Attorney-General's written consent.

(2) Despite subsection (1):

(a) a person may be arrested for an offence against this Division; or

(b) a warrant for the arrest of a person for such an offence may be issued and executed;

and the person may be charged, and may be remanded in custody or on bail, but:

(c) no further proceedings may be taken until that consent has been obtained; and

(d) the person must be discharged if proceedings are not continued within a reasonable time.

Repealing the requirement for the Attorney-General's consent

Section 80.5 provides that the Attorney-General must give written consent before proceedings for an offence against Division 80 (treason or urging violence) may commence.

The proposed amendment repeals section 80.5.

Repealing section 80.5 implements recommendation 13-1 of the ALRC Report. The ALRC indicated that, although the provision is designed to provide an additional safeguard for a person charged with an offence within Division 80, the provision adds to the perception that there may be a political element to the decision whether or not to prosecute. Therefore, the ALRC concluded that the provision should be repealed.

An application provision accompanies this amendment to clarify how the proposed amendment repealing section 80.5 is to apply. This amendment applies only to offences committed after the commencement of the new provisions. Proceedings for offences against Division 80 committed before the commencement of the new provisions will still require the Attorney-General's consent.

Repealing outdated offences in Part IIA of the *Crimes Act 1914*

Part II—Offences against the Government

…

24F Certain acts done in good faith not unlawful

(1) Nothing in the preceding provisions of this Part makes it unlawful for a person:

(a) to endeavour in good faith to show that the Sovereign, the Governor-General, the Governor of a State, the Administrator of a Territory, or the advisers of any of them, or the persons responsible for the government of another country, has or have been, or is or are, mistaken in any of his, her or their counsels, policies or actions;

(b) to point out in good faith errors or defects in the government, the constitution, the legislation or the administration of justice of or in the Commonwealth, a State, a Territory or another country, with a view to the reformation of those errors or defects;

(c) to excite in good faith another person to attempt to procure by lawful means the alteration of any matter established by law in the Commonwealth, a State, a Territory or another country;

(d) to point out in good faith, in order to bring about their removal, any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different classes of persons; or

(e) to do anything in good faith in connexion with an industrial dispute or an industrial matter.

(2) For the purpose of subsection (1), an act or thing done:

(a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth;

(b) with intent to assist an enemy:

(i) at war with the Commonwealth; and

(ii) specified by proclamation made for the purpose of ~~paragraph 80.1(1)(e)~~ **paragraph 80.1AA(1)(b)**of the *Criminal Code* to be an enemy at war with the Commonwealth;

(ba) with intent to assist:

(i) another country; or

(ii) an organisation (within the meaning of section 100.1 of the *Criminal Code*);

that is engaged in armed hostilities against the Australian Defence Force;

(c) with intent to assist a proclaimed enemy, as defined by subsection 24AA(4) of this Act, of a proclaimed country as so defined;

(d) with intent to assist persons specified in paragraphs 24AA(2)(a) and (b) of this Act; or

(e) with the intention of causing violence or creating public disorder or a public disturbance;

is not an act or thing done in good faith.

…

Repealing outdated offences in Part IIA of the *Crimes Act 1914*

It is proposed that the majority of the offences and related provisions in Part IIA of the *Crimes Act 1914* be repealed as they are no longer relevant to the current security environment in Australia.

The proposed amendments repeal sections 30A, 30AA, 30AB, 30B, 30C, 30D, 30E, 30F, 30FA, 30FC, 30FD, 30G, 30H and 30R.

With the exception of section 30C, all these offences relate to unlawful associations. These sections are repealed as the offences relating to unlawful associations do not relate to contemporary threats, particularly as the offences within the Criminal Code relating to terrorist organisations adequately address associating with a terrorist or terrorist organisation. Further, the proscription process in Part IIA of the *Crimes Act 1914* is inconsistent with the process for proscription of terrorist organisations in the Criminal Code.

Repealing the unlawful association offences implements recommendation 4-1 of the ALRC Report. The ALRC considered the terrorist organisation provisions were a more modern and appropriate way of addressing organisations that advocate politically motivated violence than the offences contained in Part IIA of the *Crimes Act 1914*, which the ALRC considered outdated. In addition, in 1991 the Gibbs Committee considered that the 'little used' provisions, which originated in 1926, should be repealed, as the activities at which these provisions are aimed are dealt with by other laws and there is therefore no longer a need for these offences.[16]

Section 30C, which contains the offence of advocating or inciting to crime, is also repealed. This amendment implements recommendation 9-3 of the ALRC Report. The ALRC considered that the offence of advocating or inciting to crime enacted under section 30C was virtually identical to the offence in subsection 80.2(1) of the Criminal Code, thereby rendering section 30C redundant.

It is also proposed that a consequential amendment be made to section 24F (Certain acts done in good faith not unlawful) to reflect the proposed amendments to the offences in Division 80 of the Criminal Code.

[16] H Gibbs, R Watson and A Menzies, *Review of Commonwealth Criminal Law: Fifth Interim Report* (1991) at paragraph 38.8

Part IIA – ~~Protection of the Constitution and of public and other services~~ Protection of public and other services

~~30A Unlawful associations~~

~~(1) The following are hereby declared to be unlawful associations, namely:~~

~~(a) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages:~~

~~(i) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;~~

~~(ii) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government; or~~

~~(iii) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States;~~

~~or which is, or purports to be, affiliated with any organization which advocates or encourages any of the doctrines or practices specified in this paragraph;~~

~~(b) any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a seditious intention (see subsection (3)).~~

~~(1A) Without limiting the effect of the provisions of subsection (1), any body of persons, incorporated or unincorporated, which is, in pursuance of section 30AA, declared by the Federal Court of Australia to be an unlawful association, shall be deemed to be an unlawful association for the purposes of this Act.~~

~~(2) Any branch or committee of an unlawful association, and any institution or school conducted by or under the authority or apparent authority of an unlawful association, shall, for all the purposes of this Act, be deemed to be an unlawful association.~~

~~(3) In this section:~~

~~***seditious intention*** means an intention to use force or violence to effect any of the following purposes:~~

~~(a) to bring the Sovereign into hatred or contempt;~~

~~(b) to urge disaffection against the following:~~

~~(i) the Constitution;~~

~~(ii) the Government of the Commonwealth;~~

~~(iii) either House of the Parliament;~~

~~(c) to urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth;~~

~~(d) to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.~~

~~30AA Application for declaration as to unlawful association~~

~~(1) The Attorney-General may apply to the Federal Court of Australia for an order calling upon any body of persons, incorporated or unincorporated, to show cause why it should not be declared to be an unlawful association.~~

THIS PAGE IS INTENTIONALLY BLANK

(2) An application under subsection (1):

(a) shall be made on the ground that the body of persons to which it relates is one which is described in subsection 30A(1); and

(b) shall be by summons which may contain averments setting out the facts relied upon in support of the application.

(4) Service of a summons under this section upon the body of persons specified in the summons may be effected by publication of the summons in the *Gazette* and in a daily newspaper circulating in the city or town in which the head office in Australia of that body is stated in the summons to be situate, but the Court may order such further or other service as it thinks fit.

(5) Any officer or member of the body of persons specified in any summons issued under this section may appear on behalf of that body to show cause.

(7) If cause to the contrary is not shown to the satisfaction of the Court, it may make an order declaring the respondent body of persons to be an unlawful association.

(8) Any person who is an interested person in relation to any declaration made under this section may, within 14 days after the making of any such declaration, apply to the Federal Court of Australia for the setting aside of the order.

(9) Any application made under subsection (8) shall be heard by a Full Court of the Federal Court of Australia, and upon the hearing of the application the Court may affirm or annul the order.

30AB Attorney-General may require information

(1) If the Attorney-General believes that any person has in his or her possession any information or documents relating to an unlawful association, he or she may require the person, or, in the case of a corporation, any person holding a specified office in the corporation:

(a) to answer questions;

(b) to furnish information; and

(c) allow the inspection of documents belonging to, or in the possession of, that person or that corporation, as the case may be;

relating to:

(d) any money, property or funds belonging to or held by or on behalf of an unlawful association, or as to which there is reasonable cause to believe that they belong to or are held by or on behalf of an unlawful association;

(e) any payments made directly or indirectly by, to, or on behalf of, an unlawful association, or as to which there is reasonable cause to believe that they are so made; or

(f) any transactions to which an unlawful association is or is reasonably believed to be a party.

(2) Any person failing or neglecting to answer questions, furnish information or produce documents as required in pursuance of this section, shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

THIS PAGE IS INTENTIONALLY BLANK

~~30B Officers of unlawful associations~~

~~Any person over the age of 18 years who is a member of an unlawful association, and any person who occupies or acts in any office or position in or of an unlawful association, or who acts as a representative of an unlawful association, or who acts as a teacher in any institution or school conducted by or under the authority or apparent authority of an unlawful association, shall be guilty of an offence.~~

~~Penalty: Imprisonment for 1 year.~~

~~30C Advocating or inciting to crime~~

~~Any person who by speech or writing advocates or encourages:~~

~~(a) the overthrow of the Constitution of the Commonwealth by revolution or sabotage;~~

~~(b) the overthrow by force or violence of the established government of the Commonwealth or of a State or of any other civilized country or of organized government; or~~

~~(c) the destruction or injury of property of the Commonwealth or of property used in trade or commerce with other countries or among the States;~~

~~shall be guilty of an offence and shall be liable on conviction to imprisonment for any period not exceeding 2 years.~~

~~30D Giving or soliciting contributions for unlawful associations~~

~~(1) Any person who:~~

~~(a) gives or contributes money or goods to an unlawful association; or~~

~~(b) receives or solicits subscriptions or contributions of money or goods for an unlawful association;~~

~~shall be guilty of an offence.~~

~~Penalty: Imprisonment for 6 months.~~

~~(2) For the purposes of this section the printer and the publisher of a newspaper or periodical which contains any solicitation of subscriptions or contributions of money or goods for an unlawful association, or any notification or indication as to places where or persons to whom payment or delivery may be made of subscriptions or contributions of money or goods for an unlawful association, shall be deemed to solicit subscriptions or contributions of money or goods for an unlawful association.~~

~~30E Books etc. issued by unlawful association not transmissible by post~~

~~(1) No book, periodical, pamphlet, handbill, poster or newspaper issued by or on behalf or in the interests of any unlawful association shall:~~

~~(a) if posted in Australia, be transmitted through the post; or~~

~~(b) in the case of a newspaper, be registered as a newspaper under the provisions of the *Postal Services Act 1975*.~~

~~(2) Any newspaper registered under that Act, which is issued by or on behalf or in the interests of any unlawful association, shall be removed from the register.~~

THIS PAGE IS INTENTIONALLY BLANK

(3) Any book, periodical, pamphlet, handbill, poster or newspaper posted in Australia, the transmission of which would be a contravention of this Act, shall be forfeited to the Commonwealth and shall be destroyed or disposed of as provided in the regulations in force under the *Postal Services Act 1975*.

30F Prohibition of sale of books etc. issued by unlawful association

Any person who intentionally prints, publishes, sells or exposes for sale or who intentionally circulates or distributes any book, periodical, pamphlet, handbill, poster or newspaper for or in the interests of or issued by any unlawful association shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

30FA Imprints on publications

(1) The imprint appearing upon any book, periodical, pamphlet, handbill, poster or newspaper shall, in any proceedings under this Part, be prima facie evidence that the book, periodical, pamphlet, handbill, poster or newspaper was printed or published by or on behalf of, or in the interests of, the person or body of persons specified in the imprint.

(2) For the purposes of this section, ***imprint*** means a statement of the name and address of the printer or of the publisher of the book, periodical, pamphlet, handbill, poster or newspaper with or without a description of the place where it is printed.

30FC Owner etc. of building permitting meeting of unlawful association

Any person who, being the owner, lessee, agent or superintendent of any building, room, premises or place, intentionally permits therein any meeting of an unlawful association or of any branch or committee thereof, shall be guilty of an offence.

Penalty: Imprisonment for 6 months.

30FD Disqualification from voting of member of unlawful association

Any person who, at the date of any declaration made by a court under this Part declaring any body of persons to be an unlawful association, is a member of the Committee or Executive of that association, shall not for a period of 7 years from that date be entitled to have his or her name placed on or retained on any roll of electors for the Senate or House of Representatives, or to vote at any Senate election or House of Representatives election unless so entitled under section 41 of the Constitution.

30G Forfeiture of property held by an unlawful association

All goods and chattels belonging to an unlawful association, or held by any person for or on behalf of an unlawful association, and all books, periodicals, pamphlets, handbills, posters or newspapers issued by or on behalf of, or in the interests of, an unlawful association shall be forfeited to the Commonwealth.

THIS PAGE IS INTENTIONALLY BLANK

~~30H Proof of membership of an association~~

~~In any prosecution under this Act, proof that the defendant has, at any time since the commencement of this section:~~

~~(a) been a member of an association;~~

~~(b) attended a meeting of an association;~~

~~(c) spoken publicly in advocacy of an association or its objects; or~~

~~(d) distributed literature of an association;~~

~~shall, in the absence of proof to the contrary, be evidence that at all times material to the case he or she was a member of the association.~~

…

~~30R Books etc. taken to have been issued by associations~~

~~(5) Any book, periodical, pamphlet, handbill, poster or newspaper purporting to be issued by or on behalf of, or in the interests of, an association shall, unless the contrary is proved, be deemed to be so issued.~~

Part 3 Amendments to the terrorist act definition and offences in Divisions 100 and 101 of the Criminal Code

Part 3 contains proposed amendments to Divisions 100 and 101 of the *Criminal Code Act 1995* (Criminal Code).

Division 100 of the Criminal Code includes the definition of a terrorist act (section 100.1) along with other technical provisions dealing with the reference of power and constitutional bases for the operation of Part 5.3 of the Criminal Code.

Division 101 of the Criminal Code contains the following terrorism offences which are linked to the definition of terrorist act in Division 100:

- section 101.1 – engaging in a terrorist act
- section 101.2 – providing or receiving training connected with terrorist acts
- section 101.4 – possessing things connected with a terrorist act
- section 101.5 – collecting or making documents likely to facilitate a terrorist act, and
- section 101.6 – other acts done in preparation for, or planning, terrorist acts.

Divisions 100 and 101 of the Criminal Code were reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2006 following the review undertaken by the Security Legislation Review Committee (Sheller Committee).

The Sheller Committee tabled its report, *Report of the Security Legislation Review Committee* (Sheller Committee Report), in Parliament in June 2006 concluding that the Committee was satisfied that, in addition to the general criminal law, separate security legislation is necessary.[17]

The PJCIS tabled its report, *Review of Security and Counter-Terrorism Legislation* (2006 PJCIS Report) in Parliament in December 2006. Overall, the PJCIS concluded that a special terrorism law regime is justifiable and forms an important, although not exclusive, tool in Australia's counter-terrorism strategy.[18] The Government tabled its response to the 2006 PJCIS Report in December 2008.

[17] Sheller Committee Report page 3
[18] 2006 PJCIS Report, http://www.aph.gov.au/house/committee/pjcis/securityleg/report/report.pdf - foreword

Amendments to the definition of a terrorist act

100.1(1) *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

(ia) coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations; or

(ii) intimidating the public or a section of the public.

(2) Action falls within this subsection if it:

(a) causes**, or is likely to cause,** serious harm ~~**that is physical harm**~~ to a person; or

(b) causes**, or is likely to cause,** serious damage to property; or

(c) causes**, or is likely to cause,** a person's death; or

(d) endangers**, or is likely to endanger,** a person's life, other than the life of the person taking the action; or

(e) creates**, or is likely to create,** 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**; or**

(g) is likely to seriously interfere with, seriously disrupt or destroy an electronic system including, but not limited to, an electronic system mentioned in a subparagraph of paragraph (f).

(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.

Amendments to definition of 'terrorist act' in the Criminal Code

Clarifying that the United Nations may be the target of terrorist violence

Currently for the purposes of the definition of terrorist act in section 100.1 of the Criminal Code, action or a threat of action must be made with the intention of 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. This does not extend to international organisations such as the United Nations.

The PJCIS recommended that the definition of terrorist act be amended to recognise that international organisations may be the target of terrorist violence (recommendation 11). The PJCIS noted that European and international counter-terrorism law recognises that international governmental organisations, such as the United Nations, may be targets of terrorism.[19]

The United Nations has been the target of terrorism on numerous occasions, including the bombing of the United Nations Headquarters in Baghdad on 19 August 2003. The Government supports the inclusion of a specific subsection in the definition of terrorist act which recognises that the United Nations may be the target of terrorist violence. The proposed amendment at new subparagraph 100.1(c)(ia) not only implements the recommendation of the PJCIS, but also ensures that the Australian legal framework is consistent with broader international practice. It also complements existing Australian law, which provides for a range of offences for the protection of the United Nations and associated personnel in accordance with Australia's obligations under the *Convention on the Safety of United Nations and Associated Personnel*.[20]

Psychological harm in the definition of harm

The current definition of terrorist act as defined in section 100.1 of the Criminal Code requires, among other things, that the action or threat of action causes serious harm that is physical harm to a person.

The Sheller Committee Report recommended (recommendation 6) that the words 'harm that is physical' be deleted from paragraph 2(a) and subparagraph 3(b)(i) in the definition of 'terrorist act', so that the definition of 'harm' in the Dictionary to the Criminal Code applies and these provisions extend to cover serious harm to a person's mental health. The Sheller Committee made this recommendation as it recognised that the consequences and costs of psychological harm can be of as great concern as the consequences and costs of physical harm.[21] The PJCIS did not accept this finding of the Sheller Committee but, as per recommendation 9 of the 2006 PJCIS Report, considered that it would be open to the Government to consult the States and Territories regarding acceptance of the Sheller Committee recommendation.

[19] 2006 PJCIS Report paragraph 5.41
[20] Division 71 of the Criminal Code
[21] Sheller Committee Report, paragraph 6.8, page 50

THIS PAGE IS INTENTIONALLY BLANK

The Government agrees that serious psychological harm could be just as damaging as serious physical harm and proposes that the limitation in the definition of terrorist act be removed. This would be consistent with the Model Criminal Code offences against the person in Chapter 5[22], as well as offences against the person as they apply in each State and Territory.

The proposed amendments at paragraph 100.1(2)(a) and subparagraph 100.1(3)(b)(i) would align the definition of 'terrorist act' with the Criminal Code Dictionary definitions of 'serious harm' and 'harm', which include both physical and psychological harm. The definitions of 'harm' and 'serious harm' do not include being subjected to any force or impact that is within the limits of what is acceptable as incidental to social interaction or to life in the community.

Clarifying the harm that arises from a 'threat of action'

The current definition of terrorist act in section 100.1 of the Criminal Code includes the concept of a threat of action. This concept should be understood as a threat, communicated with the intentions described in paragraphs (1)(b) and (c), to engage in actions which, if done, fall within subsection (2) and not within subsection (3) of section 100.1.

The concept of 'threat of action' in the definition of terrorist act has caused significant commentary regarding the relationship between a threat of 'action' and the criteria in sections 100.1(2) and (3).

The Sheller Committee usefully considered that a threat usually means a communicated intention to inflict some kind of harm on the person or property of another, with the intention to intimidate the other person, to overcome their will, to unsettle their mind, or to restrain their freedom of action.[23]

However, a difficulty that arises is that an unintended interpretation of the definition might be that it requires the threat of action to actually result in serious harm to a person or other harm as is defined in subsection 100.1(2) of the Criminal Code.

Both the Sheller Committee and the PJCIS considered that problems in the interpretation of the definition of 'terrorist act' should be avoided as the intention of the legislation is to make a threat of a terrorist act an offence.[24] Consequently, both the Sheller Committee and the PJCIS made recommendations in relation to the concept of 'threat of action' within the terrorist act definition.

The Sheller Committee recommended that the reference to 'threat of action' and other references to 'threat' be removed from the definition of 'terrorist act' in section 100.1(1) of the Criminal Code (recommendation 7). Further, the Sheller Committee recommended that an offence of 'threat of action' or 'threat to commit a terrorist act' be included in Division 101 of the Criminal Code. To this end, the Sheller Committee

[22] http://www.ag.gov.au/www/agd/agd.nsf/Page/Modelcriminalcode_Chapter5-OffencesAgainstthePerson
[23] Sheller Report paragraph 6.10
[24] PJCIS report paragraph 5.40 page 62

THIS PAGE IS INTENTIONALLY BLANK

recommended that such an offence should extend to cover both the case where the action threatened in fact occurred and the case where it did not occur (recommendation 8). The PJCIS also recommended that 'threat' of terrorist act be removed from the definition of terrorism and be dealt with as a separate offence (recommendation 10).

However, to remove the 'threat of action' from the definition of terrorist act dilutes the policy focus of criminalising 'threat of action' within the offences in Division 101 of the Criminal Code. Therefore, the Government proposes to clarify the issue in another way. Both the Sheller Committee and the PJCIS considered scope for there to be a clarification to the definition to assist in making it clear that the threats of action relate to damage which is likely to be caused as a result of the terrorist threat as opposed to damage which is actually caused by a terrorist act.[25] The Government therefore proposes the addition of the words 'or is likely to cause' after the word 'causes' in each paragraph of subsection 100.1(2) to provide greater clarity to the definition of 'terrorist act'. The effect of the proposed amendments in subsection 100.1(2) is that an offence will be committed where a threat of relevant conduct is made and it is likely to cause an outcome listed in subsection 100.1(2).

[25] Sheller Committee Report - paragraph 6.10

New terrorism hoax offence

101.7 Terrorism hoaxes

A person commits an offence if:

(a) the person engages in conduct; and

(b) the person does so with the intention of inducing a false belief that a terrorist act has occurred, is occurring or is likely to occur.

Penalty: Imprisonment for 10 years.

Terrorism-specific hoax offence

The Criminal Code currently contains offences for the commission of hoaxes that are made either via the post or a telecommunications network (sections 471.10 and 474.16 of the Criminal Code). However, if a terrorism-specific hoax is committed without the use of the post or a telecommunications network, it will not be captured by these offences. Given the potential for a terrorism-specific hoax to cause significant alarm to the community and to divert valuable law enforcement and emergency services, both the Sheller Committee and the PJCIS recommended that a separate terrorist hoax offence be created (recommendation 20 of the Sheller Committee Report and recommendation 13 of the 2006 PJCIS Report).

Both the Sheller Committee and the PJCIS recognised that the concept of a hoax is different from that of a 'threat of action' as is currently provided for in the definition of terrorist act in section 100.1 of the Criminal Code. As outlined by the PJCIS, the Macquarie Dictionary defines a threat as a 'declaration of intention' to do something, whereas a hoax is a 'deception of a public authority'.[26] In making this distinction, both the Sheller Committee and the PJCIS considered that both activities warranted separate criminal offences.

The proposed terrorism-specific hoax offence in new section 101.7 covers a person who intentionally engages in conduct with the intention of inducing a false belief that a terrorist act will occur or is likely to occur.

The penalty for the offence is the same as the penalty for similar offences for the commission of hoaxes that are made either via the post or a telecommunications network. The terrorism -specific hoax offence is also consistent with international thinking as the United Nations Draft Comprehensive Convention on International Terrorism also contains a terrorism specific hoax offence (Article 2(2)).

The post and telecommunications hoax offences in the Criminal Code will be retained as separate offences because they cover all types of hoaxes using these mediums which are within specific Commonwealth jurisdiction.

[26] 2006 PJCIS Report at paragraph 5.52 quoting from *Macquarie Dictionary* (3rd Ed), 2001, p 1016 and 2204.

THIS PAGE IS INTENTIONALLY BLANK

Part 4 Amendments to the terrorist organisation listing provisions and offences in Division 102 of the Criminal Code

Part 4 contains proposed amendments to Division 102 of the *Criminal Code Act 1995* (Criminal Code). Division 102 of the Criminal Code contains the definition of a 'terrorist organisation' (section 102.1), the process for proscribing terrorist organisations and the terrorist organisation offences including:

- section 102.2 – directing the activities of a terrorist organisation
- section 102.3 – membership of a terrorist organisation
- section 102.4 – recruiting for a terrorist organisation
- section 102.5 – training a terrorist organisation or receiving training from a terrorist organisation
- section 102.6 – getting funds to, from or for a terrorist organisation
- section 102.7 – providing support to a terrorist organisation
- section 102.8 – associating with terrorist organisations

The terrorist organisation offences require a person to intentionally engage in conduct with an organisation and either know or be reckless as to the fact that the organisation is a terrorist organisation.

The Criminal Code provides two ways for an organisation to be identified as a 'terrorist organisation'. The first occurs when a person is charged with one of the terrorist organisation offences in relation to an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs). In this situation, a court will determine whether or not the organisation is a terrorist organisation.

Secondly, the Governor-General may make a regulation proscribing an organisation as a terrorist organisation if the Attorney-General is satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or it advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). The current list of organisations proscribed as terrorist organisations under the Criminal Code is available at www.nationalsecurity.gov.au.

Division 102 of the Criminal Code has been reviewed by the Parliamentary Joint Committee on Intelligence and Security (PJCIS) in 2006 and 2007 following the review undertaken by the Security Legislation Review Committee (Sheller Committee). Specifically, in accordance with subsection 102.1A(2) of the Criminal Code, the PJCIS conducted a statutory review into the operation, effectiveness and implications of the proscription provisions in Division 102. The PJCIS tabled its report, *Inquiry into the proscription of 'terrorist organisations' under the Australian Criminal Code* (2007 PJCIS Report), on 20 September 2007. Overall, the PJCIS concluded that the current model of executive regulation and parliamentary oversight

provides a transparent and accountable system that is consistent with international practice.[27]

In addition to the above reviews, the offence of providing support or resources to a terrorist organisation was also considered by the Clarke Inquiry into the Case of Dr Mohamed Haneef (Clarke Inquiry). The Government tabled the Clarke Inquiry's report, *Report of the Inquiry* (Clarke Inquiry Report) in Parliament on 23 December 2008.

The Government tabled its response to the PJCIS reports and the Clarke Inquiry Report in December 2008.

[27] 2007 PJCIS Report, http://www.aph.gov.au/house/committee/pjcis/proscription/report.htm – foreword.

THIS PAGE IS INTENTIONALLY BLANK

Definition of advocates in Division 102 of the Criminal Code

102.1(1A) In this Division, an organisation *advocates* the doing of a terrorist act if:

(a) the organisation directly or indirectly counsels or urges the doing of a terrorist act; or

(b) the organisation directly or indirectly provides instruction on the doing of a terrorist act; or

(c) the organisation directly praises the doing of a terrorist act in circumstances where there is a **substantial** risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

Definition of advocates in Division 102 of the Criminal Code

Paragraph 102.1(2)(b) of the Criminal Code provides that the Governor-General may make a regulation proscribing an organisation as a terrorist organisation if the Attorney-General is satisfied that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur).

Currently paragraph 102.1(1A)(c) of the Criminal Code provides that an organisation advocates the doing of a terrorist act if the organisation directly praises the doing of a terrorist act in circumstances where there is a risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment (within the meaning of section 7.3) that the person might suffer) to engage in a terrorist act.

Both the Sheller Committee and the PJCIS made recommendations that the threshold of a mere risk that praise might have the effect of leading a person to engage in a terrorist act was too low. In addition, other concerns were raised that the threshold of mere risk raised substantive questions about limits of freedom of expression in Australia.

The PJCIS did not recommend the repeal of advocacy as a basis for listing an organisation as a terrorist organisation but recommended that this issue be subject to further review. In addition, the PJCIS recommended that 'risk' be amended to substantial risk (recommendation 14).

The insertion of the word 'substantial' before 'risk' in the proposed amendment to paragraph 102.1(1A)(c) clarifies that the risk threshold within the definition of advocates associated with an organisation directly praising the doing of a terrorist act has to be real and apparent on the evidence presented. It has always been intended that the risk threshold associated with an organisation directly praising the doing of a terrorist act must be substantial. Accordingly, the inclusion of the word 'substantial' provides reassurance that the level of risk associated with advocacy is not mere risk but a heightened risk. Such an amendment would also be consistent with the language of the Criminal Code in relation to the concept of risk; for example, 'substantial risk' is used in the definition of recklessness in section 5.4 of the Criminal Code.

A consequential amendment would also be made to paragraph 9(A)(2)(c) of the *Classification (Publications, Films and Computer Games) Act 1995* to mirror the change to the definition of advocates in the Criminal Code.

Expiration of regulations which list terrorist organisations

102.1(3) Regulations for the purposes of paragraph (b) of the definition of *terrorist organisation* in this section cease to have effect on the ~~second anniversary~~ **third anniversary** of the day on which they take effect. To avoid doubt, this subsection does not prevent:

(a) the repeal of those regulations; or

(b) the cessation of effect of those regulations under subsection (4); or

(c) the making of new regulations the same in substance as those regulations (whether the new regulations are made or take effect before or after those regulations cease to have effect because of this subsection).

Expiration of regulations which list terrorist organisations

In accordance with subsection 102.1(3) of the Criminal Code, the listing of an organisation ceases to have effect two years after its commencement, or if the Attorney-General ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, whichever occurs first.

The purpose of the automatic expiration is to ensure that if the Government wishes to continue the proscription, the Attorney-General has considered afresh all the relevant information and is satisfied that there is a sufficient factual basis to justify the proscription for a further period. To date the re-listing of each entity under the Criminal Code has been subject to the scrutiny of the PJCIS. Based on its own experience since 2004, the PJCIS recommended that extending the period of a regulation from two years to three years and providing an opportunity for parliamentary review at least once during the parliamentary cycle would provide an adequate level of oversight.

The proposed amendments to subsection 102.1(3) provide that a regulation proscribing an entity as a terrorist organisation under the Criminal Code automatically now expires on the third anniversary of the day on which it took effect.

The proposed amendment will apply to listing regulations which are in force at the time the amendment commences. The proposed amendment, however, will not apply to such a regulation that has ceased to have effect before the commencement of the section.

Update of name of Parliamentary Joint Committee on Intelligence and Security

102.1A Reviews by Parliamentary Joint ~~**Committee on ASIO, ASIS and DSD**~~ **Committee on Intelligence and Security**

Review of listing regulation

(1) If a regulation made after the commencement of this section specifies an organisation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in section 102.1, the Parliamentary Joint ~~Committee on ASIO, ASIS and DSD~~ **Committee on Intelligence and Security** may:

(a) review the regulation as soon as possible after the making of the regulation; and

(b) report the Committee's comments and recommendations to each House of the Parliament before the end of the applicable disallowance period for that House.

~~*Review of listing provisions*~~

~~(2) The Parliamentary Joint Committee on ASIO, ASIS and DSD has the following functions:~~

~~(a) to review, as soon as possible after the third anniversary of the commencement of this section, the operation, effectiveness and implications of subsections 102.1(2), (2A), (4), (5), (6), (17) and (18) as in force after the commencement of this section;~~

~~(b) to report the Committee's comments and recommendations to each House of the Parliament and to the Minister.~~

Update of name of Parliamentary Joint Committee on Intelligence and Security

In accordance with section 102.1A of the Criminal Code, when the Government decides to list an organisation as a terrorist organisation, that decision may be publicly reviewed by the PJCIS. Any person who wishes to raise any issues with the decision to list an organisation may submit their objections or concerns to the PJCIS.

At the time of enacting section 102.1A of the Criminal Code, the PJCIS was referred to as the Parliamentary Joint Committee on ASIO, ASIS and DSD.

The proposed amendment updates section 102.1A to reflect the current name of the PJCIS.

Subsection 102.1A(2) of the Criminal Code required the PJCIS to conduct a review into the operation, effectiveness and implications of the terrorist organisation proscription provisions in Division 102 of the Criminal Code as soon as possible after the third anniversary of the commencement of the section. Paragraph 29(1)(b) of the *Intelligence Services Act 2001* also required the PJCIS to conduct a statutory review into the counter-terrorism and security legislation.

The PJCIS conducted these reviews in 2006 and 2007 resulting in the PJCIS tabling its reports in December 2006 and September 2007 respectively. The Government responded to these reports on 23 December 2008 and amendments within this Part of the Discussion Paper implement recommendations arising from those reports.

As the statutory review processes provided for in subsection 102.1A(2) of the Criminal Code and paragraph 29(1)(ba) of the *Intelligence Services Act 2001* are now complete, the proposed amendments would repeal those provisions.

Clarifying the offence of providing support to a terrorist organisation

102.7 Providing **resources or material** support to a terrorist organisation

(1) A person commits an offence if:

~~(a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and~~

(a) the person provides to an organisation resources or material support; and

(aa) the person does so with the intention of helping the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and

(b) the organisation is a terrorist organisation; and

(c) the person knows the organisation is a terrorist organisation.

Penalty: Imprisonment for 25 years.

(2) A person commits an offence if:

~~(a) the person intentionally provides to an organisation support or resources that would help the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; and~~

(a) the person provides to an organisation resources or material support; and

(aa) the person does so with the intention of helping the organisation engage in an activity described in paragraph (a) of the definition of *terrorist organisation* in this Division; 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 15 years.

Clarifying the offence of providing support to a terrorist organisation

Under section 102.7 of the Criminal Code, it is an offence for a person to intentionally provide support or resources to an organisation that would help the organisation engage in preparing, planning, assisting in or fostering the doing of a terrorist act. The offence requires that the person either knows, or is aware of a substantial risk that, the organisation to which the person is providing support or resources is a terrorist organisation.

Material support

Both the Sheller Committee and the PJCIS concluded that the lack of clarity around the word 'support' may suggest that the offence could extend beyond its original intended application.[28] However, as recognised by the Sheller Committee, 'support' in the context of the offence should be considered as support that directly or indirectly helps a terrorist organisation engage in terrorist activity.[29] In addition, the PJCIS recognised that the underlying policy rationale for the offence is to target the provision of support and resources that help a terrorist organisation engage in terrorist activity.[30] Therefore the 'support' in the context of the offence means 'material support'.

In support of recommendation 18 of the PJCIS Report and to ensure the policy intent of the offence is clear, the Government proposes to amend section 102.7 to require there to be 'material' support in order to clarify that the level of support required to commit the offence goes beyond mere support. Describing the type of support which will qualify for the purpose of the offence as 'material support' is not a significant change because the level of support which must be proven would in any case need to be real and concrete.

Clarifying fault elements

Section 102.7 was also reviewed as part of the Clarke Inquiry. The Clarke Inquiry concluded that the language used in paragraphs 102.7(1)(a) and (2)(a) could cause ambiguity as to which fault elements apply to the offence, which has the potential to cause confusion and judicial error. The Clarke Inquiry therefore recommended that consideration be given to amending section 102.7 of the Criminal Code to remove uncertainties about which fault elements apply to paragraphs 102.7(1)(a) and (2)(a) (recommendation 5). The proposed amendment clarifies that there are two physical elements in paragraphs 102.7(1)(a) and (2)(a). These physical elements are:

- the person intentionally provides to an organisation resources or material support; and
- the person does so with the intention of helping the organisation engage in terrorist activity.

[28] Sheller Committee Report, paragraph 10.50 at page 121; 2006 PJCIS Report, paragraph 5.91 at page 78.
[29] Sheller Committee Report, paragraph 10.50 at page 121
[30] 2006 PJCIS Report, paragraph 5.91 at page 78

THIS PAGE IS INTENTIONALLY BLANK

The proposed amendments also clarify that the fault element of intention applies to both these physical elements. Intention is defined in section 5.2 of the Criminal Code and is the default fault element for a physical element of an offence that consists only of conduct (section 5.6 of the Criminal Code). Therefore, although new paragraphs 102.7(1)(a) and (2)(a) do not specify the fault element, in accordance with section 5.6 of the Criminal Code, in the context of the offence, the person must intentionally provide to a terrorist organisation resources or material support in order to commit the offence.

Clarifying interaction between delivery of humanitarian aid and the terrorist organisation training offence

Subdivision BA—Declared aid organisations and declared regional aid organisations

102.8A Declared aid organisations and declared regional aid organisations

(1) The Minister may declare, in writing, that:

(a) an organisation is a *declared aid organisation*; or

(b) an organisation is a *declared regional aid organisation* in respect of one or more particular geographical areas.

(2) The Minister must not make a declaration under subsection (1) in relation to an organisation unless the Minister is satisfied on reasonable grounds that:

(a) the organisation is, or will be, providing humanitarian aid to a community; and

(b) the benefits to that community of providing the humanitarian aid outweigh, or will outweigh, any benefits that could be received, directly or indirectly, by a terrorist organisation as a result of the organisation providing the aid.

(3) A declaration under subsection (1) in relation to an organisation may be made:

(a) on written application by the organisation; or

(b) on the Minister's own initiative.

(4) If an application for a declaration is made and the Minister does not make the declaration, the Minister must refuse to make the declaration.

(5) A declaration made under subsection (1) remains in force for the shorter of the following periods, unless earlier revoked:

(a) the period specified in the declaration;

(b) 3 years.

(6) The Minister must cause a notice of a declaration made under subsection (1) to be published in the *Gazette*.

(7) A declaration made under subsection (1) is not a legislative instrument.

102.8B Revocation of declaration

(1) The Minister may, in writing, revoke a declaration in relation to an organisation if the Minister is no longer satisfied of the matters in paragraphs 102.8A(2)(a) and (b) in relation to the organisation.

(2) If the Minister revokes under subsection (1) a declaration under subsection 102.8A(1), the Minister must cause a notice of the revocation to be published in the *Gazette*.

Clarifying interaction between delivery of humanitarian aid and the terrorist organisation training offence

Ministerial authorisation scheme

Recommendation 16 of the 2006 PJCIS Report recommended certain changes to the training offence (section 102.5 of the Criminal Code) to ensure the offence does not capture legitimate activities. The Government supports the recommendation in principle. The Government proposes an alternative approach and considers it necessary to develop a ministerial authorisation scheme for aid organisations.

Concerns were put to the Sheller Committee and the PJCIS regarding the potential impact of the training offence on the delivery of humanitarian aid where it is suspected terrorist organisations are present in the community during a conflict. These concerns resulted in recommendations being made by both Committees to ensure the training offence (section 102.5 of the Criminal Code) does not capture legitimate training activities such as those provided by humanitarian aid organisations (recommendation 12 of the Sheller Committee Report and recommendation 16 of the 2006 PJCIS Report).

The Government has considered various options for addressing these concerns including providing a general exemption to the terrorist organisation offences for the purposes of providing aid of a humanitarian nature. Such an exemption currently applies to the terrorist organisation association offence contained in section 102.8 of the Criminal Code. However, in the context of the training offence, such an exemption may be subject to abuse, particularly where support for terrorism is being provided under the guise of 'aid' or charities.

Because of Australia's international obligations to ensure support, resources and funding are not provided to terrorist organisations, the majority of the terrorist organisation offences in the Criminal Code would not be suitable for the application of the proposed exemption. However, given the discussion raised by both the Sheller Committee and the PJCIS in their respective reviews in relation to the training offence, it is proposed that such a scheme apply to the offence of providing training to a terrorist organisation (section 102.5). It is proposed that a ministerial authorisation scheme be established which would allow legitimate and reputable humanitarian aid organisations to be exempt, in limited circumstances, from the offence of providing training to a terrorist organisation.

Proposed ministerial authorisation scheme

In response to the discussions which were generated as part of the Sheller Committee and PJCIS review, it is proposed that a ministerial authorisation scheme be inserted into Division 102 which enables the Attorney-General (as the responsible Minister) to declare certain aid organisations, either in their entirety, in part or in geographical regions, exempt from the application of the terrorist organisation training offence in section 102.5 of the Criminal Code.

THIS PAGE IS INTENTIONALLY BLANK

The proposed amendments would require the Attorney-General to make such a declaration where the Attorney-General is satisfied on reasonable grounds that an organisation is, or will be:

- providing humanitarian aid to a community; and
- the benefits to that community of providing the humanitarian aid outweigh, or will outweigh, any benefits that could be received, directly or indirectly, by a terrorist organisation as a result of the organisation providing the aid.

The proposed amendments allow humanitarian aid organisations to apply to the Attorney-General for the exemption. They also allow the Attorney-General to list any humanitarian aid organisations which he considers meet the statutory criteria. This scheme addresses the situation where medical training is being provided to a community where, because of the social makeup of that community, there is a risk that such training could indirectly assist a terrorist organisation which is deeply entrenched within that community, yet the importance of the delivery of the medical training to the community outweighs the possible benefit to a terrorist organisation.

The proposed amendments would require the Attorney-General to publish such a declaration in the Gazette. Analogous schemes can be found in section 22 of the *Charter of the United Nations Act 1945* and subsection 9(2) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

When an exemption is granted by the Attorney-General, that exemption would apply for three years. This ensures that exemptions are reviewed regularly to ensure they continue to meet the statutory requirements. However, the Attorney-General may declare the exemption to run for a shorter period. In addition, where the Attorney-General is no longer satisfied that an organisation meets the statutory criteria, the proposed amendments allow him to revoke a declaration. Any revocation would also need to be published in the Gazette.

It would be appropriate for an organisation or an individual to have the ability to seek review of the Attorney-General's decision. The decision would be a decision which may be reviewed under the *Administrative Decisions (Judicial Review) Act 1977* in the same way the Attorney-General's decision to proscribe a terrorist organisation under Division 102 of the Criminal Code is reviewable.

Exemption in the training offence for declared aid organisations

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) 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)).

(5) Subsections (1) and (2) do not apply if the training was provided by:
  (a) an organisation that, at the time the training was provided, was a declared aid organisation; or
  (b) an organisation that, at the time the training was provided, was a declared regional aid organisation in respect of the geographical area in which the training was provided.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5) (see subsection 13.3(3)).

Definitions of 'declared aid organisation' and 'declared regional aid organisation' in Division 102

102.1 Definitions

(1) In this Division:

…

declared aid organisation **means an organisation declared by the Minister to be a declared aid organisation under paragraph 102.8A(1)(a).**

declared regional aid organisation **means an organisation declared by the Minister to be a declared regional aid organisation under paragraph 102.8A(1)(b).**

Exemption in the training offence for declared aid organisations

Section 102.5 of the Criminal Code contains two offences which criminalise intentionally providing training to or receiving training from a terrorist organisation.

The first offence in subsection 102.5(1) applies where a person is reckless as to whether the organisation to which the training is being provided, or from which the training is being received, is a terrorist organisation as defined in section 102.1 of the Criminal Code.

The second offence would be committed if a person intentionally provides training to, or intentionally receives training from, a terrorist organisation and the person is reckless as to whether the organisation is listed as a terrorist organisation in the *Criminal Code Regulations 2002*.

The fault element of recklessness which is applied to paragraphs 102.5(1)(c) and (2)(b) is defined in section 5.4 of the Criminal Code. Therefore, in order to commit the offences, a person must be aware of a substantial risk that the organisation is a terrorist organisation, or is a listed terrorist organisation in the *Criminal Code Regulations 2002*, unless the person has a mistaken belief as strict liability applies to paragraph 102.5(2)(b).[31]

The proposed subsection 102.5(5) would provide an exemption to the terrorist organisation training offences in subsections 102.5(1) and (2), if the training was being provided in accordance with an authorisation made by the Attorney-General under proposed section 102.8A. The exemption provided for in proposed subsection 102.5(5) would apply to a declared aid or declared regional aid organisation as well as to any member of such a declared organisation.

As subsection 102.5(5) is a defence to the offences in subsections 102.5(1) and (2), in accordance with subsection 13.3(3) of the Criminal Code, the defendant seeking to rely on the defence would bear the evidential burden in establishing the defence. This is because the information necessary to establish the defence will often be within the unique knowledge of the defendant.

Section 13.6 of the Criminal Code defines evidential burden to mean the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

Definitions of 'declared aid organisation' and 'declared regional aid organisation' in Division 102

The proposed amendments insert definitions of 'declared aid organisation' and declared regional aid organisation' into section 102.1, which contains definitions relevant to Division 102 (Terrorist Organisations). The proposed amendments clarify

[31] Strict liability is defined in section 6.1 of the Criminal Code and the defence of mistake of fact is defined in section 9.2 of the Criminal Code. It is noted that as part of the Government's response to the PJCIS reports, the Government will refer the issue of applying strict liability to the terrorist organisation offences to the National Security Legislation Monitor once appointed.

THIS PAGE IS INTENTIONALLY BLANK

that, for the purposes of Division 102, a 'declared aid organisation' is an organisation declared to be a declared aid organisation by the Minister under paragraph 102.8A(1)(a). Similarly, a 'declared regional aid organisation' is an organisation declared by the Minister to be a declared regional aid organisation under paragraph 102.8A(1)(b).

THIS PAGE IS INTENTIONALLY BLANK

Part 5 Miscellaneous amendments to Part 5.3 of the Criminal Code

Part 5 contains amendments to definitional provisions within Part 5.3 of the *Criminal Code Act 1995* (Criminal Code) to implement the Government's policy of ensuring equality of same sex partnerships in Commonwealth legislation. The majority of this policy was implemented through the enactment of the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws—General Law Reform) Act 2008*.

The proposed amendments ensure that the definitions in the *Acts Interpretation Act 1901* (Acts Interpretation Act) of defacto 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. These definitions form part of important safeguards within the terrorist organisation association offence and preventative detention regime.

Application of definition of defacto partner and related definitions to Part 5.3

100.5 Application of *Acts Interpretation Act 1901*

(1) The *Acts Interpretation Act 1901*, as in force on the day on which Schedule 1 to the *Criminal Code Amendment (Terrorism) Act 2003* commences, applies to this Part.

(2) Amendments of the *Acts Interpretation Act 1901* made after that day do not apply to this Part.

(3) Despite subsections (1) and (2), sections 22A, 22B and 22C of the *Acts Interpretation Act 1901* apply to this Part.

102.1(1) *close family member* of a person means:

(a) the person's spouse**~~, de facto spouse or same-sex partner~~ or de facto partner**; or

(b) a parent, step-parent or grandparent of the person; or

(c) a child, step-child or grandchild of the person; or

(d) a brother, sister, step-brother or step-sister of the person; or

(e) a guardian or carer of the person.

Note: See also subsection (19).

102.1(19) For the purposes of this Division, the close family members of a person are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of *child* in the Dictionary;

(c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a close family member of the person.

105.35 Contacting family members etc.

(1) The person being detained is entitled to contact:

(a) one of his or her family members; and

(b) if he or she:

(i) lives with another person and that other person is not a family member of the person being detained; or

(ii) lives with other people and those other people are not family members of the person being detained;

that other person or one of those other people; and

(c) if he or she is employed—his or her employer; and

(d) if he or she employs people in a business—one of the people he or she employs in that business; and

(e) if he or she engages in a business together with another person or other people—that other person or one of those other people; and

(f) if the police officer detaining the person being detained agrees to the person contacting another person—that person;

Amendment to section 100.5

Currently, section 100.5 of the Criminal Code provides that the Acts Interpretation Act, as it was in force on the day Schedule 1 to the *Criminal Code Amendment (Terrorism) Act 2003* commenced, applies to this part. As a result, no amendments to the *Acts Interpretation Act 1901* made after that day apply to this Part. This provision relates to the reference of powers for terrorism matters from the States and Territories which originally underpinned Part 5.3 of the Criminal Code.

The proposed amendments to paragraph 100.5 will enable recognition of the new definition of 'de facto partner' which was inserted into the Acts Interpretation Act by the *Same-Sex Relationships (Equal Treatment in Commonwealth Laws – Superannuation) Act 2008*. The new definition of de facto partner encompasses members of both same-sex and opposite-sex de facto relationships. This amendment will implement the Commonwealth Government's policy to remove all discrimination against same-sex couples while the remainder of the Acts Interpretation Act as it was in force at that time will continue to apply.

Amendments to section 102.1

Subsection 102.1(1) of the Criminal Code contains the definition of *close family member*. This definition is important in the context of the terrorist organisation association offence in section 102.8 of the Criminal Code. Subsection 102.8(4) of the Criminal Code provides that the terrorist organisation association offence does not apply if the association is with a *close family member* and relates only to a matter that could reasonably be regarded (taking into account the person's cultural background) as a matter of family or domestic concern (section 102.8).

Currently paragraph 102.1(1)(a) provides that a close family member consists of the 'person's spouse, de facto spouse or same sex partner'.

The proposed amendments will remove the words 'de facto spouse or same sex partner' and replace them with an updated definition of 'de facto partner'. Such an amendment will align the Criminal Code with the Acts Interpretation Act. The definition of 'de facto partner' in the Acts Interpretation Act applies to de facto relationships whether the parties to the relationship are of the same-sex or opposite-sex.

To avoid doubt, it is proposed that paragraph 102.1(19) be inserted to emphasise the definition of *close family member* located in paragraph 102.1(1).

The current definition of 'close family member' could be discriminatory as it may not extend to relationships between a child and their co-mother or co-father's relatives. The policy intention is to ensure same-sex parents and their families are recognised as part of the child's family consistently across Commonwealth legislation. This provision will ensure that the definition of close family member includes relationships traced through the child-parent relationship and will thus ensure that same-sex parents and their families are recognised as 'relatives' of the child.

by telephone, fax or email but solely for the purposes of letting the person contacted know that the person being detained is safe but is not able to be contacted for the time being.

(2) To avoid doubt, the person being detained is not entitled, under subsection (1), to disclose:

(a) the fact that a preventative detention order has been made in relation to the person; or

(b) the fact that the person is being detained; or

(c) the period for which the person is being detained.

(3) In this section:

family member of a person means:

(a) the person's spouse, ~~**de facto spouse or same-sex partner**~~ **or de facto partner**; or

(b) a parent, step-parent or grandparent of the person; or

(c) a child, step-child or grandchild of the person; or

(d) a brother, sister, step-brother or step-sister of the person; or

(e) a guardian or carer of the person.

(4) For the purposes of this section, the family members of a person are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of *child* in the Dictionary;

(c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a family member of the person.

Amendments to section 105.35

Subsection 105.35(3) of the Criminal Code contains the definition of *family member*. This definition is important in the context of the preventative detention regime as section 105.35 contains an essential safeguard by ensuring that a person being preventatively detained has the right to contact family members.

Currently paragraph 105.35(3)(a) provides that a family member consists of the 'person's spouse, de facto spouse or same sex partner'.

The proposed amendments will remove the words 'de facto spouse or same sex partner' and replace them with an updated definition of 'de facto partner'. Such an amendment will align the Criminal Code with the Acts Interpretation Act. The definition of 'de facto partner' in the Acts Interpretation Act applies to de facto relationships whether the parties to the relationship are of the same-sex or opposite-sex.

This amendment will ensure that the Commonwealth Government's policy of ensuring equality of same sex partnerships is replicated in the Criminal Code.

It is also proposed that subsection 105.35(4) be inserted to ensure that the definition of family member in subsection 105.35(3) includes relationships that are traced through the child-parent relationship.

The current definition of 'family member' could be discriminatory as it may not extend to relationships between a child and the child's co-mother or co-father's relatives. The policy intention is to ensure same-sex parents and their families are recognised as part of the child's family consistently across Commonwealth legislation.

Dictionary in the *Criminal Code*

***child*: without limiting who is a child of a person for the purposes of this Act, someone is the *child* of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.**

***step-child*: without limiting who is a step-child of a person for the purposes of this Act, someone who is a child of a de facto partner of the person is the *step-child* of the person, if he or she would be the person's step-child except that the person is not legally married to the partner.**

***step-parent*: without limiting who is a step-parent of a person for the purposes of this Act, someone who is a de facto partner of a parent of the person is the *step-parent* of the person, if he or she would be the person's step-parent except that he or she is not legally married to the person's parent.**

Dictionary in the Criminal Code

New definition of child

A new definition of 'child' is proposed to be inserted into the Criminal Code dictionary. The effect of this definition will be that in addition to children within the ordinary meaning of the term, the provision will include a new class of children within the meaning of the *Family Law Act 1975* as amended by the *Family Law Act Amendment (De Facto Financial Matters and Other Measures) Act 2008*. The *Family Law Act 1975* has rules about the parentage of children, including those born following artificial conception procedures. The meaning of 'child' in the *Family Law Act 1975* will include children:

- born to a woman as the result of an artificial conception procedure while that woman was married to, or was a de facto partner of another person (whether of the same or opposite sex), and
- who are children of a person because of an order of a State or Territory court made under a State or Territory law prescribed for the purposes of section 60HB of the *Family Law Act 1975*, giving effect to a surrogacy agreement.

This will ensure that the children of same-sex couples are recognised consistently across Commonwealth laws.

New definition of step-child

A new definition of 'step-child' is proposed to be inserted into the Criminal Code Dictionary. The ordinary meaning of 'stepchild' is a 'child of a husband or wife by a former union'. As same-sex couples cannot marry, the child of one member of the couple by a former relationship cannot be considered to be the other member of the couple's stepchild. This is also the case for children of opposite-sex de facto partners by a former relationship.

The proposed amendment would expand the definition of 'stepchild' to include a child of an opposite-sex or same-sex de facto partner by a former relationship. This is achieved by providing that a 'stepchild' includes a child who would be the stepchild of a person who is the de facto partner of a parent of the child, except that the person and the parent are not legally married. It is not necessary to establish that the person and the parent are capable of being legally married. The definition is inclusive and does not limit who is a stepchild for the purposes of the Criminal Code. The insertion of this definition ensures that stepchildren of both opposite-sex and same-sex de facto relationships are recognised for the purposes of the Criminal Code.

New definition of step-parent

A new definition of 'step-parent' is proposed to be inserted into the Criminal Code dictionary. The ordinary meaning of 'step-parent' is a 'spouse of a parent of a child by a former union'. As same-sex couples cannot marry, a same-sex de facto partner of a parent cannot be considered to be a step-parent of a child born into a former relationship of the parent, de facto or otherwise. This also applies to opposite-sex

THIS PAGE IS INTENTIONALLY BLANK

de facto partners of parents of children who are born into a former relationship of the birth parent, de facto or otherwise.

The proposed amendment would expand the definition of 'step-parent' (where relevant) to include a same-sex or opposite-sex de facto partner of a parent of a child by a former relationship. This is achieved by providing that the partner is a 'step-parent' where that partner would be the child's step-parent, except that the partner and the parent are not legally married. It is not necessary to establish that the partner and the parent are capable of being legally married.

The definition is inclusive and does not limit who is a step-parent for the purposes of the Criminal Code. The insertion of this definition ensures that step-parents of children of both opposite-sex and same-sex de facto relationships are recognised for the purposes of the Criminal Code.

THIS PAGE IS INTENTIONALLY BLANK

Chapter 2 Amendments to the *Crimes Act 1914*

Chapter 2 contains proposed amendments to the *Crimes Act 1914* including:

- amendments to the police arrest, questioning and investigation powers in Part 1C;
- amendments to Part 1AA to provide for an emergency search power when investigating terrorism and to provide greater flexibility for re-entry under a search warrant; and
- amendments to section 15AA to provide for a right of appeal in bail cases.

The proposed amendments to Part 1C of the *Crimes Act 1914* arise from recent operational experience in counter-terrorism investigations and cases. The Government considers it necessary that lessons be learned from counter-terrorism investigations and cases. Implementing lessons learned should provide for an ongoing effective and sustainable national security and counter-terrorism framework.

The proposed amendments to Part 1C of the *Crimes Act 1914* also respond to the findings of the Inquiry by the Hon John Clarke QC into the case of Dr Mohamed Haneef (Clarke Inquiry). The proposed amendments will clarify the original policy intent of the terrorism investigation powers and improve the practical operation of Part 1C for the police, legal practitioners and the courts.

THIS PAGE IS INTENTIONALLY BLANK

Part 1 Amendments to the investigation regime for terrorism offences in Part 1C of the *Crimes Act 1914*

Part 1 of this Chapter addresses proposed amendments to Part 1C of the *Crimes Act 1914*, which provides for the arrest, questioning and investigation powers of law enforcement officers when investigating a Commonwealth crime.

The provisions in Part 1C were considered by the Hon John Clarke QC, who was appointed by the Commonwealth Attorney-General to conduct an independent inquiry into the case of Dr Mohamed Haneef. Mr Clarke produced a Report (the Clarke Report) on his inquiry, which was tabled in Parliament on 23 December 2008.[32] One aspect of the Report looked at deficiencies in the relevant laws of the Commonwealth that were connected to Dr Haneef's case, including Part 1C of the *Crimes Act 1914*.[33] His report identified what he perceived to be 'problem areas' in Part 1C, noting the 'need to strike a balance between civil liberties and the threat to public safety arising from terrorism.'[34]

In response to this aspect of the Clarke Report, the Commonwealth Government is reviewing the relevant provisions in Part 1C, and their interaction with section 3W of the *Crimes Act 1914*, taking into account the issues discussed in the Report.

History of Part 1C of the Crimes Act 1914

At common law, a person must be brought before a judicial officer following arrest as soon as reasonably practicable. A person who is arrested may be detained only for the purpose of bringing the person before a judicial officer to be dealt with according to law. This common law principle was restated in *Williams v R* [1987] HCA 36; (1986) 161 CLR 278.

In *Williams*, the High Court looked at the issue of whether a suspect, after his arrest, was detained longer than was reasonably necessary to enable him to be brought before a magistrate. The relevant State law had provided that the suspect should be taken before a justice as soon as practicable. The High Court held that 'as soon as practicable' gave no power to question an arrested person about the offence for which he had been arrested or other offences, and did not make justifiable a delay which resulted only from the fact that the arresting officers wished to question him. If legislation were to abrogate the common law principle, it needed to be very clear.[35]

Following the High Court decision in *Williams*, Part 1C was inserted into the *Crimes Act 1914* to make it clear that an arrested person may be detained, prior to being brought before a magistrate or other judicial officer, for the purpose of:

- investigating whether that person committed the offence for which they were arrested, and/or

[32] The Report of the Inquiry into the case of Dr Mohamed Haneef (the Clarke Report) is available at http://www.haneefcaseinquiry.gov.au/.
[33] The Clarke Report, pages 231-255.
[34] The Clarke Report, page 231.
[35] *Williams v R* (1986) 161 CLR 278 per Wilson J and Dawson J at page 304 and 313.

- investigating whether the person committed another Commonwealth offence that an investigating official suspects them of committing.

Part 1C provides a framework for how a person can be detained and questioned once they have been arrested for a Commonwealth offence. It also contains important investigatory safeguards to balance the practical consideration that police should be able to question a suspect about an offence before they are brought before a judicial officer.

Part 1C was amended in 2004 by the *Anti-Terrorism Act 2004*. The purpose of the amendments was to provide for a longer investigation period for investigations of terrorism offences, and provide for additional types of time which were excluded from the investigation period. Rather than creating a separate regime for the investigation of terrorism offences, the terrorism provisions were built into the existing Part 1C structure with many of the provisions being based on the existing provisions in Part 1C.

Comparative approaches to arrest and detention in the US, UK and Canada

The United States (US)

In relation to US citizens, the *Federal Rules of Criminal Procedure* (US) provide that a person arrested for a federal offence must be brought before a magistrate 'without unnecessary delay'.[36] This has been generally interpreted to mean 48 hours. Non-US citizens can be detained without arrest if the US Attorney-General has reasonable grounds to believe they endanger national security.[37] In this situation, criminal charges or deportation proceedings must be brought against the person within 7 days or the person will be released. If unable to be deported, the person can remain in custody if they are considered a threat to the community or national security, for an undefined period of time. However, there is a requirement this be reviewed by the Attorney-General every 6 months.

Under the Bush Administration, the US sought to justify pre-charge detention of terrorist suspects by arguing that this was justified by the law that applies during armed conflict, i.e. international humanitarian law. The Bush Administration based its detention of persons held at Guantanamo Bay on the 'Authorization for the Use of Military Force'(AUMF),[38] informed by its interpretation of the principles of international humanitarian law. Under the AUMF, the President has authority to detain persons who he determines planned, authorised, committed, or aided the terrorist attacks that occurred on September 11, 2001, and persons who harboured those responsible for the September 11 attacks. A terrorist suspect could potentially be held indefinitely, without being charged with a criminal offence.

This position has been criticised as being inconsistent with fair trial rights under international law, and the international law prohibition on arbitrary detention. On

[36] *Federal Rules of Criminal Procedure* (USA), Chapter II Rule 5. These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States.
[37] *Immigration and Nationality Act* (USA), section 236A (as amended by section 412 of the *USA Patriot Act 2001*).
[38] Pub.L. 107-40, 115 Stat. 224 (2001)

22 January 2009, US President Obama issued two Executive Orders initiating reviews to determine the appropriate disposition for the detainees held at Guantanamo Bay and to develop a prospective detention policy. [39] We understand these reviews are ongoing.

United Kingdom (UK) and Canada

Common law countries, such as the UK and Canada, have placed pre-charge detention directly into their respective criminal legislation.[40] This legislation applies to the pre-charge detention of both citizens and non-citizens alike and places limits on the authority to detain individuals beyond a specified time without charge.

Proposed amendments to Part 1C of the Crimes Act 1914

Public comment is welcome on the proposed amendments to Part 1C of the *Crimes Act 1914*, which draw upon the suggestions for reform made in the Clarke Report and are aimed at achieving the following objectives:

- clarify the interaction between the power of arrest without warrant under section 3W with the powers of investigation under Part 1C
- set a maximum 7 day limit on the amount of time that can be specified under section 23CB and disregarded from the investigation period when a person has been arrested for a terrorism offence (often referred to as 'dead time')
- clarify how the investigation period and time that is disregarded from the investigation period are calculated, and
- clarify the procedures that apply when making an application to extend the period of investigation or apply for a period of time to be specified under section 23CB.

Although the issues raised in the Clarke Report focussed on the provisions in Part 1C that relate to the investigation of terrorism offences, some of the issues identified in the Report apply equally to provisions in Part 1C that relate to the investigation of non-terrorism offences. Therefore, many of the proposed amendments to the terrorism provisions are also proposed for the non-terrorism provisions.

[39] Executive Orders 13492 and 13493.
[40] *Terrorism Act 2000* (UK) (Schedule 8), *Criminal Code C-46* (Canada) (section 503(1)).

Part IC – Investigation of Commonwealth Offences

Division 1 - Introduction

23 Outline of this Part

(1) This Part:
  (a) provides for the detention of people arrested for Commonwealth offences (see Division 2); and
  (b) imposes obligations on investigating officials in relation to:
    (i) people arrested for Commonwealth offences; and
    (ii) certain other people who are being investigated for Commonwealth offences;
  (see Division 3).

(2) To avoid doubt, this Part does not confer any power to arrest a person.

(3) To avoid doubt, only a person arrested for a Commonwealth offence may be detained under this Part.

23A Application of Part

(1) Any law of the Commonwealth in force immediately before the commencement of this Part, and any rule of the common law, has no effect so far as it is inconsistent with this Part.

(2) This Part does not exclude or limit the operation of a law of a State or Territory so far as it can operate concurrently with this Part.

(3) In subsection (2):

law of a State or Territory includes such a law that is given a particular application by a law of the Commonwealth.

(4) Where a law of a State or Territory would, apart from this subsection, require the electronic recording of confessional evidence in relation to a Commonwealth offence (whether or not expressed as a condition of the admissibility of that evidence), that requirement ceases to apply on the commencement of this Part.

(5) The provisions of this Part, so far as they protect the individual, are in addition to, and not in derogation of, any rights and freedoms of the individual under a law of the Commonwealth or of a State or Territory.

(6) If an offence against a law of the Australian Capital Territory is punishable by imprisonment for a period exceeding 12 months and the investigating official concerned is a member or special member of the Australian Federal Police, this Part applies to that offence as if:
  (a) references to Commonwealth offences included references to that offence; and
  (b) references to a law of the Commonwealth included references to a law of that Territory.

THIS PAGE IS INTENTIONALLY BLANK

23AA How this Part applies to the Antarctic Territories

(1) This Part applies in relation to a person as if he or she were arrested on arrival in a State or Territory if:

(a) the person was arrested within the Australian Antarctic Territory or the Territory of Heard Island and McDonald Islands; and

(b) the person was brought, while under arrest, to the State or Territory; and

(c) this Part applies in the State or Territory.

(2) This Part applies in relation to a person as if he or she first became a protected suspect on arrival in a State or Territory if:

(a) the person was a protected suspect within the Australian Antarctic Territory or the Territory of Heard Island and McDonald Islands; and

(b) the person travelled, while a protected suspect, to the State or Territory; and

(c) this Part applies in the State or Territory.

(3) This Part does not otherwise apply within the Australian Antarctic Territory or the Territory of Heard Island and McDonald Islands.

THIS PAGE IS INTENTIONALLY BLANK

23B Definitions

(1) In this Part:

Aboriginal legal aid organisation means an organisation that provides legal assistance to Aboriginal persons and Torres Strait Islanders, being an organisation identified in the regulations for the purposes of this definition.

~~*arrested*: a person is arrested if the person is arrested for a Commonwealth offence and the person's arrest has not ceased under subsection (3) or (4).~~

arrested: a person is arrested if:

(a) the person is arrested for a Commonwealth offence; and

(b) the person's arrest has not ceased under subsection (3) or (4); and

(c) the person has not been released.

authorising officer, in relation to an investigating official, means:

(a) if the investigating official is a member or special member of the Australian Federal Police—a person for the time being holding office or acting as:

(i) the Commissioner; or

(ii) a Deputy Commissioner; or

(iii) a member or special member of the Australian Federal Police who is of the rank of superintendent or higher; or

(b) if the investigating official is a member of the police force of a State or Territory—a person for the time being holding office or acting as:

(i) the Commissioner or the person holding equivalent rank; or

(ii) an Assistant Commissioner or a person holding equivalent rank; or

(iii) a superintendent or a person holding equivalent rank; of the police force of that State or Territory.

Commonwealth offence means:

(a) an offence against a law of the Commonwealth, other than an offence that is a service offence for the purposes of the *Defence Force Discipline Act 1982*; or

(b) a State offence that has a federal aspect.

inform, in relation to an investigating official informing a person who is under arrest or a protected suspect, means notify the person:

(a) in a language in which the person is able to communicate with reasonable fluency; and

(b) in a manner that the official has reasonable grounds to believe is a manner that the person can understand having regard to any apparent disability the person has.

investigating official means:

(a) a member or special member of the Australian Federal Police; or

(b) a member of the police force of a State or Territory; or

(c) a person who holds an office the functions of which include the investigation of Commonwealth offences and who is empowered by a law of the Commonwealth because of the holding of that office to make arrests in respect of such offences.

Division 1 - Introduction

Revised definitions of 'arrested' and 'under arrest'

The powers of detention under Part 1C only apply where the person is under a valid state of arrest. However, the Clarke Report highlighted there has been some uncertainty as to how the power of arrest under existing section 3W in Part 1AA interacts with the provisions in Part 1C (see proposed amendments to section 23C for a detailed discussion of this issue).

Currently, subsection 23B(1) of the *Crimes Act 1914* defines that a person is 'arrested' if the person has been arrested for a Commonwealth offence and the person's arrest has not ceased under subsection (3) or (4). The definition of 'under arrest' is similar. It is proposed that both of these definitions be amended to include the phrase 'the person has not been released' to clarify that a person may be arrested or under arrest where that person's arrest has not ceased under subsection (3) or (4) *and* the person has not been released under other circumstances.

This revised definition makes it clear that a person could be released under other circumstances. For example, the person could be released under subsection 3W(2) which provides for the release of an arrested person if the police no longer believe on reasonable grounds that the person committed an offence. The proposed amendment will, in conjunction with the more substantial amendments to proposed sections 23C and 23DB, clarify that a person is not arrested for a Commonwealth offence if the person has been released under subsection 3W(2).

New definition of 'authorising officer'

Currently, an investigating official may apply for an extension of the investigation period for a terrorism offence under section 23DA of the *Crimes Act 1914* or for a specified period of time to be disregarded from the investigation period under section 23CB. The Clarke Report stated that 'there is a strong case for requiring the application to be made by more senior officers, trained in the process and familiar with all the facts, including those arising in sensitive material.'[41] The Report suggested that the task of settling the documents and making the applications for this purpose should be entrusted only to a senior officer at a minimum at inspector level.[42]

It is therefore proposed that an additional safeguard is included in these provisions, so that before an investigating official may make an application under section 23CB or 23DA the application must be approved by a senior member of the Australian Federal Police (AFP) or senior member of a State or Territory police force (State police as well as the AFP utilise the terrorism provisions under Part 1C) (see proposed new sections 23DC and 23DE). A senior AFP member would be defined in section 23B to include the Commissioner of the AFP, a Deputy Commissioner of the AFP, or an AFP member of or above the rank of Superintendent. A senior State member of a State or Territory police force would include the equivalent of these levels.

[41] The Clarke Report, page 251.
[42] The Clarke Report, page 252.

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

judicial officer, in relation to a person who is arrested, means:

(a) a magistrate; or

(b) a justice of the peace; or

(c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

protected suspect has the meaning given by subsection (2).

question has the meaning given by subsection (6).

***serious Commonwealth offence* means a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.**

tape recording means audio recording, video recording or recording by other electronic means.

~~*under arrest*: a person is under arrest if the person has been arrested for a Commonwealth offence and the person's arrest has not ceased under subsection (3) or (4).~~

***under arrest*: a person is under arrest if:**

(a) the person is arrested for a Commonwealth offence; and

(b) the person's arrest has not ceased under subsection (3) or (4); and

(c) the person has not been released.

(2) A person is a *protected suspect* if:

(a) the person is in the company of an investigating official for the purpose of being questioned about a Commonwealth offence; and

(b) the person has not been arrested for the offence; and

(c) one or more of the following applies in relation to the person:

(i) the official believes that there is sufficient evidence to establish that the person has committed the offence;

(ii) the official would not allow the person to leave if the person wished to do so;

(iii) the official has given the person reasonable grounds for believing that the person would not be allowed to leave if he or she wished to do so; and

(d) none of the following applies in relation to the person:

(i) the official is performing functions in relation to persons or goods entering Australia, and the official does not believe that the person has committed a Commonwealth offence;

(ii) the official is performing functions in relation to persons or goods leaving Australia, and the official does not believe that the person has committed a Commonwealth offence;

(iii) the official is exercising a power under a law of the Commonwealth to detain and search the person;

(iv) the official is exercising a power under a law of the Commonwealth to require the person to provide information or to answer questions; and

(e) the person has not ceased to be a suspect under subsection (4).

Definition of 'judicial officer'

'Judicial officer' is currently defined in subsections 23C(9) and 23CA(10) and referred to in subsection 23CB(3) to mean a magistrate, justice of the peace or a person authorised to grant bail under the law of the State or Territory in which the person was arrested. A person ceases to be arrested once they have been brought before a judicial officer.

The proposed amendment will simply locate this definition at the beginning of Part 1C so that the term is centrally located with the other definitions specific to Part 1C.

(3) A person ceases, for the purposes of this Part, to be arrested for a Commonwealth offence if the person is remanded in respect of that offence by ~~one 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;~~

~~otherwise than under paragraph 83(3)(b), (4)(b), (8)(a), (8)(b), subsection 83(12), paragraph 83(14)(a), or subparagraph 84(4)(a)(ii) or (6)(a)(i) of the Service and Execution of Process Act 1992 .~~

a judicial officer otherwise than under any of the following provisions of the *Service and Execution of Process Act 1992*:

(a) paragraph 83(3)(b), (4)(b), (8)(a) or (8)(b);

(b) subsection 83(12);

(c) paragraph 83(14)(a);

(d) subparagraph 84(4)(a)(ii) or (6)(a)(i).

(4) A person ceases, for the purposes of this Part, to be arrested or a protected suspect if:

(a) an investigating official believes on reasonable grounds that the person is voluntarily taking part in covert investigations; and

(b) those covert investigations are being conducted by the official for the purpose of investigating whether another person has been involved in the commission of an offence or suspected offence (whether a Commonwealth offence or not).

(5) Subsection (4) does not prevent the person from being re-arrested or again becoming a protected suspect.

(6) In this Part, a reference to questioning a person:

(a) is a reference to questioning the person, or carrying out an investigation (in which the person participates), to investigate the involvement (if any) of the person in any Commonwealth offence (including an offence for which the person is not under arrest); and

(b) does not include a reference to carrying out a forensic procedure on the person under Part ID.

THIS PAGE IS INTENTIONALLY BLANK

Division 2--Powers of detention

Note: The powers in this Division only apply in relation to people under arrest. They do not apply in relation to protected suspects.

Subdivision A—Non-terrorism offences

23C ~~Period of arrest if arrested for non-terrorism offence~~

Period of investigation if arrested for a non-terrorism offence

(1) If a person is arrested for a Commonwealth offence (other than a terrorism offence), the following provisions apply.

Note: A person would not be arrested for a Commonwealth offence if, for example, the person has been released under subsection 3W(2) –see the definition of arrested in subsection 23B(1).

(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 Commonwealth offence that an investigating official reasonably suspects **[*reasonably believes*] that** the person **has** ~~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.~~

(2A) Subsection (2) ceases to apply at the end of the investigation period, but that cessation does not affect any other power to detain the person in relation to the arrest.

(3) If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.

~~(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 (9).~~

(4) For the purposes of this section, but subject to subsections (6) and (7), 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 23D~~ **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.

Restructure of Division 2 of Part 1C (Powers of detention)

Currently, Division 2 of Part 1C (Powers of detention) includes provisions relating to the investigation of both terrorism and non-terrorism offences. This is because the terrorism provisions were built into the existing Part 1C provisions.

To facilitate a clearer understanding of the provisions, it is proposed that the terrorism and non-terrorism provisions in Division 2 of Part 1C should be separated into two separate subdivisions. Subdivision A would deal with the investigation of non-terrorism offences, and Subdivision B would deal with the investigation of terrorism offences.

New Subdivision A – Non-terrorism offences

Period of investigation if arrested for an offence

Interaction between existing sections 3W and paragraphs 23C(2)(b) and 23CA(2)(b)

There has been some uncertainty as to how the power of arrest under existing section 3W interacts with the provisions in Part 1C that specify the period for which a person can be detained before they are brought before a magistrate or judicial officer.

Subsection 3W(1) provides that a constable may, without warrant, arrest a person for an offence if the constable believes on reasonable grounds that the person has committed or is committing a Commonwealth offence (including a terrorism offence), and that proceedings by summons against the person would not achieve one or more specified purposes, including ensuring the appearance of the person before a court in respect of the offence. Subsection 3W(2) provides that if the constable in charge of the investigation ceases to hold this belief, then the person must be released.

The powers of detention under Part 1C only apply where the person is under a valid state of arrest.[43] The provisions in Part 1C set out relevant requirements and safeguards to ensure that a reasonable pre-charge investigation period can occur before the person must be brought before a magistrate.

Subsection 23C(2) provides for the person to be detained for the purpose of investigating whether the person committed the offence for which they were arrested, or whether the person committed another offence that an investigating official reasonably suspects the person to have committed. Similarly, paragraph 23CA(2) provides for the person to be detained for the purpose of investigating whether the person committed the terrorism offence for which they were arrested, or whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed.

[43] This is supported by subsection 23(3) which states that only a person arrested for a Commonwealth offence may be detained under Part 1C. The note under Division 2 (Powers of detention) also states that "The powers in this Division only apply in relation to people under arrest." Furthermore, sections 23C(1) and 23CA(1) state that those provisions only apply if a person is arrested for an offence.

(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 23CA~~ **section 23DB.**

(6A) 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.

The Clarke Report suggested it is possible for some to misinterpret subsections 23C(2) and 23CA(2) to mean that once a person is arrested, the person can be detained in the circumstances set out in paragraphs 23C(2)(b) and 23CA(2)(b), regardless of whether the requisite belief under section 3W is maintained. The Clarke Report suggested that if the provisions were interpreted in a way that did not allow for this, it was arguable that the power to detain under section 23CA(2)(b) (and 23C(2)(b)) would serve no purpose.[44]

Paragraph 23C(2)(b) was inserted into Part 1C by the *Measures to Combat Serious and Organised Crime Act 2001*. Prior to this amendment, subsection 23C(2) enabled a person, who had been arrested for a Commonwealth offence, to be detained for the purpose of investigating whether the person committed the offence or any other Commonwealth offence. The purpose of the amendment was to create an additional safeguard by taking away an incentive to lay a holding charge.

A holding charge is where someone is arrested for a certain offence, in the hope that questioning and further investigation will reveal evidence that the person has committed other (more serious) offences for which there is presently no evidence.[45] Paragraph 23C(2)(b) ensures that if a person was arrested for a certain offence, the person cannot be questioned about any other kind of offence if there is no basis or suspicion that the person committed that offence. Paragraph 23CA(2)(b) was based on paragraph 23C(2)(b) when the terrorism provisions were inserted into Part 1C.

The requirement to release a person under subsection 3W(2) should override the power of continued detention under subsections 23C(2) and 23CA(2). Subsections 23C(2) and 23CA(2) alone should not be used to detain a person - they should simply create an additional threshold to be met for the detention under arrest to be valid. If the officer in charge of the investigation does not believe on reasonable grounds that the person committed the offence, the person must be released, regardless of whether the officer reasonably suspects the person has committed another offence. This is because the relevant threshold under section 3W is reasonable 'belief'.

It is proposed that this should be clarified. The new note under subsection 23C(1) would make it clear that a person is not arrested for a Commonwealth offence if the person has been released under subsection 3W(2). This would also be reinforced by the revised definition of 'arrested' in subsection 23B(1).

New proposed subsection 23C(2A) would also make it clear that a person could not be detained for the purpose of questioning once the investigation period had ceased. It also clarifies that this provision would not affect any other power to detain the person, for example, under State or Territory legislation or the Commonwealth preventative detention regime in Part 5.3 of the *Criminal Code*.

For corresponding amendments to the provisions for terrorism offences, see proposed new section 23DB (current section 23CA).

---

[44] The Clarke Report, page 234.

[45] The use of 'holding charges' to justify the detention and questioning of a person on charges for which there is insufficient evidence to justify arrest was criticised by the Australian Law Reform Commission in its 1975 report on *Criminal Investigation* (pg 19).

THIS PAGE IS INTENTIONALLY BLANK

'Belief'' or 'suspicion' threshold test in existing section 3W and paragraphs 23C(2)(b) and 23CA(2)(b)

Subsection 3W(1) provides that a constable may, without warrant, arrest a person for an offence if the constable *believes on reasonable grounds* that the person has committed or is committing a Commonwealth offence (the 'arrest test'). Paragraphs 23C(2)(b) and 23CA(2)(b) enable a person to be detained for the purpose of investigating an offence that is different to the offence for which they were arrested, as long as the investigating official *reasonably suspects* that the person committed the other offence (the 'investigation test').

The Clarke Report drew attention to the two different thresholds. The Report questioned whether the arrest test under section 3W should be based on 'suspicion' or 'belief' and whether it should be consistent with the threshold in the investigation test in paragraphs 23C(2)(b) and 23CA(2)(b), which is based on 'suspicion'.[46] However, the different thresholds operate for different purposes under each test because the tests relate to different aspects of a person's arrest.

In 1991, a Review Committee, chaired by the Hon Sir Harry Gibbs, produced a report which considered whether the threshold for the arrest test should be 'believe' or 'suspect'. Where legislation prescribes 'reasonable grounds' for a state of mind, such as suspicion or belief, it requires the existence of facts which are sufficient to induce that state of mind in a reasonable person. 'Reasonable grounds to believe' requires a higher degree of satisfaction of the facts than 'reasonable grounds to suspect'.

The Review Committee noted that the requirement of a belief has been in the *Crimes Act 1914* since an equivalent version of section 3W was enacted in 1926 and does not appear to have caused any difficulties for law enforcement authorities. Having regard to 'the gravity of the interference with the liberty of the subject that occurs when an arrest is made,' the Review Committee concluded that the expression 'believes on reasonable grounds' was appropriate.[47] Although the Review Committee considered this issue 18 years ago, the principles upon which the Review Committee based their conclusion are just as important in today's criminal justice system. The Committee's conclusion reflects an appropriate balance between considering the requirements of law enforcement as well as the civil liberties of individuals. It is therefore not proposed that the belief threshold in the arrest test should be lowered to that of suspicion.

The investigation test under subsections 23C(2) and 23CA(2) only applies once a person has been arrested, and serves a different purpose to the arrest test. In 1989 the Review Committee produced an Interim Report on *Detention Before Charge*.[48] The Review Committee was of the opinion that the law should provide police officers, and other officials whose duty it is to investigate criminal offences, with 'a reasonable opportunity to interrogate an arrested person before taking the arrested person before

[46] The Clarke Report, pages 235-238.
[47] H Gibbs, R Watson, & A Menzies, *Review of Commonwealth Criminal Law— FinalReport*, December 1991, paragraph 3.18.
[48] H Gibbs, R Watson, & A Menzies, *Review of Commonwealth Criminal Law— Interim Report Detention Before Charge*, February 1989.

(7) In ascertaining any period of time for the purposes of subsection (4) or (6)**,** ~~the following times are to be disregarded;~~ **disregard any reasonable time during which the questioning of the person is suspended or delayed**:

(a) ~~the time (if any) that is reasonably required to convey the person~~ **to allow the person to be conveyed** 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; **or**

(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; **or**

(c) ~~any time during which the questioning of the person is suspended or delayed~~ to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place; **or**

(d) ~~any time during which the questioning of the person is suspended or delayed~~ to allow the person to receive medical attention; **or**

(e) ~~any time during which the questioning of the person is suspended or delayed~~ because of the person's intoxication; **or**

(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; **or**

~~(fa)~~ **(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; **or**

~~(g)~~ **(h)** ~~the time (if any) that is reasonably required~~ in connection with making and disposing of an application under section 23D, 23WU or 23XB; **or**

~~(ga)~~ **(i)** ~~any time during which the constable is informing~~ **to allow a constable to inform** the person of matters specified in section 23WJ; **or**

~~(h)~~ **(j)** ~~any reasonable time during which the questioning of the person is suspended or delayed~~ to allow the person to rest or recuperate; **or**

~~(i)~~ **(k)** ~~any time during which~~ **to allow** a forensic procedure **to be** ~~is being~~ carried out on the person by order of a magistrate under Division 5 of Part ID; **or**

~~(j)~~ **(l)** ~~any time during which the questioning of the person is suspended or delayed, if~~ **where** section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section.

(7A) To avoid doubt:

(a) a time that is disregarded under subsection (7) may be covered by the application of more than one paragraph of that subsection; and

(b) subsection (7) does not prevent the person being questioned during a time covered by a paragraph of subsection (7), but if the person is questioned during such a time, the time is not to be disregarded.

a magistrate.'[49] The investigation and questioning of suspects is a fundamental part of law enforcement. Police investigations would be unduly constrained if they were not able to question a suspect about an offence, other than the offence for which the person was arrested. The Review Committee recommended that:

> a person arrested for a Commonwealth offence, could be detained for the purpose of questioning him or her with regard to that offence or other offences or for the purpose of conducting other investigations with regard to any such offence or securing or preserving evidence in relation thereto.[50]

This recommendation was implemented as subsection 23C(2) when Part 1C was inserted into the *Crimes Act 1914* in 1991. However, as discussed above, in 2001 subsection 23C(2) in Part 1C was amended to prevent the situation where someone could be subject to a 'holding charge'. The addition of paragraph 23C(2)(b) ensured that if a person was arrested for a certain offence, the person could not be questioned about any other kind of offence if there was no basis or suspicion that the person committed that offence. The relevant state of mind that was selected for this test was 'suspicion' as opposed to 'belief'. If the threshold in paragraphs 23C(2)(b) and 23CA(2)(b) was raised to that of 'belief', then police investigations would be further constrained in their ability to investigate the criminal activity associated with the arrested person. It is proposed that this would not adequately recognise the requirements of law enforcement, and that the correct balance was struck when paragraphs 23C(2)(b) and 23CA(2)(b) were inserted.

Comments are welcome on whether the provisions should be amended so that, while a person is arrested, an investigating official can only detain the person for the purpose of investigating the offence for which they were arrested or another offence that the investigating official reasonably *believes* the person to have committed.

For corresponding amendments to the terrorism provisions, see proposed subsection 23DB(2) (currently 23CA(2)).

Investigation period and disregarded time

Existing sections 23C and 23CA set out the period of time that a person, who has been arrested for a Commonwealth non-terrorism or terrorism offence, can be detained for investigation purposes. The investigation period begins when the person is arrested and can last for a reasonable time, up to a maximum of four hours.[51] The investigation period may be extended any number of times upon application, but the total length of the periods of extension cannot be more than eight hours for a serious non-terrorism offence or 20 hours for a terrorism offence. This amounts to a total maximum investigation period of 12 hours for a serious non-terrorism offence or 24 hours for a terrorism offence.

---

[49] H Gibbs, R Watson, & A Menzies,*Review of Commonwealth Criminal Law— Interim Report Detention Before Charge*, February 1989, paragraph 4.4.
[50] H Gibbs, R Watson, & A Menzies,*Review of Commonwealth Criminal Law— Interim Report Detention Before Charge*, February 1989, paragraph 1.2.
[51] The investigation period is a maximum of two hours if the person is or appears to be aged less than 18 years or is an Aboriginal person or a Torres Strait Islander.

Evidentiary provision

(8) 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

(b) any particular time was covered by a provision of subsection (7).

~~(9) 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.~~

However, subsections 23C(7) and 23CA(8) also provide for periods of time (often referred to as 'dead time') that are disregarded in the calculation of the investigation period. There has been much debate about the purpose and nature of disregarded time.

Generally, the purpose of disregarded time is to ensure that a proper pre-charge interview can take place. It recognises that there needs to be some flexibility in the maximum time limit for the investigation period to balance two competing considerations - the reasonable requirements of law enforcement and the protection of civil liberties of people who have been arrested for, but not yet charged with, a criminal offence. The types of time that can be disregarded from the investigation period for a terrorism or non-terrorism offence fall into three general categories.

The first category is where questioning is suspended or delayed because it cannot occur, or should not occur, for the benefit of the suspect. For example, a person must not be questioned during a forensic procedure.[52] This time is excluded from the investigation period to prevent a situation where a forensic procedure is conducted early in the investigation period and the investigators lose all of their remaining questioning time. Questioning also cannot occur for a reasonable time if the arrested person has requested and arranged for a legal practitioner to attend, but the legal practitioner has not yet arrived to the place of questioning.[53] Questioning of a suspect may also be suspended or delayed to allow for the suspect to rest, recuperate or receive medical attention. This takes away an incentive to rush the suspect in exercising these rights if they were not excluded from the investigation period.

The second category relates to complying with requirements of the legislation. For example, the time taken to make an application to extend the investigation period can be excluded from the investigation period. This is intended to prevent a situation where the investigation period runs out while a judicial officer is considering whether to grant an extension of the investigation period. There may also be situations where it is impractical to question a person while dealing with the logistical aspects of the investigation. For example, the time that is reasonably required to transport the suspect from the place they are arrested to the place where they are questioned, or the time that is spent arranging and conducting an identification parade could result in questioning being suspended or delayed. If these events affect the ability to properly question a person, it would be unfair if the investigation period were to include the time it took for these events to occur.

There is a third category of disregarded time that applies specifically to the terrorism provisions in Part 1C and recognises that it is not always possible to predict the circumstances where time should be disregarded from the investigation period to ensure a proper pre-charge interview takes place. Paragraph 23CA(8)(m) provides that any reasonable time that is within a period specified under section 23CB may be disregarded from the investigation period. This includes, for example, the time needed to collate information from an overseas country before presenting it to a suspect during questioning, or waiting for overseas jurisdictions to respond to requests for critical information from the Australian Federal Police. Unlike the other

[52] Section 23XIA *Crimes Act 1914*.
[53] Section 23G *Crimes Act 1914*.

THIS PAGE IS INTENTIONALLY BLANK

categories of disregarded time, the length of time that should be disregarded is not as immediately apparent. This ambiguity is balanced by requiring that these periods of time must be judicially authorised.

Overall, the fixed investigation period, coupled with the time that can be excluded from that period, provides a statutory framework for what is reasonable conduct in the course of investigating a person for a Commonwealth offence.

Can periods of disregarded time under existing subsections 23C(7) and 23CA(8) occur simultaneously or are the periods of time cumulative?

At the moment, there is uncertainty as to whether periods of disregarded time under subsections 23C(7) and 23CA(8) can occur simultaneously. Proposed subsection 23C(7A) would put beyond doubt that periods of disregarded time can occur at the same time, but if the time overlaps, it can only be disregarded once.

See proposed paragraph 23DB(10)(a) (current 23CA(8)) for similar amendments to the terrorism provisions.

Can questioning occur during a period of time that is disregarded from the investigation period under subsections 23C(7) or 23CA(8)?

The Clarke Report raised the question as to whether it was possible for investigating officials to resume questioning during a period of disregarded time. For example, paragraph 23C(7)(g) currently provides that the time reasonably required in connection with the making and disposal of an application for extending the investigation period is disregarded for the purpose of calculating the investigation period. While the better view is that questioning can be resumed because to do so is so close to the heart of the policy intent of the legislation, the Clarke Report considered clarification was required.[54]

As discussed above, the purpose of disregarded time is to ensure that a proper pre-charge interview can take place. It recognises that there may be circumstances when the questioning of the person may be suspended or delayed. These circumstances are listed in subsection 23C(7). Given there is a fixed limit to the investigation period, it would fail to recognise the exigencies of law enforcement if this time was not excluded from the investigation period.

Many of the events listed in section 23C(7) are circumstances when it would simply not be possible to question a person. For example, as described above, it is not possible to question a person while a forensic procedure is taking place. However, there may be times when an event under subsection 23C(7) occurs, but there is no reason to suspend or delay the questioning of the person. For example, a magistrate may decided to take several hours before making a determination as to whether to extend a period of investigation. There may be no practical reason why questioning could not occur during this time, and questioning the person during this time would not curtail the proper exercise of the person's rights.

[54] The Clarke Report, page 250.

THIS PAGE IS INTENTIONALLY BLANK

The proposed amendments to subsection 23C(7) would clarify that it is only when the questioning of the person is suspended or delayed that the time can be disregarded from the investigation period. Proposed subsection 23C(7A) clarifies that subsection 23C(7) does not prevent the person being questioned during a time covered by the events listed in subsection 23C(7). However, if the person is questioned during such an event, the time must count as part of the investigation period. The amendments could not be used as a way to extend the period of investigation time. For example, if investigators question a suspect during a time that falls under paragraph 23C(7)(h) (currently 23C(7)(g)), then that questioning time counts towards the four hour investigation time allowed under section 23C or as extended under section 23D.

The amendment is also not intended to affect the rights of individuals or obligations of investigating officials. Proposed subsection 23C(7A) does not suggest, for example, that the prohibition against questioning a person during a forensic procedure should be overridden. Nor does it override the requirement to delay questioning until a person's lawyer arrives. It simply clarifies that when questioning is able to occur, and does occur, the investigation period should continue to run.

See proposed subsection 23DB(10) for corresponding proposed amendments to the provisions for terrorism offences.

Sections 23CA & 23DA to 23E will be repealed and replaced with sections 23DB to 23E.

23D Application may be made for extension of investigation period ~~Extension of investigation period if arrested for non-terrorism offence~~

(1) If a person is under arrest for a serious **Commonwealth** offence (other than a terrorism offence), an investigating official may, at or before the end of the investigation period, apply, **in writing, to a magistrate** for an extension of the investigation period.

(2) Subject to subsection (3), 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 outcome of any previous application under this section in relation to the person and the investigation period;

(d) the period (if any) by which the investigation period has been reduced under subsection 23C(6);

(e) the total amount of time (if any) that has been disregarded under subsection 23C(7) in ascertaining the investigation period under subsection 23C(4);

(f) the maximum amount of time by which the investigation period could be extended;

(g) the reasons why the investigating official believes the investigation period should be extended;

(h) the period by which the investigating official believes the investigation period should be extended.

~~(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) Subsection (2) does not require any information to be included in the application if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

Extension of investigation period for non-terrorism offence

Who may grant an extension of the investigation period?

Currently under section 23D, an application for an extension of the investigation period must be made to and granted by a magistrate, any justice of the peace or a bail justice. Other categories of persons, apart from magistrates, were included on the basis that it may be difficult to secure the services of a magistrate in urgent circumstances. The Clarke Report considered that an application of this nature is too important to be dealt with by someone other than an experienced judicial officer. The Report considered that while a magistrate should be acceptable, a justice of the peace or bail justices are less compelling. Therefore, it is proposed that subsection 23D(2) should be amended so that an application for an extension of the investigation period can only be made to, and granted by, a magistrate.

See proposed sections 23DC and 23DE for corresponding amendments to the terrorism provisions.

Form and notice of applications to extend the investigation period

The Clarke Report considered that the process required by existing sections 23CA, 23CB, 23DA and consequently 23D, is not particularly prescriptive.[55] The Report considered that the procedures should be 'in a sense, watertight' to avoid any problems of procedural fairness arising.[56] However, this must be balanced with ensuring that the provisions do not become overly prescriptive or complicated.

Currently, section 23D provides that an application for extension of the investigation period may be made before a judicial officer, or in writing, by telephone or other electronic means, and the person or his or her legal representative may make representations to the judicial officer about the application. Section 23D does not require the application to include any particular statements or information. It is proposed that the process for the application and granting of an extension of the investigation period should be clarified. The revised process will ensure that sufficient procedural fairness safeguards are in place. Under proposed section 23D, the process would be as follows.

An application could only be made in writing (not by telephone). Before the application is considered by the magistrate, the investigating official would need to give a copy of the application to the person (or legal representative) and inform the person (or legal representative) that the person may make representations to the magistrate. The application would be required to include certain information to ensure that the magistrate is able to appropriately consider whether to grant the extension or not. If the magistrate decides to grant the extension, the magistrate must give the investigating official a copy of the instrument granting the extension, who must then give a copy to the person (or legal representative). If the application was made electronically, the magistrate would need to inform the investigating official of

[55] See page 251 of the Clarke Report. Although the Report considered this issue in the context of the terrorism provisions (section 23DA), the issue is applicable to section 23D.
[56] The Clarke Report, pages 252-253.

~~(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) Before the application is considered by the magistrate, the investigating official must:

(a) provide a copy of the application to the person, or to his or her legal representative; and

(b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.

~~(4) Subject to subsection (5), the judicial officer may extend the investigation period, by signed written authority, if satisfied that:~~

~~(a) the offence is a serious 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 serious 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.~~

~~(4A) 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.~~

~~(4B) The judicial officer must give the investigating official a copy of the authority as soon as practicable after signing the authority.~~

(5) If the application contains any information of a kind mentioned in subsection (3), the investigating official may remove it from the copy of the application that is provided to the person or to his or her legal representative.

~~(5) The investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once.~~

(6) The person, or his or her legal representative, may make representations to the magistrate about the application.

~~(6) In this section:~~

~~***"serious offence"*** means a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.~~

the matters included in the instrument, who would then inform the person (or legal representative).

The Clarke Report raised the issue of how sensitive or classified information should be treated in applications of this nature. It stated that 'it should be borne in mind that a judicial officer might be required to consider sensitive or classified information in the absence of the person under arrest and/or their lawyer.'[57] The Report considered that there should be specific provisions in the legislation addressing this situation and referred to Schedule 8 of the United Kingdom *Terrorism Act 2000* as an example or starting point for considering this issue. That Act contains a specific provision for the judicial officer to make an order that material may not be provided to the person or their legal representative if satisfied that for stipulated reasons there are reasonable grounds for believing that the information should be kept secret.

Proposed subsection 23D(3) is an avoidance of doubt provision so that the application is not required to include information which, if disclosed, is likely to prejudice national security, to be protected by public interest immunity, to put at risk ongoing operations by law enforcement or intelligence agencies or put at risk the safety of the community. However, proposed subsection 23D(5) provides that if the application does contain this information, the investigating official may remove that information from the copy of the application that is given to the person (or legal representative). This provision is based on subsection 104.12A(3) of the *Criminal Code*, which deals with the information that must be given to a person in relation to a control order. This model was adopted to ensure consistency within Commonwealth legislation.

[57] The Clarke Report, page 248.

23DA Magistrate may extend investigation period

(1) This section applies if:

(a) a person is arrested for a serious Commonwealth offence (other than a terrorism offence); and

(b) an application has been made under subsection 23D(1) to a magistrate in respect of the person.

Extension of investigation period ~~if arrested for a non-terrorism offence.~~

(2) ~~(4)~~ **Subject to subsection (3),** ~~(5),~~ **the magistrate may extend the investigation period, by signed written instrument** ~~authority~~**, if satisfied that:**

(a) the offence is a serious **Commonwealth** offence **(other than 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 serious **Commonwealth** 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.

(3) ~~(4A)~~ **Subject to subsection (4), the instrument** ~~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.

(4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*; or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) The magistrate 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 telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.

Note: See section 23E.

~~(4B) The judicial officer must give the investigating official a copy of the authority as soon as practicable after signing the authority.~~

THIS PAGE IS INTENTIONALLY BLANK

(6) The investigating official must:

(a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and

(b) if the instrument was made as a result of an application made by telex, fax or other electronic means – inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

(7) ~~(5)~~ The investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once.

~~(6) In this section:~~

~~***"serious offence"*** means a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.~~

THIS PAGE IS INTENTIONALLY BLANK

Subdivision B—Terrorism offences

23DB Period of investigation if arrested for a terrorism offence

~~**23CA Period of arrest if arrested for terrorism offence**~~

(1) If a person is arrested for a terrorism offence, the following provisions apply.

Note: A person would not arrested for a Commonwealth offence if, for example, the person has been released under subsection 3W(2) – see the definition of arrested in subsection 23B(1).

(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 **[*reasonably believes*] that** the person ~~to have~~ **has 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) Subsection (2) ceases to apply at the end of the investigation period, but that cessation does not affect any other power to detain the person in relation to the arrest.

(4) If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.

~~(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).~~

(5) ~~(4)~~ **For the purposes of this section, but subject to subsections (7) and (9),** ~~(6) and (8),~~ the investigation period begins when the person is arrested, and ends at a **later time** ~~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 **23DF** ~~23DA~~.

(6) ~~(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.

(7) ~~(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.

New Subdivision B – Terrorism Offences

Interaction between section 3W and paragraphs 23C(2)(b) and 23CA(2)(b)

It is proposed that a note should be inserted after subsection 23DB(1) (currently 23CA(1)), to clarify that a person is not arrested for a terrorism offence if the person has been released under subsection 3W(2). New proposed subsection 23DB(3) would also make it clear that a person could not be detained for the purpose of questioning once the investigation period has ceased. It also clarifies that this provision would not affect any power to detain the person, for example, under the Commonwealth preventative detention regime in Division 105 of the Criminal Code.

See proposed amendments to section 23C for corresponding amendments to the non-terrorism provisions and further explanation.

Threshold tests in section 3W and paragraphs 23C(2)(b) and 23CA(2)(b)

'Belief' or 'suspicion'?

It is proposed that the threshold test of 'suspicion' in section 23CA(2) should remain so that a person may be detained for the purpose of investigating a terrorism offence or another terrorism offence that an investigating official reasonably *suspects* the person has committed. However, comments are welcome on whether the threshold should be raised to that of 'belief'.

For further explanation and corresponding amendments to the non-terrorism provisions, see the proposed amendments to section 23C(2).

(8) ~~(7)~~ However, in relation to each first arrest, disregard subsection **(7)** ~~(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.

(9) In ascertaining any period of time for the purposes of subsection (5) or (7), disregard any reasonable time during which the questioning of the person is suspended or delayed:~~(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~~ **to allow** the person to be conveyed 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; **or**

(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; **or**

(c) ~~any time during which the questioning of the person is suspended or delayed~~ to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place; **or**

(d) ~~any time during which the questioning of the person is suspended or delayed~~ to allow the person to receive medical attention; **or**

(e) ~~any time during which the questioning of the person is suspended or delayed~~ because of the person's intoxication; **or**

(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; **or**

(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; **or**

(h) ~~the time (if any) that is reasonably required~~ in connection with the making and disposing of an application under section **23DC, 23DE,** 23WU or 23XB; **or**

(i) ~~any time during which the constable is informing~~ **to allow a constable to inform the person** of matters specified in section 23WJ; **or**

(j) ~~any reasonable time during which the questioning of the person is suspended or delayed~~ to allow the person to rest or recuperate; **or**

(k) ~~any time during which~~ **to allow** a forensic procedure **to be** carried out on the person by order of a magistrate under Division 5 of Part ID; **or**

(l) ~~any time during which the questioning of the person is suspended or delayed, if~~ **where** section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section; **or**

(m) **subject to subsection (11), where the time is within a period specified under section 23DD, so long as the suspension or delay in the questioning of the person is reasonable** ~~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~~.

Investigation period and disregarded time

Can periods of disregarded time under subsections 23C(7) and 23CA(8) occur simultaneously or are the periods of time cumulative?

At the moment, there is uncertainty as to whether periods of time under 23CA(8) can occur simultaneously. In the Clarke Report, the question is asked as to whether existing section 23CA(8)(m) covers the field?[58] For example, if an order is made for 48 hours under paragraph 23CA(8)(m), does that mean the provision for time to allow a person to rest under existing 23CA(8)(j) is suspended during those 48 hours, or is the time for rest added to the dead time ordered by the judicial officer?

Proposed subsection 23DB(10) would put beyond doubt that periods of disregarded time can occur simultaneously, but cannot be cumulative. In the example above, the time for the person to rest would not be added to the time ordered by the judicial officer if they happen at the same time. The time can only be disregarded from the investigation period once.

See proposed subsection 23C(7A) for corresponding amendments to the non-terrorism provisions.

Can questioning occur during a period of time that is disregarded from the investigation period under subsections 23C(7) or 23CA(8)?

Proposed subsection 23DB(10) clarifies that, to avoid doubt, subsection 23DB(9) (current subsection 23CA(8)) does not prevent the person from being questioned during a time covered by a paragraph of that subsection.

For example, paragraph 23DB(9)(m) (current paragraph 23CA(8)(m)) provides that any reasonable time that is a time during which the questioning of the person is reasonably suspended or delayed and is within a period specified under section 23DC (current section 23CB) should be disregarded. A period of time specified under section 23DC could be used by investigators to, for example, collate information from an overseas country that has a time zone difference. However, it could still be useful for investigators to continue questioning the suspect while they are waiting for this information from the overseas country, and questioning of the person during this time would not impinge on any rights of the individual. Questioning should be able to occur in these circumstances.

Proposed paragraph 23DB(10) also ensures that this amendment should not be used as a way to extend a period of disregarded time specified under proposed section 23DC. For example, if an investigator has four hours of time available in the investigation period, and a magistrate specifies a period of two days under section 23DC, the investigator could conduct a three hour questioning session during those two days. The three hours of questioning would be deducted from the four hours of investigation time, leaving one hour of investigation time remaining. The three hours would also be deducted from the specified two days, leaving 45 hours in the specified

[58] The Clarke Report, page 250.

(10) To avoid doubt:

(a) a time that is disregarded under subsection (9) may be covered by the application of more than one paragraph of that subsection; and

(b) subsection (9) does not prevent the person being questioned during a time covered by a paragraph of subsection (9), but if the person is questioned during such a time, the time is not to be disregarded; and

(c) a period specified under section 23DD is not extended by any time covered by a paragraph of subsection (9).

Limit on time that may be disregarded under paragraph (9)(m)

(11) No more than 7 days may be disregarded under paragraph (9)(m) in relation to an arrest. However:

(a) if the person has been arrested more than once within any period of 48 hours, the 7 day period for each arrest other than the first arrest is reduced by any period or periods specified under section 23DD in relation to any earlier arrest; and

(b) subsection (8) applies as if the reference in that subsection to subsection (7) were a reference to this subsection.

Evidentiary provision

(12) ~~(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

(b) any particular time was covered by a provision of subsection **(9).** ~~(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.~~

period for other activities. For further explanation, see proposed subsection 23C(7A) for corresponding amendments to the non-terrorism provisions.

Cap on specified time that can be disregarded from the investigation period for terrorism offences

Overall, the fixed investigation period, coupled with the time that can be excluded from that period, provides a statutory framework for what is reasonable conduct in the course of investigating a person for a terrorism offence. However, there is a concern that, under current paragraph 23CA(8)(m), the investigation period could span over a period of much longer than 24 hours.[59] It is therefore proposed that there should be a cap on the amount of time that can be disregarded from the investigation period under subsection 23CA(8)(m).

In the United Kingdom, under the *Terrorism Act 2000*, the maximum period of time in which a suspect may be held without charge, with judicial approval, is 28 days.[60] In Canada, under the *Criminal Code C-46*, a person may be arrested without warrant and detained and questioned for a period of up to 24 hours.[61] After this time, they must appear before a judge. The Clarke Report noted that the submissions to the Inquiry suggested varying time limits for a cap. Some submissions argued for 48 hours, others argued for up to 13 days. The Report suggested that a cap of no more than seven days would be appropriate.[62]

Taking into account these differing views, it is proposed that a seven day cap should be placed on the amount of time that can be disregarded under paragraph 23DB(8)(m) (current 23CA(8)(m)). Note that it is not proposed that a similar amendment be made to section 23C (investigation of non-terrorism offence). This is because there is no equivalent of section 23CA(8)(m) in section 23C.

[59] The Clarke Report, pages 244 -246.
[60] *Terrorism Act 2000* (UK), Schedule 8, clause 36(3)(b)(ii) (as amended by the *Terrorism Act* 2006).
[61] *Criminal Code C-46* (Canada), subsection 503(1).
[62] The Clarke Report, page 249.

23DC ~~23CB~~ Time during which suspension or delay of questioning may be disregarded—application ~~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.~~

(a) a person is arrested for a terrorism offence; and

(b) an investigation is being conducted into whether the person committed that terrorism offence or another 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 (within the meaning of paragraph (a) or (b) of the definition of that expression) may apply, in writing, to a magistrate for a period to be specified for the purpose of paragraph 23DB(9)(m).

~~(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 **not** be made ~~to:~~ **unless the application is authorised, in writing, by an authorising officer.**

~~(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.~~

~~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)~~ **(4) Subject to subsection (5), ~~T~~t**he 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 outcome of any previous application under this section in relation to:

(i) the person and the arrest; and

(ii) if the person was arrested at any time during the period of 48 hours before the arrest—the person and the earlier arrest or arrests;

Application for specified time during which suspension or delay of questioning may be disregarded

The process for making an application for a specified period of disregarded time under proposed section 23DC (currently 23CB) would be similar to the process for applying for an extension of the investigation period for a non-terrorism or terrorism offence (see discussion of section 23D).

However, there will be an additional safeguard so that an application must be approved by a senior member of the AFP or senior member of a State or Territory police force before it can be made to the magistrate.

The application would also be required to continue to include all the statements that are listed in current subsection 23CB(5), including the reasons why the investigating official believes the period should be specified. However, given there will be a seven day cap on the amount of specified time that can be disregarded from the investigation period, it will be important for the magistrate to have additional information before him or her. For example, the application would include information about the outcomes of previous applications under proposed section 23DC (current section 23CB) to determine the amount of time that, at a maximum, could be specified.

(d) the total amount of time that has been disregarded under subsection 23DB(9) in ascertaining the investigation period in relation to:

(i) the person and the arrest; and

(ii) if the person was arrested at any time during the period of 48 hours before the arrest—the person and the earlier arrest or arrests;

(e) ~~(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;

(f) ~~(d)~~ the period that the investigating official believes should be specified.

(5) Subsection (4) does not require any information to be included in the application if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004)*; or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies ; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(6) Before the application is considered by the magistrate, the investigating official must:

(a) provide a copy of the application to the person or to his or her legal representative; and

(b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.

~~(6) The person, or his or her legal representative, may make representations to the magistrate about the application.~~

(7) If the application contains any information of a kind mentioned in subsection (5), the investigating official may remove it from the copy of the application that is provided to the person or to his or her legal representative.

THIS PAGE IS INTENTIONALLY BLANK

23DD Time during which suspension or delay of questioning may be disregarded—time specified by magistrate

(1) This section applies if:

(a) a person is arrested for a terrorism offence; and

(b) an application has been made under subsection 23DC(2) to a magistrate in respect of the person.

Specification of period ~~*Decision about specifying period*~~

(2) ~~(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 application has been authorised by an authorising officer; and

(f) ~~(e)~~ the person, or his or her legal representative, has been given the opportunity to make representations about the application.

Instrument specifying period

(3) ~~(8)~~ **Subject to subsection (4),** ~~T~~**t**he 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.

(4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) The magistrate 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 telex, fax or other electronic means – inform the investigating official of the matters included in the instrument.

Note: See section 23E.

THIS PAGE IS INTENTIONALLY BLANK

(6) The investigating official must:

(a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and

(b) if the instrument was made as a result of an application made by telex, fax or other electronic means – inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

~~(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.~~

23DE ~~23DA~~ Application may be made for extension of investigation period

~~Extension of investigation period if arrested for terrorism offence~~

(1) If a person is arrested for a terrorism offence, an investigating official (within the meaning of paragraph (a) or (b) of the definition of that expression) may at or before the end of the investigation period, apply, in writing, to a magistrate for an extension of the investigation period.

~~(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 not be made unless the application is authorised, in writing, by an authorising officer.

~~(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) Subject to subsection (4), 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 outcome of any previous application under this section in relation to the person and the investigation period;

(d) the period (if any) by which the investigation period has been reduced under subsection 23DB(7);

(e) the total amount of time (if any) that has been disregarded under subsection 23DB(9) in ascertaining the investigation period;

Extension of investigation period for a terrorism offence

The process for making an application to extend the investigation period for a terrorism offence would be similar to the process for applying for an extension of the investigation period for a non-terrorism offence under section 23D (see the discussion of this section for further explanation). In addition, it will include the safeguard that an application must be approved by an authorising officer. An authorising officer means a person of high rank within the AFP or a State or Territory police force.

(f) the maximum amount of time by which the investigation period could be extended;

(g) the reasons why the investigating official believes the investigation period should be extended;

(h) the period by which the investigating official believes the investigation period should be extended.

~~(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) Subsection (3) does not require any information to be included in the application if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*; or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) Before the application is considered by the magistrate, the investigating official must:

(a) provide a copy of the application to the person or to his or her legal representative; and

(b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.

(6) If the application contains any information of a kind mentioned in subsection (4), the investigating official may remove it from the copy of the application that is provided to the person or to his or her legal representative.

~~(6) The judicial officer must give the investigating official a copy of the authority as soon as practicable after signing the authority.~~

(7) The person, or his or her legal representative, may make representations to the magistrate about the application.

23DF Magistrate may extend investigation period

(1) This section applies if:

(a) a person is arrested for a terrorism offence; and

(b) an application has been made under subsection 23DE(1) to a magistrate in respect of the person.

Extension of investigation period

(2) Subject to subsection (3), the magistrate may extend the investigation period, by signed written instrument, if satisfied that:

~~(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

THIS PAGE IS INTENTIONALLY BLANK

(c) the investigation into the offence is being conducted properly and without delay; and

(d) the application has been authorised by an authorising officer; and

(e) ~~(d)~~ the person, or his or her legal representative, has been given the opportunity to make representations about the application.

(3) Subject to subsection (4), the instrument must set out:

~~(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.

(4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the National Security Information (Criminal and Civil Proceedings) Act 2004; or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(b) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) The magistrate 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 telex, fax or other electronic means – inform the investigating official of the matters included in the instrument.

Note: See section 23E.

~~(6) The judicial officer must give the investigating official a copy of the authority as soon as practicable after signing the authority.~~

(6) The investigating official must:

(a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or to his or her legal representative, a copy of it; and

(b) if the instrument was made as a result of an application made by telex, fax or other electronic means – inform the person, or to his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

(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.

Subdivision C—Miscellaneous

23E ~~23CB(10)~~ Evidentiary provisions if application made by electronic means

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

(1) This section applies if a magistrate has, under paragraph 23DA(4)(b), 23DD(4)(b) or 23DF(4)(b), informed an investigating official of matters included in an instrument.

THIS PAGE IS INTENTIONALLY BLANK

(2) ~~(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.~~

(3) ~~(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~~ **the instrument** is taken to have had no effect.

(4) ~~(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 **instrument** ~~period~~ was **made** ~~specified~~**.**

~~**23E Applications by telephone etc.**~~

~~(1) An application under section 23D or 23DA for extension of the investigation period may be made by telephone, telex, fax or other electronic means in accordance with this section.~~

~~(2) Before making the application, the investigating official must inform the person under arrest that he or she, or his or her legal representative, may make representations to the judicial officer about the application.~~

~~(3) If the judicial officer extends the investigation period, he or she must inform the investigating official of the matters set out in the authority under subsection 23D(4A) or 23DA(5) (as the case requires).~~

~~(4) As soon as practicable after being informed of those matters, the investigating official must:~~

~~(a) complete a form of authority and write on it the name of the judicial officer and the particulars given by the judicial officer; and~~

~~(b) forward it to the judicial officer.~~

~~(5) If the form of authority completed by the investigating official does not, in all material respects, accord with the terms of the authority signed by the judicial officer, the authority granted by the judicial officer is taken to have had no effect.~~

~~(6) In any proceedings, if the authority signed by the judicial officer is not produced in evidence, the burden lies on the prosecution to prove that the authority was granted.~~

23XGD Time for carrying out forensic procedure—suspect in custody

(1) If the suspect is in custody (whether or not as the result of the issue of a warrant under section 23XGC), he or she may be detained in custody for such period (the ***detention period***) as is reasonably necessary to carry out the forensic procedure but in any case for no longer than a period starting when:

(a) the magistrate orders the carrying out of the procedure; or

(b) the suspect is arrested pursuant to a warrant under section 23XGC;

whichever is later, and ending:

(c) if the suspect is a child or an incapable person, or the investigating constable believes on reasonable grounds that the suspect is an Aboriginal person or a Torres Strait Islander—2 hours later; or

(d) in any other case—4 hours later.

THIS PAGE IS INTENTIONALLY BLANK

(2) In working out any period of time for the purposes of subsection (1), the following times are to be disregarded:

(a) the time (if any) that is reasonably required to convey the suspect from the place where the suspect is when the detention period starts to the nearest premises where facilities for carrying out the procedure in accordance with this Part are available to the investigating constable;

(b) any time during which carrying out the procedure is suspended or delayed to allow the suspect, or someone else on the suspect's behalf, to communicate with a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person as provided by this Part;

(c) any time during which carrying out the procedure is suspended or delayed to allow such a legal practitioner, friend, relative, parent, guardian, interpreter, medical practitioner, dentist or other person to arrive at the place where the procedure is to be carried out;

(d) any time during which carrying out the procedure is suspended or delayed to allow the suspect to receive medical attention;

(e) any time during which carrying out the procedure is suspended or delayed because of the suspect's intoxication;

(f) any reasonable time during which carrying out the procedure is suspended or delayed to allow the suspect to rest or recuperate;

(g) any time during which the suspect is being questioned under Part IC;

(h) any time that is to be disregarded under subsection 23C(7) **or 23DB(9)**.

THIS PAGE IS INTENTIONALLY BLANK

18 Application

(1) Subject to subitem (2), the amendments made by this Schedule apply in relation to a person who is arrested after the commencement of this item.

(2) If:

(a) a person has been arrested more than once within any period of 48 hours; and

(b) the first of those arrests was made before the commencement of this item;

the amendments made by this Schedule do not apply in relation to the person for any later arrest that is made within that 48 hour period.

(3) However, in relation to a first arrest, disregard subitem (2) for a 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 Part IC of the *Crimes Act 1914* 1914 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.

(4) In this item:

***Commonwealth offence* has the same meaning as in Part IC of the *Crimes Act 1914*.**

THIS PAGE IS INTENTIONALLY BLANK

THIS PAGE IS INTENTIONALLY BLANK

Part 2 Amendments to the search warrant provisions in Part 1AA, Divisions 1 and 2 of the *Crimes Act 1914* to allow re-entry in emergency situations

This Part contains amendments to modify the search warrant provisions in Part 1AA of the *Crimes Act 1914* so that, in emergency situations, the time available for law enforcement officers to re-enter premises under a search warrant can be extended to 12 hours, or, where authorised by an issuing authority in exceptional circumstances, a longer time not exceeding the life of the warrant.

These proposed amendments are intended to address operational issues that have emerged in law enforcement operations.

Extension of time for re-entry under a search warrant

3C(1) ***emergency situation*, in relation to the execution of a warrant in relation to premises, means a situation that the executing officer or a constable assisting believes, on reasonable grounds, involves a serious and imminent threat to a person's life, health or safety that requires the executing officer and constables assisting to leave the premises.**

3J Specific powers available to constables executing warrant

(1) In executing a warrant in relation to premises, the executing officer or a constable assisting may:
   (a) for a purpose incidental to the execution of the warrant; or
   (b) if the occupier of the premises consents in writing;

   take photographs (including video recordings) of the premises or of things at the premises.

(2) If a warrant in relation to premises is being executed, the executing officer and the constables assisting may, if the warrant is still in force, complete the execution of the warrant after all of them temporarily cease its execution and leave the premises:
   (a) for not more than one hour; or
   (aa) if there is an emergency situation, for not more than 12 hours or such longer period as allowed by an issuing officer under section 3JA; or
   (b) for a longer period if the occupier of the premises consents in writing.

3JA Extension of time to re-enter premises in emergency situations

(1) If:
   (a) a warrant in relation to premises is being executed; and
   (b) there is an emergency situation; and
   (c) the executing officer or a constable assisting believes on reasonable grounds that the executing officer and the constables assisting will not be able to return to the premises within the 12 hour period mentioned in paragraph 3J(2)(aa);

   he or she may apply to an issuing officer for an extension of that period.

(2) Before making the application, the executing officer or a constable assisting must, if it is practicable to do so, give notice to the occupier of the premises of his or her intention to apply for an extension.

(3) If an application mentioned in subsection (1) has been made, an issuing officer may extend the time during which the executing officer and constables assisting may be away from the premises if the issuing officer is satisfied, by information on oath or affirmation, that there are exceptional circumstances that justify the extension.

Extension of time for re-entry under a search warrant

Currently, section 3J of the *Crimes Act 1914* allows the police to re-enter a premises under a search warrant within one hour of leaving the premises. This limitation does not provide sufficient scope for police to re-enter premises where they have needed to evacuate the premises because they have discovered a threat which could endanger the safety of the police officers but also the public. For example, under the current section 3J, if a police officer, upon executing a search warrant in the investigation of a Commonwealth offence, discovered a large stockpile of volatile chemicals on the premises requiring the immediate evacuation of all persons from the premises, the police officer would not have enough time to secure the premises and render the chemicals safe before re-entering to commence a search in accordance with the search warrant.

A new definition of 'emergency situation' will be inserted into subsection 3C(1) of the *Crimes Act 1914* to provide certainty to the application of these powers. It is proposed that 'emergency situation' means a situation where there are reasonable grounds to believe that there is a serious and imminent threat to a person's life, health or safety that requires officers to leave the premises. For example, if law enforcement agencies, upon executing a search warrant, discover explosive material that requires the emergency exit of all personnel, officers would not have enough time to secure the premises and render them safe before re-entering to commence a search.

If the police require longer than 12 hours, they may apply to an issuing authority for an extension. An issuing officer is defined in section 3C of the *Crimes Act 1914* as a magistrate or a justice of the peace or other person employed in a court of a State or Territory who is authorised to issue search warrants. In order for an issuing officer to consider extensions for re-entry beyond 12 hours, he/she must be satisfied by information on oath or affirmation that there are exceptional circumstances justifying the extension.

THIS PAGE IS INTENTIONALLY BLANK

Part 3 New provision in Division 3A of Part 1AA of the *Crimes Act 1914* to allow entry without warrant in emergency situations when investigating terrorism

This Part inserts an emergency entry, search and seize power in the *Crimes Act 1914* to provide the police with appropriate response tools for the investigation of terrorism.

Division 3A of the *Crimes Act 1914* provides police with powers to stop, search and question in relation to terrorist acts. This Division was first inserted into the *Crimes Act 1914* by the *Anti-Terrorism Act (No 2) 2005* in order to provide police with specific powers in relation to terrorist acts in addition to existing police powers. Division 3A provides police with various powers in relation to terrorist acts but only in a Commonwealth place and prescribed security zone and will be the subject of review in 2010 along with other counter-terrorism measures introduced by the *Anti-Terrorism Act (No 2) 2005* to be initiated through the Council of Australian Governments.

However, Division 3A does not provide police with a power to enter premises without a warrant in emergency circumstances relating to a terrorism offence where there is material that may pose a risk to the health or safety of the public.

A range of State and Territory laws authorise entry without warrant in appropriately limited circumstances. For example, section 190 of the *Crimes Act 1914 1900* (ACT) and section 9 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) allow police to enter premises in emergencies, including where there is an imminent danger to persons. Further, section 191 of the *Crimes Act 1914 1900* (ACT) and section 22 of the *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) authorise police to seize firearms and ammunitions located on those premises to prevent the commission or repetition of an offence and dangerous articles used in connection with commission of a relevant offence, respectively. Under that legislation, police are required to obtain a search warrant (or the consent of the occupier) before seizing other items.

Unlike their State and Territory colleagues, the Australian Federal Police (AFP) do not have comprehensive emergency entry powers. The availability to the AFP of wider emergency powers has become increasingly necessary particularly in the area of counter-terrorism operations. An emergency entry power is necessary to supplement existing search, entry and seizure powers which only give police partial coverage for emergency circumstances. For example, section 3T of the *Crimes Act 1914* authorises a police officer to stop and search conveyances in emergency situations and to seize certain objects. However, there is no similar power that allows the AFP to enter premises in an emergency without a warrant. The sudden or extraordinary emergency defence at section 10 of the Criminal Code might be available to a police officer who enters premises to render them safe in an emergency situation. However, the defence does not confer a coercive power and any evidence obtained during the police officer's conduct may not be admissible in subsequent legal proceedings. As a result, there are insufficient powers for the AFP to adequately respond to incidents that may present as a national security concern and that may call for emergency entry powers.

New power to search premises

3UEA Searching premises

(1) A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that:

(a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; and

(b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being used in connection with a terrorism offence; and

(c) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

(2) The police officer may:

(a) search the premises for the thing; and

(b) seize the thing if he or she finds it there.

(3) If, in the course of searching for the thing, the police officer finds another thing that the police officer suspects, on reasonable grounds, to be relevant to an indictable offence or a summary offence, the police officer may secure the premises pending the obtaining of a warrant under Part IAA in relation to the premises.

(4) Premises must not be secured under subsection (3) for longer than is reasonably necessary to obtain the warrant.

(5) In the course of searching for the thing, the police officer may also seize any other thing if the police officer suspects, on reasonable grounds, that it is necessary to seize it:

(a) in order to protect a person's life, health or safety; and

(b) without the authority of a search warrant because the circumstances are serious and urgent.

(6) In exercising powers under this section:

(a) the police officer may use such assistance; and

(b) the police officer, or a person who is also a police officer and who is assisting the police officer, may use such force against persons and things; and

(c) a person who is not a police officer and who is assisting the police officer may use such force against things;

as is necessary and reasonable in the circumstances.

New power to search premises

The proposed amendments to Division 3A of the *Crimes Act 1914* would enable the police to enter premises without a warrant in emergency circumstances, where an officer suspects on reasonable grounds that material relevant to a terrorism offence is on the premises and there is a risk to the health or safety of the public. This allows the police to take immediate action to enter a premises and render it safe, including seizing dangerous objects, such as explosives, that they reasonably suspect are being used in connection with terrorist activity and that pose an immediate threat to public safety.

The new power would be available, for example, where a member of the public alerts the police to a terrorist threat such as the presence of an explosive device in a building. The power authorises police to take immediate action to neutralise the device and to seize inherently dangerous objects to prevent loss of life or injury to persons. The new power avoids delays caused by the requirement to obtain a warrant before making entry. Following activities necessary to render the premises safe, including seizing dangerous objects necessary to secure the premises, it would be necessary for the police to obtain a search warrant if there were grounds to conduct a further search of the premises and seize other items with evidential value. The police are also able to secure the premises for a period that is reasonably practicable, to make application for a search warrant over the premises, if the police find a thing that they reasonably believe is relevant to an indictable or summary offence. This ensures that evidence of criminal activity is preserved. If a warrant is not authorised the premises could then be handed over to the occupier. This approach is consistent with the views of the Senate Scrutiny of Bills Committee[63], which has consistently indicated powers of seizure should only be allowed under a warrant even if entry and search without warrant are permitted.

[63] http://www.aph.gov.au/senate/committee/scrutiny/index.htm

Consequential amendment about seized items under new power

3UB Application of Subdivision

(1) A police officer may exercise the powers under this Subdivision in relation to a person if:

(a) the person is in a Commonwealth place (other than a prescribed security zone) and the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit, a terrorist act; or

(b) the person is in a Commonwealth place in a prescribed security zone.

(2) This section does not limit the operation of section 3UEA.

3UF How seized things must be dealt with

Seizure notice to be served

(1) A police officer who is for the time being responsible for a thing seized under section 3UE **or 3UEA** must, within 7 days after the day on which the thing was seized, serve a seizure notice on:

(a) the owner of the thing; or

(b) if the owner of the thing cannot be identified after reasonable inquiries—the person from whom the thing was seized.

(2) Subsection (1) does not apply if:

(a) both:

(i) the owner of the thing cannot be identified after reasonable inquiries; and

(ii) the thing was not seized from a person; or

(b) it is not possible to serve the person required to be served under subsection (1).

(3) A seizure notice must:

(a) identify the thing; and

(b) state the date on which the thing was seized; and

(c) state the ground or grounds on which the thing was seized; and

(d) state that, if the owner does not request the return of the thing within 90 days after the date of the notice, the thing is forfeited to the Commonwealth.

Return of thing seized

(4) The owner of a thing seized under section 3UE **or 3UEA** may request the return of the thing.

(5) A police officer who is for the time being responsible for a thing seized under section 3UE **or 3UEA** must return the thing to its owner if:

(a) the owner requests the return of the thing; and

(b) neither subsection (6) nor (7) applies.

Consequential amendment about seized items under new power

The amendments to the provisions concerning seized goods in Division 3A simply clarify that goods seized under the new provision are to be dealt with according to the existing seizure provisions.

In addition, as the powers in Division 3A generally apply only to Commonwealth places, the proposed amendment to section 3UB provides that the new emergency entry and search power is not limited to Commonwealth places, as it already contains the limitation that it can only be used in the investigation of terrorism.

THIS PAGE IS INTENTIONALLY BLANK

Part 4 Inserting a right of appeal in section 15AA

Section 15AA was first inserted into the *Crimes Act 1914* as part of the *Anti-Terrorism Act 2004* to ensure a consistent approach to bail proceedings for serious national security offences. The purpose of this section is to ensure public safety in the case of people charged with these serious offences, and to provide the judge with the discretion to consider whether there are exceptional circumstances to justify granting bail. The proposed amendments will ensure that, similar to other bail decisions, both the prosecution and the defendant have a right to appeal the decision.

New appeal right

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 (other than an offence against section 102.8 of the *Criminal Code*); 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.

(3A) Despite any law of the Commonwealth, the Director of Public Prosecutions or the defendant may appeal against a decision of a bail authority:

(a) to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is satisfied that exceptional circumstances exist; or

(b) to refuse to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is not satisfied that exceptional circumstances exist.

New appeal right

Section 15AA of the *Crimes Act 1914* contains specific provisions relating to granting bail for persons charged with terrorism and national security offences. It provides that a person charged or convicted of a serious security or violent offence (including terrorism) must not be granted bail except in exceptional circumstances.

This section was first inserted into the *Crimes Act 1914* as part of the *Anti-Terrorism Act 2004* to ensure a consistent approach to bail proceedings for serious national security offences. Normally with Commonwealth offences, through the application of the *Judiciary Act 1903*, the relevant State and Territory law governing bail proceedings applies in Commonwealth criminal matters. As section 15AA of the *Crimes Act 1914* does not currently include an appeal right, the State and Territory legislation is relied upon to provide appeal rights to the prosecution or defendant. This can result in confusion and in some cases there may be no scope to appeal decisions made under section 15AA of the *Crimes Act 1914*. Therefore, it is proposed that a specific appeal right be incorporated into section 15AA of the *Crimes Act 1914*.

This proposed amendment inserts in the *Crimes Act 1914* a right of appeal for both the prosecution and the defendant against bail decisions in terrorism and national security matters. This right of appeal is accompanied by a power to allow the court to stay a bail order, where bail has been granted and an appeal is planned. The stay is dependent on the prosecution indicating an intention to appeal to the court, and only lasts until the appeal is heard, or until 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.

(3B) An appeal under subsection (3A):

(a) may be made to a court that would ordinarily have jurisdiction to hear and determine appeals (however described) from directions, orders or judgments of the bail authority referred to in subsection (3A), whether the jurisdiction is in respect of appeals relating to bail or appeals relating to other matters; and

(b) is to be made in accordance with the rules or procedures (if any) applicable under a law of the Commonwealth, a State or a Territory in relation to the exercise of such jurisdiction.

(3C) If:

(a) a bail authority decides to grant bail to a person charged with or convicted of an offence covered by subsection (2); and

(b) immediately after the decision is made, the Director of Public Prosecutions notifies the bail authority that he or she intends to appeal against the decision under subsection (3A);

the decision to grant bail is stayed with effect from the time of the notification.

(3D) A stay under subsection (3C) ends:

(a) when a decision on the appeal is made; or

(b) when the Director of Public Prosecutions notifies:

(i) the bail authority; or

(ii) if an appeal has already been instituted in a court—the court;

that he or she does not intend to proceed with the appeal; or

(c) 72 hours after the stay comes into effect;

whichever occurs first.

(4) To avoid doubt, except as provided by subsection (1), **(3A), (3B), (3C) and (3D)** 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~~ **These provisions indirectly affect laws of the States and Territories because they affect** section 68 of the *Judiciary Act 1903*.

(5) In this section:

ancillary offence has the meaning given in the Criminal Code.

primary offence has the meaning given in the Criminal Code.

THIS PAGE IS INTENTIONALLY BLANK

THIS PAGE IS INTENTIONALLY BLANK

Chapter 3 Amendments to the *Charter of the United Nations Act 1945*

Part 4 of the *Charter of the United Nations Act 1945* (the Charter Act) gives effect to Australia's obligations under paragraphs 1(c) and (d) of United Nations Security Council Resolution 1373 of 28 September 2001. These paragraphs oblige Australia to:

- freeze, without delay, funds and other financial assets or economic resources of: persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts; entities owned or controlled directly or indirectly by such persons; and of persons and entities acting on behalf of, or at the direction of, such persons and entities, including funds derived or generated from property owned or controlled directly or indirectly by such persons and associated persons and entities; and

- prohibit its nationals or any persons and entities within its territory from making any funds, financial assets or economic resources or financial or other related services available, directly or indirectly, for the benefit of such persons or entities.

The proposed amendments represent the Government's response to recommendation 22(a) of the Parliamentary Joint Committee on Security and Intelligence Report *Review of Security and Counter-Terrorism Legislation* , tabled in Parliament in December 2006 (the 2006 PJCIS Report) by ensuring that all listings must be subject to periodic review against the prescribed matters for listing to remain in effect. Periodic review of listings would not prevent the revocation of a listing as provided for in the Charter Act, nor would it prevent the making of a new listing that is the same in substance as another listing.

Improving the standard for listing under the Charter Act

15 Listing persons, entities and assets

(1) The Minister must list a person or entity under this section if the Minister is satisfied **on reasonable grounds** of the prescribed matters.

(2) The Governor-General may make regulations prescribing the matters of which the Minister must be satisfied before listing a person or entity under subsection (1).

(3) The Minister may list an asset, or class of asset, under this section if the Minister is satisfied **on reasonable grounds** of the prescribed matters.

(4) The Governor-General may make regulations prescribing the matters of which the Minister must be satisfied before listing an asset under subsection (3).

(5) A matter must not be prescribed under subsection (2) or (4) unless the prescription of the matter would give effect to a decision that:
   (a) the Security Council has made under Chapter VII of the Charter of the United Nations; and
   (b) Article 25 of the Charter requires Australia to carry out; and
   (c) relates to terrorism and dealings with assets.

(6) A person or entity is listed by notice in the *Gazette*.

(7) An asset or class of asset is listed by notice in the *Gazette*.

Improving the standard for listing under the Charter Act

Under Part 4 of the Charter Act the Minister for Foreign Affairs may list, by notice in the *Gazette*, a person or an entity (section 15(1)), or an asset or class of assets (section 15(3)), if he or she is satisfied of the 'prescribed matters'. It is an offence for an individual (section 20(1)) or a body corporate (section 20(3C)) to use or deal with a listed asset or with an asset that is owned or controlled by a listed person or entity, or to allow or facilitate such using or dealing, without the written authorisation of the Minister for Foreign Affairs. Part 4 also provides that it is an offence for an individual (section 21(1)) or a body corporate (section 21(2C)) to make an asset available to a listed person or entity, without the written authorisation of the Minister for Foreign Affairs.

The proposed provisions would amend subsections 15(1) and (3) to require that the Minister for Foreign Affairs list a person, entity, asset or class of assets if he or she is satisfied 'on reasonable grounds' of the prescribed matters. This would implement recommendation 22(b) of the 2006 PJCIS Report. It would also bring Australia into line with the international standard for terrorist asset freezing established by the Financial Action Task Force in its Special Recommendation III.

Providing for regular review of listings

15A Duration of listing

(1) A listing under section 15 ceases to have effect on:

(a) if no declaration under subsection (2) has been made in relation to the listing—the third anniversary of the day on which the listing took effect; or

(b) otherwise—the third anniversary of the making of the most recent declaration under subsection (2) in relation to the listing.

(2) The Minister may declare, in writing, that a specified listing under section 15 continues to have effect.

(3) The Minister must not:

(a) make a declaration under subsection (2) specifying the listing of a person or entity unless the Minister is satisfied on reasonable grounds of the matters prescribed for the purposes of subsection 15(2); or

(b) make a declaration under subsection (2) specifying the listing of an asset, or class of asset, unless the Minister is satisfied on reasonable grounds of the matters prescribed for the purposes of subsection 15(4).

(4) The regulations may prescribe a form for a declaration under subsection (2).

(5) A declaration made under subsection (2) is not a legislative instrument.

(6) To avoid doubt, subsection (1) does not prevent:

(a) the revocation, under section 16, of a listing; or

(b) the revocation of a listing by operation of section 19; or

(c) the making of a new listing that is the same in substance as another listing (whether the new listing is made or takes effect before or after the other listing ceases to have effect because of subsection (1)).

Providing for regular review of listings

The proposed amendments would also introduce a new section 15A to provide that a listing under section 15 ceases to have effect on the third anniversary of the day on which the listing took effect, unless the Minister for Foreign Affairs has, prior to this date, declared, in writing, that the listing continues to have effect. Section 15A further provides that a listing continued in effect by such a declaration will in turn cease to have effect on the third anniversary of the day of the making of the declaration, unless the Minister for Foreign Affairs makes a further declaration, in writing, that the listing continues to have effect. The Minister for Foreign Affairs must not make a declaration unless satisfied on reasonable grounds of the prescribed matters for the original listing. A declaration would not constitute a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*. This amendment ensures there is consistency between the Charter of the United Nations Act listing provisions and the terrorist organisation proscription regime in Division 102 of the Criminal Code.

Consequential amendments

19 Effect of resolution ceasing to bind Australia

(1) In so far as a listing under section 15 gives effect to a particular decision of the Security Council, the listing is revoked when Article 25 of the Charter of the United Nations ceases to require Australia to carry out that decision.

(2) In so far as regulations proscribing a person or entity under section 18 give effect to a particular decision of the Security Council:

(a) the regulations cease to have effect when Article 25 of the Charter of the United Nations ceases to require Australia to carry out that decision; and

(b) they do not revive, even if Australia again becomes required to carry out the decision.

(3) However, to avoid doubt, nothing in this section prevents:

(aa) a listing ceasing to have effect under section 15A; or

(a) the revocation, under section 16, of a listing; or

(b) the repeal of regulations; or

(c) the making of regulations that are the same in substance as regulations that have ceased to have effect because of this section.

Consequential amendments

In relation to listings in effect at the time of the commencement of the amendments, the proposed amendment provides that, for the purposes only of section 15A, such listings will be treated as if they had been made immediately after that commencement.

THIS PAGE IS INTENTIONALLY BLANK

Chapter 4 Amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004*

Chapter 4 contains proposed amendments to the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act).

History of the Act

In 2004 the Australian Law Reform Commission (ALRC) undertook a review of mechanisms which existed to protect national security information during court, tribunal and other proceedings. In its report *Keeping Secrets: The Protection of Classified and Security Sensitive Information* the ALRC noted that the methods necessary to protect national security information in proceedings are similar to those used to protect witnesses or other sensitive information in criminal prosecutions. The ALRC also commented that 'there is a very important additional dimension in the need for the protection of classified or sensitive *national security* information, since the risks of disclosure in these circumstances extend to the very security and defence of the nation, as well as to our strategic interests – not least, Australia's relationships with other nations and our arrangements for the continued acquisition and exchange of intelligence information'.[64]

The ALRC made 80 recommendations designed to reconcile the tension between disclosure in the interest of fair and effective legal proceedings and non-disclosure in the interest of national security. One of the recommendations was to enact a 'National Security Information Procedures Act', which would outline measures to protect classified and sensitive information in court, tribunal and other proceedings.

On 8 December 2004 the *National Security Information (Criminal Proceedings) Act 2004* was passed and commenced on 11 January 2005. The purpose of the Act is to protect information from disclosure in federal criminal proceedings and civil court proceedings where the disclosure would be likely to prejudice Australia's national security.[65] The Act contains various measures to facilitate the prosecution of an offence without prejudicing national security or the right of a defendant to a fair trial. The Act, in conjunction with the *National Security Information (Criminal and Civil Proceedings) Regulations 2005*[66] (NSI Regulations) and the *Requirements for the Protection of National Security Information in Federal Criminal Proceedings and Civil Proceedings*[67] (NSI Requirements), provides a comprehensive regulatory framework for the disclosure, storage and handling of national security information in federal criminal proceedings and civil proceedings. In June 2008, the Attorney-

[64] ALRC Report *Keeping Secrets*, pages 9-10.
[65] The Act 2004 was amended to extend its protections to civil proceedings by the *National Security Information Legislation Amendment Act 2005* which commenced on 3 August 2005.
[66] The Regulations prescribe requirements for the storage, handling and destruction of information under the Act.
[67] The Requirements are incorporated within the NSI Regulations. They specify how and where national security information must be accessed, stored and otherwise handled and address a range of physical security matters.

General, the Hon Robert McClelland MP, issued a Practitioner's Guide to the Act. It contains further information about the history of the Act and its current operation.[68]

Public Interest Immunity

Prior to the Act, the common law doctrine of public interest immunity (PII) was the primary mechanism by which the Commonwealth could seek to protect national security information from disclosure during court proceedings. PII allows a court to exclude evidence which, if admitted, would be injurious to the public interest. There are a number of difficulties associated with reliance upon PII to protect national security information:

- Where a PII claim is successful, a case may be unable to proceed due to a lack of admissible evidence.
- A court may rule against a claim for PII and order the disclosure of national security information in open court which presents a risk to Australia's national security.
- Confidentiality and security sensitive issues may arise unexpectedly and claims for PII will have to be determined at short notice. This is an inconvenience to both the court and the parties.
- Prior to making a court order, PII does not protect the information from disclosure.

The combination of the Act, NSI Regulations and NSI Requirements overcome these difficulties.

The NSI Act, consistent with ALRC recommendations, neither excludes nor impedes a court's power to uphold claims for PII or make other protective orders such as closure of court and non-publication orders. PII claims and other protective orders may be made instead of or in conjunction with the operation of the NSI Act.

Practical Experience with the Act

To date, the Act has been invoked in federal criminal cases involving 38 defendants. It has also been invoked in civil proceedings relating to the making of a control order under the Criminal Code.

Constitutional Issues

In *R v Faheem Khalid Lodhi* [69] Part 3[70] of the Act was challenged on constitutional grounds. One of the arguments was that Part 3 requires the State and Territory Supreme Courts to exercise Commonwealth judicial power in a manner that is inconsistent with their character. It was argued that the procedures set out in Part 3 resulted in the Courts being deprived of their powers to retain appropriate control of criminal proceedings to be able to bring the trial to an orderly conclusion.

[68] The Practitioner's Guide is available at www.ag.gov.au
[69] [2006] NSWSC 571
[70] Part 3 contains provisions on pre-trial conferences, non-disclosure certificates, notification procedures and closed hearings in federal criminal proceedings.

The Honourable Justice Whealy in the Supreme Court of New South Wales rejected these arguments and upheld the constitutional validity of the Act. His Honour held that, notwithstanding the enactment of Part 3, the Court retains unfettered control over the trial to ensure the accused is not tried unfairly. His Honour also observed that the Court's ordinary powers to restrict access to hearings and exclude evidence have not been criticised on constitutional grounds.

On 20 December 2007 the New South Wales Court of Criminal Appeal rejected an appeal by Mr Lodhi against his conviction and sentence. In the appeal it was argued that subsection 31(8) of the Act is unconstitutional. Subsection 31(8) requires the Court to give greatest weight to the risk of prejudice of national security when considering whether to make a non-disclosure order. It was argued that this direction, when considering an Attorney-General's certificate, was effectively an order as to how the case is to be decided. In the determination that subsection 31(8) was not unconstitutional, the Chief Justice held that subsection 31(8) 'merely gives the court guidance as to the comparative weight it should give one factor over another, and so does not unconstitutionally direct the court how to exercise its jurisdiction or interfere with the integrity of the judicial balancing process'.[71]

International Law Issues

International law provides for the right to a fair trial in both civil and criminal cases.[72] In *R v Faheem Khalid Lodhi* the court considered whether the Act infringes on this right. It was argued that a right to a fair trial was denied because subsection 31(8) made the court give the 'greatest' weight to the risk of prejudice to national security when the court was considering whether to make an order under section 31. It was determined that there was nothing inherent, within subsection 31(8), which would infringe the right to a fair trial. The operation of the Act will be consistent with the right to a fair trial unless, in a particular case, the practical effect of the exclusion from the proceedings of either certain information or of an individual is to make the position of the parties unequal to the point where one party is prevented from adequately presenting their case. However, the overriding discretion of the court, under section 19, to order a stay of proceedings limits the possibility of a denial of a fair hearing.

Overview of proposed amendments to the Act

The decisions in *R v Faheem Khalid Lodhi* reinforced the integrity of the fundamental principles underlying the Act. However, practical experience with the Act has identified areas where the Act could be clarified and improved. The purpose of the proposed amendments is to improve the Act's practical application to ongoing and future court proceedings, while still guaranteeing the protection of national security information in federal criminal and civil proceedings. The amendments fall within the following five general categories:

[71] [2007] NSWCCA 360 at 36-39.

[72] The right to a fair trial is guaranteed in the following instruments, which are binding on Australia: Article 14 of the ICCPR; Common Article 3 of the Geneva Conventions; Article 75 of Additional Protocol I to the Geneva Conventions and Article 6 of Additional Protocol II of Geneva Conventions.

1. Application of the Act to legal representatives

A number of the proposed amendments seek to clarify the application of the 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

- various amendments to clarify the application of the Act to a defendant's legal representative/party's legal representative when the legal representative is acting on behalf of the defendant/party.

These amendments are necessary to ensure that there is no confusion about when the defendant's or party's legal representative is subject to the obligations under the Act which attract a criminal sanction. Such obligations are equally imposed on the prosecution in federal criminal matters. These proposed amendments do not impose further obligations on defence representatives. The sole purpose of the proposed amendments is to clarify when certain obligations or requirements apply to legal representatives.

2. Role of the Attorney-General under the Act

The Attorney-General has a responsibility to protect national security information during court, tribunal and other proceedings. The proposed amendments make it clear that the Attorney-General, or representative of the Attorney-General, has the ability to attend and be heard during federal criminal or civil proceedings. It is also proposed that the Attorney-General be able to be a party to consent arrangements made in relation to the protection of national security material. Permitting the Attorney-General to be a party to these arrangements ensures the Attorney-General is involved in the formation of such arrangements and can effectively represent the interests of the Government in protecting national security.

3. Flexibility of the court

A number of the proposed amendments seek to clarify court procedures to ensure processes are flexible and efficient. Some of the proposed amendments include:

- clarifying that the 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; and

- clarifying 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.

4. Facilitate agreements under sections 22 and 38B

Agreements under section 22 and section 38B as to arrangements about the disclosure of national security information in the proceedings assist with progressing court cases efficiently. The proposed amendments will facilitate better agreement-making by:

- clarifying that the policy intention behind the Act is that, if possible, it is preferable that parties enter into a section 22 arrangement, compared to the court issuing a certificate;

- clarifying who is permitted to enter into a section 22 arrangement; and

- clarifying that section 22 arrangements not only cover the disclosure of national security information, but may also cover the protection, storage, handling and destruction of national security information.

5. Avoid unnecessary procedures

A number of amendments are designed to streamline procedures and minimise unnecessary processes. Some of the amendments include:

- clarifying that, for the purposes of the Act, re-trials should be considered to be part of the same proceeding as the trial;

- clarifying that 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

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

Part 1: Preliminary

6 Application of Act to federal criminal proceedings

(1) Subject to subsection (2), this Act applies to a federal criminal proceeding, whether begun before, on or after the day on which this section commences, if the prosecutor gives notice in writing to the defendant, **the defendant's legal representative** and the court that this Act applies to the proceeding.

(2) If the prosecutor gives the notice after the proceeding begins, this Act only applies to the parts of the proceeding that ~~take place after the notice is given~~ **occur after the notice is given (whether or not those parts began before that time).**

(3) A notice given under this section is not a legislative instrument.

Section 6: Application of Act to federal criminal proceedings

Clarify the application of the Act to a defendant's legal representative

The operation of the Act in criminal proceedings is triggered by the prosecutor. This is done by the prosecutor assessing the brief of evidence and then notifying the court and defendant that it is thought the Act should apply to the case. Currently, subsection 6(1) places an obligation on the prosecutor to notify the defendant and the court that the Act applies to the federal criminal proceeding. However, there is no express obligation on the prosecutor to notify the defendant's legal representative. The proposed amendment to subsection 6(1) clarifies that when a prosecutor gives notice of the application of the Act to a federal criminal proceeding, the prosecutor must also notify the defendant's legal representative. This is a minor amendment that clarifies what occurs in practice and ensures the defendant is adequately put on notice that the Act applies.

Clarify the application of the Act to proceedings once the Act has been invoked

Subsection 6(2) currently provides that if a prosecutor gives notice that the Act applies to the proceeding after a proceeding has commenced, the Act applies to those parts of the proceeding that occur after the notice is given. It would not be practical or logical for the Act to apply to those parts of the proceeding that have already finished, as the Act guides how information is to be disclosed during the course of proceedings.

However, it is currently unclear whether the Act applies to parts of the proceeding which start prior to the notice but continue after the notice is given. The proposed amendments clarify that where the prosecutor has given notice of the application of the Act to the proceeding, the Act applies to those parts of the federal criminal proceeding that occur after the notice is given, whether or not those parts began before the notice was given. For example, if the prosecutor gives notice that the Act applies to a federal criminal proceeding and that notice is given when the committal process is underway, the Act would apply to the remainder of the committal process as well as to all other parts of the federal criminal proceeding which take place after the committal process.

6A Application of Act to civil proceedings

Application to civil proceedings—Attorney-General not a party to proceedings

(1) If:

(a) the Attorney-General is not a party to a civil proceeding, whether begun before, on or after the day on which this section commences; and

(b) the Attorney-General gives notice in writing to the parties to the proceeding**, the legal representatives of the parties to the proceeding** and the court that this Act applies to the proceeding;

then, subject to subsection (5), this Act applies to the proceeding.

Application to civil proceedings—Attorney-General a party to proceedings

(2) If:

(a) the Attorney-General is, or becomes, a party to a civil proceeding, whether begun before, on or after the day on which this section commences; and

(b) the Minister appointed under subsection (3) or (4) gives notice in writing to the parties to the proceeding, **the legal representatives of the parties to the proceeding** and the court that this Act applies to the proceeding;

then:

(c) subject to subsection (5), this Act applies to the proceeding; and

(d) the Minister must perform the functions and exercise the powers, in relation to the proceeding, that are conferred on the Attorney-General under Divisions **1A, 1**, 2, 3 and 4 of Part 3A; and

(e) references in:

(i) Division 4 of Part 2; and

(ii) Divisions **1A, 1**, 2, 3 and 4 of Part 3A; and

(iii) Division 2 of Part 5;

to the Attorney-General (other than references to the Attorney-General as a party to the proceeding) are to be read as references to the Minister.

Attorney-General to appoint alternative Minister

(3) The Attorney-General must, as soon as possible after the commencement of this section, appoint in writing another Minister for the purposes of the operation of subsection (2) in relation to all civil proceedings.

(4) If the Minister appointed under subsection (3) is, or becomes, a party to a civil proceeding to which the Attorney-General also is or becomes a party, the Attorney-General must appoint a different Minister for the purposes of the operation of subsection (2) in relation to that civil proceeding.

Application to civil proceedings—notice given after a proceeding has begun

(5) If the Attorney-General or the Minister gives the notice after the proceeding has begun, this Act only applies to the parts of the proceeding that ~~take place after the notice is given~~ **occur after the notice is given (whether or not those parts began before that time).**

Section 6A: Application of Act to civil proceedings

The proposed amendments to subsections 6A(1), (2) and (5) mirror those to subsections 6(1) and (2), but apply to civil proceedings.

Clarify the application of the Act to a party's legal representative

The procedure for invoking the Act in the civil regime requires the Attorney-General (or, where the Attorney-General is a party to the proceedings, another appointed Minister) to notify the parties and the court that the Act applies. The proposed amendments clarify that the Attorney-General or other appointed Minister must give notice to the legal representatives of the parties as well as to the parties themselves and to the court.

Clarify the application of the Act to proceedings once the Act has been invoked

Similarly to subsection 6(2), it is unclear whether the Act can apply to parts of the proceeding which start prior to the notice but continue after the notice is given. The proposed amendment to subsection 6A(5) clarifies that the Act applies to all proceedings that take place after the notice is given, irrespective of whether the proceedings commenced prior to the notice.

Notice and appointment are not legislative instruments

(6) A notice given under subsection (1) or (2) and an appointment made by the Attorney-General under subsection (3) or (4) are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

THIS PAGE IS INTENTIONALLY BLANK

Changes to definitions within the NSI Act

7 Definitions

In this Act, unless the contrary intention appears:

court official **means an individual who:**

(a) is employed or engaged by a court to perform services in the court in relation to a proceeding in the court; or

(b) in relation to a federal criminal proceeding in a court – supervises the defendant in the court.

national security information **means information:**

(a) that relates to national security; or

(b) the disclosure of which may affect national security.

Definition of 'court official'

Currently the Act does not contain a definition of court official. This has created uncertainty as to which court staff are able to be present during closed hearings under sections 29 and 38I of the Act. The proposed definition of court official has been given a broad meaning and is not confined to persons who are actually employed by the court. The term extends to any persons who perform services to assist with the court proceedings, in an official capacity for, at the request of, or on behalf of the court. A broad definition of 'court official' would ensure that all necessary officials are able to be in the court during closed hearings, to allow the proceedings to continue efficiently and without delay.

Paragraph (a) of the definition applies to individuals employed or engaged by the court to perform services in the court in relation to a proceeding, such as a judge's associate, court reporter or an interpreter. Paragraph (b) of the definition would apply to corrections officers who are required to be present in the court room to supervise and accompany the defendant. It would also include a medical officer, such as a doctor, who is required to be in the court room to attend to the medical needs of the defendant if necessary. Such individuals may not be employed directly by the court, but their presence is in an official capacity for the purpose of facilitating federal criminal proceedings. The persons captured by this definition will be able to remain in the court room during closed court hearings under sections 29 and 38I of the Act.

Definition of 'national security information'

There is currently no definition of national security information in the Act. Instead, the provisions of the Act operate by reference to information in two different categories:

- information which relates to national security or the disclosure of which may affect national security
- information, the disclosure of which is likely to prejudice national security.

Under sections 24, 25, 38D and 38E the prosecutor, defendants and parties must notify the Attorney-General of any expected disclosure of information that falls under the first category. A concern was that, without a clear definition of national security information, it may be unclear when notification is expected. The proposed definition outlines that national security information means information that either relates to national security or the disclosure of which may affect national security. The definition will be used in the Act primarily under the notice provisions, sections 24, 25, 38D and 38E of the Act. This definition encapsulates the first category of information outlined above. This category of information captures a broad amount of information, compared to the second category. It was considered appropriate to have the definition capture a broader amount of information as it will ensure that the Attorney-General and court are made aware of any potentially damaging information that may arise in the proceeding. The second category of information is used when the Attorney-General is deciding whether to issue a non-disclosure certificate or witness exclusion certificate. This category includes less information than would be captured by the definition of 'national security information'. Using this second category, which covers less information, ensures that only information which is prejudicial to national security is prevented from being disclosed.

13 Meaning of *criminal proceeding*

(1) In this Act, ***criminal proceeding*** means a proceeding for the prosecution, whether summarily or on indictment, of an offence or offences.

(2) To avoid doubt, each of the following is part of a ***criminal proceeding***:

(a) a bail proceeding;

(b) a committal proceeding;

(c) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports ~~of persons intended to be called by a party to give evidence~~;

(d) a sentencing proceeding;

(e) an appeal proceeding;

(f) a proceeding with respect to any matter in which a person seeks a writ of mandamus or prohibition or an injunction against an officer or officers of the Commonwealth (within the meaning of subsection 39B(1B) of the *Judiciary Act 1903*) in relation to:

(i) a decision to prosecute a person for one or more offences against a law of the Commonwealth; or

(ii) a related criminal justice process decision (within the meaning of subsection 39B(3) of that Act);

(g) any other pre-trial, interlocutory or post-trial proceeding prescribed by regulations for the purposes of this paragraph.

(3) To avoid doubt, a re-trial, and proceedings relating to the re-trial (including those mentioned in subsection (2)), are part of the same criminal proceeding as the trial.

Section 13: Meaning of 'criminal proceeding'

The Act can only apply to federal criminal proceedings that fall within the definition of criminal proceeding in section 13 of the Act.

Application of the Act to discovery procedures

Paragraph 13(2)(c) currently defines a criminal proceeding to include the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence. This definition could be interpreted narrowly to only cover discovery procedures that relate to *persons* intended to be called by a party to give evidence, rather than documents, evidence and reports in general. This is problematic as it limits the breadth of the definition of criminal proceedings. The proposed amendment will clarify this uncertainty by omitting the phrase 'of persons intended to be called by a party to give evidence'. The provision will continue to cover the disclosure of evidence of an individual who could be called to give evidence. This type of evidence will be captured in the phrase, 'intended evidence'. For example, this amendment will ensure that subpoenas requesting the production of documents or persons to give evidence are captured by the definition under 13(2)(c).

Re-trials

Currently under section 13 it is unclear whether a re-trial is considered a separate criminal proceeding from the trial. If the prosecution gives notice, under section 24, that the Act will apply to a trial, there is uncertainty about whether the prosecution needs to give another notice if there is a re-trial. Proposed subsection 13(3) will make it clear that a re-trial and proceedings relating to a re-trial are considered, for the purposes of the Act, to be part of the same criminal proceeding as the trial. Therefore, where the prosecution gives notice that the Act will apply to the trial, there will be no requirement for the Act to be invoked again for the purposes of a re-trial or proceedings relating to the re-trial.

~~**14 Meaning of *federal criminal proceeding***~~

~~In this Act, ***federal criminal proceeding*** means:~~

~~(a) a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth; or~~

~~(b) a court proceeding under, or in relation to a matter arising under, the *Extradition Act 1988*.~~

14 Meaning of *federal criminal proceeding*

In this Act, *federal criminal proceeding* means a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth.

Section 14: Meaning of 'federal criminal proceeding'

Section 14 defines '*federal criminal proceeding*'. Paragraph 14(b) of the definition includes proceedings under the *Extradition Act 1988* (Cth). The terminology within the Act for federal criminal proceedings can be difficult to apply to extradition proceedings. For example, the terms 'prosecutor' and 'defendant' are not terms used in proceedings under the *Extradition Act 1988*. It is, therefore, proposed to exclude the reference to proceedings under the *Extradition Act 1988* in the definition of a federal criminal proceeding. Consequently any future proceeding under, or in relation to, a matter arising under the *Extradition Act 1988* that involves national security information will be treated as a civil proceeding for the purposes of the NSI Act.

15 Meaning of *defendant* in relation to a federal criminal proceeding

~~(1) In this Act, unless the contrary intention appears, ***defendant*** means:~~

~~(a) in relation to a federal criminal proceeding mentioned in paragraph 14(a)—a person charged with the offence or offences concerned (even if the proceeding takes place after any conviction of the person); or~~

~~(b) in relation to a federal criminal proceeding mentioned in paragraph 14(b)—a person to whom the proceeding relates.~~

(1) In this Act, *defendant,* in relation to a federal criminal proceeding, means a person charged with the offence or offences concerned (even if the proceeding occurs after any conviction of the person).

(2) If there is more than one defendant in a federal criminal proceeding, this Act applies separately in relation to each defendant.

Section 15: Meaning of 'defendant' in relation to a federal criminal proceeding

Currently, the definition includes a reference to proceedings under paragraph 14(b), which is a matter arising under the *Extradition Act 1988*. Proposed subsection 15(1) will not include any reference to paragraph 14(b). This is a consequential amendment due to the proposal to treat proceedings under the *Extradition Act 1988* as civil rather than criminal proceedings for the purpose of the NSI Act.

15A Meaning of *civil proceeding*

(1) In this Act, ***civil proceeding*** means any proceeding in a court of the Commonwealth, a State or Territory, other than a criminal proceeding.

Note: The Act only applies to a civil proceeding in respect of which a notice has been given under section 6A.

(2) To avoid doubt, each of the following is part of a ***civil proceeding***:

(a) any proceeding on an ex parte application (including an application made before pleadings are filed in a court);

(b) the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports ~~of persons intended to be called by a party to give evidence;~~

(c) an appeal proceeding;

(d) any interlocutory or other proceeding prescribed by regulations for the purposes of this paragraph.

(3) To avoid doubt, a re-hearing, and proceedings relating to the re-hearing (including those mentioned in subsection (2)), are part of the same civil proceeding as the hearing.

Section 15A: Meaning of civil proceedings

The NSI Act can only apply to civil proceedings that fall within the definition of a civil proceeding under section 15A of the Act.

Application of Act to discovery procedures

Similarly to the definition of criminal proceedings under section 13, paragraph 15A(2)(b) currently defines a civil proceeding to include the discovery, exchange, production, inspection or disclosure of intended evidence, documents and reports of persons intended to be called by a party to give evidence. This definition could be interpreted narrowly to only cover discovery procedures that relate to *persons* intended to be called by a party to give evidence, rather than documents, evidence and reports in general. Similarly to section 13, an amendment is proposed to remove the phrase 'of persons intended to be called by a party to give evidence'.

Re-hearings

Similar to section 13, currently under section 15A it is unclear whether a re-hearing and proceedings relating to a re-hearing are considered part of the original civil proceeding. The proposed addition of subsection 15A(3) will clarify that, where the Attorney-General gives notice under subsection 6A(1), the Act will apply to the substantive proceeding, as well as any re-hearing or proceedings relating to a re-hearing. There is no requirement for the Act to be invoked again for the purposes of that re-hearing.

16 Disclosure of information in permitted circumstances

A person discloses information ***in permitted circumstances*** if:

(a) the person is the prosecutor in a federal criminal proceeding and the person discloses the information in the course of his or her duties in relation to the proceeding; or

~~(aa) the person:~~

~~(i) is a party to a civil proceeding; and~~

~~(ii) has been given a security clearance by the Department at the level considered appropriate by the Secretary;~~

~~and discloses the information in the proceeding, or in a closed hearing in relation to the proceeding; or~~

~~(ab) the person:~~

~~(i) is a Minister; or~~

~~(ii) is in the employment of the Commonwealth or an authority of the Commonwealth; or~~

~~(iii) holds or performs any duties of any office or position under a law of the Commonwealth;~~

~~and the person discloses the information in the course of his or her duties in relation to a civil proceeding; or~~

~~(ac) the person:~~

~~(i) is the legal representative of a party to a civil proceeding or, if section 38K applies, of the Attorney-General; and~~

~~(ii) has been given a security clearance by the Department at the level considered appropriate by the Secretary;~~

~~and discloses the information in the course of his or her duties in relation to the proceeding; or~~

~~(ad) the person:~~

~~(i) is assisting a legal representative mentioned in paragraph (ac); and~~

~~(ii) has been given a security clearance by the Department at the level considered appropriate by the Secretary;~~

~~and discloses the information in the course of his or her duties in relation to the proceeding; or~~

~~(b) the person is a staff member within the meaning of the *Intelligence Services Act 2001* and the person discloses the information in the course of his or her duties.~~

(b) the person discloses the information in circumstances specified by the Attorney-General in a certificate or advice given under section 26, 28, 38F or 38H.

Section 16: Disclosure of information in permitted circumstances

Under the NSI Act, the Attorney-General determines whether information can be disclosed. If it is determined that the information should not be disclosed he or she will issue a non-disclosure certificate or witness exclusion certificate. However, even if a certificate is issued by the Attorney-General, an individual may still be allowed to disclose the information if it is permitted under section 16.

Section 16 provides a list of permitted circumstances when information can be disclosed. For civil proceedings, the permitted circumstances differ depending on the category of person. A point of concern with the current section is that, in relation to civil proceedings, the definition of permitted circumstances is so wide that it potentially undermines the protection accorded to national security information by other provisions of the Act. For example, under paragraph (ab) an individual will be permitted to disclose information 'in the course of their duties'. This may result in an individual being allowed to disclose information in order to comply with an order for discovery or a notice to produce.

To address this concern it is proposed to repeal subsections (aa) to (b) and insert a new subsection which would give the Attorney-General greater flexibility to prescribe the circumstances in which national security information could be disclosed. The proposed subsection will allow the disclosure to be conditional on the specifications outlined by the Attorney-General in the certificate under sections 26, 28, 38F or 38H. This proposed amendment will ensure the protection of national security information is not undermined and the Act operates as intended.

17 Meaning of likely to prejudice national security

A disclosure of ~~national security information~~ **information** is ***likely to prejudice national security*** if there is a real, and not merely a remote, possibility that the disclosure will prejudice national security.

Section 17: Meaning of likely to prejudice national security

This item is a consequential amendment which is necessary because of the proposal to insert a definition of national security information into the Act under section 7.

19 General powers of a court

Power of a court in a federal criminal proceeding

(1) The power of a court to control the conduct of a federal criminal proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(1A) In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act or regulations made under this Act.

Consideration of a matter in relation to closed hearings in a federal criminal proceeding not to prevent later stay order

(2) An order under section 31 does not prevent the court from later ordering that the federal criminal proceeding be stayed on a ground involving the same matter, including that an order made under section 31 would have a substantial adverse effect on a defendant's right to receive a fair hearing.

Power of a court in a civil proceeding

(3) The power of a court to control the conduct of a civil proceeding, in particular with respect to abuse of process, is not affected by this Act, except so far as this Act expressly or impliedly provides otherwise.

(3A) In addition to the powers of a court under this Act in a civil proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act or regulations made under this Act.

Consideration of a matter in relation to closed hearings in a civil proceeding not to prevent later stay order

(4) An order under section 38L does not prevent the court from later ordering that the civil proceeding be stayed on a ground involving the same matter, including that an order made under section 38L would have a substantial adverse effect on the substantive hearing in the proceeding.

Section 19: General powers of a court

The court's power to control court proceedings

Section 19 of the Act provides that a court retains the power to control the conduct of a court proceeding. For example, a court retains the power to stay or dismiss a proceeding and to exclude persons from the court. The purpose of this provision is to ensure that the court's discretion is not unduly fettered.

Section 19 may be interpreted to unduly restrain a court from making orders that relate to national security information that are not specifically provided for in the Act. Furthermore, lower level courts, such as the Magistrates Court, do not have inherent powers which allow them to make general orders relating to the protection of national security information. The proposed amendments clarify that, the powers of the court are not limited to those provided for by the Act. Proposed subsection 19(1A) will outline that the court is able to make any orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding or in a civil proceeding. The amendment will also enable such orders to be made by the lower courts. For example, during a committal hearing in a Magistrates Court, a magistrate may order that, in order to protect the identity of a witness because the identity of the witness is national security information, the witness may appear behind a screen.

Restrictions on the court

The proposed amendments to section 19 reinforce a court's ability to control the conduct of federal criminal proceedings under subsection 19(1) or civil proceedings under subsection 19(3) of the Act. The only restriction on the court is that their orders in relation to the disclosure, protection, storage, handling or destruction of national security information, must be in the interests of national security and not inconsistent with the NSI Act or NSI Regulations.

Factors to be considered when deciding whether to order a stay of a civil proceeding

(5) In deciding whether to order a stay of the civil proceeding, the court must consider:

(a) the extent of any financial loss that a party would suffer as a result of the proceeding being stayed; and

(b) whether a party has reasonable prospects of obtaining a remedy in the proceeding; and

(c) any other matter the court considers relevant.

THIS PAGE IS INTENTIONALLY BLANK

Protection of information whose disclosure in federal criminal proceedings is likely to prejudice etc. national security

Division 1A—Attorney-General etc. may attend and be heard at federal criminal proceedings

20A Attorney-General etc. may attend and be heard at federal criminal proceedings

If, in a federal criminal proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then any or all of the following may attend and be heard at the proceeding:

(a) the Attorney-General;

(b) the Attorney-General's legal representative;

(c) any other representative of the Attorney-General.

Protecting national security information in criminal proceedings

New Division 1A – Attorney-General etc may attend and be heard at federal criminal proceedings

Section 20A : Attorney-General etc may attend and be heard at federal criminal proceedings

Currently in the NSI Act there is limited scope for intervention by the Attorney-General in federal criminal proceedings. Under section 30 of the Act, the Attorney-General may only intervene in federal criminal proceedings when closed hearing requirements apply. Furthermore, a representative of the Attorney-General is not permitted to intervene.

The Attorney-General has a broad responsibility to protect national security information throughout all stages of a federal criminal proceeding. The intention behind this proposed amendment is to create a broader power for the Attorney-General to be able to fulfil this responsibility. Proposed new section 20A provides for the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General to attend and be heard at any stage of a federal criminal proceeding where an issue relating to disclosure, protection, storage, handling or destruction of national security information in the proceeding arises. A representative of the Attorney-General could include an officer from the Attorney-General's Department or a law enforcement or intelligence and security agency who is responsible for the information. The inclusion of this new section will assist in ensuring the appropriate protection of national security information whilst still allowing a court to run a proceeding in an efficient manner.

Division 1B—Court to consider hearing in camera etc.

20B Court to consider hearing in camera etc.

(1) If, during a hearing in a federal criminal proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then before hearing the issue, the court must consider making an order under either or both of the following:

(a) subsection 19(1A);

(b) section 93.2 of the *Criminal Code*.

(2) Subsection (1) does not apply if the issue is the subject of an order that is in force under section 22.

New Division 1B – Court to consider hearing in camera etc

Section 20B: Court to consider hearing in camera etc.

Currently, under the NSI Act, if an issue relating to the disclosure, protection, storage, handling or destruction of national security information is raised, the only mechanism to protect the information, while dealing with the issue, is through a closed hearing. However, the requirement to hold a closed hearing, whenever there is an issue relating to the disclosure, protection, storage, handling or destruction of national security information, can result in unnecessary delays in the proceeding. While the higher courts have inherent powers to make general orders relating to national security information and are therefore not required to utilise the closed hearing provisions of the Act, the lower courts do not have such inherent powers.

Proposed section 20B will provide the courts with a power to protect national security information. It will require the court, before hearing an issue relating to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding, to consider making an order under section 93.2 of the Criminal Code and/or under new subsection 19(1A). Under section 93.2 of the Criminal Code, a person presiding over the court may make orders, if satisfied they are in the interest of the security or defence of the Commonwealth, to do any or all of the following: exclude members of the public, place restrictions on reporting of proceedings, and place restrictions on access to physical evidence.

Proposed new subsection 19(1A) clarifies that the court is able to make any orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding or in a civil proceeding. The inclusion of section 20B will increase the power of the court to protect national security information during proceedings, whilst still ensuring the efficiency of the court proceeding.

However, the requirement under section 20B will not apply if the issue is the subject of an order under section 22. In those circumstances, protections agreed as sufficient by the parties and the court will already be in place.

21 ~~Pre-trial conferences~~ National security information hearings

~~(1) Before the trial in a federal criminal proceeding begins, the prosecutor or defendant may apply to the court for the court to hold a conference of the parties to consider issues relating to any disclosure, in the trial, of information that relates to national security or any disclosure, of information in the trial, that may affect national security, including:~~

~~(a) whether the prosecutor or defendant is likely to be required to give notice under section 24; and~~

~~(b) whether the parties wish to enter into an arrangement of the kind mentioned in section 22.~~

(1) At any time during a federal criminal proceeding, the Attorney-General, the Attorney-General's legal representative, the prosecutor, the defendant or the defendant's legal representative may apply to the court for the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including:

(a) the making of an arrangement of the kind mentioned in section 22; and

(b) the giving of a notice under section 24.

(1A) As soon as possible after making the application, the applicant must notify each of the following that the application has been made:

(a) if the applicant is the Attorney-General or the Attorney-General's legal representative—the prosecutor, the defendant and the defendant's legal representative;

(b) if the applicant is the prosecutor—the Attorney-General, the defendant and the defendant's legal representative;

(c) if the applicant is the defendant or the defendant's legal representative—the Attorney-General and the prosecutor.

(2) The court must hold the ~~conference~~ **hearing** as soon as possible after the application is made.

Section 21: Pre-trial conferences

Section 21 of the NSI Act currently gives parties the option to engage in a pre-trial conference to consider issues relating to national security information. Pre-trial conferences are advantageous because they can assist with the expeditious and early resolution of issues relating to national security information as well as make the court aware of any expected disclosures of national security information. There are two limitations with the current operation of section 21.

Firstly, section 21 is limited in that the conferences can only occur before the trial in a federal criminal proceeding commences. At any time during a federal criminal proceeding, the prosecutor and defendant may agree to an arrangement about the disclosure of national security information in the proceeding. Therefore, it makes sense to be able to hold a hearing to consider issues relating to the making of these arrangements at any point of the proceeding. The proposed new section 21(1) would clarify that at any stage of a federal criminal proceeding a hearing may be held to consider issues relating to disclosure, protection, storage, handling and destruction of national security information. For example, a hearing may be held to consider disclosure which is expected to occur during discovery, interrogatories, committal hearing or during the trial. The substituted section will also clarify that a hearing may be held not only to consider disclosure, in the proceeding, of national security information, but also its protection, storage, handling or destruction. This recognises the broader range of issues that may arise in relation to national security information during a proceeding. The phrase 'pre-trial conference' will be replaced with the phrase 'national security hearing', because the conference will no longer be limited to being held at the pre-trial phase. The hearing would be conducted in a similar way a directions hearing in a proceeding would be conducted. The section would also confirm that the hearing can be held in closed court if it is likely that national security information will be disclosed.

The second limitation with existing section 21 is that the Attorney-General is unable to apply to the court to hold a hearing. He also is not required to be notified when either the prosecutor or defendant applies to the court to hold a hearing. This fails to recognise the Attorney-General's role in protecting national security information in accordance with the Act. The new section 21(1) will provide that the Attorney-General or the Attorney-General's legal representative may apply to the court to hold a section 21 hearing to consider any issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information. Furthermore, allowing the Attorney-General to be a party to the hearing will bring the criminal regime in line with the civil regime. Under the civil regime the Attorney-General is currently able to attend the conference to discuss issues relating to the disclosure of national security information.

Proposed new subsection 21(1A) will clarify the obligation imposed on an applicant for a hearing under this section to notify all other relevant parties. The Attorney-General, the Attorney-General's legal representative, the prosecutor, the defendant or the defendant's legal representative may all apply to the court to hold a national security information hearing. New subsection 21(1A) will outline that the applicant must give notice to all parties involved in the proceeding that such an application has been made.

22 Arrangements for federal criminal proceedings about disclosures ~~relating to or affecting national security~~ etc. of national security information

~~(1) At any time during a federal criminal proceeding, the prosecutor and the defendant may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.~~

(1) At any time during a federal criminal proceeding:

(a) the Attorney-General, on the Commonwealth's behalf; and

(b) the prosecutor; and

(c) the defendant, or the defendant's legal representative on the defendant's behalf;

may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

(2) The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

Section 22: Arrangements for federal criminal proceedings about disclosures relating to or affecting national security.

Role of Attorney-General

Section 22 allows parties, during a federal criminal proceeding, to enter into an arrangement about any disclosure of information that relates to national security or that may affect national security. 'Section 22 arrangements' have become common practice in most cases. Currently, neither a defendant's legal representative nor the Attorney-General are specified as being able to enter a section 22 arrangement. The proposed amendment seeks to reinforce the role of the Attorney-General, under the Act, as being responsible for protecting national security information by providing that the Attorney-General may be a party to a section 22 arrangement. It also clarifies that a defendant's legal representative, on behalf of a defendant, can also be a party to such an arrangement.

Scope of arrangements

The proposed amendment will also ensure that an arrangement under section 22 may cover, not only the disclosure of national security information, but also the protection, storage, handling and destruction of national security information. This proposed amendment recognises the broader range of issues that may arise in relation to national security information during a proceeding.

23 Protection of ~~certain~~ national security information disclosed in a federal criminal proceeding

(1) The regulations may prescribe:

(a) ways in which ~~information that is disclosed, or to be disclosed, to the court~~ **national security information that is disclosed, or to be disclosed** in a federal criminal proceeding must be stored, handled or destroyed; and

(b) ways in which, and places at which, such information may be accessed and documents or records relating to such information may be prepared.

~~(2) At any time during a federal criminal proceeding, the court may make an order relating to the protection, storage, handling or destruction of information that is disclosed, or to be disclosed, to the court in the proceeding.~~

~~(3) A court must not make an order under subsection (2) that is inconsistent with a regulation mentioned in subsection (1).~~

(2) This section does not apply to information that is the subject of an order that is in force under section 22.

Note: The court may also make orders under section 93.2 of the *Criminal Code* and under other provisions of this Act in order to protect information from disclosure.

Section 23: Protection of certain information disclosed in a federal criminal proceeding

Paragraph 23(1)(a) of the NSI Act enables the regulations to prescribe how to access, prepare, store, handle or destroy information that is disclosed during proceedings. The regulation-making power is too broad as it covers all information. The proposed amendment will appropriately limit the regulation-making power to 'national security information'. The regulation-making power is also too narrow as it only covers information which is to be disclosed to the court. It does not account for information that may be disclosed outside the court. One example of when this may occur is when information is disclosed to the defendant's legal representative outside the court. The proposed amendment will extend this regulation-making power to allow for the protection of all national security information arising in a proceeding, not just that which is to be disclosed to the court.

Proposed new subsection 23(2) will also make it clear that the regulations do not apply to information that is subject to an order that is in force under section 22. The policy intention behind the Act is that, if possible, it is preferable that the parties agree to an arrangement under section 22. Arriving at an arrangement assists with court cases progressing efficiently. Therefore, throughout the Act it is the aim that the provisions support the formation of a section 22 arrangement.

24 ~~Prosecutor and defendant must notify expected disclosure in federal criminal proceedings of information relating to or affecting national security~~
Notification of expected disclosure of national security information

~~(1) If the prosecutor or defendant knows or believes that:~~

~~(a) he or she will disclose, in a federal criminal proceeding, information that relates to national security; or~~

~~(b) he or she will disclose information in a federal criminal proceeding and the disclosure may affect national security; or~~

~~(c) a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information in giving evidence or by his or her mere presence and:~~

~~(i) the information relates to national security; or~~

~~(ii) the disclosure may affect national security;~~

~~the prosecutor or defendant must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.~~

~~Note: Section 25 deals with the situation where the prosecutor or defendant knows or believes that a disclosure by a witness in answering a question may relate to or affect national security.~~

(1) If the prosecutor, the defendant or the defendant's legal representative knows or believes that:

(a) he or she will disclose national security information in a federal criminal proceeding; or

(b) a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by the person's mere presence; or

(c) on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal criminal proceeding;

then he or she must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note 1: Failure to give notice as required by this subsection is an offence in certain circumstances: see section 42.

Note 2: Section 25 deals with the situation where the prosecutor, the defendant or the defendant's legal representative knows or believes that information that will be disclosed in a witness's answer is national security information.

When not required to give notice

(1A) However, a person need not give notice about the disclosure of information under subsection (1) if:

(a) another person has already given notice about the disclosure of the information under that subsection; or

(b) the disclosure of the information:

(i) is the subject of a certificate given to the person under section 26 and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 22 or 31; or

(c) the disclosure of the information by the witness to be called:

Section 24 : Notification of expected disclosures in federal criminal proceedings of information relating to or affecting national security

Who is required to give notice to the Attorney-General?

If the prosecutor or defendant knows or believes that national security information will be disclosed during a proceeding, he or she must notify the Attorney-General and advise the court, the other party and any relevant witness that the Attorney-General has been notified. Notice must also be given if the prosecutor or defendant knows or believes that a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by that person's mere presence national security information will be disclosed. For example, notice must be given where an officer of an intelligence or security agency is to be called as a witness in a proceeding and not only will that officer be giving evidence about that agency's operations but the officer's identity itself is national security information. These notice requirements are important as they trigger the Attorney-General's consideration of whether to issue a criminal non-disclosure or witness exclusion certification under sections 26 and 28 of the NSI Act.

Proposed subsection 24(1) clarifies that this obligation to notify the Attorney-General is imposed not only on the prosecutor and defendant in federal criminal proceedings, but also on the defendant's legal representative.

Consequently subsection 24(3) will be repealed and a new subsection will be substituted, requiring the person who gives notice of a potential disclosure under subsection (1) to advise all other relevant parties that notice has been given to the Attorney-General. In cases where the defendant's legal representative or the defendant gives notice, there is no legislative requirement to advise each other of the notice. It is assumed that this will occur in the normal course of client and lawyer communications.

When does the Attorney-General need to be notified?

A difficulty with the current wording of subsection 24(1) is that it does not impose notice obligations in respect of subpoenas which may cause national security information to be disclosed. Proposed paragraph 24(1)(c) provides that notification obligations placed on the prosecutor, defendant or defendant's legal representative in federal criminal proceedings include where that person has applied to the court for a subpoena and the issuing of that subpoena will require a third party to disclose national security information in a criminal proceeding. For example, if a security or intelligence agency is subpoenaed for documents by the defendant's legal representative, where that defendant's legal representative knows or believes that those documents contain national security information, the legal representative must notify the Attorney-General of that knowledge or belief in accordance with subsection 24(1).

(i) is the subject of a certificate given to the person under section 28 and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 22 or 31; or

(d) the Attorney-General has given the person advice about the disclosure of the information under subsection 26(7) or 28(10).

Requirements for notice

(2) The notice must:

(a) be in the prescribed form; and

(b) if paragraph (c) does not apply—include a description of the information; and

(c) if the information is contained in a document—be accompanied by a copy of the document or by an extract from the document, that contains the information.

~~*Informing the court etc. of an expected disclosure*~~

~~(3) The prosecutor or defendant must also advise, in writing, the court, the other party and any person to whom paragraph (1)(c) applies that notice has been given to the Attorney-General. The advice must include a description of the information.~~

~~Note: Failure to give notice or advice as required by this section is an offence: see section 42.~~

~~*Adjournment to allow sufficient time for Attorney-General to act on the notice*~~

~~(4) On receiving the advice, the court must order that the proceeding be adjourned until the Attorney-General gives a copy of a certificate to the court under subsection 26(4) or gives advice to the court under subsection 26(7) (which applies if a decision is made not to give a certificate).~~

Informing the court etc. of an expected disclosure

(3) A person who gives notice under subsection (1) must also advise the following, in writing, that notice has been given to the Attorney-General:

(a) if the person is the prosecutor:

(i) the court; and

(ii) the defendant; and

(iii) the defendant's legal representative; and

(iv) any other person mentioned in paragraph (1)(b) or (c); and

(b) if the person is the defendant or the defendant's legal representative:

(i) the court; and

(ii) the prosecutor; and

(iii) any other person mentioned in paragraph (1)(b) or (c).

Note: Failure to give advice as required by this subsection is an offence in certain circumstances: see section 42.

(4) The advice must include a description of the information, unless the advice is being given by the defendant or the defendant's legal representative to the prosecutor.

Note: A contravention of this subsection is an offence in certain circumstances: see section 42.

When does the Attorney-General not need to be notified?

Although section 24 currently outlines when notice to the Attorney-General is necessary, it does not detail when it is not necessary. The reason for notifying the Attorney-General is to ensure he/she is aware of any potential disclosure of national security information. Where the Attorney-General has already become aware of the potential disclosure of particular national security information notice is not required to be given.

Proposed new subsection 24(1A) sets out when it is not necessary to give notice to the Attorney-General in federal criminal proceedings. For example, where particular national security information is the subject of court orders made under section 22, it is not necessary to comply with the notification requirements under subsection 24(1) in relation to that information. Notification is not required because, once section 22 orders are created, it is not necessary for the Attorney-General to issue a criminal non-disclosure or witness exclusion certification. However, if the orders under section 22 were varied or terminated or if a legal representative wishes to ask a question of a witness, knowing that the answer will disclose national security information not covered by the section 22 orders, notice must given in compliance with section 24. This amendment ensures that parties in a proceeding are not unnecessarily required to comply with multiple procedures that may delay the proceedings, while still guaranteeing adequate protection for national security information.

In what form does notice need to be given to the court etc of the expected disclosure?

Currently, subsection 24(3) requires that notice must be provided in writing and must include a description of the information. This provision may have the result of forcing the defence to disclose aspects of their defence. Proposed new subsection 24(4) will exclude a defendant or the defendant's legal representative from the requirement to include a description of the information in the advice to the prosecutor. This ensures that, to the extent possible, the defendant and the defendant's legal representative are not unnecessarily required to disclose aspects of their defence contrary to normal practice in the conduct of criminal prosecutions.

Adjournment to allow sufficient time for Attorney-General to act on the notice

(5) On receiving the advice, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:

(a) gives a copy of a certificate to the court under subsection 26(4) or 28(3); or

(b) gives advice to the court under subsection 26(7) or 28(10) (which applies if a decision is made not to give a certificate).

Adjournment to allow sufficient time for Attorney-General to act on the notice

Once notice has been given to the Attorney-General subsection 24(4) currently requires the court to adjourn the proceeding. Having to adjourn the whole proceeding can cause unnecessary delays. Proposed new subsection 24(5) ensures that the court must only adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed, i.e. that part of the proceeding which relates to the national security information which is the subject of the notice to the Attorney-General. This will ensure that there is no unnecessary delay in a federal criminal proceeding as a result of the protection of national security information through the procedures of the NSI Act.

25 Preventing witnesses from disclosing information in federal criminal proceedings by not allowing them to answer questions

Witness expected to disclose information in giving evidence

(1) This section applies if:

(a) a witness is asked a question in giving evidence in a federal criminal proceeding; and

~~(b) the prosecutor or defendant knows or believes that:~~

~~(i) information that will be disclosed in the witness's answer relates to national security; or~~

~~(ii) the disclosure of information in the witness's answer may affect national security.~~

(b) the prosecutor, the defendant or the defendant's legal representative knows or believes that information that will be disclosed in the witness's answer is national security information.

(2) The prosecutor ~~or defendant~~ **the defendant or the defendant's legal representative** must advise the court of that knowledge or belief.

Note: Failure to advise the court is an offence: see section 42.

(2A) However, a person need not advise the court under subsection (2) about the disclosure of information if:

(a) another person has already advised the court about the disclosure of the information under that subsection; or

(b) a notice has been given to the Attorney-General under subsection 24(1) about the disclosure of the information; or

(c) the disclosure of the information:

(i) is the subject of a certificate given to the person under section 26 and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 22 or 31; or

(d) the Attorney-General has given the person advice about the disclosure of the information under subsection 26(7).

~~*Court must hold hearing*~~

~~(3) The court must adjourn the proceeding and hold a hearing.~~

~~(4) The closed hearing requirements apply.~~

~~(5) At the hearing, the witness must give the court a written answer to the question. The court must show the answer to the prosecutor.~~

~~*Prosecutor must give notice to Attorney-General etc.*~~

~~(6) If the prosecutor knows or believes that, if the written answer were to be given in evidence in the proceeding:~~

~~(a) the information that would be disclosed in the witness's answer relates to national security; or~~

~~(b) the disclosure of information in the witness's answer may affect national security;~~

Section 25: Preventing witnesses from disclosing information in federal criminal proceedings by not allowing them to answer questions

Clarify the application of the Act to a defendant's legal representative

The proposed amendments to section 25 mirror those to section 24. If a witness is asked a question in the course of giving evidence and the prosecutor or defendant knows or believes that in answering the question the witness may disclose national security information, the relevant party must advise the court of that knowledge or belief. The proposed amendments clarify that the obligation set out in section 25 is borne not only by the prosecutor and the defendant, but also by the defendant's legal representative.

Improving procedure for protecting national security information when a witness is answering questions within the court room

Currently under section 25, if a witness is asked a question in the course of giving evidence and the prosecutor or the defendant knows or believes that the witness's answer may disclose national security information, the prosecutor or the defendant must advise the court. If this occurs:

- the proceedings must be adjourned and a closed court hearing held,
- the witness must provide the court with a written answer to the question and the court must show the answer to the prosecutor,
- if the prosecutor knows or believes that the information in the answer is national security information, he or she must advise the court and notify the Attorney-General, and
- if the court is advised by the prosecutor, it must adjourn the proceedings until the Attorney-General determines whether a certificate should be issued.

~~the prosecutor must advise the court of that knowledge or belief and, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.~~

~~Note: Failure to advise the court or to notify the Attorney-General is an offence: see section 42.~~

~~*Court must adjourn proceeding*~~

~~(7) If the court is advised under subsection (6), it must order that the proceeding be adjourned until the Attorney-General gives a copy of a certificate to the court under subsection 26(4) or gives advice to the court under subsection 26(7) (which applies if a decision is made not to give a certificate).~~

Witness to give written answer

(3) If the court is advised under subsection (2) and the witness would, apart from this section, be required to answer the question, the court must order that the witness give the court a written answer to the question.

(4) The court must show the written answer to the prosecutor and, if present, the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General.

(5) If:

(a) under subsection (4), the Attorney-General's representative (other than the Attorney-General's legal representative) is shown the written answer; and

(b) he or she knows or believes that, if the written answer were to be given in evidence in the proceeding, the information that would be disclosed in the witness's answer is national security information;

then he or she must advise the prosecutor of that knowledge or belief.

Prosecutor must give notice to Attorney-General etc.

(6) If the prosecutor knows, believes, or is advised under subsection (5), that, if the written answer were to be given in evidence in the proceeding, the information that would be disclosed in the witness's answer is national security information, then the prosecutor must:

(a) advise the court of that knowledge, belief or advice; and

(b) as soon as practicable, give the Attorney-General notice in writing of that knowledge, belief or advice.

Note: Failure to advise the court or to notify the Attorney-General is an offence in certain circumstances: see section 42.

(7) However, the prosecutor need not advise the court or give the Attorney-General notice about the written answer under subsection (6) if the information disclosed by the written answer:

(a) is the subject of a certificate or advice given to the prosecutor under section 26 and the certificate still has effect; or

(b) is the subject of an order that is in force under section 22 or 31.

The proposed amendments to the section aim to streamline this procedure once it is identified that a witness's testimony may disclose national security information. The aim of the proposed new procedures is to avoid unnecessary delays, whilst maintaining appropriate protections for the national security information. The proposed amendment to the procedure includes:

- removing the automatic requirement for a closed hearing. This will limit delays associated with invoking closed hearing requirements. Instead, the witness just provides the written answer to the court;

- the court may still be required to adjourn proceedings following advice from the prosecutor and notification of the Attorney-General of potential disclosure of national security information by a witness in a trial. However, the court will only be required to adjourn as much of the proceeding that may involve a disclosure of the national security information. This ensures that those parts of the proceeding that do not relate to the national security information can continue. This will assist in limiting undue delays and the possibility of an application being made for a mistrial on the basis of prejudice to the accused resulting from a lack of continuity; and

- proposed new subsection 25(2A) will clarify the circumstances when a person is not required to advise the court about the disclosure of information. This amendment ensures that parties in a proceeding do not need to comply with multiple procedures unnecessarily and proceedings are not unduly delayed.

Consequential amendments

Proposed new section 20A provides for the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General to attend and be heard at any stage of a federal criminal proceeding where an issue relating to disclosure, protection, storage, handling or destruction of national security information in the proceeding arises. As a result of this amendment, proposed subsection 25(4) will require the court to show the witness's written answer to the Attorney-General, the Attorney-General's legal representative or any other representative if they are present in the court. The proposed amendments also place an obligation on the Attorney-General's representative, to advise the prosecutor if they know or believe the answer would disclose national security information should it be given in evidence.

Adjournment to allow sufficient time for Attorney-General to act on the notice

(8) If the court is advised under subsection (6), it must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:

(a) gives a copy of a certificate to the court under subsection 26(4); or

(b) gives advice to the court under subsection 26(7) (which applies if a decision is made not to give a certificate).

THIS PAGE IS INTENTIONALLY BLANK

26 Attorney-General's criminal non-disclosure certificate

(1) This section applies if:

(a) any of the following happens:

(i) the Attorney-General is notified under section 24 that the prosecutor ~~or defendant knows or believes that the prosecutor or defendant or another person~~ ,**the defendant or the defendant's legal representative knows or believes that he or she, or another person** will disclose information in a federal criminal proceeding;

(ii) the Attorney-General for any reason expects that any of the circumstances mentioned in paragraphs 24(1)(a) to (c) will arise under which the prosecutor ~~or defendant~~ **, the defendant, the defendant's legal representative** or another person will disclose information in a federal criminal proceeding;

(iii) the Attorney-General is notified under subsection 25(6) that the prosecutor ~~considers~~ **knows, believes or is advised** that an answer by a witness in a hearing in relation to a federal criminal proceeding will disclose information; and

(b) paragraph 28(1)(a) (about the mere presence of a witness constituting disclosure) does not apply; and

(c) the Attorney-General considers that the disclosure is likely to prejudice national security.

Attorney-General may give a certificate—case where information is in the form of a document

(2) If the information would be disclosed in a document (the ***source document***), the Attorney-General may give each potential discloser (see subsection (8)) of the information in the proceeding:

(a) any of the following:

(i) a copy of the document with the information deleted;

(ii) a copy of the document with the information deleted and a summary of the information attached to the document;

(iii) a copy of the document with the information deleted and a statement of facts that the information would, or would be likely to, prove attached to the document;

together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the copy, or the copy and the statement or summary; or

(b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

Section 26: Attorney-General's criminal non-disclosure certificate

Definition of potential discloser to include a defendant's legal representative

Once the Attorney-General has been notified of an expected disclosure of information which relates to or may affect national security, the Attorney-General may issue a non-disclosure certificate. Criminal non-disclosure certificates are used to protect information likely to prejudice national security from being disclosed during a federal criminal proceeding.

The Attorney-General must give each potential discloser a copy of the non-disclosure certificate (if he or she decides to issue one) or notice that he or she has decided not to issue a certificate. The Attorney-General is obliged to do this to make sure potential disclosers are aware of information they can/can not disclose. Subsection 26(8) of the NSI Act defines a 'potential discloser.' Currently, it does not account for the possibility of the defendant's legal representative being a potential discloser. The proposed new subsection 26(8) clarifies that the defendant's legal representative, as well as the prosecutor and the defendant, will in all instances be classified as a potential discloser of the information.

Attorney-General may give a certificate—case where information is not in the form of a document

(3) If the information would be disclosed other than in a document, the Attorney-General may give each potential discloser of the information in the proceeding:

(a) either:

(i) a written summary of the information; or

(ii) a written statement of facts that the information would, or would be likely to, prove;

together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the summary or statement; or

(b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

(4) The Attorney-General must give the court a copy of:

(a) in any case—the certificate; and

(b) if paragraph (2)(a) applies—the source document, the document mentioned in subparagraph (2)(a)(i), (ii) or (iii) and the summary or statement mentioned in subparagraph (2)(a)(ii) or (iii); and

(c) if paragraph (3)(a) applies—the summary or statement mentioned in that paragraph.

Duration of a certificate

(5) The certificate ceases to have effect when any order by the court under section 31 on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Certificate is not a legislative instrument

(6) A certificate given to a potential discloser under this section is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Attorney-General may decide not to give a certificate

(7) If the Attorney-General decides not to do as mentioned in subsection (2) or (3), the Attorney-General must, in writing, advise each potential discloser and the court of his or her decision.

THIS PAGE IS INTENTIONALLY BLANK

~~(8) Each of the following persons is a *potential discloser* of the information in the proceeding:~~

~~(a) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by the prosecutor or defendant—the prosecutor or defendant; or~~

~~(b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than the prosecutor or defendant—the prosecutor or defendant and the other person; or~~

~~(c) if subparagraph (1)(a)(iii) applies—the prosecutor, defendant and the witness mentioned in that subparagraph;~~

~~and, if the defendant is a potential discloser under any of the above paragraphs, the defendant's legal representative is also a *potential discloser*.~~

Definition of potential discloser

(8) Each of the following persons is a *potential discloser* of the information in the proceeding:

(a) in all cases—the prosecutor, the defendant and the defendant's legal representative; and

(b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than the prosecutor, the defendant or the defendant's legal representative—the other person; and

(c) if subparagraph (1)(a)(iii) applies—the witness mentioned in that subparagraph.

THIS PAGE IS INTENTIONALLY BLANK

27 Consequences of Attorney-General giving criminal non-disclosure certificate

~~*Consequences of certificate for pre-trial proceedings*~~

~~(1) If a proceeding is covered by paragraph 14(a) (about a proceeding involving a trial) and, under section 26, the Attorney-General gives a potential discloser a certificate at any time during a part of the proceeding that takes place before the trial begins, the certificate is conclusive evidence, during that part of the proceeding and any later part that takes place before the hearing mentioned in paragraph (3)(a) begins, that disclosure of the information in the proceeding is likely to prejudice national security.~~

~~(2) If a proceeding is covered by paragraph 14(b) (about extradition proceedings) and, under section 26, the Attorney-General gives a potential discloser a certificate at any time before or during the proceeding, the certificate is conclusive evidence during the proceeding that disclosure of the information in the proceeding is likely to prejudice national security.~~

Consequences of certificate for pre-trial proceedings

(1) If, in a federal criminal proceeding, the Attorney-General gives a potential discloser a certificate under section 26 at any time during a part of the proceeding that occurs before the trial begins, then the certificate is conclusive evidence, during that part of the proceeding and any later part that occurs before the hearing mentioned in paragraph (3)(a) begins, that disclosure of the information in the proceeding is likely to prejudice national security.

Court hearing

(3) ~~If a proceeding is covered by paragraph 14(a) (about a proceeding involving a trial) and, under section 26, the Attorney-General gives a potential discloser a certificate~~ **If in a federal criminal proceeding, the Attorney-General gives a potential discloser a certificate under section 26** at any time during the proceeding, the court must:

(a) in any case where the certificate is given to the court before the trial begins—before the trial begins, hold a hearing to decide whether to make an order under section 31 in relation to the disclosure of the information; or

(b) if subparagraph 26(1)(a)(i) or (iii) applies and the certificate is given to the court after the trial begins—continue the adjournment of the proceeding mentioned in subsection ~~24(4) or 25(7)~~ **24(5) or 25(8)** for the purpose of holding a hearing to decide whether to make an order under section 31 in relation to the disclosure of the information; or

(c) if subparagraph 26(1)(a)(ii) applies and the certificate is given to the court after the trial begins—adjourn the proceeding for the purpose of holding a hearing to decide whether to make an order under section 31 in relation to the disclosure of the information.

(4) If the Attorney-General revokes the certificate at any time while the proceeding is adjourned or the hearing is being held, the court must end the adjournment or the hearing.

(5) The closed hearing requirements apply to the hearing.

Section 27: Consequences of Attorney-General giving criminal non-disclosure certificate

Consequential amendments

Once the Attorney-General gives a criminal non-disclosure certificate, a closed court hearing takes place to decide whether to make an order under section 31 of the NSI Act in relation to the disclosure of information. The court will determine whether it will maintain, modify or remove the restriction on disclosure of information. Until the closed court hearing takes place, the Attorney-General's certificate is conclusive evidence that disclosure of the information in the proceeding is likely to prejudice national security.

The proposed amendments to section 27 are all consequential amendments as a result of the proposed amendment to the definition of federal criminal proceedings so that it does not include extradition proceedings. Subsections 27(1),(2) and (3) refer to the current definition of federal criminal proceedings, including references to extradition proceedings under subsection 14(b). Therefore, it is proposed to amend these subsections to account for the change to the definition of federal criminal proceedings.

28 Attorney-General's criminal witness exclusion certificate

(1) This section applies if:

(a) either:

~~(i) the Attorney-General is notified under section 24 that the prosecutor or defendant knows or believes that a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence; or~~

(i) the Attorney-General is notified under section 24 that the prosecutor, the defendant or the defendant's legal representative knows or believes that a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose information by the person's mere presence; or

(ii) the Attorney-General for any reason expects that a person whom the prosecutor ~~or defendant~~ **, the defendant or the defendant's legal representative** intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence; and

(b) the Attorney-General considers that the disclosure is likely to prejudice national security.

Attorney-General may give a certificate

(2) The Attorney-General may give a certificate to the prosecutor ~~or defendant~~, **the defendant or the defendant's legal representative** as the case may be, that states that the prosecutor ~~or defendant~~, **the defendant or the defendant's legal representative** must not call the person as a witness in the federal criminal proceeding.

(3) The Attorney-General must give a copy of the certificate to the court.

Duration of a certificate

(4) The certificate ceases to have effect when any order by the court under section 31 on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Court hearing

(5) ~~If the proceeding is covered by paragraph 14(a) (about a proceeding involving a trial), the~~ **The** court must:

(a) if the certificate is given to the court before the trial begins—before the trial begins, hold a hearing to decide whether to make an order under section 31 in relation to the calling of the witness; or

(b) if the certificate is given to the court after the trial begins—adjourn the proceeding for the purpose of holding a hearing to decide whether to make an order under section 31 in relation to the calling of the witness.

~~(6) If the proceeding is covered by paragraph 14(b) (about extradition proceedings), the certificate is conclusive evidence during the proceeding that the person, if called as a witness in the proceeding, will disclose information by his or her mere presence and that the disclosure is likely to prejudice national security.~~

(7) The closed hearing requirements apply to the hearing.

Section 28: Attorney-General's criminal witness exclusion certificate

Consequential amendments

Currently, the Attorney-General may issue a witness exclusion certificate if he or she has been notified or expects that a person whom the prosecutor or defendant intends to call as a witness may disclose information by his or her mere presence and the disclosure would be likely to prejudice national security. The proposed amendments to subsection 28(1) are a result of the proposed amendments to section 24, which clarify that the obligation to notify the Attorney-General is also imposed on the legal representative. It is proposed that subsection 28(1) will clarify that the Attorney-General may also issue a certificate if he/she is notified or expects that the defendant's legal representative intends to call a witness.

The amendments to subsections 28(5) and (6) are consequential amendments as a result of removing extradition proceedings from the definition of a federal criminal proceeding in section 14.

Clarify the application of the Act to a defendant's legal representative

The amendments will also clarify that the Attorney-General may give a criminal witness exclusion certificate issued under subsection 28(2) to the defendant's legal representative. The proposed amendment to subsection 28(10) clarifies that, where the Attorney-General decides not to issue a certificate under subsection 28(2), the Attorney-General must advise the defendant's legal representative.

(8) If the Attorney-General revokes the certificate at any time while the proceeding is adjourned or the hearing is being held, the court must end the adjournment or the hearing.

Certificate is not a legislative instrument

(9) A certificate given to the prosecutor ~~or defendant~~ **, the defendant or the defendant's legal representative** under this section is not a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Attorney-General may decide not to give a certificate

(10) If the Attorney-General decides not to do as mentioned in subsection (2), the Attorney-General must, in writing, advise the prosecutor ~~or defendant~~ **, the defendant or the defendant's legal representative** as the case requires, and the court of his or her decision.

THIS PAGE IS INTENTIONALLY BLANK

29 Closed hearing requirements in federal criminal proceedings

(1) This section sets out the ***closed hearing requirements*** for a hearing under subsection ~~25(3),~~ 27(3) or 28(5).

Note: The fact that those provisions provide that the closed hearing requirements apply to certain hearings does not prevent the court from exercising any powers that it otherwise has eg to exclude persons (such as members of the public) from other hearings or to prevent publication of evidence.

Who may be present

(2) Subject to this section, no-one, including the jury (if any), must be present at the hearing except:

(a) the magistrate, judge or judges comprising the court; and

(b) court officials; and

(c) the prosecutor; and

(d) the defendant; and

(e) any legal representative of the defendant; and

~~(f) if section 30 applies—the Attorney-General and any legal representative of the Attorney-General; and~~

(f) the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and

(g) any witnesses allowed by the court.

(3) If the court considers that the information concerned would be disclosed to:

(a) the defendant; or

(b) any legal representative of the defendant who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned; or

(c) any court official who has not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned;

and that the disclosure would be likely to prejudice national security, the court may order that the defendant, the legal representative or the court official is not entitled to be present during any part of the hearing in which the prosecutor or any person mentioned in paragraph (2)(f):

(d) gives details of the information; or

(e) gives information in arguing why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

Defendant's submissions about prosecutor's non-disclosure arguments

(4) If, at the hearing, the prosecutor or any person mentioned in paragraph (2)(f) argues that any information should not be disclosed, or that the witness should not be called to give evidence, in the proceeding, the defendant and any legal representative of the defendant must be given the opportunity to make submissions to the court about the argument that the information should not be disclosed or the witness should not be called.

Section 29: Closed hearing requirements in federal criminal proceedings

Who may be present during a closed hearing

If the Attorney-General gives a criminal non-disclosure or witness exclusion certificate to the court, the court must hold a closed hearing to decide whether to make an order under section 31 in relation to the disclosure of information or the calling of a witness. There are only certain people who can be present at a closed hearing to ensure that national security information is appropriately protected.

At the moment, the Attorney-General and his or her legal representative may be present at a hearing if the Attorney-General has intervened in the proceedings under section 30. However, officers from relevant law enforcement or security agencies may not be able to assist the Attorney-General to fulfil his or her role of appropriately protecting national security information in accordance with the procedures contained in the Act. New paragraph 29(2)(f) will clarify that other representatives of the Attorney-General, in addition to the Attorney-General and the Attorney-General's legal representative, may be present during closed court hearings held as part of a federal criminal proceeding. This will allow, for example, officers of the relevant law enforcement, security or intelligence agencies or Attorney-General's Department to be present during closed hearings on behalf of the Attorney-General. This amendment complements the proposed new section 20A, which will create a broader power for the Attorney-General, the Attorney-General's legal representative and any other representative to attend and be heard at any stage of a federal criminal proceeding.

Court to make etc. record of hearing

(5) The court must:

(a) whether before or after it makes an order under section 31, make a record of the hearing; and

(b) keep the record; and

(c) make the record available to:

(i) a court that hears an appeal against, or reviews, its decision on the hearing; and

(ii) the prosecutor; and

(iii) ~~if section 30 applies~~ the Attorney-General and any legal representative of the Attorney-General; and

(d) allow any legal representative of the defendant, who has been given a security clearance at the level considered appropriate by the Secretary, to have access to the record, and to prepare documents or records in relation to the record, in a way and at a place prescribed by the regulations for the purposes of this paragraph; and

(e) not make the record available to, nor allow the record to be accessed by, anyone except as mentioned in this subsection.

Copy of proposed record to be given to prosecutor etc.

(6) Before the court makes the record under subsection (5), the court must give a copy of the proposed record to the prosecutor and, if section 30 applies, the Attorney-General (each of whom is a ***record recipient***).

Statement recipient may request variation of proposed record

(7) If a record recipient considers that making the proposed record available as mentioned in subparagraph (5)(c)(i) and allowing access to it as mentioned in paragraph (5)(d) will disclose information and the disclosure is likely to prejudice national security, the record recipient may request that the court vary the proposed record so that the ~~national security information~~ **information** will not be disclosed.

Court's decision

(8) The court must make a decision on the request.

THIS PAGE IS INTENTIONALLY BLANK

~~30 Intervention by Attorney-General in federal criminal proceedings~~

~~(1) The Attorney-General may, on behalf of the Commonwealth, intervene in a hearing in a federal criminal proceeding in relation to which the closed hearing requirements apply.~~

~~(2) If the Attorney-General intervenes in the hearing, he or she is treated as if he or she is a party to the hearing.~~

Section 30: Intervention by Attorney-General in federal criminal proceedings

Section 30 currently allows the Attorney-General to intervene in a federal criminal proceeding where closed court hearing requirements apply. This section will no longer be necessary as there will be a wider ability for the Attorney-General's interests to be represented and heard at a federal criminal proceeding under proposed new section 20A.

31 Court orders in federal criminal proceedings

Non-disclosure certificate hearings

(1) After holding a hearing required under subsection 27(3) in relation to the disclosure of information in a federal criminal proceeding, the court must make an order under one of subsections (2), (4) and (5) of this section.

(2) If the information is in the form of a document, the court may order under this subsection that:

(a) any person to whom the certificate mentioned in subsection 26(2) or (3) was given in accordance with that subsection; and

(b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and

(c) any other specified person;

must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may, subject to subsection (3), disclose (which disclosure may or may not be the same as was permitted in the Attorney-General's certificate) in the proceeding:

(d) a copy of the document with the information deleted; or

(e) a copy of the document with the information deleted and a summary of the information, as set out in the order, attached to the document; or

(f) a copy of the document with the information deleted and a statement of facts, as set out in the order, that the information would, or would be likely to, prove attached to the document.

(3) If the court makes an order under subsection (2), the copy of the document is admissible in evidence if, apart from the order, it is admissible. However if:

(a) a person who is the subject of the order seeks to adduce evidence of the contents of the document; and

(b) the contents of the document are admissible in evidence in the proceeding;

the person may adduce evidence of the contents of the document by tendering the copy, or the copy and the summary or statement, mentioned in that subsection.

(4) The court may, regardless of the form of the information, order under this subsection that:

(a) any person to whom the certificate mentioned in subsection 26(2) or (3) was given in accordance with that subsection; and

(b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and

(c) any other specified person;

must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

(5) The court may, regardless of the form of the information, order under this subsection that any person may disclose the information in the proceeding. However, the information is only admissible in evidence in the proceeding if, apart from the order, it is admissible.

Section 31: Court orders in federal criminal proceedings

Role of defendant's legal representatives after witness exclusion certificate hearing

Section 31 outlines the possible orders the court is able to make following a closed hearing under subsection 27(3).

Subsection 31(6) gives the court the power to order, after holding a witness exclusion certificate hearing, that the prosecutor or defendant may or must not call the person as a witness. However, it is unclear whether the court has the power to make an order which applies to the defendant's legal representative. Given it is most likely that the defendant's representative, rather than the defendant themselves, would be calling a witness, the proposed amendment will clarify that the court can make an order that applies to a defendant's legal representative.

Witness exclusion certificate hearings

(6) After holding a hearing required under subsection 28(5), the court must order that:

(a) the prosecutor ~~or defendant~~ **, the defendant or the defendant's legal representative** must not call the person as a witness in the federal criminal proceeding; or

(b) the prosecutor ~~or defendant~~ **, the defendant or the defendant's legal representative** may call the person as a witness in the federal criminal proceeding.

Factors to be considered by court

(7) The Court must, in deciding what order to make under this section, consider the following matters:

(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:

(i) where the certificate was given under subsection 26(2) or (3)—the information were disclosed in contravention of the certificate; or

(ii) where the certificate was given under subsection 28(2)—the witness were called;

(b) whether any such order would have a substantial adverse effect on the defendant's right to receive a fair hearing, including in particular on the conduct of his or her defence;

(c) any other matter the court considers relevant.

(8) In making its decision, the Court must give greatest weight to the matter mentioned in paragraph (7)(a).

THIS PAGE IS INTENTIONALLY BLANK

32 Reasons for court orders

Requirement to give reasons

(1) The court must give a written statement of its reasons for making an order under section 31 to the following people:
  (a) the person who is the subject of the order;
  (b) the prosecutor;
  (c) the defendant;
  (d) any legal representative of the defendant;
  (e) ~~if section 30 applies —~~the Attorney-General and any legal representative of the Attorney-General.

Copy of proposed statement to be given to prosecutor etc.

(2) Before the court gives its statement under subsection (1), the court must give a copy of the proposed statement to the prosecutor and~~, if section 30 applies,~~ the Attorney-General (each of whom is a ***statement recipient***).

Statement recipient may request variation of proposed statement

(3) If a statement recipient considers that giving the proposed statement will disclose information and the disclosure is likely to prejudice national security, the statement recipient may request that the court vary the proposed statement so that the ~~national security information~~ **information** will not be disclosed.

Court's decision

(4) The court must make a decision on the request.

Section 32: Reasons for court orders

The court must produce a written statement of its reasons for making an order under section 31 to certain people, including the Attorney-General. Paragraph 32(1)(e) states that the court must give a written statement of its reason to the Attorney-General if he or she has intervened under section 30. In addition, subsection 32(2) provides that if the Attorney-General has intervened under section 30, he or she must be provided with a copy of the proposed statement prior to the court releasing the final statement. The proposed amendments will ensure that these requirements are not limited to when the Attorney-General has intervened under section 30, given the wider ability for the Attorney-General's interests to be represented and heard at a federal criminal proceeding under proposed new section 20A.

The amendment to subsection 32(3) is a consequential amendment which is necessary because of the proposal to insert the definition of national security information in section 7.

37 Appeals against court orders under section 31

(1) The prosecutor, the defendant or~~, if the Attorney-General is an intervener under section 30,~~ the Attorney-General may appeal against any order of the court made under section 31.

(2) The court that has jurisdiction to hear and determine appeals from the judgment on the trial in the proceeding has jurisdiction to hear and determine any appeal under this section.

Section 37: Appeals against court orders under section 31

After a section 31 order is made, there is the possibility for appeal under section 37. Currently subsection 37(1) makes reference to the Attorney-General intervening under section 30. As section 30 will be repealed due to the proposed inclusion of section 20A, the reference to section 30 will be removed.

Protection of information whose disclosure in civil proceedings is likely to prejudice etc. national security.

Division 1A—Attorney-General etc. may attend and be heard at civil proceedings

38AA Attorney-General etc. may attend and be heard at civil proceedings

If, in a civil proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then any or all of the following may attend and be heard at the proceeding:

(a) the Attorney-General;

(b) the Attorney-General's legal representative;

(c) any other representative of the Attorney-General.

Protecting national security information in civil proceedings

Part 3A of the Act contains a regime for civil proceedings that is substantially similar to the regime for criminal proceedings. Given the similarity between the two regimes, many of the issues with, and proposed amendments to, the criminal proceedings provisions are also applicable to the civil proceedings provisions.

New Division 1A: Attorney-General etc may attend and be heard at civil proceedings

Section 38AA: Attorney-General etc may attend and be heard at civil proceedings

Currently section 38K allows the Attorney-General to intervene in civil proceedings if it is a closed court. The intention behind the proposed amendment is to create a broader power for the Attorney-General to be able to fulfil his or her responsibilities in relation to the protection of national security information under the Act throughout all stages of a civil proceeding.

Proposed section 38AA will allow the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General to attend and be heard at any stage of the civil proceeding where an issue relating to disclosure, protection, storage, handling or destruction of national security information in the proceeding arises. The new section will also permit an officer from the Attorney-General's Department or a law enforcement or intelligence and security agency who is responsible for the information to attend and be heard at any civil proceeding.

Division 1B—Court to consider hearing in camera etc.

38AB Court to consider hearing in camera etc.

(1) If, during a hearing in a civil proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then before hearing the issue, the court must consider making an order under either or both of the following:

(a) subsection 19(3A);

(b) section 93.2 of the *Criminal Code*.

(2) Subsection (1) does not apply if the issue is the subject of an order that is in force under section 38B.

Division 1B: Court to consider hearing in camera etc.

Section 38AB: Court to consider hearing in camera etc.

Currently, under the Act, if the courts are hearing an issue relating to the disclosure, protection, storage, handling or destruction of national security information the only mechanism to protect this information is through a closed hearing. The lower courts are particularly limited, compared to the higher courts, as they do not have inherent powers to make general orders relating to the protection of national security information. The requirement to hold a closed hearing, whenever there is an issue relating to the disclosure, protection, storage, handling or destruction of national security information, results in unnecessary delays in the proceeding.

Proposed section 38AB will provide the courts with a further power to protect national security information. It will require the court, before hearing an issue relating to the disclosure, protection, storage, handling or destruction of national security information in a civil proceeding, to consider making an order under section 93.2 of the Criminal Code and/or under new subsection 19(3A). Under section 93.2 of the Criminal Code, a person presiding over the court may make orders, if satisfied they are in the interest of the security or defence of the Commonwealth, to do any or all of the following: exclude members of the public, place restrictions on reporting of proceedings, and place restrictions on access to physical evidence. The proposed new subsection 19(3A) clarifies that the court is able to make any orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction of national security information in a federal criminal proceeding or in a civil proceeding. The inclusion of section 38AB will increase the power of the court to protect national security information during proceedings, whilst still ensuring the efficiency of the court proceeding.

However, the requirement under section 38AB will not apply if the issue is the subject of an order under section 38B. In those circumstances, protections agreed as sufficient by the parties and the court will already be in place.

38A ~~Conferences before the substantive hearings in civil proceedings begin~~ National security information hearings

~~(1) Before the substantive hearing in a civil proceeding begins, a party to the proceeding may apply to the court for the court to hold a conference of the parties to consider issues relating to:~~

~~(a) any disclosure, in the substantive hearing in the proceeding, of information that relates to national security; or~~

~~(b) any disclosure, of information in the substantive hearing in the proceeding, that may affect national security;~~

~~including:~~

~~(c) whether a party is likely to be required to give notice under section 38D; and~~

~~(d) whether the parties wish to enter into an arrangement of the kind mentioned in section 38B.~~

~~(2) If the Attorney-General is not a party to the proceeding, the Attorney-General, on behalf of the Commonwealth, must be given notice of the conference and either the Attorney-General or his or her legal representative, or both, may attend it.~~

~~(3) If the Attorney-General is a party to the proceeding, the Minister appointed by the Attorney-General under section 6A must be given notice of the conference and either the Minister or his or her legal representative, or both, may attend it.~~

(1) At any time during a civil proceeding, the Attorney General, the Attorney-General's legal representative, a party to the proceeding or a party's legal representative may apply to the court for the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including:

(a) the making of an arrangement of the kind mentioned in section 38B; and

(b) the giving of a notice under section 38D.

(2) As soon as possible after making the application, the applicant must notify each of the following that the application has been made:

(a) if the applicant is the Attorney-General or the Attorney-General's legal representative—the parties and the parties' legal representatives;

(b) if the applicant is a party or a party's legal representative—the Attorney-General, the other parties and the other parties' legal representatives.

(4) The court must hold the ~~conference~~ **hearing** as soon as possible after the application is made.

Section 38A: Conferences before the substantive hearings in civil proceedings begin

Section 38A provides for parties in civil proceedings to hold conferences before the substantive hearings commence to consider issues relating to the disclosure of national security information, prior to the commencement of the trial. The conferences facilitate the formation of an agreement between the parties, under section 38B of the Act, regarding the protection of national security information during a civil proceeding. The proposed amendments to section 38A aim to clarify the availability of conferences, who can attend conferences, the reason for which conferences may be held and who must be notified about the conference.

The availability and scope of conferences

New subsection 38A(1) will clarify that:

- hearings provided for by section 38A will be available to consider issues relating to disclosure, protection, storage, handling and destruction of national security information as may occur at any stage of a civil proceeding

- the Attorney-General or the Attorney-General's legal representative will be able to apply to the court to hold a section 38A hearing to consider any issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information. This recognises the Attorney-General's role in protecting national security information in accordance with the Act

- a hearing under subsection 38A(1) may be held to consider not only the disclosure of national security information, but also the protection, storage, handling or destruction of national security information. This recognises the broader range of issues that may arise in relation to the treatment of national security information during a civil proceeding, and

- the parties' legal representatives, as well as the parties themselves, may apply to the court for such a hearing.

Role of Attorney-General

Currently, under subsection 38A(2), if the Attorney-General is not a party to the proceeding, there is an obligation on the party who applies for the conference to notify the Attorney-General of the conference. The proposed new subsection 38A(2) will extend this obligation by requiring an applicant to notify all relevant parties that an application has been made. The Attorney-General, the Attorney-General's legal representative, the parties and the parties' legal representatives may all apply to the court to hold a national security information hearing under section 38A. Therefore, the proposed new subsection 38A(2) provides that notice must be given to all parties involved in the proceeding that an application has been made to the court to hold a national security information hearing under new subsection 38A(1).

38B Arrangements for civil proceedings about disclosures ~~relating to or affecting national security~~ etc. of national security information

~~(1) At any time during a civil proceeding:~~

~~(a) if the Attorney-General is not a party to the proceeding—the Attorney-General, on behalf of the Commonwealth, and the parties to the proceeding; or~~

~~(b) if the Attorney-General is a party to the proceeding—the Minister appointed by the Attorney-General under section 6A and the parties to the proceeding;~~

~~may agree to an arrangement about any disclosure, in the proceeding, of information that relates to national security or any disclosure, of information in the proceeding, that may affect national security.~~

(1) At any time during a civil proceeding:

(a) the Attorney-General, on the Commonwealth's behalf; and

(b) the parties to the proceeding, or their legal representatives on their behalf;

may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

(2) The court may make such order (if any) as it considers appropriate to give effect to the arrangement.

Section 38B: Arrangements for civil proceedings about disclosures relating to or affecting national security

Clarify the application of the Act to legal representatives

Similarly to section 22 which relates to federal criminal proceedings, section 38B allows parties, during a civil proceeding, to enter into an arrangement about the disclosure of information that relates to national security or that may affect national security. Currently, legal representatives are not mentioned as being able to enter into a section 38B arrangement. Proposed subsection 38B(1) will include a reference to legal representatives and in turn will clarify that a legal representative, on behalf of a party, can also be part of a section 38B arrangement.

Scope of arrangements

Proposed subsection 38B(1) will also clarify that arrangements under that subsection may cover not only the disclosure of national security information, but also the protection, storage, handling and destruction of national security information. This proposed amendment recognises the broader range of issues that may arise in relation to national security information during a proceeding.

38C Protection of ~~certain~~ national security information disclosed in a civil proceeding

(1) The regulations may prescribe:

(a) ways in which ~~information that is disclosed, or to be disclosed, to the court~~ **national security information that is disclosed, or to be disclosed,** in a civil proceeding must be stored, handled or destroyed; and

(b) ways in which, and places at which, such information may be accessed and documents or records relating to such information may be prepared.

~~(2) At any time during a civil proceeding, the court may make an order relating to the protection, storage, handling or destruction of information that is disclosed, or to be disclosed, to the court in the proceeding.~~

~~(3) A court must not make an order under subsection (2) that is inconsistent with a regulation mentioned in subsection (1).~~

(2) This section does not apply to information that is the subject of an order that is in force under section 38B.

Note: The court may also make orders under section 93.2 of the *Criminal Code* and under other provisions of this Act in order to protect information from disclosure.

Section 38C: Protection of certain information disclosed in a civil proceeding

Scope of National Security Information (Criminal and Civil Proceedings) Regulations 2005

Paragraph 38C(1)(a) of the NSI Act enables the regulations to prescribe how to access, prepare, store, handle or destroy information that is disclosed during civil proceedings. The regulation-making power is too broad as it covers all information. The proposed amendment will appropriately limit the power to regulating 'national security information'. The regulation-making power is also too narrow as it only covers information which is to be disclosed to the court. It does not account for information that may be disclosed outside the court, such as when information is disclosed to a legal representative. The proposed amendment will extend this regulation-making power to allow for the protection of all national security information arising in a proceeding, not just that which is to be disclosed to the court.

Proposed new subsection 38C(2) will also make it clear that the regulations do not apply to information that is subject to an order that is in force under section 38B. The policy intention behind the Act is that, if possible, it is preferable that the parties agree to an arrangement under section 38B. Arriving at an arrangement assists with court cases progressing efficiently.

38D ~~Parties must notify expected disclosure in civil proceedings of information relating to or affecting national security~~ Notification of expected disclosure of national security information

~~(1) If a party to a civil proceeding knows or believes that:~~

~~(a) he or she will disclose, in the proceeding, information that relates to national security; or~~

~~(b) he or she will disclose information in the proceeding and the disclosure may affect national security; or~~

~~(c) a person whom the party intends to call as a witness in the proceeding will disclose information in giving evidence or by his or her mere presence and:~~

~~(i) the information relates to national security; or~~

~~(ii) the disclosure may affect national security;~~

~~the party must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.~~

~~Note: Section 38E deals with the situation where a party knows or believes that a disclosure by a witness in answering a question may relate to or affect national security.~~

(1) If a party, or the legal representative of a party, to a civil proceeding knows or believes that:

(a) he or she will disclose national security information in the proceeding; or

(b) a person whom he or she intends to call as a witness in the proceeding will disclose national security information in giving evidence or by the person's mere presence; or

(c) on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in the proceeding;

then he or she must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note 1: Failure to give notice as required by this section is an offence in certain circumstances: see section 46C.

Note 2: Section 38E deals with the situation where a party, or a party's legal representative, knows or believes that information that will be disclosed in a witness's answer is national security information.

(2) ~~Despite subsection (1), a party need not give the Attorney-General notice~~ **However, a party or a party's legal representative need not give the Attorney-General notice about the disclosure of the information under subsection (1)** if:

(aa) another person has already given notice about the disclosure of the information under that subsection; or

(a) the information to be disclosed:

(i) is the subject of a certificate given to the party **or the legal representative** under section 38F and the certificate still has effect; or

(ii) is the subject of an order in force under section 38B or 38L; or

(b) the disclosure of information by the witness to be called:

(i) is the subject of a certificate given to the party **or the legal representative** under section 38H and the certificate still has effect; or

Section 38D: Parties must notify expected disclosure in civil proceedings of information relating to or affecting national security

Who is required to give notification?

The proposed amendments to section 38D are designed to clarify the notice obligations under the Act. If a party to a civil proceeding knows or believes that he or she will disclose information that may relate to or affect national security, the party must notify the Attorney-General. Notice is also required to be given if the party knows or believes that a person whom he or she intends to call as a witness will disclose national security information when giving evidence or by their mere presence. An example of where notice must be given under paragraph 38D(1)(b) is where an officer of a intelligence or security agency is to be called as a witness in a proceeding and not only will that officer be giving evidence about that agency's operations but the officer's identity itself is national security information. These notice requirements are important as they trigger the Attorney-General's consideration of whether to issue a non-disclosure certificate or witness exclusion certificate under sections 38F and 38H.

Proposed subsection 38D(1) clarifies that this obligation to notify the Attorney-General is imposed not only on parties to a civil proceeding, but also on their legal representatives.

It is proposed that subsection 38D(4) be replaced by a new subsection which clearly outlines the obligation on the person, who gives notice of a potential disclosure under subsection (1), to advise all other relevant parties that notice has been given to the Attorney-General. The proposed new subsection includes an obligation to notify the other parties' legal representative. This change is to make sure the section adequately details the notification obligations on legal representatives and the notification obligations towards legal representatives by others.

(ii) is the subject of an order in force under section 38B or 38L **; or**

(c) the Attorney-General has given the party or the legal representative advice about the disclosure of the information under subsection 38F(7) or 38H(9).

Note: Subsections 38F(6) and 38H(5) specify when a certificate ceases to have effect.

Requirements for notice

(3) The notice must:

(a) be in the prescribed form; and

(b) if paragraph (c) does not apply—include a description of the information; and

(c) if the information is contained in a document—be accompanied by a copy of the document or by an extract from the document, that contains the information.

Informing the court etc. of an expected disclosure

~~(4) A party who gives notice under subsection (1) must also advise, in writing:~~

~~(a) the court; and~~

~~(b) the other parties to the proceeding; and~~

~~(c) any person to whom paragraph (1)(c) applies;~~

~~that notice has been given to the Attorney-General. The advice must include a description of the information.~~

~~Note: Failure to give notice or advice as required by this section is an offence: see section 46C.~~

~~*Adjournment to allow sufficient time for Attorney-General to act on the notice*~~

~~(5) On receiving the advice, the court must order that the proceeding be adjourned until the Attorney-General gives a copy of a certificate to the court under subsection 38F(5) or gives advice to the court under subsection 38F(7) (which applies if a decision is made not to give a certificate).~~

Informing the court etc. of an expected disclosure

(4) A person who gives notice under subsection (1) must also advise, in writing:

(a) the court; and

(b) the other parties; and

(c) the other parties' legal representatives; and

(d) any other person mentioned in paragraph (1)(b) or (c);

that notice has been given to the Attorney-General. The advice must include a description of the information.

Note: Failure to give advice as required by this section is an offence in certain circumstances: see section 46C.

When does the Attorney-General need to be notified?

A difficulty with the current wording of paragraph 38D(1)(c) is that it does not impose notice obligations in respect of subpoenas which may cause national security information to be disclosed. Proposed new paragraph 38D(1)(c) clarifies that notification obligations placed on parties and parties' legal representatives in a civil proceeding extend to any potential disclosure of national security information resulting from their application to a court of a subpoena or other order which requires a person to produce a document or disclose national security information in the proceeding. For example, if a security or intelligence agency is subpoenaed for documents by the party's legal representative, where that party's legal representative knows or believes that those documents contain national security information, the legal representative must notify the Attorney-General of that knowledge or belief.

When does the Attorney-General not need to be notified?

The proposed amendments to subsection 38D(2) clarify when a party or a party's legal representative is not required to give notice under subsection 38D(1). The intention of notification provisions is to ensure the Attorney-General is aware of the potential disclosure of particular national security information. Where the Attorney-General has become aware of any potential disclosure of national security information under other mechanisms in the Act, notice is not required to be given.

If the Attorney-General is notified under the mechanisms listed under subsection 38D(2), the parties and their legal representatives no longer have an obligation to notify the Attorney-General. It is proposed to amend subsection 38D(2) to expand the list of possible mechanisms through which the Attorney-General may be notified. This amendment ensures that parties to a proceeding do not need to comply with multiple procedures unnecessarily and proceedings are not unduly delayed through the operation of the Act.

Adjournment to allow sufficient time for Attorney-General to act on the notice

(5) On receiving the advice, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:

(a) gives a copy of a certificate to the court under subsection 38F(5) or 38H(4); or

(b) gives advice to the court under subsection 38F(7) or 38H(9) (which applies if a decision is made not to give a certificate).

Adjournment to allow sufficient time for the Attorney-General to act on the notice

Under subsection 38D(5) of the NSI Act, once the court receives the advice that notice has been given, the court must adjourn the proceedings. Having to adjourn the whole proceeding can cause unnecessary delays. The proposed new subsection 38D(5) ensures that the court must only adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed, i.e. that part of the proceeding which relates to the national security information which is the subject of the notice to the Attorney-General. This will ensure that there are no unnecessary delays in the proceeding as a result of the protection of national security information through the procedures of the Act. The proposed amendment also clarifies that the adjournment of proceedings relating to the potential disclosure of national security information continues until the Attorney-General issues a civil non-disclosure certificate under subsection 38F(5), or issues a civil witness exclusion certificate under 38H(4), or provides advice to the court under subsections 38F(7) or 38H(9).

38E Preventing witnesses from disclosing information in civil proceedings by not allowing them to answer questions

Witness expected to disclose information in giving evidence

(1) This section applies if:

(a) a witness is asked a question in giving evidence in a civil proceeding; and

~~(b) a party to the proceeding knows or believes that:~~

~~(i) information that will be disclosed in the witness's answer relates to national security; or~~

~~(ii) the disclosure of information in the witness's answer may affect national security.~~

(b) a party, or the legal representative of a party, to the proceeding knows or believes that information that will be disclosed in the witness's answer is national security information.

(2) The party **or legal representative** must advise the court of that knowledge or belief.

Note: Failure to advise the court is an offence: see section 46C.

(2A) However, a person need not advise the court under subsection (2) about the disclosure of information if:

(a) another person has already advised the court about the disclosure of the information under that subsection; or

(b) a notice has been given to the Attorney-General under subsection 38D(1) about the disclosure of the information; or

(c) the disclosure of the information:

(i) is the subject of a certificate given to the person under section 38F and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 38B or 38L; or

(d) the Attorney-General has given the person advice about the disclosure of the information under subsection 38F(7).

Witness must give written answer to question

(3) If the court is advised under subsection (2), the court must order that the witness give the court a written answer to the question.

Section 38E: Preventing witnesses from disclosing information in civil proceedings by not allowing them to answer questions

Where a party to a proceeding knows or believes that a witness's testimony involves information that relates to or may affect national security, that party must advise the court. Currently under this section only the parties to the proceeding are obliged to advise the court of the knowledge or belief that the witness may disclose national security information. The proposed amendments clarify that the obligation set out in section 38E is borne not only by the parties to the proceeding, but also by the legal representatives. Proposed new subsection 38E(2A) also clarifies the circumstances when it is not necessary to give notice to the court.

Court must adjourn proceeding

(4) ~~The court must adjourn the proceeding on receiving the written answer. However, the court need not adjourn the proceeding~~ **On receiving the written answer, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. However, the court need not do so** if the information disclosed by the written answer:

(a) is the subject of a certificate given to the court under section 38F and the certificate still has effect; or

(b) is the subject of an order in force under section 38B or 38L.

Note: Subsection 38F(6) specifies when a certificate ceases to have effect.

(5) If the court ~~adjourns the proceeding~~, **adjourns a part of the proceeding under subsection (4)** the court must give the written answer to the Attorney-General.

(6) The court must continue the adjournment ~~of the proceeding~~ until the Attorney-General gives a copy of a certificate to the court under subsection 38F(5) or gives advice to the court under subsection 38F(7) (which applies if a decision is made not to give a certificate).

Adjournment to allow sufficient time for the Attorney-General to consider the witness's answer

There has been concern that the necessity to adjourn proceedings under subsections 38E(4), (5) and (6) to allow the Attorney-General to consider the written answer of a witness may cause unnecessary delay. The proposed amendments to these subsections are to ensure that, although the court is required to adjourn the proceedings, a court is to adjourn only so much of the proceeding that may involve the disclosure of national security information which is the subject of the notice under section 38E. This ensures that those parts of the proceeding that do not relate to the national security information can continue, which will assist in limiting any undue delays.

38F Attorney-General's civil non-disclosure certificate

(1) This section applies if:

(a) any of the following happens:

(i) the Attorney-General is notified under section 38D that a party**, or the legal representative of a party** to a civil proceeding knows or believes that he or she or another person will disclose information in the proceeding;

(ii) the Attorney-General for any reason expects that any of the circumstances mentioned in paragraphs 38D(1)(a) to (c) will arise under which a party**, the legal representative of a party** or another person will disclose information in a civil proceeding;

(iii) the Attorney-General considers that a written answer given by a witness under section 38E in a civil proceeding will disclose information; and

(b) paragraph 38H(1)(a) (about the mere presence of a witness constituting disclosure) does not apply; and

(c) the Attorney-General considers that the disclosure is likely to prejudice national security.

Attorney-General may give a certificate—case where information is in the form of a document

(2) If the information would be disclosed in a document (the ***source document***), the Attorney-General may give each potential discloser (see subsection (9)) of the information in the proceeding:

(a) any of the following:

(i) a copy of the document with the information deleted;

(ii) a copy of the document with the information deleted and a summary of the information attached to the document;

(iii) a copy of the document with the information deleted and a statement of facts that the information would, or would be likely to, prove attached to the document;

together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the copy, or the copy and the statement or summary; or

(b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

Section 38F: Attorney-General's civil non-disclosure certificate

Under section 38F the Attorney-General may issue a civil non-disclosure certificate if he or she has been notified or expects that a party to a civil proceeding will disclose information and the disclosure is likely to prejudice national security. The civil non-disclosure certificates are used to protect information likely to prejudice national security from being disclosed during a civil proceeding.

Definition of potential discloser to include a legal representative

If the Attorney-General decides to issue a non-disclosure certificate, he or she must give each potential discloser a copy of the certificate. If the Attorney-General decides not to issue a certificate, he or she must give each potential discloser notice of this decision. The Attorney-General has this obligation to make sure the potential disclosers are aware of the information they can/cannot disclose. Subsection 38F(9) defines a 'potential discloser'. Currently, it does not account for the possibility of the parties' legal representatives being potential disclosers. Proposed new subsection 38F(9) clarifies that legal representatives will be potential disclosers in accordance with the new paragraphs 38F(9)(a) and 38F(9)(b).

Attorney-General may give a certificate—case where information is not in the form of a document

(3) If the information would be disclosed other than in a document, the Attorney-General may give each potential discloser of the information in the proceeding:

(a) either:

(i) a written summary of the information; or

(ii) a written statement of facts that the information would, or would be likely to, prove;

together with a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may disclose the summary or statement; or

(b) a certificate that describes the information and states that the potential discloser must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

Certificate may be given at same time as notice is given under section 6A

(4) If subparagraph (1)(a)(ii) applies in respect of the proceeding, the certificate may be given at the same time as notice is given under section 6A that this Act applies to the proceeding.

Copy of certificate must be given to the court

(5) The Attorney-General must give the court a copy of:

(a) in any case—the certificate; and

(b) if paragraph (2)(a) applies—the source document, the document mentioned in subparagraph (2)(a)(i), (ii) or (iii) and the summary or statement mentioned in subparagraph (2)(a)(ii) or (iii); and

(c) if paragraph (3)(a) applies—the summary or statement mentioned in that paragraph.

Duration of a certificate

(6) The certificate ceases to have effect when:

(a) the court makes an order under section 38B about the disclosure, in the proceeding, of information that is the subject of the certificate, unless the certificate is revoked by the Attorney-General before then; or

(b) any order by the court under section 38L on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Attorney-General may decide not to give a certificate

(7) If the Attorney-General decides not to do as mentioned in subsection (2) or (3), the Attorney-General must, in writing, advise each potential discloser and the court of his or her decision.

THIS PAGE IS INTENTIONALLY BLANK

Certificate and written advice are not legislative instruments

(8) A certificate given under subsection (2) or (3) and a written advice given under subsection (7) are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

~~*Definition of **potential discloser***~~

~~(9) Each of the following persons is a ***potential discloser*** of the information in the proceeding:~~

~~(a) any of the following persons:~~

~~(i) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a party to the proceeding—the party; or~~

~~(ii) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than a party to the proceeding—the relevant party and the other person; or~~

~~(iii) if subparagraph (1)(a)(iii) applies—the parties to the proceeding and the witness mentioned in that subparagraph; and~~

~~(b) if a party to the proceeding is a potential discloser under paragraph (a)—the party's legal representative.~~

Definition of potential discloser

(9) Each of the following persons is a *potential discloser* of the information in the proceeding:

(a) in all cases—the parties and the parties' legal representatives; and

(b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than a party or a party's legal representative—the other person; and

(c) if subparagraph (1)(a)(iii) applies—the witness mentioned in that subparagraph.

THIS PAGE IS INTENTIONALLY BLANK

38H Attorney-General's civil witness exclusion certificate

(1) This section applies if:

(a) either:

(i) the Attorney-General is notified under section 38D that a party ~~to a civil proceeding knows or believes that a person whom the party~~ **, or the legal representative of a party, to a civil proceeding knows or believes that a person whom the party or legal representative** intends to call as a witness in the proceeding will disclose information by his or her mere presence; or

(ii) the Attorney-General for any reason expects that a person whom a party**, or the legal representative of a party** to a civil proceeding intends to call as a witness in the proceeding will disclose information by his or her mere presence; and

(b) the Attorney-General considers that the disclosure is likely to prejudice national security.

~~*Attorney-General may give a certificate*~~

~~(2) The Attorney-General may give a certificate to:~~

~~(a) the relevant party to the proceeding; and~~

~~(b) the party's legal representative;~~

~~that states that the party must not call the person as a witness in the proceeding.~~

Attorney-General may give a certificate

(2) The Attorney-General may give a certificate to the relevant party or legal representative that states that he or she must not call the person as a witness in the proceeding.

Certificate may be given at same time as notice is given under section 6A

(3) If subparagraph (1)(a)(ii) applies in respect of the proceeding, the certificate may be given at the same time as notice is given under section 6A that this Act applies to the proceeding.

Copy of certificate must be given to the court

(4) The Attorney-General must give a copy of the certificate to the court.

Duration of a certificate

(5) The certificate ceases to have effect when:

(a) the court makes an order under section 38B about the disclosure, in the proceeding, of information by the mere presence of the person who is the subject of the certificate, unless the certificate is revoked by the Attorney-General before then; or

(b) any order by the court under section 38L on the hearing in relation to the certificate ceases to be subject to appeal, unless the certificate is revoked by the Attorney-General before then.

Section 38H: Attorney-General's civil witness exclusion certificates

Section 38H of the NSI Act provides the Attorney-General with the power to issue a witness exclusion certificate if he or she has been notified or expects that a person whom a party intends to call as a witness may disclose information by his or her mere presence and the disclosure would be likely to prejudice national security.

Consequential amendments

The proposed amendment to subparagraph 38H(1)(a)(i) follows on from the proposed amendment to section 38D. The proposed amendment to section 38D will clarify that the notification obligations under the section are also borne by the legal representative. The proposed amendment to subparagraphs 38H(1)(a)(i) and 38H(1)(a)(ii) clarify that the Attorney-General may also issue a certificate if he or she is notified by the legal representative of a party or expects that the legal representative intends to call a witness.

Court hearing

(6) The court must:

(a) if the certificate is given to the court before the substantive hearing in the proceeding begins—before the substantive hearing in the proceeding begins, hold a hearing to decide whether to make an order under section 38L in relation to the calling of the witness; or

(b) if the certificate is given to the court after the substantive hearing in the proceeding begins—adjourn the proceeding for the purpose of holding a hearing to decide whether to make an order under section 38L in relation to the calling of the witness.

(7) The closed hearing requirements apply to the hearing to decide whether to make an order under section 38L.

(8) If, while the proceeding is adjourned or the hearing is being held:

(a) the court makes an order under section 38B about the disclosure, in the proceeding, of information by the mere presence of the person who is the subject of the certificate; or

(b) the Attorney-General revokes the certificate;

the court must end the adjournment or the hearing.

Attorney-General may decide not to give a certificate

(9) If the Attorney-General decides not to do as mentioned in subsection (2), the Attorney-General must, in writing, ~~advise the relevant party and the court of his or her decision.~~ **advise:**

(a) the relevant party or legal representative; and

(b) the court;

of his or her decision.

Certificate and written advice are not legislative instruments

(10) A certificate given under subsection (2) and a written advice given under subsection (9) are not legislative instruments for the purposes of the *Legislative Instruments Act 2003*.

Clarify the application of the Act to legal representatives

The proposed amendments will also clarify that the Attorney-General may give a criminal witness exclusion certificate issued under subsection 38H to the legal representative. The proposed amendments also clarify that where the Attorney-General decides not to issue a certificate, the Attorney-General must advise the legal representative.

38I Closed hearing requirements in civil proceedings

(1) This section sets out the ***closed hearing requirements*** for a hearing under subsection 38G(1) or 38H(6).

Note: The fact that those provisions provide that the closed hearing requirements apply to certain hearings does not prevent the court from exercising any powers that it otherwise has eg to exclude persons (such as members of the public) from other hearings or to prevent publication of evidence.

Who may be present

(2) Subject to this section, no-one, including the jury (if any), must be present at the hearing except:

(a) the magistrate, judge or judges comprising the court; and

(b) court officials; and

(c) the parties to the proceeding; and

(d) the parties' legal representatives; and

~~(e) if section 38K applies—the Attorney-General and his or her legal representative; and~~

(e) the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and

(f) any witnesses allowed by the court.

(3) If the court considers that:

(a) the information concerned would be disclosed to any of the following persons:

(i) a party to the proceeding;

(ii) a party's legal representative;

(iii) any court official;

who have not been given a security clearance at the level considered appropriate by the Secretary in relation to the information concerned; and

(b) the disclosure would be likely to prejudice national security;

the court may order that the party, the legal representative or the court official is not entitled to be present during any part of the hearing in which any person referred to in paragraph (2)(e):

(c) gives details of the information; or

(d) gives information in arguing why the information should not be disclosed, or why the witness should not be called to give evidence, in the proceeding.

Submissions about non-disclosure arguments

(4) If, at the hearing, any person referred to in paragraph (2)(e) argues that:

(a) any information should not be disclosed; or

(b) the witness should not be called to give evidence in the proceeding;

the other parties to the proceeding and any legal representatives of the other parties must be given the opportunity to make submissions to the court about the argument that the information should not be disclosed or the witness should not be called.

Section 38I: Closed hearing requirements in civil proceedings

Who may be present during a closed hearing

If the Attorney-General issues a civil non-disclosure certificate or witness exclusion certificate, the court must hold a closed hearing to decide whether to make an order under section 38L in relation to the disclosure of national security information. There are only certain people who can be present at a closed hearing to ensure that national security information is appropriately protected.

Currently, under section 38I the Attorney-General and his or her legal representative may be present. However, representatives from law enforcement or security agencies may not be permitted to be present during a closed hearing. The presence of these officers in the court may be necessary to assist the Attorney-General to fulfil his or her role of appropriately protecting national security information in accordance with the procedures contained in the Act. New paragraph 38I(2)(e) will clarify that other representatives of the Attorney-General are allowed to be present during closed court civil hearings. This will allow, for example, officers of the relevant law enforcement, security or intelligence agencies or Attorney-General's Department to be present during closed hearings on behalf of the Attorney-General. This amendment complements the proposed new section 38AA, which will create a broader power for the Attorney-General, the Attorney-General's legal representative and any other representative to be present and be heard at civil proceedings.

Court to make etc. record of hearing

(5) The court must:
  (a) whether before or after it makes an order under section 38L, make a record of the hearing; and
  (b) keep the record; and
  (c) make the record available to a court that hears an appeal against, or reviews, its decision on the hearing; and
  (d) not make the record available to, nor allow the record to be accessed by, anyone except as mentioned in this section.

Copy of record to be given to the Attorney-General etc.

(6) If section 38K applies, the court must give a copy of the record to the Attorney-General and his or her legal representative.

Request to vary record

(7) If the Attorney-General considers that:
  (a) allowing access to the record by:
    (i) a party who has been given a security clearance at the level considered appropriate by the Secretary but who has not engaged a legal representative; or
    (ii) any party's legal representative who has been given a security clearance at the level considered appropriate by the Secretary;
  will disclose information; and
  (b) the disclosure is likely to prejudice national security;
  the Attorney-General or his or her legal representative may request that the court vary the record so that the ~~national security information~~ **information** will not be disclosed.

Decision by the court

(8) The court must make a decision on the request.

Access to the record by a party or party's legal representative

(9) The court must:
  (a) allow:
    (i) a party who has been given a security clearance at the level considered appropriate by the Secretary but who has not engaged a legal representative; or
    (ii) any party's legal representative who has been given a security clearance at the level considered appropriate by the Secretary;
  to have access to:
    (iii) the record as varied in accordance with this section, and if applicable, section 38J; or
    (iv) if subparagraph (iii) does not apply—the record;
  and to prepare documents or records in relation to the varied record or the record, in a way and at a place prescribed by the regulations for the purposes of this paragraph; and
  (b) not make the varied record available to, nor allow the varied record to be accessed by, anyone except as mentioned in this subsection.

THIS PAGE IS INTENTIONALLY BLANK

~~38K Intervention by Attorney-General in civil proceedings~~

~~(1) The Attorney-General may, on behalf of the Commonwealth, intervene in a hearing in a civil proceeding in relation to which the closed hearing requirements apply.~~

~~(2) If the Attorney-General intervenes in the hearing, he or she is treated as if he or she is a party to the hearing.~~

~~Note: The Attorney-General is not treated as a party to the civil proceeding itself.~~

Section 38K: Intervention by Attorney-General in civil proceedings

Section 38K currently allows the Attorney-General to intervene in a civil proceeding where closed court hearing requirements apply. This section will no longer be necessary as there will be a wider ability for the Attorney-General's interests to be represented and heard at civil proceedings under proposed new section 38AA.

38L Court orders in civil proceedings

Civil non-disclosure certificate hearings

(1) After holding a hearing required under subsection 38G(1) in relation to the disclosure of information in a civil proceeding, the court must make an order under one of subsections (2), (4) and (5) of this section.

(2) If the information is in the form of a document, the court may order under this subsection that:

(a) any person to whom the certificate mentioned in subsection 38F(2) or (3) was given in accordance with that subsection; and

(b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and

(c) any other specified person;

must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise), but may, subject to subsection (3), disclose (which disclosure may or may not be the same as was permitted in the Attorney-General's certificate) in the proceeding:

(d) a copy of the document with the information deleted; or

(e) a copy of the document with the information deleted and a summary of the information, as set out in the order, attached to the document; or

(f) a copy of the document with the information deleted and a statement of facts, as set out in the order, that the information would, or would be likely to, prove attached to the document.

(3) If the court makes an order under subsection (2), the copy of the document is admissible in evidence if, apart from the order, it is admissible. However, if:

(a) a person who is the subject of the order seeks to adduce evidence of the contents of the document; and

(b) the contents of the document are admissible in evidence in the proceeding;

the person may adduce evidence of the contents of the document by tendering the copy, or the copy and the summary or statement, mentioned in that subsection.

(4) The court may, regardless of the form of the information, order under this subsection that:

(a) any person to whom the certificate mentioned in subsection 38F(2) or (3) was given in accordance with that subsection; and

(b) any person to whom the contents of the certificate have been disclosed for the purposes of the hearing; and

(c) any other specified person;

must not, except in permitted circumstances, disclose the information (whether in the proceeding or otherwise).

(5) The court may, regardless of the form of the information, order under this subsection that any person may disclose the information in the proceeding. However, the information is only admissible in evidence in the proceeding if, apart from the order, it is admissible.

Section 38L: Court orders in civil proceedings

Section 38L outlines the possible orders that can be made by the court after holding a closed hearing under subsection 38G(1) or subsection 38H(6) of the NSI Act.

Civil witness exclusion certificate hearings

(6) After holding a hearing required under subsection 38H(6), the court must order that:

(a) the relevant party **or legal representative** must not call the person as a witness in the civil proceeding; or

(b) the relevant party **or legal representative** may call the person as a witness in the civil proceeding.

Factors to be considered by court

(7) The court must, in deciding what order to make under this section, consider the following matters:

(a) whether, having regard to the Attorney-General's certificate, there would be a risk of prejudice to national security if:

(i) where the certificate was given under subsection 38F(2) or (3)—the information were disclosed in contravention of the certificate; or

(ii) where the certificate was given under subsection 38H(2)—the witness were called;

(b) whether any such order would have a substantial adverse effect on the substantive hearing in the proceeding;

(c) any other matter the court considers relevant.

(8) In making its decision, the court must give greatest weight to the matter mentioned in paragraph (7)(a).

Role of legal representatives after witness exclusion certificate hearing

After holding a witness exclusion certificate hearing, subsection 38L(6) gives the court the power to order that the relevant party must not or may call the person as a witness. However, it is unclear whether the court has the power to make an order, which applies to the legal representative. The proposed amendment will clarify that the court can order that the parties, as well as the parties' legal representatives, must not call/ may call a witness in a civil proceeding in accordance with subsection 38L(6) of the NSI Act.

38M Reasons for court orders

Requirement to give reasons

(1) The court must give a written statement of its reasons for making an order under section 38L to the following people:
  (a) the person who is the subject of the order;
  (b) the parties to the proceeding;
  (c) the parties' legal representatives;
  (d) ~~if section 38K applies —~~the Attorney-General and his or her legal representative.

Copy of proposed statement to be given to the Attorney-General etc.

(2) ~~If section 38K applies, before~~ **Before** the court gives its statement under subsection (1), the court must give a copy of the proposed statement to the Attorney-General and his or her legal representative.

Request to vary proposed statement

(3) If the Attorney-General considers that giving the proposed statement will disclose information and the disclosure is likely to prejudice national security, the Attorney-General or his or her legal representative may request that the court vary the proposed statement so that the ~~national security information~~ **information** will not be disclosed.

Court's decision

(4) The court must make a decision on the request.

Section 38M: Reasons for court orders

The court must produce a written statement of its reasons for making an order under section 38L. Paragraph 38M(1)(d) states that the court must give a written statement of its reasons to the Attorney-General if he or she has intervened under section 38K. In addition, subsection 38M(2) provides that if the Attorney-General has intervened under section 38K, he or she must be provided with a copy of the proposed statement prior to the court releasing the final statement. The proposed amendments would ensure that these requirements are not limited to when the Attorney-General has intervened under section 38K, given the wider ability for the Attorney-General's interests to be represented and heard at civil proceedings under proposed new section 38AA.

The amendment to subsection 38M(3) is a consequential amendment which is necessary because of the proposal to insert the definition of national security information in section 7. The definition of national security information does not include information, the disclosure of which is likely to prejudice national security. Subsection 38M(3) relates to information that is likely to prejudice national security. Therefore, it is necessary to remove the reference to national security information to eliminate any inconsistencies within the Act.

38R Appeals against court orders under section 38L

(1) A party to a civil proceeding~~, or if the Attorney-General is an intervener under section 38K,~~ **or** the Attorney-General may appeal against any order of the court made under section 38L.

(2) The court that has jurisdiction to hear and determine appeals from the judgment in the proceeding has jurisdiction to hear and determine any appeal under this section.

Section 38R: Appeals against court orders under section 38L

After a section 38L order is made, there is the possibility for appeal under section 38R. Currently, subsection 38R(1) makes reference to the Attorney-General intervening under section 38K. As section 38K will be repealed due to the proposed inclusion of section 38AA, the reference to section 38K will be removed.

Security Clearances

39 Security clearance for defendant's legal representative etc.

(1) This section applies if, before or during a federal criminal proceeding, the Secretary of the Attorney-General's Department gives written notice to any of the following persons:

(a) a legal representative of the defendant;

(b) a person assisting a legal representative of the defendant;

that in the proceeding an issue is likely to arise relating to a disclosure, of information in the proceeding, that is likely to prejudice national security.

(1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider the nature of the information itself, and not the character of the person to whom it is to be disclosed.

Person may apply for security clearance

(2) A person who receives a notice under subsection (1) may apply to the Secretary for a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information.

Note 1: Security clearances are given in accordance with the Australian Government Protective Security Manual.

Note 2: If the person does not obtain the security clearance, anyone who discloses such information to the person will, except in limited circumstances, commit an offence under section 46.

Adjournment to allow sufficient time for defendant's legal representative to be given security clearance

(3) The defendant**, or the defendant's legal representative (on the defendant's behalf)** may apply to the court for a deferral or adjournment of the proceeding until:

(a) the legal representative has been given a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information; or

(b) if the legal representative is not given such a security clearance—another legal representative is given such a security clearance.

(4) The court must defer or adjourn the proceeding accordingly.

Prosecutor may advise the court that the defendant's legal representative has not been given a security clearance etc.

(5) If the defendant's legal representative does not apply for the security clearance within 14 days after the day on which the notice is received, or within such further period as the Secretary allows:

(a) the prosecutor may advise the court of the fact; and

(b) the court may:

(i) advise the defendant of the consequences of engaging a legal representative who has not been given a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information; and

(ii) recommend that the defendant engage a legal representative who has been given, or is prepared to apply for, such a security clearance.

Section 39: Security clearances for defendant's legal representative etc.

The policy intention behind the security clearance process

The purpose of the security clearance process is to protect national security information relevant to a court case from unauthorised disclosure. Security clearances have been used for a number of years by Federal, State and Territory agencies to ensure only eligible and suitable persons have access to sensitive or classified information. Under section 29 of the NSI Act, the court has the discretion to exclude non-security cleared legal representatives of the defendant and non-security cleared court officials from a closed hearing where the court considers that disclosure of the information would be likely to prejudice national security.

Under section 39 of the Act, the Secretary of the Attorney-General's Department may give written notice to the defendant's legal representatives or assistant that an issue is likely to arise in the proceeding relating to a disclosure of information, that is likely to prejudice national security. Upon receipt of the notice, the defendant's legal representative and his/her assistants may apply to the Secretary for a security clearance by the Attorney-General's Department.

Currently, the wording of section 39 may be interpreted as stating that it is the character of the recipient, not the nature of the information, which will be considered by the Secretary of the Attorney-General's Department when deciding to issue a notice under section 39. This is contrary to the general policy intention behind the Act of protecting national security information. It is proposed that section 39 should be clarified so that the Secretary's determination, about whether the information is 'likely to prejudice national security', should be made on the basis of the nature of the information and not because of the character of the person.

Currently under subsection 39(3) it is unclear whether a legal representative could apply, on the defendant's behalf, for a deferral or adjournment of the proceeding pending receipt of their security clearance. The proposed amendment to subsection 39(3) will clarify that a defendant's legal representative, on behalf of the defendant, may apply for a deferral or adjournment.

39A Security clearance for parties etc. to a civil proceeding

(1) This section applies if, in a civil proceeding, the Secretary of the Attorney-General's Department gives written notice to any of the following persons:

(a) a party to the proceeding;

(b) a party's legal representative;

(c) a person assisting a party's legal representative;

that in the proceeding an issue is likely to arise relating to a disclosure, of information in the proceeding, that is likely to prejudice national security.

(1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider the nature of the information itself, and not the character of the person to whom it is to be disclosed.

Person may apply for security clearance

(2) A person who receives a notice under subsection (1) may apply to the Secretary for a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information.

Note 1: Security clearances are given in accordance with the Australian Government Protective Security Manual.

Note 2: If the person does not obtain the security clearance, anyone who discloses such information to the person will, except in limited circumstances, commit an offence under section 46G.

Adjournment to allow sufficient time for a person to be given security clearance

(3) A party ~~to the proceeding~~ **,or the defendant's legal representative (on the defendant's behalf,** may apply to the court for a deferral or adjournment of the proceeding to allow time for:

(a) a person who receives a notice under subsection (1) to apply for and be given a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information; or

(b) if the party's legal representative is not given such a security clearance—another legal representative to apply for and be given such a security clearance.

(4) The court must defer or adjourn the proceeding accordingly.

Section 39A: Security clearance for parties etc. to a civil proceeding

The policy intention behind the security clearance process

Section 39A of the Act concerns security clearances for parties to a civil proceeding, as well as their legal representatives and any persons assisting those legal representatives in the proceedings. Similarly to section 39, it is proposed to clarify this section so that the Secretary's determination, about whether the information is 'likely to prejudice national security', should be made on the basis of the nature of the information.

Similarly to section 39, it is unclear under section 39A whether a legal representative could apply on the defendant's behalf for a deferral or adjournment of the proceeding. Therefore, the proposed amendment will clarify that a party's legal representative, on behalf of the party, may apply for a deferral or adjournment under subsection 39A(3) to allow security clearances to be issued to an appropriate level by the Attorney-General's Department.

The Act does not compel legal representatives, under section 39 or section 39A, to obtain a security clearance. Security clearances are only sought where it is absolutely necessary. If barristers accept a brief for a case where security sensitive information is likely to be introduced in the proceedings, they do so knowing a security clearance may be necessary to review relevant evidence in the proceedings and to be present at closed hearings under sections 29 and 38I of the Act. It is the operational practice for defence counsel, in cases where protection of national security information is likely to arise, to be informed of the desirability of applying for a security clearance as early as possible in the proceedings.

Secretary may advise the court that a party has not been given a security clearance

(5) If:

(a) a party is not given a security clearance; or

(b) a party does not apply for the security clearance within 14 days after the day on which the notice is received, or within such further period as the Secretary allows;

then:

(c) the Secretary may advise the court of the fact; and

(d) the court may advise the party of the consequences of not being given a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information and:

(i) if the party is not given a security clearance and has not engaged a legal representative—recommend that the party engage a legal representative who has been given, or is prepared to apply for, such a security clearance; or

(ii) if the party has not applied for the security clearance and has not engaged a legal representative—recommend that the party apply for the security clearance or engage a legal representative who has been given, or is prepared to apply for, such a security clearance.

Secretary may advise the court that a party's legal representative etc. has not been given a security clearance etc.

(6) If:

(a) a party's legal representative or a person assisting the legal representative is not given a security clearance; or

(b) a party's legal representative or a person assisting the legal representative does not apply for the security clearance within 14 days after the day on which the notice is received, or within such further period as the Secretary allows;

then:

(c) the Secretary may advise the court of the fact; and

(d) the court may:

(i) advise the relevant party of the consequences of engaging a legal representative who has not been given a security clearance by the Department at the level considered appropriate by the Secretary in relation to the information; and

(ii) recommend that the relevant party engage a legal representative who has been given, or is prepared to apply for, such a security clearance.

Notice given by Secretary not a legislative instrument

(7) A notice given under subsection (1) is not a legislative instrument for the purposes of the Legislative Instruments Act 2003.

THIS PAGE IS INTENTIONALLY BLANK

Offences for not complying with requirements in the NSI Act

40 Offence to disclose information before Attorney-General gives criminal non-disclosure certificate etc. under section 26

~~*Disclosure where notice given to Attorney-General under section 24*~~

~~(1) If:~~

~~(a) the prosecutor or defendant gives notice to the Attorney-General under subsection 24(1) about the disclosure of information in a federal criminal proceeding by the prosecutor or defendant or another person; and~~

~~(b) section 41 does not apply; and~~

~~(c) the following person:~~

~~(i) if the disclosure is by the prosecutor or defendant—the prosecutor or defendant, as the case may be; or~~

~~(ii) if the disclosure is by a person other than the prosecutor or defendant—the prosecutor or the defendant, as the case may be, or the other person;~~

~~discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and~~

~~(d) the disclosure does not take place in permitted circumstances; and~~

~~(e) the disclosure is likely to prejudice national security;~~

~~the person who discloses the information commits an offence.~~

~~Penalty: Imprisonment for 2 years.~~

Disclosure where notice given to Attorney-General under subsection 24(1)

(1) A person commits an offence if:

(a) the person is the prosecutor, the defendant or the defendant's legal representative in a federal criminal proceeding; and

(b) the person gives notice to the Attorney-General under subsection 24(1) about the disclosure of information in the proceeding; and

(c) section 41 does not apply; and

(d) after giving the notice, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Section 40: Offences to disclose information before Attorney-General gives criminal non-disclosure certificate etc. under section 26

There are a number of proposed amendments to Part 3 and Part 3A of the NSI Act. As a consequence of these amendments it is necessary to update the majority of the offences within Part 5 of the Act. However, the changes to the offences are generally minor in nature and will not have retrospective operation.

It is an offence under section 40 for the prosecutor, the defendant or another person to disclose information after notice is given to the Attorney-General under subsection 24(1) but before the Attorney-General gives a certificate or advice under section 26. It is proposed to divide this offence into two separate offences contained within subsection 40(1) and subsection 40(1A). The offence under subsection 40(1) outlines that a prosecutor, defendant or defendant's legal representative will be capable of committing an offence. This is a consequence of the proposal to amend section 24 to place an obligation on a defendant's legal representative to notify the Attorney-General of any potential disclosures.

Disclosure where advice given under subsection 24(3)

(1A) A person commits an offence if:

(a) the person is advised under subsection 24(3) that a notice about the disclosure of information in a federal criminal proceeding has been given to the Attorney-General; and

(b) the advice includes a description of the information; and

(c) section 41 does not apply; and

(d) after being advised, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where notice given to Attorney-General under section 25

(2) If:

(a) the prosecutor gives notice to the Attorney-General under subsection 25(6) that the prosecutor knows ~~or believes~~ **believes or is advised** that an answer by a witness in a hearing in relation to a federal criminal proceeding will disclose information; and

(b) section 41 does not apply; and

(c) the prosecutor or the witness discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the prosecutor or the witness a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and

(d) the disclosure does not take place in permitted circumstances; and

(e) the disclosure is likely to prejudice national security;

the prosecutor or the witness commits an offence.

Penalty: Imprisonment for 2 years.

The offence under subsection 40(1A) of the NSI Act outlines that it is an offence when a person, other than the prosecutor, defendant and the defendant's legal representative, makes a disclosure.

The proposed amendment to paragraph 40(2)(a) is a necessary consequence of the proposed amendment to insert new subsection 25(6). New subsection 25(6) provides that if the prosecutor knows, believes, or is advised that the written answer provided by the witness will disclose national security information in a proceeding the prosecutor must advise the court and the Attorney-General of that knowledge, belief or advice as soon as practicable. Therefore, it is necessary to amend paragraph 40(2)(a) to insert the words 'or is advised'. This will ensure that it is an offence to disclose information from a witness's answer prior to a certificate being issued if the prosecutor has been advised that a witness's answer involves national security information, and he or she has notified the Attorney-General.

~~**41 Offence to disclose information before Attorney-General gives criminal witness exclusion certificate etc. under section 28**~~

~~If:~~

~~(a) the prosecutor or defendant notifies the Attorney-General under section 24 that the prosecutor or defendant knows or believes that a person whom the prosecutor or defendant intends to call as a witness in a federal criminal proceeding will disclose information by his or her mere presence; and~~

~~(b) the prosecutor or the defendant calls the person as a witness in the federal criminal proceeding at any time before the Attorney-General gives the prosecutor or defendant a certificate under subsection 28(2) or advice under subsection 28(10) in relation to the calling of the witness; and~~

~~(c) the disclosure of the information by the mere presence of the person is likely to prejudice national security;~~

~~the prosecutor or the defendant commits an offence.~~

~~Penalty: Imprisonment for 2 years.~~

41 Offence to disclose information before Attorney-General gives criminal witness exclusion certificate etc. under section 28

A person commits an offence if:

(a) the person is the prosecutor, the defendant or the defendant's legal representative in a federal criminal proceeding; and

(b) the person notifies the Attorney-General under subsection 24(1) that he or she knows or believes that a person (the *second person*) whom he or she intends to call as a witness in a federal criminal proceeding will disclose information by the second person's mere presence; and

(c) after giving the notice, the person calls the second person as a witness in the proceeding at any time before the Attorney-General gives the person a certificate under subsection 28(2) or advice under subsection 28(10) in relation to the calling of the second person as a witness; and

(d) the disclosure of the information by the mere presence of the second person is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Section 41: Offence to disclose information before Attorney-General gives criminal witness exclusion certificate etc. under section 28

Under section 41 of the NSI Act it is an offence to disclose information after the prosecutor or defendant notifies the Attorney-General that a witness may be called who will disclose information that may affect national security but before the Attorney-General has given a certificate. The proposed amendment to section 24 will place an obligation on a defendant's legal representative to notify the Attorney-General of any potential disclosure of national security information by a witness. The proposed amendment to section 41 will clarify that it is an offence under section 41 for a defendant's legal representative, in addition to the defendant themselves and the prosecutor, to call a witness after they have notified the Attorney-General that they may disclose national security information.

42 Offence to contravene requirement to notify Attorney-General etc. under sections 24 and 25

A person commits an offence if:

(a) the person contravenes subsection 24(1), (2) ~~or (3)~~ **, (3) or (4)** or 25(2) or (6); and

(b) the disclosure of information mentioned in that subsection is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Section 42: Offence to contravene requirement to notify Attorney-General etc. under sections 24 and 25

A person may have an obligation under sections 24 and 25 of the NSI Act to notify the Attorney-General of an expected disclosure, in federal criminal proceedings, of information that relates to or affects national security. The person may also have an obligation to notify other relevant parties that notice has been given to the Attorney-General and to provide a description of the information. Failure to comply with these obligations may amount to an offence under section 42 of the Act.

The proposed amendments to section 42 are consequential to the amendments that are proposed to section 24.

45A Offence to contravene regulations

(1) A person commits an offence if:

(a) regulations made under section 23 require the person to comply with a requirement relating to the storage, handling or destruction of national security information; and

(b) the person engages in conduct; and

(c) the conduct results in the requirement being contravened.

Penalty: 6 months imprisonment.

(2) In this section:

***engage in conduct* means:**

(a) do an act; or

(b) omit to perform an act.

Section 45A: Offence to contravene regulations

This proposed new section will create a new offence relating to federal criminal proceedings. This new section will make it an offence to contravene the *National Security Act (Criminal and Civil Proceedings) Regulations* made under section 23 of the NSI Act that relate to the storing, handling or destruction of national security information.

Generally where the content of an offence is delegated to regulations the maximum penalty for a breach of the offence is 50 penalty units. However, it is proposed to attach a penalty of 6 months imprisonment to this offence. A penalty of imprisonment is considered reasonable for breaching the regulations, given the serious consequences of failing to comply with the requirements relating to the storage, handling or destruction of national security information. Furthermore, without a sufficient penalty the offence would not act as a sufficient deterrent against failing to comply with the requirements in the Regulations. Comments are welcome on the appropriateness of a penalty of 6 months imprisonment for an offence under section 45A.

46A Offence to disclose information before Attorney-General gives civil non-disclosure certificate etc. under section 38F

~~*Disclosure where notice given to Attorney-General under section 38D*~~

~~(1) If:~~

~~(a) a party to a civil proceeding gives notice to the Attorney-General under subsection 38D(1) about the disclosure of information in the proceeding by the party or another person; and~~

~~(b) section 46B does not apply; and~~

~~(c) either:~~

~~(i) if the disclosure is by the party—the party; or~~

~~(ii) if the disclosure is by a person other than the party—the party or the other person;~~

~~discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the party, or both the party and the other person, a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and~~

~~(d) the disclosure does not take place in permitted circumstances; and~~

~~(e) the disclosure is likely to prejudice national security;~~

~~the person who discloses the information commits an offence.~~

~~Penalty: Imprisonment for 2 years.~~

Disclosure where notice given to Attorney-General under subsection 38D(1)

(1) A person commits an offence if:

(a) the person is a party, or a legal representative of a party, to a civil proceeding; and

(b) the person gives notice to the Attorney-General under subsection 38D(1) about the disclosure of information in the proceeding; and

(c) section 46B does not apply; and

(d) after giving the notice, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Section 46A: Offence to disclose information before Attorney-General gives civil non-disclosure certificate etc. under section 38F

Under section 46A it is an offence if a party to a civil proceeding or a person other than the party discloses information after the party notifies the Attorney-General about the potential disclosure of national security information, but before the Attorney-General has given a certificate.

The proposed amendment to section 38D clarifies that the obligation to notify the Attorney-General is imposed on the legal representative of a party. Therefore, it is proposed to amend subsection 46A(1) so the offence also applies to legal representatives but no longer applies to a person other than the party. These amendments make sure that an offence can only be committed, under this subsection, by people who have given notification of an expected disclosure and can therefore be assumed to be aware of their obligations under the Act.

Disclosure where advice given under subsection 38D(4)

(1A) A person commits an offence if:

(a) the person is advised under subsection 38D(4) that a notice about the disclosure of information in a civil proceeding has been given to the Attorney-General; and

(b) the advice includes a description of the information; and

(c) section 46B does not apply; and

(d) after being advised, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where notice given to Attorney-General under section 38E

(2) If:

(a) a witness gives a written answer to the court under section 38E in a civil proceeding; and

(b) section 46B does not apply; and

(c) the witness discloses information given in the written answer (whether in the proceeding or otherwise) at any time after the written answer is given to the court and before the Attorney-General gives the witness a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and

(d) the disclosure does not take place in permitted circumstances; and

(e) the disclosure is likely to prejudice national security;

the witness commits an offence.

Penalty: Imprisonment for 2 years.

Commentary

National Security Information (Criminal and Civil Proceedings) Act 2004

Proposed subsection 46(1A) provides for an offence where a person, other than the parties and their legal representatives, makes a disclosure where they have been previously advised that the evidence they are to provide may involve the disclosure of national security information. Again, this will ensure that an offence can only be committed by persons who have been advised of the notification and can therefore be assumed to be aware of their obligations under the NSI Act.

~~**46B Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H**~~

~~If:~~

~~(a) a party to a civil proceeding notifies the Attorney-General under section 38D that the party knows or believes that a person whom the party intends to call as a witness in the proceeding will disclose information by his or her mere presence; and~~

~~(b) the party calls the person as a witness in the proceeding at any time before the Attorney-General gives the party a certificate under subsection 38H(2) or advice under subsection 38H(9) in relation to the calling of the witness; and~~

~~(c) the disclosure of the information by the mere presence of the person is likely to prejudice national security;~~

~~the party commits an offence.~~

~~Penalty: Imprisonment for 2 years.~~

46B Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H

A person commits an offence if:

(a) the person is a party, or the legal representative of a party, to a civil proceeding; and

(b) the person notifies the Attorney-General under subsection 38D(1) that he or she knows or believes that a person (the *second person*) whom he or she intends to call as a witness in the proceeding will disclose information by the second person's mere presence; and

(c) after giving the notice, the person calls the second person as a witness in the proceeding at any time before the Attorney-General gives the person a certificate under subsection 38H(2) or advice under subsection 38H(9) in relation to the calling of the second person as a witness; and

(d) the disclosure of the information by the mere presence of the second person is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Section 46B: Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H

Under section 46B a party to a civil proceeding commits an offence if they call a witness, after they have notified the Attorney-General that the witness may disclose national security information, but before the Attorney-General gives a civil witness exclusion certificate. The proposed amendment to section 38D clarifies that the obligation to notify the Attorney-General is imposed on legal representatives. Therefore, it is proposed to amend subsection 46B so the offence also applies to legal representatives.

~~**46C Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E**~~

~~A party to a civil proceeding commits an offence if:~~

~~(a) the party contravenes subsection 38D(1), (3) or (4) or 38E(2); and~~

~~(b) the disclosure of information mentioned in that subsection is likely to prejudice national security.~~

~~Penalty: Imprisonment for 2 years~~

46C Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E

A person commits an offence if:

(a) the person is a party, or the legal representative of a party, to a civil proceeding; and

(b) the person contravenes subsection 38D(1), (3) or (4) or 38E(2); and

(c) the disclosure of information mentioned in that subsection is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Section 46C: Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E

In civil proceedings a person may have an obligation, under sections 38D and 38E of the Act, to notify the Attorney-General of an expected disclosure of information that relates to or affects national security. If the person fails to notify the Attorney-General, this is an offence under section 46C of the Act.

Similarly to the proposed amendments to other sections of Part 5, proposed section 46C reflects that notification obligations provided by sections 38D and 38E are imposed not only on parties to civil proceedings, but also on their legal representatives. An offence would be committed where a party or a party's legal representative fails to notify the Attorney-General of an expected disclosure in the proceeding.

46FA Offence to contravene regulations

(1) A person commits an offence if:

(a) regulations made under section 38C require the person to comply with a requirement relating to the storage, handling or destruction of national security information; and

(b) the person engages in conduct; and

(c) the conduct results in the requirement being contravened.

Penalty: 6 months imprisonment.

(2) In this section:

***engage in conduct* means:**

(a) do an act; or

(b) omit to perform an act.

Section 46FA: New offence to contravene regulations

This proposed new offence has a similar purpose to the proposed offence under section 45A. The only difference is that section 46F relates to civil proceedings.

New section 45A would make it an offence to engage in conduct which contravenes the requirements relating to the storage, handling or destruction of national security information currently outlined in the *National Security Act (Criminal and Civil Proceedings) Regulations.*

Generally where the content of an offence is delegated to regulations the maximum penalty for a breach of the offence is 50 penalty units. However, it is proposed to attach a penalty of 6 months imprisonment to this offence. A penalty of imprisonment is considered reasonable for breaching the regulations, given the serious consequences of failing to comply with the requirements relating to the storage, handling or destruction of national security information. Furthermore, without a sufficient penalty the offence would not act as a sufficient deterrent against failing to comply with the requirements in the Regulations. Comments are welcome on the appropriateness of a penalty of 6 months imprisonment for an offence under section 46FA.

Application of amendments and saving

Application of amendments

Notice given after commencement

(1) The amendments made by this Schedule (other than items 96 and 99) apply on and after the commencement of this item to:

(a) a federal criminal proceeding in relation to which a notice is given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* on or after that commencement; and

(b) a civil proceeding in relation to which a notice is given under section 6A of that Act on or after that commencement;

whether or not the proceeding begins before or after that commencement.

(2) The amendments made by items 96 and 99 apply on and after the commencement of those items to:

(a) a federal criminal proceeding in relation to which a notice is given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* on or after that commencement; and

(b) a civil proceeding in relation to which a notice is given under section 6A of that Act on or after that commencement;

whether or not the proceeding begins before or after that commencement.

Notice given before commencement

(3) The amendments made by this Schedule (other than items 96 and 99) apply on and after the commencement of this item to:

(a) a federal criminal proceeding in relation to which a notice was given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before that commencement; and

(b) a civil proceeding in relation to which a notice was given under section 6A of that Act before that commencement;

but only to the parts of the proceeding that occur after that commencement (whether or not those parts began before that commencement).

(4) The amendments made by items 96 and 99 apply on and after the commencement of those items to:

(a) a federal criminal proceeding in relation to which a notice was given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before that commencement; and

(b) a civil proceeding in relation to which a notice was given under section 6A of that Act before that commencement;

but only to the parts of the proceeding that occur after that commencement (whether or not those parts began before that commencement).

(5) If, under section 6 or 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, a notice was given before the commencement of this item, then:

(a) any orders that were made; and

Application of amendments

The amendments will apply to federal criminal proceedings and civil proceedings where notice under sections 6 and 6A has been given on or after the commencement of the amendments. For proceedings where notice has been given before the amendments commence, the amendments will only apply to those parts of the proceedings that take place on or after commencement. Further, any certificates, orders, notices or advices which where given before commencement will continue to have effect. This will ensure that proceedings currently taking place or starting prior to commencement can still move forward in compliance with the Act.

Savings provision

This item provides that regulations made under sections 23 and 38C of the Act will remain in force and continue as such. This is notwithstanding that sections 23 and 38C would be amended. The proposed amendments to these sections do not affect the substantive content or operation of the regulations. By allowing the regulations to continue, the ongoing effectiveness of the protective regime under the Act is ensured.

(b) any certificates, advices or notices that were given;

before that commencement under a provision of that Act continue in force (and may be dealt with) as if they were made or given under:

(c) in the case of an order made under subsection 23(2) of that Act—subsection 19(1A) of that Act as amended by this Schedule; and

(d) in the case of an order made under subsection 38C(2) of that Act—subsection 19(3A) of that Act as amended by this Schedule; and

(e) in any other case—the provision of that Act as amended by this Schedule.

Savings provision

Despite the amendments made to sections 23 and 38C of the *National Security Information (Criminal and Civil Proceedings) Act 2004* by this Schedule, regulations made under those sections and that are in force immediately before the commencement of this item continue in force (and may be dealt with) after that commencement, as if they were made under those sections as amended by this Schedule.

THIS PAGE IS INTENTIONALLY BLANK

THIS PAGE IS INTENTIONALLY BLANK

Chapter 5 Amendments to improve oversight of the Australian Federal Police

Chapter 5 includes a measure to improve oversight of the Australian Federal Police (AFP), namely the establishment of a Parliamentary Joint Committee on Law Enforcement (PJC Law Enforcement).

The Parliamentary Joint Committee on Law Enforcement Bill serves to establish the PJC Law Enforcement, enable it to provide broad oversight of the AFP and the Australian Crime Commission (ACC), and examine trends and changes in criminal activities.

The PJC Law Enforcement will be established by extending the functions of the current Parliamentary Joint Committee on the Australian Crime Commission (PJC-ACC) to include oversight of the AFP as well as the ACC.

The current PJC-ACC has responsibility for reviewing and reporting to Parliament on the performance by the ACC of its functions. The PJC Law Enforcement will continue to perform these functions, and will also review and report to Parliament on the performance by the AFP of its functions. It will also retain the current function of the PJC-ACC in relation to examining and reporting on trends and changes in criminal activities, practices and methods and any desirable changes to the functions, structure, powers and procedures of the ACC or the AFP.

The legislative basis for the PJC-ACC in Part III of the *Australian Crime Commission Act 2002* will be repealed and replaced by provisions in a new stand-alone Act that will set out the functions and administrative arrangements for the PJC Law Enforcement. The consequential amendments required to repeal the relevant provisions relating to the PJC-ACC in the *Australian Crime Commission Act 2002* and provide for transitional arrangements will be included in the National Security Legislation Amendment Bill.

Parliamentary Joint Committee on Law Enforcement Bill

1 Short title

This Act may be cited as the *Parliamentary Joint Committee on Law Enforcement Act 2009*.

2 Commencement

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

3 Definitions

In this Act:

ACC means the Australian Crime Commission established by section 7 of the *Australian Crime Commission Act 2002*.

ACC operation/investigation has the same meaning as in the *Australian Crime Commission Act 2002*.

AFP means the Australian Federal Police.

AFP conduct or practices issue has the same meaning as in the *Australian Federal Police Act 1979* .

CEO of the ACC means the Chief Executive Officer of the ACC.

intelligence operation has the same meaning as in the *Australian Crime Commission Act 2002*.

law enforcement agency means:

(a) the ACC; or
(b) the AFP; or
(c) a Police Force of a State; or
(d) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of the States.

member means a member of the Committee.

member of the Australian Federal Police has the same meaning as in the *Australian Federal Police Act 1979* .

member of the staff of the ACC has the same meaning as in the *Australian Crime Commission Act 2002*.

relevant criminal activity has the same meaning as in the *Australian Crime Commission Act 2002*.

Commentary on key provisions

Proposed section 3 sets out definitions of relevant terms used in the Bill. Many of these definitions are consistent with definitions in related legislation, such as the *Australian Crime Commission Act 2002* and the *Australian Federal Police Act 1979*. The definition of sensitive information has been modelled upon a similar definition in the *Law Enforcement Integrity Commissioner Act 2006*, but some changes have been made to reflect that the term in the *Parliamentary Joint Committee on Law Enforcement Act* applies to the roles, responsibilities and functions of the ACC and AFP rather than the Australian Commission for Law Enforcement Integrity.

sensitive information means information that, if disclosed:

(a) could prejudice:
  (i) the security, defence or international relations of Australia; or
  (ii) relations between the Commonwealth Government and the Government of a State or between the Government of a State and the Government of another State; or

(b) would disclose:
  (i) deliberations or decisions of the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or
  (ii) deliberations or decisions of the Australian Capital Territory Executive or of a committee of that Executive; or
  (iii) deliberations or advice of the Federal Executive Council or the Executive Council of a State or the Northern Territory; or

(c) could reveal, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to:
  (i) the enforcement of the criminal law of the Commonwealth, a State or Territory or a foreign country; or
  (ii) an investigation relating to misconduct or alleged misconduct by a member of the Australian Federal Police; or
  (iii) an investigation relating to misconduct or alleged misconduct by a member of the staff of the ACC; or
  (iv) an investigation into an AFP conduct or practices issue; or
  (v) an ACC operation/investigation (including an ACC operation/investigation that has been concluded); or

(d) could endanger a person's life or physical safety; or

(e) could prejudice the protection of public safety; or

(f) could prejudice the fair trial of a person or the impartial adjudication of a matter; or

(g) could prejudice the proper enforcement of the law or the operations of law enforcement agencies; or

(h) could prejudice a person's reputation; or

(i) would disclose information the disclosure of which is prohibited (absolutely or subject to qualifications) by or under another law of the Commonwealth; or

(j) would unreasonably disclose personal information (within the meaning of the *Privacy Act 1988*) in relation to a person; or

(k) would unreasonably disclose confidential commercial information.

State includes the Australian Capital Territory and the Northern Territory.

the Committee means the Parliamentary Joint Committee on Law Enforcement for the time being constituted under this Act.

4 Extension to external Territories

This Act extends to every external Territory.

THIS PAGE IS INTENTIONALLY BLANK

5 Joint Parliamentary Committee on Law Enforcement

(1) As soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Law Enforcement, is to be appointed according to the practice of the Parliament with reference to the appointment of members to serve on joint select committees of both Houses of the Parliament.

(2) The Committee is to consist of 10 members, namely, 5 members of the Senate appointed by the Senate, and 5 members of the House of Representatives appointed by that House.

(3) A member of the Parliament is not eligible for appointment as a member of the Committee if he or she is:

(a) a Minister; or

(b) the President of the Senate; or

(c) the Speaker of the House of Representatives; or

(d) the Deputy-President and Chair of Committees of the Senate or the Chair of Committees of the House of Representatives.

(4) A member ceases to hold office:

(a) when the House of Representatives expires by effluxion of time or is dissolved; or

(b) if he or she becomes the holder of an office specified in any of the paragraphs of subsection (3); or

(c) if he or she ceases to be a member of the House of the Parliament by which he or she was appointed; or

(d) if he or she resigns his or her office as provided by subsection (5) or (6).

(5) A member appointed by the Senate may resign his or her office by writing signed by him or her and delivered to the President of the Senate.

(6) A member appointed by the House of Representatives may resign his or her office by writing signed by him or her and delivered to the Speaker of that House.

(7) Either House of the Parliament may appoint one of its members to fill a vacancy amongst the members of the Committee appointed by that House.

6 Powers and proceedings of the Committee

All matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of the Parliament.

Proposed section 5 replicates section 53 of the *Australian Crime Commission Act 2002*. It sets out the administrative arrangements for establishing the PJC Law Enforcement and its membership from each Parliament. It also sets out the requirements for the resignation of a member and for the filling of a vacancy on the Committee.

The PJC Law Enforcement will consist of 10 members of Parliament, with five members of the House of Representatives and five members of the Senate. The members are to be appointed in accordance with the practice of Parliament.

Proposed section 6 replicates section 54 of the *Australian Crime Commission Act 2002*. It requires all matters relating to the powers and proceedings of the Committee to be determined by resolution of both Houses of Parliament.

7 Functions of the Committee

(1) The Committee has the following functions:

(a) to monitor and to review the performance by the ACC of its functions;

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(d) to monitor and to review the performance by the AFP of its functions;

(e) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the AFP or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(f) to examine each annual report on the AFP and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(g) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC or the AFP;

(h) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

Note 1: For the functions of the ACC, see section 7A of the *Australian Crime Commission Act 20022002*.

Note 2: For the functions of the AFP, see section 8 of the *Australian Federal Police Act 1979*.

(2) The functions of the Committee do not include:

(a) undertaking an intelligence operation or investigating a matter relating to a relevant criminal activity; or

(b) reconsidering the findings of the ACC in relation to a particular ACC operation/investigation (including an ACC operation/investigation that has been concluded); or

(c) reviewing sensitive operational information or operational methods available to the ACC or the AFP; or

(d) reviewing particular operations or investigations that have been, are being or are proposed to be undertaken by the ACC or the AFP; or

(e) reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or

(f) conducting inquiries into individual complaints about the activities of the ACC or the AFP.

(3) To avoid doubt, the Committee may examine, and report to both Houses of the Parliament on, information given to it under section ^8 or ^9.

Proposed section 7 sets out the functions of the PJC Law Enforcement, which cover three areas:

- monitoring and reporting to Parliament on the performance by the ACC of its functions;

- monitoring and reporting to Parliament on the performance by the AFP of its functions; and

- examining changes and trends in criminal activities, practices and methods and reporting on any desirable changes to the functions, structure, powers and procedures of the ACC or the AFP.

These functions are similar to the functions of the current PJC-ACC, but include review of the AFP in addition to the ACC.

Proposed subsection 7(2) clarifies that the PJC Law Enforcement's functions do not extend to the review of certain sensitive operational matters. As is the case with the PJC-ACC, the PJC Law Enforcement is not to review or reconsider the findings of any ACC or AFP operational and investigation activities. This includes reviewing sensitive operational information or operational methods available to the ACC or AFP. This is consistent with the nature of the Committee's functions being about the broad operation and effectiveness of the ACC and AFP, rather than considering particular operations or responding to individual complaints or concerns. Individual operations and investigations are subject to oversight through the process of ministerial responsibility. Similarly, the investigation of individual complaints about the AFP and ACC can be dealt with by complaints handling bodies such the Commonwealth Ombudsman, the AFP's Professional Standards Operations Monitoring Centre and the Law Enforcement Integrity Commissioner.

Proposed subsection 7(3) provides that the Committee may examine, and report to both Houses of Parliament, on information provided to the Committee in accordance with the disclosure provisions of the Bill (proposed sections 8 and 9). This enables the Committee to make its report public and examine individuals on the content of the disclosed information.

8 Disclosure to Committee by CEO of the ACC

(1) Subject to subsection (2), the CEO of the ACC:
  (a) must comply with a request by the Committee to give the Committee information in relation to an ACC operation/investigation (including an ACC operation/investigation that has been concluded); and
  (b) must when requested by the Committee, and may at such other times as the CEO thinks appropriate, inform the Committee concerning the general performance of the ACC's functions.

(2) The CEO of the ACC may decide not to comply with the request if the CEO is satisfied that:
  (a) the information is sensitive information; and
  (b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

(3) If the CEO of the ACC does not give information to the Committee because of subsection (2), the Committee may refer the request to the Minister responsible for the ACC.

(4) If the Committee refers the request to the Minister responsible for the ACC, the Minister responsible for the ACC:
  (a) must determine in writing whether:
    (i) the information is sensitive information; and
    (ii) if it is, whether the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee; and
  (b) must provide copies of that determination to the CEO of the ACC and the Committee.

(5) The Minister responsible for the ACC is not required to disclose his or her reasons for making a determination under subsection (4).

(6) A determination made by the Minister responsible for the ACC under subsection (4) is not a legislative instrument.

9 Disclosure to Committee by Commissioner of the AFP

(1) Subject to subsection (2), the Commissioner of the AFP:
  (a) must comply with a request by the Committee to give the Committee information in relation to an investigation that the AFP has conducted or is conducting; and
  (b) must when requested by the Committee, and may at such other times as the Commissioner thinks appropriate, inform the Committee concerning the general performance of the AFP's functions.

(2) The Commissioner of the AFP may decide not to comply with the request if the Commissioner is satisfied that:
  (a) the information is sensitive information; and
  (b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

Proposed sections 8 and 9 create a clear obligation for the CEO of the ACC and the Commissioner of the AFP to comply with requests by the PJC Law Enforcement to provide information about the performance of their respective agency's functions. These provisions are not intended to limit the powers of the Committee to request or require information relevant to its functions in accordance with any proceedings determined by both Houses of Parliament pursuant to proposed section 6. Therefore, it would be open for the PJC Law Enforcement to request other persons to provide information or attend hearings.

Under proposed subsection 8(2) and proposed subsection 9(2), the CEO of the ACC or the Commissioner of the AFP may decide not to comply with a request to provide the Committee with particular information if he or she is satisfied that the information requested is sensitive information (defined in section 3) *and* the prejudicial consequences outweigh the public interest served by providing the information to the Committee.

If the CEO of the ACC or Commissioner of the AFP decides not to provide information to the Committee in accordance with these provisions, the Committee may refer the request to the relevant responsible Minister, who must determine in writing whether the information is sensitive information and whether the public interest in providing that information to the Committee is outweighed by the prejudicial consequences. As the Minister's reasons for making a determination may themselves be sensitive and could have prejudicial consequences, the Minister is not required to disclose his or her reasons. However, where no prejudicial consequences are likely, the Minister would not be prevented from providing his or her reasons to the Committee.

It is intended that these provisions should be relied upon only in exceptional circumstances. Other options such as providing the information in a private hearing or on condition that sensitive information not be included in the Committee's public reports would be open to the Committee in accordance with the powers and proceedings of the Committee as determined in accordance with proposed section 6.

(3) If the Commissioner of the AFP does not give information to the Committee because of subsection (2), the Committee may refer the request to the Minister responsible for the AFP.

(4) If the Committee refers the request to the Minister responsible for the AFP, the Minister responsible for the AFP:

(a) must determine in writing whether:

(i) the information is sensitive information; and

(ii) if it is, whether the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee; and

(b) must provide copies of that determination to the Commissioner of the AFP and the Committee.

(5) The Minister responsible for the AFP is not required to disclose his or her reasons for making a determination under subsection (4).

(6) A determination made by the Minister responsible for the AFP under subsection (4) is not a legislative instrument.

THIS PAGE IS INTENTIONALLY BLANK

10 Ombudsman to brief Committee about controlled operations

(1) At least once in each calendar year the Ombudsman must provide a briefing to the Committee about the involvement of the ACC and the AFP in controlled operations under Part IAB of the *Crimes Act 1914* during the preceding 12 months.

(2) For the purposes of receiving a briefing from the Ombudsman under subsection (1), the Committee must meet in private.

11 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.

Commentary

Parliamentary Joint Committee on Law Enforcement Bill 2009

Proposed section 10 provides that the PJC Law Enforcement must meet in private at least once a year to receive a briefing from the Commonwealth Ombudsman about the involvement of the ACC and AFP in controlled operations. Controlled operations are law enforcement operations that are carried out for the purpose of obtaining evidence that may lead to prosecution of a person for a serious offence, and may involve a law enforcement officer or other person engaging in conduct that would constitute an offence if not authorised in accordance with Part IAB of the *Crimes Act 1914*.

Division 2A of Part IAB of the *Crimes Act 1914* gives the Commonwealth Ombudsman a role in monitoring controlled operations. The Ombudsman is required to inspect the records of the AFP and the ACC in relation to controlled operations at least once every 12 months, and may inspect these records at any time to ascertain whether the agencies have complied with the requirements of the *Crimes Act 1914*.

The Ombudsman is to brief the PJC Law Enforcement each year on the involvement of the ACC and AFP in controlled operations in the previous 12 months. This requirement is consistent with the current requirement in section 55AA of the Australian Crime Commission Act, which requires the Ombudsman to brief the PJC-ACC on the ACC's use of controlled operations. This Bill will extend the requirement to include briefing on the AFP's use of controlled operations. A similar requirement exists for the Ombudsman to brief the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (ACLEI) on ACLEI's use of controlled operations.

Due to the nature of the briefing, it is necessary for the Committee to meet in private in order to maintain the confidentiality of persons involved and to ensure the non-disclosure of operational information.

Consequential amendments relating to the establishment of the Parliamentary Joint Committee on Law Enforcement

Administrative Decisions (Judicial Review) Act 1977

Schedule 2—Classes of decisions that are not decisions to which section 13 applies

…

(dc) decisions under subsection 8(4) or 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act 2009*;

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

128 When AUSTRAC information can be passed on by an official of a designated agency

…

(14) The following provisions have effect:

…

(c) ~~the Chair of the Board~~ **the Chief Executive Officer** of the Australian Crime Commission may, in a manner that does not identify, and is not reasonably capable of being used to identify, a person to whom AUSTRAC information relates, communicate the information to the Parliamentary Joint Committee on ~~the Australian Crime Commission under subsection 59(6A) of the *Australian Crime Commission Act 20022002*~~ **Law Enforcement under subsection 8(1) of the *Parliamentary Joint Committee on Law Enforcement Act 2009***;

…

Australian Crime Commission Act 20022002

51 Secrecy

…

(4) In this section:

relevant Act means:

(a) this Act; or

(b) a law of a State under which the ACC performs a duty or function, or exercises a power, in accordance with section 55A; or

(c) the *Law Enforcement Integrity Commissioner Act 2006* or regulations under that Act; **or**

(d) the *Parliamentary Joint Committee on Law Enforcement Act 2009* or regulations under that Act..

Consequential amendments relating to the establishment of the Parliamentary Joint Committee on Law Enforcement

There are a number of consequential amendments to legislation that are affected by the proposed new PJC Law Enforcement.

Consequential amendments – Administrative Decisions (Judicial Review) Act

The amendment to Schedule 2 of the *Administrative Decisions (Judicial Review) Act 1977* clarifies that the Minister is not required to provide reasons for decision in relation to a determination under subsections 8(4) or 9(4) of the Parliamentary Joint Committee on Law Enforcement Act.

Consequential amendments – Anti-Money Laundering and Counter-Terrorism Financing Act

The proposed amendments to paragraph 128(14)(c) of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* substitute the reference in this paragraph to the 'Chair of the Board' of the ACC with the 'Chief Executive Officer' (CEO) for consistency with provisions in the Parliamentary Joint Committee on Law Enforcement Bill.

The proposed amendments will also update the reference to subsection 59(6A) of the *Australian Crime Commission Act 20022002* to refer to the equivalent provision in the *Parliamentary Joint Committee on Law Enforcement Act 2009*.

Consequential amendments – Australian Crime Commission Act 2002

Proposed new paragraph 51(4)(d) inserts reference to the Parliamentary Joint Committee on Law Enforcement Act for the purpose of the secrecy provision in section 51 of the *Australian Crime Commission Act 2002*. This will ensure that the secrecy offence will not prevent the CEO, Chair of the ACC, a staff member of the ACC or an ACC examiner from providing information to the proposed PJC Law Enforcement.

Part III—Parliamentary Joint Committee on the Australian Crime Commission

52 Interpretation

In this Part, unless the contrary intention appears:

member means a member of the Committee.

the Committee means the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under this Part.

53 Joint Committee on the Australian Crime Commission

(1) As soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of the Parliament to be known as the Parliamentary Joint Committee on the Australian Crime Commission is to be appointed according to the practice of the Parliament with reference to the appointment of members to serve on joint select committees of both Houses of the Parliament.

(2) The Committee shall consist of 10 members, namely, 5 members of the Senate appointed by the Senate, and 5 members of the House of Representatives appointed by that House.

(3) A member of the Parliament is not eligible for appointment as a member of the Committee if he or she is:

(a) a Minister;

(b) the President of the Senate;

(c) the Speaker of the House of Representatives; or

(d) the Deputy President and Chairman of Committees of the Senate or the Chairman of the Committees of the House of Representatives.

(4) A member ceases to hold office:

(a) when the House of Representatives expires by effluxion of time or is dissolved;

(b) if he or she becomes the holder of an office specified in any of the paragraphs of subsection (3);

(c) if he or she ceases to be a member of the House of the Parliament by which he or she was appointed; or

(d) if he or she resigns his or her office as provided by subsection (5) or (6).

(5) A member appointed by the Senate may resign his or her office by writing signed by him or her and delivered to the President of the Senate.

(6) A member appointed by the House of Representatives may resign his or her office by writing signed by him or her and delivered to the Speaker of that House.

(7) Either House of the Parliament may appoint one of its members to fill a vacancy amongst the members of the Committee appointed by that House.

54 Powers and proceedings of the Committee

All matters relating to the powers and proceedings of the Committee shall be determined by resolution of both Houses of the Parliament.

These proposed amendments repeal Part III of the *Australian Crime Commission Act 2002*, which currently contains the legislative basis for the PJC-ACC. As the proposed PJC Law Enforcement is to replace the PJC-ACC, Part III of the *Australian Crime Commission Act 2002* will no longer be necessary. Many of the provisions currently in Part III of the *Australian Crime Commission Act 2002* are reflected in the Parliamentary Joint Committee on Law Enforcement Bill, with appropriate modifications and additions to reflect the broader mandate of the PJC Law Enforcement.

~~55 Duties of the Committee~~

~~(1) The duties of the Committee are:~~

~~(a) to monitor and to review the performance by the ACC of its functions;~~

~~(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;~~

~~(c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;~~

~~(d) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC; and~~

~~(e) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.~~

~~(2) Nothing in this Part authorized the Committee:~~

~~(a) To undertake and intelligence operation or to investigate a matter relating to a relevant criminal activity; or~~

~~(b) To reconsider the findings of the ACC in relation to a particular ACC operation/investigation.~~

~~(3) To avoid doubt, the Committee may examine, and report to both Houses of the Parliament on, information given to it under section 59.~~

~~55AA Ombudsman to brief committee about controlled operations~~

~~(1) At least once in each year the Ombudsman must provide a briefing to the Committee about the ACC's involvement in controlled operations under Part IAB of the *Crimes Act 1914* during the preceding 12 months.~~

~~(2) For the purposes of receiving a briefing from the Ombudsman under subsection (1), the Committee must meet in private.~~

~~59 Furnishing of reports and information~~

~~(6A) Subject to (6B), the Chair of the Board:~~

~~(a) must comply with a request by the Parliamentary Joint Committee on the Australian Crime Commission for the time being constituted under Part III (the ***PJC***) to give the PJC information relating to an ACC operation/investigation that the ACC has conducted or is conducting; and~~

~~(b) must when requested by the PJC, and may at such other times as the Chair of the Board thinks appropriate, inform the PJC concerning the general conduct of the operations of the ACC.~~

~~(6B) If the Chair of the Board considers that disclosure of information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the Chair must not give the PJC the information.~~

It is also proposed to repeal subsections 59(6A)-(6D) of the *Australian Crime Commission Act 2002*, as similar provisions in relation to providing information to the PJC Law Enforcement are included in the Parliamentary Joint Committee on Law Enforcement Bill.

~~(6C) If the Chair of the Board does not give the PJC information on the ground that the Chair considers that disclosure of the information to the public could prejudice the safety or reputation of persons or the operations of law enforcement agencies, the PJC may refer the request to the Minister.~~

~~(6D) If the PJC refers the request to the Minister, the Minister:~~

~~(a) must determine in writing whether disclosure of the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies; and~~

~~(b) must provide copies of that determination to the Chair of the Board and the PJC; and~~

~~(c) must not disclose his or her reasons for determining the question of whether the information could prejudice the safety or reputation of persons or the operations of law enforcement agencies in the way stated in the determination.~~

THIS PAGE IS INTENTIONALLY BLANK

7 Transitional—Committee on the Australian Crime Commission

(1) This item applies to the Parliamentary Joint Committee on the Australian Crime Commission (the ***Committee***) that was in existence under the *Australian Crime Commission Act 20022002* immediately before the commencement of this item.

(2) The Committee continues in existence by force of this item, after the commencement of this item, as the Parliamentary Joint Committee on Law Enforcement under the *Parliamentary Joint Committee on Law Enforcement Act 2009*.

(3) A person who held office as a member of the Committee immediately before the commencement of this item is taken to have been appointed, immediately after that commencement, as a member of the Parliamentary Joint Committee on Law Enforcement.

(4) The person who held office as Chair of the Committee immediately before the commencement of this item is taken to have been elected, immediately after that commencement, as Chair of the Parliamentary Joint Committee on Law Enforcement.

(5) If the Committee was conducting a review immediately before commencement:

(a) the Parliamentary Joint Committee on Law Enforcement may continue the review after that commencement; and

(b) anything done for the purposes of the review before commencement is taken to have been done for the purposes of the review as continued in accordance with this item.

(6) Section 10 of the *Parliamentary Joint Committee on Law Enforcement Act 2009* does not apply in relation to the year ending on 31 December 2009 if, in that year, the Ombudsman has provided to the Committee a briefing under subsection 55AA(1) of the *Australian Crime Commission Act 2002* as in force immediately before the commencement of this item.

(7) For the avoidance of doubt, subitem (6) does not prevent the Ombudsman from providing a briefing to the Parliamentary Joint Committee on Law Enforcement about the involvement of the Australian Crime Commission or the Australian Federal Police in controlled operations under Part IAB of the *Crimes Act 1914* during the year ending on 31 December 2009.

Transitional provisions – Australian Crime Commission Act

Transitional provisions will provide that the current PJC-ACC will continue in existence but be known, after the commencement of this item, as the PJC Law Enforcement. Members of Parliament who were elected to the Committee before the commencement of this item continue to be members of the new Committee. Similarly, any reviews being conducted by the PJC-ACC may continue to be conducted by the PJC Law Enforcement.

The transitional provisions also provide that the Ombudsman is not required to give the Committee a briefing about the AFP or ACC's involvement in controlled operations under Part IAB of the *Crimes Act 1914* before 31 December 2009, if the Ombudsman has already provided a briefing immediately before the commencement of the item. However, this does not preclude the Ombudsman from delivering such a briefing. This is intended to ensure the Ombudsman is not required to duplicate briefings to the Committee if the Ombudsman has already provided a briefing to the PJC-ACC on the ACC's involvement in controlled operations in the current calendar year. However, there remains flexibility for the Ombudsman and PJC Law Enforcement to make arrangements for the Ombudsman to provide such a briefing if this would be appropriate.

Australian Federal Police Act 1979

60A Secrecy

…

(2) A person to whom this section applies must not, directly or indirectly:

(a) make a record of any prescribed information; or

(b) divulge or communicate any prescribed information to any other person;

except for:

(c) the purposes of this Act or the regulations; or

(d) the purposes of the *Law Enforcement Integrity Commissioner Act 2006* or regulations under that Act; or

(e) the purposes of the *Witness Protection Act 1994* or regulations under that Act; or

(ea) the purposes of the *Parliamentary Joint Committee on Law Enforcement Act 2009* or regulations under that Act; or

(f) the carrying out, performance or exercise of any of the person's duties, functions or powers under Acts or regulations mentioned in paragraphs (c), ~~(d) and (e)~~ **(d), (e) and (ea)**.

Penalty: Imprisonment for 2 years.

…

(3) In this section:

personal information has the same meaning as in the *Privacy Act 1988*.

prescribed information means information obtained by a person to whom this section applies:

(a) in the course of carrying out, performing or exercising any of the person's duties, functions or powers under:

(i) this Act or the regulations; or

(ii) the *Law Enforcement Integrity Commissioner Act 2006* or regulations under that Act; or

(iii) the *Witness Protection Act 1994* or regulations under that Act; or

(iv) the *Parliamentary Joint Committee on Law Enforcement Act 2009* or regulations under that Act; or

(b) otherwise in the course of the person's service, employment or engagement under Acts or regulations mentioned in paragraph (a).

Consequential amendments – Australian Federal Police Act 1979

Proposed amendments to section 60A of the *Australian Federal Police Act 1979* add a reference to the *Parliamentary Joint Committee on Law Enforcement Act 2009* to ensure that the secrecy offence will not prevent AFP officers and others to whom the secrecy offence applies from providing information to the PJC Law Enforcement in accordance with its functions.

THIS PAGE IS INTENTIONALLY BLANK

Appendix 1: Draft National Security Legislation Amendment Bill 2009

2008-2009

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

Presented and read a first time

EXPOSURE DRAFT

National Security Legislation Amendment Bill 2009

No. , 2009

(Attorney-General)

A Bill for an Act to amend the law relating to terrorism and national security, and for other purposes

A Bill for an Act to amend the law relating to terrorism and national security, and for other purposes

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *National Security Legislation Amendment Act 2009*.

2 Commencement

(1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	
2. Schedule 1, Part 1	The day after this Act receives the Royal Assent.	
3. Schedule 1, Part 2	The 28th day after the day on which this Act receives the Royal Assent.	
4. Schedules 2 to 7	The day after this Act receives the Royal Assent.	
5. Schedule 8, items 1 to 95	The 28th day after the day on which this Act receives the Royal Assent.	
6. Schedule 8, item 96	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act	

Commencement information

Column 1	Column 2	Column 3
Provision(s)	**Commencement**	**Date/Details**
	receives the Royal Assent, they commence on the first day after the end of that period.	
7. Schedule 8, items 97 and 98	The 28th day after the day on which this Act receives the Royal Assent.	
8. Schedule 8, item 99	At the same time as the provision(s) covered by table item 6.	
9. Schedule 8, items 100 and 101	The 28th day after the day on which this Act receives the Royal Assent.	
10. Schedule 9	The later of: (a) the day after this Act receives the Royal Assent; and (b) the commencement of the *Parliamentary Joint Committee on Law Enforcement Act 2009*. However, the provision(s) do not commence at all if the event mentioned in paragraph (b) does not occur.	

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

(2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

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.

Schedule 1—Treason and urging violence

Part 1—Amendments commencing day after Royal Assent

Crimes Act 1914

1 Subparagraph 24F(2)(b)(ii)

Omit "paragraph 80.1(1)(e)", substitute "paragraph 80.1AA(1)(b)".

2 Part IIA (heading)

Repeal the heading, substitute:

Part IIA—Protection of public and other services

3 Sections 30A to 30H and 30R

Repeal the sections.

Criminal Code Act 1995

4 Part 5.1 of the *Criminal Code* (heading)

Repeal the heading, substitute:

Part 5.1—Treason and urging violence

5 Division 80 of the *Criminal Code* (heading)

Repeal the heading, substitute:

Division 80—Treason and urging violence

6 Before section 80.1A of the *Criminal Code*

Insert:

Subdivision A—Preliminary

7 Before section 80.1 of the *Criminal Code*

Insert:

Subdivision B—Treason

8 Subsection 80.1(1) of the *Criminal Code*

Omit ", called treason,".

9 Paragraphs 80.1(e) and (f) of the *Criminal Code*

Repeal the paragraphs.

10 Paragraph 80.1(1)(h) of the *Criminal Code*

After "preceding paragraph", insert ", or in section 80.1AA,".

11 Subsection 80.1(1A) of the *Criminal Code*

Repeal the subsection.

12 Paragraph 80.1(1B)(a) of the *Criminal Code*

Omit "paragraph (1)(e) or (f)", substitute "section 80.1AA".

13 Subsection 80.1(5) of the *Criminal Code*

Omit ", (e), (f) or (g)", substitute "or (g), or in section 80.1AA,".

14 At the end of subsection 80.1(5) of the *Criminal Code*

Add:

Note: There is a defence in section 80.3 for acts done in good faith.

15 After section 80.1 of the *Criminal Code*

Insert:

80.1AA Treason—materially assisting enemies etc.

Assisting enemies at war with the Commonwealth

(1) A person commits an offence if:

(a) the Commonwealth is at war with an enemy (whether or not the existence of a state of war has been declared); and

(b) the enemy is specified, by Proclamation made for the purpose of this paragraph, to be an enemy at war with the Commonwealth; and

(c) the person engages in conduct; and

(d) the person intends that the conduct will materially assist the enemy to engage in war with the Commonwealth; and

(e) the conduct assists the enemy to engage in war with the Commonwealth; and

(f) when the person engages in the conduct, the person:

(i) is an Australian citizen; or

(ii) is a resident of Australia; or

(iii) has voluntarily put himself or herself under the protection of the Commonwealth; or

(iv) is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Penalty: Imprisonment for life.

(2) Despite subsection 12(2) of the *Legislative Instruments Act 2003*, a Proclamation made for the purpose of paragraph (1)(b) of this section may be expressed to take effect from a day:

(a) before the day on which the Proclamation is registered under the *Legislative Instruments Act 2003*; but

(b) not before the day on which the Proclamation is made.

(3) The fault element for paragraph (1)(f) is intention.

Note: For intention, see subsection 5.2(2).

Assisting countries etc. engaged in armed hostilities against the ADF

(4) A person commits an offence if:

(a) a country or organisation is engaged in armed hostilities against the Australian Defence Force; and

(b) the person engages in conduct; and

(c) the person intends that the conduct will materially assist the country or organisation to engage in armed hostilities against the Australian Defence Force; and

(d) the conduct assists the country or organisation to engage in armed hostilities against the Australian Defence Force; and

(e) when the person engages in the conduct, the person:

(i) is an Australian citizen; or

(ii) is a resident of Australia; or

(iii) has voluntarily put himself or herself under the protection of the Commonwealth; or

(iv) is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Penalty: Imprisonment for life.

(5) The fault element for paragraph (4)(e) is intention.

Note: For intention, see subsection 5.2(2).

Humanitarian aid

(6) Subsections (1) and (4) do not apply to engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

Note 1: A defendant bears an evidential burden in relation to the matter in subsection (6). See subsection 13.3(3).

Note 2: There is a defence in section 80.3 for acts done in good faith.

16 Saving—Proclamations

A Proclamation in force for the purposes of paragraph 80.1(1)(e) of the *Criminal Code* just before the commencement of this item has effect, from that commencement, as if it had been made for the purposes of paragraph 80.1AA(1)(b) of that Code, as inserted by this Schedule.

17 Before section 80.2 of the *Criminal Code*

Insert:

Subdivision C—Urging violence

18 Subsection 80.2(1)

Repeal the subsection, substitute:

Urging the overthrow of the Constitution or Government by force or violence

(1) A person commits an offence if:

(a) the person intentionally urges another person to overthrow by force or violence:

(i) the Constitution; or

(ii) the Government of the Commonwealth, of a State or of a Territory; or

(iii) the lawful authority of the Government of the Commonwealth; and

(b) the first person does so intending that force or violence will occur.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

Note: The heading to section 80.2 of the *Criminal Code* is replaced by the heading "**Urging violence against the Constitution etc.**".

19 Subsection 80.2(2) of the *Criminal Code*

Omit "first-mentioned", substitute "first".

20 Subsection 80.2(3) of the *Criminal Code*

Repeal the subsection, substitute:

Urging interference in Parliamentary elections or constitutional referenda by force or violence

(3) A person commits an offence if:

(a) the person intentionally urges another person to interfere, by force or violence, with lawful processes for:

(i) an election of a member or members of a House of the Parliament; or

(ii) a referendum; and

(b) the first person does so intending that force or violence will occur.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

21 Subsection 80.2(4) of the *Criminal Code*

Omit "that the first-mentioned", substitute ", or a referendum, that the first".

22 At the end of subsection 80.2(6) of the *Criminal Code*

Add:

Note: There is a defence in section 80.3 for acts done in good faith.

23 Subsections 80.2(7) to (9) of the *Criminal Code*

Repeal the subsections.

24 Before section 80.3 of the *Criminal Code*

Insert:

Subdivision D—Common provisions

25 Subsection 80.3(1) of the *Criminal Code*

Omit "Sections 80.1 and 80.2", substitute "Subdivisions B and C".

26 Subparagraph 80.3(2)(b)(ii) of the *Criminal Code*

Omit "paragraph 80.1(1)(e)", substitute "paragraph 80.1AA(1)(b)".

27 At the end of section 80.3 of the *Criminal Code*

Add:

(3) Without limiting subsection (2), in considering a defence under subsection (1) in respect of an offence against Subdivision C, the Court may have regard to any relevant matter, including whether the acts were done:

(a) in the development, performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in the dissemination of news or current affairs.

28 Application

The reference in subsection 80.3(3) of the *Criminal Code*, as added by this Schedule, to an offence against Subdivision C of Division 80 of that Code includes a reference to an offence against section 80.2 of that Code as in force before the commencement of this item.

29 Section 80.5 of the *Criminal Code*

Repeal the section.

30 Application

The amendment of the *Criminal Code* made by item 29 of this Schedule applies in relation to offences committed after the commencement of this item.

31 Dictionary in the *Criminal Code*

Insert:

referendum has the same meaning as in the *Referendum (Machinery Provisions) Act 1984*.

32 Dictionary in the *Criminal Code*

Insert:

treason means an offence against subsection 80.1(1) or section 80.1AA.

Part 2—Amendments commencing 28 days after Royal Assent

Criminal Code Act 1995

33 Subsection 80.2(5) of the *Criminal Code*

Repeal the subsection.

34 Subsection 80.2(6) of the *Criminal Code*

Repeal the subsection (not including the note).

35 At the end of Subdivision C of Division 80 of the *Criminal Code*

Add:

80.2A Urging violence against groups

Offences

(1) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a group (the ***targeted group***); and

(b) the first person does so intending that force or violence will occur; and

(c) the targeted group is distinguished by race, religion, nationality, national origin or political opinion; and

(d) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a group (the ***targeted group***); and

(b) the first person does so intending that force or violence will occur; and

(c) the targeted group is distinguished by race, religion, nationality, national origin or political opinion.

Penalty: Imprisonment for 5 years.

Note: For intention, see section 5.2.

(3) The fault element for paragraphs (1)(c) and (2)(c) is recklessness.

Note: For recklessness, see section 5.4.

Alternative verdict

(4) Subsection (5) applies if, in a prosecution for an offence (the ***prosecuted offence***) against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of the offence; but

(b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the ***alternative offence***) against subsection (2).

(5) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note: There is a defence in section 80.3 for acts done in good faith.

80.2B Urging violence against members of groups

Offences

(1) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a person (the ***targeted person***); and

(b) the first person does so intending that force or violence will occur; and

(c) the first person does so by reason of his or her belief that the targeted person is a member of a group (the ***targeted group***); and

(d) the targeted group is distinguished by race, religion, nationality, national origin or political opinion; and

(e) the use of the force or violence would threaten the peace, order and good government of the Commonwealth.

Penalty: Imprisonment for 7 years.

Note: For intention, see section 5.2.

(2) A person commits an offence if:

(a) the person intentionally urges another person, or a group, to use force or violence against a person (the ***targeted person***); and

(b) the first person does so intending that force or violence will occur; and

(c) the first person does so by reason of his or her belief that the targeted person is a member of a group (the ***targeted group***); and

(d) the targeted group is distinguished by race, religion, nationality, national origin or political opinion.

Penalty: Imprisonment for 5 years.

Note: For intention, see section 5.2.

(3) For the purposes of paragraphs (1)(c) and (2)(c), it is immaterial whether the targeted person actually is a member of the targeted group.

(4) The fault element for paragraphs (1)(d) and (2)(d) is recklessness.

Note: For recklessness, see section 5.4.

Alternative verdict

(5) Subsection (6) applies if, in a prosecution for an offence (the ***prosecuted offence***) against subsection (1), the trier of fact:

(a) is not satisfied that the defendant is guilty of the offence; but

(b) is satisfied beyond reasonable doubt that the defendant is guilty of an offence (the ***alternative offence***) against subsection (2).

(6) The trier of fact may find the defendant not guilty of the prosecuted offence but guilty of the alternative offence, so long as the defendant has been accorded procedural fairness in relation to that finding of guilt.

Note: There is a defence in section 80.3 for acts done in good faith.

Schedule 2—Terrorism

Part 1—Terrorism

Classification (Publications, Films and Computer Games) Act 1995

1 Paragraph 9A(2)(c)

Before "risk", insert "substantial".

Criminal Code Act 1995

2 Subsection 100.1(1) of the *Criminal Code* (before subparagraph (c)(ii) of the definition of *terrorist act*)

Insert:

(ia) coercing, or influencing by intimidation, the United Nations, a body of the United Nations or a specialised agency of the United Nations; or

3 Paragraph 100.1(2)(a) of the *Criminal Code*

After "causes", insert ", or is likely to cause,".

4 Paragraph 100.1(2)(a) of the *Criminal Code*

Omit "that is physical harm".

5 Paragraph 100.1(2)(b) of the *Criminal Code*

After "causes", insert ", or is likely to cause,".

6 Paragraph 100.1(2)(c) of the *Criminal Code*

After "causes", insert ", or is likely to cause,".

7 Paragraph 100.1(2)(d) of the *Criminal Code*

After "endangers", insert ", or is likely to endanger,".

8 Paragraph 100.1(2)(e) of the *Criminal Code*

After "creates", insert ", or is likely to create,".

9 At the end of subsection 100.1(2) of the *Criminal Code*

Add:

; or (g) is likely to seriously interfere with, seriously disrupt or destroy an electronic system including, but not limited to, an electronic system mentioned in a subparagraph of paragraph (f).

10 Subparagraph 100.1(3)(b)(i) of the *Criminal Code*

Omit "that is physical harm".

11 At the end of Division 101 of the *Criminal Code*

Add:

101.7 Terrorism hoaxes

A person commits an offence if:

(a) the person engages in conduct; and

(b) the person does so with the intention of inducing a false belief that a terrorist act has occurred, is occurring or is likely to occur.

Penalty: Imprisonment for 10 years.

12 Paragraph 102.1(1A)(c) of the *Criminal Code*

Before "risk", insert "substantial".

13 Subsection 102.1(3) of the *Criminal Code*

Omit "second anniversary", substitute "third anniversary".

14 Transitional—existing regulations specifying organisations

The amendment of subsection 102.1(3) of the *Criminal Code* made by this Schedule:

(a) applies to any regulation for the purposes of paragraph (b) of the definition of ***terrorist organisation*** in section 102.1 of the *Criminal Code* that was in force immediately before the commencement of this item; and

(b) does not apply to such a regulation that had ceased to have effect before that commencement.

15 Subsection 102.1A(1) of the *Criminal Code*

Omit "Committee on ASIO, ASIS and DSD", substitute "Committee on Intelligence and Security".

Note: The heading to section 102.1A of the *Criminal Code* is altered by omitting "**Committee on ASIO, ASIS and DSD**" and substituting "**Committee on Intelligence and Security**".

16 Subsection 102.1A(2) of the *Criminal Code*

Repeal the subsection.

17 Paragraph 102.7(1)(a) of the *Criminal Code*

Repeal the paragraph, substitute:

(a) the person provides to an organisation resources or material support; and

(aa) the person does so with the intention of helping the organisation engage in an activity described in paragraph (a) of the definition of ***terrorist organisation*** in this Division; and

Note: The heading to section 102.7 of the *Criminal Code* is altered by inserting "**resources or material**" after "**Providing**".

18 Paragraph 102.7(2)(a) of the *Criminal Code*

Repeal the paragraph, substitute:

(a) the person provides to an organisation resources or material support; and

(aa) the person does so with the intention of helping the organisation engage in an activity described in paragraph (a) of the definition of ***terrorist organisation*** in this Division; and

Part 2—Declared aid organisations and declared regional aid organisations

Criminal Code Act 1995

19 Subsection 102.1(1) of the *Criminal Code*

Insert:

declared aid organisation means an organisation declared by the Minister to be a declared aid organisation under paragraph 102.8A(1)(a).

20 Subsection 102.1(1) of the *Criminal Code*

Insert:

declared regional aid organisation means an organisation declared by the Minister to be a declared regional aid organisation under paragraph 102.8A(1)(b).

21 At the end of section 102.5 of the *Criminal Code*

Add:

(5) Subsections (1) and (2) do not apply if the training was provided by:

(a) an organisation that, at the time the training was provided, was a declared aid organisation; or

(b) an organisation that, at the time the training was provided, was a declared regional aid organisation in respect of the geographical area in which the training was provided.

Note: A defendant bears an evidential burden in relation to the matters in subsection (5) (see subsection 13.3(3)).

22 After Subdivision B of Division 102 of Part 5.3 of the *Criminal Code*

Insert:

Subdivision BA—Declared aid organisations and declared regional aid organisations

102.8A Declared aid organisations and declared regional aid organisations

(1) The Minister may declare, in writing, that:
  (a) an organisation is a ***declared aid organisation***; or
  (b) an organisation is a ***declared regional aid organisation*** in respect of one or more particular geographical areas.

(2) The Minister must not make a declaration under subsection (1) in relation to an organisation unless the Minister is satisfied on reasonable grounds that:
  (a) the organisation is, or will be, providing aid of a humanitarian nature to a community; and
  (b) any benefit to the community from providing the aid outweighs, or will outweigh, any benefit that could be received, directly or indirectly, by a terrorist organisation.

(3) A declaration under subsection (1) in relation to an organisation may be made:
  (a) on written application by the organisation; or
  (b) on the Minister's own initiative.

(4) If an application for a declaration is made and the Minister does not make the declaration, the Minister must refuse to make the declaration.

(5) A declaration made under subsection (1) remains in force for the shorter of the following periods, unless earlier revoked:
  (a) the period specified in the declaration;
  (b) 3 years.

(6) The Minister must cause a notice of a declaration made under subsection (1) to be published in the *Gazette*.

(7) A declaration made under subsection (1) is not a legislative instrument.

102.8B Revocation of declaration

(1) The Minister may, in writing, revoke a declaration in relation to an organisation if the Minister is no longer satisfied of the matters in paragraphs 102.8A(2)(a) and (b) in relation to the organisation.

(2) If the Minister revokes a declaration under subsection (1), the Minister must cause a notice of the revocation to be published in the *Gazette*.

Part 3—Miscellaneous

Criminal Code Act 1995

23 At the end of section 100.5 of the *Criminal Code*

Add:

(3) Despite subsections (1) and (2), sections 22A, 22B and 22C of the *Acts Interpretation Act 1901* apply to this Part.

24 Subsection 102.1(1) of the *Criminal Code* (paragraph (a) of the definition of *close family member*)

Omit ", de facto spouse or same-sex partner", substitute "or de facto partner".

25 Subsection 102.1(1) of the *Criminal Code* (at the end of the definition of *close family member*)

Add:

Note: See also subsection (19).

26 At the end of section 102.1 of the *Criminal Code*

Add:

(19) For the purposes of this Division, the close family members of a person are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of ***child*** in the Dictionary;

(c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a close family member of the person.

27 Subsection 105.35(3) of the *Criminal Code* (paragraph (a) of the definition of *family member*)

Omit ", de facto spouse or same-sex partner", substitute "or de facto partner".

28 At the end of section 105.35 of the *Criminal Code*

Add:

(4) For the purposes of this section, the family members of a person are taken to include the following (without limitation):

(a) a de facto partner of the person;

(b) someone who is the child of the person, or of whom the person is the child, because of the definition of ***child*** in the Dictionary;

(c) anyone else who would be a member of the person's family if someone mentioned in paragraph (a) or (b) is taken to be a family member of the person.

29 Dictionary in the *Criminal Code*

Insert:

child: without limiting who is a child of a person for the purposes of this Act, someone is the ***child*** of a person if he or she is a child of the person within the meaning of the *Family Law Act 1975*.

30 Dictionary in the *Criminal Code*

Insert:

parent: without limiting who is a parent of a person for the purposes of this Act, someone is the ***parent*** of a person if the person is his or her child because of the definition of ***child*** in this Dictionary.

31 Dictionary in the *Criminal Code*

Insert:

step-child: without limiting who is a step-child of a person for the purposes of this Act, someone who is a child of a de facto partner of the person is the ***step-child*** of the person, if he or she would be the person's step-child except that the person is not legally married to the partner.

32 Dictionary in the *Criminal Code*

Insert:

step-parent: without limiting who is a step-parent of a person for the purposes of this Act, someone who is a de facto partner of a parent of the person is the ***step-parent*** of the person, if he or she

would be the person's step-parent except that he or she is not legally married to the person's parent.

Schedule 3—Investigation of Commonwealth offences

Crimes Act 1914

1 Subsection 23B(1) (definition of *arrested*)

Repeal the definition, substitute:

arrested: a person is arrested if:

(a) the person is arrested for a Commonwealth offence; and

(b) the person's arrest has not ceased under subsection (3) or (4); and

(c) the person has not been released.

2 Subsection 23B(1)

Insert:

authorising officer, in relation to an investigating official, means:

(a) if the investigating official is a member or special member of the Australian Federal Police—a person for the time being holding office or acting as:

(i) the Commissioner; or

(ii) a Deputy Commissioner; or

(iii) a member or special member of the Australian Federal Police who is of the rank of superintendent or higher; or

(b) if the investigating official is a member of the police force of a State or Territory—a person for the time being holding office or acting as:

(i) the Commissioner or the person holding equivalent rank; or

(ii) an Assistant Commissioner or a person holding equivalent rank; or

(iii) a superintendent or a person holding equivalent rank;

of the police force of that State or Territory.

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

Omit "or 23CA", substitute "or @23DB".

4 Subsection 23B(1)

Insert:

judicial officer, in relation to a person who is arrested, means:

(a) a magistrate; or

(b) a justice of the peace; or

(c) a person authorised to grant bail under the law of the State or Territory in which the person was arrested.

5 Subsection 23B(1)

Insert:

serious Commonwealth offence means a Commonwealth offence that is punishable by imprisonment for a period exceeding 12 months.

6 Subsection 23B(1) (definition of *under arrest*)

Repeal the definition, substitute:

under arrest: a person is under arrest if:

(a) the person is arrested for a Commonwealth offence; and

(b) the person's arrest has not ceased under subsection (3) or (4); and

(c) the person has not been released.

7 Subsection 23B(3)

Omit all the words after "in respect of that offence by", substitute:

a judicial officer otherwise than under any of the following provisions of the *Service and Execution of Process Act 1992*:

(a) paragraph 83(3)(b), (4)(b), (8)(a) or (8)(b);

(b) subsection 83(12);

(c) paragraph 83(14)(a);

(d) subparagraph 84(4)(a)(ii) or (6)(a)(i).

8 Before section 23C

Insert:

Subdivision A—Non-terrorism offences

Note: The heading to section 23C is replaced by the heading "**Period of investigation if arrested for a non-terrorism offence**".

9 At the end of subsection 23C(1)

Add:

Note: A person would not be arrested for a Commonwealth offence if, for example, the person has been released under subsection 3W(2)—see the definition of ***arrested*** in subsection 23B(1).

10 Subsections 23C(2) and (3)

Repeal the subsections, substitute:

(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 Commonwealth offence that an investigating official reasonably suspects *[reasonably believes]* that the person has committed.

(2A) Subsection (2) ceases to apply at the end of the investigation period, but that cessation does not affect any other power to detain the person in relation to the arrest.

(3) If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.

11 Subsection 23C(4)

Omit "section 23D", substitute "section @23DA".

12 Paragraph 23C(6)(b)

Omit "section 23CA", substitute "section @23DB".

13 Subsection 23C(7)

Repeal the subsection, substitute:

(7) In ascertaining any period of time for the purposes of subsection (4) or (6), disregard any reasonable time during which the questioning of the person is suspended or delayed:

(a) to allow the person to be conveyed 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; or

(b) 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; or

(c) to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place; or

(d) to allow the person to receive medical attention; or

(e) because of the person's intoxication; or

(f) to allow for an identification parade to be arranged and conducted; or

(g) 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; or

(h) in connection with the making and disposing of an application under section @23D, 23WU or 23XB; or

(i) to allow a constable to inform the person of matters specified in section 23WJ; or

(j) to allow the person to rest or recuperate; or

(k) to allow a forensic procedure to be carried out on the person by order of a magistrate under Division 5 of Part ID; or

(l) where section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section.

(7A) To avoid doubt:

(a) a time that is disregarded under subsection (7) may be covered by the application of more than one paragraph of that subsection; and

(b) subsection (7) does not prevent the person being questioned during a time covered by a paragraph of subsection (7), but if the person is questioned during such a time, the time is not to be disregarded.

Note: The following heading to subsection 23C(8) is inserted "*Evidentiary provision*".

14 Subsection 23C(9)

Repeal the subsection.

15 Sections 23CA to 23E

Repeal the sections, substitute:

@23D Application may be made for extension of investigation period

(1) If a person is under arrest for a serious Commonwealth offence (other than a terrorism offence), an investigating official may, at or before the end of the investigation period, apply, in writing, to a magistrate for an extension of the investigation period.

(2) Subject to subsection (3), 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 outcome of any previous application under this section in relation to the person and the investigation period;

(d) the period (if any) by which the investigation period has been reduced under subsection 23C(6);

(e) the total amount of time (if any) that has been disregarded under subsection 23C(7) in ascertaining the investigation period under subsection 23C(4);

(f) the maximum amount of time by which the investigation period could be extended;

(g) the reasons why the investigating official believes the investigation period should be extended;

(h) the period by which the investigating official believes the investigation period should be extended.

(3) Subsection (2) does not require any information to be included in the application if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(4) Before the application is considered by the magistrate, the investigating official must:
   (a) provide a copy of the application to the person, or to his or her legal representative; and
   (b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.

(5) If the application contains any information of a kind mentioned in subsection (3), the investigating official may remove it from the copy of the application that is provided to the person or to his or her legal representative.

(6) The person, or his or her legal representative, may make representations to the magistrate about the application.

@23DA Magistrate may extend investigation period

(1) This section applies if:
   (a) a person is arrested for a serious Commonwealth offence (other than a terrorism offence); and
   (b) an application has been made under subsection @23D(1) to a magistrate in respect of the person.

Extension of investigation period

(2) Subject to subsection (3), the magistrate may extend the investigation period, by signed written instrument, if satisfied that:
   (a) the offence is a serious Commonwealth offence (other than 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 serious Commonwealth 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.

(3) Subject to subsection (4), the instrument 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.

(4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) The magistrate 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 telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.

Note: See section @23E.

(6) The investigating official must:

(a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and

(b) if the instrument was made as a result of an application made by telex, fax or other electronic means—inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

(7) The investigation period may be extended for a period not exceeding 8 hours, and must not be extended more than once.

16 At the end of Division 2 of Part IC

Add:

Subdivision B—Terrorism offences

@23DB Period of investigation if arrested for a terrorism offence

(1) If a person is arrested for a terrorism offence, the following provisions apply.

Note: A person would not be arrested for a Commonwealth offence if, for example, the person has been released under subsection 3W(2)—see the definition of ***arrested*** in subsection 23B(1).

(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 *[reasonably believes]* that the person has committed.

(3) Subsection (2) ceases to apply at the end of the investigation period, but that cessation does not affect any other power to detain the person in relation to the arrest.

(4) If the person is not released within the investigation period, the person must be brought before a judicial officer within the investigation period or, if it is not practicable to do so within the investigation period, as soon as practicable after the end of the investigation period.

(5) For the purposes of this section, but subject to subsections (7) and (9), the investigation period begins when the person is arrested, and ends at a later time 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 @23DF.

(6) 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.

(7) 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.

(8) However, in relation to each first arrest, disregard subsection (7) 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.

(9) In ascertaining any period of time for the purposes of subsection (5) or (7), disregard any reasonable time during which the questioning of the person is suspended or delayed:
(a) to allow the person to be conveyed 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; or
(b) 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; or
(c) to allow such a legal practitioner, friend, relative, parent, guardian, interpreter or other person to arrive at the place where the questioning is to take place; or
(d) to allow the person to receive medical attention; or
(e) because of the person's intoxication; or
(f) to allow for an identification parade to be arranged and conducted; or
(g) 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; or
(h) in connection with the making and disposing of an application under section @23DC, @23DE, 23WU or 23XB; or
(i) to allow a constable to inform the person of matters specified in section 23WJ; or
(j) to allow the person to rest or recuperate; or

(k) to allow a forensic procedure to be carried out on the person by order of a magistrate under Division 5 of Part ID; or

(l) where section 23XGD applies and that time is to be disregarded in working out a period of time for the purposes of that section; or

(m) subject to subsection (11), where the time is within a period specified under section @23DD, so long as the suspension or delay in the questioning of the person is reasonable.

(10) To avoid doubt:

(a) a time that is disregarded under subsection (9) may be covered by the application of more than one paragraph of that subsection; and

(b) subsection (9) does not prevent the person being questioned during a time covered by a paragraph of subsection (9), but if the person is questioned during such a time, the time is not to be disregarded; and

(c) a period specified under section @23DD is not extended by any time covered by a paragraph of subsection (9).

Limit on time that may be disregarded under paragraph (9)(m)

(11) No more than 7 days may be disregarded under paragraph (9)(m) in relation to an arrest. However:

(a) if the person has been arrested more than once within any period of 48 hours, the 7 day period for each arrest other than the first arrest is reduced by any period or periods specified under section @23DD in relation to any earlier arrest; and

(b) subsection (8) applies as if the reference in that subsection to subsection (7) were a reference to this subsection.

Evidentiary provision

(12) 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

(b) any particular time was covered by a provision of subsection (9).

@23DC Time during which suspension or delay of questioning may be disregarded—application

(1) This section applies if:
  (a) a person is arrested for a terrorism offence; and
  (b) an investigation is being conducted into whether the person committed that terrorism offence or another terrorism offence.

Application for specification of period

(2) At or before the end of the investigation period, an investigating official (within the meaning of paragraph (a) or (b) of the definition of that expression) may apply, in writing, to a magistrate for a period to be specified for the purpose of paragraph @23DB(9)(m).

(3) The application must not be made unless the application is authorised, in writing, by an authorising officer.

(4) Subject to subsection (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 outcome of any previous application under this section in relation to:
    (i) the person and the arrest; and
    (ii) if the person was arrested at any time during the period of 48 hours before the arrest—the person and the earlier arrest or arrests;
  (d) the total amount of time that has been disregarded under subsection @23DB(9) in ascertaining the investigation period in relation to:
    (i) the person and the arrest; and
    (ii) if the person was arrested at any time during the period of 48 hours before the arrest—the person and the earlier arrest or arrests;
  (e) 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;

(f) the period that the investigating official believes should be specified.

(5) Subsection (4) does not require any information to be included in the application if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(6) Before the application is considered by the magistrate, the investigating official must:

(a) provide a copy of the application to the person or to his or her legal representative; and

(b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.

(7) If the application contains any information of a kind mentioned in subsection (5), the investigating official may remove it from the

copy of the application that is provided to the person or to his or her legal representative.

(8) The person, or his or her legal representative, may make representations to the magistrate about the application.

@23DD Time during which suspension or delay of questioning may be disregarded—time specified by magistrate

(1) This section applies if:
  (a) a person is arrested for a terrorism offence; and
  (b) an application has been made under subsection @23DC(2) to a magistrate in respect of the person.

Specification of period

(2) The magistrate 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 application has been authorised by an authorising officer; and
  (f) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

Instrument specifying period

(3) Subject to subsection (4), 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.

(4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) The magistrate 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 telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.

Note: See section @23E.

(6) The investigating official must:

(a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and

(b) if the instrument was made as a result of an application made by telex, fax or other electronic means—inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

@23DE Application may be made for extension of investigation period

(1) If a person is arrested for a terrorism offence, an investigating official (within the meaning of paragraph (a) or (b) of the definition of that expression) may, at or before the end of the investigation period, apply, in writing, to a magistrate for an extension of the investigation period.

(2) The application must not be made unless the application is authorised, in writing, by an authorising officer.

(3) Subject to subsection (4), 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 outcome of any previous application under this section in relation to the person and the investigation period;

(d) the period (if any) by which the investigation period has been reduced under subsection @23DB(7);

(e) the total amount of time (if any) that has been disregarded under subsection @23DB(9) in ascertaining the investigation period;

(f) the maximum amount of time by which the investigation period could be extended;

(g) the reasons why the investigating official believes the investigation period should be extended;

(h) the period by which the investigating official believes the investigation period should be extended.

(4) Subsection (3) does not require any information to be included in the application if disclosure of that information is likely:

(a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or

(b) to be protected by public interest immunity; or

(c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) Before the application is considered by the magistrate, the investigating official must:

(a) provide a copy of the application to the person or to his or her legal representative; and

(b) inform the person that he or she, or his or her legal representative, may make representations to the magistrate about the application.

(6) If the application contains any information of a kind mentioned in subsection (4), the investigating official may remove it from the

copy of the application that is provided to the person or to his or her legal representative.

(7) The person, or his or her legal representative, may make representations to the magistrate about the application.

@23DF Magistrate may extend investigation period

(1) This section applies if:
  (a) a person is arrested for a terrorism offence; and
  (b) an application has been made under subsection @23DE(1) to a magistrate in respect of the person.

Extension of investigation period

(2) Subject to subsection (3), the magistrate may extend the investigation period, by signed written instrument, 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 application has been authorised by an authorising officer; and
  (e) the person, or his or her legal representative, has been given the opportunity to make representations about the application.

(3) Subject to subsection (4), the instrument 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.

(4) Subsection (3) does not require any information to be included in the instrument if disclosure of that information is likely:
  (a) to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*); or
  (b) to be protected by public interest immunity; or
  (c) to put at risk ongoing operations by law enforcement agencies or intelligence agencies; or

(d) to put at risk the safety of the community, law enforcement officers or intelligence officers.

(5) The magistrate 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 telex, fax or other electronic means—inform the investigating official of the matters included in the instrument.

Note: See section @23E.

(6) The investigating official must:

(a) as soon as practicable after receiving a copy of the instrument under paragraph (5)(a), give the person, or his or her legal representative, a copy of it; and

(b) if the instrument was made as a result of an application made by telex, fax or other electronic means—inform the person, or his or her legal representative, of the matters included in the instrument as soon as practicable after being informed of them under paragraph (5)(b).

(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.

Subdivision C—Miscellaneous

@23E Evidentiary provisions if application made by electronic means

(1) This section applies if a magistrate has, under paragraph @23DA(4)(b), @23DD(4)(b) or @23DF(4)(b), informed an investigating official of matters included in an instrument.

(2) 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 and the particulars given by him or her; and

(b) forward it to the magistrate.

(3) 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, the instrument is taken to have had no effect.

(4) In any proceedings, if the instrument signed by the magistrate is not produced in evidence, the burden lies on the prosecution to prove that the instrument was made.

17 Paragraph 23XGD(2)(h)

Omit "or 23CA(8)", substitute "or @23DB(9)".

18 Application

(1) Subject to subitem (2), the amendments made by this Schedule apply in relation to a person who is arrested after the commencement of this item.

(2) If:

(a) a person has been arrested more than once within any period of 48 hours; and

(b) the first of those arrests was made before the commencement of this item;

the amendments made by this Schedule do not apply in relation to the person for any later arrest that is made within that 48 hour period.

(3) However, in relation to a first arrest, disregard subitem (2) for a 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 Part IC of the *Crimes Act 1914* 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.

(4) In this item:

Commonwealth offence has the same meaning as in Part IC of the *Crimes Act 1914*.

Schedule 4—Powers to search premises in relation to terrorism offences

Crimes Act 1914

1 Division 3A of Part IAA (heading)

Repeal the heading, substitute:

Division 3A—Powers in relation to terrorist acts and terrorism offences

2 Section 3UB

Before "A police officer", insert "(1)".

3 At the end of section 3UB

Add:

(2) This section does not limit the operation of section 3UEA.

4 After section 3UE

Insert:

3UEA Searching premises

(1) A police officer may enter premises in accordance with this section if the police officer suspects, on reasonable grounds, that:

(a) a thing is on the premises that is relevant to a terrorism offence, whether or not the offence has occurred; and

(b) it is necessary to exercise a power under subsection (2) in order to prevent the thing from being used in connection with a terrorism offence; and

(c) it is necessary to exercise the power without the authority of a search warrant because there is a serious and imminent threat to a person's life, health or safety.

(2) The police officer may:

(a) search the premises for the thing; and

(b) seize the thing if he or she finds it there.

(3) If, in the course of searching for the thing, the police officer finds another thing that the police officer suspects, on reasonable grounds, to be relevant to an indictable offence or a summary offence, the police officer may secure the premises pending the obtaining of a warrant under Part IAA in relation to the premises.

(4) Premises must not be secured under subsection (3) for longer than is reasonably necessary to obtain the warrant.

(5) In the course of searching for the thing, the police officer may also seize any other thing if the police officer suspects, on reasonable grounds, that it is necessary to seize it:

(a) in order to protect a person's life, health or safety; and

(b) without the authority of a search warrant because the circumstances are serious and urgent.

(6) In exercising powers under this section:

(a) the police officer may use such assistance; and

(b) the police officer, or a person who is also a police officer and who is assisting the police officer, may use such force against persons and things; and

(c) a person who is not a police officer and who is assisting the police officer may use such force against things;

as is necessary and reasonable in the circumstances.

5 Subsections 3UF(1), (4) and (5)

After "section 3UE", insert "or 3UEA".

Schedule 5—Re-entry of premises in emergency situation

Crimes Act 1914

1 Subsection 3C(1)

Insert:

> ***emergency situation***, in relation to the execution of a warrant in relation to premises, means a situation that the executing officer or a constable assisting believes, on reasonable grounds, involves a serious and imminent threat to a person's life, health or safety that requires the executing officer and constables assisting to leave the premises.

2 Subsections 3E(1) and (2)

Omit "by information on oath", insert ", by information on oath or affirmation,".

3 After paragraph 3J(2)(a)

Insert:

(aa) if there is an emergency situation, for not more than 12 hours or such longer period as allowed by an issuing officer under section 3JA; or

4 After section 3J

Insert:

3JA Extension of time to re-enter premises in emergency situations

(1) If:

(a) a warrant in relation to premises is being executed; and

(b) there is an emergency situation; and

(c) the executing officer or a constable assisting believes on reasonable grounds that the executing officer and the constables assisting will not be able to return to the premises within the 12 hour period mentioned in paragraph 3J(2)(aa);

he or she may apply to an issuing officer for an extension of that period.

(2) Before making the application, the executing officer or a constable assisting must, if it is practicable to do so, give notice to the occupier of the premises of his or her intention to apply for an extension.

(3) If an application mentioned in subsection (1) has been made, an issuing officer may extend the time during which the executing officer and constables assisting may be away from the premises if the issuing officer is satisfied, by information on oath or affirmation, that there are exceptional circumstances that justify the extension.

5 Subsection 3L(7)

Omit "the issuing officer", substitute "an issuing officer".

Schedule 6—Amendments relating to bail

Crimes Act 1914

1 After subsection 15AA(3)

Insert:

(3A) Despite any law of the Commonwealth, the Director of Public Prosecutions or the defendant may appeal against a decision of a bail authority:

(a) to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is satisfied that exceptional circumstances exist; or

(b) to refuse to grant bail to a person charged with or convicted of an offence covered by subsection (2) on the basis that the bail authority is not satisfied that exceptional circumstances exist.

(3B) An appeal under subsection (3A):

(a) may be made to a court that would ordinarily have jurisdiction to hear and determine appeals (however described) from directions, orders or judgments of the bail authority referred to in subsection (3A), whether the jurisdiction is in respect of appeals relating to bail or appeals relating to other matters; and

(b) is to be made in accordance with the rules or procedures (if any) applicable under a law of the Commonwealth, a State or a Territory in relation to the exercise of such jurisdiction.

(3C) If:

(a) a bail authority decides to grant bail to a person charged with or convicted of an offence covered by subsection (2); and

(b) immediately after the decision is made, the Director of Public Prosecutions notifies the bail authority that he or she intends to appeal against the decision under subsection (3A);

the decision to grant bail is stayed with effect from the time of the notification.

(3D) A stay under subsection (3C) ends:

(a) when a decision on the appeal is made; or

(b) when the Director of Public Prosecutions notifies:

(i) the bail authority; or

(ii) if an appeal has already been instituted in a court—the court;

that he or she does not intend to proceed with the appeal; or

(c) 72 hours after the stay comes into effect;

whichever occurs first.

2 Subsection 15AA(4)

Omit "subsection (1)", substitute "subsections (1), (3A), (3B), (3C) and (3D)".

3 Subsection 15AA(4) (note)

Omit "Subsection (1) indirectly affects laws of the States and Territories because it affects", substitute "These provisions indirectly affect laws of the States and Territories because they affect".

4 Application

The amendments made by this Schedule apply on and after the commencement of this Schedule to:

(a) a proceeding relating to bail initiated on or after that commencement; and

(b) a proceeding relating to bail initiated before commencement, but only to the parts of the proceeding that occur after that commencement.

Schedule 7—Listings under the Charter of the United Nations Act 1945

Charter of the United Nations Act 1945

1 Subsections 15(1) and (3)

After "satisfied", insert "on reasonable grounds".

2 After section 15

Insert:

15A Duration of listing

(1) A listing under section 15 ceases to have effect on:

(a) if no declaration under subsection (2) has been made in relation to the listing—the third anniversary of the day on which the listing took effect; or

(b) otherwise—the third anniversary of the making of the most recent declaration under subsection (2) in relation to the listing.

(2) The Minister may declare, in writing, that a specified listing under section 15 continues to have effect.

(3) The Minister must not:

(a) make a declaration under subsection (2) specifying the listing of a person or entity unless the Minister is satisfied on reasonable grounds of the matters prescribed for the purposes of subsection 15(2); or

(b) make a declaration under subsection (2) specifying the listing of an asset, or class of asset, unless the Minister is satisfied on reasonable grounds of the matters prescribed for the purposes of subsection 15(4).

(4) The regulations may prescribe a form for a declaration under subsection (2).

(5) A declaration made under subsection (2) is not a legislative instrument.

(6) To avoid doubt, subsection (1) does not prevent:

(a) the revocation, under section 16, of a listing; or

(b) the revocation of a listing by operation of section 19; or

(c) the making of a new listing that is the same in substance as another listing (whether the new listing is made or takes effect before or after the other listing ceases to have effect because of subsection (1)).

3 Before paragraph 19(3)(a)

Insert:

(aa) a listing ceasing to have effect under section 15A; or

4 Transitional—listings under section 15 of the *Charter of the United Nations Act 1945*

A listing that was made under subsection 15(1) or (3) of the *Charter of the United Nations Act 1945* and that was in force immediately before the commencement of this item has effect, after that commencement, as if:

(a) it had been made under that subsection as amended by this Act; and

(b) for the purposes only of section 15A of that Act, it had been made immediately after that commencement.

Schedule 8—Amendments relating to the disclosure of national security information in criminal and civil proceedings

Part 1—Amendments

National Security Information (Criminal and Civil Proceedings) Act 2004

1 Subsection 6(1)

After "defendant", insert ", the defendant's legal representative".

2 Subsection 6(2)

Omit "take place after the notice is given", substitute "occur after the notice is given (whether or not those parts began before that time)".

3 Paragraphs 6A(1)(b) and (2)(b)

After "parties to the proceeding", insert ", the legal representatives of the parties to the proceeding".

4 Paragraph 6A(2)(d)

After "Divisions", insert "1A, 1,".

5 Subparagraph 6A(2)(e)(ii)

After "Divisions", insert "1A, 1,".

6 Subsection 6A(5)

Omit "take place after the notice is given", substitute "occur after the notice is given (whether or not those parts began before that time)".

7 Section 7

Insert:

court official means an individual who:

(a) is employed or engaged by a court to perform services in the court in relation to a proceeding in the court; or

(b) in relation to a federal criminal proceeding in a court—supervises the defendant in the court.

8 Section 7

Insert:

national security information means information:

(a) that relates to national security; or

(b) the disclosure of which may affect national security.

9 Paragraph 13(2)(c)

Omit "of persons intended to be called by a party to give evidence".

10 At the end of section 13

Add:

(3) To avoid doubt, a re-trial, and proceedings relating to the re-trial (including those mentioned in subsection (2)), are part of the same criminal proceeding as the trial.

11 Section 14

Repeal the section, substitute:

14 Meaning of *federal criminal proceeding*

In this Act, ***federal criminal proceeding*** means a criminal proceeding in any court exercising federal jurisdiction, where the offence or any of the offences concerned are against a law of the Commonwealth.

12 Subsection 15(1)

Repeal the subsection, substitute:

(1) In this Act, ***defendant***, in relation to a federal criminal proceeding, means a person charged with the offence or offences concerned (even if the proceeding occurs after any conviction of the person).

13 Paragraph 15A(2)(b)

Omit "of persons intended to be called by a party to give evidence".

14 At the end of section 15A

Add:

(3) To avoid doubt, a re-hearing, and proceedings relating to the re-hearing (including those mentioned in subsection (2)), are part of the same civil proceeding as the hearing.

15 Paragraphs 16(aa), (ab), (ac), (ad) and (b)

Repeal the paragraphs, substitute:

(b) the person discloses the information in circumstances specified by the Attorney-General in a certificate or advice given under section 26, 28, 38F or 38H.

16 Section 17

Omit "national security information", substitute "information".

17 After subsection 19(1)

Insert:

(1A) In addition to the powers of a court under this Act in a federal criminal proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act or regulations made under this Act.

18 After subsection 19(3)

Insert:

(3A) In addition to the powers of a court under this Act in a civil proceeding, the court may make such orders as the court considers appropriate in relation to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information if:

(a) the court is satisfied that it is in the interest of national security to make such orders; and

(b) the orders are not inconsistent with this Act or regulations made under this Act.

19 Before Division 1 of Part 3

Insert:

Division 1A—Attorney-General etc. may attend and be heard at federal criminal proceedings

20A Attorney-General etc. may attend and be heard at federal criminal proceedings

If, in a federal criminal proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then any or all of the following may attend and be heard at the proceeding:

(a) the Attorney-General;

(b) the Attorney-General's legal representative;

(c) any other representative of the Attorney-General.

Division 1B—Court to consider hearing in camera etc.

20B Court to consider hearing in camera etc.

(1) If, during a hearing in a federal criminal proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then before hearing the issue, the court must consider making an order under either or both of the following:

(a) subsection 19(1A);

(b) section 93.2 of the *Criminal Code*.

(2) Subsection (1) does not apply if the issue is the subject of an order that is in force under section 22.

20 Subsection 21(1)

Repeal the subsection, substitute:

(1) At any time during a federal criminal proceeding, the Attorney-General, the Attorney-General's legal representative, the prosecutor, the defendant or the defendant's legal representative may apply to the court for the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including:

(a) the making of an arrangement of the kind mentioned in section 22; and

(b) the giving of a notice under section 24.

(1A) As soon as possible after making the application, the applicant must notify each of the following that the application has been made:

(a) if the applicant is the Attorney-General or the Attorney-General's legal representative—the prosecutor, the defendant and the defendant's legal representative;

(b) if the applicant is the prosecutor—the Attorney-General, the defendant and the defendant's legal representative;

(c) if the applicant is the defendant or the defendant's legal representative—the Attorney-General and the prosecutor.

Note: The heading to section 21 is replaced by the heading "**National security information hearings**".

21 Subsection 21(2)

Omit "conference", substitute "hearing".

22 Subsection 22(1)

Repeal the subsection, substitute:

(1) At any time during a federal criminal proceeding:

(a) the Attorney-General, on the Commonwealth's behalf; and

(b) the prosecutor; and

(c) the defendant, or the defendant's legal representative on the defendant's behalf;

may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

Note: The heading to section 22 is altered by omitting "**relating to or affecting national security**" and substituting "**etc. of national security information**".

23 Paragraph 23(1)(a)

Omit "information that is disclosed, or to be disclosed, to the court", substitute "national security information that is disclosed, or to be disclosed,".

Note: The heading to section 23 is altered by omitting "**certain**" and substituting "**national security**".

24 Subsections 23(2) and (3)

Repeal the subsections, substitute:

(2) This section does not apply to information that is the subject of an order that is in force under section 22.

25 Subsection 24(1)

Repeal the subsection, substitute:

(1) If the prosecutor, the defendant or the defendant's legal representative knows or believes that:

(a) he or she will disclose national security information in a federal criminal proceeding; or

(b) a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose national security information in giving evidence or by the person's mere presence; or

(c) on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in a federal criminal proceeding;

then he or she must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note 1: Failure to give notice as required by this subsection is an offence in certain circumstances: see section 42.

Note 2: Section 25 deals with the situation where the prosecutor, the defendant or the defendant's legal representative knows or believes that information that will be disclosed in a witness's answer is national security information.

When not required to give notice

(1A) However, a person need not give notice about the disclosure of information under subsection (1) if:

(a) another person has already given notice about the disclosure of the information under that subsection; or

(b) the disclosure of the information:

(i) is the subject of a certificate given to the person under section 26 and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 22 or 31; or

(c) the disclosure of the information by the witness to be called:

(i) is the subject of a certificate given to the person under section 28 and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 22 or 31; or

(d) the Attorney-General has given the person advice about the disclosure of the information under subsection 26(7) or 28(10).

Note: The heading to section 24 is replaced by the heading "**Notification of expected disclosure of national security information**".

26 Subsections 24(3) and (4)

Repeal the subsections, substitute:

Informing the court etc. of an expected disclosure

(3) A person who gives notice under subsection (1) must also advise the following, in writing, that notice has been given to the Attorney-General:

(a) if the person is the prosecutor:

(i) the court; and

(ii) the defendant; and

(iii) the defendant's legal representative; and

(iv) any other person mentioned in paragraph (1)(b) or (c); and

(b) if the person is the defendant or the defendant's legal representative:

(i) the court; and

(ii) the prosecutor; and

(iii) any other person mentioned in paragraph (1)(b) or (c).

Note: Failure to give advice as required by this subsection is an offence in certain circumstances: see section 42.

(4) The advice must include a description of the information, unless the advice is being given by the defendant or the defendant's legal representative to the prosecutor.

Note: A contravention of this subsection is an offence in certain circumstances: see section 42.

Adjournment to allow sufficient time for Attorney-General to act on the notice

(5) On receiving the advice, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not

disclosed. The court must continue the adjournment until the Attorney-General:

(a) gives a copy of a certificate to the court under subsection 26(4) or 28(3); or

(b) gives advice to the court under subsection 26(7) or 28(10) (which applies if a decision is made not to give a certificate).

27 Paragraph 25(1)(b)

Repeal the paragraph, substitute:

(b) the prosecutor, the defendant or the defendant's legal representative knows or believes that information that will be disclosed in the witness's answer is national security information.

28 Subsection 25(2)

Omit "or defendant", substitute ", the defendant or the defendant's legal representative".

29 After subsection 25(2)

Insert:

(2A) However, a person need not advise the court under subsection (2) about the disclosure of information if:

(a) another person has already advised the court about the disclosure of the information under that subsection; or

(b) a notice has been given to the Attorney-General under subsection 24(1) about the disclosure of the information; or

(c) the disclosure of the information:

(i) is the subject of a certificate given to the person under section 26 and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 22 or 31; or

(d) the Attorney-General has given the person advice about the disclosure of the information under subsection 26(7).

30 Subsections 25(3), (4), (5), (6) and (7)

Repeal the subsections, substitute:

Witness to give written answer

(3) If the court is advised under subsection (2) and the witness would, apart from this section, be required to answer the question, the court must order that the witness give the court a written answer to the question.

(4) The court must show the written answer to the prosecutor and, if present, the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General.

(5) If:

(a) under subsection (4), the Attorney-General's representative (other than the Attorney-General's legal representative) is shown the written answer; and

(b) he or she knows or believes that, if the written answer were to be given in evidence in the proceeding, the information that would be disclosed in the witness's answer is national security information;

then he or she must advise the prosecutor of that knowledge or belief.

Prosecutor must give notice to Attorney-General etc.

(6) If the prosecutor knows, believes, or is advised under subsection (5), that, if the written answer were to be given in evidence in the proceeding, the information that would be disclosed in the witness's answer is national security information, then the prosecutor must:

(a) advise the court of that knowledge, belief or advice; and

(b) as soon as practicable, give the Attorney-General notice in writing of that knowledge, belief or advice.

Note: Failure to advise the court or to notify the Attorney-General is an offence in certain circumstances: see section 42.

(7) However, the prosecutor need not advise the court or give the Attorney-General notice about the written answer under subsection (6) if the information disclosed by the written answer:

(a) is the subject of a certificate or advice given to the prosecutor under section 26 and the certificate still has effect; or

(b) is the subject of an order that is in force under section 22 or 31.

Adjournment to allow sufficient time for Attorney-General to act on the notice

(8) If the court is advised under subsection (6), it must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:

(a) gives a copy of a certificate to the court under subsection 26(4); or

(b) gives advice to the court under subsection 26(7) (which applies if a decision is made not to give a certificate).

31 Subparagraph 26(1)(a)(i)

Omit "or defendant knows or believes that the prosecutor or defendant or another person", substitute ", the defendant or the defendant's legal representative knows or believes that he or she, or another person,".

32 Subparagraph 26(1)(a)(ii)

Omit "or defendant", substitute ", the defendant, the defendant's legal representative".

33 Subparagraph 26(1)(a)(iii)

Omit "considers", substitute "knows, believes or is advised".

34 Subsection 26(8)

Repeal the subsection, substitute:

*Definition of **potential discloser***

(8) Each of the following persons is a ***potential discloser*** of the information in the proceeding:

(a) in all cases—the prosecutor, the defendant and the defendant's legal representative;

(b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than the prosecutor, the defendant or the defendant's legal representative—the other person;

(c) if subparagraph (1)(a)(iii) applies—the witness mentioned in that subparagraph.

35 Subsections 27(1) and (2)

Repeal the subsections, substitute:

Consequences of certificate for pre-trial proceedings

(1) If, in a federal criminal proceeding, the Attorney-General gives a potential discloser a certificate under section 26 at any time during a part of the proceeding that occurs before the trial begins, then the certificate is conclusive evidence, during that part of the proceeding and any later part that occurs before the hearing mentioned in paragraph (3)(a) begins, that disclosure of the information in the proceeding is likely to prejudice national security.

36 Subsection 27(3)

Omit "If a proceeding is covered by paragraph 14(a) (about a proceeding involving a trial) and, under section 26, the Attorney-General gives a potential discloser a certificate", substitute "If, in a federal criminal proceeding, the Attorney-General gives a potential discloser a certificate under section 26".

37 Paragraph 27(3)(b)

Omit "24(4) or 25(7)", substitute "24(5) or 25(8)".

38 Subparagraph 28(1)(a)(i)

Repeal the subparagraph, substitute:

(i) the Attorney-General is notified under section 24 that the prosecutor, the defendant or the defendant's legal representative knows or believes that a person whom he or she intends to call as a witness in a federal criminal proceeding will disclose information by the person's mere presence; or

39 Subparagraph 28(1)(a)(ii)

Omit "or defendant", substitute ", the defendant or the defendant's legal representative".

40 Subsection 28(2)

Omit "or defendant" (wherever occurring), substitute ", the defendant or the defendant's legal representative".

41 Subsection 28(5)

Omit "If the proceeding is covered by paragraph 14(a) (about a proceeding involving a trial), the", substitute "The".

42 Subsection 28(6)

Repeal the subsection.

43 Subsections 28(9) and (10)

Omit "or defendant", substitute ", the defendant or the defendant's legal representative".

44 Subsection 29(1)

Omit "25(3),".

45 Paragraph 29(2)(f)

Repeal the paragraph, substitute:

(f) the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and

46 Subparagraph 29(5)(c)(iii)

Omit "if section 30 applies—".

47 Subsection 29(6)

Omit ", if section 30 applies,".

48 Subsection 29(7)

Omit "national security information", substitute "information".

49 Section 30

Repeal the section.

50 Paragraphs 31(6)(a) and (b)

Omit "or defendant", substitute ", the defendant or the defendant's legal representative".

51 Paragraph 32(1)(e)

Omit "if section 30 applies—".

52 Subsection 32(2)

Omit ", if section 30 applies,".

53 Subsection 32(3)

Omit "national security information", substitute "information".

54 Subsection 37(1)

Omit ", if the Attorney-General is an intervener under section 30,".

55 Before Division 1 of Part 3A

Insert:

Division 1A—Attorney-General etc. may attend and be heard at civil proceedings

38AA Attorney-General etc. may attend and be heard at civil proceedings

If, in a civil proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then any or all of the following may attend and be heard at the proceeding:

(a) the Attorney-General;

(b) the Attorney-General's legal representative;

(c) any other representative of the Attorney-General.

Division 1B—Court to consider hearing in camera etc.

38AB Court to consider hearing in camera etc.

(1) If, during a hearing in a civil proceeding, an issue arises relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, then before hearing the issue, the court must consider making an order under either or both of the following:

(a) subsection 19(3A);

(b) section 93.2 of the *Criminal Code*.

(2) Subsection (1) does not apply if the issue is the subject of an order that is in force under section 38B.

56 Subsections 38A(1), (2) and (3)

Repeal the subsections, substitute:

(1) At any time during a civil proceeding, the Attorney General, the Attorney-General's legal representative, a party to the proceeding or a party's legal representative may apply to the court for the court to hold a hearing to consider issues relating to the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information, including:

(a) the making of an arrangement of the kind mentioned in section 38B; and

(b) the giving of a notice under section 38D.

(2) As soon as possible after making the application, the applicant must notify each of the following that the application has been made:

(a) if the applicant is the Attorney-General or the Attorney-General's legal representative—the parties and the parties' legal representatives;

(b) if the applicant is a party or a party's legal representative—the Attorney-General, the other parties and the other parties' legal representatives.

Note: The heading to section 38A is replaced by the heading "**National security information hearings**".

57 Subsection 38A(4)

Omit "conference", substitute "hearing".

58 Subsection 38B(1)

Repeal the subsection, substitute:

(1) At any time during a civil proceeding:

(a) the Attorney-General, on the Commonwealth's behalf; and

(b) the parties to the proceeding, or their legal representatives on their behalf;

may agree to an arrangement about the disclosure, protection, storage, handling or destruction, in the proceeding, of national security information.

Note: The heading to section 38B is altered by omitting "**relating to or affecting national security**" and substituting "**etc. of national security information**".

59 Paragraph 38C(1)(a)

Omit "information that is disclosed, or to be disclosed, to the court", substitute "national security information that is disclosed, or to be disclosed,".

Note: The heading to section 38C is altered by omitting "**certain**" and substituting "**national security**".

60 Subsections 38C(2) and (3)

Repeal the subsections, substitute:

(2) This section does not apply to information that is the subject of an order that is in force under section 38B.

61 Subsection 38D(1)

Repeal the subsection, substitute:

(1) If a party, or the legal representative of a party, to a civil proceeding knows or believes that:

(a) he or she will disclose national security information in the proceeding; or

(b) a person whom he or she intends to call as a witness in the proceeding will disclose national security information in giving evidence or by the person's mere presence; or

(c) on his or her application, the court has issued a subpoena to, or made another order in relation to, another person who, because of that subpoena or order, is required (other than as a witness) to disclose national security information in the proceeding;

then he or she must, as soon as practicable, give the Attorney-General notice in writing of that knowledge or belief.

Note 1: Failure to give notice as required by this section is an offence in certain circumstances: see section 46C.

Note 2: Section 38E deals with the situation where a party, or a party's legal representative, knows or believes that information that will be disclosed in a witness's answer is national security information.

Note: The heading to section 38D is replaced by the heading "**Notification of expected disclosure of national security information**".

62 Subsection 38D(2)

Omit "Despite subsection (1), a party need not give the Attorney-General notice", substitute "However, a party or a party's legal representative need not give the Attorney-General notice about the disclosure of the information under subsection (1)".

63 Before paragraph 38D(2)(a)

Insert:

(aa) another person has already given notice about the disclosure of the information under that subsection; or

64 Subparagraphs 38D(2)(a)(i) and (b)(i)

After "party", insert "or the legal representative".

65 At the end of subsection 38D(2)

Add:

; or (c) the Attorney-General has given the party or the legal representative advice about the disclosure of the information under subsection 38F(7) or 38H(9).

66 Subsections 38D(4) and (5)

Repeal the subsections, substitute:

Informing the court etc. of an expected disclosure

(4) A person who gives notice under subsection (1) must also advise, in writing:

(a) the court; and

(b) the other parties; and

(c) the other parties' legal representatives; and

(d) any other person mentioned in paragraph (1)(b) or (c);

that notice has been given to the Attorney-General. The advice must include a description of the information.

Note: Failure to give advice as required by this section is an offence in certain circumstances: see section 46C.

Adjournment to allow sufficient time for Attorney-General to act on the notice

(5) On receiving the advice, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. The court must continue the adjournment until the Attorney-General:

(a) gives a copy of a certificate to the court under subsection 38F(5) or 38H(4); or

(b) gives advice to the court under subsection 38F(7) or 38H(9) (which applies if a decision is made not to give a certificate).

67 Paragraph 38E(1)(b)

Repeal the paragraph, substitute:

(b) a party, or the legal representative of a party, to the proceeding knows or believes that information that will be disclosed in the witness's answer is national security information.

68 Subsection 38E(2)

After "party", insert "or legal representative".

69 After subsection 38E(2)

Insert:

(2A) However, a person need not advise the court under subsection (2) about the disclosure of information if:

(a) another person has already advised the court about the disclosure of the information under that subsection; or

(b) a notice has been given to the Attorney-General under subsection 38D(1) about the disclosure of the information; or

(c) the disclosure of the information:

(i) is the subject of a certificate given to the person under section 38F and the certificate still has effect; or

(ii) is the subject of an order that is in force under section 38B or 38L; or

(d) the Attorney-General has given the person advice about the disclosure of the information under subsection 38F(7).

70 Subsection 38E(4)

Omit "The court must adjourn the proceeding on receiving the written answer. However, the court need not adjourn the proceeding", substitute "On receiving the written answer, the court must adjourn so much of the proceeding as is necessary to ensure that the information is not disclosed. However, the court need not do so".

71 Subsection 38E(5)

Omit "adjourns the proceeding", substitute "adjourns a part of the proceeding under subsection (4)".

72 Subsection 38E(6)

Omit "of the proceeding".

73 Subparagraph 38F(1)(a)(i)

After "a party", insert ", or the legal representative of a party,".

74 Subparagraph 38F(1)(a)(ii)

After "a party", insert ", the legal representative of a party".

75 Subsection 38F(9)

Repeal the subsection, substitute:

*Definition of **potential discloser***

(9) Each of the following persons is a ***potential discloser*** of the information in the proceeding:

(a) in all cases—the parties and the parties' legal representatives;

(b) if subparagraph (1)(a)(i) or (ii) applies and the disclosure is by a person other than a party or a party's legal representative—the other person;

(c) if subparagraph (1)(a)(iii) applies—the witness mentioned in that subparagraph.

76 Subparagraph 38H(1)(a)(i)

Omit "to a civil proceeding knows or believes that a person whom the party", substitute ", or the legal representative of a party, to a civil proceeding knows or believes that a person whom the party or legal representative".

77 Subparagraph 38H(1)(a)(ii)

After "party", insert ", or the legal representative of a party,".

78 Subsection 38H(2)

Repeal the subsection, substitute:

Attorney-General may give a certificate

(2) The Attorney-General may give a certificate to the relevant party or legal representative that states that he or she must not call the person as a witness in the proceeding.

79 Subsection 38H(9)

Omit all the words after "writing,", substitute:

advise:

(a) the relevant party or legal representative; and

(b) the court;

of his or her decision.

80 Paragraph 38I(2)(e)

Repeal the paragraph, substitute:

(e) the Attorney-General, the Attorney-General's legal representative and any other representative of the Attorney-General; and

81 Subsection 38I(7)

Omit "national security information", substitute "information".

82 Section 38K

Repeal the section.

83 Paragraphs 38L(6)(a) and (b)

After "party", insert "or legal representative".

84 Paragraph 38M(1)(d)

Omit "if section 38K applies—".

85 Subsection 38M(2)

Omit "If section 38K applies, before", substitute "Before".

86 Subsection 38M(3)

Omit "national security information", substitute "information".

87 Subsection 38R(1)

Omit ", or if the Attorney-General is an intervener under section 38K,", substitute "or".

88 After subsection 39(1)

Insert:

(1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider the nature of the information itself, and not the character of the person to whom it is to be disclosed.

89 Subsection 39(3)

After "defendant", insert ", or the defendant's legal representative (on the defendant's behalf),".

90 After subsection 39A(1)

Insert:

(1A) When considering, for the purposes of subsection (1), whether a disclosure of the information would be likely to prejudice national security, the Secretary is to consider the nature of the information itself, and not the character of the person to whom it is to be disclosed.

91 Subsection 39A(3)

After "to the proceeding", insert ", or the party's legal representative (on the party's behalf),".

92 Subsection 40(1)

Repeal the subsection, substitute:

Disclosure where notice given to Attorney-General under subsection 24(1)

(1) A person commits an offence if:

(a) the person is the prosecutor, the defendant or the defendant's legal representative in a federal criminal proceeding; and

(b) the person gives notice to the Attorney-General under subsection 24(1) about the disclosure of information in the proceeding; and

(c) section 41 does not apply; and

(d) after giving the notice, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where advice given under subsection 24(3)

(1A) A person commits an offence if:

(a) the person is advised under subsection 24(3) that a notice about the disclosure of information in a federal criminal proceeding has been given to the Attorney-General; and

(b) the advice includes a description of the information; and

(c) section 41 does not apply; and

(d) after being advised, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 26(2) or (3) or advice under subsection 26(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

93 Paragraph 40(2)(a)

Omit "or believes", substitute ", believes or is advised".

94 Section 41

Repeal the section, substitute:

41 Offence to disclose information before Attorney-General gives criminal witness exclusion certificate etc. under section 28

A person commits an offence if:

(a) the person is the prosecutor, the defendant or the defendant's legal representative in a federal criminal proceeding; and

(b) the person notifies the Attorney-General under subsection 24(1) that he or she knows or believes that a person (the ***second person***) whom he or she intends to call as a witness in a federal criminal proceeding will disclose information by the second person's mere presence; and

(c) after giving the notice, the person calls the second person as a witness in the proceeding at any time before the Attorney-General gives the person a certificate under subsection 28(2) or advice under subsection 28(10) in relation to the calling of the second person as a witness; and

(d) the disclosure of the information by the mere presence of the second person is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

95 Paragraph 42(a)

Omit "or (3)", substitute ", (3) or (4)".

96 After section 45

Insert:

45A Offence to contravene regulations

(1) A person commits an offence if:
(a) regulations made under section 23 require the person to comply with a requirement relating to the storage, handling or destruction of national security information; and
(b) the person engages in conduct; and
(c) the conduct results in the requirement being contravened.

Penalty: 6 months imprisonment.

(2) In this section:

engage in conduct means:
(a) do an act; or
(b) omit to perform an act.

97 Subsection 46A(1)

Repeal the subsection, substitute:

Disclosure where notice given to Attorney-General under subsection 38D(1)

(1) A person commits an offence if:
(a) the person is a party, or a legal representative of a party, to a civil proceeding; and
(b) the person gives notice to the Attorney-General under subsection 38D(1) about the disclosure of information in the proceeding; and
(c) section 46B does not apply; and

(d) after giving the notice, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

Disclosure where advice given under subsection 38D(4)

(1A) A person commits an offence if:

(a) the person is advised under subsection 38D(4) that a notice about the disclosure of information in a civil proceeding has been given to the Attorney-General; and

(b) the advice includes a description of the information; and

(c) section 46B does not apply; and

(d) after being advised, the person discloses the information (whether in the proceeding or otherwise) at any time before the Attorney-General gives the person a certificate under subsection 38F(2) or (3) or advice under subsection 38F(7) in relation to the disclosure of the information; and

(e) the disclosure does not take place in permitted circumstances; and

(f) the disclosure is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

98 Sections 46B and 46C

Repeal the sections, substitute:

46B Offence to disclose information before Attorney-General gives civil witness exclusion certificate etc. under section 38H

A person commits an offence if:

(a) the person is a party, or the legal representative of a party, to a civil proceeding; and

(b) the person notifies the Attorney-General under subsection 38D(1) that he or she knows or believes that a person (the ***second person***) whom he or she intends to call as a witness in

the proceeding will disclose information by the second person's mere presence; and

(c) after giving the notice, the person calls the second person as a witness in the proceeding at any time before the Attorney-General gives the person a certificate under subsection 38H(2) or advice under subsection 38H(9) in relation to the calling of the second person as a witness; and

(d) the disclosure of the information by the mere presence of the second person is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

46C Offence to contravene requirement to notify Attorney-General etc. under sections 38D and 38E

A person commits an offence if:

(a) the person is a party, or the legal representative of a party, to a civil proceeding; and

(b) the person contravenes subsection 38D(1), (3) or (4) or 38E(2); and

(c) the disclosure of information mentioned in that subsection is likely to prejudice national security.

Penalty: Imprisonment for 2 years.

99 After section 46F

Insert:

46FA Offence to contravene regulations

(1) A person commits an offence if:

(a) regulations made under section 38C require the person to comply with a requirement relating to the storage, handling or destruction of national security information; and

(b) the person engages in conduct; and

(c) the conduct results in the requirement being contravened.

Penalty: 6 months imprisonment.

(2) In this section:

engage in conduct means:

(a) do an act; or

(b) omit to perform an act.

Part 2—Application of amendments and saving

100 Application of amendments

Notice given after commencement

(1) The amendments made by this Schedule (other than items 96 and 99) apply on and after the commencement of this item to:

(a) a federal criminal proceeding in relation to which a notice is given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* on or after that commencement; and

(b) a civil proceeding in relation to which a notice is given under section 6A of that Act on or after that commencement;

whether or not the proceeding begins before or after that commencement.

(2) The amendments made by items 96 and 99 of this Schedule apply on and after the commencement of those items to:

(a) a federal criminal proceeding in relation to which a notice is given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* on or after that commencement; and

(b) a civil proceeding in relation to which a notice is given under section 6A of that Act on or after that commencement;

whether or not the proceeding begins before or after that commencement.

Notice given before commencement

(3) The amendments made by this Schedule (other than items 96 and 99) apply on and after the commencement of this item to:

(a) a federal criminal proceeding in relation to which a notice was given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before that commencement; and

(b) a civil proceeding in relation to which a notice was given under section 6A of that Act before that commencement;

but only to the parts of the proceeding that occur after that commencement (whether or not those parts began before that commencement).

(4) The amendments made by items 96 and 99 of this Schedule apply on and after the commencement of those items to:

(a) a federal criminal proceeding in relation to which a notice was given under section 6 of the *National Security Information (Criminal and Civil Proceedings) Act 2004* before that commencement; and

(b) a civil proceeding in relation to which a notice was given under section 6A of that Act before that commencement;

but only to the parts of the proceeding that occur after that commencement (whether or not those parts began before that commencement).

(5) If, under section 6 or 6A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*, a notice was given before the commencement of this item, then:

(a) any orders that were made; and

(b) any certificates, advices or notices that were given;

before that commencement under a provision of that Act continue in force (and may be dealt with) as if they were made or given under:

(c) in the case of an order made under subsection 23(2) of that Act—subsection 19(1A) of that Act as amended by this Schedule; and

(d) in the case of an order made under subsection 38C(2) of that Act—subsection 19(3A) of that Act as amended by this Schedule; and

(e) in any other case—the provision of that Act as amended by this Schedule.

101 Saving

Despite the amendments made to sections 23 and 38C of the *National Security Information (Criminal and Civil Proceedings) Act 2004* by this Schedule, regulations made under those sections and that are in force immediately before the commencement of this item continue in force (and may be dealt with) after that commencement, as if they were made under those sections as amended by this Schedule.

Schedule 9—Consequential amendments relating to the establishment of the Parliamentary Joint Committee on Law Enforcement

Administrative Decisions (Judicial Review) Act 1977

1 After paragraph (db) of Schedule 2

Insert:

(dc) decisions under subsection 8(4) or 9(4) of the *Parliamentary Joint Committee on Law Enforcement Act 2009*;

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

2 Paragraph 128(14)(c)

Omit "the Chair of the Board", substitute "the Chief Executive Officer".

3 Paragraph 128(14)(c)

Omit "the Australian Crime Commission under subsection 59(6A) of the *Australian Crime Commission Act 2002*", substitute "Law Enforcement under subsection 8(1) of the *Parliamentary Joint Committee on Law Enforcement Act 2009*".

Australian Crime Commission Act 2002

4 Subsection 51(4) (at the end of the definition of *relevant Act*)

Add:

; or (d) the *Parliamentary Joint Committee on Law Enforcement Act 2009* or regulations under that Act.

5 Part III

Repeal the Part.

6 Subsections 59(6A), (6B), (6C) and (6D)

Repeal the subsections.

7 Transitional—Committee on the Australian Crime Commission

(1) This item applies to the Parliamentary Joint Committee on the Australian Crime Commission (the ***Committee***) that was in existence under the *Australian Crime Commission Act 2002* immediately before the commencement of this item.

(2) The Committee continues in existence by force of this item, after the commencement of this item, as the Parliamentary Joint Committee on Law Enforcement under the *Parliamentary Joint Committee on Law Enforcement Act 2009*.

(3) A person who held office as a member of the Committee immediately before the commencement of this item is taken to have been appointed, immediately after that commencement, as a member of the Parliamentary Joint Committee on Law Enforcement.

(4) The person who held office as Chair of the Committee immediately before the commencement of this item is taken to have been elected, immediately after that commencement, as Chair of the Parliamentary Joint Committee on Law Enforcement.

(5) If the Committee was conducting a review immediately before commencement:

(a) the Parliamentary Joint Committee on Law Enforcement may continue the review after that commencement; and

(b) anything done for the purposes of the review before commencement is taken to have been done for the purposes of the review as continued in accordance with this item.

(6) Section 10 of the *Parliamentary Joint Committee on Law Enforcement Act 2009* does not apply in relation to the year ending on 31 December 2009 if, in that year, the Ombudsman has provided to the Committee a briefing under subsection 55AA(1) of the *Australian Crime Commission Act 2002* as in force immediately before the commencement of this item.

(7) For the avoidance of doubt, subitem (6) does not prevent the Ombudsman from providing a briefing to the Parliamentary Joint Committee on Law Enforcement about the involvement of the Australian Crime Commission or the Australian Federal Police in

controlled operations under Part IAB of the *Crimes Act 1914* during the year ending on 31 December 2009.

Australian Federal Police Act 1979

8 After paragraph 60A(2)(e)

Insert:

(ea) the purposes of the *Parliamentary Joint Committee on Law Enforcement Act 2009* or regulations under that Act; or

9 Paragraph 60A(2)(f)

Omit "(d) and (e)", substitute "(d), (e) and (ea)".

THIS PAGE IS INTENTIONALLY BLANK

Appendix 2: Draft Parliamentary Joint Committee on Law Enforcement Bill 2009

2008-2009

The Parliament of the
Commonwealth of Australia

HOUSE OF REPRESENTATIVES/THE SENATE

EXPOSURE DRAFT

Parliamentary Joint Committee on Law Enforcement Bill 2009

No. , 2009

(Attorney-General)

A Bill for an Act to establish a Parliamentary Joint Committee on Law Enforcement, and for related purposes

A Bill for an Act to establish a Parliamentary Joint Committee on Law Enforcement, and for related purposes

The Parliament of Australia enacts:

Part 1—Preliminary

1 Short title

This Act may be cited as the *Parliamentary Joint Committee on Law Enforcement Act 2009*.

2 Commencement

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

3 Definitions

In this Act:

ACC means the Australian Crime Commission established by section 7 of the *Australian Crime Commission Act 2002*.

ACC operation/investigation has the same meaning as in the *Australian Crime Commission Act 2002*.

AFP means the Australian Federal Police.

AFP conduct or practices issue has the same meaning as in the *Australian Federal Police Act 1979*.

CEO of the ACC means the Chief Executive Officer of the ACC.

intelligence operation has the same meaning as in the *Australian Crime Commission Act 2002*.

law enforcement agency means:

(a) the ACC; or

(b) the AFP; or

(c) a Police Force of a State; or

(d) any other authority or person responsible for the enforcement of the laws of the Commonwealth or of the States.

member means a member of the Committee.

member of the Australian Federal Police has the same meaning as in the *Australian Federal Police Act 1979*.

member of the staff of the ACC has the same meaning as in the *Australian Crime Commission Act 2002*.

relevant criminal activity has the same meaning as in the *Australian Crime Commission Act 2002*.

sensitive information means information that, if disclosed:

(a) could prejudice:

(i) the security, defence or international relations of Australia; or

(ii) relations between the Commonwealth Government and the Government of a State or between the Government of a State and the Government of another State; or

(b) would disclose:

(i) deliberations or decisions of the Cabinet, or of a Committee of the Cabinet, of the Commonwealth or of a State; or

(ii) deliberations or decisions of the Australian Capital Territory Executive or of a committee of that Executive; or

(iii) deliberations or advice of the Federal Executive Council or the Executive Council of a State or the Northern Territory; or

(c) could reveal, or enable a person to ascertain, the existence or identity of a confidential source of information in relation to:

(i) the enforcement of the criminal law of the Commonwealth, a State or Territory or a foreign country; or

(ii) an investigation relating to misconduct or alleged misconduct by a member of the Australian Federal Police; or

(iii) an investigation relating to misconduct or alleged misconduct by a member of the staff of the ACC; or

(iv) an investigation into an AFP conduct or practices issue; or

(v) an ACC operation/investigation (including an ACC operation/investigation that has been concluded); or

(d) could endanger a person's life or physical safety; or

(e) could prejudice the protection of public safety; or

(f) could prejudice the fair trial of a person or the impartial adjudication of a matter; or

(g) could prejudice the proper enforcement of the law or the operations of law enforcement agencies; or

(h) could prejudice a person's reputation; or

(i) would disclose information the disclosure of which is prohibited (absolutely or subject to qualifications) by or under another law of the Commonwealth; or

(j) would unreasonably disclose personal information (within the meaning of the *Privacy Act 1988*); or

(k) would unreasonably disclose confidential commercial information.

State includes the Australian Capital Territory and the Northern Territory.

the Committee means the Parliamentary Joint Committee on Law Enforcement for the time being constituted under this Act.

4 Extension to external Territories

This Act extends to every external Territory.

Part 2—Joint Parliamentary Committee on Law Enforcement

5 Joint Parliamentary Committee on Law Enforcement

(1) As soon as practicable after the commencement of the first session of each Parliament, a joint committee of members of the Parliament, to be known as the Parliamentary Joint Committee on Law Enforcement, is to be appointed according to the practice of the Parliament with reference to the appointment of members to serve on joint select committees of both Houses of the Parliament.

(2) The Committee is to consist of 10 members, namely, 5 members of the Senate appointed by the Senate, and 5 members of the House of Representatives appointed by that House.

(3) A member of the Parliament is not eligible for appointment as a member of the Committee if he or she is:

(a) a Minister; or

(b) the President of the Senate; or

(c) the Speaker of the House of Representatives; or

(d) the Deputy-President and Chair of Committees of the Senate or the Chair of Committees of the House of Representatives.

(4) A member ceases to hold office:

(a) when the House of Representatives expires by effluxion of time or is dissolved; or

(b) if he or she becomes the holder of an office specified in any of the paragraphs of subsection (3); or

(c) if he or she ceases to be a member of the House of the Parliament by which he or she was appointed; or

(d) if he or she resigns his or her office as provided by subsection (5) or (6).

(5) A member appointed by the Senate may resign his or her office by writing signed by him or her and delivered to the President of the Senate.

(6) A member appointed by the House of Representatives may resign his or her office by writing signed by him or her and delivered to the Speaker of that House.

(7) Either House of the Parliament may appoint one of its members to fill a vacancy amongst the members of the Committee appointed by that House.

6 Powers and proceedings of the Committee

All matters relating to the powers and proceedings of the Committee are to be determined by resolution of both Houses of the Parliament.

7 Functions of the Committee

(1) The Committee has the following functions:

(a) to monitor and to review the performance by the ACC of its functions;

(b) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the ACC or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(c) to examine each annual report on the ACC and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(d) to monitor and to review the performance by the AFP of its functions;

(e) to report to both Houses of the Parliament, with such comments as it thinks fit, upon any matter appertaining to the AFP or connected with the performance of its functions to which, in the opinion of the Committee, the attention of the Parliament should be directed;

(f) to examine each annual report on the AFP and report to the Parliament on any matter appearing in, or arising out of, any such annual report;

(g) to examine trends and changes in criminal activities, practices and methods and report to both Houses of the Parliament any change which the Committee thinks desirable to the functions, structure, powers and procedures of the ACC or the AFP;

(h) to inquire into any question in connection with its duties which is referred to it by either House of the Parliament, and to report to that House upon that question.

Note 1: For the functions of the ACC, see section 7A of the *Australian Crime Commission Act 2002*.

Note 2: For the functions of the AFP, see section 8 of the *Australian Federal Police Act 1979*.

(2) The functions of the Committee do not include:

(a) undertaking an intelligence operation or investigating a matter relating to a relevant criminal activity; or

(b) reconsidering the findings of the ACC in relation to a particular ACC operation/investigation (including an ACC operation/investigation that has been concluded); or

(c) reviewing sensitive operational information or operational methods available to the ACC or the AFP; or

(d) reviewing particular operations or investigations that have been, are being or are proposed to be undertaken by the ACC or the AFP; or

(e) reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or

(f) conducting inquiries into individual complaints about the activities of the ACC or the AFP.

(3) To avoid doubt, the Committee may examine, and report to both Houses of the Parliament on, information given to it under section 8 or 9.

8 Disclosure to Committee by CEO of the ACC

(1) Subject to subsection (2), the CEO of the ACC:

(a) must comply with a request by the Committee to give the Committee information in relation to an ACC operation/investigation (including an ACC operation/investigation that has been concluded); and

(b) must when requested by the Committee, and may at such other times as the CEO thinks appropriate, inform the Committee concerning the general performance of the ACC's functions.

(2) The CEO of the ACC may decide not to comply with the request if the CEO is satisfied that:

(a) the information is sensitive information; and

(b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

(3) If the CEO of the ACC does not give information to the Committee because of subsection (2), the Committee may refer the request to the Minister responsible for the ACC.

(4) If the Committee refers the request to the Minister responsible for the ACC, the Minister responsible for the ACC:

(a) must determine in writing whether:

(i) the information is sensitive information; and

(ii) if it is, whether the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee; and

(b) must provide copies of that determination to the CEO of the ACC and the Committee.

(5) The Minister responsible for the ACC is not required to disclose his or her reasons for making a determination under subsection (4).

(6) A determination made by the Minister responsible for the ACC under subsection (4) is not a legislative instrument.

9 Disclosure to Committee by Commissioner of the AFP

(1) Subject to subsection (2), the Commissioner of the AFP:

(a) must comply with a request by the Committee to give the Committee information in relation to an investigation that the AFP has conducted or is conducting; and

(b) must when requested by the Committee, and may at such other times as the Commissioner thinks appropriate, inform the Committee concerning the general performance of the AFP's functions.

(2) The Commissioner of the AFP may decide not to comply with the request if the Commissioner is satisfied that:

(a) the information is sensitive information; and

(b) the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee.

(3) If the Commissioner of the AFP does not give information to the Committee because of subsection (2), the Committee may refer the request to the Minister responsible for the AFP.

(4) If the Committee refers the request to the Minister responsible for the AFP, the Minister responsible for the AFP:

(a) must determine in writing whether:

(i) the information is sensitive information; and

(ii) if it is, whether the public interest that would be served by giving the information to the Committee is outweighed by the prejudicial consequences that might result from giving the information to the Committee; and

(b) must provide copies of that determination to the Commissioner of the AFP and the Committee.

(5) The Minister responsible for the AFP is not required to disclose his or her reasons for making a determination under subsection (4).

(6) A determination made by the Minister responsible for the AFP under subsection (4) is not a legislative instrument.

10 Ombudsman to brief Committee about controlled operations

(1) At least once in each calendar year the Ombudsman must provide a briefing to the Committee about the involvement of the ACC and the AFP in controlled operations under Part IAB of the *Crimes Act 1914* during the preceding 12 months.

(2) For the purposes of receiving a briefing from the Ombudsman under subsection (1), the Committee must meet in private.

Part 3—Miscellaneous

11 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.