

EXPLANATORY STATEMENT

[Select Legislative Instrument No. X, 2017]

Criminal Code Amendment (High Risk Terrorist Offenders) Regulations 2017

Background

Division 105A of the *Criminal Code* was inserted by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* (Cth), and provides a scheme allowing for the continuing detention of a convicted terrorist offender.

Division 105A of the *Criminal Code* allows the Attorney-General to apply to the Supreme Court of a state or territory for the continuing detention of a convicted terrorist offender who poses an unacceptable risk of committing a serious terrorist offence if released into the community at the conclusion of their custodial sentence.

Section 105A.15A of the *Criminal Code* provides that where an offender, due to circumstances beyond the offender's control, is unable to engage a legal representative in relation to a continuing detention order proceeding, the Court may make either an order staying the proceedings or an order requiring the Commonwealth to bear, in accordance with the regulations, all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding.

Subsection 105A.15A(3) provides for regulations that prescribe matters that the Court may take into account in determining whether circumstances are beyond the offender's control, and what constitutes reasonable costs and expenses of the offender's legal representation for the proceeding.

Section 105A.19 provides that the Attorney-General may request information from, and disclose information to, persons prescribed by the regulations that the Attorney-General reasonably believes to be relevant to the administration or execution of Division 105A, or that is necessary to enable the person to exercise their powers or perform their functions, respectively.

Purpose

The purpose of the *Criminal Code (High Risk Terrorist Offenders) Regulations 2017* (Cth) (the Regulations) is to amend the *Criminal Code Regulations 2002* (Cth) to:

- prescribe matters the Court may consider in determining whether circumstances are beyond the offender's control in making an order under section 105A.15A of the *Criminal Code*
- prescribe persons the Attorney-General may request information from, and disclose information to, for the purpose of facilitating the administration and execution of Division 105A of the *Criminal Code*.

Explanation and effect of provisions

Details of the Regulations are set out in Attachment A.

Consultation

The Regulations have been subject to consultation through the High Risk Terrorist Offenders Implementation Working Group. Agencies represented on this working group include:

- Australian Federal Police
- Australian Intelligence Security Organisation
- Department of Prime Minister and Cabinet
- state and territory corrections agencies
- state and territory police
- state and territory justice departments, and
- state and territory first ministers' departments.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

***Criminal Code (High Risk Terrorist Offenders) Regulations 2017* (Cth)**

The Regulations, a Disallowable Legislative Instrument, are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth).

Overview of the Regulations

Division 105A of the *Criminal Code* establishes a scheme whereby the Attorney-General can apply to the Supreme Court of a State or Territory for a continuing detention order. The effect of a continuing detention order is to commit a ‘terrorist offender’ to detention in a prison for the period the order is in force, which can be up to three years. The scheme does not authorise detention by executive action or the detention of minors.

The object of the Regulations is twofold: to provide guidance to the Court in considering an order under section 105A.15A of the *Criminal Code*, and to prescribe persons for the purpose of sharing information under subsections 105A.19(1) and (3) of the *Criminal Code*.

Human Rights implications

The Regulations engage the following rights:

- Article 14, *International Covenant on Civil and Political Rights* (ICCPR), and
- Article 17, ICCPR.

Article 14, ICCPR – right to a fair trial and a fair hearing

New regulation 4A engages the right to a fair trial and a fair hearing. This right is contained in article 14 of the International Covenant on Civil and Political Rights (ICCPR). Under this article all persons shall be equal before the courts and tribunals.

Section 105A.15A was introduced following Recommendation 12 of the Parliamentary Joint Committee on Intelligence and Security Advisory Report on the Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016. In making this Recommendation, the Committee considered that ensuring access to legal representation is a vital protection of an offender’s rights.

Under section 105A.15A of the *Criminal Code*, the Court may make an order to stay the continuing detention order proceedings, and/or require the Commonwealth to bear the reasonable costs and expenses of the offender’s legal representation for the proceeding. The Court may make an order under section 105A.15A where an offender subject to a continuing detention order application, due to circumstances beyond their control, is unable to engage a legal representative in relation to the proceeding. New regulation 4A provides guidance to the

Court in making an order under section 105A.15A. In particular, it prescribes matters the Court may take into account in determining whether circumstances are beyond an offender's control. The matters prescribed by the Regulations seek to ensure the Court has considered key issues in determining the appropriateness of making the order. New regulation 4A expressly provides that it does not limit the ability of the Court to consider additional matters to those prescribed.

It is ultimately a decision for the Court as to whether to make an order under section 105A.15A.

By ensuring, where appropriate, the offender has the benefit of legal representation, the Regulations promote the offender's right to a fair trial as expressed in article 14.

Article 17, ICCPR - protection against unlawful and arbitrary interference with privacy

Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy.

New regulation 4B interacts with the right to privacy by allowing, in limited circumstances, disclosure of information to a prescribed list of persons. The disclosure of personal information without a person's consent will engage, and limit, the protection from arbitrary or unlawful interference with their privacy.

The right in Article 17 may be subject to permissible limitations, where the limitations are authorised by law and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances.

New regulation 4B specifically limits the list of persons who may have access to information to ensure that information is only provided to those with a relevant purpose. The regulation also works within the framework established by section 105A.19 of the *Criminal Code*, which limits the sharing of information to those who require the information to enable them to exercise the powers or perform their duties. This framework appropriately limits the unnecessary or further disclosure of information. To the extent that the measures in new regulation 4B limit the right in Article 17 of the ICCPR, they are lawful and non-arbitrary.

Conclusion

The Regulations engage the right to a fair trial and the right to privacy. The Regulations are compatible with human rights because they promote certain rights, and to the extent that they may limit human rights, those limitations are reasonable, necessary and proportionate.

ATTACHMENT A

Details of the *Criminal Code (High Risk Terrorist Offenders) Regulations 2017 (Cth)*

Section 1 – Name

This section provides that the title of the Regulations is the *Criminal Code (High Risk Terrorist Offenders) Regulations 2017*.

Section 2 – Commencement

This section provides for the Regulations to commence the day after the Regulations are registered.

Section 3 – Authority

This section provides that the Regulations are made under the *Criminal Code Act 1995 (Cth)*.

Section 4 – Schedules

This section provides that each regulation that is specified in a Schedule to these Regulations is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Regulations has effect according to its terms.

Schedule 1 – Amendments

Item 1 – regulation 4A

Subsection 105A.15A(2) of the *Criminal Code* allows a Supreme Court of a State or Territory to make an order staying a continuing detention order proceeding, and/or requiring the Commonwealth to bear all or part of the reasonable costs and expenses of the offender's legal representation. The Court can make one or both of these orders where the proceeding is a continuing detention order proceeding, and the offender, due to circumstances beyond that offender's control, is unable to engage a legal representative in the proceeding. The provision seeks to ensure that a person is legally represented in a continuing detention order proceeding.

Item 1 of Schedule 1 inserts new regulation 4A into the *Criminal Code Regulations 2002 (Cth)*. In accordance with paragraph 105A.15A(3)(a) of the *Criminal Code*, new regulation 4A provides the Court with guidance as to what matters it may consider when deciding if circumstances are beyond an offender's control. It is ultimately up to the Court as to what matters it considers, and what weight it gives to each matter.

Paragraph 4A(a) provides that the court may take into account an offender's financial circumstances. An offender's financial circumstances will be highly relevant in determining whether that offender is able to afford the costs of legal representation.

Paragraph 4A(b) provides that the Court may take into account whether the offender has engaged in unreasonable conduct during the proceeding which has resulted in the offender

being unable to afford any or all of the costs and expenses of legal representation. This matter may be relevant where, for example, a person is no longer able to afford legal representation as a result of unreasonably delaying the proceedings and knowingly incurring high legal costs.

Paragraph 4A(c) provides that the Court may consider whether an offender has made efforts to obtain legal aid or legal assistance, and the outcomes of those efforts. Where an offender believes that he or she cannot afford the costs of legal representation for a continuing detention order proceeding, that offender should make efforts to apply for legal aid or legal assistance. The outcomes of those efforts may also be relevant to the Court's decision. For example, an offender may not be granted access to legal aid if they can afford legal representation using funds available to them.

Paragraph 4A(d) provides that the Court may also consider any other matter it considers relevant. The inclusion of this paragraph clarifies that matters in regulation 4A are not exhaustive, and do not prevent the Court from considering additional matters that it considers relevant.

It is anticipated that, as a civil proceeding, existing state and territory Supreme Court processes will be applied and relied on to assess these costs.

Item 1 – regulation 4B

In accordance with subsections 105A.19(1) and (3) of the *Criminal Code*, Item 1 inserts new regulation 4B into the *Criminal Code Regulations 2002* (Cth). New regulation 4B prescribes a list of persons who:

- the Attorney-General may request information from that the Attorney-General reasonably believes to be relevant to the administration or execution of Division 105A of the *Criminal Code*
- the Attorney-General may disclose information to, if:
 - the information was acquired by either the Attorney-General, a legal representative of the Attorney-General, the Secretary of the Department, an APS employee in the Department, and
 - the Attorney-General reasonably believes that the disclosure is necessary to enable the person to exercise the person's powers, or to perform the person's functions or duties.

New regulation 4B is designed to ensure that all relevant agencies that hold information on high risk terrorist offenders eligible for continuing detention orders are able to appropriately share that information. The sharing of this information will support an application for a continuing detention order by the Attorney-General.

Information held by police, corrective services, intelligence agencies, and sentencing and immigration authorities is crucial to facilitating the effective execution and administration of Division 105A.