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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**CRIMINAL CODE AMENDMENT (HIGH RISK TERRORIST OFFENDERS) BILL
2016**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, Senator the Honourable George Brandis QC)

CRIMINAL CODE AMENDMENT (HIGH RISK TERRORIST OFFENDERS) BILL 2016

GENERAL OUTLINE

1. The Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016 (the Bill) will amend Part 5.3 of the *Criminal Code* to establish a scheme for the continuing detention of high risk terrorist offenders who pose an unacceptable risk to the community at the conclusion of their custodial sentence. The measures in this Bill incorporate an additional tool into Australia's comprehensive national security framework and respond to the ongoing threat terrorism poses to Australia and its people.

FINANCIAL IMPACT STATEMENT

2. The amendments in this Bill have little or no financial impact on Government expenditure or revenue.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016

3. This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

4. The Bill strengthens Australia's national security laws and counter-terrorism framework by ensuring that the Government has the means to protect the community from the risk of terrorist acts. It does so by enabling the continued detention of terrorist offenders serving custodial sentences who are assessed by a judge in civil proceedings to present an unacceptable risk to the community at the time their sentences finish.

5. A majority of States and Territories, as well as international counterparts, have enacted schemes which attempt to manage dangerous offenders through post-sentence controls including extended supervision or in some cases continuing detention. New South Wales and South Australia have schemes which cover both sex offenders and violent offenders, while Queensland, Victoria, Western Australia, and the Northern Territory have limited their schemes to only sex offenders. Tasmania and the Australian Capital Territory do not have post-sentence detention regimes for sex offenders or violent offenders.

6. Currently, where a terrorist offender continues to pose a risk to the community at the expiration of their custodial sentence, there are limited options to manage the risk that person may present to the community following their release from prison. While a preventative detention order or control order may be available in some circumstances to help manage the risk posed by terrorist offenders following their release from prison, the obligations, prohibitions or restrictions available under these measures and their duration are considered insufficient to address the assessed risk of a terrorist act occurring.

7. In the current security environment where attacks can be planned and carried out with great speed, ease and little engagement with other individuals, the risk to community safety may be too great to permit the release of some terrorist offenders who retain a strong motivation or intent to carry out terrorist acts within Australia.

8. Accordingly, a scheme that permits the continuing detention of terrorist offenders assessed to pose an unacceptable risk to community safety is required.

9. The Bill amends the *Criminal Code*. It also makes consequential amendments to the *Surveillance Devices Act 2004* and the *Telecommunications (Interception and Access) Act 1979*.

Overview of measures

Schedule 1 – Amendments to the *Criminal Code*

10. The Bill 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.

11. Section 105A.3 provides that a terrorist offender is a person convicted of a defined range of terrorism-related offences who is either serving a sentence for those offences or who is already detained under the scheme. The defined range of terrorism offences captures international terrorist activities using explosive or lethal devices; treason; foreign incursions and recruitment offences and a ‘serious Part 5.3 offence’. A serious Part 5.3 offence is an offence against Part 5.3 of the *Criminal Code* (which contains terrorism-related offences) with a maximum penalty of 7 or more years of imprisonment.

12. The Court can only make a continuing detention order if satisfied of certain matters set out in the Bill at new subsection 105A.7(1):

- i. First, the Court must be satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a ‘serious Part 5.3 offence’ if released into the community. The Court can appoint one or more suitably qualified experts with medical, psychiatric, psychological or other expertise to assess and report on the risk posed by the offender. A copy of the expert’s report must be provided to the terrorist offender.
- ii. Second, the Court must also be satisfied that there are no other less restrictive means that would be effective in preventing the unacceptable risk.

13. The Attorney-General bears the onus of satisfying the Court of these matters.

14. Section 105A.7(5) provides that the period of detention ordered by the Court must not exceed three years and must be limited to the period reasonably necessary to prevent the unacceptable risk. Section 105A.7(6) provides that there is no limit on the number of continuing detention orders that can be made.

15. If a continuing detention order application has been made, and the Court is satisfied that the offender will be released before the application for the continuing detention order has been determined, section 105A.9 provides that the Court may order an interim detention order committing the terrorist offender to detention for up to 28 days (or three months, if consecutive interim detention orders are applied for and granted).

16. Sections 105A.10 and 105A.11 provide that a continuing detention order must be reviewed by the Court annually, or sooner if the terrorist offender applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review. Section 105A.12 provides that the Court can affirm, revoke or vary the continuing detention order by shortening the period it is in force. The Court must revoke the continuing detention order unless satisfied that the terrorist offender continues to pose an unacceptable risk and that there are no less restrictive measures that would be effective in preventing the unacceptable risk. The Attorney-General bears the onus of satisfying the Court of these

matters. As with proceedings to determine an application for a continuing detention order, the Court can appoint one or more suitably qualified experts to assess and report on the risk posed by the offender.

17. The provisions in subdivision E ensure procedural protections are applicable in proceedings determining an application for a continuing detention order or an interim detention order and in proceedings to review a continuing detention order: the Court must apply the rules of evidence and procedure applicable to civil matters; the parties (including the terrorist offender) can adduce evidence and make submissions; reasons for decisions must be given; and decisions can be appealed.

18. Subsection 105A.4(1) provides that a person detained under a continuing detention order or an interim detention order in a prison must be treated in a way that is appropriate to their status as a person who is not serving a sentence of imprisonment. This requirement is subject to any reasonable requirements necessary to maintain the management, security or good order of the prison; the safe custody or welfare of the offender or prisoners; and the safety or protection of the community.

19. Subsection 105A.4(2) provides that persons detained under a continuing detention order or an interim detention order in a prison must not be accommodated or detained in the same area or unit of a prison as persons serving ordinary sentences of imprisonment unless to do so is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation or other group activities; is necessary for the security or good order of the prison or the safe custody or welfare of the offender or prisoners or is necessary for the safety and protection of the community. This requirement can also be departed from if the offender elects to be accommodated or detained in an area or unit of the prison that includes persons serving ordinary sentences of imprisonment.

20. The Attorney-General must report annually to the Parliament about the operation of the scheme.

Schedule 2 – Consequential amendments

21. The Bill will amend the *Surveillance Devices Act 2004* (the SD Act) and *Telecommunications (Interception and Access) Act 1979* (the TIA Act) to allow Commonwealth, State and Territory agencies to admit information obtained under a warrant or authorisation pursuant to the SD Act and TIA Act into evidence in proceedings relating to those continuing detention and interim detention orders. It will also allow Commonwealth, State and Territory agencies to use, record, communicate or publish such information in connection with this purpose.

22. Importantly, the amendments only apply to information that has already been lawfully obtained under the *Surveillance Devices Act 2004* and *Telecommunications (Interception and Access) Act 1979*. The amendments do not provide Commonwealth, State and Territory police with a further purpose to collect covert information.

Amendments to the *Surveillance Devices Act 2004* (SD Act)

23. The SD Act regulates the use of surveillance devices by law enforcement agencies for federal law enforcement purposes. Information obtained under a surveillance device warrant can only be used, recorded, communicated, published or admitted into evidence for a limited set of purposes. Information of this kind is defined as ‘protected information’.

24. The SD Act maintains strict controls on dealing with protected information, including criminal liability for persons who contravene the prohibition on disclosure of protected information. Additional safeguards include robust record-keeping and reporting requirements and independent oversight by the Commonwealth Ombudsman.

25. The amendments to the SD Act will enable law enforcement agencies to use, communicate or give in evidence protected information for the purpose of a proceeding related to a continuing detention order or interim detention order under Division 105A of the *Criminal Code*. The amendments relate only to the use and disclosure of protected information once it has been gathered in an investigation, and does not modify thresholds for the issuing of a surveillance device warrant.

Amendments to the *Telecommunications (Interception and Access) Act 1979 (TIA Act)*

26. The TIA Act protects the privacy of Australians by prohibiting the interception of communications and restricting access to the content and telecommunications data of communications not obtained in accordance with the legislation. The TIA Act also restricts dealing with information obtained under the Act. The Act strictly controls the purposes for which information obtained under a telecommunications interception warrant, a stored communications warrant or a data authorisation may be used or disclosed.

27. The prohibition on dealing with information is maintained through robust protections, including criminal liability. The Act includes additional safeguards including the threshold for issuing warrants, ministerial and other reporting requirements, and independent oversight of the Commonwealth Ombudsman.

28. The amendments to the TIA Act will enable law enforcement agencies to use, communicate or give in evidence information obtained under the Act for purposes related to continuing detention orders and interim detention orders in Division 105A of the *Criminal Code*. The amendments relate only to the use and disclosure of information once it has been gathered in an investigation and does not modify thresholds for the issuing of a telecommunications interception warrant, a stored communications warrant or the making of an authorisation for access to telecommunications data.

Human rights implications

29. This Bill engages:

- the right to freedom from arbitrary detention and the right to liberty of the person in Article 9 of the *International Covenant on Civil and Political Rights (ICCPR)*
- the right of persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person in Article 10 of the ICCPR
- the right to procedural guarantees in Article 14 of the ICCPR, and
- the right to freedom from arbitrary or unlawful interference with privacy in Article 17 of the ICCPR.

Schedule 1 – Amendments to the *Criminal Code Act 1995*

Continuing Detention Orders and Interim Detention Orders

30. The effect of a continuing detention order or an interim detention order is to commit the person the subject of the order to detention in a prison for the period the order is in force.

The right not to be deprived of liberty except on such grounds and in accordance with such procedures as are established by law in Article 9(1) of the ICCPR

31. Article 9(1) of the ICCPR provides that no-one shall be deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. Continuing detention orders and interim detention orders engage this right because they authorise detention.

32. Detention under a continuing detention order or an interim detention order is authorised by and operates in accordance with the procedures prescribed in Division 105A.

33. Accordingly, detention under a continuing detention order and an interim detention order complies with the requirement in Article 9(1) that deprivation of liberty not occur except in accordance with grounds and procedures prescribed by law.

The right to freedom from arbitrary detention in Article 9(1) of the ICCPR

34. Article 9(1) of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention. Continuing detention orders and interim detention orders engage the right to freedom from arbitrary detention because they authorise detention.

35. Article 9 regulates, rather than prohibits, detention—it is only ‘arbitrary’ detention that is prohibited. Arbitrariness includes the elements of inappropriateness, injustice and a lack of predictability. Detention will not be arbitrary where, in all the circumstances, it is appropriate, justifiable, reasonable, necessary and proportionate to a legitimate end. Detention may be arbitrary where there are less restrictive alternatives available. Preventative detention is not arbitrary per se and may be consistent with Article 9 if it is ordered by a court and is limited to a period during which it is justified by compelling reasons that are reviewable by a judicial authority.

36. The preventative detention authorised by a continuing detention order or an interim detention order cannot be described as ‘arbitrary’. The objective of the scheme (to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious terrorism offences) is legitimate and consistent with the purposes of the ICCPR. By continuing to detain terrorist offenders who pose an unacceptable risk of committing serious terrorism offences, the scheme protects and promotes the rights of people in the community whose life, liberty and property would be imperilled by the commission of serious terrorism offences.

37. The scheme includes numerous features designed to ensure that detention is only authorised where it is non-arbitrary:

- only a limited class of persons can be subject to the scheme and the characteristic used to define that class (imprisonment for a terrorism-related offence) is rationally connected with the scheme’s protective purpose

- only the Attorney-General, or their legal representative, can apply for a continuing detention order or interim detention order
- the terrorist offender must be provided with certain documents to enable him or her to prepare for the Court's hearing of an application for a continuing detention order
- the power to make a continuing detention order or interim detention order lies with an independent judicial authority (the Supreme Court of the relevant State or Territory) bound to apply the rules of evidence and procedure applicable in civil matters
- the terrorist offender can adduce evidence and make submissions in court proceedings
- when deciding an application for, or reviewing, a continuing detention order the Court must have regard to a range of matters rationally connected with the level of risk posed by the terrorist offender (for example, their degree of participation in rehabilitation programs), including the evidence of an independent expert competent to assess the risk posed by the terrorist offender
- the threshold for making a continuing detention order is high: the Court must be 'satisfied to a high degree of probability, on the basis of admissible evidence' that the terrorist offender poses an 'unacceptable risk' of committing a serious terrorism offence with a maximum penalty of seven years or more imprisonment
- the Court will not make a continuing detention order if other less restrictive measures would be effective in preventing the unacceptable risk
- the Attorney-General bears the onus of satisfying the Court that a continuing detention order should be made and, if reviewed, that a continuing detention order should be affirmed
- the period of detention authorised by a continuing detention order must be limited to a period that is reasonably necessary to prevent the unacceptable risk, and not exceed three years
- the period of detention authorised by an interim detention order must be limited to a period that is reasonably necessary to determine the application for a continuing detention order and not exceed 28 days and the total period of detention authorised by consecutive interim detention orders must not exceed 3 months
- detention under a continuing detention order is subject to review by the Court annually, or sooner if the terrorist offender applies for a review and the Court is satisfied that new facts or circumstances, or the interests of justice, justify the review
- the Court must provide reasons for decisions in an application for a continuing detention order or interim detention order, or in a review of a continuing detention order, and these decisions can be appealed.

38. Accordingly, detention under the scheme is not arbitrary and the scheme therefore complies with the right to freedom from arbitrary detention in Article 9(1).

Procedural guarantees under Article 14 of the ICCPR

39. Article 14(1) of the ICCPR provides that, in the determination of a person's rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The continuing detention

scheme engages this right as continuing detention order proceedings involve the determination of a terrorist offender's rights and obligations.

40. The provisions in new subdivision E require continuing detention order proceedings to be heard by the Supreme Court of a State or Territory and for the Court to apply the rules of evidence and procedure applicable in civil proceedings. The terrorist offender must be provided with certain documents (the application for a continuing detention order, including the report of a relevant expert—subsection 105A.5(4)—and the reasons for a decision in a continuing detention order proceeding—paragraph 105A.16(c)) to enable him or her to prepare for and respond to court rulings. The terrorist offender can adduce evidence and make submissions. The terrorist offender has the benefit of provisions at subsections 105A.7(3) and 105A.12(6), which put the onus on the Attorney-General to satisfy the Court that the relevant threshold for the grant of a continuing detention order is met, and provisions at paragraphs 105A.7(1)(c) and 105A.12(4)(b), that there are no less restrictive alternatives available.

41. Section 105A.16 requires that if a Court makes a continuing detention order decision, the Court must state the reason for its decision and cause those reasons to be entered in the records of the Court—this accords with the requirement in Article 14(1) that any judgement rendered in a suit at law shall be made public.

42. Consequently, subject to the limitations permitted under Article 4(1), the provisions of the Bill protect the rights of terrorist offenders to a fair and public hearing by a competent, independent and impartial tribunal established by law.

43. Articles 14(2) and (3) set out a number of procedural protections that must be observed in the determination of a criminal charge. These protections are not relevant to continuing detention order proceedings, which do not involve the determination of a criminal charge, being civil, rather than criminal, in nature.

44. Article 14(7) provides that no one shall be liable to be tried or punished again for an offence for which he or she has already been finally convicted in accordance with the law and penal procedure of the country.

45. This right is not engaged by the Bill as the continued detention of a terrorist offender under the scheme does not constitute additional punishment for their prior offending – the continued detention is protective rather than punitive or retributive.

46. As well as being defined explicitly in Subdivision A, the scheme's protective purpose is reflected in numerous features of the scheme including the grounds on which a continuing detention order may be made or affirmed; the matters to which the Court must have regard when making or reviewing a continuing detention order; the requirement to consider less restrictive measures and the requirement that the period of detention authorised by a continuing detention order be limited to a period that is reasonably necessary to prevent the unacceptable risk.

47. The fact that the effect of a continuing detention order or interim detention order is to commit the terrorist offender to detention in a prison does not render the detention punitive. The Bill nominates these facilities as the place of detention because they have the infrastructure necessary to appropriately manage terrorist offenders who pose an unacceptable risk of committing serious terrorism offence if released into the community.

Further, the scheme provides that, subject to certain exceptions (related to the management of the prison, the safety of others and the offender's preferences), terrorist offenders detained in a prison under a continuing detention order or interim detention order must be treated in a way that is appropriate to their status as persons who are not serving a sentence of imprisonment and must not be accommodated or detained in the same area or unit of a prison as persons serving sentences of imprisonment.

48. Accordingly, the detention scheme does not further punish those convicted of terrorism offences and Article 14(7) of the ICCPR is not engaged.

Prohibition on the retrospective operation of criminal laws in Article 15 of the ICCPR

49. Article 15 of the ICCPR provides that no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time it was committed. The article also prohibits the imposition of a heavier penalty than the one that was applicable at the time when the criminal offence was committed.

50. The scheme is applicable to terrorist offenders, defined to include persons serving sentences of imprisonment for terrorism-related offences. The scheme will therefore apply to persons convicted of terrorism offences prior to the enactment of the scheme.

51. As outlined in the above discussion of Article 14, detention under a continuing detention order or interim detention order does not constitute punishment. The continued detention of terrorist offenders does not, therefore, constitute a prohibited form of retrospective punishment or the imposition of a penalty for an offence heavier than that which was applicable at the time the offence was committed.

Conditions of detention

52. The Bill at subsection 105A.4(1) provides that, subject to certain exceptions, a terrorist offender detained in a prison under a continuing detention order or an interim detention order must be 'treated in a way that is appropriate to his or her status as a person who is not serving a sentence of imprisonment'. This standard of treatment is mandated 'subject to any reasonable requirements necessary to maintain' 'the management, security or good order of the prison', the 'safe custody or welfare of the offender or any prisoners' and 'the safety or protection of the community'.

53. Subsection 105A.4(2) also requires that the terrorist offender be accommodated or detained in a different area or unit of the prison from persons serving sentences of imprisonment unless the contrary 'is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation or other group activities', 'is necessary for the security or good order of the prison or the safe custody or welfare of the offender or prisoners', 'is necessary for the safety and protection of the community' or 'the offender elects to be so accommodated or detained'.

The right to be treated with humanity and dignity in Article 10 of the ICCPR

54. Article 10(1) of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. The continuing detention scheme may be considered to engage this obligation as it involves detention.

55. Article 10(2)(a) provides that ‘accused persons’ must, save in exceptional circumstances, be segregated from convicted persons and be subject to separate treatment appropriate to their status as unconvicted persons. These obligations do not apply to the continuing detention scheme directly as the scheme does not involve the detention of ‘accused persons’. The grounds for detention under a continuing detention order or interim detention order are not connected with the laying of or determination of a criminal charge.

56. By mandating appropriate standards of treatment and accommodation arrangements, the Bill promotes the rights of terrorist offenders detained under the scheme to be treated with humanity and respect for the inherent dignity of the human person. While the Bill permits deviation from these standards, it does so only where necessary to protect the safety or rights of others, or to reflect the terrorist offender’s wishes. To the extent that the scheme permits limitations on the rights of terrorist offenders under Article 10(1) the limitations are reasonable, necessary and proportionate to achieve legitimate objectives of the scheme.

Obligation to attend assessment

57. When hearing an application for, or reviewing, a continuing detention order the Court has the power to appoint one or more experts to assess the risk of the terrorist offender committing a serious Part 5.3 offence if released into the community. Where an expert is appointed, the offender is required to attend the expert’s assessment. The Court is required to explain to the offender the effect of this requirement, and in deciding whether to make or affirm a continuing detention order, the Court will have regard to the expert’s report and the level of the offender’s participation in the assessment by the expert.

The right to be free from arbitrary or unlawful interference with privacy in Article 17(1) of the ICCPR

58. Article 17(1) provides that no one shall be subjected to arbitrary or unlawful interference with his or her privacy.

59. The requirement that the terrorist offender attend an assessment does not engage this right. The terrorist offender is under no obligation to participate in the assessment or to disclose any private information. The fact that the Court must consider the level of the terrorist offender’s participation in the expert’s assessment does not create a de facto obligation to participate. Participation in the expert’s assessment is not the only means by which the terrorist offender can seek to influence the outcome of the Court’s consideration of an application for, or review of, a continuing detention order; the terrorist offender can adduce his or her own evidence and make submissions.

60. The requirement that the terrorist offender attend an assessment with the expert does not engage Article 17(1).

Schedule 2 – Consequential amendments

61. The Bill amends

- the SD Act to permit the use of ‘protected information’ (defined in section 44 of the SD Act to include information obtained from the use of a surveillance device) in continuing detention order proceedings, and in appeals from such proceedings

- Chapter 3 of the TIA Act to enable authorised persons to deal with information obtained under a stored communications warrant for purposes relating to a continuing detention order, and
- Chapters 2 and 4 of the TIA Act to allow Commonwealth, State and Territory agencies to admit evidence obtained under telecommunications warrants, stored communications warrants and data authorisations in continuing detention order proceedings, and to use, record or communicate information in connection with that purpose.

The right to life and security of the person in Articles 6 and 9 of the ICCPR

62. The right to security of the person in Article 9 of the ICCPR requires states to provide reasonable and appropriate measures to protect a person's physical security. The right to life also places a positive obligation on states to protect individuals from unwarranted actions by private persons, such as acts of terrorism. The obligation to protect life requires the state to take preventative operational measures to protect individuals whose safety may be compromised in particular circumstances, such as by a terrorist act. This includes enhancing the capabilities of law enforcement agencies to respond to a heightened terrorist threat.

63. The Bill promotes the right to life and the right to security of the person by enhancing the capabilities of law enforcement agencies to respond to a heightened terrorist threat. The amendments to the SD and TIA Acts enable pertinent information to be used and disclosed in proceedings against persons who may pose a significant terrorist threat. This allows both the agencies and the Court to make a more informed assessment on the risks to public safety that a high risk terrorist offender may pose.

The right to be free from arbitrary or unlawful interference with privacy in Article 17(1) of the ICCPR

64. Article 17 of the ICCPR prohibits arbitrary or unlawful interference with an individual's privacy, family, home or correspondence. This right may be subject to permissible limitations where those limitations are provided by law and non-arbitrary. In order for limitations not to be arbitrary, they must be aimed at a legitimate objective and be reasonable, necessary and proportionate to that objective.

65. The amendments in Schedule 2 engage Article 17(1) because they permit interference with the privacy of those whose information (that has been previously obtained under a surveillance device or under telecommunications interception warrants, stored communications warrants and data authorisations) can be further used for the purposes of continuing detention and interim detention orders.

66. To justify a limitation of human rights, a legitimate objective must address a pressing or substantial concern and not simply seek an outcome that is desirable or convenient. The amendments to the SD and TIA Acts are intended to make available pertinent evidence where a terrorist offender poses an unacceptable risk of committing a serious terrorism offence if released into the community.

67. Terrorism is a significant threat to national security and public safety. Politically motivated violent acts can indiscriminately threaten the lives and physical safety of Australian citizens. This can perpetuate a climate of fear which is socially divisive, threatening the cohesiveness of Australian society.

68. Proceedings under the new continuing detention order and interim detention order provisions are intended to mitigate the threat of terrorism. Information obtained from a surveillance device or under the TIA Act can be important in applications for such orders and the amendments ensure that covertly collected information can be used in continuing detention order and interim detention order proceedings.

69. Significant safeguards apply to dealing with this information and persons who use information unlawfully are subject to criminal liability.

70. In light of the risk posed by terrorism, interference with the privacy of persons against whom these orders are made is legitimate and proportionate to the objective of protecting the broader community from terrorism.

Conclusion

71. While the Bill engages a range of human rights, it is compatible with human rights because it promotes some rights, and to the extent that it limits some rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

NOTES ON CLAUSES

Clause 1: Short title

73. Clause 1 provides for the short title of the Act to be the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*.

Clause 2: Commencement

74. This clause provides for the commencement of each provision in the Bill, as set out in the table.

75. Table item 1 of the table in subclause 2(1) provides that sections 1 to 3 will commence on the day the Act receives Royal Assent.

76. Table items 2 and 3 provide that Schedule 1 and Part 1 of Schedule 2 will commence on either a day to be fixed by Proclamation, or within 6 months of the day the Act receives Royal Assent. This delayed commencement is to provide sufficient time for administrative arrangements to be put in place to ensure the new regime can work effectively.

77. Table item 4 provides that Part 2, Division 1 of Schedule 2 will commence on either, a day to be fixed by Proclamation, or within 6 months of the day the Act receives Royal Assent. However, if Schedule 9 of the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016* (the CTLA Bill) commences at or before that time, the provisions covered by this table item do not commence at all. Schedule 9 of the CTLA Bill amends the *Telecommunications (Interception and Access) Act 1979* to provide Commonwealth, State and Territory interception agencies with the ability to monitor the compliance of a person subject to a control order.

78. Table item 5 applies to the occurrence in which Part 2, Division 2 of Schedule 2 commences immediately before the commencement of Schedule 9 of the CTLA Bill. However, the provisions covered by this table item will not commence at all if Schedule 9 of the CTLA Bill commences on or before the commencement of the provisions covered by table item 2.

79. Table item 6 provides that Part 2, Division 3 of Schedule 2 will commence on either a day to be fixed by Proclamation, or within 6 months of the day the Act receives Royal Assent. However, if Schedule 9 of the CTLA Bill commences at or before that time, the provisions covered by this table item do not commence at all.

80. Table item 7 provides that Part 2, Division 4 of Schedule 2 will commence at the later of the commencement of the provisions covered by table item 2 or the commencement of Schedule 9 to the CTLA Bill. However, the provisions do not commence if Schedule 9 of the CTLA Bill does not commence at all.

Clause 3: Schedules

81. Legislation that is specific in a Schedule to this Act is amended as set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – *Criminal Code Act 1995*

Criminal Code

Overview

82. The *Criminal Code* and *Crimes Act 1914* establish a range of mechanisms available to law enforcement agencies to ensure the safety of the community. However, Australian law does not currently provide adequate protection from the possible unacceptable risk posed by a high risk terrorist offender at the conclusion of their sentence. While there are State and Territory schemes that provide for the continuing detention of high risk sexual or violent offenders, these schemes do not provide for nationally consistent preventative detention of high risk terrorist offenders.

83. The amendments create a nationally consistent preventative scheme which will ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders who are deemed by a court to pose an unacceptable risk of committing a serious offence under Part 5.3 of the *Criminal Code*.

84. The scheme is modelled on the existing State and Territory sexual or violent offender preventative detention schemes.

Object

85. The object of the scheme is preventative in nature and seeks to ensure the safety and protection of the community by providing for the continuing detention of terrorist offenders serving custodial sentences who pose an unacceptable risk of committing a serious terrorist offence if released into the community upon the expiry of their sentence.

Detention orders

86. The Bill provides for the Supreme Court of a State or Territory to make two types of detention orders against a terrorist offender, as defined in the Bill: a continuing detention order, and an interim detention order.

87. A terrorist offender is defined at section 105A.3 as a person convicted of certain terrorist offences against the *Criminal Code* and who is serving a sentence of imprisonment for the offence, or is subject to either a continuing detention order or an interim detention order.

88. The effect of a continuing detention order is to commit the terrorist offender to detention for the period that order is in force. An order may be made for no more than three years. However, there is no limit to the number of orders that may be made against a terrorist offender.

89. The Court may only make a continuing detention order under section 105A.7 if it is satisfied to a high degree of probability, on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if they were released into the community.

90. There are several matters that the Court must have regard to in making a continuing detention order (section 105A.8).

91. In the event that a terrorist offender's sentence of imprisonment or existing continuing detention order will end before a continuing detention order application has been determined, the Court may issue an interim detention order under subsection 105A.9(2).

92. The Court may only make an interim detention order if it believes that the matters alleged in the application would, if proved, justify making a continuing detention order in relation to the offender. The order detains the terrorist offender in custody for no longer than 28 days. While multiple interim detention orders may be made, the total period of all orders must not exceed 3 months.

Continuing detention order proceedings

93. The Attorney-General, or a legal representative of the Attorney-General, may apply to the Supreme Court of a State or Territory for a continuing detention order in relation to a terrorist offender during the last six months of their sentence. Once an application is made the following occurs:

- The application must be personally provided to the terrorist offender within two business days (subsection 105A.5(4) and section 105A.15).
- A preliminary hearing must be held within 28 days after the application is given to the offender (subsection 105A.6(2)). At that preliminary hearing the Court must decide whether to appoint one or more relevant experts, if the Court believes that the matters alleged in the application would, if proved, justify making a continuing detention order (subsection 105A.6(3)).
- If the Court will not make a decision on whether to make a continuing detention order within the six months before the terrorist offender's sentence or existing continuing detention order has expired, the applicant may apply for, and the Court may grant, an interim detention order (section 105A.9).
- A continuing detention order must specify the period during which it is in force, but must be no longer than three years (subsections 105A.7(4) and 105A.7(5)). However, a court may make successive continuing detention orders (subsection 105A.7(6)).

Safeguards

94. The Bill contains important safeguards. These include:

- A continuing detention order may only be made against a terrorist offender who is at least 18 years old at the expiry of their sentence (paragraph 105A.3(1)(c)).
- The making of a continuing detention order is a judicial process subject to civil rules of evidence and procedure (section 105A.7 and section 105A.13).
- The Court must be satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk before making a continuing detention order (paragraph 105A.7(1)(c)).
- A continuing detention order is appealable as of right and with leave (section 105A.17).
- A continuing detention order is subject to review that must commence within 12 months after the order began to be in force, or the most recent review ended, or by

application of the terrorist offender, or his or her legal representative (section 105A.10 and section 105A.11).

- A continuing detention order remains in force for a maximum of three years (subsection 105A.7(5)).
- The Court may appoint one or more independent experts whose opinion it must have regard to (section 105A.6 and section 105A.8).
- A terrorist offender must not be accommodated or detained in the same area or unit of a prison as persons serving ordinary sentences of imprisonment, except in certain circumstances (section 105A.4).
- A terrorist offender must be personally served with an application for a continuing detention order (subsection 105A.5(4) and section 105A.15).

Item 1 – Division 105A

95. Item 1 inserts Division 105A into the *Criminal Code*. This item provides for the new continuing detention order scheme, allowing for the preventative detention of terrorist offenders who pose an unacceptable risk to the safety and protection of the community at the conclusion of their sentence.

Subdivision A – Object and definitions

Section 105A.1 – Object

96. Section 105A.1 sets out the object of the Division as ensuring the safety and protection of the community. This is to be achieved through the continuing detention of terrorist offenders who pose an unacceptable risk of committing serious Part 5.3 offences if released into the community. A serious Part 5.3 offence is defined under section 105A.2.

Section 105A.2 – Definitions

97. Section 105A.2 provides the definitions for the Division.

Section 105A.2 – definition of ‘continuing detention order’

98. This definition relates to subsection 105A.7(1) which establishes that a Supreme Court of a State or Territory may make a written continuing detention order if certain thresholds are met.

Section 105A.2 – definition of ‘continuing detention order decision’

99. This definition includes two separate decisions:

- a decision by the Court on the application for either a continuing detention order or an interim detention order, or
- a decision to affirm, revoke or vary a continuing detention order upon review.

This definition is relevant in the context of Subdivision E (provisions relating to continuing detention order proceedings). The Court must provide reasons for making a continuing detention order decision. A continuing detention order decision may also be appealed.

Section 105A.2 – definition of ‘continuing detention order proceeding’

100. A continuing detention order proceeding means any proceeding under Subdivision C or D. The definition includes all proceedings relating to a continuing detention order, including a preliminary hearing under section 105A.6, a hearing for a continuing detention order or an interim detention order, a proceeding to determine whether to grant a review under section 105A.11, and a review hearing.

101. This definition is relevant in the context of Subdivision E, which requires the civil evidence and procedure rules to apply to a continuing detention order proceeding.

Section 105A.2 – definition of ‘interim detention order’

102. This definition refers to subsection 105A.9(2) which provides that the Court may make a written interim detention order if certain thresholds are met.

Section 105A.2 – definition of ‘prison’

103. This definition is required because subsection 105A.3(2) provides that a person subject to a continuing detention order or interim detention order must be detained in prison for the period of the order. The definition of prison is broad to provide flexibility to the States and Territories in the types of facilities in which the person will be housed.

Section 105A.2 – definition of ‘relevant expert’

104. This definition provides guidance as to who the Court may appoint as a relevant expert at a preliminary hearing under section 105A.6 or for the purposes of a review of a continuing detention order under section 105A.12. Importantly, the expert must be competent to assess the risk of a terrorist offender committing a serious offence under Part 5.3 of the *Criminal Code*.

Section 105A.2 – definition of ‘serious Part 5.3 offence’

105. A ‘serious Part 5.3 offence’ is an offence against Part 5.3 of the *Criminal Code* that carries a maximum penalty of 7 or more years of imprisonment. The definition therefore excludes less serious offences in Part 5.3 including associating with terrorist organisations (under section 102.8) and contravening a control order (under section 104.27).

Section 105A.2 – definition of ‘terrorist offender’

106. This definition relates to subsection 105A.3(1) which sets out to whom a continuing detention order may apply.

Subdivision B – Continuing detention orders

Section 105A.3 - Who a continuing detention order may apply to and effect of an order

107. Subsection 105A.3(1) provides that a continuing detention order can only be made against a terrorist offender. A terrorist offender is a person convicted of the following offences against the *Criminal Code*:

- Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices)
- Subdivision B of Division 80 (treason)
- Part 5.3 (terrorism) which carries a maximum penalty of 7 or more years imprisonment (a serious Part 5.3 offence), or
- Part 5.5 (foreign incursions and recruitment) (paragraph 105A.3(1)(a)).

108. The person must also be detained in custody and serving a sentence of imprisonment for one of the aforementioned offences, or have a continuing detention order or interim detention order in force against them (paragraph 105A.3(1)(b)).

109. The offences listed in paragraph 105A.3(1)(a) broadly reflect the definition of ‘terrorism offence’ at subsection 3(1) of the *Crimes Act 1914*. Although offences under the *Charter of the United Nations Act 1945* are included in the definition of terrorism offence under the Crimes Act, it is not appropriate to include these offences for the purpose of the scheme on the basis that the most serious financing terrorism offences, carrying a maximum penalty of life imprisonment, are already covered under Division 103 of the *Criminal Code*. To ensure that the scheme is appropriately targeted, the scheme applies to Part 5.3 (terrorism) offences which carry a maximum penalty of 7 or more years. Therefore a person convicted and serving a sentence of imprisonment for the offence of associating with a terrorist organisation (which carries a maximum penalty of only 3 years imprisonment) will not be subject to the scheme.

110. Subsection 105A.3(2) provides that the effect of a continuing detention order is to commit a terrorist offender to detention in a prison, as defined in section 105A.2, for the period of the order.

Section 105A.4 – Treatment of a terrorist offender in a prison under a continuing detention order

111. Section 105A.4 provides that a terrorist offender subject to a continuing detention order must be treated in a way appropriate to their status as a person who is not serving a sentence of imprisonment. This includes not accommodating or detaining them in the same area or unit of a prison as persons serving sentences of imprisonment. However, exceptions are permitted to this requirement on the basis of the management, security or good order of the prison; the safe custody or welfare of the terrorist offender or any prisoners; the safety and protection of the community; the purposes of rehabilitation, treatment, work, education, general socialisation or other group activities; or at the offender’s election. This section does not apply to those who are still serving a sentence of imprisonment.

Subdivision C – Making a continuing detention order

Section 105A.5 – Applying for a continuing detention order

112. Subsection 105A.5(1) provides that the applicant for a continuing detention order is the Attorney-General, or a legal representative of the Attorney-General, and that a State or Territory Supreme Court has jurisdiction to hear an application for a continuing detention order.

113. Subsection 105A.5(2) stipulates the relevant time period for applying for a continuing detention order. If the terrorist offender is serving a sentence of imprisonment, an application may not be made more than six months before the end of the sentence. If the offender is subject to a continuing detention order an application may not be made more than six months before the end of the period for which the order is in force. This allows the Supreme Court a maximum of six months to finalise a continuing detention order proceeding. However, in the event that this process is not finalised before the conclusion of the terrorist offender's sentence of imprisonment or prior continuing detention order the applicant may apply for an interim detention order under section 105A.9.

114. Subsection 105A.5(3) sets out the requirements for the contents of an application for a continuing detention order. An application must include any report or documentation the applicant seeks to rely on, include information about the offender's age, and request a period for which an order should be in force.

115. Subsection 105A.5(4) requires the offender to be given a copy of the application within two days of the application being made. This ensures the offender understands the allegations that have been made against them at a very early stage. It operates in addition to any other applicable procedural rights in a civil proceeding. Subsection 105A.5(5) does not require the Attorney-General to include in the copy of the application that goes to the offender any material over which the Attorney-General may seek protective orders preventing or limiting the disclosure of the information. For example, the Attorney-General may wish to seek suppression orders to ensure that the information in the application can be protected from release to the broader public. The provision will enable the Attorney-General to give a redacted copy of the application to the offender until the Court has dealt with the suppression order application. It will not prevent the material that the Attorney-General seeks to rely on in the application from ultimately being disclosed to the offender.

116. Section 105A.15 provides further guidance for the process of giving terrorist offenders documents.

Section 105A.6 – Appointment of and assessment by relevant expert

117. Subsections 105A.6(1) and 105A.6(2) provide that the Court must hold a preliminary hearing within 28 days after the application is given to the offender under subsection 105A.5(4) to determine whether the court should appoint one or more relevant experts. The role of the expert is to assist the Court in its determination of whether the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community.

118. In order for the Court to appoint an expert under this section, subsection 105A.6(3) requires that the Court must believe that the matters alleged in the application would, if proved, justify making a continuing detention order in relation to the offender. This is a lower threshold than that required for the Court to make a continuing detention order. It is designed to ensure that the Court considers whether there is a minimum basis for the application before requiring the offender to attend an assessment by the expert. The proceedings can continue, even if the Court decides not to appoint an expert because it does not consider this threshold to be met. Furthermore, the Court may decide not to appoint an expert even if it considers the threshold to be met. The decision to appoint an expert is at the Court's discretion.

119. Under subsection 105A.6(4) the relevant expert appointed by the Court must conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community. This assessment is independent and the report must be provided to the Court, the Attorney-General and the offender to ensure that all parties are aware of the evidence provided to the Court. This does not limit the rights of any party to adduce further evidence under section 105A.14, or the matters the Court must have regard to under section 105A.8. The offender must be provided with the report in accordance with the process for giving terrorist offenders documents as set out in section 105A.15.

120. Subsection 105A.6(5) provides that the offender must attend the assessment, which may occur over multiple sessions. This subsection does not compel the offender to participate in any meaningful way. However, the level of the offender's participation in the assessment is a matter the Court must have regard to under subsection 105A.8(b).

121. Subsection 105A.6(6) requires the Court to ensure that the offender is provided with an explanation of the effect of both the requirement for the offender to attend the assessment (under subsection 105A.6(5)), and the fact that the Court must have regard to the offender's participation in the assessment (under subsection 105A.8(b)). The Court is not required to explain the effect of these provisions to the offender itself, but must ensure that they have been explained to the offender.

122. Subsection 105A.6(7) provides for the matters which the expert's report must include. It allows for the expert to consider all issues that may be relevant to each individual offender and to assist the Court in its assessment.

Section 105A.7 – Making a continuing detention order

123. Subsection 105A.7(1) sets out matters of which a Supreme Court of a State or Territory must be satisfied in order to make a continuing detention order. Importantly, in order to make a continuing detention order, the Court must be satisfied to a high degree of probability on the basis of admissible evidence, that the offender poses an unacceptable risk of committing a serious Part 5.3 offence if the offender is released into the community.

124. The term 'unacceptable risk' is not defined within the Bill and is to be left open to the Court to apply flexibly on an individual basis. The reference to 'admissible evidence' emphasises the need for the Court to apply the rules of evidence and procedure for civil matters (subsection 105A.13(1)). The Court may consider evidence of the terrorist offender's criminal history (subsection 105A.13(2)).

125. Paragraph 105A.7(1)(c) states that to make a continuing detention order the Court must be satisfied that there is no less restrictive measure that would be effective in preventing the unacceptable risk. An example of a less restrictive measure is a control order under sections 104.4 or 104.14 of the *Criminal Code*. However, this will not require an application for a control order to be made or for the Court to consider whether the threshold for obtaining a control order would be met. Rather, the Court would need to be satisfied that the kinds of conditions that may be available under a control order, such as wearing a tracking device or placing restrictions on who the offender can communicate or associate with, would not be effective in preventing the unacceptable risk of the offender committing a Part 5.3 offence if they were released into the community. It is not open to the Court to make a control order as an alternative to a continuing detention order. Subject to the Attorney-General's consent, a senior Australian Federal Police member would need to separately request an issuing court to

make an interim control order pursuant to section 104.3 of the *Criminal Code*. An issuing court is defined at subsection 100.1(1) of the *Criminal Code* as the Federal Court of Australia, the Family Court of Australia or the Federal Circuit Court of Australia.

126. Subsection 105A.7(2) provides that if the Court is not satisfied of the matters in subsection 105A.7(1) it must dismiss the application.

127. Subsection 105A.7(3) makes it clear that the Attorney-General bears the onus of satisfying the Court of the required threshold in subsections 105A.7(1)(b) and 105A.7(1)(c).

128. Subsections 105A.7(4) and 105A.7(5) provide that the Court must specify in its written order the period for which the order is in force. The Court must be satisfied that the period is reasonably necessary to prevent the unacceptable risk. The period must not be longer than 3 years. Subsection 105A.7(6) clarifies that the requirement that an order be no longer than 3 years does not prevent the Court from making successive continuing detention orders. There is no limit to the number of continuing detention orders that may be made against a terrorist offender.

Section 105A.8 – Matters a Court must have regard to in making a continuing detention order

129. Section 105A.8 provides for the matters that the Court must have regard to in considering whether it is satisfied of the matters set out in paragraph 105A.7(1)(b). These include:

- the safety and protection of the community
- the report of any Court appointed expert, and the level of the offender's participation in the assessment by the expert
- the results of any other assessment conducted by a relevant expert of the risk of the offender committing a serious Part 5.3 offence, and the level of the offender's participation in any such assessment
- reports prepared by relevant corrective services and other authorities competent to assess the extent to which the offender can be reasonably and practically managed in the community
- the offender's participation in any treatment and rehabilitation programs
- the offender's compliance with obligations while on parole for any offence, or subject to a continuing or interim detention order
- the offender's criminal history
- views of the sentencing court at the time the relevant sentence of imprisonment was imposed
- any other information as to the risk of the offender committing a serious Part 5.3 offence, and
- any other matter the Court considers relevant.

Section 105A.9 – Interim detention orders

130. Subsection 105A.9(1) enables the Attorney-General, or a legal representative of the Attorney-General, to apply to the Supreme Court of a State or Territory to seek an interim detention order. An application may only be made if an application for a continuing detention order has been made to the Court in relation to the offender.

131. Subsection 105A.9(2) sets out the circumstances in which the Court may make an interim detention order, and the matters of which it must be satisfied. The purpose of an interim detention order is to ensure that an interim measure can be put in place when the terrorist offender's sentence, or existing continuing detention order, will come to an end before the Court has been able to make a decision on whether to make the continuing detention order.

132. An interim detention order has the same effect as a continuing detention order as it commits the offender to detention in prison, as defined in section 105A.2, while the order is in force.

133. Subsections 105A.9(4), 105A.9(5) and 105A.9(6) provide that the Court must specify the length of an interim detention order, however, the period is to be no longer than 28 days. Successive interim detention orders may be made against the offender, however, the total period of all interim detention orders must not exceed 3 months.

134. Subsection 105A.9(7) provides that offenders subject to an interim detention order are to be treated the same as offenders subject to a continuing detention order, as prescribed under section 105A.4.

Subdivision D

Section 105A.10 – Periodic review of continuing detention order

Section 105A.10 requires the Supreme Court of the State or Territory in which an offender who is subject to a continuing detention order is detained to begin a review of the continuing detention order within 12 months after the order began to be in force. Following that initial review, the Court must periodically review the continuing detention order within 12 months after the end of the most recent review. A review is not required where an application for a new continuing detention order has been made in relation to the offender.

Section 105A.11 – Review of continuing detention order on application

135. In addition to the required periodic review of the continuing detention order under section 105A.10, subsection 105A.11(1) gives the terrorist offender, or their legal representative, a right to apply for a review of their continuing detention order to the Supreme Court of the State or Territory in which they are detained.

136. Subsection 105A.11(2) provides the matters that the Court must be satisfied of in order to conduct a review on application. If the Court is not satisfied of those matters, subsection 105A.11(3) requires the Court to dismiss the application.

Section 105A.12 – Process for reviewing a continuing detention order

137. Section 105A.12 establishes the process for a review of a continuing detention order conducted under either section 105A.10 or 105A.11.

138. Under subsection 105A.12(2) the parties to the review are the Attorney-General and the offender. The Court also has the discretion to appoint one or more relevant experts for the purpose of the review following the processes established in subsections 105A.6(4) to (7).

139. The Court may affirm the order if it is satisfied of the matters set out in paragraph 105A.12(4)(a) and 105A.12(4)(b). If the Court is not so satisfied subsection 105A.12(5) requires that it revoke the order.

140. Under subsection 105A.12(6) the Attorney-General bears the onus of satisfying the Court of the matters set out in subsection 105A.12(4).

141. Following a review of a continuing detention order, if the Court decides to affirm the order, but is not satisfied that the length of the order is reasonably necessary to prevent the unacceptable risk, the Court must under subsection 105A.12(7) vary the order to shorten the time for which it will be in force. In varying the order, the Court must also be satisfied that the new period is reasonably necessary to prevent the unacceptable risk.

Subdivision E – Provisions relating to continuing detention order proceedings

Section 105A.13 – Civil evidence and procedure rules in relation to continuing detention order proceedings

142. Subsection 105A.13(1) provides that, in any continuing detention order proceeding the Supreme Court of a State or Territory must apply the rules of evidence and procedure for civil matters. However, subsection 105A(2) provides that, despite that, the Court may receive evidence of the terrorist offender's criminal history (including prior convictions or findings of guilt in respect of any offences).

Section 105A.14 – Adducing evidence and making submissions

143. Section 105A.14 ensures that any party to a continuing detention order proceeding is entitled to adduce evidence (including by calling witness or producing material), or make submissions, to the Court in relation to the proceeding.

Section 105A.15 – Giving terrorist offenders documents

144. Section 105A.15 provides for the process if a terrorist offender is required to be given a document under Division 105A. In the event that a terrorist offender is required to be given a document, it is taken to have been given to the offender if it is given to the chief executive officer (however described) of the prison in which they are detained.

145. Subsection 105A.15(2) requires the chief executive officer to give the document to the offender as soon as reasonably practicable. Once they have done so, the chief executive officer must notify the Court and the person who gave the offender the document, in writing that the document was given to the offender and the day it was given to the offender. This section ensures that the offender has full access to the information and documents relevant to the proceeding, and that the time limits prescribed within Division 105A operate fairly.

Section 105A.16 – Reasons for decisions

146. Section 105A.16 requires the Court to provide reasons for its decision in relation to any continuing detention order decision. The Court must also cause those reasons to be entered into the records of the Court and a copy of any order to be provided to each party.

Section 105A.17 – Right of Appeal

147. Subsection 105A.17(1) provides that a right of appeal lies to the court of appeal of a State or Territory when a Supreme Court of a State or Territory makes a continuing detention order.

148. Subsection 105A.17(2) establishes that an appeal is to be by way of rehearing. It also clarifies the powers of the Court when hearing an appeal.

149. Subsection 105A.17(3) ensures that appeals may be made both as of right (within 28 days after the day the continuing detention order decision was made), or by leave of the court, within such further time as the court of appeal may allow.

150. Subsections 105A.17(4) and 105A.17(5) stipulate that the making of an appeal does not stay the operation of a continuing detention order or interim detention order, and that nothing in section 105A.17 limits any other right of appeal.

Section 105A.18 – Consequences of release of terrorist offender

151. Subsection 105A.18(2) addresses the situation in which the offender is released from custody before a continuing detention order proceeding or an appeal has been determined because, for example, the offender's custodial sentence has expired, or the relevant interim or continuing detention order has expired, or been revoked. In the circumstances prescribed by subsection 105A.18(1), subsection 105.18(2) enables the Court to subject the offender to a continuing detention order, despite the offender not being in custody at the time they make that order.

152. Subsections 105A.18(3) to 105A.18(5) provide that in this situation, police officers have the power to detain the person for the purposes of giving effect to a continuing detention order or an interim detention order. A police officer who takes the person into custody has the same powers and obligations as the police officer would have if they were arresting a person, or detaining a person for an offence.

Subdivision F - Miscellaneous

Section 105A.19 – Sharing information

153. The purpose of section 105A.19 is to facilitate information sharing about a terrorist offender between the Attorney-General, the Attorney-General's Department and relevant third party agencies, for the purpose of Division 105A. Similar to when the Attorney-General makes decisions under the *Crimes Act 1914* (Cth) in relation to parole for federal offenders, the Attorney-General will need to rely heavily on information provided by third parties, and Commonwealth and State or Territory agencies to determine whether to make an application for a continued detention order in relation to a terrorist offender. Section 105A.19 will facilitate the sharing of necessary and relevant information about a terrorist offender to ensure the Attorney-General can make an informed decision.

154. Subsection 105A.19(1) allows the Attorney-General to request a person to give them information that the Attorney-General reasonably believes to be relevant to the administration or execution of Division 105A. The Attorney-General may only request information from a person prescribed by the regulations.

155. Subsection 105A.19(2) specifies that the request for information under subsection 105A.19(1) need not be in writing.

156. Subsection 105A.19(3) allows the Attorney-General to disclose information to a person prescribed by the regulations in the circumstances set out in that subsection.

157. Subsection 105A.19(4) ensures that subsection 105A.19(3) applies despite any other law of the Commonwealth, a State or Territory (whether written or unwritten).

Section 105A.20 – Delegation by the Attorney-General

158. Section 105A.20 provides for the Attorney-General to delegate to the Secretary of the Attorney-General's Department or another relevant employee of the Department who performs duties in connection with the administration or execution of Division 105A, his or her powers and functions in requesting or disclosing information under section 105A.19.

159. The section restricts delegation of the Attorney-General's powers to employees who perform duties in connection with Division 105A. Only a limited number of people in the Department will perform duties in connection with an application for a continuing detention order including being able to request or disclose necessary and relevant information, and this information will be held separately within the Department's record keeping system. This will ensure that other employees of the Department who do not have a need to know, cannot access information about the terrorist offender.

Section 105A.21 – Arrangement with States and Territories

160. Terrorist offenders subject to a continuing detention order will be housed in State and Territory prison facilities. Subsection 105A.21(1) allows the Attorney-General to make mutual arrangements with any State or Territory to facilitate this.

161. Subsection 105A.21(2) provides the chief executive officer (however described) of the prison with authority to detain the offender within the prison for the period of a continuing detention order.

Section 105A.22 – Annual report

162. Subsection 105A.22(1) requires the Attorney-General to, as soon as practicable after 30 June each year, cause a report to be prepared about the operation of this Division during the year ended on that 30 June.

163. Subsection 105A.22(2) requires the report to include the information set out in that subsection.

164. Subsection 105A.22(3) requires the Attorney-General to table copies of the report before each House of the Parliament within 15 sitting days of that House after the report is complete.

Item 2 – In the appropriate position in Division 106 of the *Criminal Code*

Item 2 inserts section 106.8 into the *Criminal Code*.

Section 106.8 – Application provision for amendments in the Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016

165. Section 106.8 prescribes who the Bill will apply to upon commencement. The Bill will apply to any person who has been detained in custody and is serving a sentence of imprisonment for a relevant offence, regardless of whether they were convicted and sentenced prior to the commencement of the Bill. It will also apply to persons who have been convicted of a relevant offence prior to the commencement of the Bill, but sentenced after the commencement of the Bill.

Schedule 2 – Consequential amendments

Part 1 – Amendments commencing on day fixed by Proclamation

Surveillance Devices Act 2004 and Telecommunications (Interception and Access) Act 1979

Overview

166. The amendments in this Schedule will allow agencies to use, communicate or give in evidence information obtained using powers in the *Surveillance Devices Act 2004* (the SD Act) and the *Telecommunications (Interception and Access) Act 1979* (the TIA Act) for purposes related to new Division 105A of the *Criminal Code*.

167. The amendments do not provide new purposes for which intercepted information, stored communications, telecommunications data or surveillance device material can be obtained under a warrant or authorisation. Rather, the amendments allow for information that has been obtained by using those methods to be further used, communicated or given in evidence for purposes related to new Division 105A of the *Criminal Code*.

168. The amendments reflect the structure of continuing detention and interim detention orders. Such orders can only be obtained where the subject has been convicted of certain terrorism offences (e.g. serious Part 5.3 offences) and the continued detention of the terrorist offender is necessary because the person poses an unacceptable risk of committing a serious Part 5.3 offence if released into the community. For instance, the amendments allow for information that was obtained in relation to the conviction of the original terrorism offence to be adduced in an application to keep the offender in detention to prevent the commission of a further terrorism offence.

Item 1 – Subsection 6(1) of the SD Act

169. Item 1 inserts a new paragraph into the definition of ‘relevant proceeding’ under section 6 of the SD Act to include a proceeding under, or related to a matter arising under, Division 105A of the *Criminal Code*.

170. This item will allow protected information (within the meaning of section 44 of the SD Act) to be used, recorded, communicated, published or admitted in evidence for the

purposes of a proceeding under, or related to a matter arising under, Division 105A of the *Criminal Code*.

Items 2 and 3 – Subsection 5(1) of the TIA Act

171. Subsection 63(1) of the TIA Act prohibits a person from communicating to another person, making use of, or making a record of lawfully intercepted information. Section 67 of the TIA Act establishes an exception to this prohibition. This exception enables officers of the relevant interception agency to communicate to another person, make use of, or make a record of lawfully intercepted information for a ‘permitted purpose’.

172. This item amends the definition of ‘permitted purpose’ to provide the AFP and state and territory police with the ability to use, communicate or record lawfully intercepted information for the purposes of continuing detention and interim detention orders under new Division 105A of the *Criminal Code*.

Item 4 – After paragraph 5B(1)(bc) of the TIA Act

173. Subsection 63(1) of the TIA Act prohibits a person from giving in evidence in a proceeding lawfully intercepted information. Section 74 of the TIA Act establishes an exception to this prohibition. Subsection 74(1) relevantly provides that a person may give lawfully intercepted information ‘in evidence in an exempt proceeding’.

174. Item 4 amends the definition of ‘exempt proceeding’ in subsection 5B(1) of the Act to allow agencies to use lawfully intercepted information in a proceeding relating to continuing detention and interim detention orders under Division 105A of the *Criminal Code*.

Item 5 – Before section 140 of the TIA Act

175. ‘Lawfully accessed information’ is defined as information obtained by accessing a stored communication otherwise than in contravention of subsection 108(1). Pursuant to paragraph 108(2)(a), the prohibition in subsection 108(1) does not apply to accessing a stored communication under a stored communications warrant.

176. Item 5 inserts new section 139C which ensures that ‘lawfully accessed information’ can be used, communicated, recorded or given in evidence for a purpose connected with new Division 105A of the *Criminal Code*.

Item 6 – After subparagraphs 180D(2)(b)(i) and (c)(i)

177. Sections 180A and 180B allow an authorised officer of the Australian Federal Police (AFP) to authorise access to historical (180A) and prospective (180B) telecommunications data if the disclosure is reasonably necessary for the enforcement of the criminal law of a foreign country. The authorised officer may only lawfully authorise the use or disclosure of information obtained under an 180A or 180B for a limited number of purposes.

178. Item 6 inserts new subparagraphs to allow an authorised officer in the AFP to authorise the use or disclose of information or documents obtained under an 180A or 180B authorisation if the use or disclosure is reasonably necessary for the purposes of the new Division 105A.

Items 7 & 8 – After subparagraphs 181B(3)(b)(ii) and 181B(6)(b)(i)

179. Section 181B prohibits a person from disclosing or using information about an authorisation for telecommunications data (or its revocation) by an enforcement agency under Division 4 or information about such an authorisation (or revocation). Division 4 regulates access to historical and prospective telecommunication data by enforcement agencies, allowing an authorised officer to disclose data if reasonably necessary for the enforcement of the criminal law, location of missing persons, imposing a pecuniary penalty or protecting the public revenue. Contravention of the prohibition against the use and disclosure of this information exposes a person to criminal liability.

180. Items 7 and 8 insert subparagraphs to allow a person to use or disclose this information for the purposes of the new Division 105A.

181. There has been no amendment to subsections 181A(3) and 181A(6), which apply to the disclosure and use of information in relation to authorisations made by the Australian Security Intelligence Organisation (ASIO), as those provisions enable ASIO to disclose such information for purposes related to new Division 105A in the performance of its functions.

Items 9 & 10 – After subparagraphs 182(2)(a)(iii) and 182(3)(a)(ii)

182. Subsection 182(1) prohibits a person from disclosing or using information or documents provided to them as permitted by Division 4 or 4A. Division 4 and 4A regulate access to historical and prospective telecommunications data by enforcement agencies. Division 4 allows an authorised officer to disclose data if reasonably necessary for the enforcement of the criminal law, location of missing persons, imposing a pecuniary penalty or protecting the public revenue. Division 4A allows an authorised AFP officer to disclose data if reasonably necessary for the enforcement of the criminal law of a foreign country. Contravention of the prohibition against the use and disclosure of this information exposes a person to criminal liability.

183. Items 9 and 10 insert paragraphs to allow a person to use or disclose this information if the disclosure is reasonably necessary for the purposes of Division 105A.

Item 11 – After subparagraphs 182B(b)(iv)

184. Section 182A prohibits a person from disclosing or using information about a journalist information warrant or the journalist information warrant (or its revocation). Contravention of this prohibition exposes a person to criminal liability.

185. Item 11 inserts a paragraph to allow a person to use or disclose this information if the disclosure is reasonably necessary for the purposes of Division 105A.

Part 2 – Contingent amendments

186. This Part is contingent on items 51 to 55 of the *Counter-Terrorism Legislation Amendment Bill (No. 1) 2016* (the CTLA Bill) passing Parliament and receiving Royal Assent. These items relate to the introduction of new section 139B, and amend provisions relating to further dealing of ‘lawfully accessed information’ and the destruction of such information.

187. Depending on the passage of the CTLA Bill, sections 139, 139A, 142 and 150 will be amended to reflect the introduction of new section 139C (item 5 of Schedule 1). These provisions relate to further dealing of 'lawfully accessed information' and the destruction of such information.