



# **Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016**

**No. 95, 2016**

**An Act to amend the *Criminal Code Act 1995*, and for related purposes**

Note: An electronic version of this Act is available on the Federal Register of Legislation (<https://www.legislation.gov.au/>)



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**No. 95, 2016**

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## **An Act to amend the *Criminal Code Act 1995*, and for related purposes**

[Assented to 7 December 2016]

The Parliament of Australia enacts:

### **1 Short title**

This Act is the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*.

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## 2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day this Act receives the Royal Assent.	7 December 2016
2. Schedule 1	A single day to be fixed by Proclamation. However, if the provisions do not commence within the period of 6 months beginning on the day this Act receives the Royal Assent, they commence on the day after the end of that period.	
3. Schedule 2, Part 1	At the same time as the provisions covered by table item 2.	
4. Schedule 2, Part 2, Division 1	At the same time as the provisions covered by table item 2. However, if Schedule 9 to the <i>Counter-Terrorism Legislation Amendment Act (No. 1) 2016</i> commences at or before that time, the provisions covered by this table item do not commence at all.	Never commenced
5. Schedule 2, Part 2, Division 2	Immediately before the commencement of Schedule 9 to the <i>Counter-Terrorism Legislation Amendment Act (No. 1) 2016</i> . However, if that Schedule commences on or before the commencement of the provisions covered by table item 2, the provisions covered by this table item do not commence at all.	Never commenced
6. Schedule 2, Part 2, Division 3	At the same time as the provisions covered by table item 2.	

Commencement information		
Column 1	Column 2	Column 3
Provisions	Commencement	Date/Details
	However, if Schedule 9 to the <i>Counter-Terrorism Legislation Amendment Act (No. 1) 2016</i> does not commence on or before the commencement of the provisions covered by table item 2, the provisions covered by this table item do not commence at all.	
7. Schedule 2, Part 2, Division 4	<p>The later of:</p> <p>(a) immediately after the commencement of the provisions covered by table item 2; and</p> <p>(b) immediately after the commencement of Schedule 9 to the <i>Counter-Terrorism Legislation Amendment Act (No. 1) 2016</i>.</p> <p>However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.</p>	
Note:	This table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.	

- (2) Any information in column 3 of the table is not part of this Act. Information may be inserted in this column, or information in it may be edited, in any published version of this Act.

### 3 Schedules

Legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

## Schedule 1—Criminal Code Act 1995

### *Criminal Code Act 1995*

#### **1A At the end of section 72.3 of the *Criminal Code***

Add:

Note: A court that is sentencing a person who has been convicted of an offence against this section must warn the person about continuing detention orders (see section 105A.23).

#### **1B At the end of section 100.1 of the *Criminal Code***

Add:

Note: A court that is sentencing a person who has been convicted of an offence against this Part, the maximum penalty for which is 7 or more years of imprisonment, must warn the person about continuing detention orders (see section 105A.23).

#### **1C Subsection 104.2(5) of the *Criminal Code***

Repeal the subsection, substitute:

- (5) To avoid doubt, a senior AFP member may seek the Attorney-General's consent to request an interim control order in relation to a person even if:
- (a) such a request has previously been made in relation to the person; or
  - (b) the person is detained in custody.

Note: An interim control order in relation to a person who is detained in custody does not begin to be in force until the person is released from custody (see paragraph 104.5(1)(d)).

#### **1D Paragraph 104.5(1)(d) of the *Criminal Code***

Repeal the paragraph, substitute:

- (d) state that the order does not begin to be in force until:
- (i) it is served personally on the person; and
  - (ii) if the person is detained in custody—the person is released from custody; and

#### **1E After paragraph 104.5(1B)(a) of the *Criminal Code***

Insert:

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- (aa) if the person to whom the order relates is detained in custody—any other matter relating to the person’s detention that the court considers relevant; and

**1F After subsection 104.5(1B) of the *Criminal Code***

Insert:

- (1C) To avoid doubt, if the person is detained in custody, the person has a right to attend court on the day specified for the purposes of paragraph (1)(e).

**1G After subsection 104.5(2) of the *Criminal Code***

Insert:

- (2AA) To avoid doubt, if a control order is in force in relation to a person, the control order does not cease to be in force merely because the person is detained in custody.

Note: However, if a person is detained in custody, and a control order is made in relation to the person, the control order does not begin to be in force until the person is released from custody (see paragraph (1)(d)).

**1H At the end of subsections 104.10(3) and 104.12(1) of the *Criminal Code***

Add:

Note: For the personal service of documents on a person detained in custody, see section 104.28B.

**1J After subsection 104.12(3) of the *Criminal Code***

Insert:

- (3A) Paragraphs (1)(b) and (c) do not apply if the person in relation to whom the interim control order has been made is detained in custody and it is impracticable for the AFP member to comply with those paragraphs.

**1K At the end of subsections 104.12A(2) and (4) and 104.17(1) of the *Criminal Code***

Add:

Note: For the personal service of documents on a person detained in custody, see section 104.28B.

**1L After subsection 104.17(2) of the *Criminal Code***

Insert:

- (2A) Paragraphs (1)(b) and (c) do not apply if the person in relation to whom the interim control order has been declared void, revoked or confirmed is detained in custody and it is impracticable for the AFP member to comply with those paragraphs.

**1M At the end of subsections 104.20(3) and 104.26(1) of the *Criminal Code***

Add:

Note: For the personal service of documents on a person detained in custody, see section 104.28B.

**1N Subsection 104.26(3) of the *Criminal Code***

Omit “interim control order”, substitute “control order”.

**1P After subsection 104.26(3) of the *Criminal Code***

Insert:

- (3A) Paragraphs (1)(b), (c) and (d) do not apply if the person in relation to whom the control order has been made is detained in custody and it is impracticable for the AFP member to comply with those paragraphs.

**1Q After section 104.28A of the *Criminal Code***

Insert:

**104.28B Giving documents to persons detained in custody**

- (1) A document that is required under this Division to be given to a person (the *prisoner*) personally who is detained in custody at a prison is taken to have been given to the prisoner at the time referred to in paragraph (3)(b) if the document is given to the following person (the *recipient*):
- (a) the legal representative of the prisoner;
  - (b) if the prisoner does not have a legal representative—the chief executive officer (however described) of the prison, or a delegate of the chief executive officer.

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Note: The obligation to inform the prisoner of the matters referred to in paragraphs 104.12(1)(b), 104.17(1)(b) and 104.26(1)(b) and (c) might not apply if it is impracticable for an AFP member to comply with the obligation (see subsections 104.12(3A), 104.17(2A) and 104.26(3A)).

- (2) The recipient must, as soon as reasonably practicable, give the document to the prisoner personally.
- (3) Once the recipient has done so, he or she must notify the Court and the person who gave the recipient the document, in writing:
  - (a) that the document has been given to the prisoner; and
  - (b) of the day that document was so given.

## **1 After Division 105 of the *Criminal Code***

Insert:

### **Division 105A—Continuing detention orders**

#### **Subdivision A—Object and definitions**

##### **105A.1 Object**

The object of this Division is 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 Part 5.3 offences if released into the community.

##### **105A.2 Definitions**

In this Division:

***Commonwealth law enforcement officer*** has the meaning given by Part 7.8.

***continuing detention order*** means an order made under subsection 105A.7(1).

***continuing detention order decision*** means:

- (a) a decision on an application for a continuing detention order or an interim detention order; or
- (b) a decision in a review of a continuing detention order to affirm, revoke or vary the order; or

- (c) a decision made under section 105A.15A (when a terrorist offender is unable to engage a legal representative).

***continuing detention order proceeding*** means a proceeding under Subdivision C or D.

***intelligence or security officer*** has the meaning given by Part 10.6.

***interim detention order*** means an order made under subsection 105A.9(2).

***prison*** includes any gaol, lock-up or other place of detention.

***relevant expert*** means any of the following persons who is competent to assess the risk of a terrorist offender committing a serious Part 5.3 offence if the offender is released into the community:

- (a) a person who is:
  - (i) registered as a medical practitioner under a law of a State or Territory; and
  - (ii) a fellow of the Royal Australian and New Zealand College of Psychiatrists;
- (b) any other person registered as a medical practitioner under a law of a State or Territory;
- (c) a person registered as a psychologist under a law of a State or Territory;
- (d) any other expert.

***serious Part 5.3 offence*** means an offence against this Part, the maximum penalty for which is 7 or more years of imprisonment.

***terrorist offender***: see subsection 105A.3(1) and section 105A.18.

## **Subdivision B—Continuing detention orders**

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

- (1) A continuing detention order may be made under section 105A.7 in relation to a person (the ***terrorist offender***) if:
  - (a) the person has been convicted of:

- (i) an offence against Subdivision A of Division 72 (international terrorist activities using explosive or lethal devices); or
  - (iii) a serious Part 5.3 offence; or
  - (iv) an offence against Part 5.5 (foreign incursions and recruitment), except an offence against subsection 119.7(2) or (3) (publishing recruitment advertisements); or
  - (v) an offence against the repealed *Crimes (Foreign Incursions and Recruitment) Act 1978*, except an offence against paragraph 9(1)(b) or (c) of that Act (publishing recruitment advertisements); and
- (b) either:
- (i) the person is detained in custody and serving a sentence of imprisonment for the offence; or
  - (ii) a continuing detention order or interim detention order is in force in relation to the person; and
- (c) if subparagraph (b)(i) applies—the person will be at least 18 years old when the sentence ends.

Note: Before making the order, a Court must be satisfied of certain matters under section 105A.7.

- (2) The effect of the order is to commit the offender to detention in a prison for the period the order is in force.

Note 1: The period must not be more than 3 years (see subsection 105A.7(5)).

Note 2: An arrangement with a State or Territory must be in force for an offender to be detained at a prison of the State or Territory (see subsection 105A.21(2)).

Note 3: The offender may not be eligible to be released on bail or parole while the continuing detention order is in force (see section 105A.24).

#### **105A.4 Treatment of a terrorist offender in a prison under a continuing detention order**

- (1) A terrorist offender who is detained in a prison under a continuing 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, subject to any reasonable requirements necessary to maintain:
- (a) the management, security or good order of the prison; and

- (b) the safe custody or welfare of the offender or any prisoners;  
and
  - (c) the safety and protection of the community.
- (2) The offender must not be accommodated or detained in the same area or unit of the prison as persons who are in prison for the purpose of serving sentences of imprisonment unless:
  - (a) it is reasonably necessary for the purposes of rehabilitation, treatment, work, education, general socialisation or other group activities; or
  - (b) it is necessary for the security or good order of the prison or the safe custody or welfare of the offender or prisoners; or
  - (c) it is necessary for the safety and protection of the community; or
  - (d) the offender elects to be so accommodated or detained.
- (3) This section does not apply if the offender is serving a sentence of imprisonment.

### **Subdivision C—Making a continuing detention order**

#### **105A.5 Applying for a continuing detention order**

- (1) The Attorney-General, or a legal representative of the Attorney-General, (the *applicant*) may apply to a Supreme Court of a State or Territory for a continuing detention order in relation to a terrorist offender.
- (2) However, the application may not be made more than 12 months before the end of:
  - (a) a sentence of imprisonment referred to in subparagraph 105A.3(1)(b)(i) that the offender is serving, at the end of which the offender would be required to be released into the community; or
  - (b) if a continuing detention order is in force in relation to the offender—the period for which the order is in force.
- (2A) The Attorney-General must ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be made.

*Content of application*

- (3) The application must:
- (a) include any report or other document that the applicant intends, at the time of the application, to rely on in relation to the application; and
  - (aa) include:
    - (i) a copy of any material in the possession of the applicant; and
    - (ii) a statement of any facts that the applicant is aware of; that would reasonably be regarded as supporting a finding that the order should not be made; and
  - (b) include information about the offender's age; and
  - (c) request that the order be in force for a specified period.

Note 1: The period must not be more than 3 years (see subsection 105A.7(5)).

Note 2: Evidence may also be adduced later under section 105A.14.

*Giving offender copy of application*

- (4) The applicant must, subject to subsection (5), give a copy of the application to the offender personally within 2 business days after the application is made.

Note: For giving the offender documents, see section 105A.15.

- (5) The applicant is not required to give to the offender, when the applicant gives the copy of the application to the offender under subsection (4), any information included in the application if the Attorney-General is likely to take any of the following actions in relation to the information:
- (a) give a certificate under Subdivision C of Division 2 of Part 3A of the *National Security Information (Criminal and Civil Proceedings) Act 2004*;
  - (b) seek an arrangement under section 38B of that Act;
  - (d) seek an order of the Court preventing or limiting disclosure of the information.
- (6) However, the applicant must give the offender personally a complete copy of the application:
- (a) if the Attorney-General later decides not to take any of the actions referred to in any of paragraphs (5)(a) to (d), or after

the Attorney-General takes such action the Court makes an order—within 2 business days of the Attorney-General's decision or the order (as the case requires); and

- (b) in any case—within a reasonable period before the preliminary hearing referred to in section 105A.6.

Note: For giving the offender documents, see section 105A.15.

#### **105A.6 Appointment of and assessment by relevant expert**

- (1) If an application for a continuing detention order is made to a Supreme Court of a State or Territory in relation to a terrorist offender, the Court must hold a preliminary hearing to determine whether to appoint one or more relevant experts.
- (2) The hearing must be held within 28 days after a copy of the application is given to the offender under subsection 105A.5(4).
- (3) The Court may, either at the preliminary hearing or at any later time in the proceeding, appoint one or more relevant experts if the Court considers that doing so is likely to materially assist the Court in deciding whether to make a continuing detention order in relation to the offender.
- (3A) The Attorney-General, the offender, or a legal representative of the Attorney-General or offender, may nominate one or more relevant experts for the purposes of subsection (3).
- (4) The relevant expert who is appointed must:
  - (a) conduct an assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community; and
  - (b) provide a report of the expert's assessment to the Court, the Attorney-General and the offender.

Note: For giving the offender documents, see section 105A.15.

##### *Attendance and participation at assessment*

- (5) The offender must attend the assessment.

Note: The assessment may be conducted over a number of sessions.

- (5A) None of the following is admissible in evidence against the offender in criminal or civil proceedings:

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- (a) the answer to a question or information given at the assessment;
  - (b) answering a question or giving information at the assessment.
- (6) The Court must ensure that the effect of subsections (5) and (5A) and paragraph 105A.8(1)(b) is explained to the offender.

*Contents of report*

- (7) The expert's report may include any one or more of the following matters:
- (a) the expert's assessment of the risk of the offender committing a serious Part 5.3 offence if the offender is released into the community;
  - (b) reasons for that assessment;
  - (c) the pattern or progression to date of behaviour on the part of the offender in relation to serious Part 5.3 offences, and an indication of the nature of any likely future behaviour on his or her part in relation to serious Part 5.3 offences;
  - (d) efforts made to date by the offender to address the causes of his or her behaviour in relation to serious Part 5.3 offences, including whether he or she has actively participated in any rehabilitation or treatment programs;
  - (e) if the offender has participated in any rehabilitation or treatment programs—whether or not this participation has had a positive effect on him or her;
  - (f) any relevant background of the offender, including developmental and social factors;
  - (g) factors that might increase or decrease any risks that have been identified of the offender committing a serious Part 5.3 offence if the offender is released into the community;
  - (h) any other matters the expert considers relevant.

*Other relevant experts*

- (8) This section does not prevent the Attorney-General, the offender, or a legal representative of the Attorney-General or offender, from calling his or her own relevant expert as a witness in the proceeding.

### **105A.7 Making a continuing detention order**

- (1) A Supreme Court of a State or Territory may make a written order under this subsection if:
- (a) an application is made in accordance with section 105A.5 for a continuing detention order in relation to a terrorist offender; and
  - (b) after having regard to matters in accordance with section 105A.8, the Court 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 the offender is released into the community; and
  - (c) the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

Note 1: An example of a less restrictive measure is a control order.

Note 2: The rules of evidence and procedure for civil matters apply when the Court has regard to matters in accordance with section 105A.8, as referred to in paragraph (1)(b) of this section (see subsection 105A.8(3) and section 105A.13).

- (2) Otherwise, the Court must dismiss the application.

#### *Onus of satisfying Court*

- (3) The Attorney-General bears the onus of satisfying the Court of the matters referred to in paragraphs (1)(b) and (c).

#### *Period of order*

- (4) The order must specify the period during which it is in force.
- (5) The period must be a period of no more than 3 years that the Court is satisfied is reasonably necessary to prevent the unacceptable risk.

#### *Court may make successive continuing detention orders*

- (6) To avoid doubt, subsection (5) does not prevent a Supreme Court of a State or Territory making a continuing detention order in relation to a terrorist offender that begins to be in force

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immediately after a previous continuing detention order in relation to the offender ceases to be in force.

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

- (1) In deciding whether the Court is satisfied as referred to in paragraph 105A.7(1)(b) in relation to a terrorist offender, a Supreme Court of a State or Territory must have regard to the following matters:
- (a) the safety and protection of the community;
  - (b) any report received from a relevant expert under section 105A.6 in relation to the offender, and the level of the offender's participation in the assessment by the expert;
  - (c) 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;
  - (d) any report, relating to the extent to which the offender can reasonably and practicably be managed in the community, that has been prepared by:
    - (i) the relevant State or Territory corrective services; or
    - (ii) any other person or body who is competent to assess that extent;
  - (e) any treatment or rehabilitation programs in which the offender has had an opportunity to participate, and the level of the offender's participation in any such programs;
  - (f) the level of the offender's compliance with any obligations to which he or she is or has been subject while:
    - (i) on release on parole for any offence referred to in paragraph 105A.3(1)(a); or
    - (ii) subject to a continuing detention order or interim detention order;
  - (g) the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence referred to in paragraph 105A.3(1)(a);
  - (h) the views of the sentencing court at the time any sentence for any offence referred to in paragraph 105A.3(1)(a) was imposed on the offender;

- (i) any other information as to the risk of the offender committing a serious Part 5.3 offence.
- (2) Subsection (1) does not prevent the Court from having regard to any other matter the Court considers relevant.
- (3) To avoid doubt, section 105A.13 (civil evidence and procedure rules in relation to continuing detention order proceedings) applies to the Court's consideration of the matters referred to in subsections (1) and (2) of this section.

#### **105A.9 Interim detention orders**

- (1) The Attorney-General, or a legal representative of the Attorney-General, may apply to a Supreme Court of a State or Territory for an interim detention order in relation to a terrorist offender if an application has been made to the Court for a continuing detention order in relation to the offender.
  - (1A) On receiving the application for the interim detention order, the Court must hold a hearing to determine whether to make the order.
  - (2) The Court may make a written order under this subsection if:
    - (a) the Court is satisfied that either of the following periods will end before the application for the continuing detention order has been determined:
      - (i) the sentence of imprisonment referred to in subparagraph 105A.3(1)(b)(i) that the offender is serving;
      - (ii) the period for which a continuing detention order or an interim detention order is in force in relation to the offender; and
    - (b) the Court is satisfied that there are reasonable grounds for considering that a continuing detention order will be made in relation to the offender.
- Note: More than one interim detention order can be made in relation to a person (see subsection (6)).
- (3) The effect of the order is to commit the offender to detention in a prison while the order is in force.

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*Period of order*

- (4) The order must specify the period during which it is in force.
- (5) The period must be a period of no more than 28 days that the Court is satisfied is reasonably necessary to determine the application for the continuing detention order.
- (6) The total period of all interim detention orders made in relation to the offender before the Court makes a decision on the application for the continuing detention order must not be more than 3 months.

*Treatment of certain offenders covered by interim detention orders*

- (7) While an interim detention order is in force in relation to the offender, section 105A.4 applies as if a continuing detention order were in force in relation to the offender.

Note: Section 105A.4 deals with the treatment of a terrorist offender who is in a prison under a continuing detention order.

**Subdivision D—Review of continuing detention order****105A.10 Periodic review of continuing detention order**

- (1A) The Attorney-General, or a legal representative of the Attorney-General, must, before the end of the period referred to in subsection (1B), apply to a Supreme Court of a State or Territory for a review of a continuing detention order that is in force in relation to a terrorist offender.

Note: For when an application is not required to be made, see subsection (2).

- (1B) The application must be made before the end of the period of 12 months after:
  - (a) the order began to be in force; or
  - (b) if the order has been reviewed under this Subdivision by a Supreme Court of a State or Territory—the most recent review ended.

- (1) On receiving the application, the Court must begin the review of the order before the end of that period.

Note: For the process for reviewing a continuing detention order, see section 105A.12.

- (2) Despite subsection (1), an application for a review, and a review, are not required if an application for a new continuing detention order in relation to the offender has been made and not withdrawn.
- (3) The application must be made to the Court of the State or Territory where the prison in which the offender is detained is located.
- (4) If an application is not made in accordance with this section, the order ceases to be in force at the end of the period referred to in subsection (1B).

#### **105A.11 Review of continuing detention order on application**

- (1) A terrorist offender, or a legal representative of a terrorist offender, in relation to whom a continuing detention order is in force may apply to a Supreme Court of a State or Territory for review of the order.

Note: For the process for reviewing a continuing detention order, see section 105A.12.

- (2) The Court may review the order if the Court is satisfied that:
  - (a) there are new facts or circumstances which would justify reviewing the order; or
  - (b) it would be in the interests of justice, having regard to the purposes of the order and the manner and effect of its implementation, to review the order.
- (3) Otherwise, the Court must dismiss the application.
- (4) The application must be made to the Supreme Court of the State or Territory where the prison in which the offender is detained is located.

#### **105A.12 Process for reviewing a continuing detention order**

- (1) This section applies if, under section 105A.10 or 105A.11, a Supreme Court of a State or Territory reviews a continuing detention order that is in force in relation to a terrorist offender.

##### *Parties to the review*

- (2) The parties to the review are:
  - (a) the Attorney-General; and

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(b) the offender.

*Relevant experts*

- (3) The Court may appoint one or more relevant experts for the purposes of the review. If the Court does so, subsections 105A.6(4) to (7) apply in relation to the review.
- (3A) The Attorney-General, the offender, or a legal representative of the Attorney-General or offender, may nominate one or more relevant experts for the purposes of subsection (3).
- (3B) Subsection (3) does not prevent the Attorney-General, the offender, or a legal representative of the Attorney-General or offender, from calling his or her own relevant expert as a witness in the review.

*Affirming or revoking the order*

- (4) The Court may affirm the order if:
- (a) after having regard to the matters referred to in section 105A.8, the Court 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 the offender is released into the community; and
  - (b) the Court is satisfied that there is no other less restrictive measure that would be effective in preventing the unacceptable risk.

Note 1: An example of a less restrictive measure is a control order.

Note 2: The rules of evidence and procedure for civil matters apply when the Court has regard to matters in accordance with section 105A.8, as referred to in paragraph (4)(a) of this section (see subsection 105A.8(3) and section 105A.13).

- (5) Otherwise, the Court must revoke the order.

*Onus of satisfying Court*

- (5A) The Attorney-General must ensure that reasonable inquiries are made to ascertain any facts known to any Commonwealth law enforcement officer or intelligence or security officer that would reasonably be regarded as supporting a finding that the order should not be affirmed.

- (6) The Attorney-General bears the onus of satisfying the Court of the matters referred to in subsection (4).
- (6A) The Attorney-General, or the legal representative of the Attorney-General, must present to the Court:
  - (a) a copy of any material in the possession of the Attorney-General or legal representative; and
  - (b) a statement of any facts that the Attorney-General or legal representative is aware of;that would reasonably be regarded as supporting a finding that the order should not be affirmed.

*Varying the period specified by the order*

- (7) The Court must vary the order to specify a shorter period for which the order will be in force if:
  - (a) the Court affirms the order under subsection (4); but
  - (b) the Court is not satisfied that the period currently specified is reasonably necessary to prevent the unacceptable risk.The shorter period must be a period that the Court is satisfied is reasonably necessary to prevent the unacceptable risk.

**Subdivision E—Provisions relating to continuing detention order proceedings**

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

- (1) A Supreme Court of a State or Territory must, subject to subsection (2), apply the rules of evidence and procedure for civil matters during a continuing detention order proceeding.
- (2) Despite anything in the rules of evidence and procedure, the Court may receive in evidence in the proceeding evidence of:
  - (a) the level of the offender's compliance with any obligations to which he or she is or has been subject while on release on parole for any offence; and
  - (b) the offender's history of any prior convictions for, and findings of guilt made in relation to, any offence.

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**105A.14 Adducing evidence and making submissions**

A party to a continuing detention order proceeding in a Supreme Court of a State or Territory may adduce evidence (including by calling witnesses or producing material), or make submissions, to the Court in relation to the proceeding.

**105A.15 Giving terrorist offenders documents**

- (1) A document that is required to be given under this Division to a terrorist offender who is detained in a prison is taken to have been given to the offender at the time referred to in paragraph (3)(b) if the document is given to the following person (the *recipient*):
  - (a) the legal representative of the offender;
  - (b) if the offender does not have a legal representative—the chief executive officer (however described) of the prison, or a delegate of the chief executive officer.
- (2) The recipient must, as soon as reasonably practicable, give the document to the offender personally.
- (3) Once the recipient has done so, he or she must notify the Court and the person who gave the recipient the document, in writing:
  - (a) that the document has been given to the offender; and
  - (b) of the day that document was so given.

**105A.15A When a terrorist offender is unable to engage a legal representative**

- (1) This section applies if:
  - (a) a continuing detention order proceeding relating to a terrorist offender is before a Supreme Court of a State or Territory; and
  - (b) the offender, due to circumstances beyond the offender's control, is unable to engage a legal representative in relation to the proceeding.
- (2) The Court may make either or both of the following orders:
  - (a) an order staying the proceeding for such period and subject to such conditions as the Court thinks fit;

- (b) an order requiring the Commonwealth to bear, in accordance with the regulations (if any), all or part of the reasonable costs and expenses of the offender's legal representation for the proceeding.
- (3) The regulations may prescribe matters that the Court may, must or must not take into account in determining either or both of the following:
  - (a) whether circumstances are beyond the offender's control;
  - (b) reasonable costs and expenses of the offender's legal representation for the proceeding.
- (4) This section does not limit any other power of the Court.

#### **105A.16 Reasons for decisions**

A Supreme Court of a State or Territory that makes a continuing detention order decision in a continuing detention order proceeding must:

- (a) state the reasons for its decision; and
- (b) cause those reasons to be entered in the records of the Court; and
- (c) cause a copy of any order it made to be provided to each party to the proceeding.

#### **105A.17 Right of appeal**

- (1) An appeal lies to the court of appeal (however described) of a State or Territory if:
  - (a) the Supreme Court of the State or Territory makes a continuing detention order decision; and
  - (b) the court of appeal has jurisdiction to hear appeals from the Supreme Court in relation to civil matters.
- (2) The appeal is to be by way of rehearing. In particular, in relation to the appeal, the court of appeal:
  - (a) subject to this subsection, has all the powers, functions and duties that the Supreme Court has in relation to the relevant continuing detention order proceedings; and
  - (b) may draw inferences of fact which are not inconsistent with the findings of the Supreme Court; and

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- (c) may receive further evidence as to questions of fact (orally in court, by affidavit or in any other way) if the court of appeal is satisfied that there are special grounds for doing so.
  - (3) The appeal against the decision of the Supreme Court may be made:
    - (a) as of right, within 28 days after the day on which the decision was made; or
    - (b) by leave, within such further time as the court of appeal allows.
  - (4) The making of the appeal does not stay the operation of the order.
  - (5) This section does not limit any other right of appeal that exists apart from this section.

### **105A.18 Consequences of release of terrorist offender**

- (1) This section applies in relation to a continuing detention order proceeding if:
  - (a) the proceeding is any of the following:
    - (i) a proceeding on an application for a continuing detention order in relation to a terrorist offender;
    - (ii) an appeal against a decision to dismiss such an application;
    - (iii) an appeal against a decision to revoke a continuing detention order in relation to a terrorist offender;
    - (iv) an appeal against a decision (including in a review of such an order) to specify a particular period for which such an order will be in force;
    - (v) an appeal against a decision under section 105A.15A to stay a continuing detention order proceeding in relation to a terrorist offender (including a decision under that section to stay a proceeding for a specified period or to impose a specified condition); and
  - (b) before the application or appeal is determined (whether before or after the appeal is made), the offender is released from custody because:
    - (i) the sentence of imprisonment referred to in subparagraph 105A.3(1)(b)(i) that the offender was serving ends; or

- (ii) the period for which a continuing detention order or an interim detention order is in force in relation to the offender ends; or
  - (iii) a continuing detention order in force in relation to the offender was revoked as referred to in subparagraph (a)(iii) of this subsection.
- (2) For the purposes of the continuing detention order proceeding:
  - (a) the offender is taken to remain a terrorist offender despite being released from custody; and
  - (b) a reference in this Division to the offender being released into the community includes a reference to the offender remaining in the community.

*Power of police officer to detain terrorist offender*

- (3) If a continuing detention order or interim detention order is in force in relation to the offender at any time after the offender is released as mentioned in paragraph (1)(b):
  - (a) any police officer may take the offender into custody; and
  - (b) any police officer may detain the offender;for the purpose of giving effect to the order.
- (4) A police officer, in:
  - (a) taking the offender into custody; or
  - (b) detaining the offender;under subsection (3) has the same powers and obligations as the police officer would have if the police officer were arresting the offender, or detaining the offender, for an offence.
- (5) In subsection (4):

**offence** means:

  - (a) if the police officer is an AFP member—an offence against a law of the Commonwealth; or
  - (b) if the police officer is not an AFP member—an offence against a law of the State or Territory of whose police force the police officer is a member.

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**Subdivision F—Miscellaneous****105A.19 Sharing information***Requesting information*

- (1) The Attorney-General may request a person prescribed by the regulations for the purposes of this subsection to give the Attorney-General information that the Attorney-General reasonably believes to be relevant to the administration or execution of this Division.
- (2) The request need not be in writing.

*Disclosing information*

- (3) The Attorney-General may disclose information to a person prescribed by the regulations for the purposes of this subsection if:
  - (a) the information was acquired by any of the following in the exercise of a power under, or the performance of a function or duty in connection with, this Division:
    - (i) the Attorney-General;
    - (ii) a legal representative of the Attorney-General;
    - (iii) the Secretary of the Department;
    - (iv) an APS employee in the Department; and
  - (b) 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; and
  - (c) if the regulations provide that information may be disclosed to the person only if specified circumstances are met—those circumstances are met.
- (4) Subsection (3) applies despite any other law of the Commonwealth, a State or a Territory (whether written or unwritten).

**105A.20 Delegation by the Attorney-General**

The Attorney-General may, in writing, delegate any of his or her powers or functions under section 105A.19 to any of the following persons:

- (a) the Secretary of the Department;
- (b) any APS employee in the Department who performs duties in connection with the administration or execution of this Division.

#### **105A.21 Arrangement with States and Territories**

- (1) The Attorney-General may arrange for a terrorist offender in relation to whom a continuing detention order or interim detention order is in force to be detained in a prison of a State or Territory.
- (2) If an arrangement is made under subsection (1), the continuing detention order or interim detention order is taken to authorise the chief executive officer (however described) of the prison to detain the offender at the prison while the order is in force.

#### **105A.22 Annual report**

- (1) The Attorney-General must, as soon as practicable after each 30 June, cause a report to be prepared about the operation of this Division during the year ended on that 30 June.
- (2) Without limiting subsection (1), a report relating to a year must include the number of each of the following:
  - (a) applications for continuing detention orders made during the year;
  - (b) applications for interim detention orders made during the year;
  - (c) continuing detention orders made during the year;
  - (d) interim detention orders made during the year;
  - (e) applications for review of continuing detention orders made by terrorist offenders during the year;
  - (f) continuing detention orders affirmed during the year;
  - (g) continuing detention orders varied during the year;
  - (h) continuing detention orders revoked during the year.
- (3) The Attorney-General must cause copies of the report to be laid before each House of the Parliament within 15 sitting days of that House after the report is completed.

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**105A.23 Warning about continuing detention orders when sentencing for certain offences**

- (1) A court that is sentencing a person who is convicted of an offence referred to in paragraph 105A.3(1)(a) must warn the person that an application may be made under this Division for a continuing detention order requiring the person to be detained in a prison after the end of the person's sentence for the offence.
- (2) A failure by the court to comply with subsection (1) does not:
  - (a) affect the validity of the sentence for the offence; or
  - (b) prevent an application from being made under this Division in relation to the person.

**105A.24 Effect of continuing detention orders on bail or parole laws**

- (1) A person in relation to whom a continuing detention order or an interim detention order is in force is not eligible to be released on bail or parole until the order ceases to be in force.
- (2) Subsection (1) does not prevent the person from applying, before the order ceases to be in force, to be released on bail if the person is charged with an offence while the order is in force.

Note: Although the person can apply to be released on bail, as a result of subsection (1), the person cannot be released on bail until the continuing detention order ceases to be in force.

- (3) This section applies despite any law of the Commonwealth, a State or a Territory.

**105A.25 Sunset provision**

A continuing detention order, and an interim detention order, cannot be applied for, or made, after the end of 10 years after the day the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* received the Royal Assent.

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

Insert:

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

- (1) The amendments of section 104.2 made by the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* apply in relation to any control order, whether made before or after this section commences.
- (2) The amendments of subsections 104.5(1) and (1B) and section 104.12 made by that Act apply in relation to a control order if the request for the control order is made after this section commences.
- (3) Subsections 104.5(1C) and (2AA), as inserted by that Act, apply in relation to any control order, whether made before or after this section commences.
- (4) The amendments of section 104.17 made by that Act apply in relation to any interim control order that is declared to be void, revoked or confirmed after this section commences.
- (5) The amendments of section 104.26 made by that Act apply in relation to any control order varied after this section commences.
- (6) Section 104.28B, as inserted by that Act, applies in relation to the giving of documents after this section commences.
- (7) Division 105A (except section 105A.23), as inserted by that Act, applies in relation to:
  - (a) any person who, on the day this section commences, is detained in custody and serving a sentence of imprisonment for an offence referred to in paragraph 105A.3(1)(a) of this Code; and
  - (b) any person who, on or after that day, begins a sentence of imprisonment for such an offence (whether the conviction for the offence occurred before, on or after that day).
- (8) Section 105A.23, as inserted by that Act, applies in relation to any sentence imposed on a person after this section commences, whether the offence in relation to which the sentence is imposed was committed before or after that commencement.

**3 At the end of section 117.1 of the *Criminal Code***

Add:

Note: A court that is sentencing a person who has been convicted of an offence against this Part (except subsection 119.7(2) or (3)) must warn the person about continuing detention orders (see section 105A.23).

## Schedule 2—Consequential amendments

### Part 1—Amendments commencing on day fixed by Proclamation

#### *Crimes Act 1914*

##### **1A Paragraph 3ZQU(1)(e)**

Omit “or 105”, substitute “, 105 or 105A”.

##### **1B Paragraph 3ZZEA(1)(d)**

Omit “or 105”, substitute “, 105 or 105A”.

##### **1C At the end of subsection 16F(1)**

Add:

Note: A court that is sentencing a person who has been convicted of an offence referred to in paragraph 105A.3(1)(a) of the *Criminal Code* must warn the person about continuing detention orders (see section 105A.23 of the Code).

#### *Independent National Security Legislation Monitor Act 2010*

##### **1D After subparagraph 6(1)(a)(i)**

Insert:

(ia) without limiting subparagraph (i), Division 105A of the *Criminal Code* and any other provision of that Code as far as it relates to that Division; and

##### **1E After subsection 6(1B)**

Insert:

(1C) The Independent National Security Legislation Monitor must complete the review under subparagraph (1)(a)(ia) before the end of 5 years after the day the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* received the Royal Assent.

### ***Intelligence Services Act 2001***

#### **1F After paragraph 29(1)(ca)**

Insert:

- (cb) without limiting paragraphs (baa) to (bac), to review, before the end of 6 years after the day the *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016* received the Royal Assent, the operation, effectiveness and implications of Division 105A of the *Criminal Code* and any other provision of that Code as far as it relates to that Division;

### ***Surveillance Devices Act 2004***

#### **1 Subsection 6(1) (after paragraph (o) of the definition of *relevant proceeding*)**

Insert:

- (oa) a proceeding under, or related to a matter arising under, Division 105A of the *Criminal Code* (continuing detention orders); or

### ***Telecommunications (Interception and Access) Act 1979***

#### **2 Subsection 5(1) (at the end of paragraph (b) of the definition of *permitted purpose*)**

Add:

- (vii) the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under, Division 105A of the *Criminal Code*, so far as the function, duty or power relates to a continuing detention order or an interim detention order; or

#### **3 Subsection 5(1) (after subparagraph (c)(iv) of the definition of *permitted purpose*)**

Insert:

- (iva) the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in

relation to a matter arising under, Division 105A of the *Criminal Code*, so far as the function, duty or power relates to a continuing detention order or an interim detention order; or

**4 After paragraph 5B(1)(bc)**

Insert:

- (bd) a proceeding under, or a proceeding relating to a matter arising under, Division 105A of the *Criminal Code*, so far as the proceeding relates to a continuing detention order or an interim detention order; or

**5 Before section 140**

Insert:

**139C Dealing for purposes relating to continuing detention orders**

- (1) An officer or staff member of:
  - (a) the Australian Federal Police; or
  - (b) the Police Force of a State;may, for one or more purposes referred to in subsection (2), and for no other purpose (other than a purpose referred to in subsection 139(2) or (4A) or 139A(2), if applicable), communicate to another person, make use of, or make a record of lawfully accessed information other than foreign intelligence information.
- (2) The purposes are purposes connected with the performance of a function or duty, or the exercise of a power, by a person, court or other body under, or in relation to a matter arising under, Division 105A of the *Criminal Code* (continuing detention orders).

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

Insert:

- (ia) for the purposes of Division 105A of the *Criminal Code* (continuing detention orders); or

**7 After subparagraph 181B(3)(b)(ii)**

Insert:

- (iia) for the purposes of Division 105A of the *Criminal Code* (continuing detention orders); or

**8 After subparagraph 181B(6)(b)(i)**

Insert:

- (iaa) for the purposes of Division 105A of the *Criminal Code* (continuing detention orders); or

**9 After subparagraph 182(2)(a)(iii)**

Insert:

- (iiia) for the purposes of Division 105A of the *Criminal Code* (continuing detention orders); or

**10 After subparagraph 182(3)(a)(ii)**

Insert:

- (iia) for the purposes of Division 105A of the *Criminal Code* (continuing detention orders); or

**11 After subparagraph 182B(b)(iv)**

Insert:

- (iva) for the purposes of Division 105A of the *Criminal Code* (continuing detention orders); or

## **Part 2—Contingent amendments**

### **Division 1—Amendments if the Counter-Terrorism Legislation Amendment Act (No. 1) 2016 commences after this Act**

#### ***Telecommunications (Interception and Access) Act 1979***

##### **12 Subsection 139(1)**

After “139A(2)”, insert “or 139C(2)”.

##### **13 Subsection 139A(1)**

After “139(2)”, insert “or 139C(2)”.

##### **14 Section 142**

Omit “or 139A”, substitute “, 139A or 139C”.

##### **15 Paragraph 150(1)(b)**

Omit “or 139A(2)”, substitute “, 139A(2) or 139C(2)”.

### **Division 2—Amendment of the Counter-Terrorism Legislation Amendment Act (No. 1) 2016**

#### ***Counter-Terrorism Legislation Amendment Act (No. 1) 2016***

##### **16 Items 51 and 52 of Schedule 9**

Repeal the items, substitute:

##### **51 Subsection 139(1)**

After “139A(2)”, insert “, 139B(2)”.

##### **52 Subsection 139A(1)**

After “139(2)”, insert “or (4A), 139B(2)”.

##### **17 Items 54 and 55 of Schedule 9**

Repeal the items, substitute:

**54 Section 142**

After “139A”, insert “, 139B”.

**55 Paragraph 150(1)(b)**

Omit “139A(2)”, substitute “or (4A), 139A(2), 139B(2)”.

**Division 3—Amendments if the Counter-Terrorism  
Legislation Amendment Act (No. 1) 2016  
commences before this Act**

***Telecommunications (Interception and Access) Act 1979***

**18 Subsection 139(1)**

Omit “or 139B(2)”, substitute “, 139B(2) or 139C(2)”.

**19 Subsection 139A(1)**

Omit “or 139B(2)”, substitute “, 139B(2) or 139C(2)”.

**20 Section 142**

Omit “or 139B”, substitute “, 139B or 139C”.

**21 Paragraph 150(1)(b)**

Omit “or 139B(2)”, substitute “, 139B(2) or 139C(2)”.

**Division 4—Amendments after Counter-Terrorism  
Legislation Amendment Act (No. 1) 2016  
commences**

***Telecommunications (Interception and Access) Act 1979***

**22 Subsection 139B(1)**

Omit “or 139A(2)”, substitute “, 139A(2) or 139C(2)”.

**23 Subsection 139C(1)**

Omit “or 139A(2)”, substitute “, 139A(2) or 139B(2)”.

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*[Minister's second reading speech made in—  
Senate on 15 September 2016  
House of Representatives on 1 December 2016]*

(95/16)

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36      *Criminal Code Amendment (High Risk Terrorist Offenders) Act 2016*      No. 95, 2016