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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

THE HOUSE OF REPRESENTATIVES

INTELLIGENCE AND SECURITY (CONSEQUENTIAL AMENDMENTS) BILL 1986

EXPLANATORY MEMORANDUM

(Circulated by the Authority of the Attorney-General,

the Hon. Lionel Bowen MP)

INTELLIGENCE AND SECURITY  
(CONFIDENTIAL AMENDMENTS) BILL 1986

OUTLINE

This Bill provides for an amendment to the Crimes Act 1914, and for the amendment of other Acts as a consequence of the provisions of the ASIO Amendment Bill and the Inspector-General of Intelligence and Security Bill.

Principal features of the Bill are as follows:

- . the Audit Act 1901 is to be amended to provide for the addition of further details to the certificate supplied by the Minister each year to the Auditor-General dealing with the Organization's exempt account. That certificate will be required to state that the exempt accounts have been subject to internal inspection and examination, and whether any irregularity has been disclosed and, if so, resolved or rectified;
- . amendment of the offence of sedition in the Crimes Act 1914 to remove anachronistic provisions and to provide that the writing and so forth of seditious words is not an offence unless done with an intent to create violence or public disturbance or disorder. This implements a recommendation by Mr Justice Hope in the Report of the Royal Commission on Australia's Security and Intelligence Agencies;
- . the exemption of documents in the possession of, or received from, the Inspector General of Intelligence and Security from the provisions of the Freedom of Information Act 1982;

amendment of the Human Rights Commission Act 1981 to provide that a complaint about an act or practice of a security or intelligence agency is to be investigated by the Inspector-General instead of the Commission;

amendment of the Migration Act 1958 to provide that the Minister can only order the deportation of a person from Australia on security grounds when he has been furnished with an adverse security assessment from ASIO. Where, in accordance with the provisions of the Act, the person has been informed of the adverse assessment, the security assessment will be reviewable by the Security Appeals Tribunal. Where the Tribunal confirms the adverse assessment the Minister will be able to order deportation. This amendment will enable the security grounds on which a deportation decision is based, to be fully reviewed by an independent Tribunal;

finally, there are a number of amendments to the Telecommunications (Interception) Act 1979, corresponding to changes made to the special powers provisions of the ASIO Act, to take account of the new ASIO function of obtaining foreign intelligence in Australia.

#### Financial Impact Statement

The addition to the jurisdiction of the Security Appeals Tribunal may lead to slight increase in the cost of that Tribunal.

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NOTES ON CLAUSES

PART I - PRELIMINARY

Clause 1 - Short Title, etc.

1. Formal.

Clause 2 - Commencement

2. The Act will come into operation on the day on which the majority of the provisions of the Australian Security Intelligence Organisation (Amendment) Act 1986 comes into operation.

PART II - AMENDMENT OF THE ADMINISTRATIVE DECISIONS  
(JUDICIAL REVIEW) ACT 1977

Clause 3 - Principal Act

3. In this Part, the Administrative Decisions (Judicial Review) Act 1977 is the Principal Act.

Clause 4 - Schedule 1

4. Clause 4 adds the Inspector General of Intelligence and Security Act 1986 to the list of Acts contained in paragraph (d) of Schedule 1 of the Principal Act. Clause 4 also adds a new paragraph (da) to Schedule 1, which includes decisions taken under new section 13 of the Migration Act 1958 in the matters covered by the schedule. As a consequence, decisions made under those Acts are not subject to the provisions of the Principal Act - see the definition of 'decision to which this Act applies' contained in section 3 of the Principal Act.

PART III - AMENDMENTS OF THE ARCHIVES ACT 1983

Clause 5 - Principal Act

5. In this Part the Archives Act 1983 is the Principal Act.

Clause 6 - Exemption of certain records

6. Clause 6 amends section 29 of the Principal Act by adding the Inspector General of Intelligence and Security to the list of Commonwealth institutions contained in sub-section 8. The institutions listed in sub-section 8 have authority to determine, without requiring the concurrence of the Director-General of Archives, that records in the possession of that institution that are not in the open access period need not be transferred to Archives, and that Archives shall not be entitled to full and free access to such records. Sub-section 6 of section 29 of the Principal Act provides that, once a record is in the open access period, a determination by an institution listed in sub-section 8 cannot prevent access to the record by the Archives unless a certificate of a Minister under section 34 of the Principal Act is in force in respect of the record. (A record is in the open access period if a period of 30 years has elapsed since the end of the year ending on 31 December in which the record came into existence - sub-section 3(7) of the Principal Act) A ministerial certificate under section 34 of the Principal Act establishes conclusively that the record is an exempt record under sub-section 33(1), and is given where the Minister is satisfied that the record contains information or matter of a kind referred to in paragraphs 33(1)(a) and (b).

PART IV - AMENDMENTS OF THE AUDIT ACT 1901

Clause 7 - Principal Act

6. In this Part, the Audit Act 1901 is the Principal Act.

Clause 8 - Responsibilities of Secretaries

7. The Clause 8 amends section 2AB of the Principal Act by adding a new sub-section (3), which places the same responsibilities on the Director-General of Security, in relation to the Australian Security Intelligence Organisation, as those imposed by sub-section (1) upon the Secretary of a Department for making appropriate arrangements for implementing the provisions of the Audit Act.

Clause 9 - Exempt Accounts.

8. Clause 9 amends section 70D of the Principal Act by adding, in new paras 70D(5)(c) and (d), two additional matters that must be certified by the responsible Minister, in the certificate supplied to the Auditor General each year, namely, whether the exempt accounts have been subject to internal audit and inspection and whether irregularity or deficiency in the exempt accounts has been disclosed and, if so, whether the irregularity or deficiency has been resolved or rectified.

PART V - AMENDMENTS OF THE CRIMES ACT 1914

Clause 10 - Principal Act

9. In this Part, the Crimes Act 1914 is the Principal Act.

Clause 11 - Definition of seditious intention

10. The definition of seditious intention, set out in section 24A of the Principal Act, is amended by omitting paras (b), (c) (e). Those paragraphs are as follows -

'(b) to excite disaffection against the Sovereign or the Government or Constitution of the United Kingdom or against either House of the Parliament of the United Kingdom;

(c) to excite disaffection against the Government or Constitution of any of the Queen's dominions;

(e) to excite disaffection against the connection of the Queen's dominions under the Crown;'

These elements of the definition of seditious intention are deleted as being archaic and no longer relevant to Australia.

Clause 12 - Offences

11. Clause 12 amends section 24C of the Principal Act by adding a new element to the offences relating to a seditious enterprise set out in that section. The amendment will require that the act prescribed by section 24C must be done with the intention of causing violence or creating public disorder or a public disturbance.

Clause 13 - Seditious words

12. Clause 13 amends section 24D of the Principal Act by adding a new element to offences relating to seditious words set out in that section. The proposed amendment will require that acts prescribed by that section must be done with the intention of causing violence or with the intention of creating public disorder or public disturbance.

Clause 14 - Acts done in good faith

13. Clause 14 amends section 24F of the Principal Act by adding 'with the intention of causing violence or creating public disorder or a public disturbance' to the list of acts or things done which are deemed to be not an act or thing done in good faith in sub-section (2).

PART VI - AMENDMENTS OF THE FREEDOM OF INFORMATION ACT 1982

Clause 15 - Principal Act

14. In this Part, the Freedom of Information Act 1982 is the Principal Act.

Clause 16 - Exemption of certain bodies

15. Clause 16 amends section 7 of the Principal Act by adding the Inspector General of Intelligence and Security to the list contained in sub-section (2A). As a consequence, agencies are exempt from the operation of the Freedom of Information Act in relation to documents that originate with or are received from the Inspector General.

Clause 17 - Schedule 2

16. Clause 17 amends schedule 2 to the Principal Act by adding 'Inspector General of Intelligence and Security' to the list contained in part 1. The bodies specified in part 1 are deemed not to be prescribed authorities for the purposes of the Principal Act. Prescribed authorities are included in the definition of agency (sub-section 4(1) of the Principal Act). Only agencies, as defined, are obliged to give access to documents in accordance with the provisions of the Principal Act.



PART VII - AMENDMENTS OF THE HUMAN RIGHTS COMMISSION ACT 1981

Clause 18 - Principal Act

17. In this Part, the Human Rights Commission Act 1981 is the Principal Act.

Clause 19 - Functions of Commission

18. Clause 19 amends section 9 of the Principal Act by inserting a new sub-section (2A). The new sub-section provides that it is not the function of the Commission to inquire into an act or practice of an intelligence agency, and where a complaint is made to the Commission alleging that an act or practice of such an agency is inconsistent with or contrary to any human right the Commission shall refer the complaint to the Inspector General of Intelligence and Security. New sub-section (2B) provides that a reference in sub-section (2A) to an intelligence agency shall be a reference to the bodies listed in sub-section (2B).

PART VIII - AMENDMENTS OF MIGRATION ACT 1958

Clause 20 - Principal Act

19. In this Part, the Migration Act 1958 is the Principal Act.

Clause 21 - Deportation of non-citizens upon security grounds

20. This clause amends the Principal Act by adding a new section 13. Sub-section(13)(1) gives authority to the Minister to order the deportation of a non-citizen (provided that the non-citizen is a person who has not been present in Australia as a permanent resident for a period of 10 years, or periods that, in the aggregate, amount to a period of at least 10 years) where two conditions are satisfied. New para 13(1)(a) requires that the conduct of the non-citizen must appear to

the Minister to constitute, or have constituted, a threat to the security of the Commonwealth, of a state or territory. (The power to deport in such circumstances is not new. At present, sub-section 14(1) of the Principal Act gives the Minister the authority to deport in such circumstances.) Paragraph (b) provides that the Minister, before he can order deportation under the new section 13, must have been furnished with an adverse security assessment in respect of the non-citizen by the Organization, being an assessment made for the purposes of sub-section 13 (1). This condition is new. Under the present authority to deport the Minister is not required to have previously received an adverse security assessment from the Organisation.

21. Sub-section (2) recognises the non-citizen's right to apply for review of the adverse security assessment by the Security Appeals Tribunal. The Australian Security Intelligence Organisation Act 1979 provides for the review of adverse and qualified security assessments by the Security Appeals Tribunal. The main elements of that scheme for review are -

- . Adverse or qualified security assessments shall be accompanied by statements of grounds for the assessment (section 37(2) ).
- . The person the subject of an adverse or qualified security assessment must be notified of the assessment within 14 days after the day on which the assessment was furnished, by notice in writing, to which a copy of the assessment is attached. Information about applying for review must be included (section 38(1)).
- . No such notice is to be given to the person the subject of the adverse qualified security assessment where the Attorney-General certifies that he is satisfied that the withholding of notice is essential to security of the nation (para.38(2)(a)).

- . The statement of grounds, or a particular part of that statement, need not be disclosed if the Attorney-General certifies that he is satisfied that such disclosure would be prejudicial to the interests to the security (para.38(2)(b)).
- . Where a person has been given notice of an adverse of qualified security assessment, he may apply to the Security Appeals Tribunal for a review of the assessment (section 54).
- . Such application must be made within the period of 30 days after receipt of the adverse or qualified security assessment, or within such further time as the Tribunal allows (section 55).

22. The new sub-section (2) preserves the non-citizen's right of appeal by providing that the Minister shall not order the deportation of the non-citizen when sub-section (1) applies in relation to the non-citizen, there is no certificate by the Attorney-General preventing notice to the non-citizen of the adverse security assessment, and the non-citizen has applied to the Security Appeals Tribunal for a review of the assessment within the period of 30 days after receipt by the non-citizen of the notice of the assessment, and the Tribunal after reviewing the assessment has found that the assessment should not have been adverse.

23. New sub-section (3) recognises that, even in circumstances where the Attorney-General has certified that the non-citizen should not receive notice of the adverse security assessment, it is still possible for the assessment to be reviewed by the Security Appeals Tribunal. Under para.65(1)(b) of the Australian Security Intelligence Organization Act 1979, where a security assessment has been furnished to a Commonwealth agency and a copy has not been delivered to the person the subject of the assessment, the Minister may, if he is satisfied that it is desirable to do

so by reason of special circumstances, require the Tribunal to review such assessment, and report its findings to the Minister.

24. New sub-section (3) prevents the deportation of the non-citizen in circumstances where the Security Appeals Tribunal has conducted a review on the requirement of the Minister acting under section 65, and has concluded that the assessment should not have been adverse.

25. New sub-section (4) provides for the information that must be contained in a notice to a non-citizen that a security assessment has been made. The non-citizen must be informed that the assessment was made for the purposes of sub-section (13)(1), and that the person may be deported pursuant to that section.

26. New sub-section (5) restricts the time allowable for the making of an application for review to the Security Appeals Tribunal by the non-citizen, the subject of an adverse security assessment, to 30 day. The Tribunal's power to extend the time for the making of an application of review is thus removed in relation to cases under this new section. This is because the Minister is entitled to deport the non-citizen the subject of the adverse security assessment after the period of time for the making of an application for a review to the Tribunal has ended. The period must therefore be certain.

27. New sub-section (6) provides that 'adverse security assessment,' 'security assessment' and 'Tribunal' have the same meanings as they have in Part 4 of the Australian Security Intelligence Organization Act 1979; and that 'Organization' means the Australian Security Intelligence Organization.

Clause 22-Deportation of non-citizens who are convicted of certain serious offences

27. Clause 22 amends section 14 of the Principal Act by omitting sub-section (1). This is because the new section 13 replaces sub-section (1).

Clause 23- definition of permanent resident

28. Clause 23 is an amendment consequential upon Clause 22.

PART 9 - AMENDMENTS OF THE TELECOMMUNICATIONS  
(INTERCEPTION ) ACT 1979

Clause 24 - Principal Act

29. In this Part, the Telecommunications (Interception) Act 1979 is the Principal Act.

Clause 25-Title

30. This clause amends the title of the Principal Act.

Clause 26-Interpretation

31. This clause provides that 'foreign intelligence' has the same meaning as it has in the Australian Security Intelligence Organization Act 1979, and inserts a reference to new section 11A in the definition of 'warrant' in sub-section 5(1) of the Principal Act.

Clause 27-Telecommunications not to be intercepted

32. This clause amends section 7 of the Principal Act by omitting sub-section (4), and replacing it with three new sub-sections. New sub-section (4) provides for the present prohibition on the divulging, communicating, using or recording of information obtained by intercepting a

communication, with an exception for officers of the Telecommunications Commission acting in the performance of their duty. New sub-section (4A) provides an exception to sub-section (4) where things are done in relation to the performance by the Organization of its functions, or for the purpose of narcotics inquiries made or being made by the Australian Federal Police. New sub-section (4B) allows communication, use or recording of information obtained by virtue of a warrant issued under section 11A within the Organization.

33. Clause 27 also inserts a new para.7(5)(c) which provides that the approval of the Attorney-General is required for any communication of information obtained by virtue of a warrant issued under section 11A, not covered by new sub-section (4), (4A) and (4B).

Clause 28-Warrants for the performance of functions under paragraph 17(1)(e) of the ASIO Act

34. Clause 28 inserts a new section 11A, to give effect to the Organization's new function of the obtaining within Australia of foreign intelligence. The new section gives authority to the Attorney-General to issue a warrant authorizing the doing of any of the acts or things capable of being authorized by warrant issued under present sub-section 9(1) or 11(1), as are specified in the warrant. Sub-section (1) provides that where the Director-General of Security makes application in writing to the Attorney-General requesting the issue of such a warrant in relation to an identified telecommunication service or person for the purpose of obtaining foreign intelligence, and the Attorney-General is satisfied, on the basis of advice received from the relevant Minister, that the collection of such foreign intelligence is important in relation to the defence of the Commonwealth, or to the conduct of the Commonwealth's international affairs, the Attorney-General may issue such a warrant.

35. Sub-section (4) provides for the warrant authorizations to remain in force for the same period as similar authorizations would remain in force under present sub-section 9(5) and 11(5). Sub-section (2) is in similar terms present sub-section 9(2) of the Principal Act. Sub-section (3) is in similar terms to present sub-section 9(4). Sub-section (5) is in similar terms to present sub-sections 9(6) and 11(6). Sub-sections (6) and (7) are in similar terms to the present sub-sections 11(8) and (9).

36. Sub-section (8) provides that the Director-General shall not request the issue of a warrant under this section for the purpose of collecting information concerning an Australian citizen or a permanent resident. Further, sub-section (9) provides that the conditions or restrictions, which may under sub-section (1), be included in any warrant issued by the Minister under the authority of that sub-section, may include conditions or restrictions designed to minimise the incidental obtaining by the Organization, in the execution of the warrant, of information that is not publicly available concerning Australian citizens or permanent residents, or to minimise the retention of such information by the Organization.

Clause 29-Persons authorized to intercept communications for Organization

37. This clause provides for amendments to section 12 of the Principal Act in consequence of the introduction of new section 11A.

Clause 30-Discontinuance of interception before expiration of warrant

38. This clause provides for amendments to section 13 of the Principal Act in consequence of the introduction of new section 11A.

Clause 31-Certain records retained by Organization to be destroyed

39. Clause 31 inserts new section 14 into the Act. This section places an obligation on the Director-General of Security to cause the destruction of any record or copy, obtained by virtue of a warrant issued pursuant to sections 9, 11 or 11A, which is not required for the performance of the functions or the exercise of the powers of the Organization, where that record is in the possession or custody or under the control of the Organization. The obligation is limited to records in the possession of the Organization as the Organization may lawfully communicate information to other agencies, for example to police forces or the National Crime Authority.

Clause 32-Manner in which warrant etc to be dealt with

40. This clause provides for amendments to section 15 of the Principal Act in consequence of the introduction of new section 11A.

Clause 33-Obstruction

41. This clause provides for amendments to section 16 of the Principal Act in consequence of the introduction of new section 11A.

Clause 34-Reports to be made to Attorney-General on results on interception

42. This clause provides for amendments to section 17 of the Principal Act in consequence of the introduction of new section 11A.