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Criminal Code Amendment (Espionage and
Related Offences) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 117 2001-02

Criminal Code Amendment (Espionage and Related
Offences) Bill 2002

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4 April 2002

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Criminal Code Amendment (Espionage and Related Offences) Bill 2002

Date Introduced: 13 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: The Bill itself commences on Royal Assent. However, the main operational aspects of the Bill generally¹ commence 28 days after Royal Assent.

Purpose

To transfer the offence of espionage and some related matters from Part VII of the *Crimes Act 1914* to new Chapter 5 of the *Criminal Code Act 1995*. Some changes to the law are made, particularly in increasing the maximum penalty for espionage.

Background

The Criminal Code Amendment (Espionage and Related Offences) Bill 2002 (the Bill) is a modified version of a bill of the same name that was introduced but not debated shortly before the November 2001 Federal election.

In addition to the espionage provisions, the 2001 version of the Bill also transferred the official secrets provisions of Part VII of the *Crimes Act 1914* to Chapter 5 of the *Criminal Code Act 1995* (the Criminal Code). Whilst the 2001 Bill did not significantly change the law on official secrets, this aspect of the Bill was heavily criticised particularly in the press for containing gaol terms for secondary disclosure or 'whistleblowing' in relation to non-national security matters, even when the information was disclosed or published on so-called public interest grounds. In maintaining the status quo in this area, the 2001 Bill did not take up the recommendations of the Gibbs Review of Commonwealth Criminal Law² and two subsequent related inquiries.³

Given the criticism of the official secrets provisions of the 2001 Bill, the Government has - apart from one amendment in Schedule 1⁴ - chosen to drop these elements from the 2002

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Bill. Other than this change, and some other minor consequential alterations, the 2002 Bill is the same as the 2001 Bill.

The current law on espionage – Part VII of the *Crimes Act 1914*

The current form of Part VII dates from 1960 with no substantive amendments made since.⁵

Part VII actually contains offences relating to:

- Espionage
- Official secrets
- Unlawful soundings
- Harboursing spies, and
- Illegal use of uniforms, official permits, impersonation.

Apart from the issue of official secrets discussed above, not all of Part VII will be carried over to the Criminal Code. The offences of harboursing spies and illegal use of uniforms, official permits and impersonation will disappear from the statute books.

Part VII also contains various procedural elements such as arrest, search, institution of prosecutions, and in camera hearings. Again, only some of these are carried over in the Bill and these are noted in the main provisions section of this Digest.

The following describes the existing Part VII espionage provisions as this offence is the main focus of the Bill. The equivalent provisions in the Bill are analysed in the main provisions section of this Digest.

The offence of espionage is contained in existing section 78 of Part VII.

For a section 78 offence to have occurred, both a physical element (an act or a result of an act) and a mental element (a person's intention, or state of mind) are required to be proven.

The *physical element* occurs if a person makes, collects, records, possesses, communicates information that is likely to be, might be, or intended to be directly or indirectly useful to an enemy or foreign power, or approaches, inspects or is in a prohibited place. The definition of prohibited place appears to be extremely wide.⁶ The *mental element* is satisfied if the person committed the physical element with the 'intention of *prejudicing the safety or defence* of the Commonwealth or a part of the Queen's dominions'.

The offence carries a maximum penalty of 7 years.

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The Gibbs Review

Part VII was examined by the independent Review Committee on Commonwealth Criminal Law (the Gibbs review) established by the then ALP Government in 1987. The recommendations of the Gibbs review were delivered in 1991.

One universal change recommended by the Gibbs review was the deletion of all reference to the Queen's dominions in the context of the safety or defence of Commonwealth (ie Australia). This recommendation was made to reflect 'the changing pattern of Australia's international relations and relations within the Commonwealth of Nations'.⁷ This recommendation has been incorporated into the Bill.

In relation to espionage, the main recommendation was to delete the provisions that allowed, amongst other things, an offence to be proved through the accused's 'conduct or known character' rather than having to prove that a particular act had been committed. This was done on the ground that it was unclear how such a provision would operate in practice. This recommendation has also been incorporated into the Bill.

Main Provisions

Commencement

Clause 2 sets out when various parts of the Bill are to commence. Note there are some typographical errors in paragraphs (4) and (5). These paragraphs should respectively refer to item 6 of Schedule 1 to the *Security Legislation Amendment (Terrorism) Act 2002* (not item 6 of Schedule 2 as printed) and item 7 of Schedule 1 to the *Security Legislation Amendment (Terrorism) Act 2002* (not item 6 of Schedule 2 as printed).

Transitional Provisions

Clause 4 provides that the Bill is not intended to operate retrospectively, ie. existing Part VII will continue to apply to offences that take place before the Bill commences.

Schedule 1

Item 1 repeals section 78 of the *Crimes Act 1914* which contains the offence of espionage.

Item 2 amends section 79 of the *Crimes Act 1914* which contains the offence of unlawful disclosure of official secrets. The amendment replaces the term '[intention to prejudice the] *safety* or defence'⁸ currently in Part VII with that of '[intention to prejudice the] *security* or defence'. Security or defence is defined in **new section 90.1** of the Criminal Code (see item 5 below) as including 'the operations, capabilities and technologies of, and methods

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and sources used by, the country's intelligence or security agencies'. However, this **new section 90.1** definition only applies to Part 5.2 of the Criminal Code, not to the *Crimes Act 1914*. In the interests of clarity, a definition should also be included for the *Crimes Act 1914*.

The Government has stated that the objective behind this substituting the new term *security* for existing *safety* is to '[afford] protection to a wider range of material that may not be protected under the current laws'.⁹ The protection of security matters, rather just traditional defence matters, was actually advocated by the Australian Secret Intelligence Service over ten years ago in its submission to the Gibbs review. This proposal was rejected in the report with rather a cursory comment that 'the meaning of security if not specifically defined, is unclear and in the context safety appears to be the more appropriate term'.¹⁰

Item 3 repeals sections 81 (harbouring spies), 83 (unlawful soundings), 83A (illegal use of uniforms, official permits, impersonation etc), 83B (arrest without a warrant) 84 (arrest of persons in or around prohibited places) 84A (search of suspects), 85A (offences by companies) and 85C (imprints to be evidence) of the *Crimes Act 1914*. Only section 83 is carried over by the Bill to the criminal Code.

Item 4 inserts the heading for the new Chapter 5 of the Criminal Code - *The integrity and security of the Commonwealth*. This heading is also inserted by other pieces of anti-terrorism legislation introduced into Parliament by the Government on 12 March 2002. **Item 4** will only come into force if the Bill receives Royal Assent before the other relevant anti-terrorism legislation.

Item 5 inserts the main operational elements of the Bill - **new Divisions 90-94** within new Part 5.2 of the Criminal Code.

New Division 90 incorporates a number of definitions and concepts. Most of these are simply copied from existing section 77 of the Crimes Act. New definitions are 'security or defence' (see earlier comment on item 2) and 'record' which clarifies that a record of information may take virtually any form. The definition of 'information', which includes an opinion or a report of a conversation (irrespective of whether either of these are true or not), is virtually identical to that in existing section 77.

New Division 91 contains four separate **espionage** offences. All carry a maximum penalty of 25 years imprisonment, an increase from the current maximum of 7 years. By comparison, maximum penalties in other jurisdictions including New Zealand, Canada, and the United Kingdom are in the range from 10-14 years. In the United States the penalties are more severe, with certain acts of espionage attracting a maximum of life, or even the death penalty if they relate to certain types of information¹¹ or the espionage results in the death of a US agent.

New subsections 91.1(1) and **91.1(2)** both incorporate a common physical element of a person communicating or making available information concerning either the

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Commonwealth's security or defence, or security or defence of another country where that information is or has been in the control or possession of the Commonwealth. The person's act must also be likely to result in the information being disclosed to a foreign country or organisation, or their agent.

The difference between **new subsections 91.1(1) and 91.1(2)** is a required mental element - for **new subsection 91.1(1)** it is that the person committed the act 'intending to prejudice the Commonwealth's security or defence'; for **new subsection 91.1(2)** the person must act without lawful authority *and* 'intend to give an advantage to another country's security or defence'. This latter mental element could apply in a number of different situations. An example might include if the information in question concerned plans for a defence weapons system that has been provided to, or developed by, Australia, but that Australia does not intend to use for whatever reason. If these plans were compromised by communication to a foreign agent, Australia's security or defence would not be directly prejudiced (although it may impact on the extent to which other countries are confident about sharing intelligence with Australia), but the security or defence of the receiving country might well be advantaged. This makes the information very valuable and, consequently, just as susceptible to compromise as information of a more directly relevant to Australia's security or defence nature. The mental element might arguably also cover situations where Australia or its allies gather domestic intelligence¹² on other countries and the information leaked to another country or organisation will compromise these intelligence efforts. In summary, **new subsection 91.1(2)** expands the scope of Commonwealth law as compared to existing section 78 of the Crimes Act.

New subsections 91.1(3) and 91.1(4) both incorporate a common physical element of making, obtaining or copying available information concerning either the Commonwealth's security, or defence or security or defence of another country where that information is or has been in the control or possession of the Commonwealth. Both have *two* required mental elements. Under **new subsection 91.1(3)**, the person must commit that act intending both that the information may be delivered to a foreign country or organisation, or their agent *and* to prejudice the Commonwealth's security or defence. In relation to **new subsection 91.1(4)**, the act must be committed without lawful authority intending both that the information may be delivered to a foreign country or organisation, or their agent *and* to give an advantage to another country's security or defence.

Note that the current offence under paragraph 78(1)(c) of 'approaching, being in, etc a prohibited place with the intention of prejudicing the safety or defence of the Commonwealth' has not been carried over to the Bill. As it stands, it is arguable that paragraph 78(1)(c) allows for a person participating in some form of civil disobedience activity (eg a sit-in) at a defence facility to be found guilty of espionage.

Persons charged with a **Division 91** offence can only remanded on bail by a Supreme Court judge of the relevant State or Territory: **new subsection 91.1(6)**. Apart from this requirement, applications are to be determined according the bail legislation of the State or Territory in which the charges are brought.

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New subsection 91.1(7) provides that the Criminal Code extended geographical jurisdiction category D¹³ applies to **new section 91.1** espionage offences. This is the broadest jurisdictional category and the offence provisions apply to any person, including where their actions take place outside of Australia. This is effectively the same as the existing section 78 espionage offences since existing section 3A of the *Crimes Act 1914* states that 'this Act...also applies beyond the Commonwealth and the Territories'.¹⁴

Division 92, offences related to **soundings**, is modelled on existing section 83.

Soundings are measurements of water depth. The offence only applies to sounds taken in Australia's territorial sea (that is, within twelve nautical miles seaward of coastal baselines defined under the *Seas and Submerged Lands Act 1973*).

Essentially, **new section 92.1** provides that *unless* a person can prove¹⁵ that the soundings in question were made with Federal, State or Territory authority or were reasonably necessary for vessel navigation or any other lawful activity of the vessel that person commits an offence if they

- Take any soundings or record them, or
- Have any records of soundings in their possession, or
- Communicate information about the soundings to a person outside the Commonwealth or communicate that information to a person with the intention that the information would ultimately be passed on to someone outside the Commonwealth.

The maximum penalty is unchanged from section 83 at 2 years.

New Division 93 deals with the bringing of **prosecutions** under **new Part 5.2** and the hearing of those prosecutions.

As is the case for the equivalent provisions in Part VII, prosecutions of offences under **new Part 5.2** (including section 93.2)¹⁶ can only be instituted with the consent of the Attorney-General or a person acting under the Attorney-General's direction: **new subsection 93.1(1)**. The Explanatory Memorandum to the Bill comments that such prosecutions 'are likely to raise issues regarding matters of national security or sensitive international relations that require government to government contact'.¹⁷ It also comments that such consent is required for prosecutions under other security and counter-terrorism legislation.¹⁸ Under **new subsection 93.1(2)**, the Attorney-General's consent is not required for the arrest and / or remanding in custody or on bail of a person alleged to have committed an offence.

New section 93.2 provides that a judge, magistrate or other competent person may, 'if satisfied that it is in the interest of the security or defence of the Commonwealth' exclude the public from court hearings, prevent the publishing of report about any part of proceedings or prevent access to evidence or other information relevant to the

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proceedings. The equivalent provision in Part VII (subsection 85B(1)) is 'if satisfied such a course is expedient in the interest of the defence of the Commonwealth'.

New section 93.2 only applies to a federal court, a court exercising federal jurisdiction, or a court of a Territory, but the proceedings may relate to any Act, not just Chapter 5 of the Criminal Code. A person who violates a **new section 93.2** order or direction is subject to a maximum penalty of five years imprisonment.

New Division 94 provides that any information or related device that is dealt with in contravention of **new Part 5.2** is forfeited to the Commonwealth.

Schedule 2 - Consequential Amendments

Schedule 2 deletes references in both the *Crimes Act 1914* and the *Australian Protective Service Act 1987* to those sections repealed by **items 1 and 3** in **Schedule 1** and where appropriate replaces these with equivalent references to the Criminal Code.

Endnotes

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- 1 Certain items do not commence at all if other anti-terrorism legislation introduced on March 12 comes into force first. For example, see item 4 in Schedule 1.
 - 2 *Review of Commonwealth Criminal Law*, Fifth Interim Report, June 1991.
 - 3 *In the Public Interest*, Report of the Senate Committee on Public Interest Whistleblowing, August 1994; *Commission of Inquiry on Australian Secret Intelligence Service*, 1994.
 - 4 Item 2, Schedule 1. See comments in the main provisions section of the digest.
 - 5 Sections 78 and 79 were amended by the *Law and Justice Legislation Amendment (Application of Criminal Code) Act 2001*. The amendment replaced the old phrase 'a purpose intended to be prejudicial to the safety or defence of the Commonwealth...' with a new version 'with the intention of prejudicing the safety or defence of the Commonwealth'. The amendment was to clarify that, as a matter of law, the prosecution is required to prove a (mental) fault element rather than a physical element that is the result of the accused's actions.
 - 6 The very broad nature of the definition is due to the rather ambiguous provisions in paragraph 80(a) that appears to state that any office belonging to the Commonwealth is a prohibited place, even in times of peace. Military installations or places used to produce, store, test etc war material are included within the definition. The Governor-General also has the power to declare places as prohibited places on the grounds that information, damage or interference related to the place 'would be useful to an enemy or to a foreign power': paragraph 80(c).
 - 7 *Review of Commonwealth Criminal Law*, op cit, paragraph 42.27 at p. 365.
 - 8 The term 'safety or defence' is not defined in Part VII.

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- 9 The Hon Daryl Williams, second reading speech, *House of Representatives Debates*, 13 March 2002 p. 1021.
- 10 *Review of Commonwealth Criminal Law*, op cit, paragraph 42.26 at p. 365.
- 11 For example, information relating to nuclear defences.
- 12 That is, intelligence that does not relate to these countries views on, or operations relevant to, Australia.
- 13 Section 15.4.
- 14 Although it is arguable that there is some doubt whether section 3A means that *all* parts of the Crimes Act necessarily applies to acts of foreign nationals occurring wholly outside of the Commonwealth and Territories: see *McDonald v Bojovic* [1987] VR 387 at 393.
- 15 The same burden of proof exists under existing subsection 83(3) in Part VII.
- 16 That is, a prosecution for violating an order / direction to exclude the public from court hearings, prevent the publishing of a report about any part of proceedings or prevent access to evidence or other information relevant to the proceedings.
- 17 Explanatory Memorandum, at p. 9.
- 18 Ibid. Legislation listed is the *Weapons of Mass Destruction (Prevention of Proliferation) Act 1995* (section 20), *Crimes (Foreign Incursions and Recruitment) 1978* (section 10), *Crimes (Internationally Protected Persons) Act 1976* (subsection 12(3)) and the *Crimes (Biological Weapons) Act 1976* (subsection 10(3)).

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Appendix - The Lappas case

In July 2000, Simon Lappas, a former Defence Intelligence Organisation analyst, was charged with official secrets offences under subsection 79(2) of the *Crimes Act 1914*. Additional espionage charges under subsection 78(1) were brought in 2001. The charges stem from allegations that Lappas gave several classified documents to an unauthorised person, Sherryll Dowling, in order that she could sell the documents to a foreign power. Dowling was also charged with related offences under section 79.

Under the particular circumstances of the case, it appears Lappas could only be found guilty of the subsection 78(1) charges if the documents were passed with the intention of them being useful to a foreign power.¹

The documents allegedly passed by Lappas were tendered as evidence, in camera, in the April 2001 committal hearing and defence counsel were given access at that time. However, at trial, the prosecution counsel declined to tender the same documents as evidence, rather making a claim for state interest immunity under section 130 of the Evidence Act. This section provides that

If the public interest in admitting into evidence information or a document that relates to matters of state is outweighed by the public interest in preserving secrecy or confidentiality in relation to the information or document, the court may direct that the information or document not be adduced as evidence.

The prosecution intended to tender 'blacked out' versions of the documents and lead oral evidence that would describe the blacked out contents in general terms. However, Justice Gray of the ACT Supreme Court ruled that to do so would hinder the defence's ability to adduce evidence before the jury on the question of the document's usefulness to a foreign power and thus the accused would not get a fair trial under these circumstances. The end result was that Justice Gray, while allowing the claim for state interest immunity, also directed that the charges under subsection 78(1) be stayed. Lappas' trial on the remaining charges is scheduled to start in May 2002.

1 *R v Simon Lappas and Sherryll Dowling* [2001] ACTSC 115 at paragraph 20.

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