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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ANTI-TERRORISM BILL (NO. 2) 2005

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,
the Honourable Philip Ruddock MP)

ANTI-TERRORISM BILL (NO. 2) 2005

GENERAL OUTLINE

This Bill amends the *Criminal Code Act 1995* (the *Criminal Code*), the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Financial Transactions Reports Act 1988* (the *FTR Act*), the *Australian Security Intelligence Organisation Act 1979* (the *ASIO Act*), the *Surveillance Devices Act 2004*, the *Administrative Decisions (Judicial Review) Act 1977* (*AD(JR) Act*), the *Crimes Act 1914* (the *Crimes Act*), the *Migration Act 1958*, the *Aviation Transport Security Act 2004*, the *Proceeds of Crime Act 2002*, the *Customs Act 1901*, and the *Customs Administration Act 1985*.

The Bill improves the existing strong federal regime of offences and powers targeting terrorist acts and terrorist organisations. The Bill is the result of a comprehensive review of existing federal legislation that criminalises terrorist activity and confers powers on law enforcement and intelligence agencies to effectively prevent and investigate terrorism.

The principal features of the Bill are:

- an extension of the definition of a terrorist organisation to enable listing of organisations that advocate terrorism;
- a new regime to allow for ‘control orders’ that will allow for the overt close monitoring of terrorist suspects who pose a risk to the community;
- a new police preventative detention regime that will allow detention of a person without charge where it is reasonably necessary to prevent a terrorist act or to preserve evidence of such an act;
- updated sedition offences to cover those who urge violence or assistance to Australia’s enemies;
- strengthened offences of financing of terrorism by better coverage of the collection of funds for terrorist activity;
- a new regime of stop, question, search and seize powers that will be exercisable at airports and other Commonwealth places to prevent or respond to terrorism;
- a new notice to produce regime to ensure the AFP is able to enforce compliance with lawful requests for information that will facilitate the investigation of a terrorism or other serious offence;
- amendments to ASIO’s special powers warrant regime;
- amendments to the offence of providing false or misleading information under an ASIO questioning warrant;
- amendments to authorise access to airline passenger information for law enforcement and intelligence agencies;

- the creation of a legal basis for the use of video surveillance at Australia's major airports and on aircraft; and
- additional implementation of FATF Special Recommendations covering criminalising financing of terrorism, alternative remittance dealers, wire transfers and cash couriers.

FINANCIAL IMPACT STATEMENT

There is no financial impact flowing directly from the offence provisions in this Bill.

NOTES ON CLAUSES

General

Unless otherwise indicated, any reference to a 'section', 'subsection' or 'paragraph' in these notes is a reference to a section, subsection or paragraph in the *Criminal Code Act 1995* (the *Criminal Code*).

Clause 1: Short title

This is a formal clause which provides for the citation of the Bill. This clause provides that the Bill when passed, may be cited as the *Anti-Terrorism Act (No. 2) 2005*.

Clause 2: Commencement

This clause set out when the various parts of the Bill commence.

Sections 1 to 4 of the Bill (the short title, the commencement, the schedules provision and the review of anti-terrorism laws provision) and anything in the Bill not covered elsewhere in the table in clause 2 will commence on the day the Act receives Royal Assent. This is necessary to ensure the laws are available during the long Summer holiday period.

Schedules 1 and 3 to the Bill amend offences and definitions in the *Criminal Code*. Schedule 4 to the Bill amends offences and definitions, and inserts new powers and offences into the *Criminal Code*, and Schedules 5 and 6 to the Bill insert new definitions, powers and offences into the *Crimes Act*. Items 1 to 21 and item 23 of Schedule 1 and Schedules 3, 4, 5 and 6 to the Bill commence on the day after the day the Act receives Royal Assent. This is to ensure these important new powers, that are designed to prevent the commission of a terrorist act or other serious offence, can be exercised immediately. It is important to have these powers available during the holiday period which is a time when there are many mass gatherings.

Item 22 of Schedule 1 to the Bill commences on a single day to be fixed by Proclamation or, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period. It is appropriate that this provision commence by proclamation in the usual way.

Schedule 2 to the Bill renumbers the provisions in Division 104 in Part 5.4 of the *Criminal Code*, so a new Division 104 can be inserted into Part 5.3 of the *Criminal Code*. It commences on the day the Act receives Royal Assent. This will ensure there is no confusion about the section numbers for the existing provisions in Division 104 and the new provisions to be inserted into the new Division 104.

Schedule 7 repeals an existing offence in the *Crimes Act 1914* (the *Crimes Act*) and replaces it with a new sedition offence in the *Criminal Code*, and Schedule 8 would provide a head of power for the use of optical surveillance devices at airports and on board aircraft. These Schedules commence on the 28th day after the day the Act

receives Royal Assent. This is to ensure that there is some prior notice before these new provisions, which include offence provisions, commence.

Items 1, 2, 6, 8, 9, 14, 15 and 18 to 24 of Schedule 9 to the Bill, which amend the *Financial Transaction Reports Act 1988* (the *FTR Act*) to introduce a ‘disclosure when asked’ system for persons who carry negotiable bearer instruments into or out of Australia, commence on Proclamation, or if any of the provisions do not commence within the period of 12 months beginning on the day the Act receives Royal Assent, they commence on the expiry of 12 months and one day from the date of Royal Assent.

The reason for the potential delay of 12 months for the commencement of these provisions is to allow for a public education campaign to raise awareness about the implications of the amendments and to enable the Australian Customs Service and Australian Transaction Reports and Analysis Centre (AUSTRAC) to put in place appropriate training and system upgrades.

Items 3, 4 and 7 of Schedule 9 to the Bill, which make minor technical and clarifying amendments to the *FTR Act*, commence on the day the Act receives Royal Assent.

Items 5, 10 to 13, 16 and 17 of Schedule 9 to the Bill, which amend the *FTR Act* to require customer information to be included with international fund transfer instructions and provide for the registration of remittance service providers, commence on Proclamation, or if any of the provisions do not commence within the period of 6 months, beginning on the day the Act receives Royal Assent, they commence on the expiry of 6 months and one day from the date of Royal Assent.

The reason for the potential delay of 6 months for the commencement of these provisions is to allow for industry to develop processes to meet the inclusion of customer information requirements with international funds transfer instructions and for AUSTRAC to implement appropriate systems to raise public awareness of the new register requirements and to manage this information.

Items 1 to 25 and 29 to 32 of Schedule 10 to the Bill, which amend the *Australian Security Intelligence Organisation Act 1979* (the *ASIO Act*) and customs and migration legislation to give greater powers for security and intelligence purposes, commence on the day the Act receives Royal Assent. This is to enable these important new powers to be exercised immediately if necessary.

Items 26 to 28 of Schedule 10 make consequential amendments to the *ASIO Act* related to the amendments made by Schedule 4 to the Bill, and therefore commence at the same time, being the day after the day the Act receives Royal Assent.

Clause 3: Schedules

This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

Clause 4: Review of anti-terrorism laws

This clause provides for a review of the amendments made by Schedules 1, 3, 4 and 5 after five years.

Subclause 4(1) provides that the Council of Australian Governments (COAG) agreed on 27 September 2005 to undertake this review. It was also agreed that certain equivalent State laws would also be reviewed.

Subclause 4(2) provides that if a copy of a report of this review is made available to the Attorney-General, he or she must cause a copy of the report to be laid before each House of Parliament within 15 sitting days after the report is received.

This clause ensures that the COAG agreement to a five-year review of these new laws is enshrined in the legislation. It also ensures that any report on the review of these new laws will be made public.

Schedule 1 – Definition of terrorist organisation etc.

This Schedule adds a further ground for listing terrorist organisations in regulations made under the *Criminal Code*, and makes other minor amendments.

Crimes (Foreign Incursions and Recruitment) Act 1978

Item 1

This item removes a reference to the definition of **terrorist organisation** in subsection 102.1(1) in the *Criminal Code*, from paragraph 6(7)(b) of the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

Criminal Code Act 1995

Item 2

This item provides that **advocate** has the meaning provided in new subsection 102.1(1A). This definition applies only to the new definition of **terrorist organisation** in section 102.1. Details on the meaning of **advocate** are provided under item 9 below.

Items 3 to 5

These items repeal the definition of **Hamas organisation**, **Hizballah organisation** and **Lashkar-e-Tayyiba organisation** in subsection 102.1(1).

These three organisations are listed as terrorist organisations under separate Regulations under the Criminal Code Amendment Regulations 2005. Accordingly, the definitions are no longer required.

Item 6

This item is an interpretative amendment to the existing definition of **terrorist organisation** in section 102.1 of the *Criminal Code*.

This item clarifies that, when determining whether an organisation satisfies the definition of a terrorist organisation, it is not necessary to prove the organisation is preparing, planning, assisting in or fostering ‘the’ particular terrorist act. It will be sufficient if the prosecution can show the organisation is preparing, planning, assisting in or fostering ‘a’ terrorist act.

Item 7

This item makes a technical amendment to paragraph (b) of the definition of **terrorist organisation** in subsection 102.1(1).

Item 8

This item repeals paragraphs (c), (d) and (e) from the definition of **terrorist organisation** in subsection 102.1(1), which refer to a Hizballah organisation, a Hamas organisation or a Lashkar-e-Tayyiba organisation. These three organisations are listed as terrorist organisations under separate Regulations under the Criminal Code Amendment Regulations 2005.

Item 9

This item inserts a new subsection (1A) after subsection 102.1(1). This new subsection inserts a definition of **advocates** as part of a new offence of ‘*advocates* the doing of a terrorist act’.

The definition is designed to cover direct or indirect advocacy by an organisation, in the form of counselling, urging and providing instruction on the doing of a terrorist act. It also covers direct praise of a terrorist act. ‘Organisation’ is defined at existing subsection 100.1(1) of the *Criminal Code*. It mentions a body corporate or an unincorporated body whether or not the body is based outside Australia, consists of persons who are not Australian citizens or is part of a larger organisation. A ‘terrorist act’ is defined in the same subsections as an action or threat of action, such as causing death or serious harm, that is done with the intention of advocating a political, religious or ideological cause, and done with the intention of coercing government or a section of the public. The advocacy would need to be about such an act, not generalised support of a cause.

The definition of **advocates** is not restricted in terms of the manner in which the advocacy occurs. It covers all types of communications, commentary and conduct.

The definition recognises that such communications and conduct are inherently dangerous because it could inspire a person to cause harm to the community. This could be the case where it may not be possible to show that the organisation intended that a particular terrorism offence be committed or even intended to communicate the material to that particular person. Accordingly, the definition is not limited to circumstances where a terrorist act has in fact occurred, but is available whether or not a terrorist act occurs.

An organisation may advocate the doing of a terrorist act without being a terrorist organisation, as this new definition captures statements and conduct in support of previous terrorist acts as well as any prospective terrorist acts.

Item 10

Existing subsection 102.1(2) of the *Criminal Code* provides that the Minister must be satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (that is, the organisation satisfies paragraph (a) of the definition of **terrorist organisation**) before the Governor-General can make a regulation specifying the organisation as a terrorist organisation.

This item amends subsection 102.1(2) of the *Criminal Code* by providing that the Minister must be satisfied on reasonable grounds that the organisation either is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act, whether or not a terrorist act has occurred or will occur (that is, the organisation satisfies either paragraph (a) of the definition of ***terrorist organisation*** or the new definition of ***advocating*** in subsection 102.1(1A)) before the Governor-General can make a regulation specifying the organisation as a terrorist organisation.

Advocacy may only be a ground for listing an organisation. Unlike other grounds upon which it can be proved in court in the context of a prosecution that an organisation is a terrorist organisation, it will not be possible to prove an organisation is a terrorist organisation on the grounds of ‘advocacy’ unless the organisation is listed in the regulations.

Item 11

Existing paragraph 102.1(4)(b) of the *Criminal Code* provides that if an organisation is specified in regulations as a terrorist organisation and the Minister ceases to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (that is, that the organisation satisfies paragraph (a) of the definition of ***terrorist organisation***), the Minister must publish a notice in the *Gazette* to the effect that the Minister has ceased to be so satisfied.

This item amends paragraph 102.1(4)(b) of the *Criminal Code* by providing that if an organisation is specified in regulations as a terrorist organisation and the Minister ceases to be satisfied that that the organisation is either directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act (that is, that the organisation satisfies paragraph (a) of the definition of ***terrorist organisation*** or the new definition of ***advocating*** in subsection 102.1(1A)), the Minister must publish a notice in the *Gazette* to the effect that the Minister has ceased to be so satisfied.

Item 12

This item makes a technical amendment to correct an outdated cross-reference to section 50 of the *Acts Interpretation Act 1901*, and replaces it with the correct reference to section 15 of the *Legislative Instruments Act 2003*.

Item 13

Existing subsections 102.1(7) to (16) of the *Criminal Code* provide for the circumstances where regulations may specify a Hizballah, Hamas or Lashkar-e-Tayyiba organisation as a terrorist organisation under paragraphs (c), (d) and (e) of the definition of a ***terrorist organisation***. Consistent with the repeal of these paragraphs, this item repeals subsections 102.1(7) to (16) of the *Criminal Code*.

Items 14 and 15

These items make technical amendments by deleting references to provisions that have been repealed.

Item 16

Existing paragraph 102.1(17)(c) of the *Criminal Code* provides that if an application is made to de-list a terrorist organisation, the Minister must consider the de-listing application if it is made on the grounds that there is no basis for the Minister to be satisfied that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (that is, the organisation satisfies paragraph (a) of the definition of *terrorist organisation*).

This item amends paragraph 102.1(17)(c) of the *Criminal Code* to provide that if an application is made to de-list a terrorist organisation, the Minister must consider the de-listing application if it is made on the grounds that there is no basis for the Minister to be satisfied that the organisation is either directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act, or advocates the doing of a terrorist act (that is, that the organisation satisfies paragraph (a) of the definition of *terrorist organisation* or the new definition of *advocating* in subsection 102.1(1A)).

Item 17 to 20

These items make technical amendments by deleting references to provisions that have been repealed.

Item 21

This item inserts new section 106.2 which provides that regulations made before the commencement of the section which were in force before commencement, continue to have effect after commencement.

A note to this item amends the heading of section 106.1 of the *Criminal Code* consistent with the amendments made by this item.

Item 22

This item inserts a new section 106.3 which provides that the amendments made by Schedule 1 to the *Anti-Terrorism Act 2005* apply to offences committed whether before or after the commencement of this section. This is justified because the provision merely clarifies what was originally intended. It is necessary because it will otherwise create an incorrect implication.

Customs Act 1901

Item 23

This item makes a technical amendment to subparagraph 203DA(1)(c)(i) of the *Customs Act 1901* by omitting a reference to ‘the terrorist act’ and substituting ‘a terrorist act’.

Schedule 2 – Technical amendments

This Schedule makes technical amendments to renumber certain provisions of Part 5.4 of the *Criminal Code*. This is to ensure that additional sections may be added to Part 5.3 without affecting the sequential numbering from Part 5.3 through to Part 5.4.

Criminal Code Act 1995

Items 1 and 2

These items renumber the Division of Part 5.4 of the *Criminal Code* that deals with offences relating to Harming Australians, and the provisions in that Division, from Division 104 to Division 115. This creates additional space for new provisions to be inserted into this Part of the *Criminal Code*.

Schedule 3 – Financing terrorism

This Schedule contains amendments to the terrorist financing provisions of the *Criminal Code*. The amendments strengthen the existing terrorist financing offences and confirm Australia’s commitment to the principles behind the Financial Action Task Force on Money Laundering’s (FATF’s) Special Recommendations on Terrorist Financing, the International Convention for the Suppression of the Financing of Terrorism and United Nations Security Council Resolution 1373. In particular, the proposed amendments better implement FATF’s Special Recommendation II, which was developed with the objective of ensuring that countries have the legal capacity to prosecute and apply criminal sanctions to a person who finances terrorism.

Criminal Code Act 1995

Item 1

Currently, subsections 102.6(1) and (2) of the *Criminal Code* criminalise the receiving of funds from, or making funds available to, a terrorist organisation, whether directly or indirectly. The difference between the two provisions is that subsection 102.6(1) deals with the situation where the offender knows the organisation is a terrorist organisation, and subsection 102.6(2) deals with the situation where the offender is reckless as to whether the organisation is a terrorist organisation. New subsection 102.6(1) carries a maximum penalty of 25 years imprisonment and subsection 102.6(2) 15 years imprisonment.

‘Knowledge’ and ‘recklessness’ are defined in sections 5.3 and 5.4 respectively of the *Criminal Code*. Section 5.3 provides that a person has knowledge of a circumstance (in this case that an organisation is a terrorist organisation) if they are aware that the circumstance exists or will exist in the ordinary course of events. Section 5.4 provides that a person is reckless with respect to a circumstance if (a) they are aware of a substantial risk that the circumstance exists or will exist, and (b) having regard to the circumstances known to them, it is unjustifiable to take the risk.

‘Terrorist organisation’ is defined in section 102.1 of the *Criminal Code*. ‘Funds’ are broadly defined in section 100.1 of the *Criminal Code*, and cover property and assets of every kind.

This item amends subsections 102.6(1) and (2) by adding a third form of conduct to these offences for which a person could be prosecuted. The amendments criminalise the *collection of funds* for, or on behalf of, an organisation, whether directly or indirectly, that the person either knows to be a terrorist organisation (102.6(1)) or is reckless as to whether it is a terrorist organisation (102.6(2)). The maximum penalties for the offences under subsections 102.6(1) and (2) will not change.

These amendments are in response to the FATF requirement that the wilful collection of funds for terrorist organisations be explicitly covered by terrorist financing offences.

A note at the end of this item amends the heading of section 102.6 of the *Criminal Code* consistent with the amendments made by this item.

Item 2

This item repeals subsection 103.1(3) of the *Criminal Code*, which provides that extended geographical jurisdiction – category D applies to the financing terrorism offence in subsection 103.1(1). Subsection 103.1(3) will be replaced by new section 103.3 (see item 3 below), which will apply extended geographical jurisdiction – category D to both existing subsection 103.1(1) and new subsection 103.2(1) (also see item 3).

Item 3

Existing subsection 103.1(1) of the *Criminal Code* makes it an offence to provide or collect funds being reckless as to whether those funds will be used to facilitate or engage in a terrorist act. The offence in new subsection 103.2(1) deals with similar conduct, but explicitly requires that the funds be made available to or collected for, or on behalf of, *another person*. If the person providing or collecting the funds is reckless as to whether that other person will use the funds to facilitate or engage in a terrorist act, the offence will be made out.

Recklessness as it applies to a result, as in new subsection 103.2(1) is defined in subsection 5.4(2) of the *Criminal Code*. This provision provides that a person is reckless with respect to a result if they are aware of a substantial risk that the result will occur, and having regard to the circumstances known to them it is unjustifiable to take that risk. As recklessness is a relatively high standard fault element, the proposed offence will not apply to a person who provides or collects funds believing those funds will be used for an innocuous purpose, irrespective of whether the funds are in fact used for a terrorist act.

Terrorist act is defined in subsection 100.1(1) of the *Criminal Code*.

This amendment is intended to better implement FATF's Special Recommendation II. Special Recommendation II in part requires that countries' terrorist financing offences explicitly cover the wilful provision or collection of funds intending or knowing that they will be used by an *individual terrorist*. The other characteristics of Special Recommendation II already exist under Australian law.

New subsection 103.2(1) carries a maximum penalty of life imprisonment. This is the same penalty for offences committed under existing section 103.1 of the *Criminal Code*.

New subsection 103.2(2) ensures consistency with amendments made by Schedule 1 to this Bill. The effect of this provision is that as long as the elements of the offence can be proven it does not matter whether a terrorist act actually occurs, that the funds will be used for a different terrorist act to that which the offender thought they may be used for, or that the funds will be used to fund a number of terrorist acts, instead of just the one act.

New subsection 103.2(1) carries a maximum penalty of life imprisonment. This is the same penalty for offences committed under existing section 103.1 of the *Criminal Code*.

This item also inserts new section 103.3, which provides for the application of extended geographical jurisdiction – category D, as set out in section 15.4 of the *Criminal Code*, to offences under Division 103 (existing subsection 103.1(1) and new subsection 103.2(1)). Category D extended geographical jurisdiction is unrestricted and means that an offence under one of these provisions is committed whether or not the conduct constituting the alleged offence or the result of that conduct occurs in Australia.

Financial Transaction Reports Act 1988

Item 4

Under subsection 16(1A) of the *Financial Transaction Reports Act 1988 (FTR Act)*, a cash dealer (as defined in subsection 3(1) of that Act) must make a report to AUSTRAC about any transaction it is involved in that it has reasonable grounds to suspect is either:

- preparatory to the commission of a financing of terrorism offence, or
- relevant to the investigation or prosecution of a financing of terrorism offence.

Currently, paragraph (a) of the definition of ‘financing of terrorism offence’ in subsection 16(6) of the *FTR Act* includes an offence under section 103.1 of the *Criminal Code*. This item amends the definition to include offences committed under section 102.6 (Getting funds to, for or from a terrorist organisation) or Division 3 (Financing terrorism).

The offence in section 102.6 of the *Criminal Code*, dealing with providing funds to or receiving funds from, for, or on behalf of a terrorist organisation, clearly comes within the ordinary meaning of ‘financing of terrorism offence’. Section 102.6 should have originally been included in this definition and this amendment corrects this oversight.

The proposed reference to Division 3 of the *Criminal Code*, rather than just section 103.1, ensures that the new terrorist financing offence added to Division 3 by item 3 of this Schedule falls within the definition of ‘financing of terrorism offence’.

Schedule 4 – Control Orders and preventative detention orders

Part 1 – Control orders and preventative detention orders

Part 1 of this Schedule amends the *Criminal Code* to introduce a new Division 104 to permit the Australian Federal Police to seek, from a court, control orders for up to 12 months duration on people who pose a terrorist risk to the community. Part 1 of this Schedule also amends the *Criminal Code* to introduce a new Division 105 to permit the Australian Federal Police to seek, from a senior Police Officer, preventative detention orders for up to 24 hours, and from a Magistrate or a Judge, continued preventative detention orders for up to an additional 24 hours, in relation to people who pose an imminent terrorist risk to the community or who may destroy evidence.

Criminal Code Act 1995

Definitions – Section 100.1 of the Criminal Code

Items 1 to 23 insert new definitions into subsection 100.1(1) of the *Criminal Code*.

Item 1

This item inserts a definition of **AFP member** which is consistent with the *Australian Federal Police Act 1979*. AFP members may apply for preventative detention orders in compliance with new Division 105 as described below.

Item 2

This item inserts a definition of **confirmed control order** to mean an order made under new section 104.16 as described below.

Item 3

This item inserts a definition of **continued preventative detention order** to mean an order made under new section 105.12 as described below.

Item 4

This item inserts a definition of **control order** to mean an interim control order or a confirmed control order, definitions of which are inserted by items 9 and 2 respectively.

Item 5

This item inserts a definition of **corresponding State preventative detention law** to mean a law of a State or Territory or particular provisions of a law of a State or Territory that are declared by regulations to correspond with Division 105 of this Act. COAG agreed on 27 September 2005 that States and Territories would enact laws which would enable preventive detention for up to 14 days.

Item 6

This item inserts a definition of *frisk search* which is consistent with the definition in section 3C of the *Crimes Act*.

Item 7

This item inserts a definition of *identification material*, in relation to a person. The definition includes means of identifying a person but excludes tape recordings made for the purposes of section 23U or 23V of the *Crimes Act*. These sections relate to tape recordings of information when questioning a person under arrest.

Item 8

This item inserts a definition of *initial preventative detention order* to mean an order made under new section 105.8 as described below.

Item 9

This item inserts a definition of *interim control order* to mean an order made under new sections 104.4, 104.7 or 104.9 as described below.

Item 10

This item inserts a definition of *issuing authority*. An issuing authority relates to preventative detention orders. For an initial preventative detention order this means a senior AFP member. For continued preventative detention orders an issuing authority must be a judge of a State or Territory Supreme Court, a Federal Magistrate, a Judge (Federal or Family Court), a former judge, or a President or Deputy President of the Administrative Appeals Tribunal, appointed in accordance with section 105.2 as described below.

Item 11

This item inserts a definition of *issuing court*. These courts may issue control orders in accordance with new sections 104.3 to 104.9 and 104.28 or revoke control orders in accordance with new sections 104.18, 104.19 and 104.20 as described below.

Item 12

This item inserts a definition of *Judge*. A Judge of a court created by Parliament may be an issuing authority for the purposes of preventative detention orders under new Division 105 as described below. This includes Federal and Family Court Judges and Federal Magistrates.

Item 13

This item inserts a definition of *lawyer*. A person who is the subject of a control order is able to contact a lawyer in accordance with new section 104.5 and the lawyer is able to obtain a copy of the control order in accordance with new sections 104.5 and

104.11. A person who is in preventative detention is also entitled to a lawyer in accordance with new section 105.37 and this must be explained to the person as soon as he or she is taken into custody in accordance with new section 105.28. Their lawyer is able to obtain a copy of the preventative detention order in accordance with new section 105.32.

Item 14

This item inserts a definition of a ***listed terrorist organisation***. A listed terrorist organisation means an organisation that is specified by the regulations where the Attorney-General is satisfied on reasonable grounds that the organisation is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not the terrorist act has occurred or will occur). This is in accordance with paragraph (a) of the definition of *terrorist organisation* in section 102.1 of the *Criminal Code*. In addition, a listed terrorist organisation means an organisation that is specified by the regulations where the Attorney-General is satisfied on reasonable grounds that the organisation advocates the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). An organisation advocates the doing of a terrorist act if the organisation directly or indirectly counsels or urges the doing of a terrorist act, directly or indirectly provides instruction on the doing of a terrorist act, or directly praises the doing of a terrorist act (see new subsection 102.1(1A) of the *Criminal Code*, explained in item 9 in Schedule 1 above).

Item 15

This item inserts a definition of ***ordinary search*** for the purposes of new section 105.24 which is consistent with the definition in the *Crimes Act*.

Item 16

This item inserts a definition of ***police officer***. A police officer means an AFP member or a member (however described) of a police force of a State or Territory. The phrase 'however described' is intended to ensure that all State and Territory police officers fall within this definition, whether they are described as members, officers or employees of the force. This is necessary to ensure that the AFP can obtain the assistance of State or Territory police to enforce orders.

Item 17

This item inserts a definition of ***prescribed authority*** which has the same meaning as in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (the *ASIO Act*) and is relevant to new section 105.25. A prescribed authority under the *ASIO Act* is a retired federal, State or Territory judge, or a current State or Territory judge, or a President or Deputy President of the Administrative Appeals Tribunal who has consented to be appointed by the Minister for the purposes of the questioning regime under the *ASIO Act*.

Item 18

This item inserts a definition of *preventative detention order* to mean an order under new section 105.8 or 105.12 as described below.

Item 19

This item inserts a definition of *prohibited contact order* to mean an order made under new sections 105.15 or 105.16 as described below.

Item 20

This item inserts a definition of *seizable item* which relates to frisk searches or ordinary searches in accordance with new sections 105.23 and 105.24. This definition is consistent with the definition under section 3C of the *Crimes Act* but also includes items that could be used to contact another person or to operate a device remotely.

Item 21

This item inserts a definition of *senior AFP member*. A senior AFP Member, who may request control orders in accordance with new Division 104, is defined to mean the Commissioner or Deputy Commissioner of the AFP, or a member of the AFP of, or above, the rank of Superintendent.

Item 22

This item inserts a definition of *superior court*. A superior court, which is relevant to the definition of issuing authority for the purposes of continued preventative detention orders, means the High Court of Australia, the Federal Court of Australia, the Family Court of Australia or of a State or the Supreme Court or District Court (or equivalent) of a State or Territory. The phrase ‘or equivalent’ recognises that certain jurisdictions have alternative names for the middle level of court. It is not intended to include the equivalent of Magistrates’ Courts.

Item 23

This item inserts a definition of *tracking device* which is consistent with the definition under the *Surveillance Devices Act 2004*. Under new section 104.5 a control order may contain a requirement that a person wear a tracking device.

Item 24

This item inserts a new Division 104 – Control Orders and a new Division 105 – Preventative Detention Orders after Division 103 of the *Criminal Code*.

Division 104 – Control orders

Proposed Division 104 of the *Criminal Code* provides a regime for placing controls on persons for up to 12 months in the case of adults, and for up to 3 months in the case of young persons aged between 16 and 18 years, to protect the community from a

terrorist act. Interim control orders can only be requested by a senior AFP member, and can only be made by a court, and are reviewed and reconsidered before being confirmed. The Division lists the types of controls that can be imposed on a person, and provides for requests for interim control orders and applications for confirming variation and revocation of those orders, as well as setting out the safeguards surrounding this new regime.

New Subdivision A – Object of this Division

New section 104.1 – Object of this Division

New section 104.1 sets out the objects of new Division 104, which are to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.

New Subdivision B – Making an interim control order

New section 104.2 – Attorney-General’s consent to request a control order

New section 104.2 sets out the process for seeking the consent of the Attorney-General for an interim control order. Only a senior AFP member can request an interim control order. It is appropriate that requests for control orders which have the potential to impose strict conditions on a person are considered by experienced and senior officers.

New subsection 104.2(1) provides that the request can not be made without the consent of the Attorney-General. However, the note to subsection 104.2(1) refers to new Subdivision C, which provides that in urgent circumstances, a senior AFP member may request an interim control order without first obtaining the Attorney-General’s consent.

New subsection 104.2(2) provides that prior to seeking the Attorney-General’s consent, the senior AFP member must either consider on reasonable grounds that the making of the order would substantially assist in preventing a terrorist act, or suspect on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation.

New subsection 104.2(3) provides that, when seeking the Attorney-General’s consent, the senior AFP member making the request must give the Attorney-General a draft request. The draft request must include:

- (a) a draft of the interim control order to be requested;
- (b) a statement of facts as to why the order should be made, including a statement of any facts known as to why the order should not be made;
- (c) an explanation as to why each of the obligations, prohibitions and restrictions should be imposed on the person, including a statement of any facts known as to why those obligations, prohibitions and restrictions should not be imposed;
- (d) the outcomes and particulars of all previous requests for interim control orders (including whether those orders were confirmed), applications for variations and revocations of control orders (both interim and confirmed) and applications for

preventative detention orders in relation to the person and the details (if any) of any detention under a corresponding State preventative detention law; and
(e) any information known about the person's age.

The first note to subsection 104.2(3) indicates that the requirement to include information known about the person's age is necessary because an interim control order cannot be requested in relation to a person who is under 16 years of age (see new section 104.28).

The second note to subsection 104.2(3) indicates that it is an offence to include information in the draft request that is false or misleading (see sections 137.1 and 137.2 of the *Criminal Code*, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

New subsection 104.2(4) provides that the Attorney-General may grant his or her consent to the request subject to changes to the draft interim control order.

New subsection 104.2(5) is an avoidance of doubt provision to ensure that a further request for an interim control order can be made in relation to a person, even if a request has previously been made in relation to that person. This applies whether or not the previous request was successful. For example, if an application is unsuccessful because the issuing court considers there is insufficient information upon which to make the order, the AFP member may obtain further information that is relevant to the making of an order, and may make a further application. In addition, the provision makes it clear that, when an order expires, there is no impediment to an AFP member applying for a further order.

New Section 104.3 – Requesting the court to make an interim control order

New section 104.3 provides that, if the Attorney-General consents to the request under section 104.2, the senior AFP member may then request the interim control order from an issuing court (the Federal Court, the Family Court or a Federal Magistrates Court). The issuing court must be provided with the request, including any changes required by the Attorney-General. The application must be sworn or affirmed by the senior AFP member, and a copy of the Attorney-General's consent must be provided to the issuing court.

The note to section 104.3 indicates that it is an offence to include information in the draft request that is false or misleading (see sections 137.1 and 137.2 of the *Criminal Code*, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

New Section 104.4 – Making an interim control order

New subsection 104.4(1) provides that the issuing court may make an interim control order, but only if four conditions are met.

The first condition is that the senior AFP member requested the order in accordance with the requirements under new section 104.3.

The second condition is that the issuing court has received and considered such further information (if any) that the court requires before making its decision.

The third condition is that the issuing court is satisfied on the balance of probabilities either that making the order would substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organisation.

The fourth condition is that the issuing court is satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act (the obligations, prohibitions and restrictions that may be imposed on a person by a control order are described in new subsection 104.5(3)).

New subsection 104.4(2) provides that in making a decision under new subsection 104.4(1), the court must take into account the impact of the obligations, prohibitions or restrictions on the person's circumstances (including the person's financial and personal circumstances). This is designed to ensure an obligation that would, for example, have an adverse impact on the ability of person to earn a living and support his or her family must be taken into account before the obligation, prohibition or restriction is imposed.

New subsection 104.4(3) expressly provides that the issuing court may make an interim control order which does not have each of the obligations, prohibitions or restrictions that were requested by the senior AFP member, if the court is not satisfied that those particular obligations, prohibitions or restrictions are reasonably necessary, appropriate or adapted in accordance with new paragraph (1)(d).

This allows the issuing court to ensure that each order will be tailored to the particular risk posed by the individual concerned. The more onerous an obligation or stringent a prohibition or requirement, the greater the burden on the AFP member to satisfy the issuing court that the particular obligation, prohibition or restriction sought to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act.

New Section 104.5 – Terms of an interim control order

New subsection 104.5(1) sets out the matters that must be included in an interim control order. An interim control order must:

- (a) state that the court is satisfied of the matters mentioned in paragraphs 104.4(1)(c) and (d), being that the court is satisfied on the balance of probabilities that making the order would substantially assist in preventing a terrorist act or that the person has provided training to, or received training from, a listed terrorist organisation, and that each of the obligations, prohibitions and restrictions to be imposed on the person by the order is reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act;
- (b) specify the name of the person to whom the order relates;

- (c) specify all the obligations, prohibitions and restrictions that may be imposed under new subsection (3) that are to be imposed on the person by the order;
- (d) state that the order does not begin to be in force until it is personally served on the person;
- (e) specify a day on which the person may attend the court for the court to confirm the interim control order (with or without variation), declare the interim control order to be void or revoke the interim control order;
- (f) specify the period during which the order is to be in force which must not end more than 12 months after the day on which the order is made; and
- (g) state that the person's lawyer may attend a specified place in order to obtain a copy of the order.

The note to new subsection 104.5(1) indicates that for young persons aged at least 16 years but under the age of 18 years, a control order that is confirmed must not end more than 3 months after the day on which the interim control order was made (see new subsection 104.28(2)).

New subsection 104.5(2) makes it clear that paragraph 104.5(1)(f) does not prevent the making of successive control orders in relation to the same person. This includes for young persons.

New subsection 104.5(3) lists the types of obligations, prohibitions and restrictions that the court may impose on a person by a control order, which are limited to one or more of the following:

- (a) a prohibition or restriction on the person being at specified areas or places;
- (b) a prohibition or restriction on the person leaving Australia;
- (c) a requirement that the person remain at specified premises between specified times each day, or on specified days;
- (d) a requirement that the person wear a tracking device;
- (e) a prohibition or restriction on the person communicating or associating with specified individuals;
- (f) a prohibition or restriction on the person accessing or using specified forms of telecommunications or other technology (including the Internet);
- (g) a prohibition or restriction on the person possessing or using specified articles or substances;
- (h) prohibition or restriction on the person carrying out specified activities (including in respect of his or her work or occupation);
- (i) a requirement that the person report to specified persons at specified times and places;
- (j) a requirement that the person allow himself or herself to be photographed;
- (k) a requirement that the person allow impressions of his or her fingerprints to be taken; and
- (l) a requirement that the person participate in specified counselling or education.

It is not possible under the legislation to impose an obligation, prohibition or restriction that is not of a type listed.

The note to new subsection 104.5(3) indicates that new section 104.22 imposes restrictions on the use of photographs or impressions of fingerprints taken under

paragraphs 104.5(3)(j) and (k). This ensures the photographs and fingerprints are only used for the purpose for which they were taken – ensuring identification and enforcement of the order.

New subsection 104.5(4) provides that, for the purposes of any restriction imposed on a person's ability to associate or communicate with a specified person by an order under new paragraph 104.5(3)(e), the matters outlined in the association offence in subsection 102.8(4) of the *Criminal Code* apply to such communications and associations in the same way. New section 102.8(4) of the *Criminal Code* provides for exceptions to an offence of associating with a terrorist organisation. The exceptions under subsection 102.8(4) include an association with a close family member relating to a matter of family or domestic concern, an association in a place used for public religious worship and takes place in the course of practising a religion, an association for the purposes of providing aid of a humanitarian nature or an association for the purpose of providing legal advice or legal representation in connection with certain proceedings as set out in subparagraphs 102.8(4)(d)(i) to (vi).

New subsection 104.5(5) provides that a person's right to contact, communicate or associate with the person's lawyer is not affected by this section, unless the person's lawyer is specified as a person with whom the person the subject of the control order is not permitted to associate or communicate with as provided for in new subsection 104.5(3)(e). As is the case with organised crime, it is not inconceivable that some lawyers may be directly involved in the organisation of terrorist activity or are capable of passing on information that could be used to organise a terrorist act. New subsection 104.5(5) further provides that if the person's lawyer is an individual who the person is prohibited or restricted from communicating or associating with under subsection 104.5(3)(e), the person may contact, communicate or associate with any other lawyer who is not so specified (under subsection 104.5(3)(e)). That is, there are no restrictions on a person the subject of a control order contacting, communicating with or associating with a lawyer who is not listed as a prohibited contact as provided for by subsection 104.5(3)(e).

New subsection 104.5(6) ensures that if an order made in relation to a person requires the person to attend counselling or education under a control order, the person need only attend that counselling or education if, at the time of attendance, the person agrees to so attend. This recognises that the benefit of counselling or education can only be achieved through willing participation. This measure recognises that control orders can last for a long period and that the individual may be able to gain some benefit that take them further away from association with terrorists through appropriate counselling or education. For example, lack of literacy skills could be holding the person back from general employment. Opportunities to participate in education programmes could address this.

Subdivision C – Making an urgent interim control order

New section 104.6 – Requesting an urgent interim control order by electronic means

New section 104.6 sets out the process for requesting an urgent interim control order by electronic means. This provision is designed to deal with the situation where an

AFP member experiences difficulty attending at the location of an issuing court to seek an interim control order.

New subsection 104.6(1) authorises a senior AFP member to make a request to an issuing court to make an interim control order by telephone, fax or email. Such requests can only be made if the member considers it necessary to use such means because of the urgency of the circumstances and the member must consider on reasonable grounds that the making of the order would substantially assist in preventing a terrorist act, or suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation (as provided in new subsection 104.2(2)).

New subsection 104.6(2) provides that the Attorney-General's consent under new section 104.2 is not required before the request is made. However, the note to new subsection (2) indicates that under new section 104.10, if the Attorney-General's consent is not obtained before the request is made, the Attorney-General's consent must be obtained within 4 hours of making the request. Travel within Australia can in some cases make it difficult to contact the Attorney-General on short notice.

New subsection 104.6(3) provides that the court may require communication by voice to the extent that it is practicable in the circumstances.

New subsection 104.6(4) requires the request to the issuing court to include all that is required in an ordinary request for an interim control order under subsection 104.2(3), including, if the Attorney-General's consent has been obtained before making the request, the changes, if any, required by the Attorney-General, an explanation as to why the making of the order is urgent, and a copy of the Attorney-General's consent, if his or her consent has been obtained before making the request.

The note to subsection 104.6(4) indicates that it is an offence to include information in the draft request that is false or misleading (see sections 137.1 and 137.2 of the *Criminal Code*, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

New subsection 104.6(5) requires the information and the explanation included in the request, including the information as to why the request is urgent, to be sworn or affirmed by the AFP member. The swearing or affirming of the information and explanation can occur after the request is made, but must occur within 24 hours (see new subsection 104.7(5)).

New section 104.7 – Making an urgent interim control order by electronic means

New section 104.7 sets out the process for an issuing court to make an urgent interim control order by electronic means.

New subsection 104.7(1) provides that before making an interim control order in response to a request under section 104.6, the court must consider the information and the explanation included in the request. In addition, the court can receive and consider any such further information as the court requires.

New subsection 104.7(2) provides that if the court is satisfied that an order should be made, the court may complete the same form of order that would be made under sections 104.4 and 104.5.

New subsections 104.7(3) to (6) set out the procedure that must be followed after an urgent interim control order is made.

New subsection 104.7(3) provides that if the court makes the order, the court must inform the senior AFP member by telephone, fax, email or other electronic means, of the terms of the order and the day on which and the time at which, the order was completed.

New subsection 104.7(4) provides that the AFP member must then complete a form of order in terms substantially corresponding to those given by the issuing court, stating on the form, the name of the court and the day on and time at which, the order was completed.

New subsection 104.7(5) provides that within 24 hours of being informed of the terms of the order and the day on which and the time at which, the order was completed under new subsection (3), the AFP member must give or transmit to the court the completed form of order, sworn or affirmed information and explanation, where that information and explanation included in the request were not sworn or affirmed before the request was made to the court, and a copy of the Attorney-General's consent, if his or her consent was not obtained before making the request.

New subsection 104.7(6) provides that the court must attach to the documents provided under new subsection (5) the form of order completed by the court.

New section 104.8 – Requesting an urgent interim control order in person

New section 104.8 sets out the process for requesting an urgent interim control order in person. This provision is designed to deal with the situation where an AFP member experiences difficulty obtaining the consent of the Attorney-General before requesting that the issuing court make an interim control order.

New subsection 104.8(1) authorises a senior AFP member to make a request to an issuing court to make an interim control order without first obtaining the Attorney-General's consent under section 104.2, if the member considers it necessary to request the order without consent due to the urgency of the circumstances. The member must also consider on reasonable grounds that the making of the order would substantially assist in preventing a terrorist act, or suspects on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation (as provided in new subsection 104.2(2)). As with urgent electronic requests under new section 104.6, the Attorney-General's consent must be obtained within 4 hours of making the request (see new section 104.10).

New subsection 104.8(2) requires the request to include all that is required in an ordinary request for an interim control order under new subsection 104.2(3), including information that is sworn or affirmed by the member, and an explanation that is sworn

or affirmed as to why the making of the interim control order without first obtaining the Attorney-General's consent is urgent.

The note to new subsection (2) indicates that it is an offence to include information in the draft request that is false or misleading (see sections 137.1 and 137.2 of the *Criminal Code*, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

New section 104.9 – Making an urgent interim control order in person

New section 104.9 sets out the process for making an urgent interim control order in person.

As is the case in making an interim control order by electronic means under new section 104.7, new subsection 104.9(1) provides that before making an interim control order in response to a request under new section 104.8, the court must consider the information and the explanation included in the request and receive and consider any such further information as the court requires.

New subsection 104.9(2) sets out similar requirements to those for making an urgent interim control order by electronic means. That is, if the court is satisfied that an order in the terms of the request should be made, the court may complete the same form of order that would be made under new sections 104.4 and 104.5.

New subsection 104.9(3) provides that the member must give or transmit a copy of the order and either the Attorney-General's consent to request the order if given, or written notification that this consent was not obtained, to the issuing court within 24 hours of the order being made under new subsection 104.9(2).

The note to new subsection (3) indicates that obtaining the Attorney-General's consent is dealt with by new section 104.10.

New section 104.10 – Obtaining the Attorney-General's consent within 4 hours

This section is relevant to requesting an interim urgent control order under new sections 104.6 and 104.8.

New subsection 104.10(1) provides that if the Attorney-General's consent to request an interim control order was not first sought before making a request for an urgent interim control order under section 104.6 or 104.8, the senior AFP member must seek that consent within 4 hours of making the request to the issuing court. The consent must be sought in accordance with the provisions of subsection 104.2(3).

New subsection 104.10(2) provides that if the Attorney-General refuses consent or has not given consent to request the order within 4 hours of the request being made, the order made by the issuing court immediately ceases to be in force.

The note to subsection 104.10(2) indicates that if the Attorney-General's consent is refused or not obtained, a senior AFP member can make a new request and seek the

Attorney-General's consent to request a new interim control order in relation to the person under subsection 104.2(5).

New subsection 104.10(3) provides that if the order ceases to be in force under new subsection (2) due to the Attorney-General's consent not being obtained, the senior AFP member must, as soon as practicable, notify the issuing court that the order has ceased to be in force, and if the order has already been served on the person in relation to whom it was made, annotate the order to indicate that it has ceased to be in force and cause the annotated order to be served personally on the person.

New section 104.11 – Court to assume that exercise of power not authorised by urgent interim control order

New section 104.11 provides that it is material in any proceedings, for a court to be satisfied that the exercise of a power under or in respect of, an interim control order made under section 104.7, was duly authorised, and where the form of order completed by the issuing court is not produced in evidence, the court hearing the proceedings is to assume that the exercise of the power was not duly authorised unless the contrary is proved. This provision places an obligation on the prosecution to produce to the court a form of the order alleged to have been made by the issuing court.

New Subdivision D – Confirming an interim control order

New section 104.12 – Service, explanation and notification and explanation of an interim control order

New section 104.12 requires an AFP member to serve the order on the person subject to the order, and inform the person of the making of a control order.

New subsection 104.12(1) provides that the AFP member must serve the order on the person to whom it relates and inform the person of the effect of the order, the period for which the order (if confirmed) is in force, the effect of new sections 104.13, 104.14, 104.18, and 104.27 (and new section 104.22 if appropriate), and ensure that the person understands this information, taking into account the person's age, language skills, mental capacity and any other relevant factor.

The AFP member is required to serve the order and inform the person of these matters as soon as practicable after an interim control order is made, which must be at least 48 hours before the time specified in the order as the day on which the court is to consider whether to confirm the interim control order. The order must be served personally on the person to whom it relates.

In addition to serving the order, the AFP member must serve on the person a summary of the grounds upon which the order is made. For example, the summary of the grounds could be that the person is alleged to have engaged in training with a specified listed terrorist organisation.

New subsection 104.12(2) provides that the requirements under new paragraphs 104.12(1)(b) and (c) to inform the person of certain matters and ensure the

person understands those matter do not apply if the actions of the person to whom the interim control order applies has made it impracticable for the AFP member to comply with those requirements.

New subsection 104.12(3) provides that a failure to ensure that the person understands the information, as required under paragraph 104.12(1)(c), does not make the control order ineffective to any extent.

New subsection 104.12(5) provides for the involvement of the Queensland public interest monitor in the processes for confirming interim control orders. That provision provides that if the person in relation to whom the interim control order is made is a resident of Queensland or if the issuing court made the interim control order in Queensland an AFP member must give to the Queensland public interest monitor written notice of certain facts. Those facts are that an interim control order has been made in relation to the person the subject of the order, the name of the court that made the order, and the day on which the person the subject of the order has been advised that he or she may attend the court for the court to confirm, void or revoke the interim control order.

New section 104.13 – Lawyer may request a copy of an interim control order

New paragraph 104.5(1)(g) provides that an interim control order must specify a place that a person’s lawyer may attend to obtain a copy of the order. New subsection 104.13(1) authorises a lawyer of the person to whom an interim control order is made to attend that place in order to obtain a copy of the order and the grounds on which the order is made.

New subsection 104.13(2) makes it clear that this section does not require the lawyer to be given a copy of the interim control order or summary by more than one person, nor does it entitle the lawyer to request or be given a copy of, or see, a document other than the interim control order or summary.

New section 104.14 – Confirming an interim control order

New section 104.14 sets out the process by which an interim control order is confirmed or otherwise ceases. This process occurs on the day specified in the interim control order under new paragraph 104.5(1)(e).

New subsection 104.14(1) provides that the senior AFP member who requested the interim control order, one or more other AFP members, the person in relation to whom the interim control is made and one or more representatives of the person (which include legal representation), may adduce evidence (including by calling witnesses or producing material) or make submissions to the issuing court before the interim control order is confirmed or otherwise dealt with.

In addition, new subsection 104.14(1) provides that the Queensland public interest monitor may adduce evidence (including by calling witnesses or producing material) or make submissions, but only if the interim control order is made in relation to a resident of Queensland or if the issuing court made the interim control order in Queensland.

New subsection 104.14(2) provides that subsection 104.14(1) does not limit the power of the court to control proceedings in relation to the confirmation of an interim control order.

New subsection 104.14(3) provides that before taking action under section 104.14, the court must consider the original request for the interim control order, and any evidence adduced, submissions made, and material produced, under subsection (1) in respect of the order.

New subsection 104.14(4) provides that the court may confirm the order without variation if neither the person to whom the order relates, or any representative of that person, has attended court on the specified day, and it is satisfied that the person to whom the order relates was properly served with the order.

New subsection 104.14(5) provides that if the person or a representative of the person attends court, the court may take one of the actions specified in new subsections 104.14(6) and 104.14(7).

New subsection 104.14(6) provides that the court may declare, in writing, the order to be void if it is satisfied that, at the time the order was made, there were no grounds for making the order.

New subsection 104.14(7) provides that if the court does not act under new subsection 104.14(6), it may either revoke the order if no longer satisfied that the grounds for making it exist, or confirm the order if satisfied that the grounds for making it still exist. In this latter scenario, the court may either vary the obligations, prohibitions or restrictions imposed by the interim control order if it considers that they are no longer necessary, or appropriate or adapted, for the reasons expressed, or confirm the order in the same form as the interim control order.

The note to new subsection 104.14(7) provides that if the court confirms the order, it must make a new order under new section 104.16.

New section 104.15 – When a declaration, or a revocation, variation or confirmation of a control order, is in force

New subsection 104.15(1) provides that if the court declares an interim control order to be void under new subsection 104.14(6), the order is taken to have never been in force.

New subsection 104.15(2) provides that if the court revokes an interim control order under new paragraph 104.14(7)(a), the order ceases to be in force when the court revokes it.

New subsection 104.15(3) provides that if the court confirms the interim control order with or without variation under new subsection 104.14(4) or new paragraph 104.14(7)(b) or (c), the interim control order ceases to be in force, and the confirmed control order begins to be in force, when the court makes a corresponding confirmed control order under new section 104.16.

New section 104.16 – Terms of a confirmed control order

New subsection 104.16(1) provides that if the issuing court confirms an interim control order under new section 104.14, it must make a corresponding confirmed control order which states similar requirements as those that must be stated in an interim control order.

In particular, the confirmed control order must state the court's satisfaction of the appropriateness of the order and the obligations, prohibitions and restrictions that it imposes, specify the person to whom it relates, specify the obligations, prohibitions and restrictions that it imposes, specify the period, not being longer than 12 months since the interim control order was made, for which it is in force, and specify a place at which a lawyer of the person may attend to obtain a copy of the order.

The note to new subsection (1) reminds the reader that a confirmed control order made in relation to a person who is between the ages of 16 and 18 may not be in force for a period longer than 3 months since the interim control order was made (see section 104.28).

New subsection 104.16(2) ensures that the 12-month (or 3-month, as applicable) restriction on the period on which a confirmed control order may be in force does not prevent the making of successive control orders in relation to the same person.

New section 104.17 – Service of a declaration, or a revocation, variation or confirmation of a control order

New section 104.17 provides that as soon as practicable after an interim control order is declared void, revoked or confirmed (with or without variation), an AFP member must serve the declaration, revocation or confirmed control order personally on the person. This is consistent with the service and notification requirements for interim control orders.

New Subdivision E – Rights in respect of a control order

New section 104.18 – Application by the person for a revocation or, variation of a control order

New section 104.18 confers rights on a person who is the subject of a control order to apply to an issuing court to have the order revoked or varied.

New subsection 104.18(2) provides that the person may make the application any time after the order is served. This is designed to ensure the person has the earliest opportunity to seek the removal of the obligations, prohibitions and restrictions imposed on the person by a control order.

New subsection 104.18(3) requires the person to give written notice to the AFP Commissioner of both the application and the grounds on which the revocation or variation is sought. It also requires the person to give notice to the Queensland public

interest monitor, but only if the interim control order is made in relation to a resident of Queensland or if the issuing court made the interim control order in Queensland.

New subsection 104.18(4) provides that the Commissioner and one or more other AFP members, the person in relation to whom the order is made, and one or more representatives of the person may adduce additional material to the court in relation to the application.

New subsection 104.18(5) provides that subsection (4) does not limit the power of the court to control proceedings in relation to an application to revoke or vary a confirmed control order.

New section 104.19 – Application by the AFP Commissioner for a revocation or variation

New section 104.19 applies while a control order is in force, and sets out the circumstances in which the AFP Commissioner must apply to an issuing court for revocation or variation of the order .

New subsection 104.19(1) requires the Commissioner to make an application to have the order revoked if the Commissioner is satisfied that the grounds on which the order was confirmed have ceased to exist, or varied if the Commissioner is satisfied that the obligations, prohibitions or restrictions imposed by the order should no longer be imposed on the person.

New subsection 104.19(2) requires the Commissioner to give written notice to the person of both the application and the grounds on which the revocation or variation is sought. In addition, new subsection 104.19(2) requires the Commissioner to give written notice to the Queensland public interest monitor, but only if the interim control order is made in relation to a resident of Queensland or if the issuing court made the interim control order in Queensland.

New subsection 104.19(3) provides that the Commissioner, one or more other AFP members, the person, and one or more of his or her representatives, and, if applicable, the Queensland public interest monitor, may adduce additional matter to the court in relation to an application.

New subsection 104.19(4) provides that subsection 104.19(3), which provides that certain persons can adduce material, does not otherwise limit the power of the court to control proceedings in relation to an application to revoke or vary a confirmed control order

New section 104.20 – Revocation or variation of a control order

New section 104.20 sets out the powers of the court where an application is made under new section 104.18 or 104.19.

New subsection 104.20(1) provides that the court may revoke the control order if the court is satisfied that the grounds for it being made no longer exist, vary the control order by removing identified obligations, prohibitions or restrictions if the court is

satisfied that the grounds for the control order still exist but those identified obligations, prohibitions or restrictions are no longer necessary, or appropriate and adapted to the purposes of the control order, or dismiss the application if the court is satisfied that the grounds for the control order still exist and the obligations, prohibitions or restrictions imposed by it are still necessary, appropriate and adapted to its purposes.

New subsection 104.20(2) provides that a revocation or variation begins to have effect when the court revokes or varies the order.

New subsection 104.20(3) provides that an AFP member must serve the revocation or variation personally on the person as soon as practicable after a control order is revoked or varied.

New section 104.21 – Lawyer may request a copy of a control order

New section 104.21 is similar to new section 104.13 in that it allows a lawyer to request a copy of a varied control order in the same manner as obtaining a copy of an interim control order.

New subsection 104.21(1) authorises a lawyer of the person to whom a control order which is varied under new section 104.14, 104.20 or 104.24 relates, to attend the place specified in the order under new paragraph 104.16(1)(e) or 104.25(d) to obtain a copy of the variation order.

New subsection 104.21(2) makes it clear that this section does not require the lawyer to be given a copy of the varied control order by more than one person, nor does it entitle the lawyer to request or be given a copy of, or see, a document other than the varied control order.

New section 104.22 – Treatment of photographs and impressions of fingerprints

New subsection 104.22(1) prohibits the use of a photograph or an impression of fingerprints, taken as part of the terms of a control order under paragraph 104.5(3)(j) or (k) respectively, for any purpose other than ensuring compliance with that control order.

Under subsection 104.22(2), if 12 months have elapsed after the control order ceases to be in force and proceedings in respect of the control order or the treatment of the person have not been brought or have been brought and discontinued or completed, the photograph or impression must be destroyed as soon as practicable after the end of this period.

New subsection 104.22(3) provides that it is an offence to use a photograph or an impression of fingerprints taken under paragraph 104.5(3)(j) or (k) for any purpose other than of ensuring compliance with the control order. The offence carries a maximum penalty of 2 years imprisonment.

New Subdivision F – Adding obligations, prohibitions or restrictions to a control order

New section 104.23 – Application by the AFP Commissioner for addition of obligations, prohibitions or restrictions

New section 104.23 authorises the AFP Commissioner to apply to a court to vary a confirmed control order by imposing additional obligations, prohibitions or restrictions mentioned in subsection 104.5(3). The Commissioner can only make such an application if he or she considers on reasonable grounds that the varied control order would substantially assist in preventing a terrorist act.

New subsection 104.23(2) requires the Commissioner to give to the court a copy of the additional obligations, prohibitions or restrictions to be imposed on the person, an explanation as to why the obligations, prohibitions or restrictions should be imposed on the person, including any known facts as to why the obligations, prohibitions or restrictions should not be imposed, and any information known about the person's age.

The first note to new subsection 104.23(2) indicates that the requirement to include information about the person's age is necessary as new section 104.28 prohibits the making of a control order in relation to a person who is under 16 years of age.

The second note to new subsection 104.23(2) indicates that it is an offence to include information in the variation application that is false or misleading (see sections 137.1 and 137.2 of the *Criminal Code*, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

New subsection 104.23(3) requires the Commissioner to give written notice to the person subject to the order of the application and the grounds on which the variation is sought, and if applicable, the Queensland public interest monitor.

New subsection 104.23(4) provides that the Commissioner, one or more other AFP members, the person and one or more of the person's representatives, and if applicable, the Queensland public interest monitor, may adduce additional evidence to the court in relation to the application to vary the order.

New subsection 104.23(5) provides that subsection 104.23(4) does not otherwise limit the power of the court to control proceedings in relation to an application to vary a confirmed control order.

New section 104.24 – Varying a control order

New subsection 104.24(1) provides that an issuing court may vary a control order by adding additional obligations, prohibitions or restrictions only if an application has been made in accordance with the requirements set out in section 104.23, and the court is satisfied on the balance of probabilities that each of the additional obligations, prohibitions or restrictions to be imposed on the person is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist act.

New subsection 104.24(2) provides that in making a decision under new subsection 104.24(1), the court must take into account the impact of each of the obligations, prohibitions or restrictions on the person's circumstances (including the person's financial and personal circumstances). This is designed to ensure an obligation that would, for example, have an adverse impact on the ability of person to earn a living and support his or her family must be taken into account before the obligation, prohibition or restriction is imposed.

New section 104.25 – Terms of a varied control order

New section 104.25 sets out the information that must be included in a control order that is varied by a court under section 104.24.

The varied control order must include a statement that the court is satisfied of the matter referred to in new paragraph 104.24(1)(b), which is that the court is satisfied on the balance of probabilities that each of the additional obligations, prohibitions or restrictions to be imposed on the person is reasonably necessary and reasonably appropriate and adapted for the purpose of protecting the public from a terrorist, a statement of the additional obligations, prohibitions or restrictions that are imposed on the person by the varied order, a statement that the variation of the order does not begin to be in force until the varied order is served personally on the person, and a statement that the person's lawyer may attend a specified place in order to obtain a copy of the varied order.

New section 104.26 – Service and explanation of a varied control order

Similar to new sections 104.12 and 104.17 in relation to service of control orders, new section 104.26 requires an AFP member to serve the varied order on the person to whom the order relates, and inform the person of the variation of the order, inform the person of the effect of the additional obligations, prohibitions and restrictions and the effect of new sections 104.18, 104.21 and 104.27 (and new section 104.22 if appropriate), and ensure that the person understands this information taking into account the person's age, language skills, mental capacity and any other relevant factor.

The AFP member is required to serve the varied order and inform the person as soon as practicable after the variation is made. The varied order must be served personally.

New subsection 104.26(2) provides that, to avoid any doubt, subparagraph 104.26(1)(a)(ii) does not require information to be included in the summary if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

New subsection 104.26(3) provides that the requirements under new paragraphs 104.26(1)(c) and (d) to inform the person of certain matters and ensure the person understands do not apply if the actions of the person to whom the control order applies has made it impracticable for the AFP member to comply with those requirements.

New subsection 104.26(4) provides that a failure to ensure that the person understands the information, as required under new paragraph (1)(d), does not make the control order ineffective to any extent.

New Subdivision G – Contravening a control order

New section 104.27 – Offence of contravening a control order

New section 104.27 creates an offence for a person to contravene a term of a control order that is in force in relation to the person. Section 5.6 of the *Criminal Code* operates to require proof that the accused was at least reckless as to the contravention. ‘Recklessness’ is defined in section 5.4 with respect to a circumstances if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to the person it is unjustifiable to take the risk. The offence carries a maximum penalty of 5 years imprisonment.

New Subdivision H – Miscellaneous

New section 104.28 – Special rules for young people

New section 104.28 provides for the special rules relating to control orders for young people aged under 16 years and aged between 16 and 18 years.

New subsection 104.28(1) provides that a control order cannot be requested, made or confirmed in relation to a person who is under 16 years of age.

New subsection 104.28(2) provides that if the court is satisfied that a person in relation to whom an interim control order is being made or confirmed is at least 16 but under 18, the control order can only be in force for 3 months from the day the order is made by the court. This is designed to recognise the special needs of young people and the additional care that needs to be exercised when dealing with young people in the criminal and security environments.

New subsection 104.28(3) makes it clear that new subsection 104.28(2) does not prevent the making of successive control orders in relation to the same person.

New section 104.29 – Reporting requirements

New section 104.29 requires the Attorney-General to cause a report on the operation of the Division to be prepared and tabled annually.

New subsection 104.29(2) provides that the report relating to a year must include the number of interim control orders made, specifically identifying the number of urgent control orders made electronically and in person, the number of control orders confirmed, the number of control orders declared to be void, the number of control orders revoked, the number of control orders varied and particulars of any complaints relating to control orders made or referred to the Commonwealth Ombudsman or the Internal Investigation Division of the Australian Federal Police.

New subsection 104.29(3) provides that the Attorney-General must cause copies of the report to be laid before each House of Parliament within 15 sitting days of that House after the report is completed.

New section 104.30 – Requirements to notify Attorney-General of declarations, revocations or variations

New section 104.30 requires the Commissioner of the AFP to cause the Attorney-General to be notified in writing if a control order is declared to be void under section 104.14, revoked under section 104.14 or 104.20 or varied under section 104.14, 104.20 or 104.24. If a control order is varied, the Commissioner must cause a copy of the varied control order to be given to the Attorney-General.

New section 104.31 – Queensland public interest monitor functions and powers not affected

New section 104.31 provides that this new Division does not affect any functions or powers that Queensland public interest monitor or deputy public interest monitor has under a law of Queensland. In Queensland, all applications for warrants and related judicial authorisations are attended by the public interest monitor who provides the case for the person who would be the subject of the warrant. This new Division is not intended to affect any powers of that office. It is intended to ensure that the role of the Queensland public interest monitor in overseeing Queensland law enforcement officers operating under Queensland legislation in relation to control orders is preserved. The provision is not intended to authorise the Queensland Parliament to legislate to control how powers are to be exercised under the Bill by Commonwealth officers.

New section 104.32 – Sunset provision

New subsection 104.32(1) provides that a control order that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time. In addition, proposed subsection 104.32(2) provides that a control order can not be requested, made or confirmed after the end of 10 years after the day on which this Division commences.

The sunset provision acknowledges that there are a number of machinery type provisions that must continue in operation despite the intention that the Division providing for control orders should cease to have effect at the end of 10 years. These provisions include, for example, the requirement to destroy identification material.

Division 105 – Preventative Detention Orders

New Division 105 of the *Criminal Code* provides a regime for detaining persons for up to 48 hours for the purposes of preventing a terrorist act or preventing the destruction of evidence relating to a terrorist act.

Applications for initial preventative detention orders are made by an AFP member to a senior AFP officer. Initial preventative detention orders can have force for up to 24 hours from the time the person was first taken into custody. Applications for

continued preventative detention orders are made by AFP members to a judge of a State or Territory Supreme Court, Federal Magistrate, Judge, retired judge or President or Deputy President of the Administrative Appeals Tribunal. Continued preventative detention orders can have force for up to 48 hours from the time the person was first taken into custody.

Although only AFP members can request the issue of preventative detention orders, any police officer, whether an AFP member or a member of the police force of a State or Territory, may detain a person under such an order. This is to ensure that if a State or Territory police officer is aware that a preventative detention order is in force in relation to a person and locates that person, the person may be immediately detained without the need for an AFP member to attend and personally detain the person.

While in preventative detention, the person has an entitlement to contact those who are close to them to let them know that he or she is safe, and to contact a lawyer. These contact rights can be restricted by obtaining a prohibited contact order, which prohibits the person from contacting specified persons where the prohibition of such contact will assist in achieving the objectives of the preventative detention order.

Subdivision A—Preliminary

New section 105.1 – Object

New section 105.1 sets out the objects of new Division 105. The objects are to enable the police to take a person into custody and detain that person for a short period of time, being no longer than 48 hours, in order to prevent an imminent terrorist act occurring, or to preserve evidence of, or relating to, a recent terrorist act.

The note to new section 105.1 indicates that a person detained under a preventative detention order may only be questioned for very limited purposes, in accordance with new section 105.42. This note clarifies that extended questioning is not an object of preventative detention orders.

New section 105.2 – Issuing authorities for continued preventative detention orders

New section 105.2 sets out the persons who can be ‘issuing authorities’ for the purposes of continued preventative detention orders.

New subsection 105.2(1) provides that the Minister may appoint, in writing, a judge of a State or Territory Supreme Court, a Federal Magistrate, a Judge (Federal or Family Court), a former judge who has served at least five years as a judge of one or more superior courts, or a President or Deputy President of the Administrative Appeals Tribunal who is enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory and has been so enrolled for at least five years, to be an issuing authority for continued preventative detention orders.

New subsection 105.2(2) provides that the Minister may not appoint a person unless the person has, in writing, consented to being appointed, and the person has not revoked that consent.

This is to ensure that those who are undertaking the role of issuing authorities have been given appropriate opportunity to consider the operation of the preventative detention regime in advance of being requested to consent to a particular request.

It should be noted that these issuing authorities relate to continued preventative detention orders. Initial preventative detention orders can be issued by the Commissioner or Deputy Commissioner of the AFP, or an AFP member of, or above, the rank of Superintendent.

New section 105.3 – Police officer detaining person under a preventative detention order

New section 105.3 provides that where more than one police officer is involved in the detention of a person under a preventative detention order, it is either the most senior of those officers who are AFP members, or if none of the officers are AFP members, the most senior of those officers, who is required to ensure compliance with any obligations imposed on the police officer with respect to that detention.

For example, if a person is taken into custody under a preventative detention order by an AFP sergeant and a State inspector, the AFP sergeant is responsible for ensuring that the requirements about explaining the preventative detention order to the person are met. In the case of a State constable and a sergeant, it is the sergeant who is responsible.

Where the person is subsequently held in a cell in a watch house under the preventative detention order, the most senior police officer on duty is responsible for ensuring compliance with the obligations imposed by this Division, including that the person is treated humanely and not questioned about an offence.

This is designed to facilitate the compliance with obligations created by this Division by making it clear who bears responsibility for them at any given time.

Subdivision B—Preventative detention orders

New section 105.4 – Basis for applying for, and making, preventative detention orders

New subsection 105.4(1) provides that a preventative detention order may only be applied for by an AFP member who satisfies new subsection (4) or (6). Similarly, new subsection 105.4(2) provides that a preventative detention order may only be made by an issuing authority who satisfies new subsection (4) or (6).

New subsection 105.4(3) is a definitional provision which provides that, for the purposes of this section, the person in relation to whom the preventative detention order is applied for, or made, is referred to as the ***subject***.

A person meets the criteria in new subsection 105.4(4) if the person is satisfied that there are reasonable grounds to suspect that the subject will engage in a terrorist act, possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act, or has done, or will do, an act in preparation for, or planning,

a terrorist act, making the order would substantially assist in preventing a terrorist act occurring and detaining the person for the period for which detention is to occur is reasonably necessary for preventing this act. This ensures the AFP member who applies for an order, and the issuing authority who makes an order, must specifically consider the duration for which the person should be detained.

New subsection 105.4(5) qualifies the operation of new subsection 105.4(4) by providing that the terrorist act must be imminent and must be expected to occur in the next 14 days.

The combined operation of these subsections creates a high threshold for applying for and issuing a preventative detention order because it is necessary to show not only that the subject had, for example, done something in preparation for a terrorist act, but also that the terrorist act is imminent, and that making the order would assist in preventing a terrorist act.

A person does not satisfy new subsection 105.4(4) where even one of these criteria are not established. For example, if the terrorist act was not imminent, but was expected to occur in three weeks time, the criteria would not be met and it would not be possible to obtain a preventative detention order. However, in such cases, it might be possible to use other investigatory tools, such as surveillance or listening devices.

In circumstances where one or more terrorist acts have already occurred and intelligence indicates that further terrorist acts are imminent, it is possible for a preventative detention order to be made provided the other criteria in subsection 105.4(4) are met.

New subsection 105.4(6) provides an alternative basis for requesting, or making, a preventative detention order. A person satisfies this new subsection if the person is satisfied that a terrorist act has occurred within the last 28 days, it is necessary to detain the subject to preserve evidence of, or relating to, the terrorist act and that detaining the subject for the period for which detention is to occur is reasonably necessary for preserving this evidence.

Unlike new subsection 105.4(4), a preventative detention order under new subsection 105.4(6) can only be made where a terrorist act has already occurred.

New subsection 105.4(7) provides that an issuing authority may require the AFP member applying for the order to provide further information before making a preventative detention order. This provides flexibility in cases where the information provided during the application process is not sufficient for the making of an order, but the AFP member is able to provide such additional information as will enable the issuing authority to make such an order.

New section 105.5 – No preventative detention order in relation to persons under 16 years of age

New subsection 105.5(1) prohibits an AFP member from applying for, and an issuing authority making, a preventative detention order in relation to a person who is under 16 years of age.

The note to new subsection 105.5(1) indicates that new section 105.39 and new subsections 105.43(4) to (9) and (11) provide special rules for the making of preventative special orders in relation to people who are under 18 years of age.

It is possible that an AFP member could apply for, and an issuing authority could make, a preventative detention order in relation to a person without knowing that the person is under 16 years of age. Therefore, as an additional safeguard, new subsection 105.5(2) provides that if a police officer detaining a person under a preventative detention order is satisfied on reasonable grounds that the person is under 16 years of age, the police officer must, if themselves an AFP member, release the person from detention as soon as practicable, or if not themselves an AFP member, must inform a senior AFP member as soon as practicable of his or her suspicions.

New subsection 105.5(3) provides that if a senior AFP member is informed of a police officer's suspicions under new subsection 105.5(2), and the senior AFP member is satisfied that the person being detained is under 16 years of age, the senior AFP member must arrange to have the person released from detention as soon as practicable.

New section 105.6 – Restrictions on multiple preventative detention orders

The time limits on preventative detention are an extremely important safeguard in the regime and protect individuals from lengthy periods of detention when there is insufficient evidence available to arrest and charge a person. It is therefore vital that there be restrictions on obtaining multiple preventative detention orders in relation to the same person.

New subsection 105.6(1) prevents the AFP from obtaining multiple initial preventative detention orders in relation to the same person on the basis of assisting in preventing a particular terrorist act occurring within a particular period. Without this safeguard, it would be possible to obtain multiple initial preventative detention orders, each for the maximum period permitted under the legislation, without judicial consideration (under the regime, only a Federal Magistrate or a Judge can extend a preventative detention order beyond 24 hours and up to 48 hours).

The note to new subsection 105.6(1) indicates that this provision does not prevent the making of a preventative detention order to preserve evidence in relation to the terrorist act, if it occurs. For example, a person could be taken into preventative detention under an order made under new subsection 105.4(2) or under a corresponding state law to prevent the person committing a terrorist act in the next 14 days. Following release from detention, a terrorist act could occur. In those circumstances, provided the criteria for making an initial preventative detention order in relation to the person under subsection 105.4(4) were satisfied, it would be possible to apply for and make an initial preventative detention order in relation to the person and take the person into preventative detention for the purposes of preserving evidence of a terrorist act. In those circumstances, it would be possible for the person to be subject to preventative detention for a period exceeding 48 hours within the same 14-day period.

New subsection 105.6(2) prevents the AFP from obtaining multiple initial preventative detention orders in relation to the same person on the basis of assisting in preventing different terrorist acts occurring within a particular period, unless the order is based on information that became available only after the initial preventative detention order was made.

New subsection 105.6(3) prevents the AFP from obtaining multiple initial preventative detention orders in relation to the same person on the basis of preserving evidence of, or relating to, a terrorist act. Consistent with subsection 105.6(1), this limitation only applies where the person is detained under the order.

New subsection 105.6(4) is the equivalent of subsection 105.6(1) where the person is detained under a corresponding State preventative detention law. A ***corresponding State preventative detention law*** is defined in subsection 100.1(1) as a law or particular provisions of a law of a State or Territory declared by the regulations to correspond to Division 105 of this Act. This provision prevents the AFP from obtaining an initial preventative detention order in relation to a person already detained under a corresponding State preventative detention law without judicial consideration.

New subsection 105.6(5) is the equivalent of subsection 105.6(2) where the person is detained under a corresponding State preventative detention law.

New subsection 105.6(6) is the equivalent of subsection 105.6(3) where the person is detained under a corresponding State preventative detention law.

The limitations in section 105.6 only apply where the person is detained under the order. If, for example, a preventative detention order is made and the police are unable to locate and take the person into preventative detention before the order expires (see subsection 105.9(2)), the provision does not prevent the AFP from obtaining a further initial preventative detention order provided the criteria for making an order are satisfied.

New section 105.7 – Applying for an initial preventative detention order

New section 105.7 outlines the steps required for applying for an initial preventative detention order.

New subsection 105.7(1) provides that an application can be made by an AFP member to an issuing authority. The notes to new subsection (1) indicate that an ***issuing authority*** for the purposes of an initial preventative detention order is a ***senior AFP member***, with both terms defined in subsection 100.1(1). The persons who can be issuing authorities for the purposes of initial preventative detention orders are limited to the Commissioner or Deputy Commissioner of the AFP, or an AFP member of, or above, the rank of Superintendent.

New subsection 105.7(2) provides that an application must be made in writing and must set out the facts and other grounds on which the AFP member considers that the order should be made. The application must also specify the period for which the person is to be detained under the order, the facts and other grounds on which the

AFP member considers that the person should be detained for that period, the person's age (if known), the particulars and outcomes of all previous applications for preventative detention orders and requests for control orders and information about any periods for which the person has been detained under a corresponding State preventative detention law (if known). There is no requirement that the facts and other grounds be sworn or affirmed by the AFP member.

New subsection 105.7(3) provides that, if an AFP member applies for a further initial preventative detention order in relation to a person, the application must identify the information on which the application is made that became available only after the initial preventative detention order was made. As with section 105.6, this applies only where the person is detained under the order.

New subsection 105.7(4) is the equivalent of subsection 105.7(3) where the person is detained under a corresponding State preventative detention law.

There is no requirement to include information about any unsuccessful applications for orders. Such processes will not have had any adverse impact on the person as a person can not be taken into custody under such circumstances, and in fact would be unlikely to be aware that a previous application was unsuccessful.

New section 105.8 – Senior AFP member may make an initial preventative detention order

New section 105.8 outlines the procedure for making an initial preventative detention order.

New subsection 105.8(1) provides that an issuing authority may make an initial preventative detention order. As noted above, an ***issuing authority*** for the purposes of an initial preventative detention order is the Commissioner or Deputy Commissioner of the AFP or an AFP member at, or above, the rank of Superintendent.

New subsection 105.8(2) notes that new section 105.8 operates subject to the matters contained in new sections 105.4, 105.5 and 105.6. Those new sections deal with the criteria for applying for and making a preventative detention order, the prohibition on obtaining a preventative detention order for a person under 16 years of age, and the limits on multiple initial preventative detention orders in relation to the same terrorist act, respectively.

New subsection 105.8(3) outlines the actions that an initial preventative detention order authorises, which includes that the person specified in the order may be taken into custody and detained. The period during which the person can be detained under the order starts when the person is first taken into custody under the order and ends at the time specified in the order.

New subsection 105.8(4) provides that the order must be in writing.

New subsection 105.8(5) provides that the period of detention authorised by the order under new subsection 105.8(3) must not exceed 24 hours.

New subsection 105.8(6) requires an initial preventative detention order to set out the name of the person in relation to whom it is made, the period (not exceeding 24 hours) during which the person may be detained under the order, the date on which, and the time at which, the order is made, and the date and time after which the person may not be taken into custody under the order (see subsection 105.9(2)).

New subsection 105.8(7) provides that if the order is made in relation to a person who is under the age of 18 years (but note section 105.5, which prevents an order being made in relation to a person under the age of 16 years) or who is incapable of managing his or her affairs, the order may specify any period of time during which the person may have contact with another person. In the absence of this provision, or the specification of any period in the order, the person may not have contact with another person for more than two hours per day (see subsection 105.39(4)).

New section 105.9 – Duration of initial preventative detention order

New subsection 105.9(1) provides that an initial preventative detention order has effect from the time when it is made.

The note to new subsection (1) indicates that the order comes into force when it is made and authorises the AFP to take the person into custody under new paragraph 105.8(3)(a). This is to be distinguished from the period for which the person may then be detained under the order, which only commences when the person is first taken into custody under the order.

New subsection 105.9(2) provides for the expiry of the initial preventative detention order if it is not executed within a specified time. Specifically, if the person is not taken into custody under the order within 48 hours of it being made, the order ceases to have effect. Where the police do not take the person into custody during the period permitted, the AFP can apply for a fresh initial preventative detention order under new section 105.6.

New subsection 105.9(3) provides for the expiry of the initial preventative detention order if it is executed within a specified time. An initial preventative detention order under which the person is taken into preventative detention ceases to have effect when either the period specified in the order or in an extended order under new section 105.10, expires, or when the order is revoked under new section 105.17, whichever occurs first.

The first note to new subsection 105.9(3) indicates that where a person is released from detention under an order (eg, for the purposes of a warrant under section 34D of the *Australian Security Intelligence Organisation Act 1979 (ASIO Act)*), the order does not cease to have effect (see new sections 105.25 and 105.26).

The second note to new subsection 105.9(3) indicates that the subsection should be read in conjunction with new section 105.11, which provides for a continued preventative detention order, and allows the person to continue to be detained for up to 48 hours after the person is first taken into custody under the initial preventative detention order.

New section 105.10 – Extension of initial preventative detention order

New subsection 105.10(1) authorises an AFP member to apply to an issuing authority for the extension of an initial preventative detention order.

Consistent with the process for applying for an initial preventative detention order, new subsection 105.10(2) provides that an application for extension must be in writing and must set out the facts and other grounds on which the AFP member considers that the extension or further extension should be made. The application must also set out the particulars and outcomes of all previous applications for extensions of the order. The note to new subsection (2) indicates that new subsections 105.4(4) and (6) set out the grounds on which a preventative detention order may be made.

New subsection 105.10(3) authorises the issuing authority to extend or further extend the period for which the order is to be in force in relation to the person. New subsection 105.10(4) provides that the extension or further extension must be made in writing.

New subsection 105.10(5) provides that the total period of detention allowed under an initial preventative detention order, including extensions, must end no later than 24 hours after the person is first taken into custody under the order.

New section 105.11 – Application for continued preventative detention order

A person can not be detained under an initial preventative detention order, including an extended initial preventative detention order, for a period exceeding 24 hours. However, new section 105.11 provides for that detention to be continued for a period not exceeding 48 hours where a judicial issuing authority authorises such detention.

Where an initial preventative detention order is in force in relation to a person, new subsection 105.11(1) authorises an AFP member to apply to an issuing authority for a continued preventative detention order in relation to that person. For the purposes of a continued preventative detention order, an issuing authority is limited to certain judges, Federal Magistrates, AAT members and retired judges who have consented to that appointment in writing (see new section 105.2).

Consistent with new subsection 105.7(2), new subsection 105.11(2) requires the application to be made in writing and to set out the facts and other grounds on which the AFP member considers that the order should be made. The application must also specify the period for which the person is to continue to be detained under the order and set out the facts and other grounds on which the AFP member considers that the person should continue to be detained for that period, the person's age (if known), information about any periods for which the person has been detained under a corresponding State preventative detention law (if known) and the particulars and outcomes of all previous applications for preventative detention orders, and requests for control orders, in relation to the person.

The note to new subsection 105.11(2) indicates that it is an offence to include information in the variation application that is false or misleading (see sections 137.1 and 137.2 of the *Criminal Code*, which provide for the offences of false or misleading information (section 137.1) and documents (section 137.2)).

New subsection 105.11(3) notes that the requirement to include information about previous preventative detention orders in relation to the person does not include information about the initial preventative detention order in relation to which the continued preventative detention order is sought.

New subsection 105.11(4) requires the information in the application to be sworn or affirmed by the AFP member.

New section 105.12 – Judge or Federal magistrate, AAT member or retired judge may make continued preventative detention order

New subsection 105.12(1) authorises an issuing authority to make a continued preventative detention order if a person has been taken into custody under an initial preventative detention order, and that order is still in force. It does not matter if the person is being detained under the order at the time (for example, the person may be, for the time being, in the custody of ASIO under a warrant issued under section 34D of the *ASIO Act*).

Consistent with new subsection 105.8(2), new subsection 105.12(2) notes that new subsection 105.12(1) operates subject to the matters contained in new sections 105.4, 105.5 and 105.6. Those sections deal with the criteria for applying for and making a preventative detention order, the prohibition on obtaining a preventative detention order for a person under 16 years of age, and the limits on multiple initial preventative detention orders in relation to the same terrorist act, respectively. New subsection 105.12(2) means that, whether a preventative detention order will be made is to be decided on its merits, effectively as a stand alone application, and is to be determined in accordance with the criteria in new sections 105.4, 105.5 and 105.6.

New subsection 105.12(3) outlines the things that a continued preventative detention order authorises, which includes that the person specified in the order may be detained. The period during which the person can be detained under the order starts when the person is first taken into custody under the order and ends at the time specified in the order.

New subsection 105.12(4) provides that the order must be in writing.

New subsection 105.12(5) provides that the period of detention authorised by the order under subsection 105.12(3) must not exceed 48 hours.

New subsection 105.12(6) requires a continued preventative detention order to set out the name of the person in relation to whom it is made, the further period during which the person may be detained under the order, and the date on which, and the time at which, the order is made.

New subsection 105.12(7) provides that if the order is made in relation to a person who is under the age of 18 years or who is incapable of managing his or her affairs, the order may specify any period of time during which the person may have contact with another person. In the absence of this provision, or the specification of any period in the order, the person may not have contact with another person for more than two hours per day (see subsection 105.39(4)).

New section 105.13 – Duration of continued preventative detention order

New subsection 105.13(1) provides that a continued preventative detention order has effect from the time when it is made.

The note to subsection 105.13(1) indicates that as with initial orders, the continued order comes into force when it is made and the period for which the person may be detained under the order starts to run when the period during which the person may be detained under the initial preventative detention order ends.

New subsection 105.13(2) provides that the continued preventative detention order expires when either the period specified in the order or in an extended order under new section 105.14 expires, or when the order is revoked under new section 105.17, whichever occurs first.

New subsection 105.13(2) should be read in conjunction with new section 105.14, which provides for the extension of a continued preventative detention order.

The note to subsection 105.13(2) indicates that as with initial preventative detention orders, where a person is released from detention under an order (eg, for the purposes of a warrant under section 34D of the *Australian Security Intelligence Organisation Act 1979*), the order does not cease to have effect (see new section 105.25 below).

New section 105.14 – Extension of continued preventative detention order

Where a continued preventative detention order is in force in relation to a person, new subsection 105.14(1) authorises an AFP member to apply to an issuing authority for the extension of that continued preventative detention order (see new section 105.2).

Consistent with the process for applying for the extension of an initial preventative detention order, new subsection 105.14(2) provides that an application for extension must be in writing and must set out the facts and other grounds on which the AFP member considers that the extension or further extension should be made. The application must also set out the particulars and outcomes of all previous applications for extensions of the order. The note to new subsection (2) indicates that new subsections 105.4(4) and (6) set out the grounds on which a preventative detention order may be made.

As with applications for continued preventative detention orders, new subsection 105.14(3) provides that the information in the application must be sworn or affirmed by the AFP member.

New subsection 105.14(4) authorises the issuing authority to extend or further extend the period for which the order is to be in force in relation to the person. New subsection 105.10(5) provides that the extension or further extension must be made in writing.

New subsection 105.14(6) provides that the total period of detention allowed, as extended or further extended, must end no later than 48 hours after the person is first taken into custody under the initial preventative detention order.

New section 105.15 – Prohibited contact order (person in relation to whom preventative detention order is being sought)

New section 105.15 provides for orders that prohibit a person who is in custody under a preventative detention order from contacting specified persons. This is designed to ensure that the ‘preventative’ purpose of the order is not defeated by the person in detention being able to contact other persons, including co-conspirators or those who might be in custody of evidence relating to a terrorist act, and, for example, instructing such a person to further the terrorist act in the person’s absence, or destroy evidence of a terrorist act.

New subsection 105.15(1) authorises an AFP member who applies for a preventative detention order to also apply for a prohibited contact order. The application must be made to an issuing authority. Accordingly, if an application is made at the time of applying for an initial preventative detention order, the application must be made to the Commissioner or a Deputy Commissioner of the AFP, or an AFP member of, or above, the rank of Superintendent. If an application is made at the time of applying for a continued preventative detention order, the application must be made to an issuing authority (see new section 105.2).

New subsection 105.15(2) requires an application to set out the terms of the order sought and the facts and other grounds on which the AFP member considers that the order should be made.

In the case of an application for a prohibited contact order that is made at the time of applying for an initial preventative detention order, there is no requirement for the information in the application for the prohibited contact order to be sworn or affirmed by the AFP member. However, in the case of an application for a prohibited contact order that is made at the time of applying for a continued preventative detention order, new subsection 105.15(3) requires the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member.

New subsection 105.15(4) authorises the relevant issuing authority to make the prohibited contact order if the preventative detention order is to be made and the issuing authority is satisfied that making the prohibited contact order will assist in achieving the objectives of the preventative detention order. The prohibited contact order prohibits the subject, while being detained under the preventative detention order, from contacting a person specified in the prohibited contact order. The note to new subsection (2) indicates that new subsections 105.4(4) and (6) set out the objectives of preventative detention orders.

New subsection 105.15(5) provides that the prohibited contact order must be in writing.

New section 105.16 – Prohibited contact order (person in relation to whom preventative detention order is already in force)

It is possible that, as a result on ongoing enquiries, the AFP obtains information that indicates that obtaining a prohibited contact order in relation to a person in relation to whom a preventative detention order is already in force would assist in achieving the objectives of the preventative detention order. In those cases, it will be necessary for the AFP member to apply for a prohibited contact order while the person is in detention.

New subsection 105.16(1) provides that an AFP member can apply to the relevant issuing authority for a prohibited contact order while the preventative detention order is in force. As with prohibited contact orders under new section 105.15, the relevant issuing authority will be the Commissioner or a Deputy Commissioner of the AFP, or an AFP member of, or above, the rank of Superintendent in relation to an initial preventative detention order, and a judge of a State or Territory Supreme Court, a Federal Magistrate, a Judge (Federal or Family Court), a former judge, or a President or Deputy President of the Administrative Appeals Tribunal in relation to a continued preventative detention order.

Consistent with prohibited contact orders sought under new subsection 105.15, new subsection 105.16(2) provides that an application under this section must set out the terms of the order sought and the facts and other grounds on which the AFP member considers that the order should be made.

In the case of an application for a prohibited contact order that is made in connection with an initial preventative detention order, there is no requirement for the information in the application for the prohibited contact order to be sworn or affirmed by the AFP member. However, in the case of an application for a prohibited contact order that is made in connection with a continued preventative detention order new subsection 105.16(3) requires the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member.

New subsection 105.16(4) authorises the relevant issuing authority to make the prohibited contact order where it is satisfied that making the prohibited contact order will assist in achieving the objectives of the preventative detention order. The prohibited contact order prohibits the subject, while being detained under the preventative detention order, from contacting a person specified in the prohibited contact order. The note to new subsection (2) indicates that new subsections 105.4(4) and (6) set out the objectives of preventative detention orders.

New subsection 105.16(5) provides that the prohibited contact order must be in writing.

It should be noted that new subsection 105.16 does not authorise the AFP to prohibit a person from contacting a person while the AFP member or another AFP member applies to an issuing authority for a prohibited contact order in relation to that person.

Therefore, if a person is in detention under a preventative detention order, and the person requests to contact a specific person under new section 105.35, 105.36, 105.37 or 105.39, who is not the subject of an existing prohibited contact order, the AFP member detaining the person must not refuse that contact (subject to new section 105.38).

New section 105.17 – Revocation of preventative detention order or prohibited contact order

New subsection 105.17(1) requires a police officer who is detaining a person under a preventative detention order and who is satisfied that the grounds on which the preventative detention order was made have ceased to exist to either apply to a relevant issuing authority for the revocation of the preventative detention order, if the police officer is an AFP member, or inform a senior AFP member of the police officer's reasons for being satisfied that the grounds no longer exist.

New subsection 105.17(2) provides that if a senior AFP member is informed by a police officer under new subsection (1) and the senior AFP member is also satisfied that the grounds on which the order was made have ceased to exist, the AFP member must apply to a relevant issuing authority for the revocation of the order.

New subsection 105.17(3) requires an issuing authority who is satisfied, on application by an AFP member, that the grounds on which the preventative detention order was made have ceased to exist, to revoke the preventative detention order.

New subsections 105.17(4) to (6) are the equivalent of new subsections (1) to (3) in relation to the situation where a police officer detaining a person under a preventative detention order, in relation to whom a prohibited contact order is also in place, and the police officer is satisfied the grounds on which the prohibited contact order was made have ceased. In these circumstances, an application must be made to revoke this order and the relevant issuing authority, if in agreement, must revoke the order.

New section 105.18 – Status of person making continued preventative detention order

New subsection 105.18(1) provides that an issuing authority who makes a continued preventative detention order or a prohibited contact order has the same protection and immunity as a Justice of the High Court.

New subsection 105.18(2) provides that making, revoking, extending or further extending a continued preventative detention order, or making or revoking a prohibited contact order, are powers conferred in a personal capacity and not as a court or a member of a court. This new subsection has been included to ensure that it is clear that the function of issuing authority is conferred on judge, a Federal Magistrate or a member of the Administrative Appeals Tribunal in their personal capacity. It is clear that a former judge who is an issuing authority is exercising powers conferred by the Division in a personal capacity and not as a court or a member of a court, and it is therefore unnecessary to specifically refer to former judges in subsection 105.18(2).

The provision is in similar terms to section 4AAA of the *Crimes Act* which regulates the conferral of functions on judicial officers under Commonwealth law in relation to ‘criminal matters’.

Subdivision C—Carrying out preventative detention orders

New section 105.19 – Power to detain person under preventative detention order

New subsection 105.19(1) provides that, once the preventative detention order has come into force by being made by an issuing authority, the person the subject of the order can be taken into custody and detained by any police officer. Consistent with arrest warrants and similar documents, it is not necessary for the AFP member who applied for the order to take the person into custody and to detain the person.

This ensures the person does not avoid being taken into custody and detained because they have been located by a police officer of a State or Territory or another AFP member.

New subsection 105.19(2) provides that a police officer, in effecting the taking of a person into custody and ensuring that the person remains in custody, has the same powers and obligations as the police officer would have in the situation of arresting the person for an offence or ensuring that the person remained in custody after being arrested for an offence. However, new subsection 105.19(4) ensures that this does not apply to the extent that powers and obligations are provided for in this new Subdivision, or new Subdivisions D or E.

The effect of these provisions is to ensure that a police officer may take the same action to ensure that the person is taken into custody and does not escape that custody that he or she is permitted to take to ensure the same result in relation to an arrest warrant. These provisions are intended to relate to the actual moment of taking the person into custody. It is not intended that these provisions require a person to be brought before a judge or magistrate as soon as possible for the purposes of either charging or releasing the person.

New subsection 105.19(3) defines *offence* for the purposes of new subsection 105.19(2) to mean an offence against the Commonwealth for AFP members and an offence against a law of the particular State or Territory for members of a State or Territory police force. This is to ensure that each individual police officer is subject to his or her usual rules and procedures in relation to arrests. In the case of the AFP, the relevant powers are conferred by section 3ZC of the *Crimes Act*. State and Territory powers vary. This provision is designed to ensure police are able to use those powers in relation to which they have received training and are experienced and familiar.

In addition, new subsection 105.19(4) ensures that where specific powers and obligations are expressed in this new Division, they override other usual powers that may apply to police officers in relation to arrests. For example, new section 105.22 provides a power to enter premises, and new sections 105.23 and 105.24 provide powers to conduct frisk and ordinary searches. These new provisions apply to the

exclusion of any powers and obligations that may exist under general police procedures in relation to these actions.

New subsections 105.19(5) through (9) place obligations on the Commissioner of the AFP to ensure obligations in relation to the preventative detention order are exercised properly.

New subsection 105.19(5) requires the Commissioner of the Australian Federal Police must nominate a senior AFP member (the *nominated senior AFP member*) to oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order. That nominated senior AFP member must be someone who was not involved in the making of the application for the preventative detention order (see new subsection 105.19(6)).

New subsection 105.19(7) provides that the nominated senior AFP member must oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order, ensure compliance with the provisions of section 105.17 (which deals with revocation of preventative detention orders and prohibited contact orders), and receive and consider any representations that are made under subsection 105.19(8). This provision ensures that the detainee, the detainee's lawyer, or a person with whom that person has contact under subsection 105.39(2) can make representations to a particular senior AFP member about the order and the treatment of the detainee under the order, including compliance with the provisions of section 105.17 (which deals with revocation of preventative detention orders and prohibited contact orders) (see new subsection 105.19(8)).

New subsection 105.19(9) provides that the Commissioner of the AFP may delegate his or her powers to make a nomination of a senior AFP member for the purposes of this provision.

New section 105.20 – Endorsement of order with date and time person taken into custody

New section 105.20 requires the police officer who is detaining the person under the initial preventative detention order to endorse on the order the date on which, and time at which, the person is first taken into custody under the order as soon as practicable after a person is first taken into custody. The time the person is taken into custody is relevant to determining the time when the person must be released from detention under the initial preventative detention order. This information is also relevant to extended initial preventative detention orders and continued preventative detention orders.

New section 105.21 – Requirement to provide name etc.

New subsection 105.21(1) authorises a police officer to request the name and address of a person if the police officer believes on reasonable grounds that the person, whose details are unknown, may be able to assist the police officer in executing a preventative detention order.

New subsection 105.21(2) creates an offence of refusing or failing to comply with such a request, or giving false information, although this offence only applies where the police officer has informed the person of the reason for the request, the police officer has shown evidence that he or she is a police officer if not in uniform at the time of making the request and the police officer has complied with any request for information from the person under new subsection 105.21(4). This offence is punishable by a fine of 20 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$2200.

New subsection 105.21(3) provides that it is defence to the offence created by new subsection 105.21(2) if the person has a reasonable excuse for refusing or failing to comply, or providing false information. The note to subsection 105.21(3) indicates that the person bears the evidential burden in relation to this matter (see subsection 13.3(3)).

New subsection 105.21(4) provides that if the person the subject of the request asks the police officer to provide his or her name, the address of his or her place of duty and his or her identification number if he or she has such a number, or his or her rank if not, and the police officer refuses or fails to comply with the request or gives a name, address, number or rank that is false in a material particular, the police officer commits an offence. This offence is punishable by a fine of 5 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$550.

New section 105.22 – Power to enter premises

New subsection 105.22(1) authorises a police officer to enter premises, using force that is necessary and reasonable in the circumstances, to search for, or take into custody, a person in relation to whom a preventative detention order is in force.

New subsection 105.22(2) limits the ability of a police officer to exercise the power conferred by subsection (1) by prohibiting a police officer from entering a dwelling house for the purpose of searching the premises for the person or taking the person into custody between 9 pm and 6 am unless it would not be practicable to take the person into custody, either at the dwelling house or elsewhere, at another time, or it is necessary to do so in order to prevent the concealment, loss or destruction of evidence of, or relating to, a terrorist act.

New subsection 105.22(3) provides a definition of the term ***dwelling house*** for the purpose of the section to include a conveyance, and a room in a hotel, motel, boarding house or club, in which people ordinarily retire for the night. The definition of dwelling house is in the same terms as the definition in section 3ZB of the *Crimes Act*, which confers a power on police to enter premises, including dwelling houses, for the purposes of arresting an offender.

New section 105.23 – Power to conduct a frisk search

New section 105.23 authorises a police officer who takes a person into custody under a preventative detention order, or who is present at that time to conduct a frisk search of the person. The section authorises the seizure of any seizable item. This provision is necessary to ensure the person being taken into custody does not have in their

possession anything that could be used to harm themselves or others or be used to facilitate their escape from custody.

This provision is in similar terms to section 3ZE of the *Crimes Act*, which confers a power on police officers to conduct a frisk search of an arrested person.

Seizable item and *frisk search* are defined in section 100.1(1) of the *Criminal Code*.

New section 105.24 – Power to conduct an ordinary search

New section 105.24 is in similar terms to new section 105.23, except that it authorises an ordinary, rather than a frisk search, and also authorises a police officer to seize evidence of, or relating to, a terrorist act.

This provision is in similar terms to section 3ZF of the *Crimes Act*, which confers a power on police officers to conduct an ordinary search of an arrested person.

Seizable item and *ordinary search* are defined in section 100.1(1) of the *Criminal Code*.

New section 105.25 – Warrant under section 34D of the Australian Security Intelligence Organisation Act 1979

New subsections 105.25(1) and (2) provide that, if a person is being detained under a preventative detention order and a warrant under section 34D of the *ASIO Act* is in force in relation to the person, and the police is given a copy of the relevant warrant, the police officer must take such steps as are necessary in order for the person to be dealt with in accordance with that warrant.

New subsection 105.25(3) provides that these steps may include releasing the person from detention under the preventative detention order so that the person may be dealt with in accordance with the warrant.

The note to new subsection (3) indicates that if the police officer is not an AFP member, the police officer is not able to release the person without the approval of a senior AFP member under new subsection 105.26(2).

New subsection 105.25(4) is an avoidance of doubt provision that confirms that releasing the person from preventative detention for the purposes of handing the person over so that the person may be questioned or detained under the ASIO warrant does not extend the period for which the preventative detention order remains in force in relation to the person. As indicated by the note to new subsection (4), this is consistent with new paragraph 105.26(7)(a).

For example, a person could be taken into custody at 9am on Monday under a preventative detention order that authorises detention for 24 hours. The person could be handed over to ASIO at 6pm that day, and dealt with under the ASIO warrant for 20 hours or until 2pm on Tuesday. As the 24 hours authorised by the preventative detention order has elapsed, it is not possible to take the person back into preventative

detention unless the AFP member has applied for, and the issuing authority has issued, an extension.

New section 105.26 – Release of person from preventative detention

New subsection 105.26(1) provides that a person may be released from preventative detention while the order is still in force. The reasons for release are not limited by the legislation and may include, for example, that the AFP has obtained information or evidence in relation to the person and the AFP member wishes to question the person under Part IC of the *Crimes Act 1914* or so the person may be questioned or detained under an ASIO warrant under new section 105.25.

New subsection 105.26(2) provides that a police officer who is not an AFP member may not release the person from preventative detention without the approval of a senior AFP member, and that if requested, a senior AFP member must agree to the release of the person so that the person can be questioned in accordance with a warrant issued under section 34D of the *ASIO Act*.

New subsection 105.26(3) provides that where a person is released from preventative detention while the order is still in force, the police officer who releases the person must give the person a written statement, signed by the police officer, that the person is being released. However, new subsection 105.26(4) provides that if the person is released so that the person may be dealt with in accordance with a warrant under section 34D of the *ASIO Act* or under Division 4 of Part IAA of the *Crimes Act*, there is no requirement to give the person a signed written statement that the person is being released.

New subsection 105.26(5) is an avoidance of doubt provision that provides that a person may be taken to have been released from detention under a preventative detention order even if the person is released from detention under the order and immediately taken into custody on some other basis.

New subsection 105.26(6) is a further avoidance of doubt provision that provides that the person is taken not to be detained under the preventative detention order during the period during which the person is released from detention under the order. The limitations and other prohibitions imposed by Division 105, such as restrictions on the person contacting others, do not apply during periods of release.

New subsection 105.26(7) is a further avoidance of doubt provision that provides that, where a person is released from preventative detention under subsection (1), the period for which the preventative detention order remains in force is not affected, and despite the person having been released, the person may be taken into custody and detained under the order at any time while the order remains in force in relation to the person.

New section 105.27 – Arrangement for detainee to be held in State or Territory facility

New subsection 105.27(1) authorises a senior AFP member to arrange for the person to be detained under a preventative detention order at a prison or remand centre of a

State or Territory. This provision provides flexibility in selecting a suitable venue in which to detain the person and is necessary to ensure that State and Territory police officers can detain persons under a preventative detention order.

New subsection 105.27(2) provides that if such an arrangement is made, the order is taken to authorise the person in charge of the prison or remand centre to detain the subject while the order is in force in relation to the subject, and the person in charge of that prison or remand centre or any other person involved in the subject's detention at that prison or remand centre who is exercising authority under the order or implementing or enforcing the order is required to treat the person humanely, in accordance with new section 105.33. In addition, while the subject is detained at the prison or remand centre, the senior AFP member who makes the arrangement for the detention at the State or Territory prison or remand centre is taken to be the AFP member detaining the subject for the purposes of new Subdivisions D and E of this Division.

New subsection 105.27(3) provides that the arrangement may include provision for the Commonwealth meeting the expenses of the subject's detention at the prison or remand centre. However, there is no requirement for the arrangement to include such a provision.

Subdivision D—Informing person detained about preventative detention order

New section 105.28 – Effect of initial preventative detention order to be explained to person detained

New subsection 105.28(1) requires the police officer who is detaining the person to inform the person of a number of matters as soon as practicable after a person is first taken into custody under an initial preventative detention order.

Although a failure to comply with this requirement may constitute an offence on the part of the police officer under new section 105.45, a failure to comply does not affect the lawfulness of the person's detention, under new subsection 105.31(5).

New subsection 105.28(2) sets out those matters, including the fact that the order has been made, the period of detention, the restrictions that apply to the people that the person may contact, the fact that an application may be made to continue detaining the person, any rights the person has to make a complaint to the Commonwealth Ombudsman or State or Territory equivalent, or to seek a remedy from a federal court under new section 105.51, in relation to the order, or the person's treatment in connection with the detention under the order, the person's entitlement to contact a lawyer under new section 105.37, and the name and work telephone number of the senior AFP member who has been nominated under subsection 105.19(5) to oversee the exercise of powers under, and the performance of obligations in relation to, the order.

New subsection 105.28(3) provides that the police officer is not required to inform the person being detained of the fact that a prohibited contact order has been made in relation to the person's detention or the name of a person specified in a prohibited contact order that has been made in relation to the person's detention.

New section 105.29 – Effect of continued preventative order to be explained to person detained

New subsection 105.29(1) requires the police officer who is detaining the person to inform the person of a number of matters as soon as practicable after a continued preventative detention order is made in relation to the person.

Although a failure to comply with this requirement may constitute an offence on the part of the police officer under new section 105.45, a failure to comply does not affect the lawfulness of the person's detention, under new subsection 105.31(5).

New subsection 105.29(2) sets out those matters, including the fact that the order has been made, the continuing period of detention, the restrictions that apply to the people that the person may contact, any rights the person has to make a complaint to the Commonwealth Ombudsman or State or Territory equivalent, or to seek a remedy from a federal court under new section 105.51, in relation to the order, or the person's treatment in connection with the detention under the order, the person's entitlement to contact a lawyer under new section 105.37, and the name and work telephone number of the senior AFP member who has been nominated under subsection 105.19(5) to oversee the exercise of powers under, and the performance of obligations in relation to, the order.

New subsection 105.28(3) provides that the police officer is not required to inform the person being detained of the fact that a prohibited contact order has been made in relation to the person's detention or the name of a person specified in a prohibited contact order that has been made in relation to the person's detention.

New section 105.30 – Person being detained to be informed of extension of preventative detention order

New section 105.30 provides additional requirements on the police officer if a preventative detention order is extended or further extended. In these circumstances, the police officer detaining the person under the order must inform the person of the extension, or further extension, as soon as practicable after the extension, or further extension, is made.

New section 105.31 – Compliance with obligations to inform

New subsection 105.31(1) provides that the requirements to inform the person of those matters mentioned above does not apply if the actions of the person make it impracticable for the police officer to comply with that subsection.

New subsection 105.31(2) provides that the police officer detaining the person under the preventative detention order complies with the requirements to inform the person of certain matters if the police officer informs the person in substance of the relevant matters (even if this is not done in language of a precise or technical nature). This provision ensures that these obligations may be satisfied by substantial compliance, even where the exact language of the relevant provision is not used.

New subsection 105.31(3) provides that if the police officer who is detaining the person under the preventative detention order has reasonable grounds to believe that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language must arrange for the assistance of an interpreter in complying with the provisions requiring the police officer to inform the person of certain matters. New subsection 105.31(4) provides that the assistance of the interpreter may be provided by telephone, but this is not intended to limit any other manner in which the interpreter may provide assistance.

New subsection 105.31(5) provides that the lawfulness of a person's detention under a preventative detention order is not affected by a failure to comply with the abovementioned requirements.

New section 105.32 – Copy of preventative detention order and summary of grounds

New subsection 105.32(1) requires the police officer who is detaining the person under an initial preventative detention order to give the person a copy of the order and a summary of the grounds on which the order is made. However, new subsection 105.32(2) does not require information to be included in the summary required under paragraph 105.32(1)(b) if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*).

New subsection 105.32(3) ensures that the police officer does not need to have a copy of the order with the police officer, and does not need to produce a copy of the order to the person, when the police officer takes the person into custody. This is to ensure that a police officer may still take a person into custody under a preventative detention order without having the order on his or her person at that time, but new subsection (1) requires the order to be produced as soon as practicable once the person is in detention.

New subsections 105.32(4) and (5) are equivalent provisions in relation to continued preventative detention orders, and extended and further extended preventative detention orders respectively.

In addition, new subsection 105.32(6) authorises the person to request the police officer who is detaining the person to arrange for a copy of the order or the summary given to the person under paragraph 105.32(1)(b), or any extension or further extension of the order to be given to a lawyer acting for the person, and to make arrangements for a copy of the order, or the extension or further extension, to be given to the lawyer as soon as practicable after the request is made.

The notes to subsection 105.32(6) indicate that section 105.37 deals with the person's right to contact a lawyer and the obligation of the police officer detaining the person to give the person assistance to choose a lawyer, and that section 105.40 prevents the person from contacting a lawyer who is specified in a prohibited contact order.

New subsection 105.32(7) requires the police officer to comply with a request under new subsection (5). New subsection 105.32(8) provides that the relevant copy may be

faxed or emailed to the lawyer. This subsection is not intended to limit any other method of providing the lawyer with a copy of the order.

New subsection 105.32(9) is an avoidance of doubt provision that provides that the rights conferred with respect to lawyers by this section do not entitle a lawyer to be given a copy of, or see, a document other than the order or the extension.

New subsection 105.32(10) is an avoidance of doubt provision that provides that this section does not require a copy of a prohibited contact order to be given to any person.

New subsection 105.32(11) requires the police officer who gives a copy of an initial preventative detention order to the person being detained or the person's lawyer must endorse on the copy the date on which, and time at which, the person was first taken into custody under the order.

New subsection 105.32(12) provides that a failure to comply with subsections (1), (4), (5), (7) or (11) does not affect the lawfulness of a person's detention under a preventative detention order.

Subdivision E—Treatment of person detained

New section 105.33 – Humane treatment of person being detained

New section 105.33 provides that a person being taken into custody, or being detained, under a preventative detention order must be treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment by anyone exercising authority under the order or implementing or enforcing the order.

The note to this new section indicates that there is an offence for contravening this provision in new section 105.45.

This is a standard provision in Commonwealth legislation that confer powers on law enforcement officers, designed to codify the common law and ensure the person is treated appropriately. The provision is in similar terms to section 23Q of the *Crimes Act*, which requires police officers to treat persons who are under arrest or are protected suspects with humanity and with respect for human dignity, and not to subject persons who are under arrest or are protected suspects to cruel, inhuman or degrading treatment.

New section 105.34 – Restriction on contact with other people

New section 105.34 prohibits the person from contacting another person while being detained under a preventative detention order, except to the extent that such contact is authorised by sections 105.35, 105.36, 105.37 and 105.39.

The first note to this section indicates that the prohibition only applies if the person is actually detained under the order – this restriction does not apply while a person is not detained, even though the order may still be in force in relation to the person.

The second note to this section indicates that contact that is authorised by sections 105.35, 105.37 and 105.39 may be restricted by a prohibited contact order made under new section 105.15 or 105.16.

New section 105.35 – Contacting family members etc.

New section 105.35 entitles the person to contact a number of persons. Those persons are one of the person's family members (as defined in subsection 105.35(3), one non-family member with whom the person lives, one of the person's employer, employees or business associates, as applicable, or such other person as the police officer detaining the person agrees. The entitlement is to contact one person from each of the relevant categories by telephone, fax or email, and may only be to let the person or persons contacted know that the person is safe but is not able to be contacted for the time being. The provision enabling such other persons as the police officer sees fit ensures that the police officer permit the contact that is most appropriate in the circumstances.

Although the provision only provides an entitlement to contact one person from each of the relevant categories once during the period of detention, the AFP can authorise further contact during the course of the detention. This could be, for example, when the person is informed that the preventative detention order has been extended.

New subsection 105.35(2) is an avoidance of doubt provision that makes it clear that the person is not entitled to disclose the fact that a preventative detention order has been made in relation to the person, the fact that the person is being detained under the order or the period for which the person is being detained.

For the purposes of new subsection 105.35(1), ***family member*** of a person is defined in new subsection 105.35(3) to mean the person's spouse, de facto spouse or same-sex partner, a parent, step-parent or grandparent of the person, a child, step-child or grandchild of the person, a brother, sister, step-brother or step-sister of the person, or a guardian or carer of the person. The definition of family member is the same as the definition of close family member in section 102.1 of the *Criminal Code* that is relevant to the association offence in section 102.8 of the *Criminal Code*.

The model for permissible contact under this new regime is less restrictive than that provided by the *ASIO Act*. Under the *ASIO Act* there are stricter limitations on contact for a warrant that authorises questioning and detention. Subsection 34F(8) provides that a person who has been taken into custody or detained under Division 3 of the *ASIO Act* is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. Subsection 34F(9) of the *ASIO Act* provides that the detained person is only able to contact the IGIS, the Ombudsman, and a person whom the warrant or prescribed authority permits him or her to contact. Subparagraph 34D(2)(b)(ii) of the *ASIO Act* provides that a detention warrant must permit the subject of the warrant to contact identified persons at specified times when the person is in custody or detention. The person identified in the warrant may be a lawyer of the person's choice, a person with whom the subject of the warrant has a particular familial or legal relationship or other persons (see subsection 34D(4)). A detention warrant must permit the person to contact a single lawyer of the person's

choice (see subsection 34C(3B)). However, a prescribed authority may prevent a person detained under a warrant from contacting a lawyer of the person's choice where a prescribed authority is satisfied, on the basis of circumstances relating to a particular lawyer, that if the subject is permitted to contact that lawyer a person involved in a terrorism offence may be alerted that the offence is being investigated or a relevant record or thing may be destroyed, damaged or altered (see section 34TA). If the subject of the warrant is aged between 16 and 18, the warrant must also permit the person to contact a parent or guardian, or another person who can represent the subject's interests (see subsections 34NA(6) and (7)).

New section 105.36 – Contacting Ombudsman etc.

New subsection 105.36(1) provides that the person is entitled to contact the Commonwealth Ombudsman in accordance with the *Complaints (Australian Federal Police) Act 1981*. New section 105.36 should be read in conjunction with section 22 of the *Complaints (Australian Federal Police) Act 1981*, which provides for the manner in which a person who is in custody may make a complaint to the Commonwealth Ombudsman under that Act.

New subsection 105.36(2) is an equivalent provision enabling a person to contact the State or Territory equivalent to the Commonwealth Ombudsman where the person is being held by a police officer of a State or Territory or in a State or Territory prison or remand centre.

New section 105.37 – Contacting lawyer

New subsection 105.37(1) provides that the person is entitled to contact a lawyer for limited purposes. The person may seek advice on his or her rights in relation to the preventative detention order or the treatment of the person in connection with the order, which includes instructing the lawyer in federal court proceedings seeking a remedy connected with the order or the treatment, or in complaint proceedings through the Commonwealth Ombudsman connected with the order or the treatment of the person in connection with the person's detention under the order. The person may also instruct the lawyer to appear for him or her in relation to any other court proceedings for which an appearance or hearing is to take place during the period in which the person is to be detained.

New subsection 105.37(2) provides that the person may have contact with the lawyer in person or by telephone, fax or email.

New subsection 105.37(3) provides that, if the person is either not entitled to contact a particular lawyer because of section 105.40 (prohibited contact orders) or is not able to contact a particular lawyer, the police officer who is detaining the person is required to provide reasonable assistance to the person in choosing another lawyer.

New subsection 105.37(4) provides that in recommending lawyers, the police officer who is detaining the person may give priority to lawyers who have been given a security clearance at an appropriate level by the Attorney-General's Department. However, new subsection 105.37(5) provides that new subsection (4) does not restrict the person in his or her choice of lawyers to a lawyer who has a security clearance.

New section 105.38 – Monitoring contact under section 105.35 or 105.37

New subsection 105.38(1) provides that the contact with other people to which the person is entitled can only occur if it is conducted in such a way that both the contact and the content and meaning of the communication can be effectively monitored by a police officer acting under the authority of the preventative detention order. This is to ensure that the person does not communicate information that he or she is not entitled to communicate.

New subsection 105.38(2) provides that, although the contact may take place in a language other than English, this can only occur if the content and meaning of the communication that takes place during the contact can be effectively monitored with the assistance of an interpreter. New subsection 105.38(3) provides that the interpreter can be a police officer, but this does not limit non-AFP interpreters from providing assistance.

New subsection 105.38(4) places an obligation on the police officer who is detaining the person to arrange for the services of an appropriate interpreter to be provided if this is required. This is to ensure that it is not more onerous for the person to speak in a language other than English.

New subsection 105.38(5) ensures the person's communications with his or her lawyer that occur lawfully under new section 105.37 can not be admitted in evidence against the person in any proceedings in a court. Even though it is an offence under new subsection 105.41(7) for a police officer to disclose such information, this safeguard is necessary to ensure a police officer is not called upon to provide evidence of what he or she heard during monitoring conversations likely to be protected by legal professional privilege.

New section 105.39 – Special contact rules for person under 18 or incapable of managing own affairs

New section 105.39 recognises the special needs of young persons and those incapable of managing their own affairs, particularly when taken into police custody.

New subsection 105.39(1) provides that section 105.39 applies if the person being detained under a preventative detention order is under 18 years of age (but at least 16 years of age under new section 105.5) or is incapable of managing his or her affairs.

New subsection 105.39(2) provides that those categories of persons are entitled to have contact with a parent or guardian, or another person who is able to represent the person's interests, while being detained under the order. The person representing the person's interests can not be an AFP member or employee, a member of a police force of a State or Territory or an officer or employee of the Australian Security Intelligence Organisation (ASIO).

It is important to note that these two categories are completely separate. Therefore, if a person has a parent or guardian who is an AFP member or employee, a member of a

police force of a State or Territory or an officer or employee of ASIO, the person is entitled to contact that person. The exceptions set out in new paragraph (2)(b) are to ensure that a person, other than a parent or guardian, who is to represent the person's interests, is a person independent of the police and security services.

New subsection 105.39(3) is an avoidance of doubt provision which ensures that the person being detained is entitled to see 2 parents, or 2 or more guardians and is entitled to disclose the fact that a preventative detention order is in place, the fact that the person is being detained and the period of detention to each of these people.

New subsection 105.39(4) permits the contact to be in person or via telephone, fax or email.

New subsection 105.39(5) limits the period for which the person is entitled to have contact to 2 hours each day, or such longer period as may be specified in the preventative detention order. The note to this subsection indicates that an issuing authority may specify a longer period in the order under new subsection 105.8(7) or 105.12(7).

New subsection 105.39(6) makes it clear that, despite the time limit of 2 hours, or such further time as specified in the preventative detention order, the police officer who is detaining the person may permit the person to have contact for longer than this period. While this is not a right, it permits the police officer to assess the best needs of the person in the circumstances.

New subsections 105.39(7) to 105.39(10) ensure that contact by young persons or person unable to manage their own affairs can be effectively monitored, consistent with the monitoring requirements as set out in new section 105.38.

New subsection 105.39(7) provides that the contact that the person has with another person under subsection 105.39(2) must be conducted in a way that it can be monitored. New subsection 105.39(8) provides that if the communication takes place in a language other than English, the contact may continue only if it can be effectively monitored with the assistance of an interpreter, with new subsection 105.39(9) permitting this interpreter to be a police officer. New subsection 105.39(10) places an obligation on the police officer who is detaining the person to arrange for the services of an appropriate interpreter to be provided if necessary.

New section 105.40 – Entitlement to contact subject to prohibited contact order

New section 105.40 makes it clear that the entitlement to contact others in sections 105.35, 105.37 and 105.39 are subject to the existence of any prohibited contact order made in relation to the person's detention. Therefore, if the person requested to contact a particular family member who was specified in a prohibited contact order made under new section 105.15, the person would not be permitted to contact that person, but would be entitled to request to contact another family member.

This is designed to ensure that the 'preventative' purpose of the order is not defeated by entitlements to contact others, by permitting the person to contact another person,

including co-conspirators or those who might be in custody of evidence relating to a terrorist act, and, for example, instructing such a person to further the terrorist act in the person's absence, or destroy evidence of a terrorist act.

The model for permissible disclosures under this new regime is also less restrictive than that provided by the *ASIO Act*. Under the *ASIO Act* there are stricter limitations on contact for a warrant that authorises questioning and detention. While subjects of ASIO detention warrants are permitted to contact certain persons, they must not reveal information to those persons contrary to section 34VAA (secrecy offences). Section 34VAA protects the effectiveness of intelligence gathering operations by prohibiting disclosure without authorisation of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant while a warrant is in force, and by prohibiting disclosure without authorisation of any ASIO operational information while a warrant is in force and during the period of two years after the expiry of the warrant.

Section 34VAA(5) of the *ASIO Act* sets out a number of permitted disclosures (whereby the secrecy offence would not apply) including disclosures for the purpose of obtaining legal advice or making complaints to the IGIS, disclosures permitted by a prescribed authority, and disclosures permitted by the Director-General of ASIO.

New section 105.41 – Disclosure offences

New section 105.41 creates a number of offences for disclosing information related to a preventative detention order. Each of the disclosure offences carries a penalty of 5 years imprisonment.

New subsection 105.41(1) creates an offence for the person who is being detained to disclose the fact that a preventative detention order has been made in relation to the person, the fact that the person is being detained under the order, or the period for which the person is being detained under the order. The provision only prohibits the disclosure of this information while the person is being detained. The offence does not prevent disclosure of information that the person is entitled to make under new sections 105.36, 105.37 or 105.39, such as information disclosed to the Commonwealth Ombudsman in accordance with the *Complaints (Australian Federal Police) Act 1981* or communicating with a lawyer for the purposes permitted in new section 104.34.

New subsection 105.41(2) creates an offence for the person's lawyer to disclose the fact that a preventative detention order has been made in relation to the person, the fact that the person is being detained under the order, the period for which the person is being detained under the order or any information that the person gives the lawyer in the course of the contact. The provision only prohibits the disclosure of this information while the person is being detained. The offence does not prevent disclosure of information that the lawyer makes for the purposes of proceedings in a federal court or a complaint to the Commonwealth Ombudsman or equivalent State or Territory officer or authority. Nor does the offence prohibit disclosure of information for the purpose of making representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order, or to another police officer involved in the detainee's detention, about the exercise of powers under the order, the

performance of obligations in relation to the order or the treatment of the detainee in connection with the detainee's detention under the order.

There is no provision for the person's lawyer to disclose information he or she lawfully obtains from the person under new section 105.37 because if the lawyer wishes to seek advice from a barrister, for example, it should not be necessary to disclose the fact of the particular person's detention to that barrister.

New subsection 105.41(3) creates an offence for the disclosure of certain information by a person who, under new section 105.39, has special contact with person who is under 18 years of age or incapable of managing his or her own affairs. A person in this situation commits an offence if they disclose to another person, who is not another person that the person lawfully had contact with under new section 105.39, the fact that a preventative detention order has been made in relation to the person, the fact that the person is being detained under the order, the period of detention or any information that the person gives the offender in the course of the contact. As with new subsections 105.41(1) and (2), the offence only applies to disclosures made while the person is being detained under the order, and it does not apply to a disclosure made by the person for the purposes of a complaint to the Commonwealth Ombudsman or equivalent State or Territory officer or authority. Nor does the offence prohibit disclosure of information for the purpose of making representations to the senior AFP member nominated under subsection 105.19(5) in relation to the order, or to another police officer involved in the detainee's detention, about the exercise of powers under the order, the performance of obligations in relation to the order or the treatment of the detainee in connection with the detainee's detention under the order.

New subsection 105.41(4) is an avoidance of doubt provision which clarifies that a person does not contravene subsection 105.41(3) merely by letting another person know that the person is safe but is not able to be contacted for the time being.

New subsection 105.41(5) creates an offence for an interpreter assisting in monitoring contact between the person and another person under new section 105.35, 105.36, 105.37 or 105.39. An interpreter commits an offence if they disclose to another person the fact that a preventative detention order has been made in relation to the person, the fact that the person is being detained under the order, the period of detention or any information that the interpreter obtains in the course of assisting in monitoring the person's contact. As with the previous new offences, the offence only applies to disclosures made by the interpreter while the person is being detained under the order.

New subsection 105.41(6) creates an offence for secondary disclosures of information that was improperly disclosed. A person commits an offence if another person discloses information to the first person relating to the existence of a preventative detention order, the fact that the person is being detained under the order, the period of that detention or any other information obtained from the person, that disclosure was contrary to new subsection (1), (2) (3) or (5), or this new subsection, and the first person discloses the information to a third person. As with the previous new offences, the offence only applies to disclosures made by the interpreter while the person is being detained under the order.

This offence ensures that a person to whom information is disclosed in contravention of these new offences cannot disclose that information to a third party without themselves being guilty of an offence.

New subsection 105.41(7) creates an offence for a police officer or interpreter monitoring contact with a lawyer to disclose any information that was lawfully communicated between the person and the lawyer in the course of contact under new subsection 105.37(1). Unlike the previous new offences, this offence applies to disclosures made by the police officer or interpreter at any time, and is not limited to the period when the person is being detained under the order.

In conjunction with new section 105.38, this offence ensures that the police officer, with the assistance of an interpreter where necessary, can effectively monitor communications between a person and the person's lawyer to prevent communications from occurring that are not permitted under the legislation, while also protecting the confidentiality of communications that are permitted under section 105.37. This offence also works in conjunction with new subsection 105.38(5), which ensures the person's communications with his or her lawyer that occur lawfully under new section 105.37 can not be admitted in evidence against the person in any proceedings in a court.

New section 105.42 – Questioning of person prohibited while person is detained

New subsection 105.42(1) prohibits a police officer from questioning a person while the person is being detained under a preventative detention order. This is necessary to ensure safeguards relating to the manner in which a suspect for an offence is to be questioned by a police officer in other legislation, such as Part IC of the *Crimes Act*, are not avoided or defeated because the person is the subject of a preventative detention order. For example, section 23F of the *Crimes Act* requires an investigating official to inform a person who is under arrest or is a protected suspect that he or she does not have to say or do anything.

New subsection 105.42(1) contains a number of exceptions that authorise the police officer to ask the person certain questions to determine whether the person is the person specified in the order, ensure the safety and well-being of the person, and allow the AFP member to comply with requirements set out in Division 105 in relation to the person's detention under the order.

The first note to subsection 105.42(1) indicates that this section does not apply where the person has been released from detention, even if the preventative detention order is still in effect. This is to ensure that a police officer is able to release a person from detention under the order in order to question the person under other legislation. For example, a person could be taken into preventative detention under an order, and following the receipt of additional information, for example from the execution of a search warrant at the person's premises, the police officer may wish to question the person in relation to an alleged criminal offence. In such circumstances, the police officer can release the person from preventative detention under the order and offer the person the opportunity to participate in a taped record of interview in relation to

the alleged offence. In such a case, all the protections and safeguards under the *Crimes Act* would apply.

The second note to subsection 105.42(1) indicates that a police officer may commit an offence under section 105.45 if the member questions a person in contravention of this subsection.

New subsection 105.42(2) prohibits an officer or employee of ASIO from questioning a person while the person is being detained under a preventative detention order. There are no exceptions to this general prohibition.

However, the same issues apply to this offence as with the offence under subsection 105.42(1), meaning that it is possible for the person to be released from preventative detention for the purposes of ASIO questioning. Accordingly, this provision should be read in conjunction with new section 105.25, which provides that, if a person is being detained under a preventative detention order and a warrant under section 34D of the *ASIO Act* is in force in relation to the person, the AFP member must make all necessary arrangements to enable the person to be dealt with in accordance with that warrant.

The rationale for this process is that detention in itself is a factor that can impact on the reliability of answers to questions. Given the purpose of the preventative detention regime is to prevent a terrorist attack and to preserve evidence, and the police and ASIO questioning time was recently modified to extend questioning for terrorism investigations, it follows that the existing procedures for questioning should be used. Those procedures contain safeguards in relation to the questioning of persons, including persons who are under arrest or are protected suspects.

In addition, an officer or employee of ASIO may commit an offence under section 105.45 if the officer or employee questions a person in contravention of this subsection.

New subsection 105.42(3) complements the prohibitions in new subsections 105.42(1) and (2) by prohibiting an AFP member or an officer or employee of ASIO from questioning a person while the person is being detained under an order made under a corresponding State preventative detention law. ***Corresponding State preventative detention law*** is defined in subsection 100.1(1).

Consistent with the other provisions in this section, the offence does not apply if the person has been released from detention, even if the preventative detention order is still in place. In addition, an AFP member or an officer or employee of ASIO who questions a person in contravention of this subsection may commit an offence under section 105.45.

New section 105.43 – Taking identifying material

New subsection 105.43(1) prohibits a police officer from taking identification material from a person who is being detained under a preventative detention order. It is necessary to provide for the taking of identification material to determine whether the person is the person specified in the order (see new section 105.41).

Identification material is defined in the new definition in subsection 101.(1) to mean prints of the person's hands, fingers, feet or toes, recordings of the person's voice, samples of the person's handwriting or photographs (including video recordings) of the person. Identification material does not include tape recordings made for the purposes of section 23U or 23V of the *Crimes Act 1914*.

A police officer who contravenes the prohibition in subsection 105.43(1) may commit an offence under section 105.45.

New subsections 105.43(2) through (11) provide exceptions to this general prohibition that are similar to the exceptions in section 3ZJ of the *Crimes Act 1914*

New subsection 105.43(2) provides that a police officer who is of the rank of sergeant or higher may take identification material from the person, or cause identification material from the person to be taken, only if the person consents in writing or the police officer believes on reasonable grounds that it is necessary to do so for the purpose of confirming the person's identity as the person specified in the order.

New subsection 105.43(3) provides that a police officer may use such force as is necessary and reasonable in the circumstances to take identification material from a person under this section. Without this provision, there could be doubt about whether a police officer was authorised to make the physical contact with the person that was reasonably necessary to obtain certain types of identification material, such as the physical contact that occurs when an impression of a person's fingerprints are made.

New subsection 105.43(4) prohibits a police officer from taking identification material (other than hand prints, finger prints, foot prints or toe prints) from the person if the person is under 18 years of age or is incapable of managing his or her affairs unless a Federal Magistrate orders that the material be taken. New subsection 105.43(5) provides that, in deciding whether to make such an order, the Federal Magistrate must have regard to the age, or any disability, of the person and such other matters as the Federal Magistrate thinks fit. These provisions are designed to protect the interests of young people and those who are incapable of managing their own affairs.

A police officer who contravenes the prohibition in subsection 105.43(4) may commit an offence under section 105.45.

New subsection 105.43(6) requires that, where identification material is taken from a person who is under 18 years of age or is incapable of managing his or her affairs, this must be done in the presence of a parent or guardian of the person or another appropriate person. An **appropriate person** in this section is defined in new subsection 105.43(11) as a person who is capable of representing the person's interests and is acceptable to the person and the police officer who is detaining the person. However, an appropriate person can not be an AFP member or employee, a member of a police force of a State or Territory, or an officer or employee of ASIO.

A police officer who contravenes the prohibition in subsection 105.43(6) may commit an offence under section 105.45.

New subsection 105.43(7) permits the taking of identification material from a young person who is detained under an order, provided the person is capable of managing his or her affairs, and the person and a parent or guardian or appropriate person agrees in writing (see new subsections 105.43(8) and (9)). If the agreement in writing is obtained from the person, but not a parent or guardian or appropriate person, or agreement in writing is obtained from a parent or guardian or appropriate person, but not the person, the material can be taken if a Federal Magistrate orders that the material be taken. When deciding whether to make such an order, the Federal Magistrate must have regard to the matters set out in subsection 105.43(5).

New subsection 105.43(10) makes it clear that identification material may be taken from a person who is at least 18 years of age and is capable of managing his or her affairs if the person consents in writing. In such cases, it is not necessary to obtain the consent of another person or an order from a Federal Magistrate.

New subsection 105.44 – Use of identification material

New section 105.44 limits the uses of identification material lawfully taken under new subsection 105.43.

New subsection 105.44 provides that identification material taken from a person under section 105.43 may only be used to determine whether the person is the person specified in the order.

New subsection 105.44(3) requires the material to be destroyed as soon as practicable once 12 months have elapsed since the material was taken, if proceedings in respect of the preventative detention order, or the treatment of the person in connection with that order, have not been brought.

A contravention of the requirement to destroy the material under subsection 105.44(3) may constitute an offence under section 105.45.

New section 105.45 – Offences of contravening safeguards

New section 105.45 creates an offence, with a penalty of 2 years imprisonment, for conduct which amounts to a contravention of the safeguards and limitations outlined in new Subdivisions D and E of Division 105.

The offence is designed to ensure compliance with those safeguards and limitations by AFP members and employees, member of police forces of a State or Territory, and officers or employees of ASIO.

Subdivision F – Miscellaneous

New section 105.46 – Nature of functions of Federal Magistrate

New subsection 105.46(1) provides that the function of making an order that identification material be taken that is conferred on a Federal Magistrate by new section 105.43 is conferred on the Federal Magistrate in a personal capacity and not as a court or a member of a court.

New subsection 105.46(2) provides that an order made by a Federal Magistrate under section 105.43 has effect only by virtue of this Act and is not to be taken by implication to be made by a court.

New subsection 105.46(3) provides that a Federal Magistrate performing a function of, or connected with, making an order under new section 105.43 has the same protection and immunity as if he or she were performing that function as, or as a member of, the Federal Magistrates Court.

These provisions ensure that although an order of a Federal Magistrate in relation to the taking of identification material is not taken to be an order of, or a view of, the Federal Magistrates Court in relation to any future proceedings, the individual Federal Magistrate is immune from any civil or criminal proceedings that could result from that order.

New section 105.47 – Annual report

New subsection 105.47(1) requires the Attorney-General to cause a report about the operation of Division 105 during the year to be prepared as soon as practicable after each 30 June.

New subsection 105.47(2) sets out the matters that are required to be included in the report. These matters include the number of initial and continued preventative detention orders made during the year, whether a person was taken into custody under each of those orders and, if so, the period of detention, particulars of any complaints in relation to the detention of a person under a preventative detention order made or referred during the year to the Commonwealth Ombudsman or the Australian Federal Police and the number of prohibited contact orders made during the year.

New section 105.47(3) requires the Attorney-General to 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.

New section 105.48 – Ombudsman functions and powers not affected

New section 105.48 makes it clear that Division 105 does not affect a function or power of the Commonwealth Ombudsman under the *Complaints (Australian Federal Police) Act 1981*.

New section 105.49 – Queensland Public interest monitor functions and powers not affected

New section 105.49 provides that this new Division does not affect any functions or powers that Queensland public interest monitor or deputy public interest monitor has under a law of Queensland. In Queensland, all applications for warrants and related judicial authorisations are attended by the public interest monitor who provides the case for the person who would be the subject of the warrant. This new Division is not intended to affect any powers of that office. It is intended to ensure that the role of the Queensland public interest monitor in overseeing Queensland law enforcement officers operating under Queensland legislation in relation to preventative detention orders is preserved. The provision is not intended to authorise the Queensland Parliament to legislate to control how powers are to be exercised under the Bill by Commonwealth officers.

New section 105.50 – Law relating to legal professional privilege not affected

New section 105.50 is an avoidance of doubt provision which makes it clear that Division 105 does not affect the law relating to legal professional privilege.

New section 105.51 – Legal proceedings in relation to preventative detention orders

New section 105.51 sets out the legal rights in relation to Commonwealth preventative detention orders, both in relation to review of those orders and damages associated with the execution of those orders.

New section 105.51(1) provides that proceedings may be brought in a court for a remedy in relation to a preventative detention order or the treatment of a person in connection with such an order.

The right to bring proceedings under new section 105.51(1) is limited by subsection 105.51(2), which provides that a court of a State or Territory does not have jurisdiction in proceedings for a remedy if those proceedings are commenced while the order is in force. It may be possible to seek injunctive relief to stop the detention in the equitable jurisdiction of the Federal Court. This provision does not prevent the person seeking a remedy in a State or Territory court once the preventative detention order has ceased to be in force.

New subsection 105.51(3) provides that subsection 105.51(2) has effect despite any other law of the Commonwealth (whether passed or made before or after the commencement of this section). This ensures that, if an amendment is made to legislation such as the *Judiciary Act 1903*, unless that amendment specifically addressed the matters covered by this new section, such amendments could not be assumed to override this provision.

The right to bring proceedings under new section 105.51(1) is also limited by subsection 105.51(4), which provides that an application cannot be made under the *Administrative Decisions (Judicial Review) Act 1977 (AD(JR) Act)* in relation to a decision made under Division 105. It is appropriate to exempt review under that Act as there are requirements in that legislation that are not suitable in the context of the

security environment. This exemption is also consistent with existing exemptions for decisions that relate to criminal proceedings and with specific exemptions for decisions made in relation to ASIO questioning and detention warrants.

New subsection 105.51(5) provides that an application may be made to the Administrative Appeals Tribunal (AAT) for review of a decision by an issuing authority to make an initial preventative detention order under section 105.8 or a decision by an issuing authority to make a continued initial preventative detention order under section 105.12 or a decision by an issuing authority to extend or further extend a preventative detention order. However, new subsection 105.51(5) precludes the making of an application to the AAT while the order is in force.

New subsection 105.51(6) restricts the exercise of the power of the Administrative Appeals Tribunal to review a decision referred to in subsection 105.51(5) to the Security Appeals Division of the Tribunal. The Security Appeals Division is the appropriate review body as it has relevant experience, including familiarity with dealing with national security and related information.

New subsection 105.51(7) outlines the decisions the AAT may make in relation to a review of a decision referred to in subsection 105.51(5). The AAT may declare a decision to be void if the Tribunal would have set the decision aside if an application for review of the decision had been able to be made to the Tribunal while the order was in force. The AAT may determine that the Commonwealth should compensate the person in relation to the person's detention under the order if the Tribunal declares the decision to be void. Provision is made for the Commonwealth being liable to pay the compensation determined by the AAT (new subsection 105.51(8)).

New subsection 105.51(9) provides for the *Administrative Appeals Tribunal Act 1975* to apply in relation to an application to the AAT for review of a decision with the modifications specified in the regulations made under this Act. This provision will ensure that it is possible to make any minor amendments that are considered necessary for the review process, such as minor adjustments to the normal processes of the Security Division.

New section 105.52 – Review by State and Territory courts

New section 105.52 sets out the legal rights in relation to preventative detention orders where a person has been detained under a Commonwealth and a State preventative detention order, both in relation to review of those orders and damages associated with the execution of those orders.

New subsection 105.52(1) provides that new section 105.52 applies only if a number of criteria are satisfied. Those criteria are that a detainee is detained under a Commonwealth preventative detention order and a State preventative detention order that is made under a corresponding State preventative detention law. Both orders must have been made on the basis of assisting in preventing the same terrorist act, or a different terrorist act, occurring within the period or preserving evidence of, or relating to, the same terrorist act. In addition, the section only applies if the person who was detained brings proceedings before a court of a State or Territory in relation

to the application for, or the making of, the State order or the person's treatment in connection with the person's detention under the State order.

New subsection 105.52(2) authorises the court to review the application for, and the making of, the Commonwealth order, and the person's treatment in connection with the person's detention under the Commonwealth order, on the same grounds as those on which the court may review the application for, and the making of, the State order, and the person's treatment in connection with the person's detention under the State order. In addition, new subsection 105.52(2) authorises the court to grant the same remedies in relation to the application for, and the making of, the Commonwealth order, and the person's treatment in connection with the person's detention under the Commonwealth order, as those the court can grant in relation to the application for, and the making of, the State order, and the person's treatment in connection with the person's detention under the State order. In other words, provided the criteria in new subsection 105.52(1) are satisfied, there is consistency in the remedies that are available to a person who was detained.

New subsection 105.52(3) provides that the court may order the Commissioner of the Australian Federal Police to give the court, and the parties to the proceedings, the information that was put before the person who issued the Commonwealth order when the application for the Commonwealth order was made. This obligation only arises if the person who was detained applies to the court for review of the application for, or the making of, the Commonwealth order or the person's treatment in connection with the person's detention under the Commonwealth order or a remedy in relation to the Commonwealth order or the person's treatment in connection with the person's detention under the Commonwealth order and the person applies to the court for an order under this subsection.

New subsection 105.52(3) does not require information to be given to the court, or the parties to the proceedings, if the disclosure of the information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*) (see new subsection 105.52(4)). In addition, nothing in new section 105.52 affects the operation of the *National Security Information (Criminal and Civil Proceedings) Act 2004* in relation to the proceedings (see new subsection 105.52(6)).

New subsection 105.52(5) makes it clear that new section 105.52 has effect without limiting subsection 105.51(1), which provides that proceedings may be brought in a court for a remedy in relation to a preventative detention order or the treatment of a person in connection with such an order. New subsection 105.52(5) makes it clear that new section 105.52 has effect subject to subsection 105.51(2), which provides that a court of a State or Territory does not have jurisdiction in proceedings for a remedy if those proceedings are commenced while the order is in force.

New section 105.53 – Sunset provision

New subsection 105.53(1) provides that a preventative detention order, or a prohibited contact order, that is in force at the end of 10 years after the day on which this Division commences ceases to be in force at that time. In addition, new subsection 105.53(2) provides that neither a preventative detention order nor a

prohibited contact order can be applied for or made after the end of 10 years after the day on which this Division commences.

The sunset provision acknowledges that there are a number of machinery type provisions that must continue in operation despite the intention that the Division providing for preventative detention should cease to have effect at the end of 10 years. These provisions include, for example, the requirement to destroy identification material and the offence for disclosing information overheard by an AFP member or interpreter while monitoring discussions between the person and their lawyer.

Part 2 – Consequential amendments

Part 2 of this Schedule amends the *AD(JR) Act* to exclude certain decisions made in relation to control orders and preventative detention orders from review under that Act.

Item 25

Item 25 excludes decisions made by the Attorney-General under new section 104.2 and all decisions made under new Division 105 of the *Criminal Code* from review under the *AD(JR) Act*. It is appropriate to exclude these decisions from such review due to their security nature.

Schedule 5 – Powers to stop, question and search persons in relation to terrorist acts

This Schedule amends the *Crimes Act* to introduce a regime of police stop, question and search powers for the purposes of investigating and preventing terrorism and other serious offences. These provisions will dovetail with equivalent State and Territory stop, question and search powers, but will provide a common approach for police operating in Commonwealth places throughout Australia.

Crimes Act 1914

Item 1

This item repeals the existing heading to Part IAA of the *Crimes Act* and inserts a new heading ‘Search, information gathering, arrest and related powers’ which reflects the new provisions in this Part.

Item 2

This item inserts a definition of *serious offence* in subsection 3C(1) of the *Crimes Act* to mean an offence that is punishable by imprisonment for 2 years or more that is a Commonwealth offence, an offence against a State law that has a federal aspect or an offence against a Territory law. Serious terrorism offences, a new term also to be defined in subsection 3C(1), are excluded from this definition.

Item 3

This item inserts a definition of *serious terrorism offence* in subsection 3C(1) of the *Crimes Act* to mean a terrorism offence (other than an offence against section 102.8 or Division 104 or 105 of the *Criminal Code*), an offence against a State law that has a federal aspect that has the characteristics of a terrorism offence (other than the characteristics of an offence against section 102.8 or Division 104 or 105) or an offence against a Territory law that has the characteristics of a terrorism offence (other than the characteristics of an offence section 102.8 or Division 104 or 105).

Items 4 to 9

These items amend section 3D of the *Crimes Act* as a consequence of the insertion of new Division 3A in Part IAA by item 10. Section 3D sets out the application of Part IAA of the *Crimes Act*, and these amendments are required to ensure that new Division 3A does not limit or exclude the operation of another law of the Commonwealth, or a law of Territory, that relates to the search of premises, arrest and related matters, the stopping, detaining or searching of conveyances or persons, the seizure of things or the requesting of information or documents from persons.

Item 10

This item inserts a new Division 3A into Part IAA of the *Crimes Act* dealing with Powers to stop, question and search persons in relation to terrorist acts.

New Division 3A – Powers to stop, question and search persons in relation to terrorist acts

New Subdivision A – Definitions

New section 3UA – Definitions

New section 3UA defines the terms *Commonwealth place*, *police officer*, *prescribed security zone*, *serious offence related item*, *terrorism-related item*, *terrorist act* and *vehicle* for the purposes of the new powers in new Division 3A.

A ***Commonwealth place*** means a Commonwealth place within the meaning of the *Commonwealth Places (Application of Laws) Act 1970*. A *Commonwealth place* is defined in section 3 of the *Commonwealth Places (Application of Laws) Act 1970* as a place (not being the seat of government) with respect to which the Parliament, by virtue of section 52 of the Constitution, has, subject to the Constitution, exclusive power to make laws for the peace, order, and good government of the Commonwealth.

police officer means a member or special member of the AFP (within the meaning of the *Australian Federal Police Act 1979*) or a member of a police force of a State or Territory.

prescribed security zone means a zone in respect of which a declaration under section 3UJ is in force. New section 3UJ provides for the making of declarations by the Minister.

serious offence related item means a thing that a police officer conducting a search under section 3UD reasonably suspects may be used in a serious offence, is connected with the preparation for, or the engagement of a person in a serious offence, or is evidence of, or relating to, a serious offence. A definition of the term ***serious offence*** is inserted into subsection 3C(1) of the *Crimes Act* by the Bill, and means an offence that is punishable by imprisonment for 2 years or more that is a Commonwealth offence, an offence against a State law that has a federal aspect or an offence against a Territory law.

terrorism related item means a thing that a police officer conducting a search under section 3UD reasonably suspects may be used in a terrorist act, is connected with the preparation for, or the engagement of a person in, a terrorist act, or is evidence of, or relating to, a terrorist act.

terrorist act has the same meaning as in subsection 100.1(1) of the *Criminal Code*.

vehicle means any means of transport and includes a vessel and an aircraft. These examples are not intended to limit the generality of this definition.

New Subdivision B – Powers

Subdivision B contains a number of new powers for police officers to stop, question and search persons in relation to terrorist acts.

New section 3UB – Application of Subdivision

New section 3UB provides that the powers under new Subdivision B may be exercised by a police officer in relation to a person who is in a Commonwealth place, if either the officer suspects on reasonable grounds that the person has just committed, might be committing or might be about to commit a terrorist act, or where the person is in a prescribed security zone. New Subdivision C sets out the procedure for places to be declared as a prescribed security zone under section 3UJ.

New section 3UC – Requirement to provide name etc.

New subsection 3UC(1) provides a police officer with the power to ask a person for their name, residential address, their reason for being in a Commonwealth place and evidence of their identity.

New subsection 3UC(2) provides that if a police officer makes a request of a person under new subsection 3UC(1) and informs the person of the officer's authority to make such a request and that it may be an offence not to comply with the request, the person commits an offence if he or she fails to comply with the request, or gives a name or address which is materially false. This offence carries a maximum fine of 20 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$2200.

The note to new subsection 3UC(2) indicates that the more serious offence of obstruction, hindering or intimidating a Commonwealth official, including a designated person, in the execution of his or her functions, which is found in section 149.1 of the *Criminal Code*, and which carries a maximum penalty of imprisonment for 2 years, may also apply.

New subsection 3UC(3) provides a reasonable excuse defence to the offence created by new subsection 3UC(2). What is regarded as a reasonable excuse will depend not only on the circumstances of the individual cases but also the purpose of the provision to which the defence is an exception. An example of a reasonable excuse might be that the person is unable to comply because of illness. The defendant bears the evidential burden in relation to subsection 3UC(3), in accordance with section 13.3(3) of the *Criminal Code*.

New section 3UD – Stopping and searching

New subsection 3UD(1) provides a police officer with the power to stop and detain a person for the purpose of searching for a terrorist related item on that person. This search may constitute an ordinary search or a frisk search of the person, a search of any thing that the officer suspects on reasonable grounds is in the person's immediate control, a search of a vehicle operated or occupied by the person, or a search of any thing that the officer suspects on reasonable grounds that the person has brought into the Commonwealth place. The terms *ordinary search* and *frisk search* are defined in section 3C of the *Crimes Act*.

New subsection 3UD(2) provides that a police officer, while in the process of conducting a search under new subsection 3UD(1), must not use more force, or

subject the person to greater indignity, than is reasonable and necessary for the search to be conducted. Therefore, in the course of searching a person, a police officer must not do any act that is likely harm the person being searched, unless the officer believes on reasonable grounds that his or her act is necessary to undertake the search.

New subsection 3UD(3) provides that a person must not be detained under new subsection 3UD(1) for longer than is reasonably necessary for a search to be conducted.

New subsection 3UD(4) provides that when conducting a search of a thing (including a vehicle) under new subsection 3UD(1) a police officer may use such force as is necessary and reasonable in the circumstances. However the police officer must not cause damage to the thing being searched by forcing it, or a part of it, open, unless the owner or person in possession of the thing has been given a reasonable opportunity to open the thing or it is not possible for the police to give the person the opportunity to do so. An example of this may apply to circumstances where the person cannot be located or has abandoned the thing, or where the person refuses to cooperate with the officer.

New section 3UE – Seizure of terrorism related item and serious non-terrorism offence related items

New section 3UE provides that a police officer may seize a terrorism related item or a serious offence related item found during a search pursuant to section 3UD.

New section 3UF – How seized things are to be dealt with

New section 3UF establishes how, and the timeframes in which, seized items are to be dealt with. This provision is in similar terms to section 14L of the *Australian Federal Police Act 1979*.

New subsection 3UF(1) requires a police officer who is responsible for the seized thing to serve a seizure notice on the owner of the thing or, if the owner can not be identified after reasonable inquiries, on the person from whom the thing was seized, within 7 days of the thing being seized.

New subsection 3UF(2) provides that the seizure notice provision under new subsection 3UF(1) does not apply if the owner of the thing cannot be identified after reasonable inquiries and the thing was not seized from a person, or if it is not possible to serve the person required to be served under new subsection 3UF(1). This latter scenario may occur where the thing seized had been abandoned or if a false name and address has been provided when requested by a police officer under new subsection 3UC(1).

New subsection 3UF(3) provides that a seizure notice must identify the thing seized, the date on which it was seized, the ground or grounds on which it was seized and state that if the owner does not request the return of the thing within 90 days after the date of the notice, the thing is forfeited to the Commonwealth.

New subsection 3UF(4) provides that the owner of the thing may request the return of a thing seized. New subsections 3UF(5), (6) and (7) provide that the police officer responsible for the seized thing must return the thing if requested by the owner, unless there are reasonable grounds to suspect that, if the thing is returned to the owner, it is likely to be used by the owner or another person in the commission of a terrorist act or serious offence, or if the thing is evidence of, or relates to, a terrorist act or serious offence.

New subsection 3UF(8) provides that if the owner of the thing does not request the return of the thing within 90 days of the seizure notice, the thing will be forfeited to the Commonwealth. Where no seizure notice was served under new subsection 3UF(1) due to the application of new subsection 3UF(2), the thing will be forfeited to the Commonwealth if the owner has not requested the return of the thing within 90 days of the day that the thing was seized.

New subsection 3UF(9) provides that where the owner of the thing requests the return of the thing under subsection 3UF(4), the police officer responsible for the thing does not return the thing, and a period of 90 days has elapsed since the date of the seizure notice or the seizure day as applicable, the police officer must, within five more days, either return the thing to the owner or apply to a magistrate for an order under new section 3UG.

New section 3UG – Application to magistrate

New section 3UG applies where the owner of the seized thing has requested the return of the thing under new subsection 3UF(4), and the police officer responsible for the thing has not returned, and does not intend to return, the thing to the owner. In this scenario, new subsection 3UG(1), read with new subsection 3UF(9), provides that the police officer must make an application to a magistrate for an order in relation to the thing.

New subsection 3UG(2) provides that the owner of the thing must be allowed to appear and to be heard by the magistrate in considering the application.

New subsection 3UG(3) provides that if the magistrate is satisfied that the thing is evidence of, or relating to, a terrorist act or serious offence, the magistrate must make an order that the thing be retained by the police officer for the period of time specified in the order.

New subsection 3UG(4) provides that if the magistrate is satisfied there are reasonable grounds to suspect that if the seized thing is returned to the owner, the thing is likely to be used by the owner or another person in the commission of a terrorist act or serious offence, the magistrate may order the police officer to retain the thing for a specified period, the thing to be forfeited to the Commonwealth, the thing to be sold and the proceeds given to the owner, or the thing to be otherwise sold or disposed of.

New subsection 3UG(5) provides that if the magistrate is not satisfied that the conditions of new subsection (3) or (4) are met, he or she must order that the thing be returned to the owner.

New section 3UH – Relationship of Subdivision to other laws

New section 3UH provides that the powers and duties in new Subdivision B are additional to, and do not lessen, any powers and duties police officers have under Commonwealth law or the law of a State or Territory. It also specifies that these powers and duties do not exclude or limit the operation of any other law of the Commonwealth or a State or Territory insofar as these other laws are capable of operating concurrently with the new laws.

New Subdivision C – Prescribed security zones

New Subdivision C sets out the procedure for declaring a place to be a prescribed security zone for the purpose of this new Division.

New Section 3UI – Applications for declarations

New section 3UI provides that a police officer may make an application to the Minister for a declaration that a Commonwealth place be declared to be a prescribed security zone.

New Section 3UJ – Minister may make declarations

New subsection 3UJ(1) provides that the Minister may declare, in writing, a specified Commonwealth place to be a prescribed security zone if the Minister considers that such a declaration would substantially assist in either preventing a terrorist act occurring or responding to a terrorist act which has occurred. This regime is designed to dovetail with State and Territory legislation authorising similar declarations.

New subsection 3UJ(2) provides that a declaration made under new subsection (1) has immediate effect. New subsection 3UJ(3) provides that the declaration ceases to have effect 28 days after the declaration is made, unless the declaration is earlier revoked by the Minister under new subsection (4).

New subsection 3UJ(4) provides that if the Minister is satisfied that the grounds for making the declaration under new subsection (1) no longer exist, such that the declaration is no longer required, the Minister must revoke the declaration in writing

New subsection 3UJ(5) provides that if the Minister makes or revokes a declaration under subsection (1) or (4), the Minister must arrange for a statement to be prepared which specifies that a declaration has been made or revoked and identifies the prescribed security zone. This statement must be broadcast by television or radio so as to be capable of being received within the prescribed security zone, and published in the *Gazette* and on the Internet. New subsection 3UJ(6) provides that a failure to comply with new subsection (5) does not have the effect of making the declaration or its revocation ineffective.

New subsection 3UJ(7) ensures that despite the publication requirements, a declaration or revocation made under new subsection (1) or (4) is not a legislative

instrument. This reflects the fact that given the security nature of this declaration, it is not appropriate for its operation to be uncertain due to the possibility of disallowance.

New Subdivision D – Sunset provision

New section 3UK – Sunset provision

New subsection 3UK(1) provides that a police officer must not exercise powers or perform duties under new Division 3A after the end of 10 years after the day on which the Division commences. The exceptions relating to powers and duties under sections 3UF and 3UG acknowledges the machinery type provisions that must continue in operation despite the intention that this new Division should cease to have effect at the end of 10 years. These provisions deal with how seized items are to be dealt with and must continue to operate beyond the end of the 10 year period.

New subsection 3UK(2) provides that, if a declaration under new section 3UJ is in force at the end of 10 years after the day on which the Division commences, such declaration ceases to be in force at that time.

New subsection 3UK(3) prohibits a police officer from applying for, and a Minister from making, a declaration after the end of 10 years after the day on which the Division commences

Schedule 6 – Power to obtain information and documents

This Schedule amends the *Crimes Act* to introduce new powers to permit police to request information from organisations for the purposes of investigating terrorism and other serious offences.

Crimes Act 1914

Item 1

New Division 4B – Power to obtain information and documents

This item inserts a new Division 4B into Part IAA of the *Crimes Act 1914*. The new Division provides powers to request information or documents about terrorist acts from operators of aircraft or ships and to obtain documents relating to serious terrorism and non-terrorism offences. The Division is based on models in the *Australian Crime Commission Act 2002* and the *Proceeds of Crime Act 2002*.

New Subdivision A – Definitions

New Section 3ZQL – Definitions

New section 3ZQL provides definitions for the terms ***authorised AFP officer*** and ***Federal Magistrate***.

An ***authorised AFP officer*** means the Commissioner or a Deputy Commissioner of the AFP, or a senior executive AFP employee who is a member of the Australian Federal Police and is authorised by the Commissioner in writing.

A ***Federal Magistrate*** has the same meaning as in the *Federal Magistrates Act 1999*.

New Subdivision B – Power to request information or documents about terrorist acts from operators of aircraft or ships

New section 3ZQM – Power to request information or documents about terrorist acts from operators of aircraft or ships

New subsection 3ZQM(1) provides that new section 3ZQM applies where an authorised AFP officer believes on reasonable grounds that an operator of an aircraft or ship has information or documents that are relevant to a matter that relates to the doing of a terrorist act (whether or not a terrorist act has occurred or will occur). Documents include documents in electronic form. ***Operator*** and ***terrorist act*** are defined by new subsection 3ZQM(7) to have same meaning as in section 4 of the *Customs Act 1901* and section 100.1 of the *Criminal Code* respectively.

New subsection 3ZQM(2) provides that the authorised AFP officer may ask the operator questions relating to the aircraft or ship, or its cargo, crew, passengers, stores or voyage, that are relevant to the matter, or request the operator to produce documents relating to the aircraft or ship, its cargo, crew, passengers, stores or

voyage, that are relevant to the matter and are in the possession or under the control of the operator.

New subsection 3ZQM(3) provides that a person who is asked a question or requested to produce a document under new subsection (2) must answer the question or produce the document as soon as practicable.

New subsection 3ZQM(4) provides that a person commits an offence if the person is an operator of an aircraft or ship and is asked a question or requested to produce a document under new subsection (2) and fails to answer the question or produce the document. An offence against this new subsection is punishable by a maximum fine of 60 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$6600.

New subsection 3ZQM(5) provides that strict liability applies to the offence under new subsection (4). This means that the prosecution does not need to prove fault for this offence, but that the defence of mistake of fact under section 9.2 of the *Criminal Code* is available. The use of strict liability is considered appropriate because the requirement to prove fault would undermine the deterrent effect of the offence and there are legitimate grounds for penalising persons lacking 'fault' in respect of the offence.

New subsection 3ZQM(6) creates a defence to the offence under new subsection (4) if the person charged had a reasonable excuse for failing to answer the question or produce the document. What is regarded as a reasonable excuse will depend not only on the circumstances of the individual cases but also the purpose of the provision to which the defence is an exception.

New Subdivision C – Power to obtain documents relating to serious terrorism and non-terrorism offences

New section 3ZQN – Power to obtain documents relating to serious terrorism offences

New section 3ZQN provides the criteria for issuing a notice to a person to produce documents in relation to a serious terrorism offence. ***Serious terrorism offence*** is defined in subsection 3C(1) of the *Crimes Act*, and is explained in relation to item 3 of Schedule 5 above, and includes terrorism offences (other than the association offence against section 102.8 or the new offences in new Divisions 104 and 105 of the *Criminal Code*), offences against a State law that have a federal aspect and that have the characteristics of a terrorism offence (other than the association offence against section 102.8 or the new offences in new Divisions 104 and 105), and offences against a Territory law that have the characteristics of a terrorism offence (other than the association offence against section 102.8 or the new offences in new Divisions 104 and 105).

New subsection 3ZQN(1) provides that new section 3ZQN applies where an authorised AFP officer considers on reasonable grounds that a person has documents (including in electronic form) that are relevant to and will assist the investigation of a

serious terrorism offence. A person may include a body corporate by virtue of section 22 of the *Acts Interpretation Act 1901*.

New subsection 3ZQN(2) provides that the AFP officer may give a written notice to the person requiring the person to produce documents that relate to one or more matters set out in new section 3ZQP, as specified in the notice, and that are in possession or under the control of the person.

New subsection 3ZQN(3) provides that a notice issued under new subsection (2) must specify the name of the person to whom the notice is given, the matters to which the documents to be produced relate and the manner in which and place at which the documents are to be produced. The notice must also state that the person must comply with the notice as soon as practicable and set out the effect of new section 3ZQS, which creates an offence for failure to comply with the notice. In addition, if the notice specifies that information about the notice must not be disclosed, the notice must set out the effect of new section 3ZQT, which creates an offence for disclosing the existence or nature of a notice.

New section 3ZQO – Power to obtain documents relating to serious offences

New section 3ZQO provides the criteria for issuing a notice to a person to produce documents in relation to a serious offence. ***Serious offence*** (which does not include serious terrorism offences) is defined in subsection 3C(1) of the *Crimes Act*, and is explained in relation to item 2 of Schedule 5 above.

New subsection 3ZQO(1) provides that an authorised AFP officer may apply to a Federal Magistrate for a notice in respect of a person if the officer considers on reasonable grounds that the person has documents that are relevant to and will assist the investigation of a serious offence. Documents include documents in electronic form.

New subsection 3ZQO(2) provides that if the Magistrate is satisfied on the balance of probabilities that a person has documents that are relevant to and will assist the investigation of a serious offence, the Magistrate may issue a written notice to the person to produce documents that relate to one or more of the matters set out in new section 3ZQP, as specified in the notice, and that are in the possession or under the control of the person. The test differs from the test required to issue a notice for a terrorism offence in recognition of the fact that a magistrate is independently coming to the decision, based on sworn or affirmed evidence, to issue a notice for an offence not related to terrorism.

New subsection 3ZQO(3) provides that the Magistrate must not give the notice unless the authorised AFP officer or another person has given the Magistrate, either orally or by affidavit, such further information (if any) as is required by the Magistrate concerning the grounds on which the issue of the notice is being sought. This provision permits the Magistrate to make such further enquiries as he or she sees fit before giving a notice.

New subsection 3ZQO(4) provides that the notice must set out the same matters as are required by a notice issued under new subsection 3ZQN(3) as and described above.

New section 3ZQP – Matters to which documents must relate

New section 3ZQP sets out the matters which a document to be produced under a notice issued under sections 3ZQN or 3ZQO must relate. The document must relate to determining one or more of the following matters:

- (a) whether an account is held by a specified person with a specified financial institution, and details relating to the account and of any related accounts;
- (b) whether a specified person is a signatory to an account with a specified financial institute, and details relating to the account and of any related accounts;
- (c) whether a transaction has been conducted by a specified financial institution on behalf of a specified person and details relating to the transaction (including details relating to other parties to the transaction);
- (d) whether a specified person travelled or will travel between specified dates or locations and details relating to the travel (including details relating to other persons travelling with the specified person);
- (e) whether assets have been transferred to or from a specified person between specified dates, and details relating to the transfers (including details relating to the names of any other person to or from whom the assets were transferred);
- (f) whether an account is held by a specified person in respect of a specified utility (such as gas, water or electricity) and details relating to the account (including the names of any other persons who also hold the account);
- (g) who holds an account in respect of a specified utility (such as gas, water or electricity) at a specified place, and details relating to the account;
- (h) whether a telephone account is held by a specified person and details relating to the account, including details of calls made to or from the relevant phone number, the times at which the calls were made or received, the duration of such calls or the telephone numbers to and from which such calls were made and received;
- (i) who holds a specified telephone account and details relating to that account (including specific details mentioned in paragraph (h) above);
- (j) whether a specified person resides at a specified place; and
- (k) who resides at a specified place.

Care has been taken to ensure sensitive material can not be obtained under the new notice to produce regime. Sensitive material held by health professionals, lawyers, counsellors and journalists is clearly not caught by the regime. Such sensitive material might be able to be obtained for the purposes of an investigation through a search warrant.

New Section 3ZQQ – Powers conferred on Federal Magistrates in their personal capacity

New subsection 3ZQQ(1) provides that a power conferred on a Federal Magistrate by new section 3ZQO is conferred on the Magistrate in a personal capacity and not as a court or a member of a court.

New subsection 3ZQQ(2) provides that a Federal Magistrate need not accept the power conferred.

New subsection 3ZQQ(3) provides that a Federal Magistrate exercising the same power conferred by new section 3ZQO has the same protection and immunity as if he or she were exercising that power as, or as a member of, the court of which the Magistrate is a member.

New Section 3ZQR – Documents must be produced

New section 3ZQR provides that documents requested under a notice given under either new section 3ZQN or 3ZQO must be produced, but provides certain protections to people required to produce documents.

New subsection 3ZQR(1) provides that a person is not excused from producing a document under new section 3ZQN or 3ZQO on the grounds that disclosure may contravene any other law, tend to incriminate or expose the person to a penalty or other liability, disclose material that is protected against disclosure by a duty of confidence or would be otherwise contrary to the public interest. This provision effectively ensures that the power to request documents under this new Division supersedes all other laws.

However, new subsection 3ZQR(2) provides an immunity to ensure that self-incriminatory disclosures cannot be used against the person who makes the disclosure, either directly in court or indirectly, to gather other evidence against the person. The only exception to this immunity relates to proceedings relating to offences against section 137.1, 137.2 or 149.1 of the *Criminal Code*, which relate to the provision of false or misleading information and documents, and obstructing Commonwealth public officials.

This provision is not intended to prevent the information from being used against a third party, such as an employer, partner or accomplice.

New subsection 3ZQR(3) provides that a person is not liable to any penalty by reason of his or her producing a document when required to do so under new section 3ZQN or 3ZQO. This includes both criminal and civil penalties.

New subsection 3ZQR(4) protects claims of legal professional privilege that anyone may make in relation to documents that must be produced under the notice.

New section 3ZQS – Offence for failure to comply with notice under section 3ZQN or 3ZQO

New section 3ZQS creates an offence for a person who is given a notice under new section 3ZQN or 3ZQO to fail to comply with that notice. This offence is punishable by a maximum fine of 30 penalty units which under section 4AA of the *Crimes Act* is equivalent to \$3300.

This penalty is consistent with similar provisions requiring the production of information such as section 218 of the *Proceeds of Crime Act 2002* for the production of financial information and section 306H of the *Migration Act 1958* for the production of certain documents held by migration agents.

New section 3ZQT – Offence for disclosing existence or nature of notice

New subsection 3ZQT(1) creates an offence for a person who is given a notice under new section 3ZQN or 3ZQO to disclose the existence or nature of the notice, if the notice specifies that information about the notice must not be disclosed. This offence is punishable by a fine of 120 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$13200, or imprisonment for 2 years, or both.

New subsection 3ZQT(2) provides that the offence does not apply where the person discloses the information to another person in order to obtain a document required by the notice and that other person is directed not to inform the person to whom the document relates, where the disclosure is made to obtain legal advice or legal representation in relation to the notice, or where the disclosure is made for the purposes of, or in the course of, legal proceedings.

The note to new subsection (2) indicates that the person bears the evidential burden of proof in relation to the matters set out in new subsection (2), in accordance with subsection 13.3(3) of the *Criminal Code*.

Schedule 7 – Sedition

This Schedule provides for amendments to the *Crimes Act*, the *Criminal Code*, the *Migration Act 1958 (Migration Act)* and the *Surveillance Devices Act 2004*.

Crimes Act 1914

The *Crimes Act* is amended by removing the existing sedition offence, which is included in an updated form in the *Criminal Code*.

Item 1

This item makes a technical amendment to paragraph 4J(7)(b) of the *Crimes Act* to ensure that the sedition offences in the *Criminal Code* will also be excluded from the operation of section 4J. As is the case with the existing law, the new sedition offence will not be able to be heard summarily.

Item 2

This item repeals sections 24A to 24E of the *Crimes Act*. These sections contain offences relating to seditious enterprises and seditious words which are to be the new offences in the *Criminal Code*.

Item 3

This item make a consequential amendment to paragraph 30A(1)(b) of the *Crimes Act* (by item 2 of this Schedule) consequential to the repeal of the definition of *seditious intention* in section 24A by its inclusion in new subsection 30A(3) (by item 4 of this Schedule).

Item 4

This item inserts a new subsection (3) into section 30A of the *Crimes Act* as a consequential amendment that maintains the substance of the existing definition of *seditious intention*. The existing definition of seditious intention in section 24A of the *Crimes Act* is repealed by item 2 above.

Existing paragraph 30A(1)(b) of the *Crimes Act* provides that an unlawful association includes any body of persons, incorporated or unincorporated, which by its constitution or propaganda or otherwise advocates or encourages the doing of any act having or purporting to have as an object the carrying out of a sedition intention.

New subsection 30A(3) defines *seditious intention* to mean an intention to bring the Sovereign into hatred or contempt, to urge disaffection against the Constitution, the Government of the Commonwealth or either House of the Parliament, to urge another person to attempt to procure a change, otherwise than by lawful means, to any matter established by law of the Commonwealth or to promote feelings of ill-will or hostility between different groups so as to threaten the peace, order and good government of the Commonwealth.

The effect of this item is to modernise the definition of seditious intention from the former definition provided in section 24A by using the term ‘urging’ of another person to attempt to procure a change to any matter established by law in the Commonwealth. The requirement in the former section 24A, that there must be procurement of ‘any matter in the Commonwealth’ has been removed. New paragraph 30A(3)(c) requires that there must be an urging ‘to procure a change in any matter established by law in the Commonwealth’.

The only other difference between section 24A and the new definition is to update the language, with the phrase ‘classes of Her Majesty’s subjects’ substituted with the word ‘groups’, thereby removing the requirement of a class being a subject of the Crown and substituting a broader requirement of ‘groups’.

The effect of this is that seditious intention under new paragraph 30A(3)(d) may include an intention to promote feelings of ill-will or hostility between different groups. These ‘groups’ may include groups of people of all types, races, religions, political interests and nationalities.

Criminal Code Act 1995

The amendments to the *Criminal Code* insert offences of sedition into Part 5.1 which had formerly only provided for treason offences. The new offence of sedition in the *Criminal Code* applies to a person who urges violence against the Constitution or Government, urges interference in Parliamentary elections, urges violence within the community or urges others to assist the enemy. These amendments also clarify the existing provisions relating to the offence of treason. The inclusion of sedition in the *Criminal Code* is consistent with the general policy of moving serious offences to the new *Criminal Code* when they are updated. These offences have been update in line with a number of recommendations of Sir Harry Gibbs in the Review of Commonwealth Criminal Law, Fifth Interim Report, June 1991 (the Gibbs Report).

Items 5 and 6

These items amend the headings of Part 5.1 of the *Criminal Code* and Division 80 of the *Criminal Code* respectively to reflect the new sedition offences contained in this Part and Division.

Item 7

This item inserts a new section 80.1A to define ***organisation*** for the purposes of the treason and sedition offences in Division 80 of the *Criminal Code*.

New section 80.1A defines an ***organisation*** as a body corporate or an unincorporated body, whether or not the body is based outside Australia, consists of persons who are not Australian citizens or is part of a larger organisation. This definition is consistent with the existing definition of ***organisation*** in subsection 80.1(8), which applies only to the current treason offences, and is repealed by item 11 below.

Items 8 and 9

These items insert a second note to subsection 80.1(1A) to indicate the existence of a defence, in section 80.3, to the offence of treason.

Item 10

This item repeals subsections 80.1(3), (4), (6) and (7) consequential to other amendments made by this Schedule. These provisions currently deal with matters relevant to the treason offences only, but are intended to apply to the new sedition offences equally.

New subsections 80.1(3) and (4) dealt with obtaining the Attorney-General's consent before the issuing of proceedings, which is now provided for by new section 80.5, inserted by item 12 below.

New subsection 80.1(6) dealt with a defence of good faith, which is now provided for by new section 80.3, inserted by item 12 below.

New subsection 80.1(7) dealt with geographical jurisdiction of the treason offences, which is now provided for by new section 80.4, inserted by item 12 below.

Item 11

This item repeals the definition of *organisation* in subsection 80.1(8) consequential to the new definition of *organisation* in new section 80.1A which applies to the entire Division, instead of just the treason offences.

Item 12

This item adds five new sections at the end of Division 80, to create a new offence of sedition and to give effect to the offences of treason and sedition.

New section 80.2 – Sedition

New section 80.2 contains updated versions of the offences of sedition which are currently in the *Crimes Act*. These offences occur where a person urges another person to act to use force or violence to overthrow, interfere with or threaten the peace, order and good government of the Commonwealth, or assist an enemy at war with the Commonwealth.

New subsection 80.2(1) provides that a person commits an offence if the person urges another person to overthrow by force or violence, the Constitution, the Government of the Commonwealth, a State or a Territory or the lawful authority of the Government of the Commonwealth. The penalty for an offence under this new subsection is imprisonment for 7 years. This is similar in effect to paragraph 24A(d) and section 24D of the *Crimes Act*. The penalty is increased from a maximum of 3 years imprisonment in line with the Gibbs Report.

New subsection 80.2(2) provides that recklessness applies to the elements of the offence in new subsection (1) that the person is urging the overthrow of the Constitution, the Government or a lawful authority of Government. Section 5.4 of the *Criminal Code* defines the element of recklessness to mean that a person is reckless with respect to a result if they are aware of a substantial risk that the result will occur, and having regard to the circumstances known to them it is unjustifiable to take that risk.

New subsection 80.2(3) provides that a person commits an offence if the person urges another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament. The penalty for an offence under this new subsection is imprisonment for 7 years. This is a new aspect of the offences recommended by the Gibbs Report.

New subsection 80.2(4) provides that recklessness applies to the elements of the offence in new subsection (3) that the interference is with lawful processes for election to a House of the Parliament. The element of recklessness is defined in section 5.4 of the *Criminal Code*.

New subsection 80.2(5) provides that a person commits an offence if the person urges a group or groups (whether distinguished by race, religion, nationality or political opinion) to use force or violence against another group or other groups (as so distinguished) and the use of the force or violence would threaten the peace, order and good government of the Commonwealth. New subsection 80.2(5) modernises the language from classes or groups as recommended by the Gibbs Report. The penalty for an offence under this new subsection is imprisonment for 7 years.

New subsection 80.2(6) provides that recklessness applies to the elements of the offence in new subsection (5) that the violence is against a group or groups that are distinguished by race, religion, nationality or political opinion. The element of recklessness is defined in section 5.4 of the *Criminal Code*.

New subsection 80.2(7) provides that a person commits an offence if the person urges another to engage in conduct and intends the conduct to assist by any means an organisation or country, and the organisation and country is at war with the Commonwealth, whether or not the existence of a state of war has been declared and specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth. The penalty for an offence under this subsection is imprisonment for 7 years.

Paragraph 80.1(1)(e) provides that it is an offence of treason to engage in conduct by whatever means with intent to assist a country or organisation who is an enemy at war with the Commonwealth and is specified by Proclamation to be an enemy at war with the Commonwealth.

New subsection 80.2(8) provides that a person commits an offence if the person urges another to engage in conduct and intends the conduct to assist by any means whatever, an organisation or country, and the organisation or country is engaged in armed hostilities against the Australian Defence Force. The penalty for an offence under this subsection is imprisonment for 7 years.

New subsection 80.2(9) provides for defences for the offences provided for under new subsections 80.2(7) and 80.2(8) where there is engagement in conduct by way of, or for the purposes of, the provision of aid of a humanitarian nature.

The first note to new subsection 80.2(9) indicates that a defendant bears an evidential burden in relation to the defence provided by this subsection, pursuant to subsection 13.3(3). Subsection 13.3(6) of the *Criminal Code* provides that evidential burden means the burden of adducing or pointing to evidence that suggests a reasonable possibility that the matter exists or does not exist.

The second note to new subsection 80.2(9) states that there is a defence in new section 80.3 for acts done in good faith, which applies to all of the offences in new section 80.2.

New section 80.3 – Defence for acts done in good faith

New section 80.3 provides for defences to the offences in sections 80.1 (relating to treason) and 80.2 (relating to sedition), for acts done in good faith.

This section effectively mirrors the defence of good faith contained in section 24F of the *Crimes Act*, which applied to the sedition offences in that Act, and the treason offence in section 80.1 of the *Criminal Code* (by virtue of subsection 80.1(6)). The only substantive difference between section 24F of the *Crimes Act* and new section 80.3 of the *Criminal Code* is that the new provision gives more discretion to a court in considering whether an act was done in good faith. This is discussed in more detail in relation to new subsection 80.3(2) below.

New subsection 80.3(1) provides that it is a defence to the offences of treason and sedition in sections 80.1 and 80.2 if the person who did the act which would otherwise constitute the offence:

- (a) was trying in good faith to show that any of the Sovereign, the Governor-General, the Governor of a State, the Administrator of a Territory, the advisers of any of these people or a person responsible for the government of another country are mistaken in any of his or her counsels, policies or actions;
- (b) was pointing out in good faith errors or defects, with a view to reforming those errors or defects in the Government or legislation of the Commonwealth, a State or a Territory, the Constitution or the administration of justice of or in the Commonwealth, a State, a Territory or another country;
- (c) was urging in good faith another person to attempt to lawfully procure a change to any matter established by law in the Commonwealth, a State, a Territory or another country;
- (d) was pointing out in good faith any matters that are producing, or have a tendency to produce, feelings of ill-will or hostility between different groups, in order to bring about the removal of those matters; or
- (e) was doing anything in good faith in connection with an industrial dispute or an industrial matter.

The note to new subsection 80.3(1) indicates that a defendant bears an evidential burden in relation to the defences included in the new subsection, in accordance with subsection 13.3(3).

New subsection 80.3(2) provides that a court may take into account any relevant matter in considering a defence under new subsection (1), including whether the acts were done:

- (a) for a purpose intended to be prejudicial to the safety or defence of the Commonwealth;
- (b) with the intention of assisting an enemy which is at war with the Commonwealth and specified by Proclamation made for the purpose of paragraph 80.1(1)(e) to be an enemy at war with the Commonwealth;
- (c) with the intention of assisting another country, or an organisation, that is engaged in armed hostilities against the Australian Defence Force;
- (d) with the intention of assisting a proclaimed enemy of a proclaimed country (within the meaning of subsection 24AA(4) of the *Crimes Act*);
- (e) with the intention of assisting persons specified in paragraphs 24AA(2)(a) and (b) of the *Crimes Act*; or
- (f) with the intention of causing violence or creating public disorder or a public disturbance.

The references to section 24AA of the *Crimes Act* are references to offences of treachery. A proclaimed country means a country proclaimed to be an ally, while a proclaimed enemy of a proclaimed country means an enemy proclaimed to be an enemy of that ally.

New subsection 80.3(2) differs from subsection 24F(2) of the *Crimes Act*. Subsection 24F(2) provides that if the acts were done for any of the purposes, or with any of the intentions, set out above, the act is taken not to be an act done in good faith. In contrast, new subsection 80.3(2) provides that these are matters to which a court may have regard, but that these matters are not in and of themselves conclusive that a particular act was not done in good faith. This difference ensures wider application of the defence of good faith and ensures greater judicial discretion in considering whether this defence applies.

New section 80.4 – Extended geographical jurisdiction for offences

New section 80.4 provides that the extended geographical jurisdiction – Category D, provided for in section 15.4 of the *Criminal Code*, applies to the offences in Division 80. The effect of this is for the offences to apply whether the conduct constituting the alleged offence or a result of the conduct constituting the alleged offence occurs in Australia or outside of Australia, and in relation to any person, whether resident or non-resident, citizen or non-citizen, of Australia, at the time of committing the offence.

This extended geographical jurisdiction applied to the existing treason offence by virtue of subsection 80.1(7), repealed by item 10 of this Schedule.

New section 80.5 – Attorney-General’s consent required

New subsection 80.5(1) provides that proceedings for an offence against Division 80 must not be commenced without the Attorney-General’s written consent. This provision applied to the existing treason offence by virtue of subsection 80.1(3), repealed by item 10 of this Schedule.

New subsection 80.5(2) provides that even though proceedings may not be commenced without the Attorney-General’s consent as required by new subsection (1), a person may be arrested for an offence against Division 80, a warrant for the arrest of a person for such an offence may be issued and executed, and the person may be charged and be remanded in custody or on bail. However, no further proceedings may be taken until that consent has been obtained and the person must be discharged if proceedings are not continued within a reasonable time. This provision applied to the existing treason offence by virtue of subsection 80.1(4), repealed by item 10 of this Schedule.

The effect of this subsection is to provide firm safeguards to a person arrested or charged with an offence under Division 80. Those safeguards ensure that no actual court proceedings may be commenced until the Attorney-General has provided written consent to those proceedings, or where proceedings are not continued within a reasonable time, the person must be discharged.

New section 80.6 – Division not intended to exclude State or Territory law

New section 80.6 provides that Parliament intends that Division 80 is not to apply to the exclusion of a law of a State or Territory to the extent that the law is capable of operating concurrently with Division 80. This is to ensure that these laws do not exclude any State or Territory laws dealing with the urging or inciting terrorist activity, or other seditious activities.

Migration Act 1958

Items 13 and 14

These items make technical amendments to the *Migration Act* as a consequence of the amendments made to the *Crimes Act* and the *Criminal Code* by this Schedule. Item 13 removes a redundant cross-reference to a section of the *Crimes Act* that has been repealed, while item 14 ensures that the reference to serious offence in section 203 of the *Migration Act*, which already includes the treason offences, also includes the sedition offences.

Surveillance Devices Act 2004

Items 15 to 18

These items make technical amendments to the *Surveillance Devices Act 2004* both as a consequence of the amendments made to the *Criminal Code* by this Schedule and in an attempt to tidy up paragraph 30(1)(a) of that Act.

Items 15 and 17 repeal subparagraphs 30(1)(a)(v) and (vii) respectively, which refer to Divisions 72 and 101, 102 and 103 respectively. These Divisions are now referred to in subparagraph 30(1)(a)(viii), as amended by item 18.

Item 16 removes the reference to section 80.1 of the *Criminal Code* from subparagraph 30(1)(a)(vi). Division 80, which now includes both the treason and sedition offences, is referred to in subparagraph 30(1)(a)(viii), as amended by item 18.

Schedule 8 – Optical surveillance devices at airports and on board aircraft

This Schedule inserts a new Division 10 into Part 4 of the *Aviation Transport Security Act 2004 (ATS Act)* which will enable the Minister to determine a code regulating and authorising the use of optical surveillance devices, such as closed-circuit television at airports. The use of closed-circuit television will assist in the provision of aviation transport security.

Item 1

This item amends the title of the *ATS Act* to substitute the word ‘related’ with the word ‘other’. This amendment is required to allow for the extended purposes included in the new Division 10 of Part 4.

Item 2

This item adds a note at the end of subsection 3(1) of the *ATS Act* to clarify that the new Division 10 of Part 4, and specifically section 74J, sets out additional purposes of the *ATS Act*.

Item 3

This item inserts the additional purpose provided for in the new section 74J within section 4 of the *ATS Act*, which provides a simplified overview of the Act.

Item 4

This item inserts a definition of *optical surveillance device* into section 9 of the *ATS Act*, defining the term to have the same as in the *Surveillance Devices Act 2004*, to ensure consistency between these two pieces of legislation.

Item 5

This item inserts a new Division 10 into Part 4 of the *ATS Act*.

New Division 10 – Optical surveillance devices

New section 74J – Purposes of this Division

New section 74J outlines the purposes of new Division 10 to include preventing and detecting contraventions of, or offences against, the *ATS Act* or any other laws of the Commonwealth, at airports and on board aircraft, as well as safeguarding the interests of the Commonwealth more generally.

New section 74K – Minister may determine code

New subsection 74K(1) provides the Minister with a power to, by legislative instrument and for the purposes of this Division, determine a code which authorises and regulates the use of optical surveillance by aviation industry participants, to monitor and record activities at security controlled airports, on aircraft at security

controlled airports or other prescribed aircraft, including baggage holds, or a vehicle that is on board an aircraft referred to earlier or at a security controlled airport. For the avoidance of doubt, the code made pursuant to new section 74K is intended to override any law of a State and Territory.

New subsection 74K(2) anticipates that the code may also authorise and regulate the use or disclosure of information obtained through the use of an optical surveillance device pursuant to the code.

New subsection 74K(3) allows for regulations to be made for the purpose of creating offences within the code which may carry penalties of up to 50 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$5500.

Schedule 9 – Financial transaction reporting

This Schedule contains amendments to the *Financial Transaction Reports Act 1988* (*FTR Act*) to better implement the requirements of the Financial Action Task Force on Money Laundering's (FATF's) Special Recommendations VI (SR VI), VII (SR VII) and IX (SR IX) on Terrorist Financing.

The *FTR Act* is part of Australia's anti-money laundering and counter-terrorist financing regime. The *FTR Act* creates a regime of verification of identification records, reporting and record-keeping obligations designed to reduce the incidence, and facilitate the tracking, of money laundering and terrorist financing. Consideration is being given to other reforms to strengthen Australia's anti-money laundering and counter terrorist financing standards as set out in the 40 FATF Recommendations and the nine Special Recommendations on Terrorist Financing.

SR VI deals with the licensing or registration of persons or legal entities involved in the transmission of value or money, including through informal networks (items 5 and 11 of this Schedule). SR VII requires the inclusion, with funds transfer instructions, of customer information about the sender of the funds (items 10, 12, 13, 16 and 17 of this Schedule). SR IX deals with the adoption of systems to help detect the physical cross-border transfer of currency and bearer negotiable instruments (items 1, 2, 6, 8, 9, 14, 15 and 18 to 24 of this Schedule).

Financial Transaction Reports Act 1988

Item 1

This item inserts a definition of *bearer negotiable instrument* into subsection 3(1) of the *FTR Act*. This definition draws on the definition of bearer negotiable instruments in the Interpretative Note to FATF's SR IX on cash couriers. The definition covers any type of instrument that the holder, or some other person, can exchange for cash or a deposit of equivalent value in a bank account.

Item 2

This item inserts a definition of *bill of exchange* into subsection 3(1) of the *FTR Act*. The term is included in the definition of *bearer negotiable instrument* inserted by item 1 and is defined to have the same meaning as in paragraph 51(xvi) of the Constitution, but does not include a cheque unless the cheque is a cheque that an authorised deposit-taking institution (ADI), bank or other institution draws on itself. ADI is defined in subsection 3(1) of the *FTR Act* to mean a body corporate that is an ADI for the purposes of the *Banking Act 1959* or the Reserve Bank of Australia or a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

The term *bill of exchange* can be understood to include an unconditional order in writing addressed by one person to another, signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person or to

bearer. The reference to the constitutional meaning of the term is a mechanism to enable the meaning of the term to incorporate continuing judicial interpretation.

Items 3 and 4

These items repeal the definition of *non-reportable currency transfer* from, and insert the definition of *non-reportable transfer* into, subsection 3(1) of the *FTR Act* respectively. *Non-reportable transfer* carries the same meaning as the existing definition of *non-reportable currency transfer*. This is a technical amendment to correct an error in the *FTR Act*.

Item 5

This item inserts a definition of *prescribed particulars* into subsection 3(1) of the *FTR Act*. *Prescribed particulars* are defined to mean particulars prescribed by the regulations made for the purposes of new sections 24E and 24F, which are inserted by item 11.

Under new section 24F, the prescribed particulars of a person who falls within subparagraph (k)(ib) or paragraph (l) of the definition of *cash dealer* in subsection 3(1) of the *FTR Act* would be placed on a register of providers of remittance services maintained by the Director of the Australian Transaction Reports and Analysis Centre (AUSTRAC). It is intended that the types of details which may be prescribed particulars for the purposes of the regulations include information such as the name, business address, phone and fax numbers, Australian Business Number (ABN) and email address of relevant persons.

Item 6

This item inserts a definition of *promissory note* into subsection 3(1) of the *FTR Act*. This term is included in the definition of *bearer negotiable instrument* inserted by item 1 and is defined to have the same meaning as in paragraph 51(xvi) of the Constitution. The term is defined to have the same meaning as in paragraph 51(xvi) of the Constitution. This is a mechanism to enable incorporation of continuing judicial interpretations of the term.

The term *promissory note* can be understood to include an unconditional promise in writing made by one person to another, signed by the maker, engaging to pay on demand or at a fixed or determinable future time a sum in money to or to the order of a specified person or bearer.

Item 7

New section 3A – Translation of foreign currency to Australian currency

This item inserts new section 3A into the *FTR Act*. This new section provides that in determining whether an amount of foreign currency (including an amount in which a bearer negotiable instrument or other document is denominated) is not less than an Australian dollar amount, the amount of foreign currency is to be translated into Australian dollars using the exchange rate applicable at the relevant time.

For example, the relevant time for translating foreign currency to Australian currency for the purpose of section 3A would be when a person brings foreign currency into Australia and fills out a report under section 15.

Item 8

This item amends the heading to Division 1A of Part II consistent with the inclusion in Division 1A of a new provision concerning bearer negotiable instruments.

Item 9

New section 15AA – Reports in relation to bearer negotiable instruments taken into or out of Australia

This item inserts new section 15AA into Division 1A of Part II of the *FTR Act* to better implement FATF SR IX. The Interpretative Note to SR IX: Cash Couriers states that countries may meet their obligations under SR IX by implementing either a declaration or a disclosure system and that a country does not have to use the same type of system for incoming and outgoing cross-border transportation of currency or bearer negotiable instruments. Australia already has a declaration system in place under the *FTR Act* for transportation of currency into and out of Australia which is designed to monitor cash amounts of \$10,000 or more (see section 15 of the *FTR Act*).

New subsection 15AA(1) provides that if a person, in response to a request, produces a bearer negotiable instrument that the person has with him or her to an officer, or an officer conducts an examination or search and finds a bearer negotiable instrument, then the officer may request the person to prepare a report for the Director of AUSTRAC (new subsection 15AA(6) defines *officer* as a police or customs officer). This subsection provides a power, not an obligation, on the officer, to allow the officer flexibility to determine in each case whether or not a report is required. In some instances an officer may consider that it would be more appropriate for further criminal investigation to take place. In such instances AUSTRAC would be informed of the results of that investigation under usual AUSTRAC/police protocols.

There is no monetary limit on the face value of a bearer negotiable instrument that triggers a report under section 15AA. In practice a person will only be required to produce a bearer negotiable instrument when asked by an officer. It is not proposed that the currency declaration system that applies to all persons travelling into or out of Australia be extended to bearer negotiable instruments. This ‘disclosure when asked’ system will enable more targeted use of customs and police resources. For example, officers may request disclosure by particular persons about whom they might already have some relevant intelligence information.

New subsection 15AA(2) sets out the requirements for the form and content of a report under new subsection (1), which are for the report to be in the approved form, contain the reportable details and be signed by the person giving the report. New subsection (6) defines *reportable details* as those set out in Schedule 3AA to the *FTR Act*, which is inserted by item 21, and includes such matters as the amount payable under each bearer negotiable instrument.

New subsection 15AA(3) provides that the report must be given to an officer as soon as possible after the request is made. It is intended that a person who is requested to prepare a report will do so immediately upon request on an approved form provided by the officer requesting the report.

New subsection 15AA(4) creates an offence punishable by two years imprisonment if a person is requested to prepare a report and fails to comply with the request or fails to give the report to an officer in accordance with new subsection (3).

New subsection 15AA(5) provides that the officer must, as soon as practicable after receiving the report, forward it to the Director of AUSTRAC.

As mentioned above, new subsection 15AA(6) defines *officer* for the purposes of this new section to mean a police officer or a customs officer. Both of these terms are already defined in subsection 3(1) of the *FTR Act*.

New subsection 15AA(6) also defines *reportable details* to mean details referred to in new Schedule 3AA to the *FTR Act*, which is inserted by item 21 of this Schedule. These details are the equivalent of the reportable details for the purposes of section 15, set out in Schedule 3 to the *FTR Act*, and ensure that reports about currency and reports about bearer negotiable instruments are consistent.

Item 10

New Division 3A – Customer information to be included in international funds transfer instructions

This item inserts new Division 3A into Part II of the *FTR Act*. This new Division better implements SR VII, which requires the inclusion, with funds transfer instructions, of customer information about the customer sending the funds. SR VII was developed with the objective of preventing terrorists and other criminals from having unfettered access to wire transfers for moving their funds and for detecting such misuse when it occurs.

Existing Division 3 of Part II of the *FTR Act*, in particular section 17B, currently requires cash dealers (defined in section 3 of the *FTR Act*) to report to AUSTRAC any international funds transfer instructions (IFTIs) transmitted into or out of Australia. New Division 3A requires cash dealers in Australia to include required information about the ordering customer with an IFTI when transmitting IFTIs out of Australia, and creates offences for failure to include this information.

New section 17FA – Customer information in international funds transfer instructions transmitted out of Australia

New subsection 17FA(1) provides that where a cash dealer in Australia sends an IFTI out of Australia and the cash dealer is acting on behalf of, or at the request of, another person who is not an ADI and/or the cash dealer is not an ADI, the IFTI must also include customer information relating to the IFTI.

The provision is intended to apply to situations where, for example, a bank sends an IFTI for a customer, or a cash dealer other than a bank, but it is not intended to apply to situations where a bank sends an IFTI on its own behalf. This is because the situation where a bank sends an IFTI on its own behalf is recognised under SR VII as a reduced risk situation for terrorist financing.

An ADI is an authorised deposit taking institution, and is defined in section 3 of the *FTR Act* to mean a body corporate that is an ADI for the purposes of the *Banking Act 1959* or the Reserve Bank of Australia or a person who carries on State banking within the meaning of paragraph 51(xiii) of the Constitution.

The note to new subsection 17FA(1) indicates that a failure to comply with this obligation is an offence under paragraph 28(1)(a) of the *FTR Act*.

New subsection 17FA(2) provides that if a cash dealer transmits an instruction on behalf of, or at the request of, another person, the cash dealer is taken to be the sender of the instruction. The subsection also provides that if a person, not being a cash dealer, transmits an instruction on behalf of, or at the request of, a cash dealer, the cash dealer is taken to be the sender of the instruction. This ensures consistency with section 17B and means that the obligation under section 17FA will apply to cash dealers who currently have obligations to report IFTIs to AUSTRAC.

New subsection 17FA(3) defines **customer information** in relation to an IFTI transmitted out of Australia to mean the ordering customer's name and full business or residential address (not being a post office box, so this information can assist the relevant authorities to locate the person if required) and either the number of the ordering customer's account with the cash dealer or, if the customer does not have an account with the cash dealer, the identification code assigned to the IFTI by the cash dealer. This definition is consistent with FATF SR VII and with information currently reported to AUSTRAC under section 17B.

The details of information required to be reported under section 17B can be found in regulation 11AA of the *Financial Transaction Reports Regulations 1990* (the Regulations). Paragraphs 11AA(1)(g), (h) and (j) of the Regulations specify that information which is the same as the customer information required to be collected under new subsection 17FA(3).

New subsection (3) also defines **financial organisation** to mean an organisation that transmits, receives, handles or executes IFTIs and **ordering customer** to mean a person or organisation (including a financial organisation) on whose behalf an instruction is sent.

New section 17FB – Customer information in international funds transfer instructions transmitted into Australia

New section 17FB deals with IFTIs transmitted into Australia. IFTIs transmitted into Australia are regulated by foreign law, and therefore the information that is transmitted into Australia by an ordering organisation is not information that Australian authorities can readily control. This accounts for the different

requirements from those under new section 17FA, where information is transmitted out of Australia and Australian law applies.

New subsection 17FB(1) provides that this new section applies if a cash dealer is the recipient of two or more IFTIs transmitted into Australia by a particular ordering organisation and at least one of the IFTIs does not include customer information relating to the IFTIs. The intention behind this application provision is to ensure that transactions are only caught where there is a pattern of IFTIs transmitted into Australia without customer information.

New subsection 17FB(2) provides the Director of AUSTRAC with a power to direct a cash dealer in writing to request the ordering organisation to include in all future IFTIs transmitted to it by the ordering organisation, customer information relating to those IFTIs. The direction must state that the cash dealer is to comply with the request within 14 days after the date of the direction.

This information assists law enforcement authorities in detecting, investigating and prosecuting terrorists or other criminals and tracing the assets of terrorists or other criminals. The information is also required to assist in analysing suspicious or unusual activity and to assist in the identification and reporting of suspicious activity.

New subsection 17FB(3) provides that it is an offence to be given a direction under new subsection 17FB(2) and not comply with it within 14 days after the date of the direction. This offence is punishable by imprisonment for two years. It is important to note that the obligation on the Australian cash dealer is only to request the ordering organisation to provide the information. The Australian cash dealer does not commit an offence if it requests the ordering organisation to provide the information but the ordering organisation does not do so.

The note to new subsection 17FB(3) indicates that under subsection 4B(2) of the *Crimes Act* a court may impose a fine instead of, or in addition to, the two year term of imprisonment.

New subsection 17FB(4) provides that where a cash dealer receives a request from the Director of AUSTRAC under new subsection 17FB(2), the cash dealer must report to the Director in writing on the response, or lack of response, from the ordering organisation in relation to the request. The cash dealer must respond to the Director of AUSTRAC within 28 days after the date of the direction or within such further time as is allowed by the Director.

The note to new subsection (4) indicates that failure to comply with the timeframe imposed to report to the Director of AUSTRAC is an offence under paragraph 28(1)(a) of the *FTR Act*. The maximum penalty for such an offence is two years imprisonment.

New subsection 17FB(5) is an avoidance of doubt provision which clarifies that a cash dealer may make available funds received from an IFTI even if the IFTI transmitted to the cash dealer did not include customer information relating to that IFTI. This provision is inserted to ensure that the ordinary course of business is not disrupted by these amendments.

New subsection 17FB(6) defines *customer information* to have the same meaning as in new section 17FA except that it includes, as alternatives to the ordering customer's full business or residential address, the ordering customer's date and place of birth or a unique identification number given to the ordering customer by either a foreign government or the ordering organisation. This change recognises that foreign law may require the collection of different information to that required under Australian law.

New subsection 17FB(6) also defines *financial organisation* and *ordering customer* consistent with the meanings given in new section 17FA, and *ordering organisation*, in relation to an IFTI, to mean the financial organisation that the ordering customer originally asked to send the IFTI or that initiated the sending of the IFTI on its own behalf.

Item 11

New Part IIIB – Register of Providers of Remittance Services

This item inserts new Part IIIB into the *FTR Act* to better implement FATF's SR VI. This recommendation requires the licensing or registration of persons or legal entities that provide a service for the transmission of money or value, including through informal networks. SR VI is particularly targeted at alternative remittance providers who provide funds transfer services through informal mechanisms. FATF has identified alternative remittance providers as a common conduit for terrorists to transfer funds. Under Part IIIB, cash dealers who provide remittance services will be required to be registered.

New section 24E – Advice by certain cash dealers to the Director

New subsection 24E(1) provides that a cash dealer who is not a financial institution or a real estate agent acting in the ordinary course of real estate business, and:

- (a) who carries on a business of remitting or transferring currency or prescribed commercial instruments, or making electronic funds transfers, into or out of Australia on behalf of other persons, or arranging for such remittance or transfer (subparagraph (k)(ib) of the definition of *cash dealer* in subsection 3(1) of the *FTR Act*);
- (b) who carries on a business in Australia of arranging, on behalf of other persons, funds to be made available outside Australia to those persons or others (subparagraph (l)(i) of the definition of *cash dealer* in subsection 3(1) of the *FTR Act*); or
- (c) who carries on a business in Australia of, on behalf of other persons outside Australia, arranging for funds to be made available, in Australia, to those persons or others (subparagraph (l)(ii) of the definition of *cash dealer* in subsection 3(1) of the *FTR Act*);

must advise the Director of AUSTRAC in writing of the cash dealer's name and all prescribed particulars, and of the fact that they provide those services, so that

AUSTRAC can maintain the person's details on a register created under new section 24F.

New subsection 24E(2) provides that it is an offence for a cash dealer to whom new subsection (1) applies to fail to notify the Director of AUSTRAC in writing within 30 days of commencement of the section or of starting their business (whichever is the later) with the relevant details. This offence is punishable by imprisonment for two years.

The note to new subsection (2) indicates that under subsection 4B(2) of the *Crimes Act* a court may impose a fine instead of, or in addition to, the two year term of imprisonment.

Prescribed particulars is defined in the amendment to subsection 3(1) of the *FTR Act*, inserted by item 5, to mean particulars prescribed by the regulations for the purposes of new sections 24E and 24F. The regulations are likely to include details such as the name, business address, phone and fax numbers, Australian Business Number and email address of the cash dealer.

New section 24F – Register of Providers of Remittance Services

New subsection 24F(1) provides that the Director of AUSTRAC must maintain a register of cash dealers to be known as the Register of Providers of Remittance Services, which includes the names and all prescribed particulars of the cash dealers. The cash dealers to whom new section 24F applies are those described in the explanation of new section 24E above. Similarly, the prescribed particulars that apply to this section are those described above.

New subsection 24F(2) provides that the Register may be maintained electronically.

New subsection 24F(3) enables an authorised officer of AUSTRAC to require a cash dealer to provide their name and all prescribed particulars, where the authorised officer has reason to believe that the cash dealer is a cash dealer of a kind described in the explanation of new section 24E above and that the Director does not have those details required by new subsection (1). The authorised officer may request these details either orally or in writing, and if so, must inform the cash dealer of the offence provision contained in new subsection 24F(4).

New subsection 24F(4) provides that it is an offence for a person who is requested to provide information under new subsection (3) to fail to provide their name and all prescribed particulars within 14 days after the day on which the request for information is made. This offence is punishable by imprisonment for two years.

The note to new subsection (4) indicates that under subsection 4B(2) of the *Crimes Act* a court may impose a fine instead of, or in addition to, the two year term of imprisonment.

The proposed Register of Providers of Remittance Services will not be a legislative instrument for the purposes of section 5 of the *Legislative Instruments Act 2003*, as the Register will simply hold administrative details of relevant cash dealers.

Items 12 and 13

These items amend paragraph 28(1)(a) and subsection 29(1) of the *FTR Act* to extend the operation of the offences of failing to communicate information when and as required under Parts II or III, and providing false or misleading information under Parts II or III, to all required communications, not just those communications to the Director of AUSTRAC. This reflects the new provisions which require communication to a person other than the Director. For example, the offences would apply if a cash dealer failed to include customer information, or included false or misleading information, with an IFTI in accordance with new subsection 17FA(1) (see item 10 of this Schedule above). These offences of failing to communicate information when required or providing false or misleading information are punishable by imprisonment for two years under existing subsections 28(4) and 29(5) respectively.

Items 14 and 15

These items amend paragraph 29(3)(a) of the *FTR Act* to extend the operation of the offence of providing false or misleading information to reports required to be made under new section 15AA and to declarations required to be made under new section 33AA. This offence of providing false or misleading information is punishable by imprisonment for five years under existing subsection 29(5). These amendments are intended to ensure that the offences in relation to providing a false or misleading report or declaration about transfers of bearer negotiable instruments are the same as those concerning providing a false or misleading report or declaration about currency.

Item 16

This item inserts new paragraph 29(4)(ba) into section 29 of the *FTR Act* making it an offence if a person makes a statement (either orally or in writing) or presents a document that is, to the person's knowledge, false or misleading in a material particular and is capable of causing a cash dealer, to include customer information relating to an IFTI, that is false or misleading in a material particular. This offence is punishable by imprisonment for five years under existing subsection 29(5). Customer information in relation to IFTIs transmitted out of Australia is defined in subsection 17FA(3) (see item 10 of this Schedule above)..

Item 17

This item amends subsection 30(1) of the *FTR Act* to extend the operation of the offence of communicating incomplete information when and as required under Part II to all required communications, not just those communications to the Director of AUSTRAC. This reflects the new provisions which require communication to a person other than the Director. For example, an offence may be committed if a cash dealer deliberately does not include the full address details of a customer in an IFTI as required under new subsection 17FA(1) (see item 10 of this Schedule above). This offence of failing to communicate information when required is punishable by a fine

of 10 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$1100.

Item 18

New section 33AA – Questioning and search powers in relation to bearer negotiable instruments

Item 18 inserts new section 33AA into Part V of the *FTR Act*. This new section contains the operational provisions that implement a ‘disclosure when asked’ system in relation to bearer negotiable instruments as required under FATF SR IX concerning Cash Couriers. The reporting structure in new section 15AA inserted by item 9 of this Schedule is activated as a result of the use of these questioning and search powers.

New subsections 33AA(1) and (2) provide that any person who is about to leave, or who arrives in, Australia must declare whether or not they have any bearer negotiable instruments with them and the amount payable under each instrument and produce each instrument, if requested to do so by an officer (defined as a police officer or a customs officer for the purposes of this section by new subsection 33A(13)). If a person fails to declare or produce a bearer negotiable instrument as required under new subsections 33AA(1) or (2) then that person commits an offence punishable by imprisonment for one year under new subsection 33AA(12).

New subsection 33AA(3) provides that an officer may make a copy of a bearer negotiable instrument that is produced by a person and that the officer must return the instrument to the person once it is copied.

This provision does not mean that every bearer negotiable instrument that is produced must be copied. It is intended to give an officer flexibility to determine whether or not a copy is required under the circumstances. For example it is envisaged that a copy could be taken where the bearer negotiable instrument is in a foreign language and the amount payable under the instrument is unclear. This copy could then be attached to a report sent to the Director of AUSTRAC.

New subsection 33AA(4) provides that the search powers in new subsections (5) and (6) only apply if an officer has asked a person questions about a bearer negotiable instrument under new subsection (1) or (2) and the officer has reasonable grounds to suspect that the person has made a false or misleading declaration. The search powers are enlivened because a false declaration in relation to a bearer negotiable instrument could be indicative of involvement in terrorist financing, money laundering or other criminal activity.

New subsection 33AA(5) provides that an officer may, with such assistance as is reasonable and necessary, examine an article that a person has with them, such as a person’s luggage, to look for a bearer negotiable instrument, if the person is about to leave or has just arrived in Australia, or is about to board or leave, or has boarded or left, any ship or aircraft. The subsection only applies when the officer has asked questions under new subsection (1) or (2) and has reasonable grounds to suspect that the person has made a false declaration. As a result of the examination the officer may request the person to prepare a report for the Director of AUSTRAC in

accordance with new section 15AA (see item 9 of this Schedule above), or where the person is suspected of being involved in more serious criminal activity the person may be detained for further investigation by the police.

New subsection 33AA(6) provides that an officer may, with such assistance as is reasonable and necessary, search a person for the purpose of finding out whether the person has with them a bearer negotiable instrument, if the person is about to leave or has just arrived in Australia, or is about to board or leave, or has boarded or left, any ship or aircraft. The subsection only applies when the officer has asked questions under new subsection (1) or (2), has reasonable grounds to suspect that the person has made a false declaration and has reasonable grounds to suspect that there may be a bearer negotiable instrument on the person or in clothing worn by the person, in respect of which the false declaration was made. As a result of a search under new subsection (6), an officer may request a person to prepare a report under new section 15AA. Where a person is suspected of being involved in more serious criminal activity they may be detained for further investigation by the police.

New subsection 33AA(7) provides that a customs officer may only carry out a search under new subsection (6), if there is in force a declaration under section 219ZA of the *Customs Act 1901* for that class of officer. This is to ensure that any customs officer conducting a search is required to comply with the procedures set out in Division 1B of Part XII of the *Customs Act 1901*.

New subsection 33AA(8) provides that an officer may only search a person, under new subsection (6), who is the same sex as the officer.

New subsection 33AA(9) provides that an officer and any person assisting the officer may board any ship or aircraft or go onto or enter any prescribed place, being a place prescribed in the regulations under section 33, to exercise the questioning and or search powers in new subsection (1), (2), (5), (6), or (10). The reason for this provision is to align the questioning and search powers in relation to physical cross border transfers of bearer negotiable instruments with those relating to currency.

New subsection 33AA(10) provides that, in the course of an examination or search, an officer may seize a bearer negotiable instrument in respect of which a false declaration has been made. New subsection 33A(11) provides that if a person produces a bearer negotiable instrument to an officer in respect of which a false declaration has been made, the officer may seize it.

New subsection 33A(12) provides that it is an offence to fail to declare or produce a bearer negotiable instrument as required under new subsection (1) or (2). This offence is punishable by imprisonment for one year.

The note to new subsection (12) indicates that under subsection 4B(2) of the *Crimes Act* a court may impose a fine instead of, or in addition to, the one year term of imprisonment.

The note to item 18 amends the heading to section 33 so that it refers to currency. The reason for this change is to clearly set out the regime for questioning and

searching in relation to currency under section 33 as a separate and distinct regime to that in relation to bearer negotiable instruments set out in new section 33AA.

Items 19 and 20

These items make consequential amendments to section 33A of the *FTR Act* to ensure that offences against existing section 15 and new section 15AA have the same consequences.

The effect of the amendment in item 19 is to extend the operation of new section 33A to enable an officer to arrest a person without a warrant where the officer has reasonable grounds to believe that a person is guilty of an offence under new section 15AA.

The effect of the amendment in item 20 is to extend the arrest without warrant power under existing subsection 33A(1) to include an offence against section 6 of the *Crimes Act 1914* or section 11.1, 11.4 or 11.5 of the *Criminal Code* that relates to an offence against new section 15AA of the *FTR Act*. These provisions deal with extensions of criminal responsibility such as attempt and incitement.

Item 21

New Schedule 3AA – Reportable details for purposes of section 15AA

This item inserts new Schedule 3AA to the *FTR Act* in relation to bearer negotiable instruments. Schedule 3AA provides the reportable details referred to in new subsection 15AA(6), inserted by item 9 above. The reportable details for the purposes of new section 15AA are the equivalent of the reportable details for the purposes of section 15, set out in Schedule 3 to the *FTR Act*, and ensure that reports about currency and reports about bearer negotiable instruments are consistent.

Proceeds of Crime Act 2002

Items 22 and 23

These items make consequential amendments to subsection 29(3) and the definition of *serious offence* in section 338 of the *Proceeds of Crime Act 2002* respectively, to ensure that the offences against sections 15 and 15AA of the *FTR Act* have the same consequences. These provisions relate to restraining orders that may be issued under the *Proceeds of Crime Act 2002*.

Surveillance Devices Act 2004

Item 24

This item makes a consequential amendment to the definition of *relevant offence* in subsection 6(1) of the *Surveillance Devices Act 2004*, to ensure that the offences against sections 15 and 15AA of the *FTR Act* have the same consequences. This definition relates to the availability of warrants under the *Surveillance Devices Act 2004*.

Schedule 10 – ASIO powers etc.

This Schedule amends the *ASIO Act* to:

- (a) strengthen ASIO’s special powers warrant regime, by:
 - clarifying the scope of computer access warrants;
 - extending the time period for the validity of search warrants and inspection of postal and delivery service warrants, and extending the equivalent periods for the purpose of foreign intelligence gathering warrants;
 - allowing for the removal and retention (for a reasonable period unless return would be prejudicial to security) of material found during execution of a search warrant; and
 - extending computer access warrants to allow entry on premises;
- (b) provide ASIO with enhanced access to aircraft and vessel information for the purpose of carrying out ASIO’s functions;
- (c) strengthen the offence for providing false or misleading information under an ASIO questioning warrant; and
- (d) make it clear that obligations, prohibitions or restrictions imposed by control orders will not be ‘prescribed administrative action’ for the purposes of Part IV of the *ASIO Act*.

This Schedule also amends the *Customs Act 1901* and the *Customs Administration Act 1985* to broaden the powers of Customs officers in relation to security and intelligence, and the *Migration Act 1958* to clarify the power to deport non-citizens on security grounds.

Australian Security Intelligence Organisation Act 1979

Item 1

This item inserts a definition of ***data storage device*** into section 4 of the *ASIO Act*, for the purposes of ASIO’s special powers in relation to search warrants and computer access warrants under sections 25 and 25A respectively. The new definition, which is consistent with the definition in the *Criminal Code*, defines a ***data storage device*** to mean a thing containing, or designed to contain, data for use by a computer.

Sections 25 and 25A currently authorise the use of a computer ‘or other electronic equipment’, although electronic equipment is not defined in the *ASIO Act*. This definition will put beyond doubt that the equipment or things that can be used to access data under sections 25 and 25A include data storage devices (which would include, for example, compact discs and similar things).

By framing the amendment in language that is technology neutral, this definition is designed to cover future technological advancements, which affords ASIO the required flexibility to conduct lawful operations in the face of changing technologies, and resolve any possible ambiguities surrounding what constitutes electronic equipment.

Item 2

This item inserts new section 23 into Division 2 of Part III of the *ASIO Act* to provide enhanced access to aircraft and vessel information for ASIO. This access is consistent with the new access given to the AFP under new section 3ZQM in the *Crimes Act*, inserted by item 1 of Schedule 6.

New section 23 gives authorised ASIO officers and employees power to request assistance from the operators of aircrafts or vessels, and imposes obligations on these operators to answer questions and produce documents. It is designed to ensure that ASIO's investigations of persons of security concern are not hampered by airline or ship operators refusing to provide, or refusing to provide promptly, information relevant to the investigations (for example, information relating to their passengers, crew or voyage).

New subsection 23(1) provides that an authorised ASIO officer or employee may, for the purposes of carrying out ASIO's functions, ask an operator of an aircraft or vessel questions relating to the aircraft or vessel, or its cargo, crew, passengers, stores or voyage, or request the operator to produce documents relating to the aircraft or vessel, or its cargo, crew, passengers, stores or voyage, that are in the possession or under the control of the operator.

New subsection 23(2) provides that a person who is asked a question or requested to produce a document under new subsection (1) must answer the question or produce the document as soon as practicable.

New subsection 23(3) provides that a person commits an offence if the person is an operator of an aircraft or vessel who is asked a question or requested to produce a document under new subsection (1) and fails to answer the question or produce the document. An offence against this new subsection is punishable by a maximum fine of 60 penalty units, which under section 4AA of the *Crimes Act* is equivalent to \$6600.

New subsection 23(4) provides that strict liability applies to the offence under new subsection (3). This means that the prosecution does not need to prove fault for this offence, but that the defence of mistake of fact under section 9.2 of the *Criminal Code* is available.

New subsection 23(5) creates a defence to the offence under new subsection (3) if the person charged had a reasonable excuse for failing to answer the question or produce the document. What is regarded as a reasonable excuse will depend not only on the circumstances of the individual cases but also the purpose of the provision to which the defence is an exception.

New subsection 23(6) provides that the Director-General, or a senior officer of the Organisation authorised by the Director-General for the purposes of this subsection, may authorise, in writing, an officer, employee or class of officers or employees of ASIO for the purposes of this section. This authorisation provision is consistent with the current regime for authorising persons to exercise authority under warrants in

section 24 of the *ASIO Act*. New subsection 23(7) defines persons so authorised as *authorised officers and employees* for the purposes of this section.

New subsection 23(7) also defines *operator* and *senior officer of the Organisation* for the purposes of this section, to have the same meanings as in section 4 of the *Customs Act 1901* and section 24 of the *ASIO Act* respectively.

Items 3 and 4

These items amend section 25 of the *ASIO Act* to clarify the period of time for which material seized under a search warrant may be retained. It covers material (any record or thing) seized during search of premises under warrant or during ordinary or frisk searches of persons at or near the subject premises when the search warrant is executed.

The current situation is that such material may be retained for such time as is reasonable for the purposes set out in paragraphs 25(4)(d) and (4A)(c), being to inspect or examine, and in the case of a record, make a copy or transcript. Item 3 removes the phrase ‘for such time as is reasonable’ from paragraphs 25(4)(d) and (4A)(c).

Item 4 inserts new subsection 25(4C) which provides that the material may only be retained for a reasonable time for those purposes listed above, but it allows ASIO to continue to retain the material if it is assessed that the return of the material would be prejudicial to security.

Items 5 to 11

These items make a number of amendments to section 25 of the *ASIO Act* as a consequence of the new definition of *data storage device* inserted by item 1. This ensures that these devices are an extra thing (additional to a computer or other electronic equipment) that can be used on premises that are the subject of a search warrant for the purpose of obtaining access to data relevant to the security matter. These amendments also ensure that a computer, data storage device or other electronic equipment need not only be found on a person’s premises, but could also be brought to the premises for the purpose of obtaining access to data relevant to the security matter.

Item 12

This item amends subsection 25(10) of the *ASIO Act* to extend the maximum period for which a search warrant can be in force from 28 days to 90 days. This will reduce the need for fresh warrants to be sought in unavoidable situations where it has not been practicable or possible to execute the warrant within 28 days. The Minister will continue to be able to revoke the warrant before the period has expired and the Director-General will continue to be able to cause action under the warrant to be discontinued under section 30.

Item 13

This item inserts new paragraph (4)(aa) into section 25A of the *ASIO Act* to ensure that the entering of specified premises may be authorised by a computer access warrant.

Section 25A currently enables computer access warrants to authorise certain activity relating to computers, but it does not enable the warrants to authorise entry on premises in order to carry out these activities. If entry onto premises is needed, separate (search) warrants are required to be obtained for this purpose. The new paragraph will mean that separate search warrants will no longer be required, which will make section 25A consistent with section 26, which authorises the entry onto premises for the purposes of installing a listening device.

The new paragraph will enable the Minister to authorise entry by ASIO onto identified premises for the purposes of doing the things permitted under a computer access warrant in subsection 25A(4). The only new authorisation is to allow access to the premises for the purpose of executing a computer access warrant. Any of the other activities undertaken under a search warrant (in section 25) would still need authorisation by way of a separate search warrant.

Item 14

This item inserts new subparagraph (a)(iv) into subsection 25A(4) of the *ASIO Act* to ensure that a computer access warrant issued under section 25A may authorise the use of a data storage device for the purpose of obtaining access to data that is relevant to the security matter and that is stored in the target computer.

Item 15

This item inserts new subsection (5A) into section 25A of the *ASIO Act* as a consequence of the power for a computer access warrant to authorise entry onto premises inserted by item 13. The new subsection requires the warrant to authorise the use of any necessary and reasonable force and specify the time at which entry may occur, which are identical to measures applying to search warrants under subsection 25(7).

Items 16 and 17

These items amend subsections 27(4) and 27AA(9) of the *ASIO Act* to extend the maximum period for which inspection of postal articles warrants and inspection of delivery service articles warrants respectively can be in force, from 90 days to six months. The extension of these periods to six months will harmonise these warrant periods with the time periods of other special power warrants, such as those for listening devices and telecommunications interception warrants. The Minister will continue to be able to revoke the warrants at any time before the specified period has expired and the Director-General will continue to be able to cause action under the warrant to be discontinued under section 30.

Items 18 to 20

These items amend paragraphs 27(A)(3)(a), (b) and (c) of the *ASIO Act* to extend the maximum time periods for foreign intelligence gathering warrants so that the periods are consistent with the general warrant period applying to the relevant activity.

Item 18 ensures that the foreign intelligence gathering search warrant period reflects the general search warrant period, extended by item 12 from 28 days to 90 days. Items 19 and 20 ensure that the foreign intelligence gathering inspection of postal and delivery service articles warrant period reflects the general inspection of postal and delivery service articles warrant period, extended by items 16 and 17 from 90 days to six months.

Items 21 and 22

These items amend section 34G of the *ASIO Act* to align the offence of giving false or misleading information during questioning under a warrant issued under Division 3 of Part III of the *ASIO Act* with the formulation used in similar offences in the *Criminal Code*.

The current formulation of the offence provision in subsection 34G(5) requires the prosecution to prove that the defendant made a statement that is ‘to the person’s knowledge false or misleading in a material particular’. These amendments will put beyond doubt that the prosecution is not required to prove that the defendant knew a false or misleading statement was false or misleading in a material particular, but materiality will still be taken into account.

Item 21 ensures that the requirement for the statement to be false or misleading in a material particular is no longer an element of the offence, while item 22 ensures that the offence does not apply if the statement is not false or misleading in a material particular. The effect of this, as indicated by the note to new subsection (5A), is that a defendant will bear the evidential burden in relation to the matter of whether the statement was false or misleading in a material particular, under subsection 13.3(3) of the *Criminal Code*.

Items 23 and 24

These items amend section 34N of the *ASIO Act* to clarify the period of time for which material seized under a questioning, or questioning and detention, warrant or through an ordinary or strip search of a detained person under Division 3 of Part III of the *ASIO Act*, may be retained. These amendments are consistent with the clarification of the period of time for which material seized under a search warrant may be retained, under items 3 and 4 of this Schedule.

The current situation is that such material may be retained for such time as is reasonable. Item 23 removes this phrase ‘for such time as is reasonable’ from paragraphs 34N(1)(a) and (c).

Item 24 inserts new subsection 34N(3) which provides that the material may only be retained for a reasonable time, but it allows ASIO to continue to retain the material if it is assessed that the return of the material would be prejudicial to security.

Item 25

This item is an application provision. Subitem 23(1) provides that all the amendments relating to warrants, being items 1, 3 to 20, 23 and 24, apply to warrants issued after this item commences.

Subitem 23(2) provides that the amendments made to the offence of providing a false or misleading statement, being items 21 and 22, apply to statements made after this item commences.

These are standard application clauses which ensure that these new provisions do not have any retrospective operation.

Items 26 to 28

These items amend section 35 of the *ASIO Act* to put beyond doubt that an obligation, prohibition or restriction imposed on a person by a control order under proposed new Division 104 of the *Criminal Code* (inserted by Schedule 4 to this Bill) is not ***prescribed administrative action*** for the purpose of Part IV of the *ASIO Act*. This purpose is achieved by item 27 inserting a note to the definitions in subsection 35(1) and item 28 inserting a new subsection 35(2), which operates as an avoidance of doubt provision.

These amendments mean that ASIO would not pass relevant information to the AFP for the purpose of the control order provisions in the form of security assessments under Part IV of that Act. However, subject to the requirements of the Act, the information could be communicated under other provisions of the Act.

Customs Act 1901

Item 29

This item amends section 186A of the *Customs Act 1901* by broadening the purposes for which Customs officers can copy documents to include a 'security or intelligence' purpose.

Currently, Customs officers have general powers of examination of goods subject to Customs control under section 186 of the *Customs Act 1901*. Section 186A provides Customs officers with the power to make copies of, and take extracts from, documents in certain circumstances.

Currently this power may only be exercised where the officer is satisfied that information contained in the document is relevant to the importation or exportation of prohibited goods, or certain criminal offences. When examining goods of arriving and departing passengers under section 186, Customs officers from time to time locate documents, written notes, diaries, electronic media or other goods which, based

on the officer's assessment of the passenger, or other information available to them at the time of the examination, may relate to matters of security or intelligence.

Currently these documents cannot be copied, as they do not relate to the import or export of prohibited goods or the commission or attempted commission of certain offences under the *Customs Act 1901* or other prescribed Acts.

The amendment will ensure that information that an officer is satisfied may be of significant national interest, being information that is relevant to the performance of ASIO's functions under section 17 of the *ASIO Act*, to the performance of functions under section 6 of the *Intelligence Services Act 2001*, or to security within the meaning of *security* in section 4 of the *ASIO Act*, may be copied.

Customs Administration Act 1985

Item 30

This item amends section 16 of the *Customs Administration Act 1985* to broaden Customs powers for 'security or intelligence' purposes.

Currently, section 16 permits the CEO of Customs, a delegate or authorised person to disclose protected information to certain persons. In particular, subsection 16(3A) permits the CEO to authorise disclosure of certain information to Commonwealth agencies for the purposes of those agencies' functions subject to conditions on the use of the information. Under this provision, the security and intelligence agencies may be provided with protected information. However, subsection 16(8) restricts personal information from being passed on subject to certain permissible purposes set out in subsection 16(9). Two relevant permissible purposes are for the administration or enforcement of a law relating to criminal law, or a law imposing a pecuniary penalty or for the forfeiture of property.

From time to time Customs may obtain information that it believes is relevant to agencies on security or intelligence grounds, but which does not relate to a criminal or pecuniary offence. It is considered appropriate that the permissible purposes also include security and intelligence purposes, in order to permit Customs officers to lawfully disclose such information to relevant agencies.

This item inserts new paragraphs 16(9)(ia) and (ib) into subsection 16(9) to include as permissible purposes those purposes relating to the performance of ASIO's functions under section 17 of the *ASIO Act*, and the performance of functions under section 6 of the *Intelligence Services Act 2001*.

Migration Act 1958

Items 31 and 32

These items amend section 202 of the *Migration Act 1958* which provides for deportation from Australia of non-citizens. Section 202 currently enables the Minister to order the deportation of a non-citizen where ASIO furnishes an adverse security

assessment and the person ‘constitutes, or has constituted, a threat to the security of the Commonwealth, of a State or of an internal or external Territory’.

Item 31 substitutes the word ‘security’ for the phrase ‘the security of the Commonwealth, of a State or of an internal or external Territory’ in paragraph 202(1)(a), and item 32 inserts a definition of *security* for the purposes of this section in subsection 202(6) which has the same meaning as in section 4 of the *ASIO Act*.

This reflects the fact that ASIO conducts security assessments on ‘security’ grounds. ‘Security’ is defined in section 4 of the *ASIO Act* to mean the protection of the Commonwealth, the States and the Territories from espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system, and acts of foreign interference. It also includes the carrying out of Australia’s responsibilities to foreign countries in relation to any of these matters. The scope for an assessment as a threat to security, under this definition, is not therefore restricted to the security of the Commonwealth, of a State or of an internal or external Territory, but may also extend to the carrying out of Australia’s responsibilities to foreign countries in security-related matters.

The amendments are part of broader efforts to similarly align the meaning of ‘security’ as used in provisions for other related purposes (including citizenship applications, and visa refusals and cancellations on security grounds) with the definition of ‘security’ in the *ASIO Act*.