

2004-2005

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

ANTI-TERRORISM BILL (NO. 2) 2005

SUPPLEMENTARY EXPLANATORY MEMORANDUM

Amendments and

New Clauses to be Moved on Behalf of the Government

(Circulated by authority of the Attorney-General,

the Hon. Philip Ruddock MP)

AMENDMENTS TO THE ANTI-TERRORISM BILL (NO. 2) 2005

GENERAL OUTLINE

The Anti-Terrorism Bill (No. 2) 2005 was introduced into the House of Representatives and referred to the Senate Legal and Constitutional Committee (the Committee) for inquiry on 3 November 2005. The Committee conducted hearings on 14, 17 and 18 November 2005, and received more than 290 submissions. The Committee's Report of 28 November 2005 contains a number of recommendations for amending the Bill. These amendments to the Bill are being brought forward in response to the Committee's Report. The amendments increase the clarity of provisions and increase safeguards.

FINANCIAL IMPACT STATEMENT

It is not expected that the amendments to the Bill will have a direct financial impact.

NOTES ON CLAUSES

Clause 2 – Commencement

Items 1 and 2 amend the Commencement table in Clause 2 of the Bill.

Items 1 and 2

These items amend the commencement provisions for those amendments contained in Schedule 9 of the Bill dealing with the inclusion of customer information with international funds transfer instructions and the registration of remittance service providers. Under the amendments in items 1A and 1B, those provisions will commence either on Proclamation, or if this does not occur within 12 months of Royal Assent they will commence on the day after the expiry of this 12 month period. The amendments increase the maximum commencement period for relevant provisions from six months to 12 months in response to Recommendation 50 of the Senate Legal and Constitutional Legislation Committee's Report on the Bill of 28 November 2005. It is not consistent with practice to have open-ended proclamation, but the increase in time will give industry sufficient time to implement the requirements.

Schedule 1 – Definition of a terrorist organisation etc

Item 3 amends Schedule 1 of the Bill in relation to the definition of a terrorist organisation.

Item 3

The Bill as introduced did not include as a criteria for listing a terrorist organisation on the basis of praise, a requirement that there was a likelihood that the praise could result in leading a person to engage in a terrorist act. However, the amendment to the definition ensures that an organisation can only be listed as a terrorist organisation in circumstances where the organisation praises a terrorist act, and there is a risk that such praise might have the effect of leading a person to engage in a terrorist act. The risk is to be assessed without regard for the age or mental capacity of the person who might be so lead. Some organisations are praising on the impressionable by reason of age or mental capacity.

Schedule 4 – Control orders

Items 4 to 26 amend Schedule 1 of the Bill in relation to control orders.

Item 4

As introduced, the Bill required a summary of grounds to be served on the person the subject of the interim control order before the interim control order commenced to have effect. However, the Bill did not include that summary of grounds as part of the order itself. This meant the issuing court did not have an opportunity to consider the summary of grounds when deciding whether to issue the interim control order. The

Bill has been amended to ensure the issuing court has the opportunity to consider whether the summary of grounds that is to be served on the person is adequate, and will enable the person the subject of the interim control order to understand why the order was made. The amendment in new paragraph 104.2(3)(f) provides that the summary of grounds forms part of the order.

Item 5

New subsection 104.2(3A) is an avoidance of doubt provision that makes it clear that the requirement to include the summary of grounds in the request for the order (in new paragraph 104.2(3)(f) does not require any information to be included in the summary if disclosure of that information is likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*). While this provision makes it clear that national security information is not required to be included in the summary of grounds, it is acknowledged that there may be other reasons that sensitive material that was used in making a request for an interim control order is not included in the summary of grounds. For example, it may be that material that is subject to a claim of public interest immunity, or that would risk an ongoing law enforcement or intelligence operation, or risk the safety of the community, law enforcement officers or intelligence officers is redacted or omitted from the summary.

Item 6

New paragraph 104.5(1)(h) is a consequential amendment to the amendment in new paragraph 104.2(3)(f). Consistent with that amendment, new paragraph 104.5(1)(h) requires the summary of grounds to form part of the interim control order that is issued by the issuing court.

Item 7

As introduced, the Bill did not provide any guidance to the issuing court for the setting of a date for the purposes of paragraph 104.5(1)(e) when the person the subject of the interim control order was entitled to attend the court and make representations about whether the interim control order should be confirmed. This amendment requires the court to specify a day for the purposes of considering whether to confirm the order as soon as practicable after the order is made. Because subsection 104.12(1) of the Bill requires the interim control order to be served personally on the person at least 48 hours before the day specified, the provision provides that the date should be at least 72 hours. This is designed to ensure the police have sufficient time in which to locate and serve the person before the issuing court considers whether to confirm the order.

Item 8

New subsection 104.5(2A) is an avoidance of doubt provision that makes it clear that the requirement to include the summary of grounds in the terms of the order that is made by the issuing court (in new paragraph 104.5(1)(h) does not require any information to be included in the summary if disclosure of that information is likely to

prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004*). While this provision makes it clear that national security information is not required to be included in the summary of grounds, it is acknowledged that there may be other reasons that sensitive material that was used in making a request for an interim control order is not included in the summary of grounds. For example, it may be that material that is subject to a claim of public interest immunity, or that would risk an ongoing law enforcement or intelligence operation, or risk the safety of the community, law enforcement officers or intelligence officers is redacted or omitted from the summary.

Item 9

As introduced, the order did not include the summary of grounds. The amendments that make the summary part of the order itself make paragraph 104.12(1)(a) redundant, so it has been deleted from the Bill.

Item 10

As introduced, the Bill did not provide for the AFP to make an election about whether to seek a confirmed control order. New subsection 104.12A (explained below) provides for this process. This amendment ensures that the AFP is required to explain the election process to the person when the order is served on the person under section 104.12.

Item 11

Schedule 4, item 24, page 27 (after line 38), no change necessary.

Item 12

New subsection 104.12(5) requires the AFP to provide a copy of the interim control order to the Queensland public interest monitor 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. This is to facilitate the involvement of the Queensland public interest monitor in any subsequent proceedings that occur in relation to the interim control order.

Item 13

New section 104.12A provides for the AFP to make an election as to whether or not to confirm an interim control order. Under new subsection 104.12A(1), if the AFP decides that an interim control order that was made in relation to a person is to be confirmed on the day specified in that order, the AFP is required to make an election to that effect at least 48 hours before the day specified in the interim control order, and must notify the issuing court that made the order of the member's election. The election that must be notified to the court is either that the AFP will seek to confirm the interim order or that the AFP will not seek confirmation.

New subsection 104.12A(2) requires the AFP to serve the person the subject of the control order with a copy of the notification and the documents mentioned in paragraphs 104.2(3)(b) and (c) (the documents used in the application process with any omissions or redactions authorised by those provisions), as well as any other details that are necessary to ensure the person is able to understand and respond to the substance of the facts, matters and circumstances that will form the basis of the confirmation of the order. In addition; if the person is a resident of Queensland, or the court made the order in Queensland, the AFP is required under new subsection 104.12A(2) to provide the Queensland public interest monitor with the documents mentioned in paragraph 104.12A(a).

New subsection 104.12A(3) is an avoidance of doubt provision that makes it clear that the requirement to provide those documents does not require sensitive information to be served or given to the person. In particular, information can be redacted or omitted from the material served or given if disclosure of that information is likely to prejudice national security, to be protected by public interest immunity, to put at risk ongoing operations by law enforcement agencies or intelligence agencies, or to put at risk the safety of the community, law enforcement officers or intelligence officers. Importantly, this provision makes it clear that the fact that information that is likely to be protected by public interest immunity, to put at risk ongoing operations by law enforcement agencies or intelligence agencies, or to put at risk the safety of the community, law enforcement officers or intelligence officers is not mentioned in the provisions in this Part that require a summary to be served or given to a person for another purpose, does not imply that such information is required to be disclosed in those provisions.

New subsection 104.12A(4) places an obligation on the AFP to annotate the order to indicate that it has ceased to be in force and cause the annotated order and the notification given under new subsection 104.12A(1) to be served personally on the person. In addition, new subsection 104.12A(4) requires the AFP to provide a copy of that notification to the Queensland public interest monitor 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.

Item 14

As introduced, the Bill did not include the summary of grounds as part of the order itself. The amendments make that summary part of the order. This amendment reflects that it is not necessary to provide the lawyer with a summary of grounds in addition to the summary that is part of the order.

Item 15

As introduced, the Bill did not provide for the AFP to make an election about whether to seek a confirmation of the order. This amendment is a consequential amendment that recognises that a confirmation proceeding will only occur if the AFP has elected to seek a confirmation of the interim control order.

Item 16

This amendment is a consequential amendment that reflects the fact that the expression “an interim control order” has been inserted into the provision, making it necessary only to refer to “the order”.

Item 17

As introduced, the Bill provided that an issuing court could confirm an interim control order without variation if the person the subject of the order did not attend and make representation on the day specified. The Bill has been amended to provide that the issuing court can confirm an interim control order without variation if neither the person the subject of the order, nor the person’s representative, nor the Queensland public interest monitor (if relevant) attends on the day specified. The amendment to the heading in this item reflects this change.

Item 18

As introduced, the Bill provided that an issuing court could confirm an interim control order without variation if the person the subject of the order did not attend and make representation on the day specified. This item amends the Bill to provide that the issuing court can confirm an interim control order without variation if neither the person the subject of the order, nor the person’s representative, nor the Queensland public interest monitor (if relevant) attends on the day specified.

Item 19

This amendment is consequential to the amendment in item 19, and specifies that it is the person in relation to whom the order is made on whom the confirmed order must be served.

Item 20

As introduced, the issuing court could only declare an interim control order to be void under subsection 104.14(6) or revoke the order under subsection 104.14(7) if either the person the subject of the order or the person’s representative attends on the day specified. Consistent with the amendment to subsection 104.14(4), subsection 104.14(5) allows the issuing court to make those decisions if the Queensland public interest monitor (if relevant) attends on the day specified.

Item 21

As introduced, the Bill did not include the summary of grounds as part of the order itself. The amendments make that summary part of the order. This amendment reflects that it is not necessary to provide the lawyer with a summary of grounds in addition to the summary that is part of the order.

Item 22

The amendments in this item are consequential to the new election process that is provided for in new section 104.12A. In particular, where an election is made under new subsection 104.12A to seek confirmation of an interim control order, new subsection 104.23(3) requires the Commissioner of the AFP to cause written notice of the application and the grounds on which the variation is sought, the documents mentioned in paragraph 104.23(2)(b), and any additional details required to enable the person in relation to whom the order is made to understand and respond to the substance of the facts, matters and circumstances which will form the basis of the variation of the order to be given to the person in relation to whom the order is made. In addition, if the person the subject of the order is a resident of Queensland or if the court will hear the application in Queensland, those documents must be given to the Queensland public interest monitor.

New subsection 104.23(3A) is an avoidance of doubt provision that makes it clear that the requirement in subsection 104.23(3) to provide those documents does not require any information to be given if disclosure of that information is likely to prejudice national security, to be protected by public interest immunity, to put at risk ongoing operations by law enforcement agencies or intelligence agencies, or to put at risk the safety of the community, law enforcement officers or intelligence officers. Consistent with new subsection 104.12A(3), this provision makes it clear that the fact that information that is likely to be protected by public interest immunity, to put at risk ongoing operations by law enforcement agencies or intelligence agencies, or to put at risk the safety of the community, law enforcement officers or intelligence officers is not mentioned in the provisions in this Part that require a summary to be served or given to a person for another purpose, does not imply that such information is required to be disclosed in those provisions.

Items 23 and 24

As introduced, the person the subject of the order was only entitled to a summary of grounds for a variation. These amendments reflect the fact that, under the amended regime, the person will have received the material relied upon in the application for variation under subsection 104.23(2). Accordingly, it is not necessary to serve on the person a summary of the grounds for the variation, and the avoidance of doubt provision that is deleted is no longer necessary.

Item 25

As drafted, it was unclear whether an application for an interim control order, a proceeding in which an issuing court can confirm an interim control order, or a proceeding to vary or revoke a confirmed order is an interlocutory proceeding for the purposes of the *Evidence Act 1995*. If such proceedings are interlocutory proceedings, section 75 of that Act would operate to ensure hearsay evidence could be relied upon provided information about the source of that hearsay was provided.

To ensure there is no doubt about this issue, this amendment provides that an application for an interim control order, including an application for an urgent interim control order, is an interlocutory proceeding for the purposes of the *Evidence Act*

1995, but that an application for a confirmation or revocation of an order is not an interlocutory proceeding for the purposes of the *Evidence Act 1995*.

Item 26

As introduced, the Bill did not provide for the process of electing whether to seek confirmation of a control order. This amendment provides that the number of interim control orders in respect of which an election was made under section 104.12A not to confirm the order is included in the annual report about the operation of the regime.

Schedule 4 - Preventative Detention

Items 25 to 64 inclusive amend Schedule 4, item 24 of the Bill in relation to preventative detention.

Item 27

This item inserts a new section 105.5A after proposed section 105.5 at page 43 (after line 21) of the Bill. The amendment extends the obligations of the AFP particularly with providing access to a lawyer and the use of an interpreter when making authorised contact with a lawyer. If a police officer has reasonable grounds to believe that a person is unable to communicate with reasonable fluency in the English language because of inadequate knowledge or a disability, new section 105.5A identifies the obligations under the Bill that then arise for a police officer in these circumstances. These obligations are to:

- arrange for the assistance of an interpreter to inform the person about the effect of an order and their rights in relation to an order under subsection 105.31(3); and
- to give the person reasonable assistance to choose and access a lawyer.

Items 28, 29, 30 and 31

The preventative detention order regime, as introduced required the police to provide a copy of the order and “summary of the grounds” on which the order was made to the person as soon as practicable after the person was taken into custody (section 105.32). Item 28 adds a new paragraph (g) at the end of subsection 105.7(2) at page 46 (after line 13) of the Bill. This amendment requires the AFP to include the summary of grounds in an application to the senior police officer for an initial preventative detention order. The summary will then be provided to the person as part of the order as made by the issuing authority when the person is taken into detention (see item 50 below).

Item 30 adds a new paragraph (e) at the end of section 105.8(6) at page 48 (after line 2) of the Bill. This amendment means that the summary of the grounds will also form part of the initial preventative detention order. The summary of grounds will also be included in any application for a continued preventative detention order (see item 34). This will mean it will be reviewed by the issuing authority before inclusion in the continued preventative detention order (see item 37 below).

Item 29 inserts a new subsection 2A after subsection 105.7(2) at page 46 (after line 15) of the Bill and item 31 inserts a new subsection 6A after subsection 105.8(6) at page 48 (after line 3) of the Bill. These provisions mean that the amendments do not alter the provisions that ensure information likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is not required to be included in the summary.

Item 32

Section 105.28(2)(e) of the Bill requires the police officer to advise a detained person of their right to contact the Ombudsman. Item 32 adds a new subsection (8) at the end of section 105.8 at page 48 (after line 10) of the Bill. This amendment requires the senior AFP member nominated to oversee the exercise of powers and obligations in relation to the order (see section 105.19(5)) to notify the Ombudsman of the making of the order, provide the Ombudsman with a copy of the initial preventative detention order and notify the Ombudsman when the person is taken into custody under the order.

Similar obligations apply to a continued preventative detention order, and any prohibited contact order (see items 39 and 42 below).

Item 33

Item 33 inserts a new section 105.10A after section 105.10 at page 49 (after line 30) of the Bill. This requires the AFP to advise the person the subject of an initial preventative detention order of an intention to apply for a continuation of the order. This provision also requires the AFP to inform the person that any further information the person may provide, in relation to any proposed application for continuation of the order, will be provided to the issuing authority. The AFP member is obliged to do this (see item 36 below).

Items 34 and 35

Item 34 adds a new paragraph (g) at the end of subsection 105.11(2) at page 50 (after line 33) of the Bill. This amendment means that the summary of the grounds for the continued order will form part of the application for a continued preventative detention order. This will mean it will be reviewed by the issuing authority before inclusion in the continued preventative detention order (see item 35 below).

Item 35 inserts a new subsection 3A after subsection 105.11(3) at page 50 (after line 39) of the Bill. This provides that the amendments do not alter the provisions that ensure information likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is not required to be included in the summary.

Item 36

The AFP is required to inform the person that further information the person may provide, in relation to any proposed application for continuation of the order, will be

provided to the issuing authority (see item 33 above). Item 32 adds a new subsection (5) to the end of section 105.11 at page 51 (after line 2) of the Bill which requires the AFP member applying for a continued preventative detention order to put this further information to the issuing authority.

Items 37 and 38

The summary of the grounds for a continued preventative detention order forms part of the application to the issuing authority for a continued preventative detention order (see item 30 above). The issuing authority will be able to consider this information. Item 37 adds a new paragraph (d) at the end of subsection 105.12(6) at page 52 (after line 3) of the Bill. This means that the summary of the grounds on which the order was made will form part of the continued preventative detention order.

Item 38 inserts a new subsection 6A after subsection 105.12(6) at page 52 (after line 3) of the Bill to provide that the amendments do not alter the provisions that ensure information likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is not required to be included in the summary.

Item 39

Item 39 adds a new subsection (8) at the end of section 105.12 at page 52 (after line 10) of the Bill. This requires the senior AFP member nominated to oversee the exercise of powers and obligations in relation to the order (see section 105.19(5)) to notify and provide the Ombudsman with a copy of the continued preventative detention order. Similar obligations apply to an initial preventative detention order, and any prohibited contact order.

Items 40 and 41

Item 40 inserts a new section 105.14A after section 105.14 at page 53 (after line 29) of the Bill. Subsection 105.14A(4) sets out the grounds that must be met in applying for a prohibited contact order in relation to an initial preventative detention order or a continued preventative detention order. An AFP member must be satisfied that making the prohibited contact order is reasonably necessary:

- (a) to avoid a risk to action being taken to prevent a terrorist act occurring; or
- (b) to prevent serious harm to a person; or
- (c) to preserve evidence of, or relating to, a terrorist act; or
- (d) to prevent interference with the gathering of information about:
 - (i) a terrorist act; or
 - (ii) the preparation for, or the planning of, a terrorist act; or
- (e) to avoid a risk to:
 - (i) the arrest of a person who is suspected of having committed an offence against this Part; or
 - (ii) the taking into custody of a person in relation to whom a preventative detention is in force or in relation to whom a preventative detention order is likely to be made; or
 - (iii) the service on a person of a control order.

Subsection 105.14A(2) provides that the issuing authority can make a prohibited contact order if the grounds in subsection (4) above are met. Subsection (5) provides that the issuing authority can refuse to make a prohibited contact order if the AFP member does not provide additional information requested from the issuing authority concerning the grounds for the order.

The Bill as introduced provided that the issuing authority may make the prohibited contact order if the making of the order will “assist in achieving the purpose of the preventative detention order” (see paragraph 105.15(4)(b)). As the grounds to make the prohibited contact order are now provided by new 105.14A, item 41 substitutes existing 105.15(4) at page 54 (lines 8 to 18) with a new subsection (4). The effect of this amendment is to remove the reference to the ground in existing paragraph 105.15(4)(b).

Item 42

Section 105.28(2)(e) of the Bill requires the police officer to advise a detained person of their right to contact the Ombudsman. Item 40 adds a new subsection (6) to the end of section 105.15 at page 54 (after line 19) of the Bill. This requires the senior AFP member, nominated to ensure the various obligations under the regime are satisfied (see section 105.19(5)), to notify and provide the Ombudsman with a copy of a prohibited contact order.

Similar obligations apply to an initial and a continued preventative detention order. (see items 32 and 39 above).

Item 43

As the grounds to make the prohibited contact order are now under new 105.14A, item 41 substitutes existing subsection 105.16(4) at page 55 (lines 1 to 8) of the Bill with a new subsection (4). This removes the reference to the grounds for making the order.

Item 44

Section 105.28(2)(e) of the Bill requires the police officer to advise a detained person of their right to contact the Ombudsman. Item 44 adds new subsection (6) to the end of section 105.16 at page 55 (after line 9) of the Bill. This requires the senior AFP member, nominated to ensure the various obligations under the regime are satisfied (see section 105.19(5)), to notify the Ombudsman and provide the Ombudsman with a copy of a prohibited contact order.

Similar obligations apply to an initial and a continued preventative detention orders. (see items 32 and 39 above).

Items 45 and 46

Item 45 inserts a new subsection (7) at the end of section 105.17 at page 57 (after line 5) of the Bill. This provides that the person may make representations to the senior AFP member nominated to ensure the various obligations under the regime are satisfied (see section 105.19(5)) in relation to the revocation of an order. Item 46 inserts a new paragraph (da) after paragraph 105.28(2)(d) at page 65 (after line 23) of the Bill. This requires the AFP member to inform the person detained under an initial detention order of the right at item 43. A similar obligation applies in relation to continued preventative detention orders (see item 48)

Item 47

Item 47 inserts a new subsection 2A after subsection 105.28(2) at page 66 (after line 22) of the Bill which requires the AFP to advise the person detained of the people who may be contacted under section 105.35 (family members, employers, business associates, or people the detainee lives with) and 105.39 (parents, guardians, or representative of the persons interests). A similar obligation applies in relation to continued preventative detention orders (see item 49).

Item 48

Item 48 inserts a new paragraph (ca) after paragraph 105.29(2)(c) at page 66 (after line 36) of the Bill which requires the AFP member to inform the person detained under a continued detention order of the right to make representations to the senior AFP member nominated to ensure the various obligations under the regime are satisfied (see section 105.19(5)) in relation to the revocation of an order.

Item 49

Item 49 inserts a new subsection 2A after subsection 105.29(2) at page 67 (after line 24) of the Bill which requires the AFP to advise the person detained of the people who may be contacted under section 105.35 (family members, employers, business associates, or people the detainee lives with) and 105.39 (parents, guardians, or representative of the persons interests). A similar obligation applies in relation to continued preventative detention order (see item 47).

Item 50

Section 105.31(3) of the Bill requires the police officer detaining a person to arrange for an interpreter if the police officer 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. Item 50 amends subsection 105.31(3) to remove the reference to physical at page 68 (line 22) of the Bill. This means that the obligation will apply to people with both a physical and mental disability.

Items 51 to 57

Items 51, 52 and 54 to 57 remove references to “summary of grounds” or “the summary” as the summary of grounds is provided within the order, not separately.

Item 53 omits subsection 105.32(2) at page 69 (lines 2 to 6) of the Bill. This subsection ensures information likely to prejudice national security (within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* is not required to be included in the summary. This provision is included at the time the summary is included in an application or an order.

Item 58

Item 58 inserts a new section 105.33A after section 105.33 at page 70 (after line 32) of the Bill which requires under 18 year olds to be detained separately from adults. Subsections (2) and (3) permit appropriate flexibility in exceptional circumstances. This could be that two siblings aged 17 and 19 years are detained and it is in their best interests to be detained together, or that limited detention space in an emergency such as the aftermath of a series of terrorist attacks means there is insufficient space to detain a child separately.

Items 59 and 60

Item 59 inserts a new subsection (3A) after 105.37 (3) at page 73 (after line 34) of the Bill. If a police officer has reasonable grounds to believe that a person is unable to communicate with reasonable fluency in the English language because of inadequate knowledge or a disability, the police officer must give the person reasonable assistance, including the assistance of an interpreter, to choose and contact a lawyer. This is consistent with item 25 above.

Item 60 inserts “or 3A” after (3) in subsection 105.37(4) at page 73 (line 36) of the Bill. This means that in recommending lawyers as part of the assistance described in item 57, the police officer may give priority to lawyers who have a security clearance.

Items 61 and 62

Item 61 omits paragraph 105.41(3)(c) at page 79 (lines 1 to 3) of the Bill and inserts a new paragraph (c). The provision in the Bill as introduced prohibited a parent or guardian from disclosing information conveyed by the detainee during authorised contact to another parent or guardian unless that other parent or guardian had contact with the detainee. The amendment means that the disclosure offence will no longer apply if the detainee is entitled to have contact with the other parent or guardian, whether or not the detainee has actually had contact. The entitlement is also subject to new subsections 105.41(4A) and (4B) as described at item 60 below.

Item 62 inserts a new subsection 4A and 4B to after subsection 105.41(4) at page 79 (after line 28) of the Bill. If a parent or guardian has had contact with a detainee and wishes to disclose this to another parent or guardian who has not had contact with a detainee but is entitled to, then the parent or guardian is required to obtain the permission of the AFP to make the disclosure before making the disclosure. This takes into account that the other parent or guardian may be the subject of a prohibited contact order.

Item 63

Item 63 inserts new subsection (4), (5) and (6) at the end of section 105.42 at page 82 (after line 9) to require questioning to be recorded unless the situation is serious and urgent and the questioning is for the purposes of confirming the person's identity as the person named in the order and ensuring the safety and well being of the person. There is also a requirement to retain those recordings for 12 months.

Items 64 and 65

Item 64 inserts a new subparagraph (iva) after subparagraph 105.45(b)(iv) at page 85 (after line 8) which means that it is an offence to contravene the requirement to separate children from adults under 105.33A(1).

Item 65 omits the words "or 3" from subparagraph 105.45(b)(v) at page 85 (line 9) and substitutes "3 or 4". This means it is an offence to contravene the requirement to record any questioning under a preventative detention order.

Item 66

Item 66 inserts a new paragraph (f) at the end of subsection 105.47(2) at page 86 (after line 14) of the Bill in relation to the annual report requirements. The Bill currently requires an annual report about various matters related to the operation of the preventative detention regime. Item 66 provides that the number of orders found not to have been validly made by the Administrative Appeals Tribunal under section 105.51 of the Bill is to be added to those matters.

Schedule 6 – Power to obtain information and documents

Item 67 amends Schedule 6 of the Bill in relation to the power to obtain information and documents.

Item 67

As introduced, it was necessary for a Magistrate deciding whether to issue a notice to produce in relation to the investigation of a serious offence to be satisfied on the balance of probabilities that a person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious offence. This amendment increases the threshold for issuing a notice to produce by requiring the Magistrate to be satisfied on the balance of probabilities that the person has documents (including in electronic form) that are relevant to, and will assist, the investigation of a serious offence and that giving the person a notice under this section is reasonably necessary, and reasonably appropriate and adapted, for the purpose of investigating the offence.

Item 68

As introduced, the Bill only required proof of an intention to use force or violence to effect one of the purposes listed in paragraphs 30A(3)(a) to (d) for the listing of an

unlawful association under section 30A of the *Crimes Act 1914*. This amendment increases the threshold for listing an unlawful association under section 30A of the Crimes Act by requiring proof of an intention to use force or violence to effect one of those purposes.

Item 69

As introduced, the Bill provided that the fault element of recklessness applied to the matters in paragraphs 80.2(1)(a) to (c) by using a cross-reference. To make very clear precisely what the fault element of recklessness applies to, this amendment sets out the matters in those paragraphs in full. Intention applies to the conduct element of urging force or violence by virtue of section 5.6 of the *Criminal Code Act 1995*.

Items 70 and 71

As introduced, proof of the offences in subsection 80.2(7) and (8) would be satisfied upon proof that the person intended their conduct to assist a country or organisation “by any means whatever”. This amendment deletes those words, so the offences will now require proof that the person intended their conduct to assist a country or organisation.

Item 72

As introduced, section 80.3 of the Bill contained a number of defences to the offences of sedition in section 80.2 and the existing offence of treason in existing section 80.1. This amendment should reassure those who publish reports or commentaries about matters of public interest are not caught by the provision, provided the publication is done in good faith. It is of course clear that such people would not intend to urge force or violence in any case.

Items 73 and 74

These items of the Bill require that a record, item or other thing retained under a search warrant or questioning and detention warrant issued respectively under sections 25 and 34D of the *Australian Security Intelligence Organisation Act 1979*. Such material may only be retained "for only such time as is reasonable, unless returning the record or thing would be prejudicial to security".

The amendments clarify that material removed under those warrants may only be retained for so long as the return of the material would be prejudicial to security. If the return of the material is not prejudicial to security, then the material may only be retained for such time as is reasonable.