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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

**COUNTER-TERRORISM LEGISLATION AMENDMENT (FOREIGN FIGHTERS)
BILL 2014**

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Attorney-General, Senator the Honourable George Brandis QC)

COUNTER-TERRORISM LEGISLATION AMENDMENT (FOREIGN FIGHTERS) BILL 2014

GENERAL OUTLINE

1. Australia faces a serious and ongoing terrorist threat. The escalating terrorist situation in Iraq and Syria poses an increasing threat to the security of all Australians both here and overseas. Existing legislation does not adequately address the domestic security threats posed by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas ('foreign fighters').
2. This Bill provides a suite of measures which are specifically designed to strengthen and improve Australia's counter-terrorism legislative framework to respond to the foreign fighter threat. It will provide additional powers for security agencies to deal with the threat of terrorism within Australia and that posed by Australians who participate in terrorist activities overseas. It will further counter terrorism through improving border security measures and by cancelling welfare payments for persons involved in terrorism.
3. The Bill also implements those recommendations of the Independent National Security Legislation Monitor's (INSLM) second and fourth Annual Reports and the Final Report of the Council of Australian Governments (COAG) Review of Counter-Terrorism Legislation (the COAG Review) that will assist to address the most pressing gaps in our counter-terrorism framework.

FINANCIAL IMPACT STATEMENT

4. The delayed notification search warrant scheme provides compensation if electronic equipment is damaged in the course of the execution of a warrant. However, this is anticipated to have minimal financial impacts on Government revenue.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011

Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014

This Bill is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Bill

5. The Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 (the Bill) makes a range of amendments to a number of Acts, primarily the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Criminal Code Act 1995*, the *Crimes Act 1914*, the *Australian Security Intelligence Organisation 1979*, the *Intelligence Services Act 2001*, the *Telecommunications (Interception and Access) Act 1979*, the *Australian Passports Act 2005*, the *Foreign Passports (Law Enforcement and Security) Act 2005*, the *Terrorism Insurance Act 2003*, the *Customs Act 1901*, the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006*, the *Migration Act 1958*, the *Foreign Evidence Act 1994*, the *A New Tax System (Family Assistance) Act 1999*, the *Paid Parental Leave Act 2010*, the *Social Security Act 1991* and the *Social Security (Administration) Act 1999*. It also makes consequential amendments to the *Administrative Decisions (Judicial Review) Act 1977*, the *Sea Installations Act 1987*, the *National Health Security Act 2007*, the *Proceeds of Crime Act 2001*, and the *AusCheck Act 2007*.

6. The Bill implements the Government's responses to the evolving national security landscape and in particular, the threat posed by Australians engaging in, and returning from, conflicts in foreign States. The latter category of persons, collectively referred to as 'foreign fighters', may have fought alongside listed terrorist organisations in overseas conflicts and return to Australia with enhanced terrorism capabilities and ideological commitment. This heightens the likelihood of the commission of terrorist acts on Australian soil.

7. The reforms introduce substantive changes to the criminal law regime in respect of terrorism offences. Cumulatively, they enhance the capabilities of Australia's law enforcement and intelligence agencies to respond proactively and effectively to the threats posed by foreign fighters to Australia and its national security interests.

8. These reforms, in part, draw on the work undertaken by various independent bodies. The INSLM has to date prepared four annual reports which have reviewed the operation, effectiveness and implications of Australia's counter-terrorism and national security legislation to ensure that it is operating effectively and appropriately. Of particular relevance for the purposes of the Bill are the recommendations made by the INSLM regarding the foreign fighter threat in his Fourth Annual Report (released on 28 March 2014) and other specific recommendations contained in the Second Annual Report (released on 20 December 2012). The Bill also builds upon the work of COAG which undertook a comprehensive review of Australia's counter-terrorism legislation. The COAG Review was tabled in Parliament by the Attorney-General on 14 March 2013.

Overview of measures

9. Outlined below is a brief summary of the substantive changes to each of the relevant Acts. Consequential and minor amendments which do not engage human rights have not been addressed in this section.

Schedule 1 – main counter-terrorism amendments

Administrative Decisions (Judicial Review) Act 1977

10. The *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) is being amended to include decisions in respect of the suspension of Australian travel documents and 14-day seizure of foreign travel documents as decisions to which the Act does not apply.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

11. The amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) include:

- enhancing the ability of the Australian Transaction Reports and Analysis Centre (AUSTRAC) to share information obtained under section 49, and
- listing the Attorney-General's Department (AGD) as a ‘designated agency’ under section 5.

Australian Passports Act 2005

12. The amendments to the *Australian Passports Act 2005* (Passports Act) include:

- introducing the power to suspend a person’s Australian travel documents for 14 days, and
- introducing a mechanism that provides that a person is not required to be notified of a passport refusal or cancellation decision by the Minister for Foreign Affairs if it is essential to the security of the nation or would adversely affect an investigation into a terrorism offence.

Australian Security Intelligence Organisation Act 1979

13. The amendments to the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) include:

- amending the provision authorising the use of force in the execution of a questioning warrant
- extending the operation of Division 3 to provide for the continuation of the questioning and questioning and detention warrant regime for a further ten years
- repealing the criterion for Ministerial consent in subparagraph 34D(4)(b) and substitute a requirement that the Minister must be satisfied that it is reasonable in all circumstances, including whether other methods of collecting that intelligence would likely be as effective
- including a new subsection in section 34L creating a new offence for persons who destroy or tamper with a record or thing, with the intention to prevent it from

- being produced, or from being produced in a legible form, in accordance with a request for production made under a questioning warrant, and
- amending section 36 to exclude the operation of Part IV from security assessments furnished by ASIO on the Department of Foreign and Trade (DFAT) recommending the Minister of Foreign Affairs suspend a person's Australian travel documents.

Crimes Act 1914

14. The amendments to the *Crimes Act 1914* (Crimes Act) include:
- introducing a delayed notification search warrant scheme for terrorism offences
 - extending the operation of the powers in relation to terrorist acts and terrorism offences in Part IAA, Division 3A for a further ten years
 - lowering the legal threshold for arrest of a person without a warrant for terrorism offences and the new 'advocating terrorism' offence to 'suspects on reasonable grounds'
 - amending the definition of 'terrorism offence' so that it applies to offences against Part 4 of the *Charter of the United Nations Act 1945* (UN Charter Act), Part 5 to the extent that it relates to the *Charter of the United Nations (Sanctions—Al Qaida) Regulations 2008*, and offences against Subdivision B of Division 80 of the Criminal Code., and
 - amending the requirement regarding the power to obtain documents such that a person must comply with the notice on a day at least 14 days after the notice is given, or in appropriate circumstances, 3 days after the notice is given.

Criminal Code Act 1995

15. Amendments to the *Criminal Code Act 1995* (Criminal Code Act) include:
- limiting the defence of humanitarian aid for the offence of treason to instances where the person did the act for the sole purpose of providing humanitarian aid
 - creating a new offence of 'advocating terrorism'
 - authorising the Attorney-General to add, remove or alter the alias of a terrorist organisation by declaration, where the Attorney-General is satisfied that the alias or aliases are those of the listed terrorist organisation
 - amending the terrorist organisation listing provision to provide that the 'advocates' limb includes the promotion and encouragement of terrorist acts, in addition to praise of the doing of a terrorist act
 - amending the terrorist organisation training offences so that they include an offence of intentionally participating in training provided to or from a terrorist organisation
 - extending the control order regime in Division 104 for a further ten years
 - expanding the criteria for issuing control orders to apply to persons who have engaged in armed hostilities in a foreign State

- expanding the criteria for issuing control orders to apply to persons convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act
- amending the criteria for issuing control orders on the basis that a person has trained with or received training from a terrorist organisation to include participating in training provided to or from a terrorist organisation
- amending the threshold for an Australian Federal Police (AFP) applicant to request a control order by amending the threshold in subparagraph 104.2(2)(a) to ‘suspects on reasonable grounds’
- introducing a requirement that an AFP member serving an interim control order must advise the person that appeal and review rights are available in relation to the order
- including an indicative maximum curfew period of 12 hours within a 24 hour period for the control order condition to direct a person to remain at specified premises between specified times each day, or on specified days
- extending the preventative detention order (PDO) regime in Division 105 for a further ten years
- enabling applications for initial PDOs and prohibited contact orders to be made verbally and electronically in urgent circumstances
- enabling PDOs to be made in respect of a person whose full name is not known, but who is able to be identified as the intended subject of the order
- amending the issuing criteria for PDOs to make the state of mind of the AFP applicant ‘suspect, on reasonable grounds’ instead of ‘reasonable grounds to suspect’, and
- amending the issuing criteria for PDOs such that a person must be satisfied that it is ‘reasonably necessary’ as opposed to ‘necessary’ to detain the subject to preserve evidence of, or relating to, the terrorist act.

Crimes (Foreign Incursions and Recruitment) Act 1978 and new Part 5.5 of the Criminal Code

16. The amendments to the *Crimes (Foreign Incursions and Recruitment) Act 1978* (Foreign Incursions Act) and equivalent provisions in Part 5.5 of the Criminal Code include:

- repealing the Foreign Incursions Act and re-enacting its provisions to Part 5.5 of the Criminal Code
- amending the definition of ‘recruit’ to ensure consistency with Part 5.3 (Terrorism) of the Criminal Code
- removing the requirement that the prosecution must prove that a person intended to engage in a hostile activity in a particular foreign country, rather than in *any* foreign country
- aligning the penalties for foreign incursions offences with the penalties for terrorism offences under Part 5.3 of the Criminal Code

- limiting the exception to the offence of preparing for an incursion into a foreign State to provide humanitarian aid to instances where the person did the act for the sole purpose of providing humanitarian aid
- replacing the phrase ‘engaging in armed hostilities in the foreign State’ by inserting the phrase ‘engages in subverting society’ into the definition of ‘engage in a hostile activity’. The definition of ‘engaging in subverting society’ includes conduct similar to that which constitutes a ‘terrorist act’ in section 100.1
- aligning the wording in the foreign incursions regime regarding causing fear of suffering death or personal injury with the wording adopted in subsection 100.1(1) of the Criminal Code concerning intimidation of the public or a section of the public, and
- creating a new offence of entering a ‘declared area’ in which a terrorist organisation is engaging in hostile activity.

Foreign Evidence Act 1994

17. The *Foreign Evidence Act 1994* (Foreign Evidence Act) is being amended to allow the court greater flexibility in determining whether to admit material obtained from overseas in terrorism-related proceedings.

Foreign Passports (Law Enforcement and Security) Act 2005

18. The *Foreign Passports (Law Enforcement and Security) Act 2005* (Foreign Passports Act) is being amended to introduce a 14-day foreign travel document seizure mechanism.

Telecommunications (Interception and Access) Act 1979

19. The *Telecommunications (Interception and Access) Act 1979* (TIA Act) is being amended to provide that the breach of a control order, and offences against Subdivision B of Division 80 and Division 119 of the Criminal Code are offences for which a telecommunications interception warrant can be issued.

Schedule 2 – Stopping welfare payments

A New Tax System (Family Assistance) Act 1999

20. *A New Tax System (Family Assistance) Act 1999* (Family Assistance Act) is being amended to provide for the cancellation of family assistance for individuals on security grounds.

Paid Parental Leave Act 2010

21. The *Paid Parental Leave Act 2010* (PPL Act) is being amended to provide for the cancellation of parental leave pay or dad and partner pay for individuals on security grounds.

Social Security Act 1991

22. The *Social Security Act 1991* (Social Security Act) is being amended to provide for the cancellation of social security payments or concession cards for individuals on security grounds.

Administrative Decisions (Judicial Review) Act 1977

23. The ADJR Act is being amended to include an exemption from the requirement to provide reasons for decisions to cancel welfare payments.

Schedule 3 – Customs’ detention power

Customs Act 1901

24. The *Customs Act 1901* (Customs Act) is being amended to overcome vulnerabilities in the detention power of Customs.

Schedule 4 – Cancelling visas on security grounds

Migration Act 1958

25. The *Migration Act 1958* (Migration Act) is being amended to include a new emergency visa cancellation power where a non-citizen outside of Australia might be a direct or indirect risk to national security.

Schedule 5 – Identifying persons in immigration clearance

Migration Act 1958

26. The amendments to the Migration Act include:

- amendments to enable automated border processing control systems such as SmartGate or eGates to obtain personal identifiers (specifically an image of the person’s face and shoulders) from all persons who use those systems
- amendments to allow personal identifiers (specifically an image of the person’s face and shoulders) to be obtained from Australian citizens who enter or depart Australia or who travel on an overseas vessel between ports within Australia. The Act currently contains safeguards applicable to the collection of personal identifiers from non-citizens. These amendments extend these safeguards to Australian citizens who may be required to provide a personal identifier by way of an identification test conducted by an ‘authorised officer’
- amendments that clarify that if a person presents a document such as a passport to a clearance authority under Division 5 of Part 2, the clearance authority may collect information in that document. The amendments also ensure that any personal information collected under Division 5 of Part 2 can be disclosed in the same way that personal identifiers can be disclosed under Part 4A of the Act, and
- amendments to expand the purposes for which personal identifiers may be accessed and disclosed to ensure that personal identifiers can be used to assist in identifying and authenticating the identity of a person who may be of national security concern.

Schedule 6 – Identifying persons entering or leaving Australia through advanced passenger processing

Migration Act 1958

27. The Migration Act will be amended to extend Advance Passenger Processing (APP) arrangement to departing air and maritime travellers.

Schedule 7 – Seizing bogus documents

Migration Act 1958

28. The Migration Act will be amended to introduce a measure to retain documents presented or provided to the Department of Immigration and Border Protection (DIBP).

Citizenship Act 2007

29. The amendments to the *Citizenship Act 2007* (Citizenship Act) include introducing a definition of ‘bogus documents’ and related documents.

Human rights implications

30. The Bill engages the following human rights:

- the right to life in Article 6 of the *International Covenant on Civil and Political Rights* (ICCPR)
- the right to freedom from arbitrary detention and the right to liberty of the person in Article 9 of the ICCPR
- the right to freedom of movement in Article 12 of the ICCPR
- the right to a fair trial, the right to minimum guarantees in criminal proceedings and the presumption of innocence in Article 14 of the ICCPR
- the right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the ICCPR
- the right to freedom of expression in Article 19 of the ICCPR
- the right to freedom of association in Article 22 of the ICCPR
- the rights of parents and children in Article 23 and 24 of the ICCPR
- the prohibition on cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT)
- the protection against the use of evidence obtained from torture in Article 15 of the CAT
- the right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR)
- the right to social security in Article 9 of the ICESCR, and
- the right of the child to be detained separately in Article 37 of the *Convention on the Rights of the Child* (CRC).

SCHEDULE 1 – MAIN COUNTER-TERRORISM AMENDMENTS

Part 1 – Amendments

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

Listing the Attorney-General's Department as a designated agency

31. Section 5 of the AML/CTF Act will be amended to include the AGD in the definition of ‘designated agency’. This will enable the AGD to have access to the financial intelligence of AUSTRAC. This amendment will result in administrative efficiencies where it is necessary for AGD to consider AUSTRAC information when formulating AML/CTF policy. Access to this information would allow AGD to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government’s foreign fighters national security response.

Freedom against unlawful and arbitrary interference with privacy in Article 17 of the ICCPR

32. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The amendment will limit the right in Article 17 by altering the definition of ‘designated agency’ to include the AGD. This will allow AGD to access AUSTRAC information, which may include personal information. The collection, disclosure, storage or use of personal information without a person’s consent will engage, and limit, the protection from arbitrary and unlawful interference with privacy in Article 17 of the ICCPR.

33. The right in Article 17 may be subject to permissible limitations, where the limitations are lawful and are not arbitrary. In order for an interference with the right to privacy to be permissible, the interference must be authorised by law, be for a reason consistent with the ICCPR and be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

34. In this case, the limitations on Article 17 are reasonable, necessary and proportionate. The vast majority of AUSTRAC information considered by AGD would be at an aggregated level to enable the Government to more effectively produce anti-money laundering and counter-terrorism financing policy to be developed. Enabling the AGD to access AUSTRAC information will enhance AGD’s abilities to bring together whole-of-government resources to properly advise the Government on important questions of counter-terrorism policy.

35. Accordingly, the amendment is reasonable, necessary and proportionate to achieving the objective of producing more informed and effective governmental policy.

Sharing information obtained under section 49

36. This amendment enhances the ability of AUSTRAC to share information it obtains under section 49 of the AML/CTF Act. Currently information obtained by AUSTRAC under section 49 is subject to different requirements compared to other information obtained under the AML/CTF Act. This amendment will enhance the value of information collected by AUSTRAC under section 49 as they will facilitate access to this information by all AUSTRAC’s partner agencies, rather than requiring such information to be quarantined.

Freedom against unlawful and arbitrary interference with privacy in Article 17 of the ICCPR

37. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The collection, disclosure, storage or use of personal information without a person's consent will engage, and limit, the protection from arbitrary and unlawful interference with privacy in Article 17 of the ICCPR. This amendment limits the right in Article 17 by allowing AUSTRAC to provide information collected under section 49 to its partner agencies.

38. As explained at paragraph 33, the right in Article 17 may be subject to permissible limitations, where the limitations are lawful and not arbitrary.

39. The sharing of information by AUSTRAC with its partner agencies is not in a relevant sense 'arbitrary'. The provision of this information will be clearly established by the AML/CTF Act and will be undertaken in accordance with that regime, which has significant safeguards to protect information. The sharing of AUSTRAC information better enables AUSTRAC to carry out its statutory objectives of being a regulator and a gatherer of financial intelligence to assist in the prevention, detection and prosecution of crime. The sharing of relevant information to partner agencies enhances the value of information obtained by AUSTRAC. Accordingly, this amendment cannot be characterised as arbitrary and is a reasonable, necessary and proportionate measure to better facilitate the work of AUSTRAC and its partner agencies.

Australian Passports Act 2005 / Australian Security Intelligence Organisation Act 1979 / Foreign Passports (Law Enforcement and Security Act) 2005 / Administrative Decisions (Judicial Review) Act 1977

Overview of passports measures

40. The Bill will amend the Passports Act to enable the Minister for Foreign Affairs to suspend a person's Australian travel documents for a period of 14 days if requested by the Australian Security Intelligence Organisation (ASIO).

41. ASIO currently has the ability to make a competent authority request for a person's Australian passport to be cancelled if it suspects on reasonable grounds that, if the person had an Australian passport, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country and that the passport should be cancelled in order to prevent the conduct.

42. The amendments will enable ASIO to make a request that the Minister for Foreign Affairs suspend for a period of 14 days all Australian travel documents issued to a person if it suspects on reasonable grounds both that the person *may* leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country and that all the person's Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.

43. The primary purpose of these amendments is to enhance the Australian Government's capacity to take proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas. The amendment will enable the Minister for Foreign Affairs to exercise a discretionary power to take temporary action to suspend a person's travel

documents upon receipt of a request from ASIO. The request will include the security rationale for the making of the request.

44. These amendments will strengthen the Australian Government's capacity to proactively mitigate the security risk arising from travel overseas by Australians who may be planning to engage in activities of security concern by providing a lower threshold for the making of a request for suspension. The requisite threshold is commensurate with the temporary nature of the contemplated administrative action by the Minister for Foreign Affairs. The amendments provide that ASIO would need to make a further competent authority request recommending passport cancellation to give longer term effect to the disruption of the security threat.

45. The amendments will also override the requirement to notify a person of the Minister's passport cancellation or refusal decision where it is essential to the security of the nation or where notification would adversely affect a current investigation into a terrorism offence.

46. The Bill will also insert provisions into the Foreign Passports Act that will complement the new suspension mechanism under the Passports Act. The Minister for Foreign Affairs already has the ability to order the surrender of a person's foreign travel documents if requested by ASIO. The proposed amendment will allow ASIO to make a request for the 14-day surrender of a person's foreign travel documents at a lower threshold than that provided for under the existing provisions.

47. Decisions relating to the new Australian travel document suspension mechanism and 14-day seizure of foreign travel documents will not be merits reviewable or reviewable under the ADJR Act. Judicial review under the Act may compromise the operations of security agencies and defeat the national security purpose of the new mechanisms.

48. These changes implement several recommendations of the INSLM's fourth annual report.

Freedom of movement in Article 12 of the ICCPR, right to a trial in Article 14 of the ICCPR, right to respect for the family in Articles 17(1) and 23 of the ICCPR

49. Article 12(1) of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. Everyone shall also be free to leave any country, including his own. Article 12(3) provides that the right to liberty of movement can be permissibly limited if the limitations are provided by law and are necessary to protect national security. The new suspension mechanism will temporarily restrict a person's right to liberty of movement if that person seeks to travel while their Australian travel documents are suspended. Consistent with Article 12(3), the restriction will be provided by law and is necessary for the protection of Australia's national security.

50. The introduction of the new suspension mechanism is reasonable and necessary to achieve the national security objective of taking proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas who may be planning to engage in activities of security concern. The amendments contemplate that the making of a suspension request by ASIO must be based on credible information which indicates that the person may pose a security risk. The suspension of an Australian travel document is only for a maximum period of 14 days and cannot be extended beyond this period. While the

suspension period is longer than the maximum 7-day suspension period proposed by the INSLM, it is necessary to ensure the practical utility of the suspension period with regard to both the security and passports operating environment.

51. Article 12(4) of the ICCPR states that no one shall be deprived of the right to enter his or her own country. The proposed 14-day seizure of foreign travel documents under the Foreign Passports Act may prevent a person from returning to their own country. However, the restriction on this right is reasonable, necessary and proportionate to mitigate the security risk arising from persons travelling overseas who may be planning to engage in activities of security concern. The limited duration of the seizure ensures that an individual's right to return to a foreign state is not unduly impinged.

52. Article 14 of the ICCPR provides that, in the determination of any criminal charge against a person or a suit at law, that person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The new mechanisms do not engage Article 14. Judicial review under section 75(v) of the Constitution is maintained and where such a suit is initiated, a person will be entitled to a fair and public hearing by an independent and impartial tribunal. A person will maintain existing review rights in the AAT in relation to the issuing of an adverse security assessment or the Minister's decision to cancel a passport. The decision to cancel a passport is also reviewable under the ADJR Act.

53. Articles 17(1) and 23 of the ICCPR concern the right to respect for family. Article 17(1) prevents arbitrary and unlawful interference with one's family while Article 23 states that the family is a natural and fundamental group unit of society and is entitled to protection by society and the State. A 'family' should be given a broad meaning and include all persons comprising the family as understood in the society of each country. Limiting the freedom of movement from Australia to a foreign State could possibly be argued to restrict the right to respect for family where the individual has family in the foreign State. However, the temporary 14-day restriction will enhance the Australian Government's capacity to take proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas. The restriction will not be arbitrary and will be undertaken in accordance with the law.

Absence of notification

Freedom of movement in Article 12 of the ICCPR

54. Article 12(1) of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. Everyone shall also be free to leave any country, including his own. The absence of notification does not of itself restrict the right to liberty of movement. In some situations, notifying a person that their passport has been cancelled (or that a decision to refuse to issue a passport has been made) will adversely affect the security of the nation or the investigation of a terrorism offence. The new provisions will ensure that, in certain limited circumstances, a person does not need to be notified of the decision relating to that person's passport or passport application. To that end, the limitations are provided by law and are reasonable, necessary and proportionate to protect Australia's national security.

Australian Security Intelligence Organisation Act 1979

‘Last resort’ requirement

55. The Bill will repeal the requirement in paragraph 34D (4)(b) that the Attorney-General must be satisfied that ‘relying on other methods of collecting that intelligence would be ineffective’ prior to issuing a questioning warrant. This requirement will be substituted with a requirement that the Minister must be satisfied that it is reasonable in all the circumstances, including whether other methods of collecting that intelligence would likely be as effective.

Right to freedom of movement in Article 12 of the ICCPR

56. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. This right has been restricted to the extent that the issuing of a questioning warrant requires a specified person to appear before a prescribed authority for questioning immediately after the person is notified of the issue of the warrant or at a time specified by the warrant.

57. Access to a questioning warrant is streamlined by this amendment as the Attorney-General no longer needs to be satisfied that others means of collecting the relevant intelligence would be ineffective. Instead a reasonableness requirement will be used and the relevant parties to the decision-making (the Director-General of ASIO, the Attorney-General and the issuing authority) should consider whether the power should be invoked.

58. The limitation on the right to freedom of movement can be justified on the basis that it achieves a legitimate objective – that the questioning warrant will ‘substantially assist in the collection of intelligence that is important in relation to a terrorism offence’. Given the statutory objective of ASIO is to ‘obtain, correlate and evaluate intelligence relevant to security’ (section 17), this amendment significantly enhances ASIO’s abilities to carry out its function. Moreover, terrorism offences constitute the most serious threats to Australia and its national security interests. The amendment improves the efficacy of the questioning warrant power and improves the tools by which terrorist threats may be mitigated.

59. The limitation on the freedom of movement is reasonable, necessary and proportionate. This is based on the safeguards already built into the questioning warrant framework. The Attorney-General’s Guidelines provide a safeguard for the appropriate use of questioning warrants. These guidelines are provided by the Attorney-General to the Director-General of ASIO under subsections 8A(1) and 8A(2). The Guidelines require ASIO to always consider the intrusiveness and proportionality of its avenues for obtaining information. Any methods for obtaining information must:

- be proportionate to the gravity of the threat posed and the probability of its occurrence
- use as little intrusion into a person’s privacy as is possible, and
- wherever possible the least intrusive techniques of information gathering should be used before resort to the more intrusive techniques (where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified).

60. Under paragraph 34D(4)(c), before issuing a questioning warrant the Attorney-General must be satisfied that there is in force a written statement of procedures to

be observed in the execution of warrants issued under Division 3 of Part III of the ASIO Act. Such a statement of procedures was originally tabled in Parliament on 12 August 2003. An updated version of those procedures, dated 16 October 2006, is currently in effect – this is a legislative instrument and is publicly available. The statement of procedures sets out procedures to be observed by ASIO and law enforcement agencies in record-keeping (including video recordings of any questioning), transport and questioning logistics, health and welfare of a subject of a warrant and options for that subject to make contact with representatives or make complaints about the process if desired. Section 34D also requires that the Director-General of ASIO must provide a draft request that includes a draft of the warrant to be requested, a statement of facts and grounds on which the Director-General considers it is necessary to issue the warrant, a statement of particulars and outcome of all previous requests for the issue of a warrant under this Division and details about any previous warrants issued in respect of the suspect under this Division, as a pre-requisite for the issuing of a questioning warrant. Furthermore, the qualifiers of ‘reasonable grounds for believing’ and ‘substantially assist’ mean that something more than a fleeting suspicion that a questioning warrant may be of use is required.

61. The INSLM observed of the Guidelines and statement of procedures that they ‘constitute formidable and reassuring prerequisites for the issue and control of the execution of a [questioning warrant]’. The INSLM considered that these safeguards justified the elimination of the ‘last resort’ requirement. The Guidelines and the reasonableness requirement ensure that the same level of rigour is exercised in a decision to issue a questioning warrant.

62. To the extent that this amendment is a restriction on the right to freedom of movement, it is reasonable, necessary and proportionate to achieving the legitimate objective of gathering important intelligence in relation to terrorism offences.

Destruction or tampering with records

63. Section 34L(6) requires that a person subject to a warrant issued under Division 3 of the ASIO Act must produce any record or thing that they have been requested in accordance with the warrant to produce. The INSLM highlighted that there is no express offence under this section for destroying or tampering with a record or thing, with the intention of preventing it from being produced, or from being produced in a legible form, in accordance with a request for production made under a questioning warrant. The offence will carry a maximum penalty of five years, in accordance with the other offences in section 34L.

Right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the ICCPR, right to freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the CAT

64. The requirement to produce certain records (defined in section 22) engages the right to protection against arbitrary or unlawful interference with the privacy of the individual. The application of the new offence is not arbitrary in that its use is established by law and not inappropriate, unjust or unpredictable and does not confer upon a person an unfettered discretion as to how it is applied. Moreover, the use of warrants is limited to instances where a request will ‘substantially assist in the collection of intelligence that is important in relation to a terrorism offence’. The documents to be produced would go towards a similar purpose of gathering evidence in relation to a terrorism offence. As terrorist acts constitute one of the

most significant threats to Australia and its national security interests, the new offence is a reasonable, necessary and proportionate measure.

65. Article 7 of the ICCPR and the CAT prohibit conduct which may be considered cruel, inhuman or degrading treatment or punishment ('ill treatment'). These rights are absolute and cannot be limited in any way. The penalty for destruction or tampering with records that are required to be produced is five years. This is proportionate and reflects the gravity of this offence. The deliberate destruction or tampering with evidence frustrates the gathering of intelligence in relation to a terrorism offence. The failure to produce such information prevents ASIO from carrying out its statutory functions whilst also endangering the safety of Australian national security interests. Accordingly, the penalty of five years imprisonment is not so significant that it would constitute cruel, inhuman or degrading treatment or punishment.

Use of force in execution of a questioning warrant

66. This amendment impacts the use of force in taking persons into custody and detaining persons for the purposes of a warrant issued under section 34G or in accordance with subsection 34K(7). In particular, subsection 34V(3) provides that the use of force to cause death of, or grievous bodily harm to, the person is permissible only if the officer 'believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the officer)'. The INSLM considered that paragraph 34V(3)(b), which allows for the use of force if there is no alternative way of taking the person into custody, should be removed. This is a largely technical amendment that amends subsection 34V(3) to more concisely capture the intent of paragraphs 34V(3)(a) and (b).

Right to security of the person in Article 9 of the ICCPR, right to life in Article 6 of the ICCPR

67. The right to security of the person in Article 9 of the ICCPR requires States to provide reasonable and appropriate measures, within the scope of those available to public authorities to protect a person's physical security. The use of reasonable and necessary force in executing a warrant can engage the right to security of the person where force could be used against a person in circumstances where it is legally authorised. Relatedly, Article 6(1) of the ICCPR guarantees every human being the inherent right to life, stating that no one shall be arbitrarily deprived of his or her life. Section 34V may engage this right to the extent it allows for the use of force.

68. The use of force in section 34V must be in accordance with the requirements of that provision and would be reasonable and necessary in the circumstances envisioned in subsection 34V(3). The use of force would be justified where it is used only in order to protect life or prevent serious injury to another person.

69. The framework of section 34V also places inherent limitations on the use of lethal force or force causing grievous bodily harm. A police officer must not use more force or subject the person to greater indignity than is necessary and reasonable to carry out the action contemplated in subsection 34V(1). This requirement also promotes respect for the inherent dignity of the human person (in accordance with Article 10 of the ICCPR). Moreover, the use of lethal force is only permissible where the police officer 'believes on reasonable grounds' that it is required to protect another human life or to prevent serious injury to

another. The threshold of ‘believes’ as opposed to ‘suspects’ and the objective nature of this test ensures that the use of force is not arbitrarily employed and only used where appropriate. Moreover, the conferral of such an authority on a police officer allows him or her to protect another human life and thereby preserve another’s right to security of the person.

70. This amendment clarifies the exceptional circumstances in which the use of force, including lethal force, is permissible. The restriction on the security of the person and right to life is not arbitrary, and is reasonable, necessary and proportionate to achieving legitimate objectives.

Extending the operation of Division 3

71. Currently, section 34ZZ provides that Division 3 will cease to have effect on 22 July 2016. The Bill amends this section to provide for the continuation of the Division for a further ten years, until 22 July 2026. Division 3 contains ASIO’s special powers relating to terrorism offences. In particular, Division 3 contains ASIO’s questioning and questioning and detention powers. This amendment recognises the enduring nature of the terrorist threat and provides ASIO with the necessary tools to respond effectively to the evolving counter-terrorism landscape.

72. The questioning warrant will require a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant. A questioning and detention warrant authorises a person to be taken into custody immediately by a police officer and be brought before a prescribed authority immediately for questioning under the warrant for a period of time described in subsection 34G(4).

Right to freedom of movement in Article 12 of the ICCPR, right to freedom from arbitrary detention in Article 9 of the ICCPR

73. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. The questioning, and questioning and detention warrants both infringe an individual’s right to freedom of movement by requiring their presence before a prescribed authority. However, this is permissible on the basis it achieves the legitimate objective of protecting Australia’s national security interests. The respective warrants are only available where there are reasonable grounds for believing that the warrant will ‘substantially assist’ in the collection of ‘intelligence that is important in relation to a terrorism offence’.

74. The extent to which an incursion into an individual’s freedom of movement is reasonable, necessary and proportionate has been explored in relation to the ‘last resort’ requirement discussed above. Similar considerations apply here and provide sufficient support for a restriction on the freedom of movement to achieve the legitimate objectives of preserving Australia’s national security.

75. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. The United Nations Human Rights Committee has stated that ‘arbitrariness’ includes the elements of inappropriateness, injustice and a lack of predictability. Arrest or detention must be reasonable and necessary in all circumstances with reference to the recurrence of crime, interference with evidence or the prevention of flight.

The questioning and detention warrant may be considered to engage the right to freedom from arbitrary detention because it allows an individual to be taken into custody by a police officer and brought before a prescribed authority immediately for questioning for a specific period of time.

76. The detention permitted under the questioning and detention regime cannot be described as ‘arbitrary’. The detention is established by and operates in accordance with the procedures described in Subdivision C of Division 3. The requirements necessary to issue a warrant provide predictability and ensure that its application is not subject to excessive discretion or capriciousness by decision-makers. The collection of important intelligence relating to terrorism offences can go towards the gathering of evidence and prove vital in the investigation, prevention and prosecution of terrorism related offences. Given the statutory objective of ASIO is to ‘obtain, correlate and evaluate intelligence relevant to security’ (section 17), this amendment significantly enhances ASIO’s abilities to carry out its function.

77. Accordingly, the continuation of the questioning and questioning and detention regime does not result in a diminishing of an individual’s right to freedom from arbitrary detention. The detention regime is clearly articulated in the ASIO Act and is a reasonable, necessary and proportionate measure in order for ASIO to carry out its statutory obligations.

Crimes Act 1914

Section 3—definition of terrorism offence

78. The definition of ‘terrorism offence’ in section 3 will be expanded so that it applies to:

- offences against Part 4 of the UN Charter Act and Part 5 of that Act insofar as it relates to the *Charter of United Nations (Sanctions – Al Qaida) Regulations 2008*
- Part 5.5 of the Criminal Code, and
- Subdivision B of Division 80 of the Criminal Code.

79. The importance of a consistent definition of terrorism offence, and the offences which should be included in such a definition, has been noted by the INSLM in his Third and Fourth Annual Reports. The practical implication of this amendment is that the provisions in the Crimes Act concerning regulating access to bail before conviction and the imposition of non-parole periods in sentencing of persons convicted of terrorism offences; search, information gathering and arrest powers affecting persons suspected of terrorism offences; the provisions for investigating terrorism offences and the questioning and detention of persons arrested for terrorism offences will consequently apply to the relevant UN Charter Act offences and Criminal Code offences captured by the definition.

80. Section 15AA regulates access to bail before conviction for persons charged with certain offences. Amending the definition of ‘terrorism offence’ will result in a broader range of offences being offences to which bail will not be granted except in exceptional circumstances. This amendment implements a recommendation from the INSLM’s Fourth Annual Report.

81. The amendment to the definition of ‘terrorism offences’ will also mean that subsection 19AG(1) in respect of non-parole periods applies to a broader range of offences.

This will result in the court having to fix a non-parole period of at least three-quarters of the sentence. This amendment implements a recommendation from the INSLM's Fourth Annual Report.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR

82. The amendment engages the limitation on the freedom from arbitrary detention under Article 9 of the ICCPR. In respect of the access to bail before conviction in section 15AA, the denial of bail in limited circumstances is in accordance with procedures that are established by law and cannot be considered arbitrary. The refusal to provide bail to a person charged with, or convicted of, a terrorism offence is intended to recognise the unique and serious threat posed to the Australian public by those alleged to have been involved in terrorism-related activities. The high risk presented by individuals charged with terrorism offences justifies a refusal to grant bail except in exceptional circumstances.

83. Section 15AA is sufficiently mindful of human rights obligations by facilitating the exercise of judicial discretion. Section 15AA recognises the importance of not providing a blanket presumption against bail, even in respect of terrorism offences. Accordingly, subsection 15AA(1) states that bail may still be granted where there are 'exceptional circumstances'. As such, this amendment does not indiscriminately deprive one of their right to freedom from arbitrary detention or arrest. It applies to serious offences such as terrorism and provides safeguards that demonstrate the measure is reasonable, necessary and proportionate in responding to the threat posed by those charged with terrorism offences.

84. The impact of this amendment on the non-parole periods regime may also engage the limitation on the freedom from arbitrary arrest or detention. However, the non-parole periods regime is established clearly by law and does not provide decision-makers with unfettered discretion such that the application of section 19AG could be considered inappropriate, unjust or unpredictable.

85. This amendment achieves the legitimate objective of protecting Australia and its national security interests. Non-parole periods are fixed only for serious crimes such as terrorism offences, treachery and offences against Divisions 80 (treason and urging violence) and 91 (offences relating to espionage and similar activities) of the Criminal Code. The policy rationale is that individuals convicted of terrorism offences should not be released into the community sooner than absolutely required on the basis they have committed serious offences that have endangered public safety.

86. This amendment does not infringe upon an individual's right to freedom from arbitrary detention or arrest. It is a reasonable, necessary and proportionate measure in responding to the continued threat presented by those who have committed serious terrorism related crimes.

Extending the operation of powers under Part IAA, Division 3A

87. Part IAA of Division 3A relates to police powers in respect of terrorist acts and terrorism offences. This Division is due to sunset on 15 December 2015. The COAG Review recommended that if the search and seizure powers were to be renewed, the sunset period should be five years, and the relevant legislation should (excepting the machinery provisions), cease to exist after this period. This Bill extends the operation of this Division for a further ten years until 15 December 2025. The sunset period has been extended beyond

the five year period recommended by COAG in recognition of the fact that the terrorist threat remains an ongoing and real phenomenon. This amendment ensures that law enforcement agencies continue to have the necessary counter-terrorism powers to prevent and disrupt terrorist activity.

Right to freedom from arbitrary or unlawful interference with privacy in Article 17 of the ICCPR, right to security of the person in Article 9 of the ICCPR, right to freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the CAT

88. To the extent that Part IAA, Division 3A relates to search and seize powers and entry into premises powers, the regime limits an individual's right to protection against arbitrary and unlawful interferences with privacy and their home. Lawful interference with the right to privacy will be permitted, provided it is not arbitrary.

89. The interference with the right to privacy is proportionate to and limited to the obtaining of relevant information in respect of terrorist acts and terrorism offences. The powers provided by the Division are subject to appropriate limitations which ensure that the use of power is reasonable and necessary. In respect of stopping and searching powers, a police officer may only use this power where a terrorism-related item is believed to be present. A terrorism-related item means a thing that the 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 (section 3UA).

90. In respect of the power of emergency entry into premises without a warrant, the power may only be exercised if the police officer 'suspects, on reasonable grounds' that a thing on the premises is being used in connection with a terrorism offence *and* that there is a 'serious and imminent threat to a person's life, health or safety' (subsection 3UEA(1)). Moreover, a condition of notification is required within 24 hours of entry to the occupier of the premises (subsection 3UEA(7)). A seizure notice must also be provided where items are seized under sections 3UE or 3UEA within 7 days after the day on which the thing was seized.

91. These measures ensure that any incursions into an individual's right to privacy are reasonable, necessary and proportionate. They require law enforcement officials to be satisfied of thresholds that mean that the powers cannot be used in an arbitrary fashion and that their level of intrusiveness is no more than necessary to achieve a legitimate objective. The legitimate objective advanced by Part IAA, Division 3A is to assist law enforcement officers prevent serious threats to Australia's national security interests. The potentially intrusive nature of the powers under Part IAA, Division 3A is balanced by its use in respect of only terrorism offences, which constitute the gravest threats to safety of Australians.

92. Article 9 of the ICCPR requires States to provide reasonable and appropriate measures, within the scope of those available to public authorities, to protect a person's physical security. Article 7 of the ICCPR guarantees that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In carrying out a search under Division 3A a police officer must not use more force, or subject the person to greater indignity, than is reasonable and necessary to conduct the search. In conducting the search a person must not be detained for longer than is reasonably necessary. Moreover, the use of reasonable force is only in respect of terrorism offences and only considered a measure of last resort in order to conduct searches.

93. Accordingly, the right to security of the person is limited only to the extent that it is reasonable, necessary and proportionate to achieve the legitimate objectives of Division 3A of Part IAA.

Lowering of the arrest threshold

94. The Bill inserts a new section 3WA to provide that a constable may, without a warrant, arrest a person for a terrorism offence or an offence against section 80.2C of the Criminal Code where the constable ‘suspects on reasonable grounds’ that the person has committed or is committing a terrorism offence or an offence against section 80.2C and that proceedings by summons would not achieve one or more specified purposes. A constable means ‘a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory’ (section 3 of the Crimes Act).

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR

95. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.

96. This amendment reduces the threshold for arrest in relation to terrorism offences to ‘suspects on reasonable grounds’. This amendment to the threshold is established by law and the requirements for such an arrest are clearly outlined in section 3WA. Its use is appropriate, justifiable and sufficiently predictable in its operation as it does not confer unfettered discretion on a constable to utilise powers of arrest in an arbitrary manner.

97. The requirement of ‘suspects on reasonable grounds’ requires something more than ‘a mere idle wondering’ and must have a ‘positive feeling of actual apprehension or mistrust, amounting to a ‘slight opinion’’. This indicates that arrest, even under the lower threshold of ‘suspicion’, is not arbitrary and clear legal standards exist around the necessary mental state required.

98. In his Fourth Annual Report, the INSLM recommended the threshold of ‘suspects’, noting that the power has a proactive and preventative focus and is of use in a terrorism-related context. An arrest threshold based on suspicion is not a new concept in Australian law and is used in a number of Australian jurisdictions. The arrest threshold in the United Kingdom is ‘reasonable grounds for suspecting’, a position which is consistent with the European Convention on Human Rights. Lowering the arrest threshold will allow police to intervene and disrupt terrorist activities and the advocating of terrorism at an earlier point that would be possible where the threshold is ‘reasonable grounds to believe’.

99. Accordingly, this amendment is a reasonable, necessary and proportionate measure in relation to offences that constitute grave threats to Australia and its national security interests.

Power to obtain documents

100. In order to enhance the efficacy of the power to obtain documents relating to serious terrorism offences in section 3ZQN, the INSLM recommended that an amendment be inserted to provide for compliance with the notice to produce the documents within 14 days. The INSLM considered that this would ensure the power operates as an effective investigatory power. This amendment also overcomes an anomaly where an individual is

required to comply with a notice to produce documents within 14 days after the day on which the notice is given for serious non-terrorism offences, but for serious terrorism offences no such time limit is specified.

Right to freedom from arbitrary or unlawful interference with privacy in Article 17 of the ICCPR

101. Article 17 of the ICCPR provides that no-one shall be subjected to arbitrary or unlawful interference with their privacy, family, home or correspondence.

102. Section 3ZQN applies where an authorised AFP officer considers on reasonable grounds that a person has documents relevant to, and will assist, the investigation of a serious terrorism offence. The officer can give the person a written notice requiring the person to produce documents as soon as practicable covering the matters identified in section 3ZQP that are in the possession (or control) of the person. The types of matters covered in section 3ZQP include documents relating to bank accounts held, whether a specified person travelled or will travel between specified dates or specified locations, whether assets have been transferred to or from a specified persons between specified dates etc. These documents relate to matters that if disclosed could result in an infringement of the right to privacy.

103. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Lawful interference with the right to privacy will be permitted provided it is not arbitrary and in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. This amendment requires individuals to provide personal documents. However, it is not arbitrary as it has been clearly prescribed by law and the power to obtain documents must be exercised in accordance with the requirements and safeguards contained in the section.

104. This amendment applies to serious terrorism offences which constitute a grave risk to Australia and its national security interests. The regime itself provides important safeguards which ensure the application of these powers are not arbitrary. The power to obtain documents can only be used when the authorised AFP officer considers on reasonable grounds that such documents will be relevant to, and will assist, the investigation of a serious terrorism offence. Furthermore, the only documents that can be obtained are those in the possession or under the control of the person. This amendment states that a notice to produce documents must specify the date by which a person must comply with the notice, being a day at least 14 days after giving the notice or in urgent circumstances, 3 days after the giving of the notice. This provides a reasonable time within which an individual can compile and provide the documents requested.

105. This amendment does not constitute an arbitrary or unlawful incursion into a person's right to privacy. To the extent that there is a restriction on an individual's right to privacy, there are number of important internal safeguards built into the regime to ensure any interference is reasonable, necessary and proportionate.

Delayed notification search warrants scheme for terrorism offences

106. Part IAAA will introduce a delayed notification search warrant (delayed notification search warrant) scheme into Part IAA of the Crimes Act. The existing search warrant provisions in Part IAA of the Crimes Act require the officer executing the warrant to provide

a copy of the warrant to the occupier of the premises and allow them to observe the search. The amendments proposed by Part IAAA will enable the AFP (defined in this Part as the ‘authorising agency’) to conduct searches of a warrant premises without the occupier’s knowledge and without notifying the occupier of the premises at the time the warrant is executed. Notice of the search will be required to be given to the occupier of a searched premise at a later date, generally within six months.

107. The delayed notification search warrant scheme will provide the AFP with warrant powers similar to those currently available under Part IAA, with the added ability to exercise those powers covertly. This includes the power to impersonate a person where reasonably necessary to execute the warrant. This is intended to be utilised to allay the suspicion of other residents of the area. In addition, the executing officer or a person assisting is empowered to leave a warrant premise temporarily and subsequently re-enter to continue the execution of the warrant in certain instances where, for example, the occupier returns home and the covert nature of the warrant is at risk. The executing officer or a person assisting is also able to enter the main premise via an adjoining premises, if this is expressly specified in the warrant, where it is required to avoid comprising the prevention or investigation of the relevant offences. This power is limited to accessing the warrant premise and does not allow for the search and seizure of things in that adjoining premise. Notice is to be given to the occupier of an adjoining premises entered to gain access to the main premise at a later date, generally within six months.

108. The ability of federal law enforcement officers to conduct a delayed notification search warrant is critical to enable covert investigation of terrorism offences. Operational experience has shown that the individuals and groups who commit such offences are highly resilient to other investigative methods and pose significant threats to the Australian community. The value of adopting a delayed notification search warrant scheme for terrorism offences was also recognised in the INSLM’s Fourth Annual Report.

109. A delayed notification search warrant will only be used in limited operational situations and will be subject to a number of safeguards to balance the legitimate interests of the Commonwealth in preventing terrorism with the need to protect human rights.

Right to freedom from arbitrary or unlawful interference with privacy in Article 17 of the ICCPR, right to life in Article 6 of the ICCPR, right to freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the CAT

110. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Accordingly, lawful interference with the right to privacy will be permitted, provided it is not arbitrary. The term ‘unlawful’ means no interference can take place except in cases authorised by law. The use of the term ‘arbitrary’ means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee has interpreted ‘reasonableness’ to imply that any limitation must be proportionate and necessary in the circumstances.

111. The delayed notification search warrant scheme limits the right to privacy by enabling law enforcement officers to enter a warrant premises, including a suspect’s home or place of work, without the knowledge or consent of the occupier. The limitation, however, serves the legitimate aim of assisting the AFP to effectively prevent or investigate Commonwealth

terrorism offences. This is because allowing for an occupier to be notified of a search warrant sometime after the warrant was executed or otherwise granted provides the AFP with the opportunity to gather evidence, identify additional suspects and locate further relevant premises and evidence while keeping the existence of an ongoing investigation confidential.

112. Without this power, there is a risk, particularly in relation to terrorist organisations, that the occupier will alert his or her criminal associates to police interest in their activities and that evidence will be destroyed or removed, jeopardising the success of a law enforcement operation. A delayed notification search warrant will therefore provide the AFP with a significant tactical advantage, enabling AFP officers to conduct further investigations without a suspect being aware of their interest. This will achieve the legitimate objectives of increasing the opportunity for successful investigations of terrorism offences and enhancing the ability of the AFP to gather information about planned operations with a view to preventing a terrorism offence from being committed.

113. The delayed notification search warrant scheme will only be utilised in limited circumstances where it is reasonable and proportionate to do so and will be subject to a number of safeguards, including a two-step authorisation process, rigorous reporting requirements and oversight by the Commonwealth Ombudsman, to ensure that the powers cannot be used arbitrarily to limit an individual's right to privacy.

114. Part IAAA clearly identifies that the delayed notification search warrant may only be applied for and authorised in relation to Commonwealth terrorism offences, with a maximum penalty of imprisonment of seven years or more. This penalty threshold is consistent with that which applies to telecommunications interception warrants and is higher than the threshold for other Commonwealth covert schemes, such as surveillance devices and controlled operations, which are both available in respect of offences with maximum penalties of imprisonment of three years or more. Accordingly, a seven year threshold is considered to be sufficiently high for making an application for and issuing of a delayed notification search warrant, ensuring that these warrants will only be used in the investigation of the most serious terrorism offences.

115. Furthermore, an application for a delayed notification search warrant will be subject to a two-step authorisation process to ensure that a warrant is subject to prior scrutiny both internally by the AFP and by an independent person before it is authorised. An officer must first obtain internal authorisation from the Commissioner (or their delegate) of the AFP (defined in the Schedule as the 'chief officer'). If the AFP Commissioner authorises the application, the officer may then apply to an eligible issuing officer for approval. An eligible issuing officer includes a Judge of the Federal Court of Australia, or of the Supreme Court of a State or Territory, who consents to be nominated to act as an eligible Judge for this purpose. An eligible issuing officer also includes a Deputy President, a full-time senior member, a part-time senior member or a member of the Administrative Appeals Tribunal (AAT).

116. To issue the delayed notification search warrant, both the AFP Commissioner and the eligible issuing officer will need to be satisfied that:

- there are reasonable grounds to suspect that one or more eligible offences have been, are being, are about to be or likely to be committed
- entry to and search of the premises will substantially assist in the prevention of, or investigation into, those offences, and

- there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises.

117. In addition, the eligible issuing officer must have regard to a number of key factors, including:

- the extent to which the exercise of the power under the warrant would assist the investigation into the offences to which the application for the warrant relates
- the existence of alternative means of obtaining the evidence or information sought to be obtained
- the extent to which the privacy of any person is likely to be affected
- the nature and seriousness of the relevant offences to which the application for the warrant relates
- any conditions to which the warrant should be subject
- whether allowing entry to an adjoining premises is reasonably necessary, and
- the outcome of any previous application in respect of the premises for a NDSW or a search warrant under Division 2 of Part IAA of the Crimes Act, so far as this is known to the eligible issuing officer.

118. The above will ensure that a delayed notification search warrant is not authorised where it is not appropriate to do so, for example, where there would be a disproportionate impact on the occupier's privacy or there is a more appropriate means of obtaining the evidence or information sought.

119. The delayed notification search warrant that is issued must clearly specify, amongst other details: the name of the applicant; the address of the warrant premises; the offence to which the warrant relates; the kinds of things that may be searched for, seized, copied, photographed, recorded, marked, tagged, operated, printed, tested or sampled; whether the warrant authorises a thing to be placed in substitution for a thing seized under the warrant and whether the warrant authorises the re-entry of the warrant premises to return anything to the warrant premises, or to retrieve anything substituted at the warrant premises.

120. As a safeguard, section 2H of Subdivision C prohibits the making of false or misleading statement in an application for delayed notification search warrant with a penalty of imprisonment for two years.

121. Part IAAA also contains measures to ensure than an occupier receives notification that a warrant has been authorised and/or executed as soon as practicable without jeopardising the investigation. A delayed notification search warrant must be executed within 30 days of issue, with notice to be given within six months of execution. An extension of time may be granted on more than one occasion, provided that the extension is not by more than six months at a time and it does not cause notice of the search to be given more than 18 months after the date the warrant was issued. An extension beyond 18 months may be provided where the Minister has issued a certificate approving an application for extension and the issuing officer is satisfied that there are reasonable grounds for granting such an extension. This recognises that, in limited circumstances, investigations may be lengthy and

early notification would compromise operational outcomes. Each extension can be for no more than six months.

122. Part IAAA will also impose rigorous reporting requirements on executing officers and the AFP Commissioner, to ensure that delayed notification search warrant are authorised and executed in accordance with the provisions of Part IAAA. This includes requirements for executing officers to provide written reports to the AFP Commissioner as soon as practicable after the warrant is executed. The AFP Commissioner must also report on each delayed notification search warrant applied for and issued to the Minister each financial year, with the report to be tabled in Parliament within set time limits. The Ombudsman will be required to inspect the records of the AFP at least once every six months to determine the extent of compliance with the scheme. Accordingly, the AFP will be required to keep detailed records of all delayed notification search warrant that have been issued and/or applied for by that agency. The Ombudsman is given a range of powers to assist in its oversight role, including the power to enter agency premises and require staff members of the agency to provide further information as required. This reporting function would also include the power to comment on the annual report that the AFP would need to prepare on their use of these warrants, which must also be tabled. The Ombudsman will be required to give a written report on its inspections to the Minister at six monthly intervals, which must be tabled in both Houses of Parliament within set time limits.

123. Finally, evidence obtained under a delayed notification search warrant will be subject to the normal rules of criminal procedure (including evidential burdens and rules of admissibility under the *Evidence Act 1995* (the Evidence Act)). Courts will retain their current discretion under the Evidence Act and the common law to admit or exclude any illegally or improperly obtained evidence if any of the provisions relating to the issue and execution of a delayed notification search warrant are not complied with.

124. A delayed notification search warrant may also authorise law enforcement officers to covertly enter neighbouring premises to gain access to target premises. Although the exercise of this power can limit the right to privacy of the occupiers of those premises, this power is necessary to assist Part IAAA in achieving its legitimate law enforcement aims and is subject to a number of safeguards which will ensure it is a reasonable and proportionate means of achieving these aims.

125. In particular, this power is limited to authorising entry onto neighbouring premises for the purpose of obtaining access to the target premises and cannot authorise the search of the neighbouring premises for evidence. Access to neighbouring premises will only be permissible where it is specifically authorised by the warrant, and will require the issuing officer considering the warrant application to be satisfied that entry to the neighbouring premises is reasonably necessary to avoid compromising the investigation. An occupier of the neighbouring premises will be required to be notified in the same manner as the occupier of the main premises, and law enforcement officers will be subject to the same reporting and oversight requirements in relation to the neighbouring premises as for target premises. As above, if any of these requirements are not complied with, the courts will retain their discretion under the Evidence Act to admit or exclude any illegally or improperly obtained evidence. Accordingly, although Part IAAA will impact the right to privacy, the limitation will be reasonable, necessary and proportionate to achieve the legitimate aim of improving the effectiveness of investigations of Commonwealth terrorism offences.

126. The power to seize and/or move items away from premises for examination and processing will also limit the right to privacy under Article 17. This power is intended to allow the AFP to deal more effectively with specific items, including electronic equipment such as laptop computers and smartphones, located during searches to support the legitimate purpose of investigating and preventing terrorism offences.

127. This power will remain subject to significant safeguards that ensure these powers are used in accordance with the right to protection against arbitrary and unlawful interference with privacy. This includes the threshold that, for a thing to be moved for examination or processing, the eligible officer must suspect on reasonable grounds that the thing contains or constitutes a thing that may be seized under the warrant and that it is significantly more practicable to do so having regard to the timeliness and cost of examining or processing the thing at another place and the availability of expert assistance. This item will be returned when the AFP Commissioner is satisfied that it is no longer required and, although unlikely, if there is any damage during this process, compensation will be available. For an item to be retained or forfeited, the eligible issuing officer, on application by an eligible officer from the AFP, would need to be satisfied that there are reasonable grounds to suspect that if the thing is returned to the owner, it is likely to be used in the commission of a terrorist act, offence, or a serious offence within the meaning of Part IAA. Details of those items seized and/or moved will be recorded as part of the delayed notification search warrant process and, in turn, in reports provided to the Ombudsman and to the Minister by the AFP.

128. Accordingly, to the extent that this power may affect a person's right to protection against arbitrary and unlawful interference with their privacy, these effects are reasonable, necessary and proportionate in achieving the intended outcome of Part IAAA.

129. Article 6(1) of the ICCPR guarantees every human being the inherent right to life, stating that no one shall be arbitrarily deprived of his or her life. Article 7 of the ICCPR guarantees that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Part IAAA potentially engages these two rights by allowing for the use of force in the execution of delayed notification search warrant. Importantly, the power to use force against a person or a thing, whether at the main or adjoining premise, is limited to where necessary and reasonable in the circumstances.

130. It is not anticipated that any powers to use force against persons would be required to be exercised during the execution of a delayed notification search warrant. However, it is possible that an executing officer may be required to use force against persons or things in exceptional and unforeseen circumstances. For example, an officer may need to break a lock to access a compartment in a premises, or possibly restrain a person who unexpectedly enters onto premises and seeks to obstruct the execution of a delayed notification search warrant. Compensation is available for damage to electronic equipment where insufficient care was exercised in the operation of the equipment.

131. Additionally, the law enforcement officers that will be empowered to use force against a person under Part IAAA are trained and authorised to do so under AFP Act. Accordingly, any potential limitation on Article 6 or 7 of the ICCPR imposed by Part IAAA would be reasonable, necessary and proportionate.

132. Part IAAA is compatible with human rights as, to the extent that it may limit human rights, it serves a reasonable and proportionate means of achieving the legitimate objective of

improving the ability of the AFP to prevent and investigate Commonwealth terrorism offences.

Criminal Code Act 1995

Humanitarian exception for treason

133. The Bill amends subsection 80.1AA(6) to alter the humanitarian aid defence so that it is applicable only where conduct is undertaken for the sole purpose of providing humanitarian aid. This reflects other humanitarian aid defences in paragraph 102.8(4)(c) and 390.3(6) of the Criminal Code. This ensures that the underlying policy objectives of the relevant offence is not compromised and that persons who engage in treasonous conduct cannot point to a single act, possibly part of a broader conduct, to enliven the defence. It will also ensure, in an appropriately limited manner, that humanitarian aid can continue to be used as a defence.

134. The human rights considerations set out below in respect of the humanitarian aid exception to foreign incursions offences will be equally applicable in this instance.

New offence of ‘advocating terrorism’

135. The Bill introduces the offence ‘advocating terrorism’ in Subdivision C of Division 80 of the Criminal Code. A person commits an offence if they intentionally counsel, promote, encourage or urge the doing of a terrorist act or the commission of a terrorism offence and the person is reckless as to whether another person will engage in a terrorist act or commit a terrorist offence. ‘Terrorist act’ has the same meaning as in section 100.1 of the Criminal Code and ‘terrorism offence’ has the same meaning as in subsection 3(1) of the Crimes Act. The offence carries a maximum penalty of five years’ imprisonment.

Freedom of expression in Article 19(2) of the ICCPR, freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and CAT

136. Article 19(2) provides that everyone has the right to freedom of expression. However, Article 19(3) provides that the freedom of expression may be limited if it is necessary to achieve a legitimate purpose, such as it is necessary in the interests of national security. The restriction on free expression is justified on the basis that advocating the commission of a terrorist act or terrorism offence is conduct which jeopardises the security of Australia, the personal safety of its population and its national security interests. This is because of the severe nature of actions which are defined as ‘terrorist acts’ in section 100.1. Terrorist acts constitute the gravest threats to the welfare of Australians as they include causing serious physical harm or death, damaging property, creating a serious risk to the health or safety of the public and interfering with electronic systems. It is reasonable that such conduct should not be advocated and that reasonable steps should be taken to discourage behaviour that promotes such actions.

137. Importantly, deterring the advocating of such acts, which can at its most serious include causing a person’s death, promotes the rights of others (in accordance with Article 19(3)(a)). In this instance, this may include protecting other people’s right to life in Article 6 of the ICCPR.

138. These restrictions on freedom of expression are a reasonable, necessary and proportionate measure in order to protect the public from terrorist acts and the terrorism activities that the relevant terrorism offences are designed to deter. The new offence is an important tool to assist disrupting and preventing the threat posed by foreign fighters. Individuals who have travelled overseas to participate in foreign conflicts often return with radicalised ideologies that includes violent extremism. Advocating terrorism heightens the probability of terrorist acts or the commission of terrorism offences on Australian soil and encourages others to join the fight overseas. The criminalisation of behaviour which encourages terrorist acts or the commission of terrorism offences is a necessary preventative mechanism to limit the influence of those advocating violent extremism and radical ideologies.

139. The existence of a good faith defence in section 80.3 for the offence created by new section 80.2C provides an important safeguard against unreasonable and disproportionate limitations of a person's right to freedom of expression. The good faith defence ensures that the communication of particular ideas intended to encourage public debate are not criminalised by the new section 80.2C. In the context of matters that are likely to pose vexed questions and produce diverse opinion, the protection of free expression that attempts to lawfully procure change, points out matters producing ill-will or hostility between different groups and reports on matters of public interests is vital. The maintenance of the right to freedom of expression, including political communication, ensures that the new offence does not unduly limit discourse which is critical in a representative democracy.

140. This legislative safeguard, taken together with the ordinary rights common to criminal proceedings in Australian courts, provide certainty that human rights guarantees are not disproportionately limited in the pursuit of preventing terrorist acts or the commission of terrorism offences. Accordingly, the limitation on the right to freedom of expression resulting from the offence in new section 80.2C is reasonable, necessary and proportionate.

141. Article 7 of the ICCPR and CAT prohibits conduct which is regarded as cruel, inhuman or degrading treatment. The maximum penalty of five years' imprisonment for the new offence is not so significant that it would constitute cruel, inhuman or degrading treatment or punishment. The maximum penalty of five years' imprisonment is considered a proportionate response given the severity of the potential consequences of encouraging others to engage in terrorist acts or commit terrorism offences. The penalty implements a gradation consistent with established principles of Commonwealth criminal law policy, as documented in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*. The Guide suggests that the maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme.

142. Furthermore, the Guide provides that a heavier penalty is appropriate where the consequences of an offence are particularly dangerous or damaging. The penalty for the new offence reflects the gravity of the crime and addresses the significant national security threat presented by individuals who advocate the commission of terrorist acts or terrorism offences. Accordingly, the maximum penalty of five years' imprisonment is reasonable, necessary and appropriate and would not constitute cruel, inhuman or degrading treatment or punishment.

Definition of ‘terrorist organisation’

143. Currently, ‘advocates’ the doing of a terrorist act is defined in section 102.1(1A) to mean:

- (a) *the organisation directly or indirectly counsels or urges the doing of a terrorist act; or*
- (b) *the organisation directly or indirectly provides instruction on the doing of a terrorist act; or*
- (c) *the organisation directly praises the doing of a terrorist act in circumstances where there is a substantial risk that such praise might have the effect of leading a person (regardless of his or her age or any mental impairment that the person might suffer) to engage in a terrorist act.*

144. The Bill amends the definition of ‘advocates’ in subsection 102.1(1A) to provide that the term includes promotes or encourages in addition to counsels or urges the doing of a terrorist act. The effect of this amendment is that where the Minister is satisfied on reasonable grounds that an organisation directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act the Governor-General may make a regulation listing the organisation as a terrorist organisation.

145. A further amendment to subsection 102.1(2) now states that a ‘terrorist act’ includes a reference to the doing of a terrorist act even if a terrorist act does not occur, a reference to the doing of a specific terrorist act and a reference to the doing of more than one terrorist act.

146. Human rights do not apply to organisations, only individuals. As this amendment does not impact an individual’s freedom of expression, no human rights are engaged in this measure.

Aliases of terrorist organisations

147. This amendment allows the Attorney-General to make a declaration that an alias be added or omitted to a terrorist organisation which is specified by a regulation. The policy rationale for the amendment is to allow a terrorist organisation listing to be kept up-to-date where there are rapid changes to aliases or names by which an organisation is also known, provided that the Attorney-General remains satisfied that the alias is the same entity as the listed organisation. The fluidity with which terrorist organisations form, evolve or adopt new aliases has been recently illustrated in the case of the Islamic State of Iraq and the Levant which changed its name to Islamic State. The efficacy of the terrorist listing regime is dependent on its ability to react efficiently to these changes, especially where terrorist organisations adopt aliases but are otherwise the same entity. The INSLM’s Fourth Annual Report recommended the implementation of this measure. This amendment overcomes a practical difficulty in the terrorist listing regime and does not engage any human rights.

Intentionally participating in training provided to or from a terrorist organisation

148. Section 102.5 makes it an offence to intentionally provide training to, or intentionally receive training from a terrorist organisation where the person is reckless to the fact that the organisation is a terrorist organisation. This Bill expands the offence to apply to situations where a person participates in training with a terrorist organisation reckless to the fact that organisation is a terrorist organisation. This is designed to capture circumstances in which

there are no formally defined teaching and learning roles in a training session, so that the individual participants are not readily identifiable as either providing or receiving training.

Right to freedom of association in Article 22 of the ICCPR

149. Article 22 of the ICCPR protects the right of all persons to group together voluntarily for a common goal and to form and join an organisation. Article 22(2) provides that this right may be limited for the purpose of national security. This amendment, and more broadly the terrorist organisation listing regime, limits the right of freedom of association to prevent people engaging with and participating in terrorist organisations. Terrorist organisations present a threat to the security of Australia and often seek to harm Australians and our democratic institutions. The statutory definition of a ‘terrorist organisation’ requires that these bodies directly or indirectly engage in, prepare, plan, assist in or foster the doing of a terrorist act which includes the causing of serious harm to persons or death and serious damage to property. Due to the severity of the danger posed by terrorist organisations, it is reasonable, necessary and proportionate to limit the right of individuals who by their association with a terrorist organisation pose a threat to Australians.

Retention of the control order regime in Division 104

150. The Bill extends the operation of the control order regime for a further ten years, following the expiration of the sunset period on 16 December 2015. This implements the Government’s response to the COAG Review which recommended the retention of the control order regime with additional safeguards. The control order regime has been retained in recognition of the enduring nature of the terrorist threat and the importance of providing law enforcement agencies with the necessary tools to respond proactively to the evolving nature of the threat presented by those wishing to undertake terrorist acts against Australia.

151. The process through which a control order is obtained pursuant to Division 104 is:

- a senior AFP member must seek the Attorney-General’s consent to request an interim control order on one of two grounds (this Bill expands the number of grounds, which are discussed in greater detail below)
- once the Attorney-General’s consent has been granted, the senior AFP member may request a control order from an issuing court
- the issuing court may only order an interim control order where it is satisfied on the balance of probabilities that making the order will satisfy the grounds on which the order is requested
- the issuing court must also be satisfied on the balance of probabilities that each of the obligations, prohibitions and restrictions to be imposed on the subject of the order is reasonably necessary, and reasonably appropriate and adapted, for the purposes of protecting the public from a terrorist act
- as soon as practicable (but at least 72 hours after) the issue of an interim control order, the AFP must decide whether to request the court to confirm the control order
- upon hearing submissions by the AFP, the subject of the control order, his/her lawyer, or in some instances the Queensland public interest monitor, the court may declare the interim control order void, revoke it or confirm it

- a confirmed control order may last for a period of up to 12 months from the date of the original interim control order, and
- the AFP or the subject of the control order may request that the court revoke or vary a confirmed control order at any time after it is served upon a person.

152. Control orders are a protective mechanism and constitute an important element of the counter-terrorism strategy. They provide the AFP with a means to request that a court impose obligations, prohibitions and restrictions on a person for the purpose of protecting the public from a terrorist act. The control order regime has been used judiciously to date — at September 2014, two control orders have been issued. This reflects the policy intent that these orders do not act as a substitute for criminal proceedings. Rather they should only be invoked in limited circumstances and are subject to numerous legislative safeguards that preserve the fundamental human rights of a person subject to a control order.

153. The control order regime in Division 104 engages several human rights. Outlined below are the rights that will likely be engaged by the continuation of the control orders regime.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR, right to freedom of movement in Article 12 of the ICCPR, right to a fair trial in Article 14 of the ICCPR, freedom of association in Article 22 of the ICCPR, right to privacy in Article 17 of the ICCPR, right to respect for family in Articles 17 and 23 of the ICCPR, right to freedom of expression in Article 19(2) of the ICCPR, right to work under Article 6 of ICESCR

154. Article 12 of the ICCPR provides that persons lawfully within the territory of a State shall have the right to freedom of movement within that State. Among the restrictions that may be placed on an individual subject to a control order is that they may be restricted from being in specified areas or places (paragraph 104.5(3)(a)), they may be prohibited from leaving Australia (paragraph 104.5(3)(b)) and they may be required to remain at specified premises between specified times each day, or on specified days (paragraph 104.5(3)(c)). Freedom of movement can be permissibly limited if the limitations are provided by law and are necessary to achieve a legitimate purpose, such as protecting national security and public order.

155. The control order regime is comprehensively prescribed by legislation. A person subject to a control order will only have their right to freedom of movement restricted on grounds clearly established by domestic law and on grounds which are in accordance with the requirements of Division 104. As well as being authorised by law, the purpose of the control order regime is to protect the Australian public from a terrorist act. This is because the circumstances in which a control order may be sought, including the expanded grounds proposed by this Bill are: where the order would ‘substantially assist in preventing a terrorist act’, or where a person has been providing training to or receiving from or participating in training with a listed terrorist organisation, engaging in a hostile activity in a foreign country or being convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or terrorist act.

156. The restriction of freedom of movement must be reasonable, necessary and proportionate to achieving this objective. These requirements are reflected in the legislative framework of the control order regime. An issuing court may only issue a control order where ‘the 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' (paragraph 104.4(1)(d)). This ensures that the restrictions on freedom of movement caused by a control order are no greater than is required to protect the welfare of the Australian public. The gravity of consequences likely to be occasioned by a terrorist act justifies a reasonable and proportionate limitation of free movement.

157. Article 22 of the ICCPR provides that everyone shall have the right to freedom of association with others. The control order regime may limit this right to the extent that an express restriction may be placed on the subject of a control order that prevents them from associating or communicating with specified individuals (paragraph 104.5(3)(e)). This may also relevantly impact upon the right to respect for family in Articles 17 and 23 of the ICCPR where a restriction is placed on an individual's right to associate with their own family members.

158. However, Article 22(2) allows for permissible limitations on the freedom of association where it is to advance a legitimate objective, one of which is the interests of national security. Moreover, the proportionality of a restriction on association is maintained on the basis that the restriction on associating with certain individuals requires a degree of specificity about the individuals whom a subject of a control order may not associate with. The associations that are restricted are those that increase the likelihood of a terrorist act being committed by the subject of the control order.

159. Moreover, the overarching requirement that a court be satisfied that any restriction be 'reasonably necessary' and 'reasonably appropriate and adapted' to protecting the public from a terrorist act prevents indiscriminate and disproportionate intrusions into an individual's freedom of association. Further, in identifying the appropriate restriction, the court is also required to take into account the impact of the restriction on the person's circumstances (subsection 104.4(2)). This additional safeguard ensures that each restriction is tailored to the subject of the control order and that specific circumstances inform the appropriateness of a restriction.

160. In addition to the above, any restriction under paragraph 104.5(3)(e) that prevents a person communicating or associating with specified individuals is limited.

Subsection 104.5(4) provides that the matters subsection 102.8(4) of the Criminal Code applies to paragraph 104.5(3)(e) in the same way as that subsection applies to section 102.8 and a person's association. 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).

161. Accordingly, a restriction on the freedom of association is reasonable, necessary and proportionate.

162. Article 17 of the ICCPR provides that no one shall be subject to arbitrary or unlawful interference with their privacy. The collection, use and storage of personal information constitutes an interference with privacy. The control order regime limits the right to protection against arbitrary and unlawful interferences with privacy to the extent it can require the person to wear a tracking device (paragraph 104.5(3)(d)), require the person allow

himself or herself to be photographed (paragraph 104.5(3)(j)) and allow impressions of a person's fingerprints to be taken (paragraph 104.5(3)(k)). These limitations on the right to privacy are justified on the basis they protect the public from a terrorist act. These obligations assist in advancing Australia's national security and ensure identification and enforcement of the control order. Photographs and impressions of fingerprints obtained under paragraphs 104.5(3)(j) and (k) are collected, stored and disclosed in accordance with the Australian Privacy Principles (noting that there have been no control orders since the enactment of the Australian Privacy Principles) and section 104.22—treatment of photographs and impressions of fingerprints.

163. The procedures by which this restriction on privacy is permitted are authorised by law and not arbitrary. The operation of the control order regime is prescribed clearly in Division 104. The use of the term 'arbitrary' suggests that any interference to privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable, necessary and proportionate to achieving that objective.

164. Legislative safeguards within the control order regime in Division 104 operate so as to not limit the right to privacy beyond what is reasonable, necessary and proportionate. These include that the restrictions imposed by a control order must be 'reasonably necessary' and 'reasonably appropriate and adapted' for the purpose of protecting the public from a terrorist act. Further, a photograph or impression of fingerprints obtained from the subject of a control order must only be used for the purpose for which they were taken – ensuring identification and enforcement of the order (subsection 104.22(1)). Subsection 104.22(3) creates an offence where a person uses the photograph or impression of fingerprints in a manner inconsistent with the purposes of ensuring compliance with the control order. The offence carries a maximum penalty of imprisonment for two years. Furthermore, a photograph or impression of fingerprints obtained from the subject of a control order must be destroyed as soon as practicable after 12 months after the control order ceases to be in force (subsection 104.22(2)). These guarantees seek to minimise the level of interference with privacy and demonstrate an intention to permit interference only to the extent that it is reasonable, necessary and proportionate to achieve a legitimate end.

165. The right to freedom of expression in Article 19(2) of the ICCPR can be limited by the control order regime to the extent that the subject of a control order may be prohibited or restricted from accessing or using specified forms of telecommunications or other technology, including the internet (paragraph 104.5(3)(f)). This is in accordance with a legitimate purpose in Article 19(3) on the grounds of national security.

166. The restriction on freedom of expression is justified on the basis that certain ideas that advocate terrorist acts or promote extremist ideologies may jeopardise national security and the communication of such ideas may endanger the liberty and safety of others. The legislative requirement that all restrictions be 'reasonably necessary' and 'reasonably appropriate and adapted' to prevent the public from a terrorist act ensures that restrictions on the freedom of expression are no greater than what is reasonable, necessary and proportionate to achieving the legitimate objective.

167. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. The impact of the control order regime on this right will be considered separately in respect of the amendment relating to the indicative maximum curfew.

168. Article 6 of ICESCR requires that State Parties must recognise the right to work, including the right of everyone to have the opportunity to gain their living by work which they freely choose or accept and take appropriate steps to safeguard this right. Article 4 of the ICESCR provides that States may only subject the rights contained in the Covenant to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society. The control order regime may limit this right to the extent it can authorise a prohibition or restriction on the person carrying out specified activities, including in respect of his or her work or occupation (paragraph 104.5(3)(h)).

169. The restriction on the right to work has been authorised by law and is subject to important legislative safeguards. Intrusions into the right to work at a place of choice are limited by the legislative requirement that the restriction be ‘reasonably necessary and reasonably appropriate and adapted’ to protect the public from a terrorist act. This clarifies that the restriction is an important part of achieving the objectives of the control order regime and that the impact on the rights of the individual subject to the control order is not greater than is necessary to achieve this objective. Of particular importance is the requirement that courts also turn their mind to the specific impact of a restriction on a person’s circumstances, including the person’s financial and personal circumstances. This ensures that any of the proposed restrictions on a subject of a control order cannot be characterised as disproportionate as they do not impose restrictions where they are not specifically needed.

170. More broadly, the control order regime is confined in its scope and its propensity for misuse by a range of legislative safeguards that protect the rights of the subject of a control order. For instance, the right to a fair trial and due process under Article 14 of the ICCPR is enhanced by:

- the requirement that the control order only come into force when the individual is notified of it (section 104.12)
- the subject’s right to apply for the order to be varied, revoked or declared void as soon as they are notified that an order is confirmed (section 104.18)
- the subject of the order and their lawyer’s right to obtain a copy of the order outlining the reasons for the order (section 104.13), and
- a court’s ability to revoke or vary a confirmed control order on an application made under sections 104.18 or 104.19 (section 104.20).

171. In addition, the control order regime cannot be sought in respect of children under the age of 16. The regime operates in a modified fashion for persons between the age of 16 and 18. Finally, the reporting requirements placed upon the Attorney-General also provide an element of transparency by requiring Parliament to be kept abreast annually on the operation of the control orders regime (section 104.29).

172. The retention of the control order regime engages a variety of human rights. To the extent that such rights are limited, the restrictions are reasonable, necessary and proportionate to achieving the legitimate objective of protecting the public from a terrorist act and not compromising national security interests.

Attorney-General's consent to request an interim control order

173. The Bill amends the threshold for an AFP member seeking a control order under paragraph 104.2(2)(a) from ‘considers’ to ‘suspects’. This amendment means that an AFP applicant can request the Attorney-General’s consent for a control order based on a lower degree of certainty as to whether a control order would ‘substantially assist in preventing a terrorist act’.

174. Nevertheless, the threshold of ‘suspicion’ requires:

*more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to a "slight opinion", but without sufficient evidence...Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence." (Kitto J in *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 - quoted in *George v Rockett* (1990) 170 CLR 104).*

175. The threshold of ‘suspicion’ is not so low as to allow a control order to be issued arbitrarily or capriciously.

176. The limitations on the human rights identified above, particularly regarding the freedom from arbitrary detention and arrest in Article 9 of the ICCPR, that are likely to flow from amending the threshold may be justified on the basis that the amendment seeks to achieve a legitimate objective, being the promotion of Australia’s national security. The threat posed by individuals engaging in and returning from conflicts overseas is novel in its scale. The numbers of Australians now believed to be engaged in foreign conflicts presents a serious security threat to Australia. These individuals are politically or ideologically motivated and there is nothing in their beliefs that would suggest their motivations cease once they leave a foreign country and return to Australia. The amended threshold reflects the view that in the present threat environment, the restriction on the rights identified is justified given the heightened threat posed by foreign fighters.

177. Additionally, the important safeguards of ensuring the control order in fact protects the public from a terrorist act and that any restrictions are ‘reasonably necessary, and appropriate and adapted’ to this end ensure that the limitations on rights are no more than is reasonable, necessary and proportionate to achieving a legitimate objective.

178. However a person’s rights under Article 9 are ultimately protected by section 104.4 and the fact that a court must apply a balance of probabilities test to the evidence produced in support of the issuance of a control order before deciding to issue one.

Requesting an interim control order

179. Paragraph 104.2(2)(b) will be amended to include the following changes:

- expanding the limb to capture those participating in training with a listed terrorist organisations
- expanding the limb to capture those engaged in hostile activity in a foreign country (within the meaning of subsection 117.1(1)), and
- expanding the limb to capture those convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.

180. The impact of these changes is to extend the instances in which a control order may be sought. They will, in particular, apply to those who are suspected of participating in training with terrorist organisations or those engaged in hostile activity in a foreign country. The risk posed by these individuals is that their association with terrorist organisations and engaging in a hostile activity in a foreign country provides them with enhanced capabilities to undertake terrorist acts on Australian soil upon their return. The nature of the restrictions imposed by control orders will be subject to the overarching legislative requirements that includes consideration by the issuing court that any limitation be ‘reasonably necessary’ and ‘reasonably appropriate and adapted’ to protecting the public from a terrorist act. As such, it is expected that any limitations will be reasonable, necessary and proportionate to achieve the legitimate objective of preventing those with enhanced terrorist capabilities (as a result of participating in training with terrorist organisations or having engaged in foreign conflicts) from committing terrorist acts on Australian soil.

181. The application of a control order on an individual who has been convicted of a terrorism offence in Australia or in a foreign jurisdiction creates a technical difficulty because there is no agreed definition at international law. What constitutes terrorism may vary from country to country. A concern may arise about the indiscriminate use of this limb to place control orders on individuals whose conduct is not in an appropriate sense a terrorism-related offence in the Australian context. However, the additional requirements must be fulfilled before a control order is issued which ensures that the terrorism offence limb is not arbitrarily or capriciously used. Any restriction must still be ‘reasonably necessary, and reasonably appropriate and adapted’ to protect the public from a terrorist act. Accordingly, a control order will not be issued for offences characterised in foreign countries as ‘terrorism’ but in Australia pose no credible risk to the public of a terrorist act (as defined in section 100.1). A nexus between the previous conduct constituting terrorism in a foreign country and a threat to the Australian public of a terrorist act must be clear. Where no such nexus exists, a control order cannot be issued.

182. Article 14 of the ICCPR protects the right to a fair trial and in particular states that no one shall be punished for an offence for which they have already been fully convicted or acquitted in accordance with the law and penal procedure of each country. It may be contended that this right is infringed where control orders are applied to persons who have already been tried and punished for having committed a terrorism offence in Australia or a foreign country. However, the application of control orders to such individuals is justifiable on two grounds. Firstly, those convicted of terrorism offences and sentenced to a term of imprisonment may not have satisfactorily rehabilitated and may show continued dangerousness. Upon their return into society, they may hold the type of radical political or ideological beliefs that previously inspired them. As such, they still pose a significant security threat to Australia and its national security interests. Secondly, the control order regime does not constitute a criminal penalty as is neither punitive nor retributive. Rather, the regime seeks to protect members of the public from the risk of terrorist acts by placing obligations, prohibitions and restrictions on the controlled person’s involvement in activities. Accordingly, this amendment does not further punish those who have been convicted or acquitted in accordance with the law.

Indicative maximum curfew

183. Currently, paragraph 104.5(3)(c) does not indicate a length of time a person may be required to remain at specified premises between specified times each day, or on specified

days as part of a control order restriction. The Bill introduces a maximum curfew of twelve hours within a 24-hour period.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR

184. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law. It may be contended that the duration of time for which a subject of a control order may be subjected to could result in a form of detention (by requiring an individual to be in one place for twelve hours).

185. However, the curfew period cannot in any sense be considered ‘arbitrary’. The conditions of a restriction to remain within specified premises is established by and granted in accordance with the law. In determining whether a restriction on a person’s movement for an extended period is acceptable, the issuing court must consider whether the restriction is ‘reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act’ (paragraph 104.4(1)(d)). Furthermore, the court must also take into account the impact of the restriction on the person’s circumstances, including the person’s financial and personal circumstances (subsection 104.4(2)). These remove the element of arbitrariness from an extended curfew and ensure that any limitations on an individual’s rights are reasonable, necessary and proportionate.

Advising controlled persons of their rights

186. The amendment to paragraph 104.12(1)(b) requires that the AFP member inform the person that he or she has the following legal rights in relation to the interim control order: the right to appeal and review rights in relation to the decision of the issuing court, the person’s right to attend court to confirm or declare or revoke the interim control order, the right of the person (or their representatives) to adduce evidence if the interim order is confirmed, the person’s right to apply for a variation or revocation if the interim order is confirmed and the person’s right (or their representative) to adduce evidence in relation to an application to revoke or vary the control order if it is confirmed. This amendment is supported by the views expressed by the COAG Review in its report on Australia’s counter-terrorism legislation.

Right to a fair trial in Article 14 of the ICCPR

187. The subject of a control order has his or her right to a fair trial under Article 14 of the ICCPR promoted by this amendment. The subject of the control order is given the opportunity to be fully alerted of their rights under the control order regime and of the appropriate means of appeal should he or she wish to challenge the application of the control order. The subject of a control order is appropriately informed of the procedures that will allow him or her to protect their own rights, including adducing evidence to support the variation or revocation of a confirmed control order. These measures cumulatively promote an individual’s right to a fair trial.

Retention of the preventative detention order regime in Division 105

188. The Bill extends the operation of the PDO regime for a further ten years, following the expiration of the sunset period on 16 December 2015. This amendment is intended to recognise the enduring nature of the terrorist threat and the importance of ensuring that law

enforcement agencies have the necessary preventative tools to counter imminent and severe national security threats.

189. The key elements of the PDO regime pursuant to Division 105 are:

- the AFP applicant and the issuing authority must be satisfied of three matters: the terrorist act is imminent (within the next 14 days), the making of the order would ‘substantially assist in preventing a terrorist act occurring’ and detaining a person is reasonably necessary to prevent a terrorist act occurring
- there is a limited duration for which a PDO operates, being a maximum of 48 hours with the requirement to seek the approval of an issuing authority for an extension beyond the initial 24 hours
- where a PDO is made on an evidence preservation basis, the AFP member and issuing authority must be satisfied that a terrorist act has occurred within the last 28 days, that it is necessary to detain the person to preserve evidence of, or relating to the terrorist act, and that detention is a reasonably necessary step in achieving this outcome
- an AFP member may apply to an issuing authority for a continued PDO. The issuing authority may authorise a continued PDO after considering afresh the merits of any application and whether the statutory criteria for the order being made is satisfied. The period of time of detention, including any initial periods, must not be greater than 48 hours
- a prohibited contact order may be sought where it is reasonably necessary to prevent serious harm to a person, to avoid a risk of action being taken to prevent the occurrence of a terrorist act, and to avoid other specified risks, and
- the key review mechanisms include: the detainee’s right to apply, on expiration of the order, to the Security Appeals Divisions of the AAT to seek merits review of the decision to make or extend an order; the detainee’s right to bring proceedings in a court on expiration of the order relating to the issuing of the order or their treatment in detention; or limited right to review of a Commonwealth order on grounds available in reviews of state and territory orders.

190. The PDO regime engages several human rights. The restriction on human rights resulting from the continuation of the PDO regime are justifiable on the basis they are in pursuit of achieving a legitimate objective – being the detention of individuals where there are reasonable grounds to suspect they will engage in a terrorist act, possess a thing connected with engaging or preparing for a terrorist act, have done an act in preparation for or planning a terrorist act; or it is necessary to detain the person to preserve evidence relating to a recent terrorist act. To the extent that particular rights have been limited, such limitations are reasonable, necessary and proportionate to achieving this legitimate objective. Outlined below are the human rights implications.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR, freedom of movement in Article 12 of the ICCPR and right to a fair trial in Article 14 of the ICCPR, right to be treated with humanity and dignity under Article 10 of the ICCPR, freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and CAT

191. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such

procedure as are established by law. That means a person can only be subject to a PDO where the grounds for such an order are clearly established in domestic law. The law itself should not be arbitrary and must not be enforced in an arbitrary manner. This means that detention must not only be lawful, but reasonable and necessary in all the circumstances.

192. The PDO regime is not arbitrary as its operation is governed by the legislative framework in Division 105. This ensures that it is only applied for the purposes of preventing an imminent terrorist act occurring or to preserve evidence of, or relating to, a recent terrorist act. The resulting detention from a PDO achieves the legitimate objective of protecting Australia and its national security interests. This is attained by preventing a crime occurring or to preventing interference with evidence relating to a terrorist act. In practice, the AFP has not yet had to rely on the use of a PDO, demonstrating the fact that the PDO regime has not been applied arbitrarily and inappropriately. It is aptly considered an avenue of last resort and only to be applied in the most severe of circumstances. Accordingly, the PDO regime cannot be said to infringe upon an individual's freedom from arbitrary detention or arrest.

193. Article 12 of the ICCPR provides the right to freedom of movement. The legitimate aim to be pursued by limiting the freedom of movement in respect of PDO is the prevention of an imminent terrorist act or the preservation of evidence relating to a recent terrorist act. Nevertheless, the means through which a legitimate objective is achieved must be reasonable, necessary and proportionate.

194. The PDO regime provides sufficient protection against unreasonable and disproportionate limitations of an individual's right to freedom of movement. This is evidenced by the high threshold required to be satisfied when applying for and issuing a PDO. The application for a PDO requires that an AFP member must be satisfied on 'reasonable grounds' that the suspect will engage in a terrorist act, possess a thing related to or done an act in preparation for or planning a terrorist act (paragraph 105.4(4)(a)). Even if this is satisfied, an AFP member must still demonstrate that the PDO will 'substantially assist in preventing a terrorist act occurring' and demonstrate that detention is 'reasonably necessary' for the purpose of preventing a terrorist act (paragraphs 105.4(4)(b) and (c)). Similar requirements exist in respect of application for a PDO for the preservation of evidence of, or relating to, the terrorist act (subsection 105.4(6)). A continued PDO under section 105.12 requires the issuing authority to consider the merits of the application afresh prior to issuing a continued PDO. Each of these requirements limits the instances under which a PDO may be sought and demonstrates that a PDO is applied only when reasonable, necessary and proportionate.

195. Article 17 of the ICCPR provides that no one shall be subject to arbitrary or unlawful interference with their privacy. The PDO regime limits such a right where it allows a police officer by force to take identification material from a person if 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 PDO. The restriction on the right to privacy is articulated clearly in section 105.43 and not in any relevant sense arbitrary. Further, identification of a PDO subject is a legitimate objective. The failure to properly identify the intended subject of the PDO could result in the wrong individual being subject to detention. This is a risk that can be reasonably mitigated by limited incursions into one's right to privacy. Any material obtained must be destroyed as soon as practicable after the end of that period. Accordingly, the restriction on the right to privacy is not arbitrary and is a reasonable, necessary and proportionate measure.

196. The PDO regime has important legislative safeguards which preserve a variety of human rights. For instance:

- Article 7 of the ICCPR and the CAT prohibit conduct which may be considered cruel, inhuman or degrading treatment or punishment. Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the person. These rights are protected by section 105.33 which guarantee that a person detained must be treated with humanity and not be subjected to cruel, inhuman or degrading treatment. A contravention is an offence under section 105.45 which results in two years' imprisonment.
- Article 37(3) of the CRC guarantees that a child who is deprived of his or her liberty shall be separated from adults unless it is in a child's best interest not to do so. Section 105.33A guarantees this right and creates an offence where a senior AFP officer fails to do so.
- Article 37(3) of the CRC also protects the rights of the child to maintain contact with his or her family through correspondence and visits, except in exceptional circumstances. Section 105.39 protects the right of a child to have contact with a parent or guardian for a period of two hours a day or such longer period as specified in the PDO (subsection 105.39(5)).
- Article 14 of the ICCPR provides fair trial rights and minimum guarantees in criminal proceedings. The PDO regime requires that an AFP member advise the person detained under the order of particular matters about the regime, including their right to make representations before a senior AFP member, to contact a lawyer and family members and to make complaints to the Commonwealth Ombudsman. The availability of an interpreter to communicate certain obligatory matters is covered by section 105.5A and further enhances a person's rights under Article 14.

197. The enduring nature of the terrorist threat and the heightened risk posed by returning foreign fighters justifies the continued existence of the PDO regime. In the evolving terrorism landscape, it remains an appropriate preventative mechanism in rare situations where immediate and preventative action is required by Australia's law enforcement agencies.

State of mind of an AFP member—issuing criteria

198. Currently, the issuing and application criteria for a PDO require that the AFP member and the issuing authority be satisfied of the matters in subsections 105.4(4) and 105.4(6). Accordingly, paragraph 105.4(4)(a) requires that both the applicant and the issuing authority must hold the same state of mind in relation to the existence of the matters set out in subparagraphs (i)-(iii). This amendment prescribes a different state of mind for the AFP member who is now required to 'suspect, on reasonable grounds' of one of the matters set out in subparagraphs (i)-(iii). This produces a dual subjective-objective requirement, as opposed to the formerly objective requirement.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR

199. This amendment engages the right to freedom from arbitrary arrest or detention in Article 9 of the ICCPR. It is unlikely that this amendment could be considered 'arbitrary' in

any sense as it is clearly articulated in section 105.4 and accordingly, established by law. Despite amending the threshold for an AFP applicant, an important safeguard that remains unchanged is the state of mind required of the issuing authority under section 105.4. Furthermore, the existing safeguards within the PDO regime ensure that the operation of a PDO is not arbitrary and occurs for no longer than is necessary to prevent imminent threats to Australia's national security.

Evidence preservation orders – issuing criteria

200. The Bill provides that a PDO may be sought where it is ‘reasonably necessary’ to preserve evidence of, or relating to, the terrorist act. The amendment was proposed by the INSLM who considered that from a practical perspective, the ‘necessary’ requirement alone would prove a difficult threshold to be satisfied of, effectively requiring satisfaction that the destruction or loss of evidence will occur.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR

201. This amendment does not ‘arbitrarily’ deny an individual their right to freedom from detention and arrest as it is clearly articulated in section 105.4 and accordingly, established by law. Its operation is clear and appropriate and justifiable on the basis that it seeks to achieve a legitimate objective. The legitimate objective in this instance is to allow the AFP to more effectively investigate and gather evidence of, or relating to, terrorist acts. The obtaining of vital evidence assists in the prosecution of those engaging in terrorist acts and provides a strong deterrent for others who may wish to undertake such acts.

Verbal and electronic applications in urgent circumstances

202. The Bill provides for the making and issuing of an initial and extended PDO on an urgent basis by electronic or verbal means. The measure similarly provides for the making and issuing of a prohibited contact order on an urgent basis by electronic means. A new provision will also be included to clarify that an urgent prohibited contact order may be sought in parallel with an application for an urgent initial PDO by electronic means. Urgent application will be permissible only if a senior AFP member considers that it is necessary because of specific urgent circumstances. This amendment does not engage any human rights.

Application of PDO where an individual’s full name is not known

203. The Bill will allow a senior AFP member to make an initial PDO where a person’s full name is not known, but they are able to be identified as the intended subject of the PDO. Such situations arise where someone is known by an alias or partial name.

Freedom from arbitrary detention and arrest in Article 9 of the ICCPR

204. This amendment does not ‘arbitrarily’ deny an individual their right to freedom from detention and arrest as it is clearly articulated in section 105.4 and accordingly, established by law. This expansion of the breadth of operation of the PDO regime does not provide decision-makers with unfettered discretion regarding when a PDO will apply.

205. Furthermore, the limitation is justified on the basis that the PDO is applicable only to prevent imminent terrorist acts or to preserve evidence of, or relating to, a terrorist act. These acts pose a threat to Australia and its national security interests. The failure of law

enforcement agencies to act proactively and efficiently to prevent such threats could result in threats to the safety of others. The legitimacy of the amendment is further supported by the fact that law enforcement officials will still need to be able to identify the individual who is to be the subject of a PDO to a reasonable level of certainty, for instance, by knowing the individual's identity through a partial name or alias. Given the grave consequences of a failure to prevent imminent terrorist acts, the allowing of a PDO to be issued for individuals whose full names are not known is a reasonable, necessary and proportionate response.

New Part 5.5 (Foreign incursions and recruitment) of the Criminal Code

206. These amendments flow from the repeal of the Foreign Incursions Act and the transfer of its contents to new Part 5.5 of the Criminal Code.

Amendment of the definition of ‘recruit’

207. New subsection 117.1(1) of Part 5.5 of the Criminal Code will amend the definition of ‘recruit’ from ‘procure, induce and incite’ in subsection 3(1) of the Foreign Incursions Act so that it is consistent with Part 5.3 (Terrorism) of the Criminal Code, being ‘induce, incite and encourage’. This amendment will modernise the definition used in relation to foreign incursion and recruitment offences and provide clarity and consistency in relation to the definition of ‘recruit’ in the Criminal Code. The new definition will include ‘encourage’ which is not novel as the definition of ‘incite’ in the Foreign Incursions Act includes ‘encourage’. ‘Incite’ was separately defined in the Foreign Incursions Act as including ‘urge, aid and encourage and also includes print or publish any writing that incites, urges, aids or encourages’. On this basis, it is a largely technical amendment.

Right to freedom of expression in Article 19 of the ICCPR

208. Article 19(2) of the ICCPR provides that everyone has the right to freedom of expression, including the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media. This includes the freedom to receive and impart information. Article 19(3) provides that this right may be subject to certain restrictions that are established by law and are necessary for the protection of national security.

209. Amending the definition of ‘recruit’ in relation to foreign incursions, while already an offence, may operate to restrict the free expression of ideas where the expression involves recruiting persons to join organisations acting against the governments of foreign countries or to serve in or with an armed force in a foreign country. Recruiting for a terrorist organisation, including encouraging a person to join, is already a criminal offence under the Criminal Code. Permissibly limiting freedom of expression to prevent individuals undertaking this type of behaviour, in particular, from recruiting individuals to join organisations engaged in hostile activities against foreign governments, is necessary to protect national security by assisting in preventing the recruitment of individuals to take part in violent conflicts overseas.

210. Statistics indicate that a significant number of Australians have already been recruited in Australia and are engaged as foreign fighters in conflicts in Syria and Iraq. When these individuals return to Australia, they often possess enhanced capabilities to undertake terrorist and other acts that could threaten the Australian Government and people in Australia. On this basis, to the extent that amending the definition of ‘recruit’ engages and limits the right to

freedom of expression, such a limitation is necessary in the interests of Australia's national security. It is a reasonable and proportionate measure to discourage the recruitment of Australians in Australia from partaking in foreign conflicts, particularly where terrorist organisations are involved.

Definition of ‘engages in subverting society’

211. The previously undefined phrase ‘engaging in armed hostilities in a foreign State’ in paragraph 6(3)(aa) of the Foreign Incursions Act has been substituted with the phrase ‘engages in subverting society’ in new subsection 117.1(1) of the Criminal Code. The definition of ‘engages in subverting society’ provided at subsection 117.1(3) refers to conduct similar to that which constitutes a ‘terrorist act’ in section 100.1. This is intended to ensure that a narrow interpretation of impermissible conduct under the foreign incursions regime is not adopted. Accordingly, the broader definition of what amounts to engaging in a hostile activity ensures that conduct, which at its most serious could result in another person’s death, is appropriately deterred. This amendment is a technical amendment to provide clarity and does not engage any human rights.

Including ‘a section of the public’ to align with the *Criminal Code*

212. The Bill amends subparagraph 6(3)(b) of the Foreign Incursions Act (new subsection 117.1(1) in the Criminal Code) to insert the text ‘the public, *or a section of the public*, in the foreign State’ to ensure that conduct otherwise criminalised under the foreign incursions regime, but directed at causing by force or violence a small minority group in a foreign State to be in fear of suffering or death or personal injury, is not excluded.

213. This amendment is consistent with the objectives of the foreign incursions regime and also ensures consistency with the wording of the provisions in section 100.1 of the Criminal Code concerning intimidation of the public or a section of the public. This is consistent with the INSLM’s recommendation in the Fourth Annual Report. This amendment is a minor measure and technical in nature and, consequently, does not engage any human rights.

Offences of incursions into foreign countries with the intention to engage in hostile activities

214. New section 119.1 of Part 5.5 of the Criminal Code will replace section 6 of the Foreign Incursions Act. This section was drafted to criminalise engaging in a hostile activity in a foreign country or entering a foreign country with the intent to engage in a hostile activity in that foreign country. The INSLM’s Fourth Annual Report and the COAG Review both highlighted that in order to overcome the practical difficulties of proving a particular foreign country was the target destination, the section should be amended to remove the need to prove an intention to engage in hostile activity in a particular foreign country. This will enable intervention by the Commonwealth Director of Public Prosecutions at an ‘appropriately preparatory stage’ where an individual may be contemplating undertaking incursions in various theatres of violence, but plans to travel to a third country to obtain training, materials or guidance as to his or her ultimate destination. It will also capture a situation where a person enters a foreign country without the intention to engage in hostile activity and then forms an intention to engage in hostile activity in that country.

Right to a fair trial in Article 14 of the ICCPR

215. Article 14 of the ICCPR provides that, in the determination of any criminal charge against a person, that person shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. Article 14 also contains a range of minimum guarantees in criminal proceedings. The amendment addresses practical difficulties that have arisen in prosecuting persons and will enable a broader range of conduct to be captured under the offence provisions. In this regard, the amendment engages the right to a fair trial. However, the inherent safeguards guaranteed by Australian court proceedings and the requirement on the prosecution to discharge the burden of proof by having to make out all the elements of an offence mean that a defendant's right to receive a fair trial has not been limited as a result of this amendment. The new section 119.1 will not apply retrospectively.

Alignment of penalty provisions with the Criminal Code

216. As part of the alignment of the Foreign Incursions Act to the existing provisions of the Criminal Code, the offences under sections 6, 7 and 8 of the CFIRA will be made consistent with the reflecting Criminal Code offences. Accordingly, offences against section 6 of the Foreign Incursions Act (now subsection 119.1(1)) will align with the terrorist act offence at section 101.1 of the Criminal Code with the penalty increased from a maximum period of 20 years' imprisonment to life imprisonment. Offences for preparation for incursions into a foreign country in section 7 of the Foreign Incursions Act (now subsection 119.4(1)) will align the terrorist act preparation offence at section 101.6 of the Criminal Code with the penalty increased from a maximum period of ten years' imprisonment to life imprisonment. Finally, offences of recruitment for foreign incursions in section 8 of the Foreign Incursions Act (now section 119.6) will align with the terrorist organisation recruitment offence at subsection 102.4(1) of the Criminal Code with the penalty increased from a maximum period of seven years' imprisonment to 25 years' imprisonment. These amendments will not operate retrospectively.

Right to freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the CAT, right to freedom from arbitrary detention in Article 9 of the ICCPR

217. Article 7 of the ICCPR and the CAT prohibit conduct which may be considered cruel, inhuman or degrading treatment or punishment ('ill treatment') and can be either physical or mental. The United Nations treaty bodies responsible for overseeing the implementation of these treaties have provided guidance on the sort of treatment that is prohibited. Examples of cruel, inhuman or degrading treatment include unduly prolonged detention that causes mental harm. Punishment may be regarded as degrading if, for instance, it entails a degree of humiliation beyond the level usually involved in punishment. These rights are absolute and cannot be limited in any way. Relatedly, Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.

218. The increased penalties for foreign incursion and recruitment offences are proportionate and reflect the gravity of these offences. Australians engaged in foreign conflicts act to destabilise foreign governments and may be involved in the perpetration of violence, which at its most serious could involve unlawful death or an intention to cause unlawful death. Moreover, those returning from foreign conflicts to Australia may have enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia.

To this extent, the penalty provisions reflect the seriousness of the offences and the threat posed to the national security of Australia and people in Australia.

219. Persons charged with these offences will have a fair trial in accordance with Article 14 of the ICCPR. If a person is convicted of one of these offences, the presiding judicial officer will have discretion to impose a penalty that reflects the gravity of the offence taking into account the nature of the conduct and the particular circumstances of the person. Furthermore, the periods of imprisonment do not impose mandatory minimum periods of imprisonment. If convicted, defendants will be sentenced to imprisonment in a State or Territory facility and will not be treated any differently to other prisoners.

220. The penalties are also consistent with the established principles of Commonwealth criminal law policy as set out in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* by imposing heavier penalties where the consequences of the offence are particularly dangerous or damaging. Accordingly, the increased penalties are proportionate to the seriousness of the offences and will not result in the imposition of periods of imprisonment that would constitute cruel, inhuman or degrading treatment or punishment.

New offence of entering, or remaining in a ‘declared area’

221. A new offence will provide that a person commits an offence if the person enters, or remains in, an area in a foreign country and that area is an area declared by the Foreign Affairs Minister. The offence will not operate retrospectively. An area will be declared where the Foreign Affairs Minister is satisfied that a terrorist organisation listed under the Criminal Code is engaging in a hostile activity in that area of the foreign country. A declaration may cover areas in two or more countries or an entire country if the Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity in each of those areas or throughout the country.

222. This offence will not prevent a person from travelling overseas, including to a declared area, for a legitimate purpose or purposes. An individual suspected of entering, or remaining in, a declared area can rely on the offence-specific defence by pointing to evidence of their sole legitimate purpose or purposes for entering, or remaining in, the area. Consistent with the normal rules for criminal prosecutions, the prosecution will then be required to prove that the person was not in the declared area solely for that purpose or purposes beyond reasonable doubt.

223. New subsection 119.2(3) provides that the following conduct will be classed as a legitimate purpose for the purposes of the offence:

- a. *providing aid of a humanitarian nature;*
- b. *satisfying an obligation to appear before a court or other body exercising judicial power;*
- c. *performing an official duty for the Commonwealth, a State or a Territory;*
- d. *performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a State or a Territory;*
- e. *performing an official duty for the United Nations or an agency of the United Nations;*

- f. making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist;
- g. making a bona fide visit to a family member;
- h. any other purpose prescribed by the regulations.

224. The ability to prescribe other purposes under regulations is an important safeguard in the event other purposes that should be covered by the defence emerge over time. A note at the end of section 119.2 provides that sections 10.1 and 10.3 of the Criminal Code also provide exceptions to subsection 119.2(1) relating to intervening conduct or event and sudden and extraordinary emergency respectively.

225. The legitimate objective of the new offence is to deter Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in, a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes might engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be employed to facilitate terrorist or other acts in Australia. The new offence will enable the prosecution of people who intentionally enter an area in a foreign country where they know, or are aware of a substantial risk, that the Australian Government has determined that terrorist organisations are engaging in a hostile activity and the person is not able to demonstrate a sole legitimate purpose or purposes for entering, or remaining in, the area. The maximum penalty for this offence is ten years' imprisonment. Reflective of the heightened threat to Australia currently emanating from overseas conflict zones, the offence will be subject to a ten year sunset clause.

Right to a fair trial and presumption of innocence in Article 14 of the ICCPR, right to freedom from arbitrary detention in Article 9 of the ICCPR, prohibition on cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and CAT and freedom of movement in Article 12 of the ICCPR

226. Article 14 of the ICCPR provides the right to fair hearing by a competent, independent and impartial tribunal established by law and Article 14(2) provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law. It imposes on the prosecution the burden of proving a criminal charge and guarantees that no guilt can be presumed until the charge has been proved beyond reasonable doubt. Offences that contain a 'reverse burden', particularly a legal, as opposed to an evidential burden, may limit the presumption of innocence. This includes a situation where the defendant has to provide evidence in relation to an offence-specific defence. This is because a defendant's failure to discharge a legal or evidential burden may permit their conviction despite reasonable doubts as to their guilt.

227. The new offence does not reverse the onus of proof as guilt is not presumed. However, it requires the defendant to provide evidence of a sole legitimate reason for entering a declared area which shifts an evidential burden to the defendant. This requires the defendant to adduce evidence that suggests a reasonable possibility that they have a sole legitimate purpose or purposes for entering the declared area. Once that evidence has been advanced by the defendant, the burden shifts back to the prosecution to disprove that evidence beyond reasonable doubt.

228. The defendant may adduce evidence to justify his or her presence in a declared area on two bases. The first is where the individual is solely there in the course of the person's service in any capacity with the armed forces of the government of a foreign country or any other armed force if a declaration under subsection 119.8(1) covers the person and the circumstances of the person's service in or with the force. The second is where the defendant is in the declared area solely for one or more 'legitimate purposes'. A list of legitimate purposes is outlined in subsection 119.2(3).

229. The new offence under section 119.2 does not reverse the onus of proof or limit the presumption of innocence. To the extent that there is a limitation on Article 14 of the ICCPR, those limitations are reasonable, necessary and proportionate to countering the threat posed to Australia and its national security interests by foreign fighters returning to Australia from areas where the Foreign Affairs Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity.

230. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law. The UN Human Rights Committee has stated that 'arbitrariness' includes the elements of inappropriateness, injustice and a lack of predictability. Arbitrariness can result from a law that is vague and provides for the exercise of powers in a broad range of circumstances that are not sufficiently defined. However, arrest or detention may be considered reasonable and necessary where it is required in the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime. In relation to this offence, arrest, detention or the deprivation of liberty of a convicted person is not 'arbitrary' in the sense that the offence is established by law and its application is clear and predictable. The amendment to Part 5.5 clearly outlines the legislative framework and requirements necessary for a prosecution of the declared areas offence.

231. Article 7 of the ICCPR and CAT prohibits conduct which is regarded as cruel, inhuman or degrading treatment. Whilst the maximum penalty imposed by the offence is ten years imprisonment, the period of imprisonment does not include a mandatory minimum sentence and the presiding judicial officer will have discretion to impose a penalty that reflects the gravity of the offence taking into account the nature of the conduct and the particular circumstances of the defendant. The offence-specific defence of legitimate purpose is also available to the defendant. If convicted, defendants will be sentenced to imprisonment in a State or Territory facility and will not be treated any differently to other prisoners. As such any penalty imposed would not constitute cruel, inhuman or degrading treatment.

232. The penalty implements a gradation consistent with established principles of Commonwealth criminal law policy, as documented in the *Guide to Framing Commonwealth offences, Infringement notices and Enforcement Powers*. The Guide suggests that the maximum penalty should aim to provide an effective deterrent to the commission of the offence, and should reflect the seriousness of the offence within the relevant legislative scheme.

233. Article 12(1) of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. Article 12(2) provides that everyone shall also be free to leave any country, including his own. This right also extends to the right of the person to determine the country of destination. These rights can be permissibly limited if the limitations are provided by law and are necessary to advance a

legitimate objective. The new offence of declaring certain areas may limit the freedom of movement of persons who wish to travel to declared areas.

234. This limitation is justified on the basis that it achieves the legitimate objective of deterring Australians from travelling to areas where listed terrorist organisations are engaged in a hostile activity unless they have a legitimate purpose to do so. People who enter, or remain in a declared area will put their own personal safety at risk. Those that travel to a declared area without a sole legitimate purpose or purposes may engage in a hostile activity with a listed terrorist organisation. These people may return from a declared area with enhanced capabilities which may be used to facilitate terrorist or other acts in Australia. The radicalisation of these individuals abroad may enhance their ability to spread extremist messages to the Australian community which thereby increases the likelihood of terrorist acts being undertaken on Australian soil. Even with the existence of a legitimate objective, any restriction on the freedom of movement must still be reasonable, necessary and proportionate. Several factors indicate that the restriction achieves an appropriate balance between securing Australia's national security and preserving an individual's civil liberties.

235. The sole legitimate purpose defence provides an appropriate safeguard for individuals who have entered, or remained in, areas that have been declared. Individuals may lead evidence highlighting that their presence in a declared area was for a legitimate purpose and prosecution will be required to discharge its burden of disproving the existence of a legitimate purpose. The legitimate purpose defence captures common reasons for travelling, including the provision of humanitarian aid, undertaking official duty for a government or the United Nations or an agency of the United Nations, making a news report of events in the area by a professional journalist and making a genuine visit to a family member. Moreover, further legitimate purposes may be prescribed by regulations should additional grounds be required. The breadth of the grounds of defence is intended to ensure that legitimate travel is not unduly restricted by the new offence.

236. The new offence also contains safeguards that ensure the declaration process and prosecution processes are rigorous. Firstly, a declaration by the Foreign Affairs Minister requires that he or she be 'satisfied' that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country. As such, a declaration will not be made in an arbitrary manner. The Minister must also arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed declaration. Any declaration will be a disallowable legislative instrument. Secondly, a declaration of the Minister ceases to have effect on the third anniversary of the day on which it takes effect. The Minister is also not prevented from revoking a declaration where he or she ceases to be satisfied that the requisite criteria for declaration are satisfied. Thirdly, the Attorney-General's consent is required prior to the institution of proceedings in respect of offences in relation to the declared area.

237. On this basis, the impact of the new declared area offence on the right to freedom of movement is reasonable, necessary and proportionate in order to achieve the legitimate objective of protecting Australia and its national security interests.

238. Article 15 of the ICCPR imposes a prohibition against the retrospective operation of criminal laws. This right has not been limited by the creation of the new offence. The offence does not apply retrospectively and will only apply from the time of declaration of an area by the Foreign Affairs Minister. Only individuals who then enter or remain in the newly designated area will be subject to prosecution under the new offence.

Humanitarian aid defence

239. Section 7(1B) of the Foreign Incursions Act (new subsections 119.4(7) and 119.5(4) of the Criminal Code) provides a defence in relation to the offence of doing acts preparatory to a foreign incursion where a person does an act related to the provision of aid of a humanitarian nature. This amendment will limit the operation of the defence to instances where the conduct is for the sole purpose of providing humanitarian aid as opposed to one among other purposes. In his Fourth Annual Report the INSLM recommended that subsection 7(1B) be amended to include an exception for activities that are humanitarian in character and are conducted by or in association with the International Committee of the Red Cross, the UN or its agencies, and agencies contracted or mandated to work with the UN or its agencies. Whilst the INSLM's specific recommendation has not been implemented, the overarching rationale of the INSLM's recommendation, being that a broad humanitarian defence for terrorism offences is not appropriate, has been adopted. This amendment will appropriately limit the operation of the defence whilst ensuring that genuine humanitarian activities do fall within the scope of the offences at new sections 119.4 and 119.5. The amendment will also provide consistency with the operation of other humanitarian aid defences in the Criminal Code such as those at paragraphs 102.8(4)(c)—associating with terrorist organisations and 390.3(6)(b)—associating in support of serious organised criminal activity.

240. The policy rationale underlying the amendment is that the relevant offence under the foreign incursions regime is not compromised by persons who are engaged in armed hostilities in a foreign State who can then point to one small act of humanitarian aid to shield conduct that otherwise contravenes the objective of the offence. Rights to a fair trial in Article 14(1) and to the presumption of innocence in Article 14(2), which provides that everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law, are not limited. Individuals will have access to the humanitarian aid defence where they undertake prohibited acts solely for the purpose of providing humanitarian assistance. Importantly, the prosecution will still need to prove all the elements of the offence before the defendant is convicted. The amendment will not operate retrospectively.

Customs Act 1901

Amendment to the definition of ‘terrorist act’

241. The Bill repeals the definition of ‘terrorist act’ in section 183UA of the Customs Act and substitutes it with a cross-reference to the definition of ‘terrorist act’ in section 100.1 of the Criminal Code. This is a technical amendment that eliminates the need to constantly update the definition of ‘terrorist act’ in section 183UA as the definition in the Criminal Code changes. This amendment does not engage any human rights.

Foreign Evidence Act 1994

Amendment to rules of evidence

242. There are two components to the amendments to the Foreign Evidence Act. Firstly, the Act will be amended to enable material received from foreign countries on an agency-to-agency basis (i.e. through police channels, intelligence channels) to be adduced in terrorism-related proceedings. Secondly, the Act would be amended to allow the court greater

flexibility in determining whether to admit material obtained on an agency-to-agency basis or as a result of a mutual assistance request in terrorism-related proceedings. The amendments include safeguards such as a broad judicial discretion to prevent material from being adduced in terrorism-related proceedings if it would have a substantial adverse effect on the right of the defendant to receive a fair trial and a requirement to exclude material obtained as a result of torture or duress.

243. The INSLM and Australian law enforcement agencies have identified difficulties in the ability to obtain foreign evidence for terrorism-related proceedings in a form which complies with Australia's rules of evidence. In particular, Recommendation IV of the INSLM's Fourth Annual Report seeks to ensure existing provisions in the Foreign Evidence Act do not unnecessarily limit the court's ability to consider whether or not to admit foreign evidence.

244. Given the very serious nature of these offences and the need to protect the safety of the community, the amendments are designed to address these difficulties by providing the court with greater discretion to admit foreign material in appropriate cases. It recognises that the majority of evidence for terrorism-related offences may be located overseas and unable to be obtained in a way that would meet Australia's evidentiary requirements. The amendments aim to enable the investigating and prosecuting authorities to develop a brief of evidence that is able to be considered by the court without the majority of the evidence being automatically excluded on the basis that it fails to meet detailed rules of evidence in Australia.

245. In recognition of the fact that the mutual assistance process remains the preferred method for obtaining foreign evidence for use in Australian proceedings and to safeguard the rights of the defendant, the amendments include a range of safeguards that will need to be met before foreign evidence is able to be adduced and admitted in terrorism-related proceedings.

Right to a fair trial in Article 14 of the ICCPR

246. Article 14 of the ICCPR protects the right to a fair trial by providing that everyone shall be entitled to a fair trial by a competent, independent and impartial tribunal established by law.

247. The amendments to the Foreign Evidence Act will have the result of displacing the rules of evidence and exclusionary discretions in relation to all foreign evidence sought to be adduced in:

- criminal proceedings for a designated offence (defined in subsection 3(1)), which include offences against Part 5.3 of the Criminal Code, Part 5.4 of the Criminal Code, the Foreign Incursions Act (now Part 5.5 of the Criminal Code) and offences against subsection 34L(4) of the ASIO Act
- proceedings under the *Proceeds of Crime Act 2002* relating to a designated offence, and
- proceedings under Division 104 of the Criminal Code.

248. Under the new provisions, the adducing of material in terrorism-related proceedings will be subject to the exercise of a broad judicial discretion to prevent material from being adduced if the court is satisfied that adducing the material would have a substantial adverse

effect on the right of a defendant to receive a fair hearing. The amendments are a reasonable, necessary and proportionate response to the difficulty of adducing evidence from foreign states who are embroiled in conflict, or who lack the capabilities or capacity to respond to requests for mutual assistance. Responding to these difficulties requires an adjustment to the rules of evidence in limited circumstances whilst still maintaining the court's discretion to ensure a fair hearing for the defendant.

249. Critical safeguards remain to ensure that minimum standards of criminal procedure are not compromised or the right to a fair trial is not abrogated, including a broad discretion on the Court to not adduce material and a mandatory requirement to exclude material obtained by torture or duress.

250. Importantly, the broad discretion on the court under section 25A, as suggested by the INSLM, remains such that the court retains the discretion to direct that evidence not be adduced if doing so would have a substantial adverse effect on the right of the defendant to receive a fair hearing (this provision will be moved to new section 27B).

251. Furthermore, in any criminal proceedings, the defence will have the opportunity to challenge such evidence and produce their own evidence to discredit the prosecution's case. Inherent in the criminal procedure is also the requirement that the prosecution must discharge the burden of proof, demonstrating a defendant is guilty of a criminal offence beyond reasonable doubt. As such, notwithstanding the change to the rules of evidence that will apply, the prosecution will continue to need to prove all elements of the specific offence have been satisfied beyond reasonable doubt. The proposed amendments do not alleviate the prosecution of this duty.

The protection against the use of evidence obtained from torture in Article 15 of the CAT

252. Article 15 of the CAT states, Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings, except against a person accused of torture as evidence that the statement was made. The proposed amendments include provision for foreign material or foreign government material to be admissible unless the court is satisfied that the material or information contained in the material, was obtained directly as a result of torture in subsection 27C(3). This provision upholds Australia's international obligations under Article 15 of the CAT.

253. Further to the requirement to exclude material obtained as a result of torture, subsection 27C(2) also provides a mandatory exception to admissibility for material, or information contained in the material, directly obtained as a result of duress.

254. The inclusion of these mandatory exceptions recognises the seriousness of threats of the kind contained in the definition of 'duress' and the inherent unreliability of material or information obtained in such a manner. It provides an important safeguard to protect the fair trial rights of the defendant. Specifically, duress will exist in circumstances where a person performs actions because of threats of death or serious injury to themselves, or to family members, being threats of such a nature that a reasonable person would have yielded to them.

255. It is also critical to appreciate that the context within which this amendment is proposed is the threat posed by foreign fighters who have engaged in acts of violence in an overseas conflict. These individuals return to Australia with significantly enhanced

capability to conduct, encourage or support acts of violence in Australia and overseas. Prosecuting returning foreign fighters is a critical step in the disruption and prevention of terrorism in Australia. The proposed amendments to the rules of evidence are reasonable, necessary and proportionate in respect of crimes that constitute the gravest threat to the lives of Australians and Australia's national security interests.

Intelligence Services Act 2001

Repeal of requirement to review particular Acts

256. The Bill repeals the requirement in paragraph 29(1)(ba) of the *Intelligence Services Act 2001* (Intelligence Services Act) for the Parliamentary Joint Committee on Intelligence and Security (PJCIS) to review the operation, effectiveness and implications of the *Security Legislation Amendment (Terrorism) Act 2002*, the *Border Security Legislation Amendment Act 2002*, the *Criminal Code Amendment (Suppression of Terrorist Bombing) Act 2002* and the *Suppression of the Financing of Terrorism Act 2002*. This amendment repeals this paragraph on the basis that the PJCIS has already undertaken this review and presented its report in December 2006. This amendment does not engage any human rights.

Extending the PJCIS review period for Division 3 of Part III of the ASIO Act

257. The PJCIS is required to review the operation, effectiveness and implications of Division 3 of Part III of the ASIO Act by 22 January 2016. The Bill amends this requirement by altering the date by which the PJCIS must report to 22 January 2026. This is consistent with the extension of the operation of Division 3 of Part III of the ASIO Act to 22 January 2026 and recognises the recent INSLM reviews of those provisions ad ongoing role to review the operation and effectiveness of these provisions. The PJCIS review and the general powers of inquiry of the Inspector-General of Intelligence and Security (IGIS) ensures that the operation of Division 3 of Part III of the ASIO Act remains effectively monitored. This amendment does not engage any human rights.

Telecommunications (Interception and Access) Act 1979

Amendment of definition of 'serious offence'

258. The amendment to the TIA Act updates the meaning of a 'serious offence' in paragraph 5D(1)(e) to include a breach of a control order, and offences against Subdivision B of Division 80 and Division 119 of the Criminal Code. A 'serious offence' for the purpose of the Act is one for which declared agencies can seek interception warrants.

Right to protection against arbitrary and unlawful interferences with privacy in Article 17 of the ICCPR

259. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. The collection, disclosure, storage or use of personal information without a person's consent will engage, and limit, the protection from arbitrary and unlawful interference with privacy in Article 17 of the ICCPR. The interception of telecommunications is likely to engage an individual's right to freedom from arbitrary or unlawful interference with privacy. The right in Article 17 may be subject to permissible limitations, where the limitations are lawful and not arbitrary. Any interference with privacy must be authorised by law, for a reason consistent with the ICCPR and be reasonable in the

particular circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

260. The interception regime is clearly authorised by law and its application authorised by the legislative framework in the TIA Act. Before issuing an interception warrant, the relevant authority must be satisfied that the agency is investigating a serious offence, the gravity of the offence warrants intrusion into privacy and the interception is likely to support the investigation. This threshold acts as a safeguard against the arbitrary or capricious use of the interception regime.

261. This amendment allows for interception warrants to be used in respect of a particular class of offences. The offences identified, being treason, control order breaches and foreign incursion offences are those that jeopardise Australia and its national security interests and for which prevention and disruption are critical elements of the counter-terrorism strategy. The gravity of the threat posed by possible breaches of these regimes demonstrates a need to take reasonable steps to detect, investigate and prosecute those suspected of engaging in such conduct.

262. The inherent safeguards and controls built into the TIA Act ensure that any incursions into privacy are no more than is reasonable, necessary and proportionate. These safeguards include the heads of interception agencies providing the Secretary of AGD a copy of each telecommunication interception warrant and interception agencies providing reports the Attorney-General, within three months of a warrant ceasing to be in force, detailing the use made of information obtained by the interception. Moreover, there is independent oversight of the use of interception powers of law enforcement agencies by the Commonwealth Ombudsman. At least twice a year, the Commonwealth Ombudsman must inspect bodies such as the AFP in relation to their use, dissemination and destruction of intercepted information. The Commonwealth Ombudsman is also required under the TIA Act to report to the Attorney-General about these inspections, including any information about deficiencies identified and remedial action.

263. The safeguards identified and the legal framework around which interception warrants are issued ensure that the use of this power is prescribed by law and not arbitrary. Accordingly, the amendment is reasonable, necessary and proportionate to achieve the legitimate objective of assisting law enforcement agencies investigate serious crimes.

Terrorism Insurance Act 2003

Amendment to the definition of ‘terrorist act’

264. The Bill repeals section 5 of the *Terrorism Insurance Act 2003*. Section 5 currently reproduces in full the definition of ‘terrorist act’ found in section 100.1 of the *Criminal Code*. This is a technical amendment that eliminates the need to update the definition of ‘terrorist act’ in section 5 as the definition in the Criminal Code changes. This amendment does not engage any human rights.

Part 2 - Repeals

Crimes (Foreign Incursions and Recruitment) Act 1978

Repeal of the Crimes (Foreign Incursions and Recruitment) Act 1978

265. The Foreign Incursions Act will be repealed and its contents moved to new Part 5.5 of the Criminal Code. This is a technical amendment and does not engage any human rights.

SCHEDULE 2 – STOPPING WELFARE PAYMENTS

A New Tax System (Family Assistance) Act 1999 / Paid Parental Leave Act 2010 / Social Security (Administration) Act 1991 / Social Security (Administration) Act 1999 / Administrative Decisions (Judicial Review) Act 1977

Stopping welfare payments

266. This Schedule amends the Family Assistance Act, the PPL Act, the Social Security Act and the *Social Security (Administration) Act 1999* (*Social Security (Administration) Act*) to provide that welfare payments can be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been refused, on national security grounds. This is to ensure that the Government does not support individuals who are fighting or training with extremist groups. It is for the benefit of society's general welfare that individuals engaged in these activities do not continue to receive welfare payments.

267. Currently, welfare payments can only be suspended or cancelled if the individual no longer meets social security eligibility rules, such as participation requirements, and residence or portability qualifications. The new provisions will require the cancellation of a person's welfare payment when the Attorney-General provides a security notice to the Minister for Social Services. The Attorney-General will have discretion to issue a security notice where either:

- the Foreign Affairs Minister has notified the Attorney-General that the individual has had their application for a passport refused or had their passport cancelled on the basis that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, or
- the Immigration Minister has notified the Attorney-General that an individual has had their visa cancelled on security grounds.

268. The Foreign Affairs Minister and the Immigration Minister will also have a discretion whether to advise the Attorney-General of the passport or visa cancellation.

269. Welfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual and the cancellation of welfare would not adversely impact the requirements of security. This is to ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups are covered. It is not intended that every person whose passport or visa has been cancelled on security grounds would have their welfare payments cancelled, but would occur only in cases where it is appropriate or justified on the grounds of security.

270. Where an individual ceases to be eligible for welfare payments, the Secretary of DSS must cause reasonable steps to be taken to notify the individual of the cessation. In practice, notifying individuals who may be participating in overseas conflicts may not be possible.

Right to social security in Article 9 of the ICESCR

271. Article 9 of the ICESCR recognises the right of everyone to social security, including social insurance. Article 4 of ICESCR provides that countries may subject economic social and cultural rights only to such limitations ‘as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society’. The objective of the proposal to cancel welfare is to promote the general welfare of the Australian community by supporting national security and promoting public order. Specifically, the proposal addresses concerns about public monies in the form of social security payments being used by individuals to facilitate or participate in terrorist activities or fund terrorist organisations.

272. Social security payments are made to Australian residents to provide them and their families with a basic but adequate standard of living in Australia. Cancelling welfare payments to individuals of security concern will restrict their right to social security. However, this power will only be available where a person has had their passport cancelled or refused or their visa cancelled on security grounds. Furthermore, the Attorney-General will have the discretion to decide whether the welfare payment should be cancelled. In exercising this discretion it would be appropriate for the Attorney-General to have regard to relevant human rights considerations. In particular, the discretion means the Attorney-General is able to consider the individual circumstances of each case, including the applicable security concerns, the effect of welfare cancellation on the individual (including the availability of other sources of income), and the purposes for which the welfare payments are used.

273. CESCR notes that persons who claim violations of their right to social security should have access to effective judicial or other appropriate remedies. The decisions of the Foreign Minister, Immigration Minister and Attorney-General to issue notices will be reviewable under the ADJR Act, but there will be no requirement to provide reasons for the decision. This is because the decision to issue the notices will be based on security advice which may be highly classified and could include information that if disclosed to an applicant may put Australia’s security at risk.

274. Furthermore, given that any decision by the Attorney-General to cancel welfare payments is triggered by the cancellation of a visa or the cancellation of, or refusal to issue an Australia passport, an individual will be able to seek review of the decision to cancel a visa or the cancellation of, or refusal to issue, a passport. This would include merits review under the *Administrative Appeals Tribunal Act 1975* (AAT Act) of an adverse security assessment made by ASIO in support of those decisions.

275. The decisions to cancel welfare payments will be subject to judicial review under section 39B of the *Judiciary Act 1903* or section 75(v) of the Constitution.

The rights of parents and children in Article 24 of the ICCPR

276. Article 24(1) of the ICCPR provides that ‘Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or

birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.'

277. Family assistance payments made under the Family Assistance Act are to assist with the cost of raising children and are normally paid to the carer of the child who has responsibility for raising the child. The carer is responsible for using the payment as he or she sees fit to assist in raising the child. If a security notice is issued to an individual who has a child, the individual the subject of the notice would not be eligible to receive family assistance which would impact on their right to protect their child.

278. However, the purpose of the payment is for the child's benefit, to assist with the cost of raising them. Although the individual the subject of the security notice would not be able to claim the family assistance payment, the whole or a part of any amount that would have been payable may instead be paid to a payment nominee of the individual under Part 8B of the Family Assistance Act. This means that the payment may still be able to be used for the individual's family which promotes the rights of parents and children.

279. The Secretary of DSS will not have to take into account the wishes (if any) of the individual in appointing a nominee to receive the payment on the individual's behalf, but instead can appoint a nominee without consulting the individual. In practice it may be very difficult to contact the individual, especially if they are overseas fighting. In these circumstances, the parent is unable to fulfil their responsibilities and duties as a parent. Accordingly, the Secretary would appoint a nominee so that the benefit could still be paid to assist the child. This promotes the rights of the child.

SCHEDULE 3 – CUSTOMS’ DETENTION POWERS

Customs Act 1901

Customs detention power

280. Customs officers have the power to detain persons suspected of committing a serious Commonwealth offence or a prescribed State or Territory offence under section 219ZJB of the Customs Act. Broadly, the amendments to the detention power in section 219ZJB relate to:

- extending ‘serious Commonwealth offence’ to any Commonwealth offence that is punishable upon conviction by imprisonment for a period of 12 months or more
- expanding the applicability of the detention powers to include where an officer has reasonable grounds to suspect that the person is *intending* to commit a Commonwealth offence
- expanding the required timeframe by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours,
- introducing a new section with a new set of circumstances in which a person may be detained in a designated area that relates to national security or security of a foreign country.

281. Section 219ZJD will also be amended to extend the power to conduct a search of the person where it is to prevent the concealment, loss or destruction of information relating to a threat to national security.

Right to freedom from arbitrary detention in Article 9 of the ICCPR, freedom of movement in Article 12 of the ICCPR, right to freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and the CAT, right of persons deprived of liberty to be treated with humanity and dignity in Article 10 of the ICCPR

282. Article 9 of the ICCPR provides that no-one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedures as are established by law.

283. The Customs detention power and the expanded scope of this power under the new amendment are likely to engage the detainee's right to freedom from arbitrary detention. This power now exists in respect of a greater number of offences as a result of its application to any Commonwealth offence that is punishable upon conviction by imprisonment for a period of 12 months or more as opposed to its previously restricted application to only serious Commonwealth offences. It will also apply where there exist reasonable grounds to suspect that the person is *intending* to commit a Commonwealth offence. The new section will also allow an officer to detain a person where the officer is satisfied that the person is, or is likely to be, involved in activities that are or likely to be a threat to national security.

284. The expanded framework of the Customs detention power is established by law and its use is in accordance with the requirements of section 219ZJB. The new section that provides for detention in respect of those who pose a national security threat also applies only in respect of actions that potentially impact Australia's national security interests. These detention powers are appropriate in that they are applicable in respect of only Commonwealth offences where imprisonment is for a period of twelve months or greater or to national security matters which pose the gravest threats to the welfare of Australians.

285. The enhanced detention powers are part of the targeted response to the threat posed by foreign fighters. A crucial element of the preventative measures undertaken to limit the threat of returning foreign fighters is to prevent Australians leaving Australia to engage in foreign conflicts in the first instance. The detention powers of Customs constitute an important preventative and disruption mechanism. Preventing individuals travelling outside of Australia where their intention is to commit acts of violence in a foreign country assists in preventing terrorists acts overseas and prevents these individuals returning to Australia with greater capabilities to carry out terrorist acts on Australian soil.

286. Accordingly, the expanded detention powers provided by these amendments are not arbitrary or unlawful. They are prescribed by law and their use is confined such that its application is restricted to instances where it is reasonable, necessary and a proportionate response to achieving the legitimate objective of securing Australia's national security.

287. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. Everyone shall also be free to leave any country, including his own. This right can be permissibly limited if the limitations are provided by law and are necessary to advance a legitimate objective. The proposed amendments will limit the right of an individual to leave Australia or movement in a 'designated place' (defined in section 4 of the Customs Act).

288. The restriction on freedom of movement is permissible on the basis that the primary reason underlying the expanded detention powers is to target individuals thought to be threats to Australia's national security leaving the country. The detention powers of Customs are not indefinite and are subject to significant safeguards including the right in all but the most extreme situations to notify a family member or others of their detention (subsections 219ZJB(5) and (6) and 219JCA (5) and (6)) and the requirement that if the officer detaining the individual ceases to be satisfied of certain matters, they must release the person from custody (subsections 219ZJB(5) and 219ZJCA(4)). Accordingly, the restriction on the freedom of movement is reasonable, necessary and proportionate to achieving the legitimate objective of securing Australia's national security.

289. Article 17 of the ICCPR accords everyone the right to protection against arbitrary or unlawful interference with their privacy, family, home or correspondence. Lawful interference with the right to privacy will be permitted, provided it is not arbitrary. The term 'unlawful' means no interference can take place except as authorised by law and should be reasonable, necessary and proportionate.

290. The new section that provides for detention on the basis of threats to national security or security of a foreign country will also include extend the existing power of an officer to conduct a frisk and ordinary search of the person and a search of the person's clothing and any property within the person's immediate control if the officer believes on reasonable grounds it is necessary to do so for the purpose of preventing concealment, loss or destruction of evidence of, or relating to the offence concerned (paragraph 219ZJD(1)(d)). Current subsection 219ZJD(3) provides that the search must be conducted as soon as practicable after the person is detained and by an officer of the same sex as the detainee. An officer will also have the authority to seize anything the officer has reasonable grounds to believe is a thing with respect to the offence committed, that will afford evidence of the commission of an offence or that was used or intended to be used for the purpose of committing an offence (paragraph 219ZJD(3)(b)). These actions constitute incursions into the right of privacy on an individual detained. They encompass a physical search of the person, of their clothing and items under their control and a seizure of items. Such an incursion is not however unlawful as it will be authorised and applicable in accordance with section 219ZJD.

291. In its application, the frisk and ordinary search power is not arbitrary. Its use will be limited to instances where the individual is considered to be a threat to national security. National security concerns pose among the gravest threats to the welfare of Australians and the consequences of a failure to act can be severe. The destruction or concealment of evidence relating to a national security offence will also be critical in investigating and prosecuting those believed to be involved in activities such as terrorism. The prevention of terrorist acts and the prosecution of those engaged in terrorist activities is an important element of Australia's foreign fighter strategy to prevent and disrupt terrorism in Australia.

292. Moreover, the detention regime has important safeguards that ensure that the human rights of the detainee are appropriately limited to promote national security considerations. Important qualifiers such as 'reasonable grounds to suspect', 'as soon as practicable', 'take all reasonable steps' and 'believes on reasonable grounds' (section 219ZJB) ensure that application of the detention provisions are not arbitrary and subject to certain thresholds which require officers of Customs to consider whether use of the detention powers is appropriate in a given circumstance. Overall, the expanded detention regime under the Customs Act is reasonable, necessary and proportionate to achieving a legitimate objective, being the protection of Australia and its national security interests.

293. Article 10 of the ICCPR provides that all persons deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person. The UN Human Rights Committee stated that this right can be violated if a detainee is subjected to unreasonable restrictions on correspondence with his or her family. This right may be limited because it is proposed to extend the time by which an officer must inform the detainee of their right to have a family member or other person notified of their detention from 45 minutes to 4 hours.

294. However, it is not likely that the extension proposed from 45 minutes to 4 hours constitutes an unreasonable restriction on correspondence with the detainee's family. This increase of time is only in respect of Commonwealth offences which carry imprisonment of twelve months or greater as penalty. The current limit of 45 minutes may not provide Customs officers with sufficient time and opportunity to undertake enquiries once a person is detained.

295. In limited instances, the Customs detention regime allows an officer to refuse notification of a detainee's family or another person in particular circumstances (subsection 219ZJB(7)). It is proposed the current justifications for depriving the detainee of this right be extended to national security. This may be considered an unreasonable restriction on correspondence with the detainee's family.

296. However, the justifications, including national security, represent a reasonable and proportionate restriction on this right. This is because in order to make a decision to not notify a family member, the officer must believe on reasonable grounds that such notification will compromise the processes of law enforcement, endanger the life and safety of any person or compromise national security. These justifications provide reasonable limits on the right to notification. The safeguard provided by the qualifier 'believes on reasonable grounds', ensures that the deprivation of the detainee's right is not arbitrary and given due consideration.

297. The amendments proposed engage the right of detained persons to be treated with humanity and dignity. To the extent that the amendments proposed limit Article 10, the restrictions are reasonable, necessary and proportionate to achieve legitimate objectives such as not compromising national security, compromising law enforcement processes or endangering another's life.

SCHEDULE 4 – CANCELLING VISAS ON SECURITY GROUNDS

298. The amendments to the Migration Act include a new emergency visa cancellation power where a non-citizen outside of Australia might be a direct or indirect risk to national security.

New emergency visa cancellation power

299. The Migration Act contains a number of powers that provide the Australian Government with appropriate tools to manage the various risks that a non-citizen might pose to the Australian community. For example, where ASIO makes an assessment that a permanent visa holder is a direct or indirect risk to national security, existing section 501 of the Migration Act provides the capacity for a permanent visa holder in Australia to be considered for visa cancellation. Further, section 116 of the Migration Act provides for the cancellation of a temporary visa *onshore*, and a temporary or permanent visa *offshore* on the

grounds that the visa holder has been assessed as posing a direct or indirect risk to the Australian community (within the meaning of the ASIO Act).

300. However, these existing cancellation provisions do not adequately address the situation where ASIO receives intelligence about a permanent or temporary visa holder who is outside Australia, where that intelligence raises the possibility that that visa holder is a risk to the Australian community, but that intelligence alone is not sufficient to enable ASIO to furnish an adverse security assessment to meet existing legal thresholds in the Migration Act. This measure will enhance the Government's capacity to respond to prospective security threats in a responsive and proportionate manner. In limited circumstances, it will be both desirable and necessary that a visa be cancelled on the basis of the nature and extent of the security risk that a person might pose, as temporary mitigating action to permit further investigation and evaluation of the individual.

301. It is therefore proposed to amend Division 3 of Part 2 of the Migration Act to insert a new section providing for the mandatory cancellation of a visa where ASIO forms a reasonable suspicion that the visa holder *might* be a risk to security. Visa cancellation will have the effect of preventing that non-citizen from entering Australia for a limited period of 28 days to enable ASIO additional time to further consider the security risk posed by that individual. The amendments provide that visa cancellation will be revoked unless ASIO furnishes a subsequent security assessment that recommends against revocation having assessed that the person *is*, directly or indirectly, a risk to security within 28 days of the original cancellation decision. The visa will remain cancelled where they do. This amendment will also include consequential discretionary cancellation provisions for family unit members where the visa remains cancelled based on an assessment by ASIO that the person *is*, directly or indirectly, a risk to security. Family unit members' visas will not be considered for cancellation until and unless the main visa holder's visa cancellation has not been revoked.

302. This new emergency cancellation provision will apply to any visa (temporary or permanent) held by a non-citizen where that person is outside Australia and where ASIO provides an assessment to the DIBP containing:

- advice that the person *might* be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), and
- a recommendation that the visa be cancelled under the new emergency cancellation power on the basis of the intelligence currently held by ASIO.

303. The cancellation under the new provision will be mandatory, will be without notice or notification and will not be merits reviewable. Within the 28 day period following the emergency cancellation decision ASIO may issue an assessment that the person *is*, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), or provide an assessment containing a recommendation for revocation of the emergency cancellation.

304. Where ASIO does not issue a further assessment, or where ASIO recommends revocation within the 28 days, the amendments will require that the cancellation must be revoked. Where ASIO provides an assessment within the required period that the person *is*, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act), the visa will remain cancelled and the person will be notified of the decision as appropriate subject to security requirements as advised by ASIO. The person, if a former permanent visa

holder, would then be able to seek merits review of the adverse security assessment by ASIO at the AAT.

305. While members of the family unit of the visa holder will not be subject to the emergency cancellation pursuant to the new provisions outlined above, the proposed amendments do include a consequential cancellation power that would see their visas considered for discretionary cancellation in the event that ASIO provides a final assessment that the primary visa holder is a risk to security.

306. The Government views it as reasonable that a person, who only holds a visa consequentially to another person, have their visa considered for cancellation when the other person's visa is cancelled. This decision would be discretionary and merits reviewable and a range of factors will be considered under policy – this includes consideration of family unity principles, the best interests of the child and possible legal consequences of the cancellation decision such as detention and removal. Consequential cancellation will not apply to a family unit member as described above who has since been granted a visa in their own right or become an Australian citizen.

307. The proposed amendments have been assessed against the seven core international human rights treaties to which Australia is party and engage the rights articulated below. However, as Australia generally only owes human rights obligations to those within its territory and/or jurisdiction, the below analysis is restricted to persons who are within Australia's territory and/or jurisdiction and who may be impacted by these proposed amendments on that basis. That is, members of the family unit of a person whose visa is cancelled under the emergency cancellation provisions, who are in Australia and whose visas are cancelled pursuant to the abovementioned amendments.

308. Consistent with the existing legislative framework of the Migration Act, where the visa of a person in Australia is cancelled pursuant to these amendments, they will become an unlawful non-citizen and in accordance with sections 189 and 198 of the Migration Act will be liable for detention and possible removal from Australia (dependant on the outcome of any merits review or judicial review process). This process engages human rights concerning the best interests of the child, family unity, the prohibition on arbitrary detention, expulsion of aliens and *non-refoulement*.

Article 3 of the Convention of the Rights of the Child (CRC)

309. Article 3 of the CRC provides that the best interests of the child shall be a primary consideration in all actions concerning children. Article 3 requires that the best interests of a child be *a* primary, not *the* primary consideration. The best interests of the child may be outweighed by other countervailing primary considerations, such as the integrity of Australia's migration system and the safety of the Australian community.

310. There are a number of circumstances arising from the proposed amendments that require the consideration of the best interests of the child. This includes the use of the emergency cancellation provision to cancel the visa of a person who is the parent or guardian of a child who is in Australia. This would continue the temporary separation of a child from their parent or guardian since the parent or guardian will no longer be able to return to Australia. A decision by the Minister to cancel a visa under proposed section 134B is mandatory. These policy settings are based on the countervailing primary consideration of national security risks, and the Government considers that they outweigh the child's best

interests in being able to have their parent to return to Australia. Depending on the circumstances of the case, the family may be able to reunite outside Australia.

311. Another circumstance arising from these provisions is the possibility of consequential cancellation of the child's visa under proposed subsection 134F(2). Policy supporting this amendment will provide that in deciding whether or not to exercise the discretion to cancel the child's visa, the decision maker should treat the best interests of that child as a primary consideration. This consideration will also consider the impact of possible detention or removal on the child, as a consequence of the potential visa cancellation.

Articles 17 and 23 of the International Covenant on Civil and Political Rights (ICCPR)

312. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with his family. Article 23 of the ICCPR provides that the family is the natural and fundamental group unit of society and is entitled to protection by society and the State. However, avoiding interference with the family or protecting the family can be weighed against other countervailing considerations including the integrity of the migration system and the safety of the Australian community, so long as the measures used to safeguard those objectives are reasonable and proportionate.

313. Under the proposed amendments, two circumstances exist in which such interference can occur within the meaning of Article 17 of the ICCPR. The first is where a visa holder's visa is cancelled under the emergency cancellation provision while they are offshore. This will result in the continued temporary separation of the visa holder whose visa has been cancelled and any family members who are located within Australia at the time of that cancellation. This continued separation is necessary on the basis that ASIO has received intelligence that the visa holder located offshore might pose a direct or indirect risk to the Australian community and requires time to establish the veracity of the intelligence. It is the Government's position that 28 days is a reasonable and proportionate period of time in which further investigations may continue because of the potential security risk the primary visa holder poses to the Australian community.

314. The second circumstance which may give rise to separation of the family is when the emergency cancellation decision is not revoked due to the security assessment made by ASIO in the specified 28 day period. Where the cancellation of the visa held by the person offshore remains after the specified 28 day period, the person and their family will be subject to ongoing separation. The impact upon the family unity principles contained in the ICCPR in this situation is necessary because ASIO has affirmed that the risk posed to the safety and security of the Australian community by the offshore person whose visa has been cancelled is significant enough to warrant not revoking the cancellation of their visa. Again, this is a proportionate response on the basis that the alleged risk that person poses to the Australian community has been comprehensively assessed and verified.

315. While the Government would not prevent family unit members from moving offshore in order to reunite with the person whose visa has been cancelled pursuant to the proposed amendments, where the cancelled person's family unit are onshore in Australia, separation of the family may result because the person whose visa is cancelled offshore has lost their entitlement to return to Australia and their family members may be unable or unwilling to reunite with them outside Australia, especially if they fear harm in country where the cancelled person now resides.

316. In relation to members of the family unit located in Australia whose visas are for consequential cancellation pursuant to proposed subsection 134F(2), relevant international obligations, including those relating to family unity, would be taken into account when making any discretionary cancellation decision.

Article 9 and 10 of the ICCPR

317. Article 9 of the ICCPR provides that no one shall be subjected to arbitrary detention. Article 10 provides that all persons deprived of their liberty be treated with humanity and with respect for the inherent dignity of the person.

318. Australia takes its obligations to people in detention very seriously. Continuing detention may become arbitrary after a certain period of time without proper justification. The determining factor, however, is not the length of detention, but whether the grounds for the detention are justifiable.

319. In the context of Article 9, “arbitrary” means detention must have a legitimate purpose within the framework of the ICCPR in its entirety. Detention must be predictable in the sense of the rule of law (it must not be capricious) and it must be reasonable (or proportional) in relation to the purpose to be achieved.

320. Detention arising from the cancellation of a visa pursuant to the proposed amendments is lawful by virtue of section 189 of the Migration Act which provides for the detention of an unlawful non-citizen.

321. The lawfulness, necessity and proportionality of any subsequent detention can form part of the consideration of the discretionary visa cancellation decision relating to the family members in Australia and as such, that circumstance does not give rise to incompatibility with human rights.

Article 13 of the ICCPR

322. Article 13 of the ICCPR states:

An alien lawfully within the territory of a State Party to present Covenant may be expelled therefrom only in pursuance of a decision reached in accordance with law and shall, except where compelling reasons of national security otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

323. The Migration Act and policy thereunder contain procedural safeguards to provide that the Government is not in breach of its obligations under Article 13 of the ICCPR in the context of visa cancellation pursuant to the proposed amendments.

324. For visas cancelled consequentially it is intended that former visa holders will be notified of the cancellation of their visa, the grounds on which their visa was cancelled and the effect of that visa cancellation on their status, including review rights if relevant.

325. Family unit members whose visas are consequentially cancelled while they are onshore and who become liable for detention and possible removal from Australia by virtue of the proposed amendments will have the ability to seek merits at the Migration Review Tribunal or the Refugee Review Tribunal pursuant to subsection 338(3) and paragraph

411(1)(d) of the Migration Act respectively. Further, all persons affected by cancellation pursuant to these amendments may pursue judicial review of the decision to cancel their visa.

326. As such, the proposed amendments are compatible with human rights.

Article 3(1) of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and Article 6 and Article 7 of the ICCPR

327. Article 3(1) of the CAT contains an express *non-refoulement* obligation which prohibits the expulsion, return or extradition of a person to another State where there are substantial grounds for believing that they would be in danger of being subjected to torture. Further *non-refoulement* obligations arise under the ICCPR, under articles 6 and 7 which prohibit the arbitrary deprivation of life and torture and other cruel, inhuman or degrading treatment or punishment respectively.

328. The Government recognises that these *non-refoulement* obligations are absolute and does not seek to resile from or limit Australia's *non-refoulement* obligations in these circumstances. Where a family unit member is being considered for consequential cancellation any *non-refoulement* obligations to that person would normally either form part of the consideration as to whether the visa should be cancelled, or, be considered through subsequent visa or ministerial intervention processes. These processes can include a Protection visa application, or the use of the Minister's personal powers under section 195A of the Migration Act to grant a visa to a person where the Minister considers it in the public interest to do so.

329. As such, the proposed amendments will be implemented in a manner which is consistent with Australia's *non-refoulement* obligations under the CAT and ICCPR.

SCHEDULE 5 – IDENTIFYING PERSONS IN IMMIGRATION CLEARANCE

Migration Act 1958

Collection of personal identifiers at automated border control eGates

330. The ability to accurately collect, store and disclose biometric identification of all persons increases the integrity of identity, security, and immigration checks of people entering and departing Australia.

331. Automated Border Clearance systems (SmartGate and eGates) are ‘authorised systems’ to perform the immigration clearance function for arriving passengers, and border processing for departing passengers. The authorised system confirms the identity of a traveller by biometrically comparing the photograph contained in the passport to a live image of the traveller’s face and conducts visa and alert checks. Currently, for both arrivals and departures, the Migration Act only allows an ‘authorised officer’ (not an ‘authorised system’) to obtain personal identifiers from non-citizens by way of an identification test under section 166, 170 and 175 of the Migration Act. DIBP relies on the *Privacy Act 1988* to obtain personal identifiers from citizens and non-citizens using an ‘authorised system’.

332. Amendments to sections 166, 170 and 175 of the Migration Act will authorise a clearance authority, which is defined as a clearance officer or an authorised system, to collect and retain personal identifiers (specifically a photograph of the person’s face and shoulders)

of citizens and non-citizens who enter or depart Australia or who travel on an overseas vessel from one port to another within Australia. The amendments will also permit the disclosure of that information for specified purposes.

333. The amendments include new subparagraphs 166(1)(d)(ii), 170(1)(d)(ii) and 175(1)(d)(ii) that will allow an authorised system to collect other personal identifiers if those personal identifiers are prescribed by the *Migration Regulations 1994* (Migration Regulations). DIBP does not intend to make new regulations in relation to this provision at this time as automated border clearance systems only need to collect a person's photograph of their face and shoulders to confirm their identity. Should the need arise, and technology improve, other personal identifiers such as a persons' fingerprints or iris scan may be prescribed in the Migration Regulations.

334. The amendments will enable the authorised system (such as SmartGate or eGates) to perform accurate biometric identification of all persons and will ensure the integrity of identity, security, and immigration checks of all persons entering and departing Australia. When the traveller presents their travel document to the authorised system, the system will be able to determine whether the traveller is the same person to whom the document was issued and whether the document satisfies the test as being a genuinely issued document.

Freedom against unlawful and arbitrary interference with privacy in Article 17 of the ICCPR and Article 16 of the Convention on the Rights of the Child

335. As this measure relates to the collection, storage and disclosure of personal information by DIBP or Customs to law enforcement agencies, this measure engages Article 17 of the ICCPR and the corresponding article in relation to children at Article 16 of the ICCPR.

336. Pursuant to Article 17 of the ICCPR, an interference with an individual's privacy must have a lawful basis and must not be arbitrary. That is to say, it must be reasonable in the sense of necessary and proportionate. Article 16 of the CRC is written in similar terms to Article 17 of the ICCPR and prohibits the arbitrary or unlawful interference with the privacy of the child. To the extent that these measures may interfere with the privacy of citizens and non-citizens, both adult and children, that interference is lawful by virtue of these legislative amendments.

337. Further, any collection, storage and disclosure of information will be undertaken in accordance with the Australian Privacy Principles contained in the Commonwealth *Privacy Act 1988*. This is consistent with the United Nations Human Rights Committee General Comment 16 in which the Committee states that the gathering and holding of personal information using information technology must be regulated by law and that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it. The eGates will also comply with the *Privacy Act 1988*, specifically Australian Privacy Principle 5 (APP5) which requires persons to be notified of a number of matters before personal information is collected (or as soon as practicable after the collection if it is not practicable to inform the person beforehand).

338. Persons will be notified of these through signs, information sheets, and information on DIBP's and Customs' websites. The Migration Act already specifies purposes for accessing identifying information 336D, and the permitted disclosures in sections 336E, 336F

and 336FA. The proposed amendments contain within them restrictions upon the purposes for which this information will be collected and used by the DIBP and Customs. These include collection of personal identifiers for those purposes already set out in subsection 5A(3) of the Migration Act. These include, amongst others, to improve the integrity of entry programs, including passenger processing at Australia's border and to enhance DIBP's ability to identify non-citizens who are of a national security concern. The proposed amendments will extend the purposes for collection in relation to Australian citizens to purposes that assist in identifying persons who may be of national security concern.

339. The safeguards in sections 258B, 258C, 258D, 258E, 261AL and 261AM of the Migration Act that apply to non-citizens will be amended so they also apply to Australian citizens who may be required to provide a personal identifier by way of an identification test conducted by an 'authorised officer'. These safeguards relate to the manner in which identification tests are to be conducted by authorised officers, the information that is to be provided to a person before an identification test, and to the protection of minors and incapable persons. The Migration Act also contains offences for disclosing identifying information if it is not a permitted disclosure.

340. The safeguards in section 258B of the Migration Act (provision of information before identification tests to obtain a personal identifier), are not being applied to identification tests carried out by authorised systems such as SmartGate or eGate. This is justified on the grounds that these safeguards are either not relevant or impractical when personal identifiers (specifically, a photograph of the person's face and shoulders) are obtained by an authorised system. These safeguards are impractical in the sense that the safeguards outline the requirement to explain to the person prior to taking their photograph, in a language they understand:

- a. why the personal identifier is required
- b. how the personal identifier will be collected and used
- c. the circumstances under which the personal identifier might be disclosed to a third party
- d. that the personal identifier might be produced in evidence in a court or tribunal, and
- e. information about the *Privacy Act 1988* and the person's rights under the *Freedom of Information Act 1982*.

341. For the eGates or SmartGate to provide this information to every person would slow the process down unreasonably. Instead, this information will be made available on signs and information sheets at the airport and on DIBP's website.

342. The safeguards in section 258E (general rules for carrying out identification tests) are not being applied to identification tests carried out by authorised systems such as SmartGate or eGate. This is because the safeguards in that section are ill-suited to authorised systems such as SmartGate or eGate. It is not possible for SmartGate or eGate to conduct an identification test to obtain a facial image away from the view of other people because the system is in a public place (paragraphs 258E(a) and (b) refer). Similarly, the rules limiting the amount of visual inspection and the removal of clothing (paragraphs 258E(d) and (e)

refer) are not relevant to identification tests undertaken by authorised systems which do not require the removal of any clothing.

343. The safeguards in subsection 261AL(5) (parent/guardian/independent person to be present when personal identifiers are obtained from a minor) are not being applied to identification tests (biometrically comparing a live photograph to the photograph contained in the passport) carried out by an authorised systems such as SmartGate or eGate. This is justified in that the system is deliberately designed to only allow one person at the Gate at the time when the person's personal identifier (photograph of the person's face and shoulders) is obtained to prevent other persons passing through the gate without authorisation. This is justified on the grounds that persons (including minors and their parents) can choose to present to a clearance officer instead of an authorised system. This would allow a parent to be present when their child provides a personal identifier if this is preferred.

344. The SmartGates or eGates are designed so that persons travelling together can see each other while their photo is being taken and parents/guardians can assist children through the machines or they can choose to present to a clearance officer.

345. Subsection 261AL(5) currently provides a safeguard for minor non-citizens and requires a parent or guardian to be present if the minor is required to provide personal identifiers to an authorised officer. The amendments to subsection 261AL(5) will ensure that an identification test carried out by an authorised officer to obtain a personal identifier from a minor who is an Australian citizen, must also be carried out in the presence of a parent or guardian of the minor or an independent person. The effect of the amendment is that minors who are Australian citizens would be subject to the same safeguards as minors who are non-citizens, if they present to a clearance officer.

346. In addition to requiring a lawful basis for interference, Article 17 prohibits *arbitrary* interference of privacy. Interferences which are lawful may nonetheless be arbitrary where those interferences are not in accordance with the objectives if the ICCPR and are not reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

347. Any interference with a person's privacy by reason of the proposed amendments is proportionate. An authorised system or a clearance officer will not take more information or personal identifiers from the person than is necessary to achieve the legitimate objective of confirming the person's identity and validate the authenticity of their travel document. The eGates or SmartGates will take a photograph of the person's head and shoulders, and will compare this image to the photograph already contained in their passport.

348. The amendments are necessary to modernise Australia's border processing and take advantage of technological advancements in facial recognition matching. Automated border clearance systems SmartGate or eGates will perform the immigration clearance function for arriving persons and border processing for departing persons. Automated border control eGates will automate identity checking for all persons by replicating the current manual face-to-passport check conducted by a clearance officer with automated biometric face matching of live image capture to a passport. Biometric face matching technology can identify persons with greater accuracy than manual processing. This will enable enhanced ability to accurately identify all persons arriving and departing Australia and detect impostors and fraudulent documents.

349. Further, in light of the current threat of persons seeking to enter and depart Australia undetected as impostors or using fraudulent documents to conduct criminal or terrorist activities, the ability to lawfully collect, store and disclose information collected by clearance officers or authorised systems is necessary, reasonable and proportionate in order to achieve the legitimate objective accurately identifying persons arriving and departing Australia to protect Australia and its national security interests.

350. Therefore, to the extent that these measures interfere with the freedom from unlawful or arbitrary interference with privacy within the meaning of Article 17 of the ICCPR and Article 16 of the CRC, such interferences are lawful and reasonable in the sense of necessary and proportionate.

SCHEDULE 6 – IDENTIFYING PERSONS ENTERING OR LEAVING AUSTRALIA THROUGH ADVANCE PASSANGER PROCESSING

Migration Act 1958

Expansion of Advance Passenger Processing systems for departing air and maritime travellers

351. For travellers arriving in Australia, the Migration Act currently requires airlines to mandatorily provide passenger data including the traveller's name, nationality and passport number through an approved reporting system (Advance Passenger Processing (APP)). APP will confirm this baseline data against the record held by the Australian Government for that visa or Australian passport or New Zealand passport and then confirm their authority to travel to Australia. The current reporting system is also used by inward bound maritime vessels that have more than 100 passenger berths. The intention of the APP system is to prevent entry to Australia of any identified high-risk travellers.

352. The Advance Passenger Processing system provides forewarning of a person's intention to travel at the point that they check in for their flight. In the context of the foreign fighter threat and persons intending to depart Australia to engage in foreign conflicts, this advance notice allows appropriate security response to persons of interest.

353. It is proposed that section 5A and Division 12B of the Migration Act be amended to require airlines and maritime vessels to electronically report on *departing* travellers via an approved system. These amendments will also impose an infringement regime for airlines and maritime vessels that fail to comply with the reporting requirement. The penalty regime will be the same as for Inward APP (for arriving travellers to Australia), being either prosecution or a financial penalty in lieu of prosecution. The financial penalty rate will be the same as for arrivals and currently this is \$1700 for each incident of the carrier failing to provide APP report for a traveller.

354. This amendment is intended to overcome the current situation of DIBP and (Customs) being only aware that a person is intending to depart Australia when the traveller arrives at the outward immigration processing point. This is particularly problematic when a traveller only presents for check-in or boarding at the airport or seaport a short time before their flight or maritime vessel departs, and DIBP and Customs do not have sufficient time to respond to or address any potential alerts or threats in relation to that traveller.

355. APP for departing travellers will also provide greater administrative efficiency in automating departure processing, streamlining the experience for international travellers leaving Australia, and improving identity management.

Freedom from arbitrary and unlawful interferences with privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR) and Article 16 of the Convention on the Rights of the Child (CRC)

356. As this measure relates to the collection of personal information of citizens and non-citizens for the purposes of reporting on persons departing from Australia, these measures engage Article 17 of the ICCPR and Article 16 of the CRC.

357. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. Article 16 of the CRC is written in similar terms to Article 17 of the ICCPR and prohibits the unlawful or arbitrary interference with the privacy of a child.

358. To the extent that these measures may interfere with the privacy of citizens and non-citizens (adults and children), such interference will be lawful by virtue of these legislative amendments.

359. Further, any collection, storage and disclosure of information pursuant to the proposed amendments will be undertaken in accordance with the Australian Privacy Principles contained in the Commonwealth *Privacy Act 1988*. In particular, the measure explicitly lists purposes for which the use or disclosure of personal information under Division 12B is authorised by law. This is also consistent with the United Nations Human Rights Committee General Comment 16 in which the Committee states that the gathering and holding of personal information using information technology must be regulated by law and that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it. Part 4A of the Migration Act outlines officers' obligations relating to identifying information including the manner in which officers are authorised to access and disclose information.

360. In addition to requiring a lawful basis for interference, Article 17 prohibits *arbitrary* interference with privacy. Lawful interferences with privacy may nonetheless be arbitrary where those interferences are not in accordance with the objectives if the ICCPR and are not reasonable in the circumstances. The United Nations Human Rights Committee has interpreted the requirement of 'reasonableness' to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

361. Any interference with a citizen or non-citizen's privacy is necessary as Outward APP forms a component of the whole of government approach to assist in preventing persons departing from Australia from engaging in foreign conflicts and other activities that compromise Australia's national security. The departure check-in data received via the APP reporting system will increase the time interval for law enforcement agencies to implement a response to a given law enforcement concern about to occur at the border. As such, these measures are necessary to mitigate the risk to the safety of the Australian community.

362. These measures are proportionate to that necessity and does not increase the scope of information collected about departing persons. The information proposed to be collected is information that is already collected at the immigration processing point when a person

departs Australia and is typically presented to carriers by travellers and entered into their systems to facilitate check-in. These amendments just ensure that the information can be requested at an earlier point in time, and that reporting can occur at multiple points. This is intended to ensure the reports can be required when circumstance change (for example if a person does not board the aircraft after check-in), and provide DIBP and Customs sufficient time to make assessment as to the threat posed by certain travellers.

363. The introduction of automated departure processing will mean that Customs staff will need to make fewer manual checks of personal information as the system will be making those checks instead. This is an operational enhancement that allows DIBP and Customs to perform its functions more thoroughly and with greater effectiveness, reducing potential workplace injuries through repetitive manual data input.

364. To the extent that this measure engages Article 17 of the ICCPR, these measures are lawful and reasonable in the sense of necessary and proportionate to achieving the legitimate purpose of identifying high risk travellers who may pose a safety risk to the Australian community.

SCHEDULE 7 – SEIZING BOGUS DOCUMENTS

Migration Act 1958 / Australian Citizenship Act 2007

Seizure of bogus documents

365. The Bill amends the Migration Act and the Citizenship Act to introduce a measure to retain documents presented or provided to DIBP that are bogus.

366. DIBP is presented with, or has provided to it, hundreds of documents on a daily basis. Examples include passports and other travel documents provided on arrival or at departure at Australia's eight international airports, visa applications lodged at DIBP counters, or during compliance visits where DIBP confirms work rights. The requirement to provide documents to DIBP relates to the type of service being requested. For example, all persons who seek to enter Australia must provide a passport or valid travel document that details the person's personal information and has a facial image. Currently, inspection of documents takes place in public, which may include DIBP officers conducting a visual inspection of document/s and asking persons questions about the documents presented.

367. While the overwhelming majority of documents are legitimate, a small number are bogus. Where a bogus document is detected currently, the DIBP officer has no option but to return the bogus document to the person who provided it. While DIBP does take action so that the person does not obtain a benefit as a result of using a bogus document at the time (for example, DIBP may refuse a visa application based on a bogus birth date), the document remains available to the person to continue to use it for potentially fraudulent purposes.

368. The following examples illustrate why it is important to remove bogus documents from circulation:

- a person may arrive or depart Australia using another person's passport/travel document, or
- a person who continues to use a bogus passport as evidence of identity in Australia to obtain a credit card and pay for goods and services.

369. The Bill describes the forfeiture, seizure, and requirements of DIBP when seizing a document and the rights of the individual whose documents may be forfeited and seized.

370. A ‘bogus document’ is currently defined in section 97 of the Migration Act:
- in relation to a person, means a document that the Minister reasonably suspects is a document that:*
- a) *purports to have been, but was not, issued in respect of the person; or*
 - b) *is counterfeit or has been altered by a person who does not have the authority to do so; or*
 - c) *was obtained because of a false or misleading statement, whether or not made knowingly.*

371. New sections will be added to the Migration Act to provide a prohibition on a person providing a bogus document/s within the meaning of section 97 above for any purpose relating to DIBP’s functions or activities under the Migration Act. A document presented or provided to DIBP is subject to forfeiture to the Commonwealth.

372. New sections will also be added to the Citizenship Act to provide a definition of bogus documents; as such a definition does not currently exist. Further provisions are also proposed relating to the prohibition of a person presenting or providing a bogus document/s for any purpose relating to DIBP’s functions or activities under that Act, and for the forfeiture of a bogus document so provided to DIBP. As under the Migration Act, applicants for citizenship also provide a wide range of documents to DIBP, and the amendments to the Citizenship Act are for the same purposes as amendments to the Migration Act.

373. The seizure of bogus document/s would take place during routine inspection of documents, which may be in a public place. In some of these instances, the retention of documents may occur in view of other members of the public. The proposed amendments to the Migration Act and the Citizenship Act would apply equally to any person who presents or provides a bogus document to DIBP.

Freedom against unlawful and arbitrary interference with privacy in Article 17 of the ICCPR

374. As these amendments relate to the forfeiture and seizure of suspected bogus documents which contain personal information (such as passports, driver licences, foreign government identity documents, bank statements, English proficiency test results), Article 17 of the ICCPR is engaged.

375. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy. To the extent that these measures may interfere with the privacy of citizens and non-citizens, those limitations are lawful by virtue of these legislative amendments.

376. Further, any collection, storage and disclosure of information pursuant to these proposed amendments will be undertaken in accordance with the Australia Privacy Principles contained in the Commonwealth *Privacy Act 1988*. This is consistent with the UN Human Rights Committee General Comment 16 in which the Committee states that the gathering and holding of personal information using information technology must be regulated by law and

that effective measures must be taken to ensure that the information collected is not accessed by persons who are not authorised by law to receive, process or use it.

377. In addition to requiring a lawful basis for interference, Article 17 prohibits arbitrary interference with privacy. Lawful interferences with privacy may nonetheless be arbitrary where those interferences are not in accordance with the objectives of the ICCPR and are not reasonable in the circumstances. The UN Human Rights Committee has interpreted the requirement of ‘reasonableness’ to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances.

378. DIBP’s objective in making these amendments is to enable effective border management and ensure integrity in its migration and citizenship programmes by accurately establishing and managing the identity of persons who enter, exist and reside in Australia. This objective is consistent with the Government’s priority to detect and prevent the travel of persons identified as travelling to/from Australia for a terrorism-related purpose. The amendments involve the authority to retain a bogus document when it is given, presented, produced or provided to DIBP. A notice will be provided to a person whose document/s is retained, and to facilitate any claim that a person may choose to initiate.

379. The ability of DIBP to retain bogus document/s from an individual is necessary as fraudulent documents may be used for criminal, including terrorist, purposes. Fraudulent documents including identity documents are recognised as enablers of criminal activity, including identity fraud. For example, bogus documentation can be used to gain financial advantage or to obtain ‘legitimate’ proof-of-identity documents for the purposes of committing fraud against the Commonwealth, State and Territory governments, the private sector (including financial institutions), and small businesses that provide service son credit.

380. Therefore, to the extent that these measures engage Article 17 of the ICCPR, these measures are lawful and necessary and proportionate to meet the legitimate objective of the Bill to reduce the threat of terrorism in Australia by assisting to remove from circulation in the Australian community bogus documents that would be able to be used to facilitate terrorist or serious criminal activity.

INDEPENDENT OVERSIGHT BODIES

381. The role of the INSLM, the Commonwealth Ombudsman and the IGIS are vital and constitute important safeguards in the monitoring of the legal and operational framework of law enforcement and intelligence agencies. The ongoing reviews undertaken by these independent bodies provide an additional safeguard to ensure the legislative regimes proposed by the Bill function effectively and that any deficiencies are identified and remedied.

The Independent National Security Legislation Monitor

382. The position of the INSLM was created under the *Independent National Security Legislation Monitor Act 2010*. The role of the INSLM is to review the effectiveness and operation of Australia’s counter-terrorism and national security legislation on an annual basis. Among the INSLM’s roles is to also take into account Australia’s international human rights obligations when reviewing legislation so as to ensure the measures adopted are proportionate and necessary. The INSLM must also report on matters referred to him or her and has the authority to commence inquiries into matters within his or her remit.

383. The INSLM will be the principal review mechanism as the statutory mandate of the INSLM is to review Australia's counter-terrorism and national-security related provisions in the Criminal Code Act, Crimes Act, ASIO Act, Foreign Incursions Act, UN Charter Act, *Defence Act 1903* and the *National Security Information (Criminal and Civil Proceedings) Act 2004*. As the measures under the Bill amend some of the abovementioned Acts, the INSLM will review the proposed amendments and report on them annually.

384. The INSLM's considerations on the operation, effectiveness and implications of Australia's counter-terrorism and national security framework will continue to inform the Australian Government's response to the emerging and evolving threat of foreign fighters and terrorism more broadly. The additional safeguard provided by the INSLM will ensure that the balancing of national security concerns with civil liberties is under constant review.

The Inspector-General of Intelligence and Security

385. The IGIS has broad powers under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) to inquire into any matter relating to compliance by ASIO with laws of the Commonwealth, the states and territories or with directions or guidelines issued by the responsible minister, the propriety of its actions and the effectiveness and appropriateness of procedures relating to legality or propriety, at the request of the responsible Minister, on his or her own motion or in response to a complaint.

386. The IGIS has particularly strong powers to compulsorily obtain information and documents and enter premises, as well as obligations to provide procedural fairness. The role of the IGIS under the IGIS Act has also been recently expanded to allow the Prime Minister to request the IGIS to inquire into an intelligence or security matter relating to any Commonwealth department or agency. Increasingly, a range of Commonwealth departments and agencies work with the Australian Intelligence Community on intelligence and security matters. To fully consider an intelligence or security matter, it may sometimes be necessary for the IGIS to consider the role played by non-Australian Intelligence Community departments or agencies in relation to that matter.

387. A crucial element of this oversight role of the IGIS is the ability to undertake formal inquiries into the activities of an Australian intelligence agency in response to a complaint or a reference from a Minister. The IGIS can also act independently to initiate inquiries and conducts regular inspections and monitoring of agency activities. In conducting a formal inquiry, the IGIS has significant powers including requiring the attendance of witnesses, taking sworn evidence, copying and retention of documents and entry into Australian intelligence agencies' premises. The IGIS may also conduct preliminary inquiries into matters with a view to determining whether a full inquiry is necessary.

388. After undertaking an inquiry, the IGIS must complete a report. Complaints can be brought to the IGIS about the actions of the relevant intelligence agency, including ASIO, and the IGIS can recommend how the agency should respond to these complaints if they are determined to be well-founded.

Commonwealth Ombudsman

389. The Commonwealth Ombudsman is also the Law Enforcement Ombudsman and is mandated to investigate complaints about the actions of AFP members and about the policies, practices and procedures of the AFP as an agency. For instance, the PDO regime in

Division 105 of the Criminal Code expressly provides that a detained person may contact the Commonwealth Ombudsman and make a complaint about his or her treatment while in detention under a PDO. The Commonwealth Ombudsman provides an additional safeguard to ensure the effective and appropriate functioning of the measures contemplated in the Bill.

Conclusion

390. The Bill engages a range of human rights and is compatible with human rights because it promotes some rights and to the extent that it may limit particular rights, those limitations are reasonable, necessary and proportionate in achieving a legitimate objective.

NOTES ON CLAUSES

Preliminary

Clause 1 – Short title

391. This clause provides for the Bill to be cited as the Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014.

Clause 2 – Commencement

392. This clause provides for the commencement of each provision in the Bill, as set out in the table.

393. Sections 1 to 3 commence on the day the Act receives Royal Assent. Schedules 1 to 2 commence on the 28th day after the Act receives Royal Assent. Schedules 3 to 5 will commence on the day after this Act receives Royal Assent. Schedule 6 will commence on 1 July 2015.

394. Schedule 7, which provides for amendments that relate to seizing bogus documents, commences according to table items 5 to 13 of the Commencement Information table.

395. Table items 5, 8, 10 and 13 provide that items 1 to 3 and items 6, 8 and 11 of Schedule 7 commence on the day after the Act receives Royal Assent.

396. Table items 6, 7, 9, 11 and 12 refer to items in Schedule 7 that make amendments that are contingent on the commencement of *the Migration Amendment (Protection and Other Measures) Act 2014* (POM Act).

397. The POM Act re-locates the definition of “bogus document” from section 97 of the Migration Act to subsection 5(1) of that Act. Items 4, 5, 7, 9 and 10 of Schedule 7 provide alternative amendments to refer to the term “bogus document” as defined in section 97 of the Migration Act if the POM Act has not yet commenced or refer to the term “bogus document” as defined in subsection 5 (1) if the POM Act has commenced first. The commencement of each item depends on whether or not the POM Act has already commenced.

Clause 3 – Schedules

398. Each Act specified in a Schedule to this Act is amended or repealed as is set out in the applicable items in the Schedule. Any other item in a Schedule to this Act has effect according to its terms.

Schedule 1 – Amendments and repeals

Part 1 – Amendments

Administrative Decisions (Judicial Review) Act 1977

Item 1 – After paragraph (db) of Schedule 1

399. Item 1 inserts paragraphs (dc) and (dd) in Schedule 1 of the ADJR Act. Schedule 1 of the Act lists classes of decisions that are not decisions to which the Act applies.

400. New paragraph (dc) provides that decisions made under new sections 22A and 24A of the Passports Act, which are inserted by items 21 and 23, are not subject to review under the ADJR Act. These new sections enable the 14-day suspension and surrender of a person's Australian travel documents.

401. New paragraph (dd) provides that decisions made under new sections 15A and 16A of the Foreign Passports Act, which are inserted by items 129 and 131, are not subject to review under the ADJR Act. These new sections relate to the 14-day surrender of a person's foreign travel documents.

402. It is necessary to exclude all decisions listed in new paragraphs (dc) and (dd) from review under the ADJR Act as judicial review under the Act may compromise the operations of security agencies and defeat the national security purpose of the new mechanisms. For example, the new mechanisms would be made redundant if a court were to make an injunction order allowing the person of security concern to travel on an Australian travel document despite that document being suspended. The exclusion of the decisions from review under the ADJR Act is balanced by the fact that the effect of the decision is for a short temporary period of 14 days.

403. The exclusion of these decisions from ADJR Act review implements Recommendations V/4 and V/5 of the INSLM's Fourth Annual Report. The INSLM noted that for the temporary passport suspension to be an effective counter-terrorism measure a decision to request a passport suspension should not be subject to judicial review (except under the Constitution) or merits review.

404. The exclusion of these decisions from ADJR Act review does not prevent the decisions from being judicially reviewed under paragraph 75(v) of the Constitution. Additionally, the IGIS will have oversight of any decision by ASIO to make a request under the new provisions in the Passports Act and the Foreign Passports Act.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

Item 2 – Section 5

405. This item inserts the new definition of 'Attorney-General's Department', meaning the department administered by the Attorney-General.

Item 3 – Section 5 (after paragraph (ha) of the definition of *designated agency*)

406. This item expands the definition of ‘designated agency’ to include AGD. This allows AGD to access the financial intelligence data holdings of the Australian Transaction Reports and Analysis Centre (AUSTRAC). This will allow AGD to more efficiently and effectively develop and implement policy around terrorism financing risks, and ensure a more holistic approach to the Government’s national security response to foreign fighters.

Item 4 – Application of amendments

407. This item provides that the listing of AGD as a designated agency under section 5 applies in relation to disclosures of, and access to, information after this item commences, regardless of whether the information was obtained before, on or after the commencement of the provision.

Item 5 – Paragraph 121(2)(a)

408. This item amends existing paragraph 121(2)(a) by removing the reference to “section 49 or”. This operates to ensure that further information obtained by an entrusted public official under section 49 may be disclosed in the circumstances set out in subsection 121(3).

Item 6 – Paragraphs 122(1)(a), (b), (c) and (d)

409. This item repeals paragraphs (a) – (d) of subsection 122(1) to make it clear that these categories of entrusted investigating officials are not subject to the restricted disclosure regime set out in section 122 regarding information obtained under section 49.

Item 7 – Paragraph 122(3)(a), (c) and (d)

410. This item repeals paragraphs (a), (c) and (d) of subsection 122(3) to make it clear that information obtained under section 49 may only be disclosed by an entrusted investigating official if the disclosure is for, or in connection with, the performance of the functions of the AUSTRAC CEO (subparagraph 122(3)(b)), or if the disclosure is made to another entrusted investigating official as provided for in subparagraphs s122(3)(e) – (j).

Item 8 – Application of amendments

411. This item provides that the amendments to sections 121 and 122 apply in relation to disclosures of information made after this item commences, regardless of whether the information was obtained before, on or after the commencement of the relevant provision.

AusCheck Act 2007

Item 9 – Paragraph 8(2)(d)

412. This item inserts a reference to Part “5.5” after the reference to Part “5.3” in paragraph 8(2)(d) which, in combination with existing paragraph 8(1)(b), limits the purposes for which a background check can be conducted under another Act. This ensures AusCheck can conduct background checks for purposes related to the prevention of the foreign incursions and recruitment conduct prohibited by new Part 5.5 of the Criminal Code.

Item 10 – Paragraph 8(2)(d)

413. This amendment is consequential to the first amendment to paragraph 8(2)(d). This amendment describes new Part 5.5 of the Criminal Code as dealing with foreign incursions and recruitment.

Australian Passports Act 2005

Overview of new passports measures

414. Items 11 to 26 will amend the Passports Act to enable the Minister for Foreign Affairs to suspend a person’s Australian travel documents for a period of 14 days if requested by ASIO.

415. ASIO currently has the ability to make a competent authority request for a person’s Australian passport to be cancelled if it suspects on reasonable grounds that, if the person had an Australian passport, the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country and that the passport should be cancelled in order to prevent the conduct.

416. The amendments will enable ASIO to make a request that the Minister for Foreign Affairs suspend for a period of 14 days all Australian travel documents issued to a person if it suspects on reasonable grounds both that the person may leave Australia to engage in conduct that might prejudice the security of Australia or a foreign country and that all the person’s Australian travel documents should be suspended in order to prevent the person from engaging in the conduct.

417. The primary purpose of these amendments is to enhance the Australian government’s capacity to take proactive, swift and proportionate action to mitigate security risks relating to Australians travelling overseas. The amendment will enable the Minister for Foreign Affairs to exercise a discretionary power to take temporary action to suspend a person’s travel documents upon receipt of a request from ASIO. The request will include the security rationale for the making of the request.

418. These amendments will strengthen the Australian Government’s capacity to proactively mitigate the security risk arising from travel overseas by Australians who may be planning to engage in activities of security concern by providing a lower threshold for the making of a request. The requisite threshold is commensurate with the temporary nature of the contemplated administrative action by the Minister for Foreign Affairs. The amendments provide that ASIO would need to make a further competent authority request recommending passport cancellation to give longer term effect to the disruption of the security threat.

419. The amendments will also override the requirement to notify a person of the Minister’s passport cancellation or refusal decision where it is essential to the security of the nation or where notification would adversely affect a current investigation into a terrorism offence.

420. Items 127 to 131 will also insert provisions into the Foreign Passports Act that will complement the new suspension mechanism under the Passports Act. The Minister for Foreign Affairs already has the ability to order the surrender of a person’s foreign travel documents if requested by ASIO. The proposed amendment will allow ASIO to make a

request for the 14-day surrender of a person's foreign travel documents at a lower threshold than that provided for under the existing provisions.

421. These changes implement several recommendations of the INSLM's Fourth Annual Report.

Item 11 – Subsection 6(1)

422. This item inserts the definition of ASIO (the Australian Security Intelligence Organisation) into subsection 6(1). A definition of ASIO is required as it is the only authority that can make a request for an Australian document to be suspended under new section 22A and it is not currently defined in the Act.

Item 12 – Section 17 (heading)

423. This item amends the heading of section 17 to reflect changes made to subsection 17(1), which relate to the new suspension of Australian travel documents.

Item 13 – At the end of subsection 17(1)

424. This item amends subsection 17(1) of the Act so that the Minister cannot issue an Australian passport to a person while their passport is suspended. This is necessary because the person's Australian travel documents may be subsequently cancelled following the suspension of those documents, so issuing the person with another passport during the suspension period would defeat the purpose of the passport suspension.

Item 14 – Division 3 of Part 2 (heading)

425. This item amends the heading of Division 3 of Part 2 to reflect the effect of Division 3, which relates to circumstances when Australian travel documents are suspended as well as cancelled.

Item 15 – Section 20 (heading)

426. This item amends the heading of section 20 to reflect the introduction of new subsection 20(3) and to clarify that existing subsections 20(1) and (2) relate to the cessation of the validity of an Australian passport.

Item 16 – At the end of section 20

427. This item inserts a new subsection 20(3) to provide that an Australian passport is not valid while it is suspended under new section 22A. This assists in preventing the person from travelling while a suspension is in place.

Item 17 – Section 21 (heading)

428. This item amends the heading of section 21 to reflect new subsection 21(2) and to clarify that new subsection 21(1) relates to the cessation of the validity of an Australian travel document.

Item 18 – Section 21

429. This item inserts new subsection 21(1), which captures the provisions already contained in section 21, which relate to the cessation of the validity of a travel document.

Item 19 – At the end of section 21

430. This item inserts new subsection 21(2), which provides that an Australian travel-related document is not valid while it is suspended under new section 22A. This assists in preventing the person from travelling while a suspension is in place.

Item 20 – At the end of section 22

431. This item inserts subsection 22(3) to ensure that it is clear that the Minister can cancel a person’s passport while the passport is suspended under section 22A.

Item 21 – At the end of Division 3 of Part 2

432. This item inserts new section 22A, which is the mechanism that allows the Minister to suspend the validity of an Australian travel document.

433. New section 22A will strengthen the effectiveness of Australia’s counter-terrorism legislative framework and enable the Australian Government to proactively mitigate security threats. Currently, there are no provisions in the Passports Act which allow the Minister for Foreign Affairs to take temporary action in relation to a person’s passport where there are security concerns in relation to the person, but there is not enough information and/or time to permit ASIO to make a competent authority request that the person’s Australian passport be cancelled under section 14 of the Act. This item introduces a temporary measure in the form of a suspension of the person’s Australian travel documents. New section 22A is the main provision that implements Recommendation V/4 of the INSLM’s fourth annual report to introduce an interim passport suspension scheme for Australian passports. The mechanism will be complemented by a new provision in the *Australian Passports Determination 2005*, which will allow the processing of a passport to be delayed at the request of ASIO where there are security concerns in relation to the person.

434. New subsection 22A(1) enables the Minister to suspend a person’s travel documents for a period of 14 days where ASIO makes a request under new subsection 22A(2). While the suspension period is longer than the maximum 7-day suspension period proposed by the INSLM this is necessary to ensure the practical utility of the suspension period with regard to both the security and passports operating environment. This time period also ensures that, on balance, a person’s travel rights are not unduly impinged upon in the interests of national security. An order made by the Minister will apply to all of a person’s Australian travel documents and not just that person’s passport. This is consistent with the intention of the mechanism to prevent overseas travel on any Australian travel document and is also consistent with the language of section 22 of the Act, which allows the Minister to cancel an Australian travel document (and not just a passport).

435. New subsection 22A(2) gives ASIO the ability to make a request to the Minister to suspend all Australian travel documents issued to a person. ASIO will be able to make a request where it suspects on reasonable grounds that the person *may* leave Australia to engage in conduct that *might* prejudice the security of Australia or a foreign country, and the

person's Australian travel documents should be suspended to prevent the person from engaging in the conduct. ASIO is the sole requesting authority as the suspension mechanism is designed to target persons of security concern as defined in section 4 of the ASIO Act. The threshold for a request under subsection 22A(2) is lower than that required for a passport refusal or cancellation request under section 14 of the Act, commensurate with the temporary nature of the contemplated administrative action.

436. The lower threshold will enable the Minister for Foreign Affairs to take temporary action to suspend a person's Australian travel documents for a period of 14 days during which time ASIO can further assess the extent and nature of the security risk to inform further security advice to DIBP of Foreign Affairs. The making of a suspension request by ASIO must be based on credible information which indicates that the person may pose a security risk. The written request will include the security rationale for the making of the request.

437. New subsection 22A(3) allows ASIO to make an additional request in relation to the person where it has new information that was not before it at the time of the suspension request and during the period of the suspension. The subsection allows ASIO to make a request where there is genuinely new information before it. However, the subsection is not intended to allow for consecutive rolling suspensions, which would defeat the purpose of the limited 14-day suspension period.

Item 22 – At the end of paragraph 24(1)(b)

438. This item amends paragraph 24(1)(b) so that an officer cannot demand that a person surrender a suspended Australian travel document to the officer under section 24. The surrender of a suspended Australian travel document is instead provided for in new section 24A.

Item 23 – After section 24

439. Under new subsection 24A(1), an officer may demand that a person surrender their Australian travel document if it has been suspended under section 22A. This surrender power ensures that a person is unable to travel using their suspended Australian travel document.

440. New subsection 24A(4) creates an offence in circumstances where a person fails to surrender their Australian travel documents after a demand from an officer under subsection 24A(1). The offence is necessary to give effect to the surrender order so a person will not be able to keep their suspended Australian travel documents, despite an order being made for their surrender, with no adverse consequences. The penalty for an offence under this subsection is imprisonment for six months or ten penalty units, or both.

441. New subsection 24A(3) provides that an Australian travel document, if surrendered, must be returned to the person at the end of the suspension period (that is, at the end of 14 days from the making of the order). Subsection 24A(3) appropriately ensures that at the end of the suspension period a person is able to exercise their right to travel. However, the exception to this is where the Minister has cancelled a person's Australian travel documents in the suspension period. In this situation, the surrendered Australian travel documents are not required to be returned to the person because they will be invalid.

442. The decision to demand the surrender of a suspended Australian travel document will not be a reviewable decision under section 48, given the temporary nature of the surrender.

Item 24 – Section 48 (note)

443. This item amends the note to section 48 to clarify that the notification provisions in section 27A of the AAT Act apply to reviewable decisions under section 48, but will not apply in the circumstances described in new section 48A.

Item 25 – After section 48

444. This item inserts new section 48A, which provides for circumstances where the notification provisions under section 27A of the AAT Act and section 38 of the ASIO do not apply. In some situations, notifying a person that their passport has been cancelled (or that a decision to refuse to issue a passport has been made) will adversely affect the security of the nation or the investigation of a terrorism offence. New section 48A has been inserted to ensure that, in certain limited circumstances, a person does not need to be notified of the decision relating to that person's passport or passport application.

445. New subsection 48A(1) provides for the scope of application of section 48A, which sets out the circumstances in which the Minister will not be required to notify a person of a decision to refuse to issue an Australian passport or to cancel an Australian travel document.

446. New subsection 48A(2) gives legislative certainty to the withholding of notice of passport cancellations. If ASIO or the Director-General of Security makes a refusal or cancellation request in relation to a person's passport under subsection 14(1) of the Passports Act the request will amount to an 'adverse security assessment' for the purposes of Part IV of the ASIO Act. If ASIO provides an adverse security assessment to DIBP or DFAT in respect of a person and recommends that the Minister cancel the person's Australian passport, subsection 38(1) of the ASIO Act imposes specific legal obligations on DFAT including the provision to the person of written notice of the security assessment, a copy of the security assessment and information in the prescribed form concerning the person's right to apply to the AAT to seek merits review of the security assessment. However, if the Attorney-General certifies in writing under paragraph 38(2)(a) of the ASIO Act that s/he is satisfied that the withholding of notice to a person is essential to the security of the nation, DFAT is permitted not to give notice to the person in accordance with subsection 38(1) of the ASIO Act in relation to the security assessment.

447. The insertion of subsection 48A(2) ensures that a person will not be notified by DFAT of the making of the competent authority request or the Minister's passport cancellation or refusal decision where the Attorney-General has certified under paragraph 38(2)(a) of the ASIO Act that s/he is satisfied that the withholding of notice of the making of a security assessment from a person is essential to the security of the nation. Under section 27A of the AAT Act, the Minister is required to take such steps as are reasonable in the circumstances to notify the person whose interests are affected by the Minister's passport cancellation or refusal decision. New subsection 48A(2), when read with new subsection 48A(7), provides that where the Attorney-General has issued a certificate under paragraph 38(2)(a) of the ASIO Act in relation to the withholding of notice to a person of the security assessment (that is, the refusal or cancellation request) the notification provisions in section 27A of the AAT Act do not apply.

448. New subsection 48A(3) provides that the Minister is not required to notify a person of the refusal or cancellation if a member or special member of the AFP has made a request under subsection 14(1) and there is in force a certificate under new subsection 48(4).

449. New subsection 48A(4) allows the Minister administering the *Australian Federal Police Act 1979* (AFP Act) to certify, in writing, that notifying a person of a refusal or cancellation decision would adversely affect a law enforcement investigation into one of the offences listed in paragraph (a)-(d). Paragraphs (a)-(d) list the terrorism offences under the new definition of ‘terrorism offence’ in the Crimes Act. The certificate under new subsection 48A(4) has been limited to these offences because, as a general rule, a person should be notified when an administrative decision has been made against them. However, in light of the enduring terrorist threat it is necessary to prevent the notification of a person where Australia’s law enforcement interests would be adversely affected by the notification of that person. New subsection 48A(4), when read with subsection 48A(7), provides that where the Minister administering the AFP Act has issued a certificate the notification provisions in section 27A of the AAT Act do not apply.

450. Subsection 48A(5) has been included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003* (Legislative Instruments Act).

451. New subsection 48A(6) has been included to ensure that the Minister is notified where the Minister administering the AFP Act has issued a certificate (or revoked a certificate) under new subsection 48A(4). It is necessary that the Minister be notified so that the Minister does not inadvertently notify the relevant person of a passport refusal or cancellation decision despite the existence of a certificate issued in accordance with new subsection 48A(4).

452. New subsection 48A(7) provides that new section 48A has effect despite the notification provisions in section 27A of the AAT Act.

Item 26 – After paragraph 51(1)(d)

453. This item inserts paragraph 51(1)(da), which allows the Minister to delegate, in writing, to an officer (within the meaning of paragraph (a), (b), (c) or (g) of the definition of officer in subsection 6(1)) the Minister’s power to suspend a person’s Australian travel documents under new section 22A. It is appropriate for the Minister to be able to delegate this power because the Minister is already able to delegate the decision to cancel a person’s Australian travel documents.

Australian Security Intelligence Organisation Act 1979

Item 27 – Section 4 (paragraph (c) of the definition of politically motivated violence)

454. This item is consequential to amending items 110 and 144 of Schedule 1 to the Bill, which repeal the Foreign Incursions Act and insert a new Part 5.5 in the Criminal Code. The offences in the Foreign Incursions Act are consolidated in the new Division 119 of Part 5.5 of the Criminal Code.

455. Paragraph (c) of the definition of ‘politically motivated violence’ in section 4 of the ASIO Act includes a number of security offences, including those against the Foreign

Incursions Act. Amending item 27 substitutes the reference in paragraph (c) to offences against the Foreign Incursions Act with offences against new Division 119 of the Criminal Code.

456. The definition of ‘politically motivated violence’ in the ASIO Act is relevant to ASIO’s statutory functions in relation to security as set out in section 17 of the ASIO Act. The term ‘security’ is defined in section 4 of the ASIO Act to include the protection of the Commonwealth, states and territories, and their people, from threats including politically motivated violence: per subparagraph (a)(iii).

457. Amending item 27 will ensure that ASIO can continue to perform its statutory functions with respect to matters relevant to security that relate to politically motivated violence, in the form of the offences presently in the Foreign Incursions Act and proposed to be relocated to new Division 119 of the Criminal Code. As this amendment is technical in nature it does not extend, in any material way, ASIO’s statutory functions or powers.

Item 28 – Paragraph 34D(4)(b)

458. This item amends one of the issuing criteria for questioning warrants in section 34D(4)(b). This provision concerns the elements of which the Minister (being the Attorney-General) must consent prior to the Director-General of Security making an application to an issuing authority for a questioning warrant. Presently, section 34D(4)(b) requires the Attorney-General to be satisfied that relying on other methods of collecting the intelligence sought to be obtained would be ineffective. As the INSLM noted in his second annual report, this operates, in effect, as a ‘last resort’ requirement, in that consent cannot be granted if there are any other intelligence collection methods available that are not ineffective. It is therefore not material that other available methods may be significantly less effective than a questioning warrant, may take considerably longer in time critical circumstances, or may involve a considerably greater risk to the lives or safety of persons collecting the intelligence.

459. Amending item 28 removes the ‘last resort’ requirement in section 34D(4)(b) and substitutes it with a provision requiring the Attorney-General to be satisfied that the issuing of the warrant requested is reasonable in all of the circumstances. The new threshold will require the Attorney-General, in making this assessment, to have regard to whether there are other methods of collecting the intelligence sought to be collected under the warrant, and whether those other methods are likely to be as effective. This means that, rather than being available only if the Attorney-General is satisfied that they are the sole means of collecting intelligence, questioning warrants will be available if the Attorney-General is satisfied that it is reasonable in the circumstances to obtain intelligence by way of a questioning warrant. The existence of other, less intrusive methods of obtaining the intelligence will therefore be a relevant but non-determinative consideration in decisions made under section 34D(4).

460. This item implements the Government’s response to a recommendation in the INSLM’s second annual report. The Government supports the reasoning of the INSLM, who concluded that it would be reasonable to substitute the ‘last resort’ requirement in section 34D(4)(b) with a ‘most effective’ requirement, on the basis that the latter requirement would be a ‘fair balance of security and liberty’ having regard to the range of other safeguards governing the exercise of powers to issue questioning warrants. These safeguards include the requirement for questioning warrants to be issued by an issuing authority who, before issuing a questioning warrant, must be satisfied that there are reasonable grounds for

believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. They also include the Attorney-General's Guidelines to ASIO, which are made under section 8A of the ASIO Act, and the ability for Statement of Procedures for the exercise of authority under Part III, Division 3 to be issued by the Director-General of Security in accordance with section 34C of the ASIO Act. Importantly, the Attorney-General's Guidelines require ASIO to undertake inquiries and investigations, wherever possible, using the least intrusive techniques to collect information.

461. Further, the legality and propriety of ASIO's activities, including in making requests for questioning warrants, is subject to the oversight of the IGIS under the IGIS Act. The IGIS also has a specific oversight function in relation to the execution of questioning and questioning and detention warrants under Division 3 of Part III of the ASIO Act. This includes an obligation on the Director-General of Security, under section 34ZI, to furnish the IGIS, as soon as practicable, with a copy of any draft requests for warrants given to the Attorney-General under section 34D(3). The IGIS will therefore have visibility of the statement of facts and other grounds on which ASIO considers it necessary that the warrant should be issued.

462. As the INSLM also noted in his second annual report, there is precedent for a requirement in the nature of that inserted by this item in the compulsory questioning powers invested in the Australian Crime Commission under section 28(1A) of the *Australian Crime Commission Act 2002*. On this basis, the Government supports the INSLM's conclusion that the 'last resort' requirement presently included in section 34D(4)(b) of the ASIO Act is not necessary, and it is appropriately replaced with the threshold in amending item 28.

Item 29 – Application of amendment

463. Amending item 29 provides that the requirement in new section 34D(4)(b) applies to consent that is sought on or after the commencement of amending item 28. This means that, if a request for the Attorney-General's consent is sought before amending item 28 commences, the 'last resort' threshold presently in section 34D(4)(b) must be applied (or the request discontinued and a new request made after new section 34D(4)(b) commences). If a request for consent is made on, or after, the commencement of amending item 28, the threshold in new section 34D(4)(b) applies. The new threshold is therefore of prospective application only.

Item 30 – At the end of section 34L

464. This item creates a new offence in section 34L (new subsection 10) in relation to persons who engage in conduct in relation to a record or a thing which has been requested to be produced under a warrant, with the result that the record or thing is unable to be produced or produced in wholly legible or useable form.

465. This item implements the Government's response to a recommendation in the INSLM's second annual report to introduce a new offence in relation to the wilful destruction of, or tampering with, records or things which have been requested to be produced under a questioning warrant. This is intended to ensure that there are no unforeseen gaps in the existing offence provision in section 34L(6), which applies to persons who fail to produce a record or thing to a prescribed authority, in accordance with a request made in a warrant issued under Division 3 of Part III of the ASIO Act. Consistent with the intent of the INSLM, the offence in new section 34L(10) is introduced to ensure the offences in section

34L capture persons who contravene the obligation to produce materials which are required to be produced under a questioning warrant.

466. The elements of the offence are that the person has been requested, under a questioning warrant, to produce a record or thing; and he or she intentionally engages in conduct, the result of which is that the record or thing is unable to be produced in a legible or useable form. The person must be reckless as to the result of his or her conduct, by reason of section 5.6(2) of the Criminal Code. This means that a person must be aware of a substantial risk that his or her conduct would result in the non-production, or production in an illegible or unusable form, of the record or thing requested under a warrant, and nonetheless and unjustifiably in the circumstances known to him or her at the time took the risk of engaging in the conduct (pursuant to section 5.4(2) of the Criminal Code).

467. The application of the fault element of recklessness to the physical element of a result of conduct in proposed section 34L(10)(c) reflects the Government's view that persons who have been placed on notice to produce materials under a warrant are held to an appropriate standard of conduct in ensuring that the materials are able to be produced. It would be counter-productive to require the prosecution to specifically prove that the person intended to destroy or otherwise interfere with a thing or record, and that the person engaged in that conduct with the specific intention of preventing the thing or record from being produced under a warrant. The inclusion of such elements in the proposed offence would create an arbitrary distinction between culpable and non-culpable conduct on the basis of evidence in relation to a person's specific intent in engaging in the relevant conduct, and the particular nature of his or her actions, notwithstanding that the result of conduct is an inability to produce the records or things specifically requested under the warrant. Unlike offences applying to persons who destroy or tamper with materials that they know are, or may be, required in judicial proceedings (for example, section 39 of the Crimes Act), the offence in proposed section 34L(10)(c) is limited to the subject of a questioning warrant, who is placed on notice to produce materials as a result of the issuing of that warrant to him or her.

468. The offence applies to conduct which prevents production of things or records in wholly legible or useable form. The inclusion of the term 'wholly' in proposed section 34L(10)(c) makes clear that the offence can apply to conduct that compromises parts of records or things requested to be produced under a warrant. This is consistent with the intention that the offence should target the wrongdoing inherent in the conduct of a person who has been placed on notice to produce a record or thing under a warrant, and who engages in conduct which frustrates or compromises the warrant. It is not material, in this respect, that the relevant record or thing is compromised in part or in full.

469. The new offence carries a maximum penalty of five years' imprisonment. This is identical to the penalty applied to the existing offence in section 34L(6) in respect of persons who fail to produce records or things to a prescribed authority in accordance with a request made under a warrant issued under Division 3 of Part III of the ASIO Act. Parity of these penalties is appropriate given that both offences are directed to similar sorts of wrongdoing that frustrate the execution of a warrant issued under Division 3 of Part III.

Item 31 – Application of subsection 34L(10) of the Australian Security Intelligence Organisation Act 1979

470. Amending item 31 provides that the new offence in section 34L(10) applies to conduct occurring on, or after, the commencement of that item. It is not material to the

application of section 34L(10) whether the warrant referred to in paragraph (a) was issued before, on or after the commencement of the offence provision.

471. This means that the new offence will apply to a person who is issued with a warrant prior to the commencement of section 34L(10), and who engages in conduct that contravenes section 34L(10) when, or after, that offence provision commences. The offence is therefore prospective in its application to the relevant conduct in paragraph (b) and the result of that conduct in paragraph (c).

472. The fact that a warrant may have been issued prior to the commencement of section 34L(10) is not considered material to a person's culpability because, in any case, it has served to place the person on notice that he or she is under a legal obligation to produce the records or things specified in the warrant, and that failure to comply is the subject of criminal penalty. Limiting the new offence to warrants issued on or after the commencement of section 34L(10) would produce an arbitrary distinction between culpable and non-culpable conduct on the basis of the time at which the warrant was issued, notwithstanding that the conduct which resulted in non-production would be identical in either scenario.

473. In addition, the existing provisions of Division 3 of Part III in relation to the execution of warrants provide considerable safeguards. In particular, questioning warrants must require the person to appear before a prescribed authority for questioning immediately after the issue of the warrant or at a time specified in the warrant: section 34E(2). Similarly, a questioning and detention warrant must authorise a person to be brought before a prescribed authority immediately for questioning under the warrant: section 34G(3). The prescribed authority is required under section 34J(1)(c) to explain the effect of section 34L to the person on his or her first appearance, including the fact that the section creates offences. A person also has the right to contact a lawyer in relation to a warrant: sections 34E(3) and 34G(5) and (6).

474. In addition, warrants may only be in force for a maximum of 28 days under sections 34E(5) and 34G(8), meaning that the opportunity for any perceived 'retrospectivity' in relation to the application of paragraph (a) of section 34L(10) is limited.

Item 32 – Subsection 34V(3)

475. This item amends the provisions in section 34V(3)(b), which authorise the use of lethal force, or force likely to cause grievous bodily harm, by a police officer where necessary to prevent a person from escaping being taken into custody in accordance with a warrant by fleeing.

476. Paragraph 34V(3)(b) authorises the use of force that is likely to cause the death of, or grievous bodily harm to, the person who is subject to the warrant, if the person is attempting to escape being taken into custody by fleeing. Subparagraphs 34V(3)(b)(i) and (b)(ii) create two, cumulative conditions for the use of lethal force, or that which is likely to cause grievous bodily harm, in these circumstances. Under subparagraph (b)(i) a police officer must believe on reasonable grounds that exercising such force is necessary to protect life or prevent serious injury to another person. Under subparagraph (b)(ii) the person must have been called upon to surrender (if practicable) and the officer must believe on reasonable grounds that the person cannot be taken into custody in any other manner.

477. The requirements in section 34V(3)(b), which apply specifically to persons attempting to escape being taken into custody, are additional to those in section 34V(3)(a), which govern

the use of lethal force, or that which is likely to cause grievous bodily harm, in all other circumstances in connection with the execution of a warrant issued under Division 3 of Part III. The test in section 34V(3)(a) is identical to that in section 34V(3)(b)(i) – namely, that the officer must believe, on reasonable grounds, that the use of lethal force, or force likely to cause grievous bodily harm, is necessary to protect life or prevent serious injury to another person.

478. Amending item 32 removes the specific thresholds in section 34V(3)(b) for the use of lethal force, or that which is likely to cause grievous bodily harm, in relation to persons who are attempting to escape being taken into custody under a warrant. This means that the general test, currently in section 34V(3)(a), will govern all circumstances in which such force can be used by a police officer in the execution of a warrant. As such, the item consolidates the ground presently in section 34V(3)(a) into a single provision in subsection (3). It is no longer necessary to maintain separate paragraphs 34V(3)(a) and (b) because a single ground will now apply.

479. Amending item 32 gives effect to the Government's response to a recommendation in the INSLM's second annual report that the requirement in section 34V(3)(b)(ii) be removed. The Government supports the INSLM's conclusion that the requirement in subparagraph (b)(ii) is not necessary, in light of the requirement in subparagraph (b)(i), which is identical to that in paragraph (a).

Item 33 – Section 34ZZ

480. Item 33 amends section 34ZZ of the ASIO Act, which provides that Division 3 of Part III ceases to have effect on 22 July 2016. The effect of this item will be to extend the existence of these provisions to 22 July 2026. The Government is of the view that there are realistic and credible circumstances in which it may be necessary to conduct coercive questioning of a person for the purposes of gathering intelligence about a terrorism offence – as distinct from conducting law enforcement action, or obtaining a preventive order under Divisions 104 and 105 of the Criminal Code – particularly in time critical circumstances. Intelligence is integral to protecting Australia and Australians from the threat of terrorism, and it is important to ensure that ASIO has the necessary capabilities to perform this function. The threat of terrorism is pervasive and has not abated since the enactment of Division 3 of Part III in 2003. On this basis, the Government is satisfied that there is a continued need for these powers.

481. The judicious use of the powers conferred by Division 3 of Part III is consistent with their extraordinary nature and the intention that they should be used sparingly. Independent reviews of Division 3 of Part III have been undertaken by the INSLM in 2012-14 and the predecessor committee to the PJCIS in 2005 (the Parliamentary Joint Committee on ASIO, ASIS and DSD), which found no evidence of impropriety in the use of these provisions. The IGIS, in undertaking her standing oversight functions, has similarly found no evidence of impropriety or aberrant use.

482. The powers under Division 3 of Part III are caveated by extensive safeguards, which will continue to apply for the ten-year extension of the Division. These include: stringent statutory issuing criteria; the appointment of an independent issuing authority to determine applications (the making of which must be approved by the Attorney-General); the conduct of questioning before an independent prescribed authority; limitations on the duration of warrants and questioning time under warrants; the conferral of rights on persons subject to

warrants to contact a lawyer, the IGIS or the Ombudsman and to access an interpreter where necessary; the imposition of obligations on persons executing warrants to treat the subject with humanity and respect for dignity; limitations in relation to powers of search (including person searches) and the use of force in the execution of warrants; special rules for young persons who are subject to warrants; specific reporting obligations to the Attorney-General and the IGIS in relation to warrants; the conferral of a specific oversight function on the IGIS under Division 3; the ability of a person subject to a warrant to apply for financial assistance from the Commonwealth; and the application of criminal offences to persons who contravene statutory safeguards under Division 3.

Item 34 – After paragraph 36(b)

483. This item inserts new subparagraph (ba) to make a security assessment that is also a request under section 22A of the Passports Act not subject to Part IV of the ASIO Act other than subsections 37(1), (3) and (4) of the ASIO Act.

484. New section 22A enables the Minister to suspend a person's Australian travel documents for a period of 14 days where ASIO makes a request under new subsection 22A(2). Similar to a request by ASIO for the cancellation of a passport under section 14(1) of the Passports Act, the request for suspension of Australian travel documents falls within the definition of prescribed administrative action within section 35 of the ASIO Act. The making of a request by ASIO in writing recommending the taking of prescribed administrative action to suspend a person's Australian travel documents will amount to a security assessment as defined within section 35 of the ASIO Act.

485. The amendments operate on the basis that a request by ASIO under new section 22A is not also subject to the notification and merits review requirements contained in Part IV of the ASIO Act. Under the new suspension scheme, it is intended that a person only have judicial review rights under the Constitution. This is to reduce the operational security risk that arises from making such decisions reviewable, in addition to being proportionate to the strict 14-day timeframe that applies where an order is made for the suspension and surrender of a person's Australian travel documents on the basis of ASIO's request. If ASIO makes a cancellation request under section 14 of the Passports Act following a suspension request in relation to the person, that person will have merits review and notification rights under Part IV in relation to that request.

Crimes Act 1914

Items 35 to 38 – Overview of definition of terrorism offence

486. Subsection 3(1) defines terrorism offence as an offence against Subdivision A of Division 72 of the Criminal Code, or an offence against Part 5.3 of the Criminal Code. This definition is particularly important in the context of the Crimes Act for:

- Division 3A of Part 1A which provides powers in relation to terrorist acts and terrorism offences
- Section 15AA which relates to bail not being granted in certain cases
- Section 19AG which relates to non-parole periods for sentences for certain offences

- New section 3WA in Part 1AA which inserts a new power of arrest without a warrant for a terrorism offence or offence of advocating terrorism
- New Part 1AAA which inserts the delayed notification search warrant scheme, and
- Part 1C which provides powers to detain a person for the purpose of investigating a terrorism offence.

487. Items 35-37 expand the current definition of terrorism offence for the purposes of the Crimes Act. These items implement Recommendation VI/6 of the INSLM's fourth report. In this recommendation the INSLM reiterates his position stated in his third annual report that "there is no reason in principle or policy to distinguish UN Charter Act terrorism financing offences which implement Australia's international counter-terrorism obligations under 1373 and relate to potentially very serious terrorism financing activity, from terrorism offences under the Criminal Code." Further to this, he notes that the Foreign Incursions Act criminalises politically motivated violence, including conduct that would fit within the meaning of 'terrorist act' under the Criminal Code and criminalises engaging in hostile activity with an organization which is a proscribed terrorist organization under the Criminal Code. For this reason there is similarly reason in principle or policy to distinguish between the offences under the Foreign Incursions Act, which cover potentially very serious terrorist activity, from terrorism offences under the Criminal Code.

488. The amended definition of terrorism offence will also be used in the *Proceeds of Crime Act 2002* as item 136 repeals the existing definition of terrorism offence in section 338 and replaces it with a cross-reference to the definition in the Crimes Act.

Item 35 – Subsection 3(1) (after paragraph (a) of the definition of terrorism offence)

489. This item extends the definition of terrorism offence in subsection 3(1) to include offences against Subdivision B of Division 80 of the Criminal Code. This includes the offence of treason at section 80.1 and the offence of treason—materially assisting enemies etc. at 80.1AA.

Item 36 – Subsection 3(1) (paragraph (b) of the definition of terrorism offence)

490. This item extends the definition of terrorism offence in subsection 3(1) to include foreign incursion and recruitment offences that will be inserted in new Part 5.5 of the Criminal Code.

Item 37 – Subsection 3(1) (at the end of the definition of terrorism offence)

491. This item extends the definition of terrorism offence in subsection 3(1) to include offences against Part 4 of the UN Charter Act and Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—Al Qaida) Regulations 2008*.

Item 38 – Application of amendments

492. This item provides that the amendments to the definition of terrorism offence in subsection 3(1) apply in relation to any terrorism offence, whether the offence occurs before, on or after commencement off this item.

Items 39 to 42 – Amendments relating to the creation of a new delayed notification search warrant scheme

These items relate to the creation of the new delayed notification search warrant scheme (see item 51) and distinguish the existing search, information gathering, arrest and related powers in Part IAA of the Crimes Act from the powers provided in the new Part IAAA, referred to at item 51.

Item 39 – Part IAA (heading)

493. This item substitutes the existing heading ‘Part IAA—search, information gathering, arrest and related powers’ with ‘Part IAA—search, information gathering, arrest and related powers (other than powers under delayed notification search warrants)’. This reflects the insertion of a new Part IAAA in the Crimes Act, which provides for additional search and information gathering powers that do not fall within Part IAA.

Item 40 – Subsection 3C(1) (at the end of the definition of *issuing officer*)

494. Item 40 adds a drafting note below the definition of issuing officer in subsection 3C(1) of the Crimes Act to clarify how this definition will interact with the relevant provisions within the new Part IAAA of the Crimes Act. The meaning of an issuing officer specifies who is authorised to issue a warrant to search premises or a person or a warrant for arrest under Part IAA of the Crimes Act. Under proposed section 3ZZBJ of the new Part IAAA of the Crimes Act, an eligible issuing officer (as defined in Part IAAA) is also authorised to issue a warrant to search premises as if the eligible issuing officer were an issuing officer within the meaning of subsection 3C(1). This provision is intended to enable applications for ordinary search warrants and delayed notification search warrants relevant to the same investigation to be determined by one eligible issuing officer.

Item 41 – Subsections 3D(1) and (2)

495. Subsections 3D(1) and (2) clarify that Part IAA does not limit or exclude the operation of Commonwealth laws relating 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 41 inserts “(including other provisions of this Act)” within subsections 3D(1) and (2) as an additional Commonwealth law that is not limited or excluded by Part IAA. This clarifies that even though new Part IAAA may provide a power to do one or more things contained within Part IAA, the similar power conferred by Part IAA may be used despite those powers elsewhere.

Item 42 – After subsection 3E(1)

496. Subsection 3E(1) specifies when search warrants can be issued under Part IAA of the Crimes Act. Item 42 inserts a drafting note at the end of this section to clarify that the issue of delayed notification search warrants is set out in new Part IAAA.

Item 43 – Subsection 3UK(1)

497. This item extends the ability for police officers to exercise powers and duties under Division 3A of Part IAA until 15 December 2025. Division 3A gives police officers powers in relation to terrorist acts and terrorism offences, including stop, search and seizure powers. These powers were due to sunset on 14 December 2015. However, in light of the enduring

threat of terrorism, these powers will be maintained for an extended period of ten years to give law enforcement agencies the appropriate tools they need to deal with this threat.

Item 44 – Subsection 3UK(2)

498. This item extends the operation of a declaration made under section 3UJ from ten years after the commencement of Division 3A to 15 December 2025. Section 3UJ gives the Minister the power to declare a Commonwealth place to be a prescribed security zone if it would assist in preventing a terrorist act occurring or assist in responding to a terrorist act that has occurred. A police officer may exercise powers under Subdivision B of Division 3A in relation to a person if that person is in a Commonwealth place in a prescribed security zone (refer to section 3UB(1)). It is necessary to extend the operation of subsection 3UK(2) to give full effect to item 43, which extends the operation of police powers and duties under Division 3A.

Item 45 – Subsection 3UK(3)

499. This item extends the ability of a police officer to apply for, and the Minister to make, a declaration under section 3UJ from ten years after the commencement of Division 3A to 15 December 2025. It is necessary to extend the operation of subsection 3UK(3) to give full effect to item 43, which extends the operation of police powers and duties under Division 3A.

Item 46 – Subsection 3W(1)

500. This item inserts ‘other than a terrorism offence and an offence against section 80.2C of the *Criminal Code*’ after the word ‘offence’ in subsection 3W(1) to provide that a constable’s powers under the subsection do not apply in relation to those offences. A constable’s powers in relation to those offences are addressed in new section 3WA inserted by item 47.

Item 47 – After section 3W

501. This item inserts new section 3WA, which gives constables the power to arrest a person without a warrant for a terrorism offence or an offence against new section 80.2C of the Criminal Code. New subsection 3WA(1) provides a police constable with the power to arrest a person without a warrant where the constable suspects on reasonable grounds that the person has committed or is committing a terrorism offence or an offence against section 80.2C and issuing a summons against the person would not be effective for the purposes specified in subparagraphs (i)-(vi). These purposes mirror the existing provisions in existing subparagraphs 3W(2)(b)(i)-(vi).

502. The threshold for ‘suspecting’ on reasonable grounds is lower than that of ‘believing’ on reasonable grounds, which is the threshold in section 3W. However, there would need to be some factual basis for the suspicion and there would need to be more than idle wondering. An arrest threshold based on suspicion is not a new concept in Australian law and is used in a number of Australian jurisdictions.

503. Lowering the arrest threshold will give police the option to intervene and disrupt terrorist activities and the advocating of terrorism at an earlier point than would be possible where the threshold is reasonable grounds to believe. Once a person has been arrested and the suspected activity disrupted, police will be able to examine the evidence (including

evidence obtained during searches conducted simultaneously with the arrest action or shortly thereafter) to support the brief of evidence. Lowering the threshold is appropriate for terrorism offences due to the extraordinary risk posed to the Australian public by terrorism and the time critical nature that a response to such offences is needed.

504. The threat from terrorism has been exacerbated by Australians travelling (and seeking to travel) overseas to participate in foreign conflicts and it will not always be appropriate or in the public's best interest to delay action until sufficient evidence has been obtained to meet the threshold of reasonable belief. Section 80.2C of the Criminal Code has been included in addition to terrorism offences as it is necessary for the police to have the ability to arrest a person at an earlier stage to prevent and disrupt that person from advocating terrorism. However, given the nature of the offence it is not necessary for the broader suite of powers that apply to 'terrorism offences', such as the stop search and seizure powers under Division 3A of Part IAA, to apply to section 80.2C.

505. New subsection 3WA(2) necessarily provides that where a person has been arrested but not yet charged and the constable in charge of the investigation ceases to suspect on reasonable grounds that the person committed the offence, or that holding the person in custody is necessary to achieve a purpose referred to in new paragraph 3WA(1)(b), the person must be released.

Item 48 – Application of amendments

506. This item provides that the application of the amendments made to section 3W and the introduction of new subsection 3WA apply to arrests made after the commencement of this item.

Item 49 – Paragraph 3ZB(2)(a)

507. This item inserts 'or 3WA' into paragraph 3ZB(2)(a). This will ensure that, if a constable can arrest someone under section 3W or new section 3WA, and the constable believes on reasonable grounds that the person is on any premises, the constable may enter the premises using necessary and reasonable force.

Item 50 – Paragraph 3ZQN(3)(e)

508. Section 3ZQN enables an authorised AFP officer to obtain documents relating to serious terrorism offences. The power is exercised through a written notice which compels a person to produce documents relevant to the investigation of a serious terrorism offence. Paragraph 3ZQN(3)(e) provides that the person must comply with the notice 'as soon as practicable', but does not presently specify any particular deadline for compliance with the notice. As there is presently no specific timeframe in which a notice must be answered, delays can be encountered in receiving the information.

509. Item 50 replaces existing paragraph 3ZQN(3)(e). The effect of this is that a notice need no longer state that a person must comply with the notice 'as soon as practicable'. Instead, it is proposed that a notice issued under section 3ZQN must specify the day by which a person is to comply with that notice.

510. That day must be at least 14 days from the giving of the notice or, if the authorised AFP officer believes that it is appropriate to specify an earlier day, having regard to the urgency of the situation, a day that is at least 3 days from the giving of the notice.

511. A serious terrorism offence is defined in section 3C of the Crimes Act.

512. This item implements Recommendation VI/4 of the INSLM's fourth annual report.

Item 51

Delayed Notification Search Warrants

513. This item will establish a delayed notification search warrant scheme in a new stand-alone Part IAAA of the Crimes Act. Under current Commonwealth search warrant provisions in the Crimes Act, the occupier of searched premises or their representative must be given a copy of the warrant if they are present (section 3H), which ensures that a search cannot occur without the occupier being made aware that the search is taking place. A delayed notification search warrant scheme will allow AFP officers to covertly enter and search premises for the purposes of preventing or investigating Commonwealth terrorism offences, without the knowledge of the occupier of the premises, with the occupier to be given notice at a later time.

514. Delaying notification of a search warrant will ensure that the investigation remains confidential. This is considered critical to the success of certain investigations by the AFP, particularly when carrying out investigations of multiple suspects over an extended period. If members of a terrorist group are alerted to investigator's knowledge of their activities, the success of the law enforcement operation could be jeopardised. For example, a suspect whose premises are searched under the current regime would be notified of police interest in their activities. A suspect could then undertake counter-surveillance measures, change their plans to avoid further detection, relocate their operations, or relocate or destroy evidence of their activities. It would also provide a suspect with the opportunity to notify their associates, who may not yet be known to police, allowing the associates to cease their involvement with the known suspect, destroy evidence or avoid detection in other ways. Delaying notification of a search warrant will also enable the AFP, when executing the warrant, to gather information about a planned operation with a view to preventing a terrorism offence from being committed.

515. Introducing a delayed notification search warrant regime is consistent with other covert Commonwealth schemes, such as telecommunications interception, surveillance devices and controlled operations schemes, which already allow law enforcement agencies to collect evidence covertly. In addition, several Australian states and territories have either delayed notification or covert search warrant regimes for investigating terrorism offences including New South Wales, Victoria, Queensland, Western Australia and the Northern Territory. Covert or delayed notification search warrants are also available in both Canada and New Zealand.

Item 51 – At the end of Part 1AA

516. This item inserts a new Part IAAA—Delayed notification search warrants into the Crimes Act. This new Part provides for requesting, authorising, issuing and reporting obligations with respect to delayed notification search warrants.

Division 1—Preliminary

517. Division 1 outlines the administrative arrangements for issuing delayed notification search warrants, and definitions of terms used in the proposed Part IAAA.

Section 3ZZAA Object of this Part

518. Subsection 3ZZAA(1) explains that Part IAAA is intended to provide eligible agencies with the ability to obtain search warrants in relation to eligible offences that authorise the entry and search of premises without having to produce the warrant at the time of entry and search. The AFP is specified as the ‘eligible agency’. An ‘eligible offence’ is defined as a terrorism offence that is punishable on conviction by imprisonment for 7 years or more. The Bill has expanded the definition of ‘terrorism offences’ within subsection 3(1) of the Crimes Act to include an offence against Subdivision B of Division 80, Part 5.3 or Part 5.5 of the Criminal Code and an offence against Part 4 of the UN Charter Act and Part 5 of that Act, to the extent that it relates to the *Charter of the United Nations (Sanctions—Al Qaida) Regulations 2008* (see items 35–37 above).

519. The threshold penalty period of 7 years or more will capture all terrorism offences within the Criminal Code, with the exception of associating with terrorist organisations (section 102.8) which attracts three years’ imprisonment. This penalty threshold is consistent with the thresholds for other Commonwealth schemes for covert investigation. For example, telecommunications interception warrants are available for the investigation of Commonwealth, state and territory offences with a penalty of seven years or more, as well as certain other offences, which involve the use of telecommunications or computers and have lower penalties, such as cybercrime offences.

Section 3ZZAB Application of Part

520. This application provision clarifies that the Part IAAA does not limit or exclude the operation of Commonwealth laws in relation to the search of premises, the seizure of things, the use of an assumed identity or the installation of surveillance devices. This applies even in instances where a power has been conferred by this Part that may be similar to an existing power under another Commonwealth law. This provision also clarifies that even though another Commonwealth law may provide a power to do one or more of those things, a similar power conferred by Part IAAA may be used despite those powers elsewhere.

Section 3ZZAC Definitions

521. Section 3ZZAC provides definitions of terms used in new Part IAAA. These definitions will be explained, where applicable, in the subsequent notes on clauses.

Section 3ZZAD Eligible Issuing Officers

522. Under new Part IAAA of the Crimes Act, the issue of a delayed notification search warrant will be contingent on a two-step process requiring both internal authorisation within an eligible agency and then application to an eligible issuing officer. New section 3ZZAD defines who is an eligible issuing officer for the purpose of Part IAAA.

523. Subsection 3ZZAD(1) defines the term ‘eligible issuing officer’ as a person who is either a judge of the Federal Court of Australia, a judge of the Supreme Court of a State or Territory or a nominated member of the AAT. For the purposes of this Part, judges are

required to have consented to, and be declared by the Minister to be, an eligible issuing officer under subsections 3ZZAE(1) and (2).

524. Subsection 3ZZAD(2) provides that any function or power conferred on a judge under this Part is conferred in a personal capacity, that is, in *persona designata*, rather than as a court or a member of a court.

525. Subsection 3ZZAD(3) provides that a judge will have the same protection and immunity in relation to the performance or exercise of a function or power conferred on them under this Part as a judge would have if that function was exercised as a member of a court of which the judge was a member. Similarly, the drafting note for this subsection explains that a member of the AAT will have the same protection and immunity in relation to the performance of a function or power conferred on them under this Part as a Justice of the High Court has in relation to proceedings in the High Court.

Section 3ZZAE Consent of Judges

526. Subsection 3ZZAE(1) and (2) provides that judges may consent to be declared an eligible issuing officer by the Minister. Both the consent and the subsequent declaration by the Minister must be in writing. Subsection 3ZZAE(3) is included to assist readers, as the consent or declaration provided under this section is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Section 3ZZAF Nominated AAT members

527. Subsection 3ZZAF(1) provides that the Minister may nominate a Deputy President, a full-time senior member, a part-time senior member or a member of the AAT to issue delayed notification search warrants.

528. Subsection 3ZZAF(2) provides that the Minister must not nominate a part-time senior member or member under subsection 3ZZAF(1) unless the person is enrolled, and has been so enrolled for at least five years, as a legal practitioner of the High Court, of another federal court, or of the Supreme Court of a state or the Australian Capital Territory. The Northern Territory is covered by the reference to state, as defined in subsection 3(1) of the Crimes Act.

529. Under subsection 3ZZAF(3) a nomination will cease to have effect if the nominated AAT member ceases to hold their appointment to the AAT or the Minister withdraws the nomination in writing.

Division 2—Issue of delayed notification search warrants

530. This division describes the process by which an application may be made for a delayed notification search warrant, requirements for their issue and what must be included in the warrant.

Subdivision A—The normal process for applying for and issuing delayed notification search warrants

Section 3ZZBA The *conditions for issue* of a delayed notification search warrant

531. The issue of a delayed notification search warrant will involve a two-stage process of both internal authorisation and application to an eligible issuing officer. Section 3ZZBA

specifies the conditions that must be met at each of these stages for a delayed notification search warrant.

532. A person must be satisfied that there are reasonable grounds to suspect that one or more eligible offences have been, are being, are about to be or are likely to be committed. A person must also be satisfied that entry to and search of the premises will substantially assist in the prevention of, or investigation into, those eligible offences. Finally, a person must be satisfied that there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of any occupier of the premises.

Section 3ZZBB Authorisation to apply for delayed notification search warrants

533. Following on from section 3ZZBA, subsection 3ZZBB(1) enables the chief officer, defined in section IC as the Commissioner, of an eligible agency to authorise an eligible officer of that agency to apply in writing for a delayed notification search warrant in respect of a particular premises if the chief officer is satisfied that the conditions for issue set out in section 3ZZBA are met. This requirement for authorisation to apply for a delayed notification search warrant is an additional safeguard which is not contained in the general search warrant provisions in Part IAA of the Crimes Act.

534. Subsection 3ZZBB(2) allows the chief officer, namely the AFP Commissioner, to provide this authorisation orally (in person, by telephone or other means of voice communication). This is limited to circumstances where the conditions for issue set out in section 3ZZBA are met and where there is either an urgent case or if receiving the authorisation in writing would frustrate the effective execution of the delayed notification search warrant. If this authorisation is provided orally, the chief officer must make a written record within 7 days as per subsection 3ZZBB(3). This balances a need for flexibility to address operational demands with the need for accountability and record-keeping measures.

Section 3ZZBC Applying for delayed notification search warrant

535. This section sets out the procedures to be followed by an eligible officer applying for a delayed notification search warrant. An eligible officer who has been authorised under section 3ZZBC may apply to an eligible issuing officer for the issue of a delayed notification search warrant in respect of a particular premises.

536. The first drafting note clarifies that for this application to be successful, it will need to address why the conditions for issues set out in 3ZZBA have been met. It will also need to address the matters that must be specified in the warrant, set out in subsection 3ZZBE (1), and any other matters that the eligible issuing officer will consider in making the decision to authorise a delayed notification search warrant, as set out in subsection 3ZZBD(2). The second drafting note cross-references section 3ZZBF to explain that this application may be made by telephone, fax or other electronic means in specified circumstances.

537. Subsection 3ZZBC(2) sets out what must be included in an application for a delayed notification search warrant. Unless made remotely under proposed section 3ZZBF, the application must be in writing. The eligible officer must provide the eligible issuing officer with a copy of, or details of, the authorisation provided under section 3ZZBB and details (including on the outcomes) of any previous applications for a warrant under this Part or Division 2 of Part IAA (general search warrants) in respect of the same premises so far as

known to the eligible officer. For example, if a previous application was refused, it is intended that the application would justify why the delayed notification search warrant should be issued at this time.

538. Subsection 3ZZBC(3) requires the application to be supported by an affidavit setting out the grounds on which the warrant is sought. Subsection 3ZZBC(4) provides that an eligible issuing officer may request further information relating to the application, and the information may be required to be provided on oath or affirmation. This power enables an eligible issuing officer to be satisfied as to the necessity for issuing a delayed notification search warrant.

Section 3ZZBD Issuing a delayed notification search warrant

539. Subsection 3ZZBD(1) provides that before issuing a delayed notification search warrant to an eligible officer, the eligible issuing officer must be satisfied, by information on oath or affirmation, that the conditions for issue set out in section 3ZZBA have been met. That is, the eligible issuing officer must be satisfied that there are reasonable grounds to suspect that one or more relevant offences have been, are being, are about to be or are likely to be committed and, that entry and search of the premises will substantially assist in the prevention of, or investigation into, those offences, and also that there are reasonable grounds to believe that it is necessary for the entry and search of the premises to be conducted without the knowledge of the occupier of the premises.

540. Subsection 3ZZBD(2) sets out seven matters which an eligible issuing officer must have regard to when deciding whether to issue a delayed notification search warrant, and includes the extent to which the exercise of the powers would assist the prevention of or investigation into the eligible offence to which the application relates to; the existence of alternative means of obtaining the evidence or information sought to be obtained; the extent to which the privacy of any person is likely to be affected; the nature and seriousness of the alleged offence(s) to which the warrant is after; whether any conditions should be included in the warrant, and the outcome of any known previous applications for delayed notification search warrant or a Division 2 of Part IAA warrant in connection with the same premises. If it is proposed that an adjoining premises be entered, the eligible issuing officer must also be satisfied that entry is reasonably necessary to enter the main premises and is required to avoid compromising the prevention or investigation of the eligible offence(s). This subsection recognises and balances the competing public interest in timely and effective law enforcement and the intrusion on the privacy of a group or individual.

541. Subsections 3ZZBD(3) enables eligible issuing officers of the Federal Court of Australia or AAT members to issue a delayed notification search warrant in relation to premises located anywhere in the Commonwealth or an external Territory. Under subsection 3ZZBD(4), eligible issuing officers who are state or territory Supreme Court Judges are restricted to issuing delayed notification search warrants only in relation to premises located in that state or territory.

Section 3ZZBE Contents of delayed notification search warrant

542. Subsection 3ZZBE(1) sets out the information, which must be contained in a delayed notification search warrant. The warrant is to contain the name of the applicant; the eligible agency and the eligible officer who is to be responsible for executing the warrant; the address, location or other description of the warrant premises; the eligible offence to which

the warrant relates; the day on which, and the time, the warrant is issued; the day on which, and the time at which, the warrant expires; the notification period and a description of the kinds of things that are proposed to be searched for, seized, copied, photographed, recorded, marked, tagged, operated, printed, tested or sampled. In addition, the warrant is to state whether the warrant authorises the entry of adjoining premises and details of that premises if required; whether a thing may be placed in substitution for a seized or moved item; any conditions to which the warrant is subject and that the eligible issuing officer is satisfied of the conditions of issue and of the matters specified in subsection 3ZZBD(2).

543. The warrant must also state whether it authorises re-entry of the warrant premises to return anything seized or moved or to retrieve anything substituted, and if so paragraph 3ZZBE(1)(m) requires that re-entry is to be within 14 days of the day on which the warrant was executed, that is, the day on which the premises were first entered under the warrant, or the time as extended in particular circumstances specified in section 3ZZCE. A delayed notification search warrant must include the name and signature of the eligible issuing officer under proposed subsection 3ZZBE(2).

544. These requirements ensure that executing officers and constables assisting have clear guidance on their powers under each delayed notification search warrant and are accountable for the proper execution of the warrant.

Subdivision B—Delayed notification search warrants by telephone, fax etc.

Section 3ZZBF Delayed notification search warrants by telephone, fax etc.

545. This section sets out an alternative method of applying for and issuing delayed notification search warrants. Subsection 3ZZBF(2) permits the application to an eligible issuing officer for a delayed notification search warrant to be made by telephone, fax, e-mail or any other means of electronic communication where the eligible officer is satisfied that it is an urgent case, or that delaying the application until it can be made in person would frustrate the effective execution of the warrant.

546. Subsections 3ZZBF(3) and (4) reflect the existing provisions of subsections 3R(2) and (3) of the Crimes Act. These subsections enable an eligible issuing officer to require communication by voice, where practicable, and to record that communication. The application must include all the information required in an ordinary application for a delayed notification search warrant, but may be made before the information is sworn or affirmed. This application must also include the details of, or be accompanied by a copy of, the authorisation provided by the chief officer of the eligible agency, namely the AFP Commissioner.

547. Pursuant to subsection 3ZZBF(5), having regard to this application, and the matters set out in subsection 3ZZBD(2), the eligible issuing officer may complete and sign a delayed notification search warrant. This is limited to circumstances where the conditions for issue set out in 3ZZBA are met and where the eligible issuing officer is satisfied that it is an urgent case, or that delaying the application until it can be made in person would frustrate the effective execution of the warrant.

548. After completing and signing the delayed notification search warrant, the eligible issuing officer must inform the applicant by telephone, fax or other electronic means of the terms of the warrant and the day on which, and the time at which, the warrant was signed as

set out in subsection 3ZZBF(6). The applicant must then complete a form of the delayed notification search warrant to reflect the warrant completed and signed by the eligible issuing officer. As required in subsection 3ZZBF(7) this form must specify the name of the eligible issuing officer who issued the delayed notifications search warrant and the day and time of signing the warrant.

549. Subsection 3ZZBF(8) requires this completed form to be sent to the eligible issuing officer, in addition to the information referred to when applying for the delayed notification search warrant which must have been duly sworn or affirmed. These are to be sent by the end of the day after the day on which the delayed notification search warrant expires or the day of execution of the warrant, whichever occurs first. Pursuant to subsection 3ZZBF(9), once received by the eligible issuing officer, these documents must be attached to the warrant signed by that eligible issuing officer. These provisions ensure appropriate accountability around delayed notification search warrants issued remotely.

Section 3ZZBG Authority of delayed notification search warrant by telephone, fax etc.

550. Subsection 3ZZBG(1) explains that the form of delayed notification search warrant completed remotely under section 2F is authority for the same powers as authorised by a warrant signed by the eligible issuing officer as part of the normal process under section 3ZZBD.

551. Subsection 3ZZBG(2) creates a rebuttable presumption if an issue arises as to whether the exercise of a power under a delayed notification search warrant issued on a remote application was duly authorised, that the power was not duly authorised unless the form of warrant signed by the eligible issuing officer is produced in evidence.

Subdivision C—Offences relating to applying for warrants etc.

Section 3ZZBH Offence for making false statement in application for delayed notification search warrant

552. This provision creates an offence for making a false or misleading statement in an application for a delayed notifications search warrant. A maximum penalty of imprisonment for two years will apply.

Section 3ZZBI Offence relating to delayed notification search warrant by telephone, fax etc.

553. This provision creates a range of offences relating to the form of delayed notification search warrants remotely authorised under section 3ZZBF. This includes detailing information that departs from the warrant authorised by the eligible issuing officer. This offence has a maximum penalty of imprisonment for two years.

554. The creation of this offence safeguards against the inappropriate use of provisions relating to remote applications for authorising delayed notification search warrants and ensures that the availability of remote authorisation of warrants for operational urgency is balanced with the necessity of ensuring accountability for those officers applying for delayed notifications search warrants.

Subdivision D—Interaction with other provisions under which search warrants may be issued

Section 3ZZBJ Issue of warrants under other provisions as well as or instead of delayed notification search warrants

555. Section 3ZZBJ empowers an eligible officer making, or who has made an application for, a delayed notification search warrant to make an application to the same eligible issuing officer for a search warrant under Division 2 of Part IAA of the Crimes Act to search the main or other premises for evidential material which may be related to the eligible offence, or to other offences which are connected to the eligible offence for which the delayed notification search warrant is sought or was issued. Provided the application relates to the same premises and offence it may be made at the same time as, or at a later time than, the application for a delayed notification search warrant.

556. This provision enables applications for ordinary search warrants and delayed notification search warrants in the same investigation to be determined by one eligible issuing officer. It also ensures that when there is no necessity for covert entry of premises, a delayed notification search warrant is not used to conduct an investigation of other premises.

557. Subsection 3ZZBJ(4) enables the eligible issuing officer to consider the Part IAA, Division 2 application as if the eligible issuing officer were an issuing officer within the meaning of section 3C of Part IAA.

558. Subsection 3ZZBJ(5) enables an eligible issuing officer who is not satisfied that a delayed notification search warrant should be issued, to treat the application for a delayed notification search warrant as an application for a search warrant under Division 2 of Part IAA, and deems the eligible issuing officer to be an issuing officer within the meaning of section 3C of Part IAA for the purposes of issuing such a search warrant.

Division 3—Exercise of powers under delayed notification search warrants

559. This division specifies the powers that are authorised under a delayed notification search warrant.

Section 3ZZCA What is authorised by a delayed notification search warrant

560. Section 3ZZCA sets out clearly what powers the executing officer or a person assisting is authorised to exercise in executing a delayed notification search warrant. An executing officer, as defined in section 3ZZAC, is the person named in the warrant as being responsible for executing the warrant or the name of another eligible officer inserted into the warrant. A person assisting is defined in section 3ZZAC as an eligible officer who is assisting in the execution of the warrant or another person who has been authorised by the executing officer to assist in executing the warrant, such as a data analyst.

561. Paragraphs 3ZZCA(1)(a) and (b) authorise the executing officer or person assisting to enter the warrant premises and, if specified in the warrant, to enter adjoining premises. This entry may occur without the knowledge of the occupier of the premises or any other person present at the premises, as authorised in subsection 3ZZCA(2). The power to impersonate a person authorised by paragraph 3ZZCA(1)(c) would enable executing officers and persons assisting to gain entry without arousing the suspicion of other residents of the area. It is not,

however, intended to empower an executing officer to impersonate a person beyond that which is reasonably necessary to execute the warrant. The drafting note included below subsection 3ZZCA(1) clarifies that proposed paragraph 3ZZCA(1)(c) does not authorise the acquisition or use of an assumed identity. If an assumed identity is required for the execution of a delayed notification search warrant, the requirements of Part IAC of the Crimes Act would need to be complied with.

562. The remaining powers include the power to search for and seize any thing of a kind specified in the warrant, or any other thing found in the course of the search, if the executing officer believes on reasonable grounds that the thing is evidential material and that the seizure of the thing is necessary to prevent its concealment, loss, destruction or use.

Paragraph 3ZZCA(1)(g) also authorises the seizure of any other thing found in the course of the search, if the executing officer believes on reasonable grounds that the thing would present a danger to a person or could be used to assist a person to escape from lawful custody.

563. Paragraph 3ZZCA(1)(h) further authorises the executing officer or a person assisting to search for and record fingerprints found at the premises, and to take samples of things found at the premises for forensic purposes. This provision is based upon section 3F(1)(b) of the Crimes Act. Samples may include such things as samples of explosive and weapon type material, and DNA from such items as used cups or cigarettes.

564. Paragraph 3ZZCA(1)(i) only authorises an executing officer or a person assisting to replace a seized item or an item moved with a substitute if specified in the warrant. These powers are authorised to ensure the occupier of the premises is not alerted to the search until an occupier's notice is provided. Paragraph 3ZZCA(1)(k) authorises an executing officer or a person assisting to do anything reasonably necessary to conceal the fact that any thing has been done under the warrant. This recognises that in the course of executing a warrant, the executing officer may become aware of something which will result in the search becoming known to the occupier. It is important in these circumstances that the executing officer has the power to do what is necessary to conceal the fact that something was done under the warrant. Without this power, the covert nature of the search could be undermined.

565. Paragraph 3ZZCA(1)(j) authorises an executing officer or a person assisting to copy, photograph or otherwise record, mark or tag, operate, print test or sample a thing of a kind specified in the warrant, and any other thing believed on reasonable grounds to be evidential material. The powers under paragraphs 3ZZCA(1)(j) are supported by the provisions of sections 3ZZCE, 3ZZCF, 3ZZCG and 3ZZCH. The power to mark or tag a thing allows for visible and invisible material to be placed onto a thing to identify if, for example, an item is later utilised in a particular location or for a particular purpose.

566. Paragraph 3ZZCA(1)(l) authorises re-entry of the warrant premises, or adjoining premises for the purpose of entering or leaving the warrant premises, to return a thing seized or moved or retrieve a thing substituted at the warrant premises. Any such re-entry must occur within the time period set out in 3ZZBE(1)(m), namely 14 days or an extended time period authorised under subsection 3ZZCC. Subsection 3ZZCA(3) provides that if this period for re-entry ends after the delayed notification search warrant expires, the power to re-enter may be exercised during that period as if the warrant was still in force. This is required to ensure the occupier of the premises is not alerted to the search until an occupier's notice is provided.

Section 3ZZCB Specific powers available to person executing the warrant

567. The powers under subsection 3ZZCB(1) are based on the existing powers under subsection 3J(1) of the Crimes Act. The subsection authorises an executing officer or person assisting to take photographs (including video recordings) of the warrant premises for a purpose incidental to the execution of the warrant. Due to the covert nature of a delayed notification search warrant, a power to take photographs with the written consent of the occupier, similar to that at subsection 3J(1), is not included.

568. Paragraph 3ZZCB(2)(a) allows the executing officer or a person assisting to leave the warrant premises temporarily for a maximum period of one hour and, provided the warrant is still in force, re-enter to complete its execution. The powers are based on subsection 3ZZCB(2) of the Crimes Act. Paragraph 3ZZCB(2)(b) allows the executing officer or a person assisting to leave the premises temporarily for not more than 24 hours and, provided the warrant is still in force, re-enter to complete its execution in emergency situations or to reduce the risk of discovery of the fact that a law enforcement officer has been on the premises. An emergency situation is defined in section 3ZZAC as a situation that the executing officer or a person assisting believes, on reasonable grounds, involves a serious and imminent threat to a person's life, health or safety that requires the executing officer and persons assisting to leave the premises. If a time period longer than 24 hours is required the conditions in section 3ZZCC must be satisfied.

569. Paragraph 3ZZCB(3) is based on subsection 3J(3) of the Crimes Act. It allows the execution of a warrant to be completed if the execution was halted by an order of a court, which is subsequently revoked or reversed, provided the warrant is still in force. If the warrant is no longer in force, but covert re-entry is still considered necessary, a new warrant must be applied for, and details of the previous warrant will be included in the supporting affidavit as required by paragraph 3ZZBC(2)(b).

Section 3ZZCC Extension of time to re-enter premises left in emergency situation or to avoid discovery of law enforcement officer

570. Subsection 3ZZCC(1) permits an eligible issuing officer or person assisting to apply to an eligible issuing officer for an extension of time to re-enter premises. This is limited to instances where the executing officer or a person assisting has left the warrant premises due to an emergency situation or to reduce the risk of discovery of the fact that a law enforcement officer has been on the premises and the executing officer or person assisting believes on reasonable grounds that he or she will not be able to return to the premises within the 24 hour time period set out in paragraph 3ZZCB(2)(b). For an extension to be authorised, the eligible issuing officer must be satisfied, by information on oath or affirmation, that there are circumstances justifying this extension and the extension would not result in the period ending after the expiry of the warrant.

Section 3ZZCD Executing a warrant – assistance, use of force and related matters

571. This section, which is based on section 3G of the Crimes Act, authorises the executing officer to obtain such assistance as is necessary and reasonable in the circumstances to execute the warrant. It also authorises the executing officer or an eligible officer who is a person assisting to use such force against people and things as is necessary and reasonable to execute a delayed notification search warrant. A person assisting who is not an eligible officer may only be authorised to use force against things.

572. Subsection 3ZZCD(2) requires that an executing officer has a copy of the warrant, or if the warrant has been issued remotely, a copy of the form of warrant, available when executing the warrant at the warrant premises, or entry of the adjoining premises. The warrant or form of warrant must be available to the executing officer or a person assisting to produce without delay, such as obtaining it from a team member outside or in an adjoining room. If circumstances require it, an executing officer or a person assisting can produce the warrant to confirm that their presence is legitimate.

573. Subsection 3ZZCD(3) clarifies that there is no requirement to produce the warrant. As a warrant allows an executing officer or a person assisting to impersonate another person during the execution of the warrant, the occupier may accept the legitimacy of the action, which obviates the need to produce the warrant, and allows the operation to remain covert.

Section 3ZZCE Use of equipment to examine or process things

574. Subsection 3ZZCE(1), which authorises the executing officer or a person assisting to bring to the warrant premises any equipment reasonably necessary for the examination or processing of a thing found at the premises, is based on subsection 3K(1) of the Crimes Act. Subsection 3ZZCE(2), which authorises the operation of equipment already at the premises to examine or process a thing found at the premises if the executing officer or person assisting believes on reasonable grounds that the equipment is suitable for the examination or processing and will not be damaged as a result of its operation, is based upon subsection 3K(4) of the Crimes Act.

575. Subsection 3ZZCE(2) authorises the removal of a thing found at the warrant premises to another place for examination or processing in order to determine whether it may be seized. This is limited to circumstances where the executing officer or a person assisting suspects on reasonable grounds that the thing is a thing that may be seized under the warrant and it is significantly more practicable to move the thing due to the time and cost of examining or processing the thing at another place and/or the availability of expert assistance. The operation of electronic equipment moved under this section is provided in sections 3ZZCG and 3SZFB.

576. Pursuant to subsection 3ZZCE(3), the time for moving a thing to another place for examination or processing is limited to a maximum of 14 days. Extensions of no more than 7 days at a time may be permitted, pursuant to subsection 3ZZCE(5), if the eligible issuing officer believes on reasonable grounds, based on the application from the executing officer, that the thing cannot be examined or processed within 14 days or the time previously extended.

Section 3ZZCF Use of electronic equipment at warrant premises

577. This section authorises the operation of electronic equipment found at the warrant premises to access data held on that equipment to determine whether it constitutes a thing that may be seized under the warrant. The power to access data not held on site from equipment found on site is consistent with the existing search warrant powers under subsection 3L(1) of the Crimes Act.

578. As computers and electronic devices are becoming increasingly interconnected, files physically held on one computer are often accessible from another computer. Accordingly, it is critical that law enforcement officers executing a search warrant are able to search not only

material on computers located on the search premises but also material accessible from those computers but located elsewhere. This provision would enable the tracing of a suspect's internet activity and viewing of material accessed by the suspect through the use of that equipment.

579. The executing officer would not be required to notify operators of computers not on search premises if data held on those computers is accessed under the warrant. It would not be practicable to impose such a notification requirement on investigating officers, as it will not always be apparent when accessing data whether it is held on premises or off site or, in some cases, where it is held. For example, computer files accessible from a personal computer connected to a network may be stored on a mainframe computer located elsewhere, but there may be nothing that would indicate to the person accessing those files that they are not held on the search premises.

580. Electronic equipment, such as a computer hard drive, can hold large amounts of data. It is often not practicable for officers to search all the data for evidential material while at the search premises and then copy only that data, which they believe may constitute evidential material. Accordingly, subsection 3ZZCF(2) authorises the executing officer or a person assisting to copy data held on electronic equipment accessed at search premises to a storage device where there are reasonable grounds to suspect that the data constitutes a thing that may be seized under the warrant, and to take that device holding the data from the premises. This will permit officers to copy all data held on a computer hard drive or data storage device if the data constitutes a thing that may be seized under the warrant or if there are reasonable grounds to suspect that the data constitutes a thing that may be seized under the warrant. The authorisation only extends to copying the data to a storage device brought to the premises by the executing officer or a person assisting. This provision is based on subsection 3L(1A) of the Crimes Act with the necessary exception that the consent of the occupier is not required to enable the executing officer or a person assisting to copy the data to a device found at the premises.

581. Subsection 3ZZCF(3) reflects existing subsection 3L(1B) of the Crimes Act. This provision safeguards the rights of the occupier when the data taken from the premises is no longer required, or is not likely to be required, to be kept for the purposes of any investigation or for handling a complaint about the conduct of officers of the eligible agency in the execution of the warrant. The chief officer, or his delegate must arrange for the data to be removed from any device onto which it was copied, or the destruction of any other reproduction of the data which has been made during the course of the examination of the data.

582. Subsections 3ZZCF(4) and (5) enable the executing officer or a person assisting to operate equipment found at the premises to reproduce the thing found by accessing the equipment in documentary form or, if that is not practicable or the possession constitutes an offence, to seize the equipment. These provisions only enable the reproduction of, or seizure of equipment, consisting of a thing that may be seized under the warrant. The subclauses are based on the existing provisions of subsections 3L(2) and (3) of the Crimes Act.

Section 3ZZCG Use of moved electronic equipment at other place

583. Subsections 3ZZCG(1) and (2) permit electronic equipment to be moved to another place to operate the equipment to access data (including data held at another place) and, if the executing officer or person assisting suspects on reasonable grounds that the data accessed

constitutes a thing that may be seized under the warrant, this data may be copied to a disk, tape or other associated device.

584. Similar to subsection 3ZZCF(3), subsection 3ZZCG(3) safeguards the rights of the occupier when the data is no longer required, or is not likely to be required, to be kept for the purposes of any investigation or for handling a complaint about the conduct of officers of the eligible agency in the execution of the warrant. The chief officer, or his or her delegate, must arrange for the data to be removed from any device onto which it was copied, or the destruction of any other reproduction of the data, which has been made during the course of the examination of the data.

585. Similar to subsections 3ZZCF(4) and (5), subsections 3ZZCH(4) and (5) enable the executing officer or a person assisting to operate equipment moved from the premises to reproduce the data or thing found into documentary form or, if that is not practicable or the possession constitutes an offence, to seize the equipment. These provisions only enable the reproduction of, or seizure of equipment, consisting of a thing that may be seized under the warrant.

Section 3ZZCH Operating seized or moved electronic equipment

586. This section applies to electronic equipment seized under this Part or moved under section 3ZZCE. Subsection 3ZZCH(2) permits electronic equipment to be operated at any location after it has been seized or moved to determine whether the data held on or accessible from the electronic equipment is a thing that may be seized under the delayed notification search warrant and, in turn, to obtain access to such data. This includes data that was not held on the electronic equipment at the time the electronic equipment was seized or moved.

587. Pursuant to subsection 3ZZCH(5), this section does not limit the operation of other provisions within Part IAAA relating to items seized or moved. The drafting note explains that, for example, section 3ZZCH does not limit the operation of the time limits set out in section 3ZZCE on the examination or processing of a thing moved under that section.

Section 3ZZCI Compensation for damage to electronic equipment

588. Subsection 3ZZCI(1) places an obligation on the Commonwealth to pay the owner of equipment operated in accordance with sections 3ZZCE, 3ZZCF, 3ZZCG or 3ZZCH reasonable compensation for damage or corruption. The damage or corruption to the equipment, data or programs must have occurred because insufficient care was exercised in either selecting the person to operate the equipment or in the operation of the equipment. Damage, in relation to data, is defined in section 1C as damage by erasure of data or addition of other data.

589. Given the covert nature of delayed notification search warrants, compensation would normally only be paid when an occupier's notice of the warrant was provided, unless the occupier had become aware that damage had been sustained. Pursuant to subsection 3ZZCI(2), the Commonwealth is required to pay the owner of the equipment, or the user of the data or programs, such reasonable compensation as the Commonwealth and the owner or user agree upon. Proceedings in the Federal Court of Australia may be instituted if the owner or the user and the Commonwealth are unable to reach an agreement.

Division 4—Notice to Occupiers

590. This division sets out the process by which the occupier of the warrant premises or of an adjoining premises entered under a delayed notification search warrant is to be given notice of the entry.

Section 3ZZDA Warrant premises occupier's notice must be prepared and given

591. Section 3ZZDA requires that a written notice be given to the occupier of premises entered under a delayed notification search warrant and sets out the information which must be contained in the notice. The notice is to be prepared by the executing officer.

592. The notice must specify the name of the authorised agency, the address, location or other description of the warrant premise, the day and time the warrant was issued, the day of execution, the number of persons who entered the warrant premises, and include a description of any thing seized and/or substituted and whether any thing was returned or retrieved from the warrant premises. The requirement that the notice include a summary of the purpose of the delayed notification search warrant and the things done under the warrant is intended to provide the occupier with an outline of the operation of the scheme. A copy of the warrant, which is to be provided under subsection 3ZZDA(3) with the occupier's notice, will give the occupier information regarding what was authorised. These requirements will ensure that the occupier of the premises is aware of why a delayed notification search warrant was issued in respect of the premises, and what was done under the warrant.

593. The notice is to be given in accordance with the time limits specified under section 3ZZDC. Subsection 3ZZDA(4) creates an exception to the requirement to give an occupier's notice if the occupier's identity cannot be ascertained, or the occupier cannot be located. In such circumstances the person who prepared the occupier's notice must report back to the eligible issuing officer who may give directions on the requirement to give the notice. As clarified in subsection 3ZZDA(5), a notice and a direction under this section is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act. This provision is included to assist readers and is merely declaratory of the law.

Section 3ZZDB Adjoining premises occupier's notice must be prepared and given

594. This subsection requires that notice be given to the occupier of adjoining premises entered under a delayed notification search warrant to gain access to the main premises, and sets out what is to be included in the notice. The notice is to be prepared by the executing officer. A copy of the delayed notification search warrant authorising the entry is also to be provided with the notice.

595. The information to be provided to the occupier of adjoining premises is more limited than that required to be provided to the occupier of the main premises to reflect the reduced powers available to the executing officer or person assisting in relation to the adjoining premises. However, it will be sufficient to ensure that the occupier is aware of why entry to his or her premises was authorised and when it occurred.

596. The notice is to be given in accordance with the time limits specified under section 3ZZDC. As at subsection 3ZZDA(4), a person who prepares an adjoining premises occupier's notice but who cannot ascertain the identity of, or locate, the occupier of the adjoining premises, must report back to the eligible issuing officer who may give directions

regarding delivery of the notice. As clarified in subsection 3ZZDB(5), a notice and a direction under this section is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act. This provision is included to assist readers and is merely declaratory of the law.

597. An executing officer would not be required to notify owners or operators of computers not on search premises if data held on those computers is accessed under warrant. Access to data held on remote computers under a delayed notification search warrant does not constitute access to adjoining premises. Accordingly, there is no requirement to give notice to the owner or operator of those computers.

Section 3ZZDC Time for giving warrant premises occupier's notice or adjoining premises occupier's notice

598. This section sets out when an occupier's notice and adjoining premises occupier's notice must be given. The general rule, as set out in subsection 3ZZDC(2) is that the notice must, unless an extension is obtained, be provided to the occupier of the premises or of the adjoining premises within six months of the day on which the delayed notification search warrant was executed.

599. Subsection 3ZZDC(4) enables the chief officer of the eligible agency, namely the AFP Commissioner, to authorise an eligible officer to apply to an eligible issuing officer for an extension of the period within which the notice must be given. This authorisation must be in writing. Subsection 3ZZDC(5) requires that an eligible issuing officer granting an extension be satisfied that there are reasonable grounds for extending the period within which the notice must be given. An extension would normally be appropriate when there is an ongoing investigation of a relevant offence, the success of which may depend on continued confidentiality.

600. Subsection 3ZZDC(6) limits the period of extension that may be granted by an eligible issuing officer by periods of up to six months on any one application, up to a maximum of 18 months. An extension beyond 18 months from the date of entry may only be granted where authorisation has been received from both the Minister, in the form of a certificate approving the application for the extension, and an eligible issuing officer. The Minister must be satisfied that there are exceptional circumstances justifying the extension and that the public interest that would be served by notifying the occupier is outweighed by the prejudicial consequences that might result from the occupier being aware that the search took place. Prejudicial circumstances may include compromising or hindering the investigation, endangering the life or safety of any person, prejudicing any legal proceeding or compromising any law enforcement agency's operational activities or methodologies. If the Minister does issue a certificate approving an application, the issuing officer must only approve delaying of notification further if he or she is also separately satisfied that an extension is justified due to exceptional circumstances. The certificate provided by the Minister is not a legislative instrument, pursuant to subsection 3ZZDC(7).

601. Subsection 3ZZDC(3) requires that if a person is charged with an offence and the prosecution is proposing to rely on evidence obtained under the warrant the notice must be given as soon as practicable after the person is charged with the offence and no later than the time of service of the brief of evidence by the prosecution. This recognises that it is important that any person charged with an offence is notified of the way in which evidence

supporting the particular charge or charges has been obtained, in order to enable them to challenge the evidence.

Division 5—Using, sharing and returning things seized

602. This division provides for the use and sharing of things seized under the warrant in specified circumstances and details the requirement for returning things that are seized.

Subdivision A—Using and sharing things seized

Section 3ZZEA Purposes for which things may be used and shared

603. Subsection 3ZZEA(1) lists the purposes for which an eligible officer or a Commonwealth officer may use, or make available to another eligible officer or a Commonwealth officer to use, a thing seized under this Part. The purposes include investigations or proceedings under a range of Commonwealth legislation such as the *Proceeds of Crime Act 1987*, the *Proceeds of Crime Act 2002*, the *Law Enforcement Integrity Commissioner Act 2006*, the *Ombudsman Act 1976* and the *Privacy Act 1988*.

Subsections 3ZZEA(2) and (3) also permit the use of a thing seized under this Part by an eligible officer or a Commonwealth officer for any other use that is required or authorised by or under a law of a state or a territory. This is not intended to be an exhaustive list, with subsection 3ZZEA(4) clarifying that this section does not limit any other law of the Commonwealth that requires or authorises the use of a thing or the making available (however described) of a thing.

604. An eligible officer of an eligible agency or a Commonwealth officer is also permitted to make a thing seized under this Part available to a state or territory law enforcement agency, as defined in section 3ZZAC. In addition, an eligible officer or a Commonwealth officer is permitted to make a thing seized under this Part available to the appropriate agency in a foreign country responsible for law enforcement, intelligence gathering or security. This ability to share a thing seized is limited to situations listed in subsections 3ZZEA(1)(2)(3) and (5). The outcome of this provision is that a thing seized under the warrant can be shared with foreign agencies for the investigation of Commonwealth, state or territory offences, in recognition of the international aspects of many modern offences, however, material cannot be shared with foreign agencies for the investigation of foreign offences.

605. Subsection 3ZZEA(6) clarifies that, in addition to the ability to share between law enforcement agencies, the Minister retains the capacity to make an arrangement with a Minister of a state or territory for the sharing of a thing that has been seized under this Part and, in turn, the disposal of such things when they are no longer of use to the relevant agency.

Subdivision B—Returning things seized

Section 3ZZEB When things seized must be returned

606. Subsection 3ZZEB(1) requires the chief officer of the eligible agency, namely the AFP Commissioner or his/her delegate, to take reasonable steps to return a thing seized under the Part if it is not required, or no longer required, for a purpose listed in subsection 3SFA or for other judicial or administrative review proceedings. The thing is to be returned to the person from whom it was seized, or to the owner if that person is not entitled to possess it.

607. Subsection 3ZZEB(2) provides an exhaustive list of exceptions to this requirement including, amongst other exceptions, that the thing may otherwise be retained, destroyed or disposed of under a law or is the subject of a dispute as to ownership. Paragraph 3ZZEB(2)(d) recognises that the item is not required to be returned until a warrant premises occupier's notice has been given to ensure that the confidentiality of the warrant is maintained until operational sensitivities allow disclosure.

Section 3ZZEC Eligible issuing officer may permit a thing seized to be retained, forfeited etc.

608. Under this section, an eligible issuing officer may make an order in relation to a thing seized under this Part for that thing to be retained for a set time period, forfeited to the Commonwealth, sold and proceeds given to the owner or destroyed or otherwise disposed. Subsection 3ZZEC(1) provides that for one of these orders to be made the eligible issuing officer must be satisfied that there are reasonable grounds to suspect that, if the thing is returned to the owner of the thing, or the person from whom the thing is seized, it is likely to be used by that person or another person in the commission of a terrorist act or a terrorism offence or a serious offence (as defined in Part IAA). Where this threshold is not met, the eligible issuing officer is required to order that the thing be returned to the person from whom the thing was seized or to the owner if that person is not entitled to possess it.

Division 6—Reporting and record-keeping

609. This division sets out the reporting requirements of the delayed notification search warrants scheme. These requirements are intended to ensure that executing officers and the authorising agencies are accountable for the use of delayed notification search warrants.

Section 3ZZFA Reporting on delayed notification search warrants

610. This section imposes reporting requirements on the executing officer of a delayed notification search warrant, whether or not it was executed.

611. Under subsection 3ZZFA(2) the executing officer or the applicant must, as soon as practicable after execution of a delayed notification search warrant, or the expiry of an unexecuted warrant, provide a report to the chief officer, namely the AFP Commissioner, setting out the matters listed in subsection 3ZZFA(3). If the delayed notification search warrant was executed, the report must also include the information listed at proposed subsection 3ZZFA(4). The requirement at paragraph 3ZZFA(4)(c) that the report contain information on the 'kind of assistance provided' requires a general description of the nature of the assistance provided rather than a technical description of what was actually done and how it was done. For example, it is sufficient to say that a person provided data analysis. It is not necessary to specify how they did it or what data was analysed. If the warrant premises occupier's notice or adjoining premises occupier's notice has not been given at the time the report is made, under subsection 3ZZFA(5) the executing officer is required to give a further report including those details. Under subsection 3ZZFA(6), if the delayed notification search warrant was not executed, the report must state why not.

612. Subsection 3ZZFA(7) sets out details to be included in a further report if the warrant premises were re-entered after the warrant was executed for the purposes of returning a thing to, or retrieving a thing left at, the premises. This report must be given to the chief officer of the eligible agency as soon as practicable after the warrant premises were re-entered. As

clarified in subsection 3ZZFA(9) a report under this section is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act. This provision is provided to assist the reader and is merely declaratory of the law.

Section 3ZZFB Annual reports to Minister

613. Section 3ZZFB requires the chief officer of the eligible agency, namely the AFP Commissioner, to provide a written report to the Minister within three months of the end of each financial year and sets out the matters which must be included in that report.

614. The report must set out the number of warrants applied for and issued to eligible officers of the eligible agency during the year, and specify the number applied for in person or remotely. The report must also include details of the eligible offence(s) to which the issued delayed notification search warrants relate. The report must not only specify the number of warrants that were executed, but must also specify the number of warrants that were executed under which things were seized, placed in substitution, returned to or retrieved from the premises or copied, photographed, recorded, marked, tagged, operated, printed, tested or sampled at the warrant premises.

615. Paragraph 3ZZFB(1)(f) provides that the report may contain any other information related to delayed notification search warrants and the administration of the scheme that the Minister considers appropriate. This enables the Minister to request further information from the chief officer, namely the AFP Commissioner. The further information may outline the benefit to an investigation of the use of a delayed notification search warrant and the use of any evidence or information obtained under the delayed notification search warrant, or provide details of the sharing of evidence or information obtained under the delayed notification search warrant to persons other than officers of the eligible agency.

616. Subsection 3ZZFB(3) requires the Minister to table the report before each House of Parliament within 15 sitting days of receipt. These reports will assist the Minister and the Parliament to ascertain the uses that are being made of delayed notification search warrants. For example, of ten warrants executed by an agency, eight of the warrants may have included items seized, two of the warrants may have included items that were copied, one of the warrants may have included items substituted for seized items, and five of the warrants may have included items tested. Provision of this information will enable an assessment of the usefulness of the delayed notification search warrants scheme, and of whether an appropriate balance between law enforcement and intrusion into privacy has been met, and will also ensure accountability of the authorised agency.

Section 3ZZFC Regular reports to Ombudsman

617. Section 3ZZFC requires the chief officer of the eligible agency, namely the AFP Commissioner, to provide a written report to the Ombudsman as soon as practicable each six-month period starting on 1 January or 1 July and sets out the matters which must be included in that report. The includes the number of warrants applied for, issued to and executed by eligible officers of the eligible agency during the year, and the number applied for in person or remotely.

Section 3ZZFD Keeping documents connected with delayed notification search warrants

618. This section imposes administrative requirements on the eligible agency using the delayed notification search warrants scheme to ensure it is sufficiently accountable. The section lists the documents, which are to be kept for purposes of records maintenance and to facilitate investigations by the Commonwealth Ombudsman under Division 7 of Part IAAA.

Section 3ZZFE Register of delayed notification search warrants

619. This section is an additional accountability requirement of the eligible agency to keep a register of delayed notification search warrants. The information to be kept in the register includes, amongst other things, the details of any directions given by an eligible issuing officer if the occupier of premises or of an adjoining premises is unknown or unable to be located. Information is to be kept about every application for a delayed notification search warrant, regardless of whether it was issued or refused.

620. Subsection 3ZZFE(3) clarifies that the register is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act. This provision is provided to assist readers and is merely declaratory of the law. It does not create an exemption from the Legislative Instruments Act.

Division 7—Inspection by Ombudsman

621. This division establishes the procedure for the Commonwealth Ombudsman to monitor the delayed notification search warrants scheme, by inspecting records and reporting to the Minister to ensure that the eligible agency is complying with its obligations under this Division.

Section 3ZZGA Appointment of inspecting officers

622. This section allows the Ombudsman to appoint members of the Ombudsman's staff to be inspecting officers for the purpose of this Division. The appointment must be evidenced in writing.

Section 3ZZGB Inspection of records by the Ombudsman

623. This section establishes an inspection regime requiring the Commonwealth Ombudsman to inspect the records kept by eligible agencies at least in each six-month period starting on 1 January or 1 July. The role of the Ombudsman is to determine whether the records kept are accurate and whether an eligible agency is complying with its obligations under the Division.

624. Paragraphs 3ZZGB(2)(a) and (b) provide that the Ombudsman can enter premises occupied by the eligible agency at any reasonable time after notifying the chief officer of the agency, namely the AFP Commissioner. The Ombudsman is then entitled to full and free access at all reasonable times to all records of the delayed notification search warrants scheme that are relevant to the inspection. The Ombudsman has the power under paragraph 3ZZGB(2)(c) to require a member of staff of the eligible agency to provide any information relevant to the inspection that is in their possession or to which the member has access.

625. Subsection 3ZZGB(3) requires the chief officer to ensure that agency staff provide the Ombudsman with any assistance that the Ombudsman reasonably requires to enable the Ombudsman to inspect the records.

626. Subsection 3ZZGB(4) enables the Ombudsman to delay the inspection of records of the agency on a delayed notification search warrant until an occupier's notice has been given in relation to the warrant. This ensures that confidentiality of the information is maintained until operational sensitivities allow disclosure.

Section 3ZZGC Power to obtain relevant information

627. This section empowers the Ombudsman to require, in writing, a staff member of the eligible agency to provide written information relevant to an inspection at a specified place and within a specified period if the Ombudsman has reason to believe that the staff member is able to give the information.

628. Under subsections 3ZZGC(3) and 3ZZGC(5) the Ombudsman may also require, in writing, a staff member to attend to answer questions relevant to the inspection before a specified inspecting officer at a specified place and within either a specified period or at a reasonable time and date. This section will enable the Ombudsman to question a staff member who he or she believes is able to give information relevant to the inspection.

629. If the Ombudsman has reasonable grounds to believe that a staff member, whose identity is unknown to the Ombudsman, is able to give information relevant to an inspection, subsections 3ZZGC(4) and 3ZZGC(5) also authorise the Ombudsman in writing to require the chief officer of an eligible agency, or a person nominated by the chief officer, to attend to answer questions relevant to the inspection before a specified inspecting officer, at a specified place and either within a reasonable specified period or at a reasonable time and date.

Section 3ZZGD Offence

630. Section 3ZZGD creates an offence if a person refuses or fails to attend before a person, to give information or to answer questions when required to do so under section 3ZZGC. The maximum penalty for the offence is imprisonment for six months.

Section 3ZZGE Ombudsman to be given information etc. despite other laws

631. Subsection 3ZZGE(1) states that a person is not excused from providing information, answering questions or giving access to a document when required under this Division, on the grounds that doing so would contravene a law, would be contrary to the public interest or might tend to incriminate the person or make them liable to a penalty, or to disclose certain advice of a legal nature.

632. Subsection 3ZZGE(2) states that if the person is a natural person, the information, answer given or the fact that the person has given access to a document, and any information or thing that is obtained as a direct or indirect consequence, is not admissible in evidence against the individual except in a prosecution for unauthorised disclosure of information under section 3ZZHA or a prosecution for providing false or misleading information or documents, or making a false document under Part 7.4 or 7.7 of the Criminal Code.

633. Subsection 3ZZGE(3) provides that nothing in section 3ZZHA, which creates an offence of unauthorised disclosure of information about delayed notification search warrants,

or any other law prevents an officer of an eligible agency from providing information to an inspecting officer in any form or from providing access to records of the eligible agency for the purposes of an inspection under this Division. This abrogation of the privilege against self-incrimination subject to a use and derivative use immunity recognises the public interest in the effective monitoring of the use of delayed notification search warrants to ensure that civil liberties are not unduly breached.

634. Subsection 3ZZGE(4) enables an officer of an eligible agency to make a record of information, or cause such a record to be made, for the purposes of giving the information to a person as permitted by subsection 3ZZGE(3), without being liable for a breach of proposed section 3ZZHA or any other law.

635. Subsection 3ZZGE(5) ensures that a claim for legal professional privilege over information, documents or other records provided or answers given under this clause is maintained.

Section 3ZZGF Exchange of information between Ombudsman and State or Territory inspecting authorities

636. Section 3ZZGF allows the Commonwealth to develop effective and consistent inspection arrangements with other inspecting bodies, particularly state ombudsmen. Subsection 3ZZGF(4) provides definitions for ‘State or Territory agency’ and ‘State or Territory inspecting authority’ for the purposes of the section.

637. Subsection 3ZZGF(1) authorises the Ombudsman to give information that relates to a state or territory agency which was obtained by the Ombudsman under this Division to the state or territory inspecting authority responsible for inspecting that agency. Subsection 3ZZGF(2) requires that the Ombudsman be satisfied that it is necessary to give the information to the inspecting authority to enable it to perform its functions in relation to the state or territory agency.

638. Subsection 3ZZGF(3) empowers the Ombudsman to receive information relevant to the performance of the Ombudsman’s functions under this Division from a state or territory inspecting authority.

Section 3ZZGG Ombudsman not to be sued

639. This section gives immunity from action, suit or proceeding to the Ombudsman, an inspecting officer or a person acting under an inspecting officer’s direction or authority for an act or omission made in good faith in the performance or exercise, purported or otherwise, of a function, power or authority conferred under this Division. It further gives immunity to a Deputy Ombudsman or a delegate of the Ombudsman.

Section 3ZZGH Report on inspection

640. Under this section, the Ombudsman is required to provide a written report to the Minister after six-month period starting on 1 January or 1 July on the results of each inspection undertaken under section 3ZZGB. Subsection 3ZZGH(2) permits the Ombudsman to include a comment on whether the requirement to provide reports to the Minister (at section 3ZZFB) and to the Ombudsman (at section 3ZZFC) has been complied with.

641. Subsection 3ZZGH(3) requires that a copy of the Ombudsman's report be tabled by the Minister before each House of Parliament within 15 sitting days of that House after the Minister has received the report.

Division 8—Unauthorised disclosure of information

642. This division creates an offence of unauthorised disclosure of information relating to a delayed notification search warrant.

Section 3ZZHA Unauthorised disclosure of information

643. Subsection 3ZZHA(1) creates an offence of unauthorised disclosure of information relating to an application for a delayed notification search warrant, the execution of a delayed notification search warrant, a report prepared by an executing officer or applicant after the warrant has been executed or has expired, or relating to an occupier's notice or adjoining occupier's notice. The offence carries a maximum penalty of two years imprisonment. This mirrors a similar offence for disclosing information relating to a controlled operation (section 15HK of the Crimes Act). Subsection 3ZZHA(2) specifies exceptions where lawful disclosure can be made. The defendant bears the evidential burden of proof of the exception in accordance with the provision at subsection 13.3(3) of the Criminal Code.

644. By virtue of paragraph 3ZZHA(2)(e), no offence can be committed under 3ZZHA(1) once the occupier's notice has been provided. The intention of this offence provision is to maintain confidentiality of the information as long as operational sensitivities require. The exceptions at 3ZZHA(2) ensure that no offence is committed if information is disclosed by officers in the performance of their duties

Division 9—Other matters

Section 3ZZIA Delegation

645. Subsection 3ZZIA(1) will allow the AFP Commissioner to delegate all or any of his/her powers, functions or duties under Part 1AAA to a Deputy Commissioner of the AFP or a senior executive AFP employee who is an AFP member and authorised in writing by the Commissioner. This provision will allow the Commissioner to delegate the power to the person most appropriately placed to handle the return of the item. This is necessary due to the large amount of seized material that police officers deal with.

646. Subsection 3ZZIA(2) will also allow the AFP Commissioner to delegate all or any of his/her powers or functions under Division 5 of Part 1AAA to the chief executive officer (however described) of a state or territory law enforcement agency or a Commonwealth officer, if the Commissioner is satisfied on reasonable grounds that the officer is able to properly exercise those powers, functions or duties. State and territory law enforcement may have access to material seized under Part 1AAA. As such, it is necessary and appropriate for the Commissioner to be able to delegate the responsibility of returning or destroying (if required) seized items to state and territory police.

647. The provision will also allow the Ombudsman to delegate all or any of his/her powers under Part 1AAA (other than the power to report to the Minister) to an APS employee responsible to the Ombudsman. Subsection 3ZZIA(5) will require all delegates to produce

the instrument of delegation or a copy of such to a person affected by the exercise of any power delegated to the delegate.

Section 3ZZIB Law relating to legal professional privilege not affected

648. Subsection 3ZZIB ensures that, except as expressly provided (such as section 3ZZGE in relation to information to be given to the Ombudsman), the law relating to legal professional privilege is maintained.

649.

Item 52 – Paragraphs 15AA(2)(c) and (d)

650. Subsection 15AA(2) provides the offences for which bail is not to be granted except in exceptional circumstances. Terrorism offences (except an offence against 102.8 of the Criminal Code) are covered by paragraph 15AA(2)(a). Paragraphs 15AA(2)(c) and (d) cover, amongst other things, Division 80 of the Criminal Code.

651. This item inserts a reference to ‘Subdivision C of’ after the words ‘provision of’ in paragraphs 15AA(2)(c) and (d). This item is consequential to amending item 35, which inserts Subdivision B of Division 80 of the Criminal Code in the definition of ‘terrorism offence’ in subsection 3(1) of the Crimes Act.

652. As the definition of terrorism offences now includes Subdivision B of Division 80 (by amending item 35), it is not necessary to refer to all of Division 80 in paragraphs 15AA(2)(c) and (d) as Subdivision B of Division 80 will be covered in paragraph 15AA(2)(a). The only other Subdivision in Division 80 that contains offence provisions is Subdivision C. Item 52 inserts reference to Subdivision C into paragraphs 15AA(2)(c) and (d) to reflect the change made to the definition of terrorism offence by item 35.

Item 53 – After paragraph 15YU(1)(f)

653. This item is consequential to items 110 and 144, which repeal the Foreign Incursions Act and insert a new Part 5.5 in the Criminal Code. The offences in the Foreign Incursions Act are consolidated in the new Division 119 of Part 5.5 of the Criminal Code.

654. Item 53 inserts paragraph (fa) into subsection 15YU(1) providing that Part IAE, which relates to the use of video link evidence in proceedings for terrorism and related offences, applies to offences against Part 5.5 of the Criminal Code.

Item 54 – Paragraph 15YU(1)(j)

655. This item is consequential to amending item 144, which repeals the Foreign Incursions Act. Item 53 repeals paragraph 15YU(1)(j), which relates to offences committed under the Foreign Incursions Act.

Item 55 – Application of amendments

656. This item provides that paragraph 15YU(1)(j) will continue to apply, despite the commencement of item 54, in relation to any proceedings for an offence against the Foreign Incursions Act. Item 55 necessarily ensures that any proceedings involving offences against

the Foreign Incursions Act will continue to be able to use the video link provisions in Part IAE despite the repeal of that Act.

Item 56 - Subsection 23DB(1) (note)

657. This item omits the reference to section ‘3W(2)’ in the note of subsection 23DB(1) and inserts ‘3WA(2)’. The amendment is consequential to the insertion of new arrest provisions for terrorism offences and offences against section 80.2C of the Criminal Code under new section 3WA (see item 47).

658. Subsection 23DB(1) provides that the provisions in section 23DB apply to persons arrested for terrorism offences. The note to the subsection outlines that a person will not be arrested for a terrorism offence if that person has been released under section 3W(2). As the arrest provisions for terrorism offence will now be contained in section 3WA, the amended reference refers to new subsection 3WA(2).

Criminal Code Act 1995

Items 57 to 62 – Amendments to Division 80 of the *Criminal Code*

These items amend the humanitarian aid defence for the offence of “Treason—materially assisting enemies”, insert a new offence for advocating terrorism into Division 80 of the *Criminal Code*, and make minor amendments consequential to the insertion of that new offence. Further information about each item is provided below.

Item 57 – Part 5.1 of the *Criminal Code* (heading)

659. This item replaces the existing heading with a new heading ‘Part 5.1—Treason, urging violence and advocating terrorism’, acknowledging the inclusion of a new offence for advocating terrorism in Part 5.1.

Item 58 – Division 80 of the *Criminal Code* (heading)

660. This item replaces the existing heading with a new heading ‘Division 80—Treason, urging violence and advocating terrorism’, acknowledging the inclusion of a new offence for advocating terrorism in Division 80.

Item 59 – Subsection 80.1AA(6) of the *Criminal Code*

661. This item inserts the word “solely” in subsection 80.1AA(6) of the Criminal Code to limit the humanitarian aid defence to the treason offences of materially assisting enemies to circumstances where the conduct was undertaken solely for humanitarian aid reasons.

662. This is designed to prevent a person who engages in treasonous conduct but also, for example, takes bandages with him or her in order to be able to render first aid to another person, from relying on the defence on the basis that one of the reasons for the persons conduct related to humanitarian aid.

Item 60 – Subdivision C of Division 80 of the *Criminal Code* (heading)

663. This item replaces the existing heading with a new heading “Subdivision C—Urging violence and advocating terrorism”, acknowledging the inclusion of a new offence for advocating terrorism in Subdivision C of Division 80.

Item 61 – At the end of Subdivision C of Division 80 of the *Criminal Code*

664. This item inserts new section 80.2C providing the new “Advocating terrorism” offence at the end of Subdivision C of Division 80.

665. New subsection 80.2C(1) creates a new offence for advocating the doing of a terrorist act or the commission of a terrorism offence where the person engages in the conduct reckless as to whether another person will engage in a terrorist act or commit a terrorism offence.

666. New subsection 80.2C(1) includes a note that refers readers to the existing defence in section 80.3 of the Criminal Code for acts done in good faith. This defence protects the implied freedom of political communication, and specifically excludes from the offence, among other things, publishing a report or commentary about a matter of public interest in good faith.

667. The offence carries a maximum penalty of five years imprisonment, recognising the severity of the potential consequences of encouraging others to engage in terrorist acts and commit terrorism offences.

668. New subsection 80.2C(2) provides that, for the purposes of the offence in subsection 80.2C(1), a ‘terrorism offence’ is limited to an offence punishable by at least five years imprisonment; does not include an offence against section 11.1 (attempt), section 11.4 (incitement) or section 11.5 (conspiracy) to the extent that it relates to a terrorism offence; and does not include a terrorism offence that a person is taken to have committed because of section 11.2 (complicity and common purpose), section 11.2A (joint commission) or section 11.3 (commission by proxy).

669. New subsection 80.2C(3) defines ‘terrorism offence’ so that it has the same meaning as in subsection 3(1) of the Crimes Act, and defines ‘terrorist act’ so that it has the same meaning as in section 100.1 of the Criminal Code. It also defines ‘advocates’ as counselling, promoting, encouraging or urging the doing of a terrorist act or the commission of a terrorism offence.

670. New subsection 80.2C(4) makes it clear that a reference to advocating the doing of a terrorist act or commission of a terrorism offence includes a reference to advocating the doing of a terrorist act or commission of a terrorism offence, even if:

- a terrorist act or terrorism offence does not occur
- it is in relation to a specific terrorist act or the commission of a specific terrorism offence, or
- it is in relation to more than one terrorist act or commission of more than one terrorism offence.

Item 62 – Subsection 80.4(2) of the *Criminal Code*

671. This item adds a reference to new subsection 80.2C(1) in subsection 80.4(2), and is consequential to the insertion of the new offence in subsection 80.2C(1). This provides that extended geographical jurisdiction—category B as defined by existing section 15.2 applies to the new offence. This is consistent with the existing offences for urging violence against groups under subsection 80.2A(2) and urging violence against members of groups under subsection 80.2B(2), which also carry a maximum penalty of five years imprisonment.

Item 63 – Subsection 102.1(1) of the *Criminal Code* (paragraph (a) of the definition of *terrorist organisation*)

672. This item removes the reference to the expression “whether or not a terrorist act occurs” in the existing definition of ‘terrorist organisation’ in paragraph 102.1(1)(a). It is no longer necessary to include that expression following the insertion of new subsection 102.1(20), which defines the doing of a terrorist act for the purposes of revised section 102.1.

Item 64 – Paragraph 102.1(1A)(a) of the *Criminal Code*

673. This item amends existing paragraph 102.1(1A)(a) of the Criminal Code to ensure that an organisation can be listed as a terrorist organisation for advocating a terrorist act where the organisation directly or indirectly counsels, promotes, encourages or urges the doing of a terrorist act by the addition of the words ‘promotes’ and ‘encourages’.

674. The terms ‘promotes’ and ‘encourages’ are not defined. The ordinary meaning of ‘encourages’ the doing of a terrorist act could include conduct or statements that inspire an individual to commit a terrorist act. The ordinary meaning of ‘promotes’ the doing of a terrorist act could include conduct or statements such as launching a campaign to commit terrorist acts.

675. While there may be some overlap with ‘counsels’ or ‘urges’ the doing of a terrorist act, which may include conduct such as inducement, persuasion or insistence, or to give advice, or an opinion about the doing of a terrorist act, the inclusion of the additional terms is designed to ensure coverage of a broader range of conduct that may be considered as advocating a terrorist act, beyond the conduct of ‘counsels’ or ‘urges’.

676. An organisation could be listed as a terrorist organisation under paragraph 102.1(1)(b) of the definition of terrorist organisation on the basis of statements made by the organisation that satisfy the definition of ‘advocates’ under subsection 102.1(1A). However, if the organisation ceases to be actively and directly involved in committing terrorist acts, and becomes more involved in the direct or indirect promotion of a ‘terrorist’ ideology or methodology, the inclusion of the terms promotes or encourages become a greater factor in considering whether the organisation continues to advocate the doing of a terrorist act.

677. An organisation could continue to have a significant influence in promoting or encouraging terrorism by others without necessarily engaging in terrorist acts itself, without directly counselling or urging the doing of a terrorist act.

678. The inclusion of the terms ‘promotes’ and ‘encourages’ in paragraph 102.1(1A)(a) is consistent with section 3 of the United Kingdom’s *Terrorism Act 2000*, which provides that an organisation is *concerned in terrorism* if it promotes or encourages terrorism.

Item 65 – Subsections 102.1(2), (4) and (17) of the *Criminal Code*

679. This item omits the expression “whether or not a terrorist act has occurred or will occur” from existing subsections 102.1(2), (4) and (17). It is no longer necessary to include that expression following the insertion of new subsection 102.1(20) which defines the doing of a terrorist act for the purposes of revised section 102.1.

Item 66 – At the end of section 102.1 of the *Criminal Code*

680. This item inserts new subsection 102.1(20) into the definitions section. New subsection 102.1(20) provides that, whenever there is a reference in section 102.1 to the doing of a ‘terrorist act’, that reference is to be interpreted as including the doing of a terrorist act whether or not any terrorist act has occurred, the doing of a specific terrorist act, and the doing of more than one terrorist act.

681. This amendment has two elements. The first is technical arising from the omission of the words “whether or not a terrorist act occurs” referred to in items 63 and 65 above. The second is to clarify that it is not necessary to prove that an organisation that directly or indirectly does any of the things listed in paragraphs 102.1(1)(a) or (b) of the definition of ‘terrorist organisation’, or section 102.1(1A) of the definition of ‘advocates’, relates to a particular terrorist act. It can be a specific terrorist act, more than one terrorist act and the terrorist act does not have to occur.

Item 67 – After section 102.1 of the *Criminal Code*

682. This item inserts a new section 102.1AA ‘Including or removing names of prescribed terrorist organisations’ after existing section 102.1.

683. New subsection 102.1AA(1) provides that the new section 102.1AA applies where the Minister is satisfied on reasonable grounds that a terrorist organisation is specified in regulations under the Criminal Code and is referred to by a name in addition to, or instead of, the name to specify the organisation (an alias) or no longer uses a name specified in the regulations (a former name). Provided the requirements of new subsection 102.1AA(1) apply new subsection 102.1AA(2) provides that the Minister may add an alias and/or remove a former name from the regulation by legislative instrument.

684. New subsection 102.1AA(3) makes it clear that amendment of regulations under new subsection 102.1AA(2) does not prevent the further amendment or repeal of regulations made under the main regulation making power, section 5 of the Criminal Code Act, nor does it affect the sunset date for the regulations.

685. New subsection 102.1AA(4) precludes the Attorney-General from amending regulations to ‘delist’ a terrorist organisation.

686. New subsection 102.1AA(5) is an avoidance of doubt measure that new section 102.1AA does not affect the power under section 5 of the Criminal Code Act to make regulations for the purposes of paragraph (b) of the definition of ‘terrorist organisation’ in subsection 102.1(1).

687. This item partially implements recommendation VI/1 of the INSLM's fourth report.

Item 68 – Section 102.5 of the *Criminal Code* (heading)

688. This item repeals the existing heading for section 102.5 of the Criminal Code and replaces it with a new heading '102.5 Training involving a terrorist organisation' reflecting amendments to extending the conduct criminalised in section 102.5.

Item 69 – Paragraphs 102.5(1)(a) and 102.5(2)(a) of the *Criminal Code*

689. This item repeals existing paragraphs 102.5(1)(a) and 102.5(2)(a) and replaces them with new paragraph 102.5(1)(a) and paragraph 102.5(2)(a).

690. New paragraph 102.5(1)(a) provides that the training offence in subsection 102.5(1) is made out not only where the person intentionally provides training to or receives training from an organisation, but where the person intentionally participates in training with an organisation, where the person is reckless as to whether the organisation providing or receiving the training is a terrorist organisation. This offence applies whether or not the organisation was a listed terrorist organisation.

691. New paragraph 102.5(2)(a) similarly provides that the training offence in subsection 102.5(2) is made out not only where the person intentionally provides training to or receives training from an organisation, but where the person intentionally participates in training with an organisation that is a listed terrorist organisation.

692. These amendments are designed to facilitate prosecutions in circumstances where there are no formally defined teaching and learning roles in a training session, where it is clear that a person has participated in training with a terrorist organisation, but the nature of the training or the circumstances in which it occurred means it is not possible to ascertain whether the person provided or received the training. An example would be where a group of like-minded individuals decide to acquire weapons and meet at a location to practice using them, for the purpose of directly or indirectly engaging in, preparing, planning, assisting in or fostering the doing of a terrorist act.

693. These amendments implement recommendation 17 of the COAG Review.

Items 70 to 87 – Amendments to Division 104 of the *Criminal Code*—Control Orders

694. These items amend Division 104 of the Criminal Code, which sets out the Commonwealth's control order regime.

695. Control orders provide law enforcement agencies with a legal basis upon which to take appropriate action to prevent a terrorist threat from eventuating in circumstances where there are insufficient grounds for arrest, but a person is nonetheless assessed as presenting a credible risk to public safety and security. This is particularly relevant in respect of emerging threats presented by Australians returning from conflict zones overseas. The small number of control orders made to date reflects the policy intent that they are extraordinary measures which are to be used sparingly.

Item 70 – Paragraph 104.2(2)(a) of the *Criminal Code*

696. This item replaces the word “considers” with “suspects” in paragraph 104.2(2)(a). This changes the threshold for a senior AFP member seeking the Attorney-General’s consent to request an interim control order to circumstances where the member suspects on reasonable grounds that the order would substantially assist in preventing a terrorist act, making it consistent with the threshold in existing and revised paragraph 104.2(2)(b).

697. This amendment follows law enforcement advice that the current threshold for seeking consent to apply for an interim control order is too high. While this lowers the threshold for seeking consent to apply, an issuing court must still be satisfied of the various matters set out in the legislation on the balance of probabilities before it can make an interim control order, including 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.

Item 71 – Paragraph 104.2(2)(b) of the *Criminal Code*

698. This item repeals the existing criteria for seeking the Attorney-General’s consent to request an interim control order under paragraph 104.2(2)(b) and replaces it with three criteria.

699. The first criteria at subparagraph 104.2(2)(b)(i) expands the existing training criteria to authorise a senior AFP member to seek the Attorney-General’s consent to request an interim control order in relation to a person the member reasonably suspects has provided training to, received training from, or participated in training with a listed terrorist organisation. This amendment broadens the criteria for seeking consent to request an interim control order, consistent with the revised terrorist organisation training offence in subsection 102.5(2).

700. The new criteria at subparagraphs 104.2(2)(b)(ii) and (iii) authorise a senior AFP member to seek consent to request an interim control order in relation to a person the member reasonably suspects has engaged in a hostile activity in a foreign country or has been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.

701. The addition of these criteria follow law enforcement advice that there is a gap in the control order regime that currently precludes them from seeking consent to apply for a control order against a person who has actually engaged in foreign fighting activity or been convicted of a terrorism offence where those persons pose a risk to the community. The inclusion of these additional criteria will facilitate the placing of appropriate controls over such individuals where this would substantially assist in preventing a terrorist act.

Item 72 – At the end of section 104.2 of the *Criminal Code*

702. This item adds a new subsection to section 104.2, which sets out the criteria for seeking consent to request an interim control order. Consistent with new subsection 102.1(20), new subsection 104.2(6) makes it clear that a reference to a terrorist act in paragraph 104.2(2)(a) and (b) is to be interpreted as including a terrorist act whether or not any terrorist act has occurred, a specific terrorist act, and more than one terrorist act.

703. In relation to paragraph 104.2(2)(a), this amendment is designed to further clarify that an AFP member can seek the Attorney-General's consent to apply for a control order without having to prove that a particular terrorism act provides the grounds for the order. This is important to ensure a person who poses a risk to the public in the form of terrorism cannot avoid being placed under a control order merely because there is no information about the specific means by which the person is likely to do a terrorist act or the precise target of the terrorist act.

704. In relation to paragraph 104.2(2)(b), this amendment is designed to further clarify that an AFP member can seek the Attorney-General's consent to apply for a control order without having to prove that a conviction in Australia or a foreign country of an offence relates to a particular terrorist act. This is consistent with the existing terrorist act offences at sections 101.2, 101.4, 101.5 and 101.6 of the Criminal Code.

Item 73 – Subparagraph 104.4(1)(c)(ii) of the *Criminal Code*

705. This item repeals existing subparagraph 104.4(1)(c)(ii) which sets out the criteria for making an interim control order and replaces it with expanded criteria, consistent with the expanded criteria for seeking consent to request such an order.

706. The expanded and new criteria at subparagraph 104.4(1)(c)(ii), (iii) and (iv) now authorise an issuing court to make an interim control order in relation to a person where the court is satisfied on the balance of probabilities that the person has provided training to, received training from, or participated in training with a listed terrorist organisation, has engaged in a hostile activity in a foreign country or has been convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or a terrorist act.

707. The inclusion of these additional criteria are consistent with the new criteria set out in subparagraph 104.2(2)(b)(ii) and (iii). Their inclusion will fill an existing gap in the control order regime by facilitating the placing of appropriate controls over individuals who have engaged in foreign fighting or have been convicted of a relevant offence where this would substantially assist in preventing a terrorist act

Item 74 – At the end of section 104.4 of the *Criminal Code*

708. This item inserts new subsection 104.4(4) at the end of existing section 104.4. Consistent with new subsection 104.2(6) which relates to requests to seek control orders, new subsection 104.4(4) makes it clear that a reference to a terrorist act in paragraph 104.4(1)(c) or (d) is to be interpreted as including a terrorist act whether or not any terrorist act has occurred or will occur, a specific terrorist act, and one or more terrorist acts.

709. This amendment is designed to further clarify that an issuing court can make a control order without proof of the particular terrorist act that provides the grounds for the order.

Item 75 – At the end of paragraph 104.5(3)(c) of the *Criminal Code*

710. This item amends paragraph 104.5(3)(c), which provides for a control order to include a requirement that the person subject to an interim control order remain at specified premises between specified times each day or on specified days. Amended paragraph 104.5(3)(c) limits the period for which a person can be required to remain at specified premises to a

maximum of twelve hours within any twenty-four hour period. This is designed to address concerns that this restriction could otherwise be used to impose house arrest on a person.

711. A period of up to twelve hours is considered reasonable and appropriate to the threat posed by the individual. Such a restriction is not anticipated to interfere with the person's ability to engage in the usual activities of daily living, such as engaging in appropriate employment, taking children and other family members to work or other appropriate appointments and engagements, and engaging in social activities, provided none of those activities would require the person to contravene one of the other terms of the control order.

712. This amendment implements the Government's response to recommendation 34 of the COAG Review.

Item 76 – Paragraphs 104.6(1)(b) and 104.8(1)(b) of the *Criminal Code*

713. This item omits the words “either considers or” and is consequential to the amendments to paragraphs 104.2(2)(a) (b) which change the threshold for seeking consent for an interim control order from ‘considers’ to ‘suspects’ on reasonable grounds.

Item 77 – Subparagraph 104.12(1)(b)(iii) of the *Criminal Code*

714. This item removes the word “and” from subparagraph 104.12(1)(b)(iii), consequential to the addition of new subparagraph 104.12(1)(b)(iv) after subparagraph 104.12(1)(b)(iii).

Item 78 – At the end of paragraph 104.12(1)(b) of the *Criminal Code*

715. This item adds new paragraphs 104.12(1)(iv) to (ix) at the end of existing subsection 104.12(1), which sets out the matters the AFP must inform the person the subject of an interim control order at the time of serving the order on that person. This provision provides an important safeguard for persons the subject of a control order by placing an obligation on the AFP member serving the order not only to explain the person's rights but to take appropriate steps to ensure the person understands them.

716. New paragraphs 104.12(1)(iv) and (vii) require the AFP member to inform the person that he or she may have appeal and review rights in relation to any decision of an issuing court to make and confirm the order.

717. New paragraphs 104.12(1)(v) and (vi) require the AFP member to inform the person of the person's right to attend court on the day specified in the order for the purposes of confirming, declaring void, or revoking the interim control order and also of the person's right to have one or more representatives adduce evidence or make submissions to the issuing court if the order is confirmed.

718. New paragraph 104.12(1)(viii) requires the AFP member to inform the person of the person's right to apply for an order revoking or varying the order if it is confirmed.

719. New paragraph 104.12(1)(ix) requires the AFP member to inform the person of the person's right to have one or more representatives adduce evidence or make submissions to the issuing court in relation to an application by the AFP Commissioner to revoke or vary the order or to add obligations, prohibitions or restrictions to the order if it is confirmed.

720. Existing subsection 104.12(3) provides that the obligations on the AFP member to serve the order on the person personally and to explain the person's rights and take appropriate steps to ensure they are understood, do not apply if the actions of the person to whom the interim control order relates makes it impractical for the AFP member to do so. This could include a situation where the person is violent towards the member, but would not include a situation where the person's comprehension of English is poor. In such a case, the AFP member would be required to make appropriate arrangements to ensure the person is aware of and can understand his or her rights.

721. This amendment implements recommendation 32 of the COAG Review.

Item 79 – Section 104.17 of the *Criminal Code*

722. This item inserts subsection number "(1)" before the text of existing section 104.17 to convert existing section 104.17 to subsection 104.17(1). This amendment is consequential to the addition of new paragraphs 104.17(1)(a) to (c) and subsections 104.17(2) and (3).

Item 80 – Section 104.17 of the *Criminal Code*

723. This item omits the words after "section 104.14," in subsection 104.17, which provides for the service of a declaration, revocation, variation of confirmation of a control order, and replaces them with three new paragraphs. These amendments provide additional safeguards for individuals the subject of an interim control order where the status of that order changes.

724. New paragraph 104.17(1)(a) requires the AFP member to serve the relevant declaration, revocation, or confirmed control order personally on the person.

725. New paragraph 104.17(1)(b) provides that, if the court confirms the interim control order—with or without variation—the AFP must inform the person that he or she may have appeal and review rights in relation to the decision of the issuing court to confirm the order, he or she has the right to apply under section 104.18 for an order revoking or varying the order, and that he or she, or one or more of his or her representatives, has the right to adduce evidence or make submissions in relation to an application to revoke or vary the order.

726. New paragraph 104.17(1)(c) provides that, where the court has confirmed the interim control order, the AFP member must ensure the person understands the information provided. In doing so, the AFP member must take into account the person's individual circumstances, including age, language skills and mental capacity.

727. This amendment implements recommendation 32 of the COAG Review.

Item 81 – At the end of section 104.17 of the *Criminal Code*

728. This item adds subsections 104.17(2) and (3) to revised section 104.17.

729. New subsection 104.17(2) provides that the obligations on the AFP member to inform the person of certain matters and to ensure the person understands those matters (imposed by paragraphs 104.17(1)(b) and (c)) do not apply if the actions of the person make compliance impracticable.

730. New subsection 104.17(3) makes it clear that a failure by the AFP member to ensure the person understands the matters set out in new paragraph 104.17(1)(b) does not impact on the effectiveness of the control order. This is an important safeguard for a number of reasons. For example, the person could advise the AFP member they understand the information provided and behave in a manner consistent with understanding the information provided, but not actually understand it. It would be difficult if not impossible for the AFP member to be aware of that. Alternatively, the person could be acting violently towards the AFP member and it could be impractical for the AFP member to ensure the person understands the information.

Item 82 – At the end of section 104.23 of the *Criminal Code*

731. This item adds a new subsection to section 104.23, which provides for the Commissioner of the AFP to cause an application to be made to vary a confirmed control order by adding one or more obligations, prohibitions or restrictions. New subsection 104.23(6) makes it clear that a reference to a terrorist act in subsection 104.23(1) is to be interpreted as including a terrorist act whether or not any terrorist act has occurred or will occur, a specific terrorist act, and one or more terrorist acts.

732. This amendment is designed to further clarify that the AFP Commissioner can seek a variation without having to prove a particular terrorist act that provides the grounds for the variation.

Item 83 – At the end of section 104.24 of the *Criminal Code*

733. This item adds a new subsection to section 104.24, which provides an issuing court can vary a confirmed control order by adding one or more obligations, prohibitions or restrictions. New subsection 104.24(4) makes it clear that a reference to a terrorist act in paragraph 104.24(1)(b) is to be interpreted as including a terrorist act whether or not any terrorist act has occurred or will occur, a specific terrorist act, and one or more terrorist acts.

734. This amendment is designed to further clarify that an issuing court can vary a confirmed control order by adding conditions without a requirement for the variation to relate to a particular terrorist act.

Item 84 – Subparagraph 104.26(1)(c)(ii) of the *Criminal Code*

735. This item removes the word “and” from subparagraph 104.26(1)(c)(ii), consequential to the addition of new subparagraphs 104.26(1)(c)(iii), (iv) and (v) after subparagraph 104.26(1)(c)(ii).

Item 85 – At the end of paragraph 104.26(1)(c) of the *Criminal Code*

736. This item adds new subparagraphs 104.26(1)(c)(iii), (iv) and (v) at the end of existing paragraph 104.26(1)(c), which sets out the matters the AFP must inform the person the subject of a varied control order at the time of serving the order on that person.

737. New subparagraph 104.26(1)(c)(iii) requires the AFP member to inform the person that he or she may have appeal and review rights in relation to any decision of an issuing court to make and confirm the order.

738. New subparagraphs 104.26(1)(c)(iv) and (v) require the AFP member to inform the person of the person's right to make an application to revoke or vary the order and also of the person's right to have one or more representatives adduce evidence or make submissions in relation to any such application.

739. Existing subsection 104.26(3) provides that the obligations on the AFP member to serve the order on the person personally and to explain the person's rights and take appropriate steps to ensure they are understood, do not apply if the actions of the person to whom the interim control order relates makes it impractical for the AFP member to do so. This could include a situation where the person is violent towards the member, but would not include a situation where the person's comprehension of English is poor. In such a case, the AFP member would be required to make appropriate arrangements to ensure the person is aware of and can understand his or her rights.

740. This amendment implements recommendation 32 of the COAG Review.

Items 86 to 87 – Subsection 104.32(1) and (2) of the *Criminal Code*

741. These items amend section 104.32 to ensure the control order regime continues for another ten years. This amendment recognises the enduring nature of the terrorist threat and the important role of control orders in mitigating and responding to that threat.

742. In light of the increasing threat the escalating terrorist situation in Iraq and Syria poses to the security of all Australians, both here in Australia and overseas, it is vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts.

Items 88 to 108 – Amendments to Division 105 of the *Criminal Code*—Preventative detention orders

743. These items amend Division 105 of the Criminal Code, which sets out the Commonwealth regime for preventative detention.

744. PDOs provide law enforcement agencies with a legal basis to take appropriate action to prevent a terrorist threat from eventuating or to preserve evidence in the immediate aftermath of a terrorist act where there are insufficient grounds for arrest, but a person is nonetheless assessed as presenting a credible risk to public safety. This is particularly relevant in respect of emerging threats presented by Australians returning from conflict zones overseas. The fact that no PDOs have been made to date reflects the policy intent that they are extraordinary measures which are to be used sparingly.

Item 88 – Subsection 105.4(4) of the *Criminal Code*

745. This item repeals existing subsection 105.4(4) to provide for a subjective test for an AFP member applying for a PDO in relation to a person.

746. New paragraph 105.4(4)(a) provides that an AFP member may apply for a PDO in relation to a person where the member "suspects" one or more of the listed matters "on reasonable grounds". The threshold is being changed on the advice of law enforcement that the use of the subjective test of suspects on reasonable grounds is more appropriate. The use of that threshold is designed to ensure that, not only are there reasonable grounds upon which to form the suspicion, but the AFP member has actually formed the suspicion.

747. New paragraph 105.4(4)(b) retains the requirement that the issuing authority is satisfied there are reasonable grounds to suspect that the relevant person will do one of the things listed. The listed matters are that the person will engage in a terrorist act, possesses a thing connected with the preparation for or engagement in a terrorist act, or has done an act in preparation or planning a terrorist act.

748. New paragraphs 105.4(4)(c) and (d) retain the requirements for both the AFP member and the issuing authority to be satisfied that making the order would substantially assist in preventing a terrorist act occurring and that detaining the person is reasonably necessary to substantially assist in preventing a terrorist act.

749. This item implements the Government's response to recommendation III/1 of the INSLM's second annual report.

Item 89 – Paragraph 105.4(6)(b) of the *Criminal Code*

750. This item changes the threshold in paragraph 105.4(6)(b) for detaining a person under a PDO to circumstances where the AFP member or issuing authority is satisfied that detention is "reasonably necessary" to preserve evidence of or relating to a terrorist act that occurred within the last 28 days. The existing additional requirements in paragraphs 105.4(6)(a) and (c) are not changed.

751. This item implements recommendation III/3 of the INSLM's second annual report.

Item 90 – Paragraph 105.7(2)(a) of the *Criminal Code*

752. This item repeals paragraph 105.7(2)(a) which sets out the requirements for an application to an issuing authority for an initial PDO in relation to a person.

753. Subparagraph 105.7(2)(a)(i) retains the ability for an AFP member to apply for an initial PDO in writing, and clarifies that this does not include writing by means of an electronic communication.

754. New subparagraph 105.7(2)(a)(ii) authorises an AFP member to apply for an initial PDO orally where the AFP member considers it necessary because of urgent circumstances. The provision authorises the AFP member to apply orally in person or by telephone, fax, email or other electronic means of communication. This inclusive description is designed to ensure other forms of electronic communication, including those not contemplated or not invented at the time of the amendment can be used to make an oral application.

755. This amendment clarifies that, under normal circumstances, an application should be made in writing in the presence of an issuing authority. However, where the situation is urgent, for example, because the person is thought to be about to abscond, destroy evidence or undertake actions in furtherance of a terrorist act, or because it is not possible to make an application to an issuing authority in person within a reasonable period of time due to physical location or other limitations, an urgent oral application can be made.

Item 91 – After subsection 105.7(2A) of the *Criminal Code*

756. This item inserts new subsection 105.7(2B) at the end of existing subsection 105.7(2A). New subsection 105.7(2B) requires that, where an AFP member makes an application orally under new subparagraph 105.7(2)(a)(ii), the AFP member must

subsequently verify or give the information that was previously provided orally to the relevant issuing authority on oath or affirmation. The use of the expression ‘verify’ acknowledges that the information provided orally should be provided again (in writing) in writing. The use of the expression ‘give’ acknowledges that information in addition to the information previously provided could also be provided in writing.

757. New subsection 105.7(2B) provides for an exception to this requirement where the issuing authority is satisfied that it is not practical to administer an oath or affirmation to the AFP member. This is a safeguard to ensure that, where unforeseen circumstances arise that make it impractical to administer an oath or affirmation, it does not compromise the validity of the application and the PDO that was made.

Item 92 – Subsection 105.8(1) of the *Criminal Code*

758. This item inserts the words “subject to subsection (1A)” into subsection 105.8(1). This amendment makes it clear that an issuing authority may make an initial PDO in relation to a person subject to new subsection 105.8(1A).

Item 93 – After subsection 105.8(1) of the *Criminal Code*

759. This item inserts new subsection 105.8(1A) after subsection 105.8(1). New subsection 105.8(1A) provides that, where an application for an initial PDO is made orally, the issuing authority must not make the order unless the issuing authority is satisfied that it is necessary, because of urgent circumstances, to apply for the order by such means. This is designed to ensure the AFP applies for PDOs in writing in cases where there are not urgent circumstances sufficient to justify the making of an order on the basis of an oral application.

Item 94 – Paragraph 105.8(6)(a) of the *Criminal Code*

760. This item inserts the words “or description” after the word “name” in paragraph 105.8(6)(a). This amendment ensures an issuing authority can make an initial PDO in relation to a person whose full name is not known, but who can be identified, for example, by a partial name or nickname. It is important that a person of security concern cannot escape being the subject of an initial PDO merely because authorities do not know the person’s full legal name.

Item 95 – After subsection 105.8(7) of the *Criminal Code*

761. This item inserts new subsection 105.8(7A) after existing subsection 105.8(7). This amendment provides an important safeguard for persons subject to an initial PDO made orally by requiring the issuing authority to ensure there is either an audio or audio-visual recording of the application (at the time the application is made) or that a written record of the details of the application and any information given in support of the application is made as soon as practicable after the order is made. It also provides a safeguard to the applicant and issuing authority by ensuring there is an accurate record of the information relied upon for the application and making of the order.

Item 96 – Paragraph 105.12(6)(a) of the *Criminal Code*

762. This item inserts the words “or description” after the word “name” in paragraph 105.12(6)(a), consistent with the amendment to paragraph 105.8(6)(a). This amendment ensures an issuing authority can make a continued PDO in relation to a person

whose full name is not known, but who can be identified, for example, by a partial name or nickname. It is important that a person of security concern cannot escape being the subject of a continued preventative detention in circumstances where authorities still do not know the person's full legal name after the person is taken into detention under an initial PDO.

Item 97 – After subsection 105.15(1) of the *Criminal Code*

763. This item inserts new subsection 105.15(1A) after existing subsection 105.15(1).

764. New paragraph 105.15(1A)(a) retains the ability for an AFP member to apply for a prohibited contact order in writing, and clarifies that this does not include writing by means of an electronic communication.

765. New paragraph 105.15(1A)(b) authorises an AFP member to apply for a prohibited contact order orally where the AFP member considers it necessary because of urgent circumstances. The provision authorises the AFP member to apply orally in person or by telephone, fax, email or other electronic means of communication. This inclusive description is designed to ensure other forms of electronic communication, including those not contemplated or not invented at the time of the amendment can be used to make an oral application.

766. This amendment complements the provisions that authorise an AFP member to apply for and an issuing authority to make an initial PDO. This measure is important to ensure a person the subject of an initial PDO made in urgent circumstances cannot circumvent the provisions providing for the making of a prohibited contact order where one or more of the criteria in subsection 105.14A(4) is satisfied.

767. This amendment clarifies that, under normal circumstances, an application for a prohibited contact order should be made in writing in the presence of an issuing authority. However, where the situation is urgent, for example, because the person is about to be taken into detention or is already in detention and is thought to be about to contact a person in order to facilitate that person absconding, destroying evidence or undertaking actions in furtherance of a terrorist act, or because it is not possible to make an application to an issuing authority in person within a reasonable period of time due to physical location or other limitations, an urgent oral application can be made.

Item 98 – Subsection 105.15(3) of the *Criminal Code*

768. This item repeals and replaces subsection 105.15(3) and inserts new subsection 105.15(3A).

769. Revised subsection 105.15(3) provides that, where an AFP member applies for a continued PDO and an application for a prohibited contact order is made in writing under subparagraph 105.15(1A)(a), the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member.

770. New subsection 105.15(3A) provides that, where an AFP member applies for a continued PDO and an application for a prohibited contact order is made orally under new subparagraph 105.15(1A)(b), the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member. Subsection 105.15(3A) provides for

an exception to this requirement where the issuing authority is satisfied that it is not practical to administer an oath or affirmation to the AFP member.

Item 99 – Subsection 105.15(4) of the *Criminal Code*

771. This item inserts the words “subject to subsection (4A)” into subsection 105.15(4). This amendment makes it clear that an issuing authority may make a prohibited contact order in relation to a person subject to new subsection 105.15(4A).

Item 100 – After subsection 105.15(4) of the *Criminal Code*

772. This item inserts new subsection 105.15(4A) after subsection 105.15(4). New subsection 105.15(4A) provides that, where an application for a prohibited contact order is made orally, the issuing authority must not make the order unless the issuing authority is satisfied that it is necessary, because of urgent circumstances, to apply for the order by such means. This is designed to ensure the AFP applies for prohibited contact orders in writing in cases where there are not urgent circumstances sufficient to justify the making of an order on the basis of an oral application.

773. This amendment clarifies that, under normal circumstances, an application for a prohibited contact order should be made in writing in the presence of an issuing authority. However, where the situation is urgent, for example, because the person is about to be taken into detention or is already in detention and is thought to be about to contact a person in order to facilitate that person absconding, destroying evidence or undertaking actions in furtherance of a terrorist act, or because it is not possible to make an application to an issuing authority in person within a reasonable period of time due to physical location or other limitations, an urgent oral application can be made.

Item 101 – At the end of section 105.15 of the *Criminal Code*

774. This item inserts new subsection 105.15(7) after existing 105.15(6). This amendment provides an important safeguard for persons subject to a prohibited contact order made orally by requiring the issuing authority to ensure there is either an audio or audio-visual recording of the application (at the time the application is made) or that a written record of the details of the application and any information given in support of the application is made as soon as practicable after the order is made. It also provides a safeguard to the applicant and issuing authority by ensuring there is an accurate record of the information relied upon for the application and making of the order.

Item 102 – After subsection 105.16(1) of the *Criminal Code*

775. This item inserts new subsection 105.16(1A) after existing subsection 105.16(1).

776. New paragraph 105.16(1A)(a) provides that an AFP member can apply for a prohibited contact order in relation to a person who is already the subject of a PDO in writing, and clarifies that this does not include writing by means of an electronic communication.

777. New paragraph 105.16(1A)(b) provides that an AFP member can apply for a prohibited contact order in relation to a person who is already the subject of a PDO orally where the AFP member considers it necessary because of urgent circumstances. The provision authorises the AFP member to apply orally in person or by telephone, fax, email or

other electronic means of communication. This inclusive description is designed to ensure other forms of electronic communication, including those not contemplated or not invented at the time of the amendment can be used to make an oral application.

Item 103 – Subsection 105.16(3) of the *Criminal Code*

778. This item repeals and replaces subsection 105.16(3) and inserts new subsection 105.16(3A).

779. Revised subsection 105.16(3) provides that, where an AFP member applies for a continued PDO and an application for a prohibited contact order in relation to a person already the subject of a preventative order in writing under subparagraph 105.16(1A)(a), the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member.

780. New subsection 105.16(3A) provides that, where an AFP member applies for a continued PDO and an application for a prohibited contact order is made in relation to a person already the subject of a preventative order orally under new subparagraph 105.16(1A)(b), the information in the application for the prohibited contact order must be sworn or affirmed by the AFP member. Subsection 105.16(3A) provides for an exception to this requirement where the issuing authority is satisfied that it is not practical to administer an oath or affirmation to the AFP member.

Item 104 – Subsection 105.16(4) of the *Criminal Code*

781. This item inserts the words “subject to subsection (4A)” into subsection 105.16(4). This amendment makes it clear that an issuing authority may make a prohibited contact order in relation to a person already the subject of a PDO subject to new subsection 105.16(4A).

782. This amendment clarifies that, under normal circumstances, an application for a prohibited contact order should be made in writing in the presence of an issuing authority. However, where the situation is urgent, for example, because the person is already in detention and is thought to be about to contact a person in order to facilitate that person absconding, destroying evidence or undertaking actions in furtherance of a terrorist act, or because it is not possible to make an application to an issuing authority in person within a reasonable period of time due to physical location or other limitations, an urgent oral application can be made.

Item 105 – After subsection 105.16(4) of the *Criminal Code*

783. This item inserts new subsection 105.16(4A) after subsection 105.16(4). New subsection 105.16(4A) provides that, where an application for a prohibited contact order is made in relation to a person who is already the subject of a PDO orally, the issuing authority must not make the order unless the issuing authority is satisfied that it is necessary, because of urgent circumstances, to apply for the order by such means. This is designed to ensure the AFP applies for prohibited contact orders in writing in cases where there are not urgent circumstances sufficient to justify the making of an order on the basis of an oral application.

Item 106 – At the end of section 105.16 of the *Criminal Code*

784. This item inserts new subsection 105.16(7) after existing 105.16(6). This amendment provides an important safeguard for persons subject to a prohibited contact order made orally

by requiring the issuing authority to ensure there is either an audio or audio-visual recording of the application (at the time the application is made) or that a written record of the details of the application and any information given in support of the application is made as soon as practicable after the order is made. It also provides a safeguard to the applicant and issuing authority by ensuring there is an accurate record of the information relied upon for the application and making of the order.

Items 107 to 108 – Section 105.53 of the *Criminal Code*

785. This item amends section 105.53 to ensure the operation of the PDO regime will continue for a further ten years after the commencement of these amendments. This amendment recognises the enduring nature of the terrorist threat and the important role of PDOs in mitigating and responding to that threat.

786. In light of the increasing threat posed by the escalating terrorist situation in Iraq and Syria to the security of all Australians, both here in Australia and overseas, it is vital that law enforcement agencies continue to have access to all tools that could be required to combat this threat and protect Australia and Australians from terrorist acts.

Item 109 – At the end of Division 106 of the *Criminal Code*

787. This item adds new section 106.5 at the end of Division 106 of the Criminal Code. New section 106.5 sets out the application provisions for certain amendments to Divisions 102, 104 and 105 made by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

788. New subsection 106.5(1) provides that the amendments to section 102.1 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* do not affect the continuity of any regulations that are in force for the purposes of that section immediately before the commencement of this section.

789. New subsection 106.5(2) provides that the amendments to section 104.2 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply to requests for interim control orders made after the commencement of section 106.5 where the conduct in relation to which the request is made occurs before or after that commencement.

790. New subsection 106.5(3) provides that the amendments to section 104.4 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply to the making of interim control orders requested after the commencement of section 106.5 where the conduct in relation to which the request is made occurs before or after that commencement.

791. New subsection 106.5(4) provides that the amendments to sections 104.6 and 104.8 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply to the making of requests for urgent interim control orders made after the commencement of this section, where the conduct in relation to which the request is made occurs before or after that commencement

792. New subsection 106.5(5) provides that the amendments to section 105.4 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply in relation to applications for PDOs made after the commencement of section 106.5.

793. New subsection 106.5(6) provides that the amendments to section 105.7 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply in relation to applications for initial PDOs made after the commencement of section 106.5.

794. New subsection 106.5(7) provides that the amendments to section 105.8 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply in relation to initial PDOs made after the commencement of section 106.5.

795. New subsection 106.5(8) provides that the amendment to section 105.12 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply in relation to continued PDOs made after the commencement of section 106.5, regardless of when the initial PDO to which the continued order relates was made.

796. New subsection 106.5(9) provides that the amendments to section 105.15 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply in relation to applications for prohibited contact orders made after the commencement of section 106.5, regardless of when the application for the PDO to which the prohibited contact order relates was made.

797. New subsection 106.5 (10) provides that any amendments to section 105.16 made by Schedule 1 to the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* apply in relation to applications for prohibited contact orders made after the commencement of section 106.5, regardless of when the PDO to which the prohibited contact order relates was made.

Item 110 – New Part 5.5 of the *Criminal Code*

798. Item 110 inserts new ‘Part 5.5—Foreign incursions and recruitment’ into the Criminal Code. New Part 5.5 contains offences and other provisions based on the Foreign Incursions Act, which is repealed by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*.

799. New Part 5.5 will modernise the provisions of the Foreign Incursions Act and addresses the anomalies and mismatches identified by the INSLM during his review of the Foreign Incursions Act in his fourth annual report to ensure that the provisions complement other counter-terrorism laws and enhance the overall effectiveness of the framework. The offences in new Part 5.5 are designed to simplify the offences to ensure they are easier to understand, and to respond to the significant threat to the safety and security of Australia and Australians posed by those who engage in foreign fighting or seek to do so.

Item 110 – At the end of Chapter 5 of the *Criminal Code*

800. This item inserts new ‘Part 5.5—Foreign incursions and recruitment’ after Part 5.4.

Part 5.5—Foreign incursions and recruitment

Division 117—Preliminary

801. New Division 117 sets out the definitions relevant to new Part 5.5, provides the criteria for the making of regulations prescribing organisations by the Governor-General, and identifies the geographical jurisdiction that applies for the offences in new Part 5.5.

117.1 Definitions

802. New subsection 117.1(1) contains a number of definitions relevant to the offences and other provisions in Part 5.5.

803. The definition of ‘engage in a hostile activity’ reflects the definition in the Foreign Incursions Act but expands the definition to include conduct that occurs in the foreign country or any other foreign country (or of a part of that or any other foreign country). This revised definition implements the Government’s response to recommendation III/2 of the INSLM’s fourth annual report.

804. The term ‘recruit’ is defined to include induce, incite or encourage. This revised definition reflects the current definition of ‘recruit’ contained in Part 5.3 of the Criminal Code. The amendment will modernise the definition used in relation to foreign incursion and recruitment offences and will provide consistency and clarity. The new definition will include ‘encourage’ which is not new as the definition of ‘incite’ in the former Foreign Incursions Act included encourage. The amendment implements the Government’s response to recommendation III/5 of the INSLM’s fourth annual report.

Prescribing organisations

805. New subsection 117.1(2) provides that, before the Governor-General makes a regulation prescribing an organisation for the purposes of paragraph 117.1(1)(a) of the definition of prescribed organisation, the Minister must be satisfied on reasonable grounds that the organisation either is directly or indirectly engaged in, preparing, planning, assisting in or fostering a serious violation of human rights or ‘subverting society’ (within the meaning given by subsection 117.1(3)) in Australia or a foreign State allied or associated with Australia or a terrorist act within the meaning of section 100.1 or an act prejudicial to the security, defence or international relations Australia.

806. New subsection 117.1(3) defines ‘engages in subverting society’ for the purposes of new Part 5.5. The new phrase ‘engages in subverting society’ replaces the previously undefined phrase at paragraph 6(3)(aa) of the Foreign Incursions Act ‘engaging in armed hostilities in the foreign State’.

807. Paragraph 6(3)(aa) of the Foreign Incursions Act was inserted by the *Crimes Legislation Amendment Act 1987* to extend the definition of ‘engaging in a hostile activity’ “to fill the present gap in the Act by reason of which it is not an offence for an Australian to become involved in mercenary activities per se in a foreign State” (*Crimes Legislation Amendment Bill 1987* explanatory memorandum, p. 25).

808. However, there has been some uncertainty about how broadly the phrase ‘engaging in armed hostilities in the foreign State’ should have been interpreted. The expression ‘engage in armed hostilities’ has a specific meaning at international law that is much narrower than

the proposed definition in 117.1(3). It is limited to acts taking place during a formal state of war. Such a narrow meaning was not intended in the originating bill and is not appropriate in the current environment.

809. To ensure that mercenary activities that extend to taking part in the commission of a terrorist act are appropriately criminalised the terminology has been changed to adopt an appropriately broad exhaustive definition for ‘engage in subverting society’ based on the definition of terrorist act in subsections 100.1(2) and (3) of the Criminal Code. This is appropriate as in his second reading speech for the Crimes (Foreign Incursions and Recruitment) Bill 1978 the Attorney-General Senator the Hon P.D. Durack equated foreign incursions with “acts of terrorism”.

810. A person ‘engages in subverting society’ if the person engages in any of the conduct specified in paragraphs 117.1(3)(a) to (f) unless that conduct that falls within subsection 117.1(4). Paragraphs 117.1(3)(a) to (c) specify conduct that causes serious harm that is physical harm to another person, serious damage to property or another person’s death. Paragraphs 117.1(3)(d) and (e) specify conduct that endangers another person’s life, other than the life of the person taking the action and conduct that creates a serious risk to the health or safety of the public or a section of the public. Paragraph 117.1(3)(f) specifies conduct that seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to an information system, a telecommunications system, a financial system, a system used for the delivery of essential government services, a system used for, or by, an essential public utility, or a system used for, or by, a transport system.

811. New subsection 117.1(4) excludes conduct that would otherwise fall within the definition in subsection 117.1(3) if that conduct is advocacy, protest, dissent or industrial action provided the conduct is also not intended to cause serious harm that is physical harm to a person, is not intended to cause a person’s death, is not intended to endanger the life of a person other than the person taking the action, and is not intended to create a serious risk to the health or safety of the public or a section of the public.

117.2 Extended geographical jurisdiction—category D

812. New section 117.2 provides that category D extended geographical jurisdiction as defined in section 15.4 of the Criminal Code applies to the offences against Part 5.5 subject to any other restrictions in Part 5.5 to the contrary.

Division 119—Foreign incursions and recruitment

119.1 Incursions into foreign countries with the intention of engaging in hostile activities

813. New section 119.1 creates two offences for entering a foreign country with the intention of engaging in hostile activities and engaging in a hostile activity in a foreign country, and a defence to those offences. The penalties for these offences implement recommendation III/7 of the INSLM’s fourth annual report, that the penalty provisions in sections 101.1 and 101.6 of the Criminal Code and 6 and 7 of the Foreign Incursions Act should be equivalent.

Offence for entering foreign countries with the intention of engaging in hostile activities

814. New subsection 119.1(1) creates an offence for intentionally entering a foreign country with the intention of engaging in a hostile activity as defined by subsection 117.1(1) in that country or in any other foreign country.

815. New paragraph 119.1(1)(b) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act or a person who has voluntarily put themselves under the protection of the Commonwealth at the time when the person enters the foreign country. This paragraph ensures the offence only applies to persons with a relevant and sufficient connection to Australia.

816. The maximum penalty for contravening the new offence in subsection 119.1(1) is imprisonment for life, reflecting the seriousness of the conduct.

Offence for engaging in a hostile activity in a foreign country

817. New subsection 119.1(2) creates an offence for intentionally engaging in a hostile activity in a foreign country. Consistent with the offence at new subsection 119.1(1), new paragraph 119.1(1)(b) limits the application of the offence to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act or a person who has voluntarily put themselves under the protection of the Commonwealth at the time when the person engages in the activity.

818. The maximum penalty for contravening the new offence in subsection 119.1(2) is imprisonment for life, reflecting the seriousness of the conduct which at its most serious could involve unlawful death or an intention to cause unlawful death.

819. New subsection 119.1(3) provides that absolute liability applies to the elements in paragraphs 119.1(1)(b) and (2)(b) that the person is a citizen, resident, visa holder, or has voluntarily placed themselves under Australia's protection.

820. The Note to subsection 119.1(3) advises readers to refer to section 6.2 of the Criminal Code for further information about the fault element of absolute liability.

821. Absolute liability is set out in section 6.2 of the Criminal Code. The effect of applying absolute liability to an element of an offence means that no fault element needs to be proved and the defence of mistake of fact under section 9.2 of the Criminal Code is not available. Accordingly, the prosecution will not be required to prove that the defendant knew or was reckless as to the fact that they were a citizen, resident, visa holder, or had voluntarily placed themselves under Australia's protection at the time they entered the foreign country to engage in the conduct.

822. Absolute liability is appropriate and required for the element of the offence that the person is a citizen, resident, visa holder, or has voluntarily placed themselves under Australia's protection. The element appropriately limits the jurisdictional operation of the offence to only operate in respect of conduct of persons with the requisite connection to Australia (otherwise extended geographical jurisdiction—category D would apply). Further, the issue of whether the person knew or was reckless to the fact that they were a citizen, resident, visa holder, or had voluntarily placed themselves under Australia's protection at the

time they entered the foreign country to either engage in a hostile activity or with the intention to engage in a hostile activity is not relevant to their culpability. This is consistent with Commonwealth criminal law practice, as described in the *Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*.

Exception

823. New subsection 119.1(4) creates a defence to the offences in subsections 119.1(1) and (2). The defence applies to an act done by a person in the course of, and as part of, the person's service in any capacity in or with either the armed forces of the government of a foreign country or any other armed force the subject of a declaration made under subsection 119.8(1), provided that declaration covers the person and the circumstances of the person's service in or with the force.

824. Note 1 to new subsection 119.1(4) advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the Criminal Code. Section 13.3 of the Criminal Code provides that in the case of a standard 'evidential burden' defence, the defendant bears the burden of adducing or pointing to evidence that suggests a reasonable possibility that the defence is made out. If this is done, the prosecution must refute the defence beyond reasonable doubt.

825. Note 2 to new subsection 119.1(4) refers readers to new section 119.9, which sets out a further defence for conduct engaged in for the defence or international relations of Australia.

119.2 Entering, or remaining in, declared areas

826. New section 119.2 creates a new offence for entering, or remaining in, an area in a foreign country that is the subject of a declaration under new section 119.3, as well as defences to that offence.

827. The purpose of the offence is to equip law enforcement and prosecutorial agencies with the tools to arrest, charge and prosecute those Australians who have committed serious offences, including associating with, fighting, or providing other support for terrorist organisations overseas. Legitimate purposes for travel to or remaining in a declared area are protected, but appropriately limited in recognition of the need to deter individuals from travelling to areas which pose a significant risk to life.

828. New subsection 119.2(1) creates an offence for intentionally entering, or remaining in, an area in a foreign country reckless to the fact that the area is an area declared for the purposes of the offence. It will not be necessary for the person to know specifically that 'the area is a declared area by the Foreign Affairs Minister under section 119.3'.

829. New paragraph 119.2(1)(c) provides that the offence only applies to certain classes of person. Those classes are Australian citizens, residents of Australia, persons who hold a visa under the Migration Act and persons who have voluntarily put themselves under the protection of the Commonwealth. This paragraph is designed to ensure the offence only applies to those persons with a relevant and sufficient connection to Australia.

830. The maximum penalty for contravening the new offence in subsection 119.2(1) is imprisonment for ten years, reflecting the seriousness of the conduct.

831. New subsection 119.2(2) provides that absolute liability applies to the elements in paragraph 119.2(1)(c) that the person is a citizen, resident, visa holder, or is under Australia's protection.

832. The Note to subsection 119.2(2) advises readers to refer to section 6.2 of the Criminal Code for further information about the fault element of absolute liability.

Exception—entry or remaining solely for legitimate purposes

833. New subsection 119.2(3) creates a defence to the offence in subsection 119.2(1). That defence is available to a person who enters or remains in the area solely for a legitimate purpose. For the purposes of the offence, legitimate purpose includes providing aid of a humanitarian nature; satisfying an obligation to appear before a court or other body exercising judicial power; performing an official duty for the Commonwealth, a state or a territory; performing an official duty for the government of a foreign country or the government of part of a foreign country (including service in the armed forces of the government of a foreign country), where that performance would not be a violation of the law of the Commonwealth, a state or a territory; performing an official duty for the United Nations or an agency of the United Nations; making a news report of events in the area, where the person is working in a professional capacity as a journalist or is assisting another person working in a professional capacity as a journalist; making a genuine visit to a family member, and any other purpose prescribed by the regulations.

834. The ability to prescribe other purposes under regulations is an important safeguard in the event other purposes that should be covered by the defence emerge over time.

835. The Note to new subsection 119.2(3) advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the Criminal Code.

Exception—entry or remaining solely for service with armed force other than prescribed organisation

836. New subsection 119.2(4) creates a defence to the offence in subsection 119.2(1). That defence is available to a person who enters or remains in the area solely in the course of and as part of the person's service in any capacity in or with the armed forces of the government of a foreign country or any other armed force the subject of a declaration made under subsection 119.8(1) provided that declaration covers the person and the circumstances of the person's service in or with the force.

837. Note 1 to new subsection 119.2(4) advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the Criminal Code.

838. New subsection 119.2(5) provides that the defence at subsection 119.2(4) does not apply if the person enters, or remains in, an area in a foreign country while in or with an organisation and the organisation is a prescribed organisation at the time the person enters, or remains in, the area.

839. Note 1 to new subsection 119.2(5) refers readers to new section 119.9, which sets out a further defence for conduct engaged in for the defence of Australia.

840. Note 2 to new subsection 119.2(5) advises readers that sections 10.1 and 10.3 of the Criminal Code also provide exceptions to subsection 119.2(1) relating to intervening conduct or event and sudden and extraordinary emergency respectively.

841. New subsection 119.2(6) provides that new section 119.2 ceases to have effect ten years after it commences.

119.3 Declaration of areas for the purposes of section 119.2

842. New section 119.3 provides for the making of a declaration for the purposes of the offence in section 119.2.

843. New subsection 119.3(1) provides that the Foreign Affairs Minister may declare an area in a foreign country for the purposes of section 119.2 by legislative instrument. The Foreign Affairs Minister may only do so if he or she is satisfied that a listed terrorist organisation is engaging in a hostile activity in that area of the foreign country.

844. New paragraph 119.3(2)(a) clarifies that a single declaration may cover areas in two or more foreign countries if the Foreign Affairs Minister is satisfied that one or more listed terrorist organisations are engaging in a hostile activity in each of those areas.

845. New paragraph 119.3(2)(b) clarifies that a single declaration may cover an entire country if the Foreign Affairs Minister is satisfied that a listed terrorist organisation is engaging in a hostile activity throughout the country.

Requirement to brief Leader of the Opposition

846. New subsection 119.3(3) provides that, before making a declaration, the Foreign Affairs Minister must arrange for the Leader of the Opposition in the House of Representatives to be briefed in relation to the proposed declaration. This is an important safeguard that is consistent with processes for the listing of a terrorist organisation under Division 102 of the Criminal Code.

Cessation of declaration

847. New subsection 119.3(4) provides that a declaration ceases to have effect on the third anniversary of the day on which it takes effect. This ensures a declaration cannot continue in automatic operation for more than three years.

848. New paragraphs 119.3(4)(a) and (b) provide that new subsection 119.3(4) does not prevent the revocation of the declaration before its expiry on the third anniversary of the day in which it takes effect or the making of a new declaration the same in substance as the previous declaration before or after the previous declaration ceases to have effect.

849. The note to subsection 119.3(4) advises readers that an offence committed in relation to the declared area before the cessation of the relevant declaration can still be prosecuted after the cessation of the declaration. The note relevantly refers readers to section 7 of the *Acts Interpretation Act 1901* as it applies because of paragraph 13(1)(a) of the Legislative Instruments Act.

850. New subsection 119.3(5) provides that, if the Foreign Affairs Minister ceases to be satisfied that a listed terrorist organisation is engaging in a hostile activity in a declared area, the Foreign Affairs Minister must revoke the declaration.

851. The note to subsection 119.3(5) provides an example of circumstances in which the Foreign Affairs Minister may cease to be satisfied that a listed terrorist organisation is engaging in a hostile activity in the area. That example is where the relevant organisation ceases to be specified in the regulations, i.e. a listed terrorist organisation as defined at section 100.1 of the Criminal Code.

852. New subsection 119.3(6) clarifies that the Foreign Affairs Minister may subsequently make a declaration in relation to an area the subject of a revoked declaration if he or she subsequently becomes satisfied that a listed terrorist organisation is engaging in a hostile activity in that area.

119.4 Preparations for incursions into foreign countries for purpose of engaging in hostile activities

Preparatory acts

853. New section 119.4 creates offences for conduct that is preparatory to the offences of entering a foreign country with the intention of engaging in a hostile activity or engaging in a hostile activity in a foreign country.

854. New subsection 119.4(1) creates an offence for intentionally engaging in conduct either within or outside Australia in circumstances where the person is reckless to the fact that the conduct is preparatory to the commission of an offence against new section 119.1. Paragraph 119.4(1)(b) provides that the conduct of the person could be preparatory to the commission of a relevant offence either by that person or by another person.

Paragraph 119.4(1)(c) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person engages in the conduct. This paragraph ensures the offence only applies to persons with a relevant and sufficient connection to Australia.

855. The maximum penalty for contravening the offence in subsection 119.4(1) is imprisonment for life, reflecting the seriousness of the conduct. The penalties for these offences implement recommendation III/7 of the INSLM's fourth annual report, that the penalty provisions in sections 101.1 and 101.6 of the Criminal Code and 6 and 7 of the Foreign Incursions Act should be equivalent.

Accumulating weapons etc.

856. New subsection 119.4(2) creates an offence for intentionally accumulating, stockpiling or otherwise keeping arms, explosives, munitions, poisons or weapons either within or outside Australia with the intention that an offence against new section 119.1 will be committed.

857. Paragraph 119.4(2)(b) provides that the conduct of the person could be preparatory to the commission of a relevant offence either by that person or by another person. Consistent

with the offence at subsection 119.4(1), paragraph 119.4(2)(c) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person engages in the conduct.

858. The maximum penalty for contravening the offence in subsection 119.4(2) is imprisonment for life, reflecting the seriousness of the conduct which at its most serious could involve an intention to cause unlawful death.

Providing or participating in training

859. New subsection 119.4(3) creates an offence for intentionally providing military training to another person or participating in providing military training to another person or being present at a meeting or assembly of persons, where the person intends at that meeting or assembly to provide, or participate in providing, military training to another person either within or outside Australia.

860. New paragraph 119.4(3)(b) limits the offence to circumstances where the person engages in the conduct intending to prepare the other person to commit an offence against new section 119.1.

861. Consistent with the offences at subsections 119.4(1) and (2), paragraph 119.4(3)(c) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person engages in the conduct.

862. The maximum penalty for contravening the offence in subsection 119.4(3) is imprisonment for life, reflecting the seriousness of the conduct.

863. New subsection 119.4(4) creates an offence for intentionally allowing military training to be provided to himself or herself or intentionally allowing himself or herself to be present at a meeting or assembly of person either within or outside Australia.

864. New paragraph 119.4(4)(b) limits the offence to circumstances where the person engages in the conduct intending to commit an offence against new subsection 119.1.

865. Consistent with the offences at subsections 119.4(1), (2) and (3), paragraph 119.4(4)(c) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person engages in the conduct.

866. The maximum penalty for contravening the offence in subsection 119.4(4) is imprisonment for life, reflecting the seriousness of the conduct.

Giving or receiving goods and services to promote the commission of an offence

867. New subsection 119.4(5) creates an offence for intentionally giving money or goods to, or performing services for, any other person, body or association or receiving or soliciting money or goods, or the performance of services for any other person, body or association, either within or outside Australia.

868. New paragraph 119.4(5)(b) limits the offence to circumstances where the person engages in the conduct with the intention of supporting or promoting the commission of an offence against new subsection 119.1.

869. Consistent with the offences at subsections 119.4(1), (2), (3) and (4) paragraph 119.4(5)(c) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person engages in the conduct.

870. The maximum penalty for contravening the offence in subsection 119.4(5) is imprisonment for life, reflecting the seriousness of the conduct.

Absolute liability element

871. New subsection 119.4(6) provides that absolute liability applies to the elements in paragraphs 119.4(1)(c), (2)(c), (3)(c), (4)(c) and (5)(c) that the person is a citizen, resident, visa holder, under Australia's protection or relevant body corporate.

872. The Note to subsection 119.4(6) advises readers to refer to section 6.2 of the Criminal Code for further information about the fault element of absolute liability.

Exception

873. New subsection 119.4(7) creates a defence to the offences in subsections 119.4(1) to (5). That defence is available where the person engages in the relevant conduct solely for humanitarian aid purposes.

874. Note 1 to new subsection 119.4(7) advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the Criminal Code.

875. Note 2 to new subsection 119.4(7) refers readers to new section 119.9, which sets out a further defence for conduct engaged in for the defence or international relations of Australia.

Disregarding paragraphs 119.1(1)(b) and (2)(b)

876. New subsection 119.4(8) provides that a reference in section 119.4 to the commission of an offence against section 119.1 includes a reference to doing an act that would constitute an offence against section 119.1 if paragraphs 119.1(1)(b) and (2)(b) were disregarded. The effect of this is that the person who engages in the preparatory conduct contrary to the section 119.4 offences must be an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the

protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person engages in the conduct—that is, the person must have a ‘connection with Australia’. However, any other persons relevant to the preparatory conduct need not satisfy that criteria.

877. For the offence against subsection 119.4(1), provided the person who engages in the relevant preparatory conduct has a connection to Australia, it is immaterial that the person intended to engage in conduct contrary to section 119.1 does not have a connection to Australia and therefore cannot be prosecuted under section 119.1.

878. Similarly, for an offence against subsection 119.4(2), provided the person who accumulates the weapons has a connection to Australia, it is immaterial that the person intended to commit an offence against section 119.1 does not have a connection to Australia and cannot be prosecuted under section 119.1.

879. For the offences against subsections 119.2(3), (4) and (5), provided the person charged has a connection to Australia, it is not necessary for the person or persons who receive military training, provide military training, or receive money or goods or services or provide money, goods or services, respectively, have a connection to Australia.

880. Subsection 119.4(8) provides an important safeguard to ensure a person cannot escape prosecution for an offence simply because the other person or persons involved are foreigners and are neither Australian citizens, residents of Australia, persons who hold visas under the Migration Act, persons who have voluntarily placed themselves under the protection of the Commonwealth, or a bodies corporate incorporated by or under a law of the Commonwealth or of a state or territory.

119.5 Allowing use of buildings, vessels and aircraft to commit offences

Use of buildings

881. New section 119.5 creates offences for facilitating, supporting or promoting the commission of a preparatory offence through the use of buildings, vessels and aircraft.

882. New subsection 119.5(1) creates an offence for a person who is an owner, lessee, occupier, agent or superintendent of any building, room, premises or other place, who intentionally permits a meeting or assembly of persons to be held in that place. The offence applies whether the person or the place is within or outside Australia.

883. Paragraph 119.5(1)(c) limits the offence to circumstances where the person permitting the meeting or assembly to be held does so with the intention to commit, or support or promote the commission of a preparatory offence contrary to section 119.4.

884. Paragraph 119.5(1)(d) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person permits the meeting or assembly to be held. This paragraph ensures the offence only applies to persons with a relevant and sufficient connection to Australia.

885. The maximum penalty for contravening the offence in subsection 119.5(1) is imprisonment for life, reflecting the seriousness of the conduct.

Use of vessels or aircraft

886. New subsection 119.5(2) creates an offence for a person who is an owner, charterer, lessee, operator, agent or master of a vessel, or an owner, charterer, lessee, operator or pilot in charge of an aircraft, who intentionally permits the vessel or aircraft to be used. The offence applies whether the person, vessel or aircraft is within or outside Australia.

887. Paragraph 119.5(2)(c) limits the offence to circumstances where the person permitting the use does so with the intention to commit, or support or promote the commission of a preparatory offence contrary to section 119.4.

888. Consistent with the offence at subsection 119.5(1), paragraph 119.5(2)(d) provides that the offence only applies to a person who is an Australian citizen, a resident of Australia, a person who holds a visa under the Migration Act, a person who has voluntarily put themselves under the protection of the Commonwealth, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory at the time the person permits the use of the vessel or aircraft.

889. The maximum penalty for contravening the offence in subsection 119.5(2) is imprisonment for life, reflecting the seriousness of the conduct. The penalties for the offences in subsections 119.5(1) and (2) implement recommendation III/7 of the INSLM's fourth annual report, that the penalty provisions in sections 101.1 and 101.6 of the Criminal Code and 6 and 7 of the Foreign Incursions Act should be equivalent.

Absolute liability element

890. New subsection 119.5(3) provides that absolute liability applies to the elements in paragraphs 119.5(1)(d) and (2)(d) that the person is a citizen, resident, visa holder, under Australia's protection or relevant body corporate.

891. The Note to subsection 119.5(3) advises readers to refer to section 6.2 of the Criminal Code for further information about the fault element of absolute liability.

Exception

892. New subsection 119.5(4) creates a defence to the offences in subsections 119.5(1) and (2). That defence is available where the person engages in the relevant conduct solely for humanitarian aid purposes.

893. Note 1 to new subsection 119.5(4) advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the Criminal Code.

894. Note 2 to new subsection 119.5(4) refers readers to new section 119.9, which sets out a further defence for conduct engaged in for the defence or international relations of Australia.

119.6 Recruiting persons to join organisations engaged in hostile activities against foreign governments

895. New section 119.6 creates an offence for intentionally recruiting, in Australia, another person to become a member of, or serve in any capacity with, a body or association of

persons whose objectives include any one or more of the objectives referred to in the definition of ‘engage in a hostile activity’ in subsection 117.1(1).

896. The Note to new section 119.6 refers readers to new section 119.9, which sets out a further defence for conduct engaged in for the defence or international relations of Australia.

897. The maximum penalty for contravening the offence in section 119.6 is imprisonment for 25 years, reflecting the relative seriousness of the conduct. The penalties for this offence implement recommendation III/6 of the INSLM’s fourth annual report, that the penalty provisions in section 102.4 of the Criminal Code for the offence of recruiting for a terrorist organisation and section 8 of the Foreign Incursions Act for the offence of recruiting person to join organizations engaged in hostile activities against foreign governments should be equivalent.

119.7 Recruiting persons to serve in or with an armed force in a foreign country

Recruiting others to serve with foreign armed forces

898. New section 119.7 creates offences for recruiting others for service with an armed force in a foreign country, in Australia.

899. New subsection 119.7(1) creates an offence for intentionally recruiting, in Australia, another person to serve in any capacity in or with an armed force in a foreign country.

900. The maximum penalty for contravening the offence in subsection 119.7(1) is imprisonment for ten years, reflecting the relative seriousness of the conduct.

Publishing recruitment advertisements

901. New subsections 119.7(2) and (3) create offences for publishing items relevant to recruiting.

902. New subsection 119.7(2) creates an offence for intentionally publishing in Australia an advertisement or item of news that was procured by the provision or promise of money or any other consideration reckless as to the fact that the publication of the advertisement or item of news is for the purpose of recruiting persons to serve in any capacity in or with an armed force in a foreign country.

903. New subsection 119.7(3) creates an offence for intentionally publishing in Australia an advertisement or item of news that was procured by the provision or promise of money or any other consideration reckless as to the fact that the advertisement or item of news contains information relating to the place at which, or the manner in which, persons may make applications to serve, or obtain information relating to service, in any capacity in or with an armed force in a foreign country or relating to the manner in which persons may travel to a foreign country for the purpose of serving in any capacity in or with an armed force in a foreign country.

904. The maximum penalty for contravening the offences in subsections 119.7(2) and (3) is imprisonment for ten years, reflecting the relative seriousness of the conduct.

Facilitating recruitment

905. New subsection 119.7(4) creates an offence for intentionally engaging in conduct in Australia with the intention to facilitate or promote the recruitment of persons to serve in any capacity in or with an armed force in a foreign country.

906. The maximum penalty for contravening the offence in subsection 119.7(4) is imprisonment for ten years, reflecting the relative seriousness of the conduct.

Exception

907. New subsection 119.7(5) provides for a defence where the recruiting, publishing or facilitating conduct is authorised pursuant to a declaration made under subsection 119.8(2). This is designed to ensure, for example, that Australia's allies can legally advertise and recruit in Australia for service in or with their legitimate armed forces for a legitimate purpose.

908. Note 1 to subsection 119.7(5) advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the *Criminal Code*.

909. Note 2 to new subsection 119.7(5) refers readers to new section 119.9, which sets out a further defence for conduct engaged in for the defence or international relations of Australia.

Armed forces that are not part of the government of a foreign country

910. New subsection 119.7(6) provides that a reference in this section to an armed force in a foreign country includes any armed force in a foreign country, whether or not the armed force forms part of the armed forces of the government of that foreign country.

911. New subsection 119.7(7) provides that, without limiting this section, a person recruits another person to serve in or with an armed force in a foreign country if the other person enters a commitment or engagement to serve in any capacity in or with an armed force, whether or not the commitment or engagement is legally enforceable or constitutes legal or formal enlistment in that force.

119.8 Declaration in relation to specified armed forces

912. New section 119.8 provides for the making of declarations by the Minister in relation to sections 119.1, 119.2 and 119.7.

Service

913. New subsection 119.8(1) provides that the Minister may declare, by legislative instrument, that section 119.1 or 119.2 does not apply in certain circumstances or to certain persons if the Minister is satisfied that it is in the interests of the defence or international relations of Australia to do so. The declaration can apply to a specified person or class of persons in any circumstances or in circumstances specified in the declaration. The effect of a subsection 119.8(1) declaration is to permit the service of the person or class of persons in the circumstances specified (if any) in or with a specified armed force in a foreign country or a specified armed force in a foreign country in a specified capacity.

914. The ability to make declarations under subsection 119.8(1) is important to Australia's defence and international relations and cooperation. A declaration could be made, for example, to authorise an individual with certain skills to work with the armed forces of one of Australia's allies in a peace keeping mission at a location that is, or that could become, the subject of a declaration made by the Foreign Affairs Minister under section 119.3 on the grounds that a listed terrorist organisation is engaging in a hostile activity in that area. In such a case, it would be important that the individual engaged in activities approved by the Australian Government was not at risk of contravening the offences of entering a foreign country with the intention of engaging in a hostile activity or entering or remaining in a declared area.

Recruitment

915. New subsection 119.8(2) provides that the Minister may, by legislative instrument, declare that section 119.7 does not apply in certain circumstances or to certain persons if the Minister is satisfied that it is in the interests of the defence or international relations of Australia to do so. The declaration can apply to a specified person or to a class of persons in any circumstances or in circumstances specified in the declaration. The effect of a subsection 119.8(2) declaration is to permit the recruitment in Australia of that person or class of persons to serve in those circumstances in or with a specified armed force in a foreign country or a specified armed force in a foreign country in a specified capacity.

916. The ability to make declarations under subsection 119.8(2) is also important to Australia's defence and international relations and cooperation. A declaration could be made, for example, to authorise one of Australia's allies to recruit or advertise to recruit a person with specialist skills necessary for a proposed peace keeping mission at a location that is, or that could become, the subject of a declaration made by the Foreign Affairs Minister under section 119.3 on the grounds that a listed terrorist organisation is engaging in a hostile activity in that area. In such a case, it would be important that the person who does the recruiting or publishing the advertisement with the approval of the Australian Government was not at risk of contravening one of the recruitment the offences in section 119.7.

119.9 Exception—conduct for defence of Australia

917. New section 119.9 provides a defence for the offences in Division 119 where the conduct the subject of the offence is undertaken by a person acting in the course of the person's duty to the Commonwealth in relation to the defence or international relations of Australia.

918. Note 1 to section 119.9 advises readers that a defendant bears an evidential burden in relation to the matters set out in that subsection. Note 1 relevantly refers readers to subsection 13.3(3) of the Criminal Code.

919. Note 2 to section 119.9 refers readers to new section 119.12, which provides for the making of declarations for the purposes of proceedings for offences against this Division.

119.10 Mode of trial

920. New section 119.10 sets out the requirements for a trial for a prosecution for the offences in Division 119 and related offences.

921. New subsection 119.10(1) provides that a prosecution for an offence against Division 119, an offence against section 6 of the Crimes Act, or an ancillary offence that relates to an offence against Division 119 is to be on indictment.

922. However, new subsection 119.10(2), provides that if a law of a State or Territory provides for a person who pleads guilty to a charge in proceedings for the person's commitment for trial on indictment to be committed to a higher court and dealt with otherwise than on indictment will prevail over subsection 119.10(1).

119.11 Consent of Attorney-General required for prosecutions

923. New section 119.11 requires the consent of the Attorney-General in order to commence proceedings against a person for offences against Division 119.

924. New subsection 119.11(1) provides that proceedings for the commitment of a person for trial on indictment or for the summary trial for an offence against Division 119 or section 6 of the Crimes Act to the extent that it relates to an offence against Division 119 must not be instituted without the written consent of the Attorney-General. This is designed to ensure there is appropriate oversight of prosecutions.

925. New subsection 119.11(2) clarifies that certain steps may be taken without consent having been given. Those steps are preliminary to the commencement of proceedings for the commitment of a person on trial, and are limited to charging, arresting and remanding a person in custody or on bail in relation to a relevant offence.

926. New subsection 119.11(3) provides that nothing in subsection (2) prevents the discharge of the accused if proceedings are not continued within a reasonable time.

119.12 Declarations for the purposes of proceedings

927. New section 119.12 provides for Ministers to make declarations for the purposes of the offences in Division 119.

928. New subsection 119.12(1) authorises the Foreign Affairs Minister to declare in writing that a specified authority is in effective governmental control in a specified foreign country or part of a foreign country or that a specified organisation is not an armed force, or part of an armed force, of the government of a foreign country.

929. New subsection 119.12(2) authorises the Defence Minister to declare in writing that if a specified person had done a specified act (being an act alleged to constitute an offence) the person would not have been acting in the course of the person's duty to the Commonwealth in relation to the defence or international relations of Australia.

930. New subsection 119.12(3) provides that a declaration may be made in relation to a specified day or period.

931. New subsection 119.12(4) provides that, in proceedings for an offence for which the Attorney-General's consent is required under Division 119, a certificate under this section is *prima facie* evidence of the matters stated in the certificate. Accordingly, it is open to the defence to provide information contrary to the matters stated in a declaration. In such a case, it will be necessary for the prosecution to prove the relevant matter to the normal criminal standards.

932. The INSLM has examined the executive evidential certificates created by section 11 of the Foreign Incursions Act. Recommendation III/8 of the INSLM's fourth annual report recommended that the evidential effect of the certificates concerning effective governmental control in a specified foreign State or part thereof, and concerning the non-governmental armed force character of a specified organisation (subsections 11(3) and 11(3A)) be amended to be conclusive in effect rather than *prima facie*. The Government has considered this recommendation and has resolved to maintain the current arrangements so that the evidential effect of the executive certificates at section 119.12 be *prima facie* evidence of particular matters. This ensures that it is the court that will ultimately have to be satisfied of the facts relevant to proving the offence.

Customs Act 1901

Item 111 – Subsection 183UA(1) (definition of *terrorist act*)

933. This item repeals and substitutes the definition of 'terrorist act' in subsection 183UA(1) of the Customs Act. The new definition will provide that this term has the meaning given by section 100.1 of the Criminal Code. The purpose of this amendment is to ensure that a consistent definition of terrorist act exists across all Commonwealth laws.

Item 112 – Subsections 183UA(4), (4A) and (5)

934. This item repeals subsections 183UA(4), (4A) and (5). These subsections contain provisions for the purposes of the definition of 'terrorist act' in subsection 183UA(1). These provisions are now redundant due to the repeal and substitution of this definition.

Item 113 – Subsection 228(7) (definition of *terrorist act*)

935. This item repeals and substitutes the definition of 'terrorist act' in subsection 228(7) of the Customs Act. Section 228 sets out the circumstances in which ships and aircraft are forfeited to the Crown. The new definition will provide that this term has the meaning given by section 100.1 of the Criminal Code. The purpose of this amendment is to ensure that a consistent definition of terrorist act exists across all Commonwealth laws.

Item 114 – Application of amendments

936. This item provides that the amendments to sections 183UA and 228 of the Customs Act apply in relation to any terrorist act (whether occurring before or after this item commences).

Foreign Evidence Act 1994

Items 115 to 126 – Amendments to provide greater discretion in deciding whether to admit foreign material in terrorism-related proceedings

937. The primary purpose of these amendments to the Foreign Evidence Act is to provide Australian judicial officers with greater discretion in deciding whether to admit foreign material in terrorism-related proceedings, while still providing appropriate judicial protection of the rights of the defendant.

938. Currently, pursuant to Part 3 of the Foreign Evidence Act, only foreign evidence which is obtained as a result of a formal government-to-government request by or on behalf of the Attorney-General to a foreign country (a mutual assistance request), and provided in a particular form, may be adduced as evidence in proceedings in Australian courts. This material is defined as ‘foreign material’. Currently, with the exception of foreign business records, foreign material which is adduced under the Foreign Evidence Act is subject to all evidentiary rules and discretions which apply under the Commonwealth, state or territory law governing proceedings in the relevant jurisdiction.

939. In the context of terrorism-related matters, obtaining foreign evidence through formal mutual assistance channels may not always be practicable. This may be because there is no functioning government to which a request may be made (for example when the alleged terrorist activity takes place in countries in a severe state of conflict). Further, there are circumstances where, although it is possible for Australia to make a mutual assistance request to another country, experience has shown that some countries are not willing or able to provide the requested evidence in response to a mutual assistance request from Australia, or not willing or able to provide it in a form that meets the existing requirements in the Foreign Evidence Act. Even where evidence can be obtained through a mutual assistance request, this can often be a lengthy process and the evidence may not be available in time to assist court proceedings.

940. In response to these difficulties, and in recognition of the seriousness of the conduct to which these proceedings will relate, the Bill will amend the Foreign Evidence Act to insert a new Part 3A, which will regulate the type of material that can be adduced and admitted as evidence in terrorism-related proceedings and the process for adducing (offering of evidence) and admitting (introduction of evidence into proceedings) this material whilst preserving the primacy of the mutual assistance regime. Under Part 3A, in addition to foreign material obtained as a result of a mutual assistance request to a foreign country, material received on a police-to-police or agency-to-agency basis will be able to be adduced in terrorism-related proceedings, as long as certain requirements are met, and subject to the exercise of a broad judicial discretion.

941. As noted above, currently, with the exception of foreign business records, foreign material which is adduced under the Foreign Evidence Act is subject to all rules of evidence, including exclusionary discretions, which apply under the Commonwealth, state or territory law governing proceedings in the relevant jurisdiction. Under Part 3A, the adducing of material in terrorism-related proceedings will be subject only to the exercise of a broad judicial discretion to prevent material from being adduced if the court is satisfied that adducing the material would have a substantial adverse effect on the right of a defendant to receive a fair hearing. The admissibility of material which is adduced in terrorism-related proceedings will be subject only to a mandatory exception to admissibility for material obtained directly as a result of torture or duress. The practical effect of this is that subject to exclusion under this mandatory exception or the court’s discretion based on whether there is a substantial adverse effect on the right of the defendant to receive a fair trial, the material can be adduced in terrorism-related proceedings regardless of whether any other evidentiary rule or discretion under Commonwealth, state or territory law would operate to exclude the material.

942. These amendments are directed towards allowing the court greater discretion as to whether to admit foreign evidence, taking into account the probative value of the evidence in terrorism-related proceedings. The amendments aim to avoid a situation where evidence is

automatically excluded on the basis of a technical rule of evidence that may have no substantial bearing on the defendant's right to a fair trial.

943. The INSLM stated in his Fourth Annual Report that 'as long as that safeguard remains to protect the integrity of criminal proceedings for terrorist etc offences regarding the use of foreign evidence, it justifies serious consideration being given to further liberalizing availability of foreign information as admissible evidence.'

944. Furthermore, the INSLM stated that the discretion to exclude otherwise admissible evidence if the court is satisfied that adducing foreign material would have a substantial adverse effect on the right of a defendant to receive a fair hearing (as expressed in the current section 25A of the Foreign Evidence Act), accords with common law fairness and the requirements for the exercise of judicial power under the Constitution. The proposed amendments will apply the discretion in section 25A to terrorism-related proceedings to protect the integrity of these proceedings.

Items 115 to 121

945. Subsection 3(1) of the Foreign Evidence Act contains a number of definitions. Items 115 to 121 will insert, amend or repeal definitions in subsection 3(1) to give effect to amendments to be made by this Bill.

Items 115 to 118 – Subsection 3(1) (definition of designated offence)

946. 'Designated offence' is currently defined in subsection 3(1) to include a range of national security and terrorism-related offences under a range of Commonwealth Acts, including the *Aviation Transport Security Act 2004*, the Criminal Code, the *Crimes (Aviation) Act 1991* and the *Crimes (Biological Weapons) Act 1976*. This term will be used in the definition of 'terrorism-related proceedings' which will be inserted by Item 121 and the operation of new Part 3A, which will regulate the type of material that can be adduced and admitted as evidence in terrorism-related proceedings and the process for adducing and admitting this material. Paragraph (c) of the definition of 'designated offence' currently refers to an offence against section 21 of the UN Charter Act, which is contained in part 4 of that Act. Item 115 will replace current paragraph (c) of the definition of 'designated offence' with a broader definition which will include any offence against Part 4 of the UN Charter Act or Part 5 of that Act to the extent that it relates to the *Charter of the United Nations (Sanctions—Al Qaida) Regulations 2008*.

947. Item 116 will amend the definition of 'designated offence' in subsection 3(1) of the Foreign Evidence Act to include an offence against Subdivision B of Division 80 of the Criminal Code (treason offences).

948. The amendments made by Items 115 and 116 reflect amendments made to the definition of 'terrorism offence' in the Crimes Act (see items 35-37) and the *Proceeds of Crime Act 2002* (see item 136).

949. Item 117 will amend the definition of 'designated offence' in subsection 3(1) of the Foreign Evidence Act to include an offence under Part 5.5 of the Criminal Code. Part 5.5 will be inserted into the Criminal Code through Item 110 of this Bill. Part 5.5 will contain the offences currently contained in the Foreign Incursions Act, which will be repealed by Item 145.

950. Paragraph (j) of the definition of ‘designated offence’ currently refers to an offence against the Foreign Incursions Act. Item 118 will repeal paragraph (j) of the definition of designated offence in subsection 3(1) of the Foreign Evidence Act. This is as a consequence of the repeal of the Foreign Incursions Act.

Item 119 – Subsection 3(1)

951. Item 119 will insert a definition of ‘duress’, ‘foreign authority’ and ‘foreign government material’ into subsection 3(1) of the Foreign Evidence Act. The admissibility of material which is adduced in terrorism-related proceedings will be subject to a mandatory exception to admissibility for material obtained directly as a result of torture or duress. Item 119 will insert the definition of ‘duress’ as having the meaning given by subsection 27D(3).

952. A ‘foreign authority’ will be defined as an authority of a foreign country or of part of a foreign country. A foreign authority may include, but is not limited to, a foreign investigative or law enforcement authority, a foreign military force, a foreign security agency or a foreign customs or immigration agency.

953. ‘Foreign government material’ will be defined as material provided by a foreign authority to an authority of the Commonwealth. This definition will cover foreign evidence provided on an agency-to-agency basis, as opposed to the provision of material through formal mutual assistance processes (as defined in paragraph (a) of the definition of ‘foreign material’ in subsection 3(1)).

954. Agency-to-agency assistance encompasses police-to-police assistance, which is informal cooperation provided by police in one country and police in another country, and cooperation between non-police agencies and their foreign counterparts overseas. Examples of agency-to-agency assistance may include the provision of witness statements on a voluntary basis and the provision of information or records to further an investigation. Other material provided could include transcripts of interviews, analysis of phones, tablets, computers, photos and videos, surveillance reports, items of forensic value and results of forensic analysis.

955. These definitions are relevant to the new Part 3A to be inserted by Item 125, which will regulate the type of material that can be adduced and admitted as evidence in terrorism-related proceedings and the process for adducing and admitting this material.

Item 120 – Subsection 3(1) (paragraph (a) of the definition of foreign material)

956. Currently, for the purposes of Part 3 of the Foreign Evidence Act, ‘foreign material’ means the testimony of a person that was obtained as a result of a request made by or on behalf of the Attorney-General to a foreign country that complies with the requirements of section 22 of the Foreign Evidence Act. These are that the testimony was taken under a legal obligation or commitment to tell the truth, for example, under oath or affirmation, and that the testimony is signed or certified by judge, magistrate or officer in or of the foreign country to which the request was made. Item 120 will expand the application of existing paragraph (a) of the definition of ‘foreign material’ to new Part 3A of the Foreign Evidence Act, which will be introduced by Item 125.

957. The purpose of this amendment is to make clear that the requirements which currently apply to foreign material for the purposes of Part 3 of the Foreign Evidence Act will also apply to foreign material for the purposes of new Part 3A of the Foreign Evidence Act.

Item 121 – Subsection 3(1)

958. Item 121 will insert a definition of ‘member of the Australian Federal Police’ into subsection 3(1) of the Foreign Evidence Act. This term will have the same meaning as in the AFP Act.

959. Item 121 will also insert a definition of ‘senior AFP member’ into subsection 3(1) of the Foreign Evidence Act. A ‘senior AFP member’ will be defined as the Commissioner or a Deputy Commissioner of the AFP, an AFP member who is a senior executive AFP employee, or an AFP member acting in one of those positions.

960. The definition of ‘senior AFP member’ is relevant to proposed paragraph 27B(1)(a) inserted by Item 125, which will require foreign government material to be under cover of a statement given by a senior AFP member for it to be able to be adduced in terrorism-related proceedings. Limiting the class of AFP members who may provide the statement to a ‘senior AFP member’ ensures that a sufficiently senior AFP member is attesting to the material. This provision recognises the fact that the mutual assistance process remains the preferred method for obtaining foreign evidence for use in Australian proceedings to safeguard the rights of the defendant.

961. Item 121 will also insert a definition of ‘substantial adverse effect’ into subsection 3(1) of the Foreign Evidence Act. ‘Substantial adverse effect’ will be defined to mean an effect that is adverse and not insubstantial, insignificant or trivial.

962. This definition is currently contained at subsection 25A(4) of the Foreign Evidence Act. Item 124 will repeal section 25A. This definition is relevant to the exercise of the judicial discretion not to adduce material at section 27C, which will be introduced by Item 125.

963. Item 121 will also insert a definition of ‘terrorism-related proceeding’ into subsection 3(1). ‘Terrorism-related proceeding’ means a criminal proceeding for a designated offence, a proceeding under the Proceeds of Crime Act which relates to a designated offence, or a proceeding under Division 104 of the Criminal Code (control order proceedings). ‘Designated offence’ is defined in subsection 3(1) to include terrorism and national security-related offences proscribed under a range of legislation. The definition of ‘designated offence’ will be amended by Items 115 and 118.

964. This definition is relevant to Part 3A which will be inserted in the Foreign Evidence Act by item 125 to introduce new rules for the adducing and admissibility of foreign evidence in terrorism-related proceedings.

965. The admissibility of material which is adduced in terrorism-related proceedings will be subject to a mandatory exception to admissibility for material obtained directly as a result of torture or duress. Item 121 will insert the definition of ‘torture’ as having the meaning given by subsection 27D(3).

Item 122 – After subsection 20(1)

966. Part 3 of the Foreign Evidence Act currently stipulates the basis upon which foreign material may be adduced in proceedings. Section 20 of the Foreign Evidence Act identifies the proceedings to which Part 3 of the Act applies including a criminal proceeding for an offence against the law of the Commonwealth, a related civil proceeding and a proceeding under proceeds of crime law. Section 22 then requires testimony attached to foreign evidence to have been taken under a legal obligation or commitment to tell the truth, for example, under oath or affirmation, and signed or certified by a judge, magistrate or officer in or of the foreign country to which the request was made.

967. Item 122 will insert a new subsection (1A) into section 20. The new subsection would outline that Part 3 of the Foreign Evidence Act would not apply to a terrorism-related proceeding. A definition of terrorism-related proceeding will be inserted by item 121. The rules that will apply to the adducing and admissibility of foreign evidence in terrorism-related proceedings will be contained in new Part 3A to be inserted by item 125.

968. New subsection (1A) will also provide that testimony or an exhibit attached to testimony can still be foreign material for the purposes of Part 3A. This is necessary because the definition of foreign material in subsection 3(1) (as amended by item 120) requires the foreign material to have been obtained as a result of a request of the kind referred to in section 21 and comply with the testimony requirements in section 22.

969. As such, for foreign material to be adduced under new Part 3A (to be inserted by item 125) the foreign material would still need to meet the requirements set out in sections 21 and 22 of the Foreign Evidence Act as set out above. The requirements for adducing ‘foreign government material’ will be contained in section 27B of the Foreign Evidence Act which will be inserted by item 125.

Item 123 – Subsection 25(1) (note)

970. Section 25 currently provides the court with the discretion to direct that foreign material not be adduced in criminal and related civil proceedings notwithstanding that the material may otherwise meet all rules of evidence relating to the adducing of evidence if justice would be better served if the foreign material were not adduced as evidence.

971. The note following subsection 25(1) currently refers to section 25A which contains a more limited discretion for ‘designated offences’. This item will repeal the note following subsection 25(1). This is as a consequence of item 124 which will repeal section 25A and item 125 which will insert a new Part 3A.

Item 124 – Section 25A

972. Section 25A of the Foreign Evidence Act currently contains a discretion for the court to prevent foreign material being adduced if the court is satisfied that adducing the material would have a substantial adverse effect on the right of a defendant in the proceeding to receive a fair hearing. This discretion applies only where the proceedings are for a designated offence or proceeds of crime proceeding related to a designated offence (compared with the discretion in section 25 which applies in all other criminal and related civil proceedings).

973. This item would repeal existing section 25A. This is as a consequence of item 125 which will insert a new Part 3A which will contain a new set of rules that will apply to the adducing and admissibility of foreign evidence in terrorism-related proceedings, including replicating the existing discretion in section 25A.

Item 125 – After Part 3

974. The INSLM and the AFP have identified the difficulties in obtaining foreign evidence in accordance with the existing requirements as an impediment to the effective investigation and prosecution of terrorism-related offences. In particular, Recommendation IV of the INSLM’s fourth Annual Report dated 28 March 2014 seeks to ensure existing provisions in the Foreign Evidence Act do not unnecessarily limit the court’s ability to consider whether or not to admit foreign evidence.

975. The existing provisions in the Foreign Evidence Act currently do not contain the flexibility necessary to adduce evidence that was not able to be obtained or provided in a way that meets Australia’s evidentiary standards. This may be because the material originated in a foreign country that has a different criminal justice system and evidentiary requirements. These challenges are likely to be compounded in terrorism-related proceedings due to the particular circumstances in which alleged terrorist activity is taking place, that is, in regions in severe states of conflict, where there is no functioning government or where the legitimacy of the government is not recognised by Australia.

976. Currently, pursuant to Part 3 of the Foreign Evidence Act, only foreign evidence which is obtained as a result of a formal mutual assistance request, and provided in a particular form, may be adduced as evidence in proceedings in Australian courts.

977. In the context of terrorism-related matters, obtaining foreign evidence through a formal request by the Attorney-General may not always be possible or practicable because there may be no effective Government to which a request can practicably be made. Further, there are circumstances where, although it is possible for Australia to make a mutual assistance request to another country, experience has demonstrated that some countries are not willing or able to provide the requested evidence in response to a mutual assistance request from Australia, or not willing or able to provide it in a form that meets the existing requirements in the Foreign Evidence Act.

978. In response to these difficulties and in recognition of the seriousness of offences to which these proceedings will relate and the need to protect the safety of the community, Item 125 will insert Part 3A into the Foreign Evidence Act. This new Part will serve two purposes.

979. Firstly, the new Part will enable foreign evidence obtained on an agency-to-agency basis to be adduced in Australian terrorism-related proceedings (defined as foreign government material as inserted by Item 119) in addition to material obtained through formal mutual assistance ('foreign material'). This material is the same material that would otherwise be obtained through mutual assistance processes but for the reasons outlined above cannot be in these circumstances.

980. In recognition of the fact that the mutual assistance process remains the preferred method for obtaining foreign evidence for use in Australian proceedings and to safeguard the rights of the defendant, there are a range of requirements that must be met before foreign

government material is able to be adduced (contained in section 27B to be inserted by this item).

981. Secondly, under Part 3A, a streamlined set of rules will apply to the process for adducing and admitting foreign material and foreign government material in terrorism-related proceedings.

982. Currently, under Part 3, the majority of foreign material which is adduced under the Foreign Evidence Act is subject to the evidentiary rules and discretions which apply in the court in which the proceeding are being heard. However, Part 3 of the Foreign Evidence Act also recognises the issues that Australia's evidentiary requirements raise in relation to evidence obtained overseas. Specifically, under section 24 of the Foreign Evidence Act, the hearsay evidentiary rule does not apply to the admissibility of foreign business records.

983. Under Part 3A, the adducing (offering of evidence) of both foreign material and foreign government material will be subject only to the exercise of the broad judicial discretion set out at section 27C inserted by Item 125. Further, the admissibility (introduction of evidence into proceedings) of foreign material and foreign government material will be subject only to the mandatory exception to admissibility set out at subsection 27D(2) and not the rules of evidence that would otherwise apply in the court in which the proceedings are being heard. The effect of these amendments will be that, subject only to these provisions, all foreign material and foreign government material will be able to be adduced and admitted in terrorism-related proceedings, subject to the court's discretion on whether there would be a substantial adverse effect on the defendant's right to a fair trial, but regardless of whether any other rules of evidence under Commonwealth, State or Territory law would ordinary apply to exclude the material.

984. The rules contained in new Part 3A intend to address the difficulties prosecutorial authorities face in seeking to adduce and admit foreign evidence in terrorism-related proceedings due to the: circumstances in which foreign evidence may have been obtained; process by which the evidence has been provided; or form in which the evidence is provided.

985. The amendments would enable investigating and prosecuting authorities to develop a brief of evidence that is able to be considered by the court without a high risk of the majority of the evidence being automatically excluded on the basis of detailed rules of evidence in Australia. Rather the court is to determine whether the evidence is to be excluded on the basis that adducing the material would have a substantial adverse effect on the defendant's right to a fair trial. This ensures that Australian authorities are better equipped to investigate and prosecute terrorism-related offences which will directly contribute to increased public safety and national security.

Section 27A

986. Item 125 will insert Section 27A which will set out the rules governing when foreign material may be adduced in terrorism-related proceedings. Section 27A(1) will provide that foreign material may be adduced in terrorism-related proceedings. Foreign material is defined in subsection 3(1) for the purposes of Part 3 and Part 3A as the testimony of a person that (i) was obtained as a result of a request of a kind referred to in section 21; and (ii) complies with the requirements of section 22 and includes any exhibit annexed to such testimony. Terrorism-related proceeding will be defined as a criminal proceeding for a

designated offence, a proceeding under the Proceeds of Crime Act relating to a designated offence or a proceeding under Division 104 of the *Criminal Code* (as inserted by item 121).

987. Note 1 to this provision will make clear that notwithstanding this provision, section 27C will provide the court with the discretion to direct that foreign material not be adduced. Note 2 will provide that section 27D will deal with the admissibility of foreign material.

988. Subsection 27A(2) will provide that foreign material is not to be adduced as evidence in terrorism-related proceedings if it appears to the court's satisfaction that the person who gave the testimony is in Australia and is able to attend the hearing. This provision mirrors the requirement for adducing foreign material in criminal and related civil proceedings (in paragraph 24(2)(a)). This is a mandatory ground on which the evidence must be excluded if the conditions of the provision are met, that is, if the court is satisfied that the person who gave the testimony is in Australia and able to attend the hearing. This recognises that wherever possible, evidence should be given in person so the defendant has the opportunity to challenge that evidence.

Section 27B

989. Item 125 will insert section 27B which will set out the rules governing when foreign government material may be adduced in terrorism-related proceedings. Subsection 27B(1) will provide that foreign government material may be adduced in terrorism-related proceedings if the material is:

- annexed to a written statement by a senior AFP member that is given under oath or affirmation and meets the requirements set out at subsection 27B(2), and
- accompanied by a certificate of the Attorney-General given under subsection 27B(3).

990. The purpose of these requirements is to ensure that sufficient information is provided to the court regarding the origins and veracity, accuracy and reliability of the foreign government material and the process by which it was obtained and subsequently provided to the AFP for use in the investigation and proceeding.

991. A definition of 'senior AFP member' will be inserted by item 121.

992. Subsection 27B(2) will require the statement given by the senior AFP member to:

- state what the material is, and
- state to the best of the senior AFP member's knowledge
 - how the material, and any information contained in the material, was obtained by the first foreign authority to obtain or produce the material or information, and
 - each step in the process by which the material or information came from that foreign authority into the possession of the AFP.

993. The purpose of the statement is to provide the court with information sufficient to satisfy the court as to what the material is, how the material was obtained and by whom and

how the material was then provided to the AFP. In effect, the purpose of the statement is to provide the court with the AFP's assessment of the provenance and history of the material.

994. The reference to 'information contained in the material' ensures that it is not only the physical object or document coming before the court that must be attested to, but also any information that is contained in the object or document (where relevant). For example, if the material being adduced is a transcript of an interview, then the statement from the senior AFP member needs to outline to the best of the member's knowledge, how the information in the transcript was obtained. A further example is where the material being adduced is an intelligence report from a foreign police force. In this example, the statement from the senior AFP member needs to outline, to the best of the member's knowledge, how the information in the report was obtained, such as through interviews, informants and/or surveillance.

995. New paragraph 27B(2)(a) will also provide that the statement must only relate to the foreign government material annexed to the statement. This is because of new section 27D which will provide that the statement to which the foreign government material is annexed is admissible in terrorism-related proceedings despite any other Australian law about evidence. If the statement were able to contain information that did not relate to the foreign government material, it would then also circumvent the normal laws of evidence. This would be contrary to the intent of the amendments made by this Bill which solely relate to evidence obtained overseas.

996. New subsection 27B(3) will enable the Attorney-General to certify that he or she is satisfied that it was not practicable to obtain the foreign government material or the information in the foreign government material as foreign material. That is, that it was not practicable to obtain the material in response to a formal request through mutual assistance channels. This certificate relates to new subsection 27B(1) which provides that foreign government material can only be adduced in terrorism-related proceedings if accompanied by a certificate of the Attorney-General.

997. Subsection 27B(3) requires the Attorney-General's certificate to be in a form prescribed under subsection (4). Subsection 27B(4) provides the Attorney-General with the power to, by legislative instrument, prescribe a form for the certificate. Prescribing the form to be used will ensure there is clarity and certainty for the Court as to what must be contained in the certificate. The Attorney-General's certificate issued under new subsection 27B(3) is not a legislative instrument within the meaning of subsection 5 of the Legislative Instruments Act.

998. The requirement for the Attorney-General to personally make this certification recognises that the mutual assistance process remains the preferred method for obtaining foreign evidence for use in Australian proceedings. It also recognises that the provisions relating to foreign government material should not be used in circumstances where it may be hard, difficult or challenging but still practicable for the material to be obtained through the mutual assistance process.

999. The receipt of foreign government material under section 27B is not contingent on the person to whom the material is attributable being unable to attend the hearing. There may be multiple persons to whom the material is attributable, and an obligation to call 'the person' may create confusion as to who should be called. It is contemplated that prosecutorial practice and the best evidence rule would ensure that in practice an available witness would

ordinarily be called, and that reliance on material in the absence of an available witness may enliven the discretion in subsection 27C(2).

1000. The requirements outlined in new section 27B provide important safeguards on the use of foreign government material in terrorism-related proceedings while still ensuring the rights of the defendant to a fair hearing are appropriately protected.

Section 27C

1001. Item 125 will insert new section 27C. This section will contain a discretion mirrored on existing section 25A to prevent foreign material or foreign government material being adduced in a terrorism-related proceeding.

1002. Subsection 27C(1) outlines the circumstances in which the section will apply. Specifically, it will apply in the following three situations which are the three components of the definition of ‘terrorism-related proceeding’:

- i. when a prosecutor is seeking to adduce material in a criminal proceeding for a ‘designated offence’. ‘Designated offence’ is defined in subsection 3(1) of the Foreign Evidence Act (and will be amended by Items 115-118) and includes, among others, an offence against Part 5.3 of the Criminal Code and an offence against Subdivision A of Division 72 of the Criminal Code (International terrorist activities using explosive or lethal devices).
- ii. when the responsible authority under the Proceeds of Crime Act seeks to adduce material in a proceeding under that Act. The responsible authority would be either the AFP or the CDPP.
- iii. When a member of the AFP seeks to adduce material in a proceeding under Division 104 of the Criminal Code which deals with control orders.

1003. Under the existing section 25A the court may direct that foreign material not be adduced as evidence in a proceeding if the court is satisfied that adducing the foreign material would have a substantial adverse effect on the right of the defendant in the proceeding to receive a fair hearing. Section 25A will be repealed by item 124.

1004. This discretion will now be contained in the new subsection 27C(2). It will now apply to all terrorism-related proceedings and will enable the court to direct that foreign material not be adduced as evidence in a proceeding if is satisfied that adducing the foreign material would have a substantial adverse effect on the right of the defendant in the proceeding to receive a fair hearing.

1005. ‘Substantial adverse effect’ will be defined in subsection 3(1) as ‘an effect that is adverse and not insubstantial, insignificant or trivial’. This mirrors the existing definition in subsection 25A(4) which will be repealed by item 124. This provision allows the Court to retain the capacity to protect its own processes from abuse and to ensure the defendant (and other parties to the proceeding) the right to a fair hearing, while ensuring the prosecution is not substantially impaired by excluding material in appropriate cases.

1006. In the 2014 INSLM Report, the INSLM suggests that the existing safeguard in section 25A accords with common law fairness and the requirements for the exercise of judicial power under Chapter III of the Constitution and is an appropriate safeguard for defendants.

1007. Moving this existing safeguard to new Part 3A will ensure that the court still has the power to protect against any abuse or injustices that may otherwise result from adducing foreign evidence in terrorism-related proceedings.

Section 27D

1008. Item 125 inserts section 27D which sets out when foreign evidence adduced in terrorism-related proceedings is admissible.

1009. Subsection 27D(1) provides that the following material is admissible in terrorism-related proceedings despite any other Australian law about evidence:

- foreign material adduced under subsection 27A (foreign material is defined in subsection 3(1) –material obtained through formal mutual assistance channels)
- foreign government material adduced under subsection 27B(1) (a definition of foreign government material will be inserted into subsection 3(1) by item 119 – material obtained on an agency-to-agency basis)
- the statement from a senior AFP member accompanying the foreign government material (as provided for in paragraph 27B(1)(a)), and
- the certificate from the Attorney-General certifying that it was not practicable to obtain the foreign government material through formal mutual assistance channels.

1010. The effect of this provision is that the standard rules governing the admissibility of evidence (such as hearsay, opinion, identification and others however described) do not apply to the admissibility of the material outlined above. This is appropriate in relation to the use of foreign evidence in terrorism-related proceedings because experience has demonstrated that regardless of whether the evidence is provided by the foreign country through formal mutual assistance channels or on an agency-to-agency basis, some countries are not willing or able to provide it in a form that meets the existing requirements in the Foreign Evidence Act. This could be due to the circumstances in which the evidence was originally obtained, differing legal systems, or a lack of domestic laws or procedures enabling that country to respond to provide the evidence in a way or form that meets Australia's stringent evidentiary requirements.

1011. This subsection (and the other provisions contained in new Part 3A aims to enable the investigating and prosecuting authorities to develop a brief of evidence that is able to be considered by the court without the majority of the evidence being automatically excluded or the basis that it fails to meet detailed rules of evidence in Australia. It recognises that the majority of evidence for terrorism-related offences may be located overseas and unable to be obtained in a way that would meet Australia's evidentiary requirements.

1012. New subsection 27D(2) outlines the exceptions to admissibility in terrorism-related proceedings. Under this subsection, the court must exclude the material if it is satisfied that the material, or the information contained in the material, was obtained directly as a result of torture or duress (defined in subsection 3(1) by reference to the definition of torture and the definition of duress in subsection 27D(3)).

1013. Subsection 27D(2) will provide that an act or omission amounting to torture or duress must be inflicted by a person who is:

- a public official
- acting in an official capacity, or
- acting at the instigation, or with the consent or acquiescence, of a public official or person acting in an official capacity.

1014. The reference to a person ‘acting in an official capacity’ is intended to encompass certain non-State actors who are exercising authority comparable to government authority. For example, they may belong to a political organisation exercising de facto authority over a particular region of a country.

1015. By providing an exception to admissibility for material obtained directly as a result of torture, subsection 27D(2) will ensure Australia continues to fulfil its obligations under Article 15 of the CAT, which was adopted by the UN General Assembly on 10 December 1984, and which entered into force for Australia on 26 June 1987. Article 15 of the CAT relevantly states:

Each State Party shall ensure that any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceedings...

1016. Subsection 27D(3) defines ‘torture’ consistently with Article 1(1) of the CAT for the purpose of subsection 27D(2). It is intended that the definition of torture is interpreted consistently with the Convention.

1017. The definition of ‘torture’ will provide that an act or omission amounting to torture must inflict severe pain or suffering, whether physical or mental. The definition of ‘torture’ in subsection 27D(3) will also list the purposes for which the relevant conduct must be engaged in to constitute torture. In summary these purposes are:

- obtaining from the other person or from a third person information or a confession, or
- punishing the other person for an act that the other person or a third person has committed or is suspected of having committed, or
- intimidating or coercing the other person or a third person, or
- discrimination that is inconsistent with the Articles of the ICCPR.

1018. The reference to ‘discrimination that is inconsistent with the Articles’ of the ICCPR will make clear that if discrimination is invoked as a relevant purpose, it must be discrimination prohibited by international law on the enumerated grounds set out in articles 2(1) and 26 of the ICCPR.

1019. Subsection 27D(3) will make clear torture would not include an act or omission arising only from, inherent in or incidental to lawful sanctions (i.e. conduct which is lawful under domestic laws) that are not inconsistent with the Articles of the ICCPR.

1020. Subsection 27D(2) also provides a mandatory exception to admissibility for material, or information contained in the material, directly obtained as a result of duress. The inclusion of this exception recognises the seriousness of threats of the kind contained in the definition of ‘duress’ and the inherent unreliability of material or information obtained in such a manner.

1021. The definition of ‘duress’ in subsection 27D(3) draws on the common law criminal defence meaning of duress (cf. *R v Hurley [1967] VR 526*). Specifically, duress will exist in circumstances where a person performs actions because of threats of death or serious injury to themselves, or to family members, being threats of such a nature that a reasonable person would have yielded to them. The party against which the material is adduced bears the evidentiary burden of raising torture or duress as an issue and it is ultimately the decision of the Court as to whether the exception applies.

1022. Subsection 27D(4) provides that if the foreign government material is not admissible, neither the statement made under paragraph 27D(1)(a) or certificate described in paragraph 27D(1)(b) is admissible to the extent they relate to the excluded material. However, if the statement or certificate relates to more than one item of foreign material, then so much of the statement and certificate that relates to admissible foreign material would also be admissible.

Section 27E

1023. New section 27E explicitly states that Part 3A does not limit the ways in which a matter may be proved or evidence adduced under other Parts of this Act or any other Australian law.

Item 126 – Application of amendments

1024. Item 126 stipulates that the amendments made by this Bill apply to proceedings instituted on or after the commencement of the amendments whether the evidence was obtained before, on or after that commencement. This ensures that there is no ability to adduce evidence under the amendments in proceedings that have already commenced.

Foreign Passports (Law Enforcement and Security) Act 2005

Item 127 – Subsection 5(1)

1025. This item omits the reference to subsection (1) because there are no other subsections in the section.

Item 128 – Subsection 5(1)

1026. This item inserts the definition of ASIO (the Australian Security Intelligence Organisation) into section 5. A definition of ASIO is required as it is the only authority that can make a request from the surrender of a foreign passport under new section 15A and it is currently not defined in the Act.

Item 129 – At the end of Division 1 of Part 2

1027. This item inserts new section 15A, which allows ASIO to make a request to the Minister for an order under new section 16A for a person’s foreign travel documents to be surrendered for 14 days. This section is designed to mirror those under the Passports Act that enable a request for the suspension of a person’s Australian travel documents. This means that if a request is made for the suspension of a person’s Australian travel documents under new section 22A of the Passports Act, but the person also has foreign travel documents, a request can also be made for the surrender of those documents to prevent the person from travelling. The provision will also apply to a person who only has foreign travel documents.

New section 15A and 16A are the main provisions that implement Recommendation V/5 of the INSLM's fourth annual report to introduce a power to suspend a person's capacity to use their foreign passport to travel in circumstances similar to those that would permit a suspension of the person's Australian passport.

1028. New subsection 15A(1) allows ASIO to make a request to the Minister for an order under new section 16A for the surrender of a person's foreign travel documents for a period of 14 days. ASIO can make a request where it suspects on reasonable grounds that the person may leave Australia to engage in conduct that might prejudice the security of a foreign country and the person should be required to surrender their foreign travel documents to prevent the person from engaging in the conduct. ASIO is the sole requesting authority as the surrender mechanism is designed to target persons of security concern. The threshold for a request under subsection 15A(1) is lower than that required for a longer-term surrender request which already exists under section 15. The lower threshold will enable ASIO to make a short-term surrender request on the basis of credible information that indicates a person may pose a security risk. During the 14 day period ASIO will be afforded critical time to further assess the extent and nature of the security risk to inform further security advice to DFAT, which may result in a request to the Minister under section 15 for the longer term surrender of a foreign travel document.

1029. New subsection 15A(2) allows ASIO to make an additional request in relation to the person where it has new information that was not before it at the time of the surrender request and during the 14-day period. The subsection allows ASIO to make a request where there is genuinely new information before it. However, the amendment is not intended to allow for consecutive rolling surrender requests, which would defeat the purpose of the limited 14-day surrender period.

Item 130 – Section 16 (heading)

1030. This item amends the heading of section 16 to reflect that the section applies to requests made under sections 13, 14 or 15 of the Act.

Item 131 – After section 16

1031. This item inserts new section 16A, which allows the Minister to order the 14-day surrender of a foreign travel document. Under new subsection 16A(1), the Minister can order the surrender of a person's foreign travel document where ASIO has made a request under section 15A. The order for the surrender of those documents will not affect the validity of the documents.

1032. New subsections 16A(2)-(4) replicate the existing surrender and seizure provisions contained in section 16 of the Act. If the Minister makes an order under new subsection 16A(1), an enforcement officer may demand that the person surrender to the officer the person's foreign travel documents under new subsection 16A(2). An enforcement officer is already defined in section 5 of the Act. If the person does not immediately surrender the person's foreign travel documents the officer can seize those documents and any foreign travel document of the person that is not in the possession or control of any person under new subsection 16A(3). New subsection 16A(4) provides that an enforcement officer is not authorised under subsection 16A(3) to enter premises the officer would not otherwise be authorised to enter.

1033. New subsection 16A(5) creates an offence in circumstances where a person fails to comply with a demand by an officer to surrender the person's foreign travel documents. The offence provision is necessary to give effect to the surrender order. The penalty for an offence under this subsection is imprisonment for six months or ten penalty units, or both.

1034. Under new subsection 16A(6), a seized or surrendered foreign travel document must be returned to the person at the end of 14 days after the Minister makes the surrender order. This ensures that at the end of the short-term surrender period a person is able to exercise their right to travel.

1035. New subsection 16A(7) provides an exception to subsection 16A(6) whereby a seized or surrendered foreign travel document does not need to be returned to the person if the Minister has made an order under section 16. This is required to ensure that the new mechanism does not result in an undesirable situation where a passport must be returned to the person at the end of the 14 day surrender period and then immediately seized again if the Minister has made an order under section 16.

Intelligence Services Act 2001

Item 132 – Paragraph 29(1)(ba)

1036. Amending item 132 repeals a spent provision in section 29(1)(ba) which requires the PJCIS to review, as soon as possible after the third anniversary of the date on which the *Security Legislation Amendment (Terrorism Act) 2002* received Royal Assent, provisions of security and counter-terrorism legislation amended or inserted by that Act. That review was completed by the PJCIS on 4 December 2006.

Item 133 – Paragraph 29(1)(bb)

1037. Amending item 133 is consequential to amending item 33. It amends a requirement in section 29(1)(bb) of the Intelligence Services Act that the PJCIS conducts a review of Division 3 of Part III of the ASIO Act by 22 January 2016. The review requirement will now be extended with the PJCIS to conduct a review by 22 January 2026. The Government is of the view that it is appropriate this review be conducted shortly before the extended sunset provision expires in 2026.

National Health Security Act 2007

Item 134 – Paragraph 89(1)(c)

1038. This item inserts a reference to Part "5.5" after the reference to Part "5.3" in paragraph 89(1)(c) which provides an authorisation to used information in certain proceedings. This amendment authorises the disclosure of protected information to a court of tribunal or a coronial inquiry in certain circumstances for the purposes of proceedings under new Part 5.5 of the Criminal Code. This is consistent with the situation in relation to proceedings under Part 3 of the *National Health Security Act 2007*, the *Crimes (Biological Weapons) Act 1976*, Part 5.3 of the Criminal Code, or any other prescribed law of the Commonwealth or of a State or Territory.

Item 135 – Paragraph 92(c)

1039. This item inserts a reference to Part “5.5” after the reference to Part “5.3” in paragraph 92(c) which provides a defence to the offence in section 90. This amendment provides that the offence relating to protected information in subsection 90(1) does not apply if the record, disclosure or other use of the information is required or authorised under new Part 5.5 of the Criminal Code. This is consistent with the situation where the record, disclosure or other use of the information is required or authorised under Part 3 of the *National Health Security Act 2007*, the *Crimes (Biological Weapons) Act 1976*, Part 5.3 of the Criminal Code, or any other prescribed law of the Commonwealth or of a State or Territory.

Proceeds of Crime Act 2002

Item 136 – Section 338 (definition of terrorism offence)

1040. This item repeals the existing definition of ‘terrorism offence’ in section 338 and replaces it with a cross-reference to the definition in the Crimes Act. Currently, the definition of terrorism offence in the *Proceeds of Crime Act 2002* is limited to an offence against Part 5.3 of the Criminal Code.

Sea Installations Act 1987

Item 137 – Schedule

1041. This item omits the reference to the “*Crimes (Foreign Incursions and Recruitment) Act 1978*” and is consequential to the repeal of that Act. As the offence and other provisions of that Act are being relocated to a new Part 5.5 of the Criminal Code, it is not necessary to include a reference to the Criminal Code in the Schedule as relevant sea installations in adjacent areas would already be covered under the Criminal Code.

Telecommunications (Interception and Access) Act 1979

1042. The amendments to the TIA Act update the meaning of ‘serious offence’ in subparagraph 5D(1)(e) to include a breach of a control order, and offences against Subdivision B of Division 80 and Division 119 of the *Criminal Code*. The effect of the amendments is to permit telecommunications interception warrants to be sought to assist in the investigation of these additional serious offences.

Item 138 – After subparagraph 5D(1)(e)(i)

1043. This item inserts new subparagraph 5D(1)(e)(ia) into the definition of *serious offence* after subparagraph 5D(1)(e)(i). New subparagraph 5D(1)(e)(ia) extends the meaning of serious offence for the purposes of the TIA Act to include offences against Subdivision 80 of the Criminal Code. The inclusion of the treason offences from the Criminal Code in the definition of ‘serious offence’ is consistent with the seriousness of those offences, and allows interception warrants to be sought to assist in the investigation of those offences.

Item 139 – At the end of paragraph 5D(1)(e)

1044. This item inserts new paragraph 5D(1)(f) into the definition of *serious offence* after paragraph 5D(1)(e). New paragraph 5D(1)(f) extends the meaning of serious offence for the purposes of the TIA Act to include offences against section 104.27 and Division 119 of the Criminal Code. The inclusion of contravening a control order offence and the foreign incursions offences from the Criminal Code in the definition of ‘serious offence’ is consistent with the seriousness of these offences, and allows interception warrants to be sought to assist in the investigation of those offences.

Terrorism Insurance Act 2003

Item 140 – Section 3 (definition of terrorist act)

1045. This item repeals the existing definition of *terrorist act* in section 3 and replaces it with a cross-reference to the definition in the Criminal Code. Currently, the definition of terrorist act in the *Terrorism Insurance Act 2003* replicates the definition in the Criminal Code. This amendment will ensure consistency across Commonwealth legislation, including in the event the definition of terrorist act in the Criminal Code is amended.

Item 141 – Section 5

1046. This item repeals the meaning of terrorist act set out in existing section 5 and is consequential to the amendment to the definition in section 3.

Item 142 – Paragraph 8(2)(b)

1047. This item omits the reference to section 5 in paragraph 8(2)(b) and replaces it with a reference to section 100.1 of the Criminal Code. This amendment is consequential to the amendment to section 3.

Item 143 – Application of amendments

1048. This item provides that the amendments to the Terrorism Insurance Act outlined above apply in relation to any terrorist act, whether the act occurred before, on or after the commencement of this amendment.

Part 2 – Repeals

Crimes (Foreign Incursions and Recruitment) Act 1978

Item 144 – The whole of the Act

1049. This item repeals the Foreign Incursions Act. Item 110 inserts new ‘Part 5.5—Foreign incursions and recruitment’ into the Criminal Code. New Part 5.5 contains offences and other provisions based on the Foreign Incursions Act.

Item 145 – Transitional provision

1050. This item provides that despite the repeal of section 11 of the Foreign Incursions Act, that section continues to apply after this item commences in relation to any certificate that is in force under that section immediately before that repeal.

Schedule 2 – Stopping welfare payments

1051. This Schedule amends the Family Assistance Act, the PPL Act, the Social Security Act and the Social Security (Administration) Act to provide that welfare payments can be cancelled for individuals whose passports have been cancelled or refused, or whose visas have been cancelled, on national security grounds. This is to ensure that the Government does not support individuals who are fighting or training with extremist groups.

1052. Currently, welfare payments can only be suspended or cancelled if the individual no longer meets social security eligibility rules, such as participation requirements, and residence or portability qualifications. The new provisions will require the cancellation of a person's welfare payment when the Attorney-General provides a security notice to the Minister for Social Services. The Attorney-General will have discretion whether to issue a security notice where either:

- the Foreign Affairs Minister has notified the Attorney-General that the individual has had their application for a passport refused or had their passport cancelled on the basis that the individual would be likely to engage in conduct that might prejudice the security of Australia or a foreign country, or
- the Immigration Minister has notified the Attorney-General that an individual has had their visa cancelled on security grounds.

1053. The Foreign Affairs Minister and the Immigration Minister will also have a discretion whether to advise the Attorney-General of the passport or visa cancellation.

1054. Welfare payments will only be cancelled in circumstances where the receipt of welfare payments was relevant to the assessed security risk posed by the individual and the cancellation of welfare would not adversely impact the requirements of security. This is to ensure that those individuals assessed to be engaged in politically motivated violence overseas, fighting or actively supporting extremist groups are captured. It is not intended that every person whose passport or visa has been cancelled on security grounds would have their welfare payments cancelled, but would occur only in cases where it is appropriate and justified.

Part 1 – Main Amendments

A New Tax System (Family Assistance) Act 1999

Item 1 – Subsection 3(1)

1055. This item inserts new subsection 3(1) to explain that the Foreign Affairs Minister means the Minister administering the Passports Act, the Immigration Minister means the Minister administering the Migration Act and that a security notice means a notice under section 57GJ.

Item 2 – At the end of Part 3

1056. This item inserts new Division 7 ‘Loss of family assistance for individuals on security grounds’ into Part 3 ‘Eligibility for Family Assistance’ of the Family Assistance Act. Division 7 sets out how the welfare cancellation process will operate for family assistance for individuals. ‘Family assistance’ is defined in section 3 of the Family Assistance Act to mean:

- *family tax benefit or*
- *stillborn baby payment; or*
- *child-care benefit; or*
- *child care rebate; or*
- *family tax benefit advance; or*
- *single income family supplement; or*
- *schoolkids bonus.*

1057. However, new section 57GQ makes it clear that this Division does not apply to the child care benefit or child care rebate.

Section 57GH Simplified outline of this Division

1058. This item inserts new section 57GH which provides a simplified outline at the start of Division 7 which states: ‘Individuals who might prejudice the security of Australia or a foreign country may lose family assistance.’ Division 7 sets out how the welfare cancellation process operates for family assistance for individuals.

1059. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

Section 57GI Loss of family assistance for individuals on security grounds

1060. This item inserts new section 57GI, which provides that where a security notice is given to the Minister for Social Services the individual who is the subject of the notice will not be eligible for family assistance.

1061. New subsection 57GI(1) provides that where the Attorney-General provides the Minister for Social Services with a security notice under section 57GJ, then while the notice is in force the individual is not eligible to be paid family assistance nor is the individual eligible for family assistance. Note 1 explains that a security notice is notice under section 57GJ of the Family Assistance Act. Note 2 confirms that this Division does not apply in relation to the child care benefit or child care rebate as provided by section 57GQ of the Family Assistance Act.

1062. New subsection 57GI (2) provides that if the Attorney-General gives a security notice to the Minister for Social Services, then any determination that the individual is entitled to be paid family assistance, that is in force immediately before the day the notice comes into force, ceases to be in force on that day. This means that the day the notice comes into force an individual will no longer be eligible for family assistance as prescribed in the notice.

1063. New subsection 57GI (3) clarifies that if the security notice ceases to be in force, then the individual is not eligible for any family assistance for any day the notice was in force. However, new subsection 57GI(4) provides that if a security notice given to the Minister for Social Services in relation to an individual recommends that payments of family assistance of the individual be paid to a payment nominee of the individual under Part 8B of the *A New Tax System (Family Assistance) (Administration) Act 1999*, and apart from subsections

57GI(1) to (3), the individual would be eligible for the whole or a part of that family assistance, then that whole or part may be paid to a payment nominee of the individual under that Part. Part 8B of the Family Assistance Administration Act provides for the appointment, payment and responsibilities of nominees. This provision enables payment to be made on behalf of the individual but ensures that the individual does not receive the money. Instead, a payment nominee will receive and distribute the money for purposes according to a written direction by the Secretary under subsection 57GI(6). This ensures that where possible, children of the individual (and other concerns under family assistance law) are not detrimentally affected because of the individual's conduct.

1064. New subsection 57GI(5) provides that if a person is to be appointed as the payment nominee of the individual, then paragraph 219TD(2)(b) of the Family Assistance Administration Act does not apply in relation to that appointment. This means that the Secretary of DSS does not have to take into account the wishes (if any) of the individual in appointing a nominee to receive the payment on the individual's behalf, but instead can appoint a nominee without consulting the individual. This provision recognises that in practice it may be very difficult to contact the individual. It would also defeat the objective of the reforms if the individual was able to direct who should receive the payment on their behalf.

1065. Under subsection 57GI (6) where a person is appointed as the payment nominee of the individual, section 219TN of the Family Assistance Administration Act does not apply in relation to the nominee. Instead, any amount paid to the nominee on behalf of the individual is to be applied by the nominee in accordance with a written direction given by the Secretary under this subsection. This means that the payment nominee is not under a legal obligation to act in the best interests of the individual. This is a reasonable measure to implement the objective of the reforms.

1066. New subsection 57GI (7) provides that where a security notice is given to the Minister for Social Services in relation to an individual who is aged 19 or less on the day the notice is given then for any day while the notice is or was in force, the individual cannot be a Family Tax Benefit (FTB) child of another individual, cannot be a regular care child of another individual and cannot be a client of an approved care organisation. This means that a person cannot be paid family assistance on behalf of an individual aged 19 or less who has been classified as a security risk.

1067. New subsection 57GI (8) clarifies that subsections 57GI (1) to (7) have effect despite any other provision of the family assistance law.

1068. New subsection 57GI (9) provides that where an individual ceases to be eligible for family assistance because of subsection 57GI (2), the Secretary must cause reasonable steps to be taken to notify the individual of the cessation. In practice, notifying individuals who may be participating in overseas conflicts may not be possible.

Section 57GJ Security notice from Attorney-General

1069. This item inserts new section 57GJ which sets out what comprises a security notice from the Attorney-General. Subsection 57GJ(1) specifies that the Attorney-General may give the Minister for Social Services a written notice requiring that Division 7 apply to a specified individual.

1070. There are two alternative limbs that may lead to the Attorney-General issuing a notice. Only one of the limbs need apply.

1071. The first limb is under paragraph 57GJ (1)(a) which provides that the Foreign Affairs Minister may give the Attorney-General a notice under section 57GK in relation to the individual.

1072. The second limb is under paragraph 57GJ (1)(b) which provides that the Immigration Minister may give the Attorney-General a notice under section 57GL in relation to the individual.

1073. Upon receipt of a notice from either the Foreign Affairs Minister or the Immigration Minister, the Attorney-General has discretion whether to provide a security notice to the Minister for Social Services, and would take into account the requirements of security in making that decision.

1074. New subsection 57GJ (2) provides that a notice under this section may recommend that payments of family assistance of the individual, to the extent set out in the notice, be paid to a payment nominee of the individual under Part 8B of the Family Assistance Administration Act. Part 8B of the Family Assistance Administration Act is concerned with the appointment, payment and responsibilities of nominees. This provision enables payment to be made on behalf of the individual's family but ensures that the individual does not receive the benefit of any family assistance. This ensures that where possible, children of the individual are not detrimentally affected because of the individual's conduct.

Section 57GK Notice from Foreign Affairs Minister

1075. This item inserts new section 57GK which provides that the Foreign Affairs Minister may give the Attorney-General a written notice notifying the Attorney-General that they have either refused to issue an individual an Australian passport under subsection 14(2) of the Passports Act, or cancelled an individual's Australian passport under section 22 of the Passports Act. The refusal or cancellation must have been made in response to a competent authority request under subsection 14(1) of that Act, and the request must have been made on the basis of the matter referred to in subparagraph 14(1)(a)(i) of that Act, namely that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country.

1076. It is not intended that every decision to refuse to issue an Australian passport under subsection 14(2) or to cancel an Australian passport under section 22 of the Passports Act will result in a notice being given to the Attorney-General. Rather, the Foreign Affairs Minister has a discretion to give a notice. The decision to give a notice would be guided by security advice.

Section 57GL Notice from Immigration Minister

1077. This item inserts new section 57GL which provides that the Immigration Minister may give the Attorney-General a written notice notifying the Attorney-General that they have cancelled an individual's visa under section 116, 128, 134B or 501 (where ASIO has assessed the individual is directly or indirectly a risk to security) of the Migration Act. It is not intended that every decision to cancel a visa will result in a notice being given to the

Attorney-General under section 57GL. The Immigration Minister has discretion to give a notice under this section. This decision would be guided by security advice.

Section 57GM Copy of security notice to be given to Secretaries

1078. This item inserts new section 57GM which provides that the Minister for Social Services must give a copy of a security notice to the Secretary of the Department of Social Services (DSS) and the Secretary of the Department of Human Services (DHS). This is to ensure that welfare cancellation can occur as expeditiously as possible.

Section 57GN Period security notice in force

1079. This item inserts new section 57GN which provides that a security notices comes into force on the day it is given to the Minister for Social Services and remains in force until revoked. The criteria for revoking a notice are set out in section 57GO.

Section 57GO Revoking a security notice

1080. This item inserts new section 57GO which provides that the Attorney-General may revoke a security notice they have given. The revocation must be in writing, and it takes effect on the day it is made. The Attorney-General must provide written notice of a decision to revoke a security notice to the Minister for Social Services who must then give a copy of the notice to the Secretary of DSS and the Secretary of DHS. The Attorney-General's discretion to revoke a security notice would be guided by security advice. New subsection 57GO (4) provides that where a security notice has been revoked that the Secretary of DSS must cause reasonable steps to be taken to notify the individual of the revocation.

Section 57GP Notices may contain personal information

1081. This item inserts new section 57GP which clarifies that a notice under Division 7 may contain personal information (within the meaning of the *Privacy Act 1988*) about the individual.

Section 57GQ This Division does not apply to child care benefit or child care rebate

1082. This item inserts new section 57GQ which clarifies that Division 7 does not apply to the child care benefit or child care rebate. It is not the intention that payments that encourage workforce participation, studying or training be included. These payments require that the recipient satisfy the work, training, study test.

Section 57GR Certain decisions not decisions of officers

1083. This item inserts new section 57GR which provides that for the purposes of Part 5 of the Family Assistance Administration Act, decisions under this Division, any decision under Part 8B of the Family Assistance Administration Act that is, or is related to, a decision to pay, or not to pay, an amount of family assistance as mentioned in new subsection 57GI (4) of the Family Assistance Act, are taken not to be decisions of an officer under the family assistance law. This means that the reviewability of decisions made under this Division is limited for security reasons as decisions will not be reviewable under Part 5 of the Family Assistance Administration Act.

Section 57GS Instruments not legislative instruments

1084. This item inserts new section 57GS which provides that a notice under this Division or a direction under new subsection 57GI(6) is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Paid Parental Leave Act 2010

Item 3 – Section 6

1085. This item inserts at section 6 of the PPL Act, three definitions to explain that the Foreign Affairs Minister means the Minister administering the Passports Act, the Immigration Minister means the Minister administering the Migration Act and that ‘security notice’ means a notice under section 278C.

Item 4 – At the end of Part 6-1

1086. This item inserts new Division 5 ‘Loss of parental leave pay or dad and partner pay for persons on security grounds’ into Part 6-1 ‘How this Act applies in particular circumstances’ of the PPL Act. Division 5 sets out the process for payment cancellation on security grounds for parental leave pay or dad and partner pay. ‘Parental leave pay’ and ‘dad and partner pay’ are defined in section 6 of the PPL Act.

Section 278A Simplified outline of this Division

1087. This item inserts new section 278A which provides a simplified outline at the start of Division 5 which states: ‘Persons who might prejudice the security of Australia or a foreign country may lose parental leave pay or dad and partner pay.’ Division 5 sets out how the cancellation process operates for these payments.

1088. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

Section 278B Loss of parental leave pay or dad and partner pay for persons on security grounds

1089. This item inserts new section 278B, which provides that where a security notice is given to the Minister for Social Services the individual the subject of the notice will not be eligible for parental leave pay or dad and partner pay.

1090. New subsection 278B(1) provides that if a security notice (as set out in section 278C of the PPL Act) is provided by the Attorney-General to the Minister for Social Services, then while the notice is in force the individual is not eligible for, and is not to be paid parental leave pay or dad and partner pay. The Note explains that a security notice is a notice under section 278C of the PPL Act).

1091. New subsection 278B(2) provides that if:

- a security notice is given to the Minister, and

- a payability determination providing the individual is entitled to be paid parental leave pay or dad and partner pay is in force at the end of the day (the relevant day) before the day the notice is given, and
- the day the notice is given is in the person's paid parental leave period, or dad and partner pay period,

the determination is taken to be varied so that the person's paid parental leave period or dad and partner pay period ends at the relevant day. This means that parental leave pay or dad and partner pay is only payable to the person for a shortened period which ends the day before the security notice is given.

1092. New subsection 278B(3) clarifies that if the security notice ceases to be in force, then the individual is not eligible for any parental leave pay or dad and partner pay for any day the notice was in force.

1093. Subsection 278B(3) will also prevent payability in the future for a person who has not claimed parental leave pay by the day the security notice is given. This is due to the requirement that to be payable, primary claimants must be eligible on each day from the day the child is born until the end of the PPL period.

1094. New subsection 278B(4) clarifies that subsections 278B(1) to (3) have effect despite any other provision of the PPL Act.

1095. New subsection 278B(5) provides that where a payability determination is varied by subsection 278B(2), the Secretary of DSS must cause reasonable steps to be taken to notify the individual of the variation.

Section 278C Security notice from Attorney-General

1096. This item inserts new section 278C which specifies that the Attorney-General may give the Minister for Social Services a written notice requiring that Division 5 apply in relation to a specified person.

1097. There are two alternative limbs that may lead to the Attorney-General issuing a notice. Only one of the limbs needs to apply.

1098. The first limb is under paragraph 278C(a) whereby the Foreign Affairs Minister may give the Attorney-General a notice under section 278D in relation to the person.

1099. The second limb is under paragraph 278C(b) whereby the Immigration Minister may give the Attorney-General a notice under section 278E in relation to the person.

1100. Upon receipt of a notice from the Foreign Affairs Minister or the Immigration Minister, the Attorney-General has discretion as to whether to provide a security notice to the Minister for Social Services or not, and would take into account the requirements of security in making that decision.

Section 278D Notice from Foreign Affairs Ministers

1101. This item inserts new section 278D which provides that the Foreign Affairs Minister may give the Attorney-General a written notice notifying the Attorney-General that they have either refused to issue an individual an Australian passport under subsection 14(2) of the

Passports Act, or cancelled an individual's Australian passport under section 22 of the Passports Act. The refusal or cancellation must have been made in response to a competent authority request under subsection 14(1) of that Act, and the request was made on the basis of the matter referred to in subparagraph 14(1)(a)(i) of that Act, namely that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country. It is not intended that every decision to refuse to issue an Australian passport under subsection 14(2) or to cancel an Australian passport under section 22 of the Passports Act will result in a notice being given to the Attorney-General. Rather, the Foreign Affairs Minister has a discretion to give a notice. The decision to give a notice would be guided by security advice.

Section 278E Notice from Immigration Minister

1102. This item inserts new section 278E which provides that the Immigration Minister may give the Attorney-General a written notice notifying the Attorney-General that they have cancelled an individual's visa under section 116, 128, 134B or 501 (where ASIO has assessed the individual is directly or indirectly a risk to security) of the Migration Act. It is not intended that every decision to cancel a visa will result in a notice being given to the Attorney-General under section 278E. The Immigration Minister has a discretion to give a notice under this section. This decision would be guided by security advice.

Section 278F Copy of security notice to be given to Secretaries

1103. This item inserts new section 278F which provides that the Minister for Social Services must give a copy of a security notice to the Secretary of DSS and the Secretary of DHS.

Section 278G Period security notice in force

1104. This item inserts new section 278G which provides that a security notices comes into force on the day it is given to the Minister for Social Services and remains in force until revoked. The criteria for revoking a notice are set out in section 278H.

Section 278H Revoking a security notice

1105. This item inserts new section 278H which provides that the Attorney-General may revoke a security notice they have given. The revocation must be in writing, and it takes effect on the day it is made. The Attorney-General must provide written notice of a decision to revoke a security notice to the Minister for Social Services who must then give a copy of the notice to the Secretary of DSS and the Secretary of DHS. The Attorney-General's discretion to revoke a security notice would be guided by security advice. Subsection 278H(4) provides that where a person's payability determination was varied by subsection 278B(2) and a security notice has been revoked, the Secretary of DSS must cause reasonable steps to be taken to notify the individual of the revocation.

Section 278J Notices may contain personal information

1106. This item inserts new section 278J which clarifies that a notice under Division 5 in relation to a person may contain personal information (within the meaning of the *Privacy Act 1988*) about the person.

Section 278K Decisions under Division not decisions of officers

1107. This item inserts new section 278K which provides that for the purposes of Chapter 5 of the PPL Act ‘Review of decisions’, a decision under Division 5 is taken not to be a decision of an officer under this Act. This means that the decision is not reviewable under the provisions of the PPL Act.

Section 278L Notices not legislative instruments

1108. This item inserts new section 278L which provides that a notice under this Division is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Social Security Act 1991

Item 5 – Definitions

1109. This item inserts three definitions into subsection 23(1) of the Social Security Act to explain that the Foreign Affairs Minister means the Minister administering the Passports Act, the Immigration Minister means the Minister administering the Migration Act and that a ‘security notice’ means a notice under section 38N.

Item 6 – After Part 1.3A of Chapter 1

1110. This item inserts new Part 1.3B ‘Loss of social security payments and concessions for persons on security grounds’ into the Social Security Act.

Section 38L Simplified outline of this Part

1111. This item inserts new section 38L which provides a simplified outline at the start of Part 1.3B that states: ‘Persons who might prejudice the security of Australia or a foreign country may lose social security payments or concession cards.’ Part 1.3B sets out how the welfare cancellation process operates for social security payments for individuals. Social security payments are defined in section 23 of the Social Security Act to mean:

- *a social security pension; or*
- *a social security benefit; or*
- *an allowance under this Act; or*
- *any other kind of payment under Chapter 2 of this Act; or*
- *a pension, benefit or allowance under the 1947 Act.*

1112. While simplified outlines are included to assist readers to understand the substantive provisions, the outlines are not intended to be comprehensive. It is intended that readers should rely on the substantive provisions.

Section 38M Loss of social security payments and concessions for persons on security grounds

1113. This item inserts new section 38M which provides that where a security notice is given to the Minister for Social Services the individual the subject of the notice may lose social security payments or concession cards.

1114. New subsection 38M(1) provides that if a security notice (as set out in section 38N) is provided by the Attorney-General to the Minister for Social Services in relation to a person, then while the notice is in force no social security payment is to be paid to the person, they are not qualified for a social security payment, a social security payment is not payable to the person and they are not qualified for a concession card. The Note explains that a security notice is a notice under section 38N.

1115. New subsection 38M(2) provides that if a security notice is given to the Minister in relation to a person, then any social security payment of the person is taken to be cancelled on the day the notice comes into force.

1116. New subsection 38M(3) provides that if a security notice is given to the Minister in relation to a person, then any concession card the person holds is taken to be cancelled on the day the notice comes into force.

1117. New subsection 38M(4) provides that for any day the security notice is in force the person is not qualified for a social security payment, a social security payment is not payable to the person and the person is not qualified for a concession card. New subsection 38M(5) clarifies that subsections 38M(1) to (4) have effect despite any other provision of the social security law.

1118. New subsection 38(6) provides that if a social security payment of a person is cancelled by subsection 38M(2) or a person's concession card is cancelled by subsection 38M (3), the Secretary of DSS must cause reasonable steps to be taken to notify the person of the cancellation.

Section 38N Security notice from Attorney-General

1119. This item inserts new section 38N which sets out what comprises a security notice from the Attorney-General. Section 38N specifies that the Attorney-General may give the Minister for Social Services a written notice requiring that Part 1.3B apply in relation to a specified person.

1120. There are two alternative limbs that may lead to the Attorney-General issuing a notice. Only one of the limbs needs to apply.

1121. The first limb is under paragraph 38N(a) whereby the Foreign Affairs Minister may give the Attorney-General a notice under section 38P in relation to the person.

1122. The second limb is under subsection 38N (b) whereby the Immigration Minister may give the Attorney-General a notice under section 38Q in relation to the person.

1123. Upon receipt of a notice from the Foreign Affairs Minister or the Immigration Minister, the Attorney-General has discretion as to whether to provide a security notice to the

Minster for Social Services or not, and would take into account the requirements of security in making that decision.

Section 38P Notice from Foreign Affairs Minister

1124. This item inserts new section 38P which provides that the Foreign Affairs Minister may give the Attorney-General a written notice notifying the Attorney-General that they have either refused to issue an individual an Australian passport under subsection 14(2) of the Passports Act, or cancelled an individual's Australian passport under section 22 of the Passports Act. The refusal or cancellation must have been made in response to a competent authority request under subsection 14(1) of that Act, and the request was made on the basis of the matter referred to in subparagraph 14(1)(a)(i) of that Act, namely that the person would be likely to engage in conduct that might prejudice the security of Australia or a foreign country. It is not intended that every decision to refuse to issue an Australian passport under subsection 14(2) or to cancel an Australian passport under section 22 of the Passports Act will result in a notice being given to the Attorney-General. Rather, the Foreign Affairs Minister has discretion to give a notice. The decision to give a notice would be guided by security advice.

Section 38Q Notice from Immigration Minister

1125. This item inserts new section 38Q which provides that the Immigration Minister may give the Attorney-General a written notice notifying the Attorney-General that they have cancelled an individual's visa under section 116, 128, 134B or 501 (where ASIO has assessed the individual is directly or indirectly a risk to security) of the Migration Act. It is not intended that every decision to cancel a visa will result in a notice being given to the Attorney-General under section 38Q. The Immigration Minister has discretion to give a notice under this section. This decision would be guided by security advice.

Section 38R Copy of security notice to be given to Secretaries

1126. This item inserts new section 38R which provides that the Minister for Social Services must give a copy of a security notice to the Secretary of DSS and the Secretary of DHS.

Section 38S Period security notice in force

1127. This item inserts new section 38S which provides that a security notice comes into force on the day it is given to the Minister for Social Services and remains in force until revoked. The criteria for revoking a notice are set out in section 38T.

Section 38T Revoking a security notice

1128. This item inserts new section 38T which provides that the Attorney-General may revoke a security notice they have given. The revocation must be in writing, and it takes effect on the day it is made. The Attorney-General must provide written notice of a decision to revoke a security notice to the Minister for Social Services who must then give a copy of the notice to the Secretary of DSS and the Secretary of DHS. The Attorney-General's discretion to revoke a security notice would be guided by security advice. Subsection 38T(4) provides that where a social security payment of a person is cancelled by subsection 38M (2)

and the Attorney-General revokes the security notice concerned, the Secretary of DSS must cause reasonable steps to be taken to notify the individual of the revocation.

Section 38U Notices may contain personal information

1129. This item inserts new section 38U which clarifies that a notice under Part 1.3B in relation to a person may contain personal information (within the meaning of the *Privacy Act 1988*) about the person.

Section 38V Decisions under Part not decisions of officers

1130. This item inserts new section 38V which clarifies that a decision made under Part 1.3B is taken not to be a decision of an officer under the social security law for the purposes of Part 4 of the Social Security (Administration) Act ‘Review of Decisions’. This is because it is the Ministers, as part of the Executive Government, (and not government officials) making the decision to require the cancellation of welfare payments.

Section 38W Notices not legislative instruments

1131. This item inserts new section 38W which provides that a notice under this Part is not a legislative instrument. This provision is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the Legislative Instruments Act.

Social Security (Administration) Act 1999

Item 7 – Before paragraph 123(1)(c)

1132. This item inserts a new ground into section 123 of the Social Security (Administration) Act that provides that a determination that a person’s claim for a social security payment is granted or a social security payment is payable to a person continues in effect until the payment is cancelled under section 38M of the Social Security Act.

Part 2 – Other amendments

Administrative Decisions (Judicial Review) Act 1977

Item 8 – After paragraph (c) of Schedule 2

1133. This item amends Schedule 2 of the ADJR Act so that decisions made in relation to welfare cancellation are reviewable, but section 13 of that Act will not apply to those decisions. This means that the decisions of the Foreign Affairs Minister, Immigration Minister and Attorney-General to issue notices will be reviewable under the ADJR Act, but there will be no requirement to provide reasons for the decision. This is because the decision to issue the notices will be based on security advice which may be highly classified and could include information that if disclosed to an applicant may put Australia’s security at risk.

1134. Furthermore, given that any decision by the Attorney-General to cancel welfare payments is triggered by the cancellation of a visa or the cancellation of, or refusal to issue an Australian passport, an individual will be able to seek review of the decision to cancel a visa or the cancellation of, or refusal to issue, a passport. This would include merits review under AAT Act of an adverse security assessment made by ASIO in support of those decisions.

1135. The exclusion of these decisions from ADJR Act review does not prevent the decisions from being judicially reviewed under section 39B of the *Judiciary Act 1903* or paragraph 75(v) of the Constitution.

Part 3 – Application provisions

Item 9 – Application provisions

1136. This Part sets out the application provisions for the Bill. Items 1-3 relates to affected payments and concessions. Items 4-5 relate to Ministerial notices.

1137. Item 1 provides that new section 57GI of the Family Assistance Act is to apply in relation to any family assistance of a person, whether the person became eligible for that assistance before, on or after the commencement of this item.

1138. Item 2 provides that new section 278B of the PPL Act is to apply in relation to parental leave pay or dad and partner pay of a person, whether the person became eligible for that pay before, on or after commencement of this item.

1139. Item 3 provides that new section 38M of the Social Security Act is to apply in relation to a social security payment of a person, whether the person qualified for that payment before, on or after the commencement of this item, and in regards to a concession card of a person, whether that card was issued before, on or after the commencement of this item.

1140. Item 4 provides that new paragraphs 57GK(a) of the Family Assistance Act, 278D(a) of the PPL Act and 38P(a) of the Social Security Act are to apply in relation to the refusal to issue, or the cancellation of, a passport before, on or after the commencement of this item.

1141. Item 5 provides that new paragraphs 57GL(a) and (c) of the Family Assistance Act, 278E(a) and (c) of the PPL Act and 38Q(a) and (c) of the Social Security Act, are to apply in relation to the cancellation of a visa, or an assessment made, before, on or after the commencement of this item.

1142. The purpose of these provisions applying before, on and after commencement of this Act is to ensure that the provisions apply to and appropriately capture those individuals who have already had a visa cancelled or a passport refused or cancelled, and who may already be fighting overseas in foreign conflicts.

Schedule 3 – Customs’ detention powers

Customs Act 1901

Item 1 – Section 219ZJA

1143. This item amends section 219ZJA to insert a new definition for the purposes of Division 1BA of Part XII of the Customs Act. The definition is ***national security***. This term has the same meaning as in the *National Security Information (Criminal and Civil Proceedings) Act 2004* which is Australia’s defence, security, international relations or law enforcement interests.

Item 2 – Section 219ZJA (definition of *serious Commonwealth offence*)

1144. This item repeals and substitutes the definition of ***serious Commonwealth offence*** for the purposes of Division 1BA of Part XII of the Customs Act. Currently this definition is linked to the definition of this term in section 15GE of the Crimes Act, which is limited to offences that relate to specified subject matters and that is punishable by imprisonment for 3 years or more. The new definition will mean an offence against a law of the Commonwealth that is punishable on conviction by imprisonment for 12 months or more. Therefore, the detention powers in section 219ZJB will be able to be exercised in relation to a greater range of Commonwealth offences.

Item 3 – Paragraph 219ZJB(1)(b)

1145. This item amends paragraph 219ZJB(1)(b) by extending its operation to where a person is intending to commit a serious Commonwealth offence.

1146. At present, section 219ZJB of the Customs Act empowers officers of Customs to detain persons in a designated place (which includes an international airport or seaport) in certain circumstances. Under section 219ZJB, a person can be detained if an officer has reasonable grounds to suspect that a person has committed, or is committing, a serious Commonwealth offence or a prescribed State or Territory offence.

1147. In exercising these powers, the current thresholds whereby an officer of Customs can detain a person if the officer has reasonable grounds to suspect that the person has committing or is committing a serious Commonwealth offence may result in situations where despite information received from partner agencies or the behaviour or documentation presented by the passenger, detention may not be possible.

1148. It is therefore proposed to extend the operation of section 219ZJB to include where an officer has reasonable grounds to suspect that a person is intending to commit a serious Commonwealth offence.

Item 4 – Subsection 219ZJB(3)

1149. This item amends subsection 219ZJB(3) to replace the statutory requirement that a person detained under section 219ZJB be delivered into the custody of a police officer with the requirement that the person be made available. This amendment reflects current practice whereby the person is made available to a police officer from Customs’ detention.

Item 5 – Subsection 219ZJB(4)

1150. This item amends subsection 219ZJB(4) by extending its operation to where a person is intending to commit a Commonwealth offence, as a consequence of the amendment in item 3. Under subsection 219ZJB(4), an officer must release a person from detention immediately where the original grounds for the detention cease. This amendment extends this obligation to where an officer ceases to have reasonable grounds to suspect a person is intending to commit a serious Commonwealth offence.

Item 6 – Subsection 219ZJB(5)

1151. This item amends subsection 219ZJB(5) by increasing the time period mentioned in this section from 45 minutes to 4 hours.

1152. Under current subsection 219ZJB(5), if a person is detained for a period of greater than 45 minutes, the person has the right to have a family member or another person notified of the person’s detention. However, under subsection 219ZJB(7) of the Customs Act, an officer may refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification should not be made to safeguard law enforcement processes or to protect the life and safety of another person.

1153. It is considered that there may also be vulnerabilities with regard to the time and opportunity for the officer of Customs to undertake sufficient enquiries once a person is detained, especially in order to determine whether the notification to a family member or other person should or should not be made. Therefore, it is proposed to amend subsection 219ZJB(5) to increase the timeframe from 45 minutes to 4 hours.

Item 7 – Paragraphs 219ZJB(7)(a) and 219ZJC(6)(a)

1154. As referred to above, under subsection 219ZJB(7) of the Customs Act, an officer may refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification should not be made to safeguard law enforcement processes or to protect the life and safety of another person.

1155. This item amends paragraph 219ZJB(7)(a) to include additional circumstances that an officer may take into account in deciding whether the notification should or should not be made. These are to safeguard national security (as defined above) or the security of a foreign country.

1156. Under section 219ZJC of the Customs Act, an officer of Customs may detain a person in a designated place if there is a warrant for the arrest of a person in relation to a Commonwealth offence or prescribed State and Territory offence or the person is on bail in relation to such an offence subject to a condition that prevents the person from leaving Australia. This power may only be exercised if the officer of Customs has reasonable grounds to suspect that the person intends to leave the designated place.

1157. Section 219ZJC contains similar provisions to section 219ZJB including the person having the a right to have a family member or another person notified of the person’s detention if a person is detained for a period of greater than 45 minutes. Similar to subsection 219ZJB(7), subsection 219ZJB(6) provides that an officer may refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification

should not be made to safeguard law enforcement processes or to protect the life and safety of another person.

1158. This item also amends paragraph 219ZJB(6)(a) to include additional circumstances that an officer may take into account in deciding whether the notification should or should not be made. These are to safeguard national security (as defined above) or the security of a foreign country.

Item 8 – At the end of Subdivision B of Division 1BA of Part XII

1159. This item inserts new section 219ZJCA into Part XII of the Customs Act. This new section sets out additional circumstances in which an officer of Customs can detain a person in a designated place.

1160. The current detention powers in section 219ZJB and 219ZJC only apply in respect of Commonwealth offences and prescribed State and Territory offences. However, recent national security incidents have highlighted the need for a broader set of circumstances in which a detention power can be exercised at the border environment. These broader circumstances, which relate to national security issues, are set out in new section 219ZJCA.

1161. New subsection 219ZJCA(1) provides that an officer of Customs may detain a person if the person is in a designated place and the officer suspects on reasonable grounds that the person is, or is likely to be, involved in an activity that is a threat to national security or the security of a foreign country. “National security” is defined in the new definition in section 219ZJA.

1162. New subsection 219ZJCA(2) provides that the detaining officer must ensure that the detainee made available, in person, to a police officer as soon as practicable to be dealt with according to law.

1163. The remaining provisions of new section 219ZJCA are similar in operation to the remaining provisions of section 219ZJB as proposed to be amended as set out above. For example, subsection 219ZJCA(4) sets out the circumstances in which an detained person must be released from detention by an officer. Also, under subsection 219ZJCA(5), if a person is detained for a period of greater than 4 hours, the person has the right to have a family member or another person notified of the person’s detention. However, under subsection 219ZJCA(7), an officer may refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification should not be made to safeguard national security (as defined above) or the security of a foreign country, law enforcement processes or to protect the life and safety of another person.

Item 9 – At the end of subsection 219ZJD(1)

1164. This item amends subsection 219ZJD(1) to insert a new circumstance in which a search of a detained person may be conducted under section 219ZJD. Under this section, a frisk or ordinary search of a detained person may be undertaken as well as a search of any clothing worn by the person and any property under the person’s immediate control. However, these searches may only be undertaken if the officer believes on reasonable grounds that the search is necessary for specified purposes.

1165. This item will insert a new purpose in relation to a person detained under new section 219ZJCA, being to prevent the concealment, loss or destruction of material of interest for national security or the security of a foreign country.

Item 10 – At the end of paragraph 219ZJD(3)(b)

1166. Under subsection 219ZJD(3), an officer may seize any relevant thing found as a result of a search conducted under subsection 219ZJD(1).

1167. This item will insert a reference to anything that is of interest for national security or the security of a foreign country, thus allowing these things to also be seized if found under the new search power set out in item 9.

Item 11 – Subsection 219ZJD(4)

1168. Under subsection 219ZLD(4), anything that is seized under subsection 219ZJD(3) must be delivered to the police officer into whose custody a detainee is required to be delivered under subsections 219ZJB(3) or 219ZJC(3).

1169. This item will extend this requirement in relation to the new detention power under section 219ZJCA, such that anything seized under new paragraph 219ZJD(3)(b) must be made available the police officer to whom the person is required to be made available under new subsection 219ZJCA(2). This item will also reflect the changes made to section 219ZJB(3) above.

Item 12 – Subsection 219ZJF(1)

1170. Subsection 219ZJF(1) provides that a person detained under section 219ZJB or 219ZJC must be informed of the reason for their detention. The amendments in this item will ensure that this obligation does not apply in relation to a person detained under new section 219ZJCA because it is not considered appropriate that a person be given reasons for their detention under section 219ZJCA at this point.

Item 13 – Subparagraph 219ZJJ(1)(b)(iv)

1171. Subsection 219ZJJ(1) of the Customs Act sets out additional obligations in relation to a detained person who is known or believed to be a minor. A minor is considered to be any person under the age of 18 years. The amendment in this item will ensure that this obligation does not apply in relation to a minor detained under new section 219ZJCA because it is not considered appropriate that a person be given reasons for their detention under section 219ZJC at this point.

Item 14 – Paragraph 219ZJJ(2)(a)

1172. Under subsection 219ZJJ(1), one of the obligations is to inform the minor of the right to have a parent or guardian notified of the minor's detention.

1173. Similar to current subsection 219ZJB(6), subsection 219ZJJ(2) provides that an officer may refuse to notify a family member or other person if the officer believes on reasonable grounds that the notification should not be made to safeguard law enforcement processes or to protect the life and safety of another person.

1174. Similar to item 7 above, this item amends paragraph 219ZJJ(2)(a) to include additional circumstances that an officer may take into account in deciding whether the notification should or should not be made. These are to safeguard national security (as defined above) or the security of a foreign country.

Schedule 4 – Cancelling visas on security grounds

Part 1 – Amendment of the *Migration Act 1958*

Division 1 – Amendments

1175. This Schedule creates a new obligation on the Minister for Immigration to cancel a visa held by a non-citizen who is outside Australia. These amendments will strengthen the government’s capacity to proactively mitigate security risks posed by individuals located offshore who may be seeking to travel to Australia and might be planning to engage in activities of security concern.

1176. The obligation to cancel the visa will arise if the ASIO suspects that the person might be a risk to security and recommends cancellation of the person’s visas. The power would be used in circumstances where ASIO suspects that a person located offshore may pose a risk to security but has either insufficient information and/or time to furnish a security assessment in advance of the person’s anticipated travel. It will enable ASIO to furnish a security assessment where it suspects the person might be, directly or indirectly a risk to security and require the Minister to cancel the visa/s held by the person for a temporary and limited period of 28 days.

1177. The visa cancellation would be revoked where ASIO, after further consideration, recommends the cancellation be revoked or if ASIO does not provide an adverse security assessment that the person is, directly or indirectly, a risk to security within the 28 day period.

1178. The Migration Act currently permits or requires visa cancellation on a range of grounds, including grounds related to character and behaviour. One basis for visa cancellation is that the holder of a visa is assessed by ASIO to be a risk, directly or indirectly, to security as defined in section 4 of the ASIO Act. Cancellation on this ground can occur under section 116 and section 128, on the basis of the prescribed ‘is a risk to security’ ground for cancellation at paragraph 2.43(1)(b) of the Migration Regulations. The visa could potentially also be cancelled under the general ‘character test’ grounds in section 501.

1179. Under the existing provisions, the consequence of an ASIO assessment of ‘is a risk to security’, for a visa holder who is outside Australia, is that the Minister must cancel the visa. Cancellation is mandatory for both temporary and permanent visas. For example, a permanent visa holder may have resided in Australia for several years. If that person departs Australia and, as a consequence of the person’s activities overseas, is assessed by ASIO to be a risk to security, the visa must be cancelled. The visa can be cancelled with notice (under section 116) or without notice (under section 128).

1180. The existing provisions do not adequately provide for a situation where ASIO has information that indicates a person located outside Australia may be a risk to security but is unable to furnish a security assessment that meets existing legal thresholds in the Migration Act due to insufficient information and/or time constraints linked to the nature of security threat.

1181. The Bill will insert new Subdivision FB – Emergency cancellation on security grounds, providing for mandatory cancellation if ASIO “*suspects that the person might be, directly or indirectly, a risk to security (within the meaning of section 4 of the ASIO Act)*”.

The cancellation will be revoked where ASIO furnishes a security assessment within the 28 day period that recommends the Minister revoke the cancellation. The cancellation will also be revoked at the end of the 28 day period unless ASIO issues an assessment that the person “is directly or indirectly a risk” to security and that recommends that the person’s visa cancellation not be revoked.

Item 1 – Subsection 5(1)

1182. This item inserts definitions of ‘ASIO’, ‘ASIO Act’ and ‘assessment’. ‘ASIO’ is defined to mean the Australian Security Intelligence Organisation. ‘ASIO Act’ is defined to mean the *Australian Security Intelligence Organisation Act 1979*. The definition of ‘assessment’, in relation to ASIO, is stated to be the same as the definition of ‘assessment’ in section 35 of the ASIO Act.

1183. Section 35 of the ASIO Act defines ‘assessment’ as: “*a statement in writing furnished by the Organisation to a Commonwealth agency expressing any recommendation, opinion or advice on, or otherwise referring to, the question whether it would be consistent with the requirements of security for prescribed administrative action to be taken in respect of a person or the question whether the requirements of security make it necessary or desirable for prescribed administrative action to be taken in respect of a person, and includes any qualification or comment expressed in connection with any such recommendation, opinion or advice, being a qualification or comment that relates or that could relate to that question.*”

Item 2 – Subsection 33(10)

1184. This item inserts a reference to Subdivision FB in existing subsection 33(10) of the Migration Act. The purpose of this amendment is to exclude special purpose visas from the new visa cancellation power in Subdivision FB. Special purpose visas are taken to have been granted to a person who has a prescribed status. Examples include airline crew and members of various armed forces and naval forces. Visa cancellation powers are not applicable to this type of visa. If a security concern arose in relation to the holder of a special purpose visa, the visa could be terminated by the Minister making a declaration under subsection 33(9) of the Migration Act.

Item 3 – Before paragraph 118(d)

1185. This item inserts a new paragraph (cc) into existing section 118. New paragraph 118(cc) ensures that the new cancellation power in section 134B does not limit, and is not limited by, any other cancellation power in the Migration Act.

Item 4 – Before Subdivision G of Division 3 of Part 2

1186. This item inserts a new Subdivision FB – Emergency cancellation on security grounds. The Subdivision comprises sections 134A to 134F.

1187. New section 134A provides that the rules of natural justice do not apply to a decision made under this Subdivision. The section puts beyond doubt that there are no natural justice requirements applicable to the exercise of the emergency cancellation power in section 134B. This is already apparent from the terms of section 134B, which provide that cancellation is mandatory once ASIO issues an assessment for the purpose of the section.

1188. New section 134B imposes a duty on the Minister to cancel all visas held by a person who is outside Australia if ASIO provides an assessment, made for the purposes of the section, which advises that ASIO suspects that the person might be, directly or indirectly, a risk to security within the meaning of section 4 of the ASIO Act, and which recommends that all visas held by the person be cancelled. The definition of ‘security’ in the ASIO Act includes reference to the protection of Australians from such matters as espionage, sabotage, politically motivated violence, promotion of communal violence, attacks on Australia’s defence system and acts of foreign interference, as well as the protection of Australia’s territorial and border integrity from serious threats.

1189. The key feature of the new cancellation power in section 134B is that the threshold for visa cancellation on security grounds in paragraph 134B(b) (“ASIO suspects that the person might be a risk”) is lower than the existing threshold in migration legislation (“is a risk”).

1190. The existing threshold is set out at paragraph 2.43(1)(b) of the Migration Regulations, where it is a prescribed ground for cancellation under section 116 and section 128 of the Migration Act. The lower threshold is provided to cater for emergency situations where a person may be planning to travel to Australia and might present a risk to security. Visa cancellation under this power will allow ASIO further time to assess whether the person is a risk, while the person remains outside Australia, rather than having to deal with the person in Australia. The exclusive focus on visa holders outside Australia is reflected in paragraph 134B(d) which limits the cancellation power to visa holders who are outside Australia.

1191. New section 134C ensures that an emergency visa cancellation decision under section 134B will be revoked no later than 28 days after the visa is cancelled unless ASIO issues an assessment during that period stating that the applicant is a risk, directly or indirectly, to security, and that recommends that the cancellation not be revoked. If no assessment is provided by ASIO within 28 days, the visa cancellation must be revoked, as soon as reasonably practicable, at the end of that period. In addition, if ASIO recommends, during the 28 day period, that the cancellation be revoked, that must occur as soon as reasonably practicable after ASIO provides that advice. This provision will cater for situations where ASIO finalises its investigation and assessment in less than 28 days, and determines that the former visa holder is not a risk to security. The intention is that the visa cancellation decision will be revoked at the earliest opportunity, to minimise the impact on visa holders.

1192. There is no provision for ASIO to seek an extension of the 28 day period in circumstances where additional time is required to conclude an assessment. ASIO can, however, issue a further assessment under section 134B, which would require the reinstated visa to again be cancelled. This would restart the 28 day period. While it is not intended to unreasonably fetter ASIO in the task of assessing security risks, it is also not intended that this mechanism would be used in serial fashion to continue extending the period within which ASIO must form an opinion about whether a person is a risk to security. The operation of the emergency cancellation power will be monitored and reviewed within the established framework of accountability measures applying to ASIO.

1193. New section 134C also has the effect that, if ASIO issues an adverse security assessment (“is a risk, directly or indirectly, to security”) during the 28 day period recommending the cancellation not be revoked, the Minister must not revoke the visa cancellation. The visa remains cancelled on a permanent basis. A person in this situation will be able to apply for a new visa in the future, but would need to meet the criteria in the

Migration Regulations at the relevant time. There would be a number of criteria which might be relevant to the grant of a visa, including a requirement for a further assessment by ASIO.

1194. New subsection 134D(1) provides that, if the cancellation of a visa is revoked under section 134C, then, without limiting its operation before the cancellation, it has effect as if it were granted on the revocation. This provision is in the same terms as existing subsection 133(1) of the Migration Act which deals with the revocation of cancellation decisions made under section 128 of the Migration Act. The purpose of the provision is to make it clear that revocation of a cancellation decision does not have the effect that the visa was held during the period when the visa was cancelled.

1195. New subsection 134D(2) provides that, subject to subsection (1), if the cancellation of a visa is revoked under section 134C, the Minister may vary the time the visa is to be in effect or any period in which, or date until which, the visa permits its holder to travel to, enter and remain in Australia, or to remain in Australia. This provision is in the same terms as existing subsection 133(2) of the Migration Act which deals with the revocation of cancellation decisions made under section 128 of the Migration Act. The purpose of the provision is to give the Minister discretion to extend the validity of the visa to compensate the visa holder for the time that was lost during the period that the visa was cancelled.

1196. New section 134E deals with notification of cancellation decisions under section 134B. The section requires notice to be given to a former visa holder, but only after ASIO issue an assessment under subsection 134C(3) stating that the former visa holder is a risk to security, and recommending that the cancellation not be revoked. Further, the timing of the notice will be determined by security requirements as advised by ASIO.

1197. The effect of section 134E is that notification is not required when the visa is first cancelled. Except in cases where the former visa holder presents at an airport and attempts to travel to Australia, the former visa holder will not become aware that the visa has been cancelled. The purpose of this provision is to avoid disruption of investigations by intelligence agencies. An immediate notification of the cancellation decision, even without giving reasons for the cancellation, would be likely to alert a former visa holder to the possibility that they are under investigation and surveillance, and notification may therefore compromise intelligence gathering activity. In addition, notification of a decision not to revoke the cancellation will be delayed in cases where ASIO advise that notification should be withheld in the interests of the security of the nation. In those cases, notification would occur as soon as reasonably practicable after receipt of advice from ASIO that it is no longer essential to the security of the nation for notice not to be given.

1198. Subsection 134E(4) provides that failure to give notification of a decision does not affect the validity of either the decision under section 134B to cancel the visa or the decision under subsection 134C(3) to not revoke the cancellation. The purpose of this provision is to ensure that, although there is a duty to notify under section 134E, a failure to notify does not affect the validity or operation of either the initial decision to cancel under section 134B or the decision not to revoke the cancellation under subsection 134C(3).

1199. New section 134F deals with the cancellation of visas held by persons who hold visas only because the person whose visa is cancelled under section 134B held a visa. This includes members of the family unit and persons who were sponsored by the person whose visa was cancelled under section 134B. The Minister will have a discretionary power to cancel visas held by those persons. Subsection 134F(1) provides that the consequential

cancellation decisions can only be made after the Minister decides not to revoke the section 134B cancellation and notifies that decision under section 134E. This provision ensures that consequential cancellation decisions are not made before the notification of the person who is a risk to security. Notification to that person can be delayed on security grounds, as set out in section 134E.

1200. Consequential cancellation decisions under subsection 134F, in relation to visa holders who are in Australia at the time of cancellation, will be subject to merits review by the Migration Review Tribunal or the Refugee Review Tribunal (in relation to protection visas).

Division 2 – Application of amendments made by Part 1

Item 5 – Application of amendments made by Part 1

1201. This item provides that the amendments made by Part 1 of this Schedule apply to visas granted before or after that commencement.

Part 2 – Amendment of the *Australian Security Intelligence Organisation Act 1979*

Items 6 & 7 – New subsection 36(2)

1202. These items insert new subsection 36(2) into the ASIO Act. Subsection 36(2) provides that Part IV of the ASIO Act applies to a security assessment given for the purposes of section 134C of the Migration Act in relation to a person who would have been the holder of a valid permanent visa but for the emergency cancellation of that visa under section 134B of the Migration Act.

1203. Currently Part IV of the ASIO Act, which includes provision for certain notice requirements and review rights with respect to security assessments made by ASIO, does not apply to a security assessment in respect of the exercise of powers or functions under the Migration Act (other than an assessment made for the purposes of subsection 202(1) of the Migration Act) in respect of a person who is not an Australian citizen, the holder of a valid permanent visa, or a person who holds a special category visa or is taken to have been granted a special purpose visa.

1204. Where a person who is the holder of a valid permanent visa is subject to an emergency cancellation of their visa under section 134B of the Migration Act, and that person is then the subject of an adverse security assessment made by ASIO under section 134C recommending that the cancellation not be revoked, new subsection 36(2) of the ASIO Act will allow the person to seek a review of that adverse security assessment under Division 4 of Part IV of the ASIO Act.

1205. This will ensure that the rights of persons who had been permanent visa holders at the time of emergency cancellation under section 134B and whose visa cancellation, under section 134C, is not revoked will be consistent with the rights available to valid permanent visa holders whose visas are cancelled for reasons of security under other provisions of the Migration Act.

Schedule 5 – Identifying persons in immigration clearance

1206. Schedule 5 amends the Migration Act to:

- Enhance DIBP’s ability to collect, access, use and disclose personal identifiers for purposes of identification of persons who may be a security concern to Australia or foreign country
- Allow personal identifiers such as facial images to be obtained from Australian citizens who enter or depart Australia or who travel on an overseas vessel between ports within Australia (sections 166, 170 and 175 of the Act).
- Ensure automated border processing systems such eGate may obtain personal identifiers such as facial images.
- Clarify that if a person presents or provides a document to a clearance authority under Division 5 of Part 2 of the Migration Act, the clearance authority may collect the information (including any personal identifiers) in the document.
- Ensure that “personal information” collected under Division 5 of Part 2 of the Migration Act can be accessed and disclosed in the same way as “identifying information” as defined under Part 4A of the Migration Act.

Item 1 – Paragraph 5A(3)(g)

1207. This item repeals paragraph 5A(3)(g) of Part 1 of the Migration Act and substitutes new paragraphs 5A(3)(g) and 5A(3)(ga).

1208. Subsection 5A(1) defines the meaning of personal identifier. Subsection 5A(3) sets out the purposes that must be promoted before any new personal identifiers are prescribed under paragraph 5A(1)(g). The purposes in subsection 5A(3) are also cross referenced in paragraphs 336D(2)(a) and 336F(2) which provide for the access and disclosure of “identifying information” which is relevantly defined in section 336A to mean “any personal identifier obtained by DIBP for one or more of the purposes referred to in subsection 5A(3)”.

1209. Paragraph 5A(3)(g) currently ensures that personal identifiers can be obtained, accessed, used and disclosed for the purpose of enhancing DIBP’s ability to identify non-citizens who have a criminal history or who are of character concern.

1210. New paragraph 5A(3)(g) is identical to repealed paragraph 5A(3)(g) except that it no longer refers to “non-citizens who are of national security concern”. Persons of national security concern are now addressed by new paragraph 5A(3)(ga) which provides that personal identifiers may be obtained, accessed and disclosed “to assist identifying, and authenticating the identity of, persons who may be a security concern to Australia or a foreign country.”

1211. This ensures that personal identifiers may be obtained, accessed, used and disclosed for the purposes of identifying both citizens and non-citizens who may be a security concern to Australia or a foreign country.

Item 2 – Part 2 (heading)

1212. This item repeals the heading of Part 2 of the Migration Act, “Control of arrival and presence of non-citizens” and substitutes it with a new heading “Arrival, presence and

departure of persons”. This amendment reflects broader amendments made to ensure that identifying information about both citizens and non-citizens may be obtained, accessed, used and disclosed for permitted purposes.

1213. These amendments support the objective of ensuring that the identity of persons travelling in and out of Australia may be verified and to identify persons who may be of security concern.

Item 3 – Paragraph 166(1)(c)

1214. This item repeals paragraph 166(1)(c) of Division 5 of Part 2 of the Migration Act and substitutes new paragraphs 166(1)(c) and (d).

1215. New paragraph 166(1)(c) provides that a person, whether a citizen or non-citizen, who enters Australia, must comply with any requirement made by a clearance officer to provide one or more personal identifiers, to a clearance authority. The types of personal identifiers a person can be required to provide are referred to in subsection (5) of section 166 of the Migration Act.

1216. New paragraph 166(1)(c) is similar to repealed paragraph 166(1)(c) except that the new paragraph:

- is expanded to also apply to citizens
- no longer requires the existence of “prescribed circumstances” before a clearance officer can exercise their discretion to require a person to provide a personal identifier
- allows a clearance officer to require a person to provide a personal identifier to either a “clearance officer” or an “authorised system” (due to the use of the term “clearance authority” which is defined in section 165), and
- clarifies that only a clearance officer (not an authorised system) can require a person to provide a personal identifier under paragraph 166(1)(c).

1217. This item also inserts new paragraph 166(1)(d) into Division 5 of Part 2 of the Migration Act. The effect of new paragraph 166(1)(d) is that if under paragraph 166(1)(a) a person presents evidence to an authorised system, the person must also provide to the authorised system a photograph or any other personal identifier referred to in subsection 166(5) that is prescribed by the regulations. Subsection 166(7) ensures that these personal identifiers must be provided by way of an identification test.

1218. The purpose of this amendment is to ensure that authorised systems such as eGate can collect and retain personal identifiers without having to “require” a person to provide those personal identifiers. This reflects that facial images will always be collected and retained when a person uses an authorised system and enables other personal identifiers, intended to be collected by the authorised system, to be prescribed in the regulations in future.

Item 4 – Subsection 166(2)

1219. This item omits “present evidence, or provide information” and substitutes “present or provide evidence, information or personal identifiers” in subsection 166(2) in Division 5 of Part 2 of the Migration Act. The amendment is consequential to amendments made to

subsection 166(1) which ensure that personal identifiers may be provided to an authorised system.

Item 5 – Subparagraph 166(2)(c)(i)

1220. This amendment removes the reference to “the system” from subparagraph 166(2)(c)(i).

1221. This amendment ensures that a person may only use an authorised system if, amongst other requirements, a clearance officer does not require evidence to be provided to a clearance officer.

1222. The effect is that s166(1) is only complied with by way of using an authorised system so long as a clearance officer has not also required the person to present or provide evidence, information or personal identifiers.

Item 6 – Subsection 166(3) (heading)

1223. This item makes a technical amendment to the heading in subsection 166(3) by replacing the current heading ‘Complying with paragraphs 1(a), (b) and (c)’ and substituting with new heading ‘*Complying with paragraphs (1)(a) and (b)*’. This amendment reflects that this heading now only covers subsections 166(3) and (4) which only refer to paragraphs (1)(a) and (b). A new heading has been inserted before subsection (5) to cover paragraph(1)(c) and new paragraph (1)(d).

Item 7 – Before subsection 166(5)

1224. This item inserts a new heading ‘*Personal identifiers provided under paragraph (1)(c) or (d)*’ before subsection 166(5) in Division 5 of Part 2 of the Migration Act.

1225. This amendment caters for the amendment of paragraph 1(c) and the insertion of paragraph (1)(d) in section 166.

Item 8 – Subsection 166(5)

1226. This item omits “paragraphs (1)(a) and (c), a person may only be required to present or” and substitutes “paragraphs (1)(c) and (d), a person may only be required to” in subsection 166(5) of the Migration Act.

1227. This amendment ensures that the limitations in subsection 166(5) regarding the types of personal identifiers that a person can be required to provide apply to new paragraphs 166(1)(c) and (d).

1228. This amendment also ensures that subsection 166(5) does not limit the evidence (such as a passport) that a person must present under paragraph 166(1)(a) in circumstances where that evidence contains a personal identifier that is not specified in subsection 166(5). This ensures that a person must present their passport under paragraph 166(1)(a) even if their passport contains a personal identifier that is not specified in subsection 166(5).

Item 9 – Paragraph 166(5)(c)

1229. This item makes a technical amendment to paragraph 166(5)(c) of the Migration Act by inserting “of a type” after “identifier” in paragraph 166(5)(c).

1230. This amendment clarifies the intended purpose of paragraph 166(5)(c) which is to allow a personal identifier of a type in a person’s passport to be collected by way of identification test even if that type of personal identifier is not specified elsewhere in subsection 166(5). For example, if a person’s passport contains a measurement of the person’s height and weight then paragraph 166(5)(c) in conjunction with paragraphs 166(1)(c) and subsection 166(7) would allow a clearance officer to require the person to provide a measurement of the person’s weight and height by way of an identification test carried out by an authorised officer even if this type of personal identifier was not specified elsewhere in subsection 166(5).

Item 10 – Subsection 166(6)

1231. This item repeals subsection 166(6) of Part 2 of Division 5 of the Migration Act. It is considered redundant to provide that paragraph 166(1)(c) does not limit a clearance authority’s power under subparagraph (1)(a)(ii) as the opening words of paragraph 166(1)(a) clearly provide that a person must present evidence, which might include a personal identifier.

1232. This is a technical change only and no substantive change to the operation of the provisions is intended by the repeal of subclause (6).

Item 11 – Subsection 166(7)

1233. This item repeals subsection 166(7) (including the note) and substitutes new 166(7) in Division 5 of Part 2 of the Migration Act.

1234. New subsection 166(7) provides that a person is taken not to have complied with a requirement to provide a personal identifier under new paragraphs (1)(c) or (d) inserted in item 3 above, unless the personal identifier is provided by way of one or more identification tests carried out by an authorised officer or authorised system. New subsection 166(7) is similar to repealed subsection 166(7) except that it:

- expands the provision to apply to citizens as well as non-citizens (by referring to “persons”)
- adds in a reference to new paragraph 166(1)(d), and
- refers to identification tests carried out by an authorised system, as well as by an authorised officer.

1235. These amendments are consequential to amendments made to section 166(1) which ensure that personal identifiers may also be obtained by an authorised system and may also be obtained from citizens.

1236. The effect and purpose of these amendments is to ensure that the requirements to provide personal identifiers in paragraphs 166(1)(c) and (d) cannot be met, by either a citizen or non-citizen, unless they are provided by way of an identification test carried out by an authorised officer or authorised system. This ensures that the requirements cannot be met by

providing personal identifiers already contained in a passport, for example, but must be collected by an authorised officer or authorised system by way of an identification test.

1237. The amendment also repeals the note from beneath subsection 166(7) as it was considered unnecessary. There is no change to the operation of section 5D or how it relates to subsection 175(4) in relation to authorised officers. This is a technical change only.

Items 12 to 13 – Subsection 166(8) and paragraph 166(8)(a)

1238. Subsection 166(8) is amended to:

- expand the provision to apply to citizens as well as non-citizens, by referring to “persons” in subsection 166(8), and
- refer to identification tests carried out by an authorised system, as well as by an authorised officer, in paragraph 166(8)(a).

1239. These amendments are consequential to amendments made to section 166(1) which ensure that personal identifiers may also be obtained by an authorised system and may also be obtained from citizens.

Item 14 – Paragraphs 170(1)(a) and (b)

1240. This item replaces the reference to “the officer or authorised system” with a reference to “a clearance authority”. Clearance authority is defined to mean a clearance officer or an authorised system.

1241. This amendment simplifies the terminology as well as ensuring that the officer who requires the personal identifiers does not have to be same officer as the officer to whom the personal identifiers are provided.

Item 15 – At the end of subsection 170(1)

1242. This item adds new paragraphs 170(1)(c) and (d) to the end of subsection 170(1) of the Migration Act and is similar to amendments at Item 3 which insert paragraphs 166(1)(c) and (d).

1243. Paragraphs 170(1)(a) and (b) empower a clearance officer to require a person who travels, or appears to intend to travel on an overseas vessel from a port to another port (in Australia) to present certain evidence and provide certain information to the clearance officer or an authorised system at either or both ports. Subsection 170(2) currently provides that if prescribed circumstances exist, a non-citizen must be required by a clearance authority to provide one or more personal identifiers referred to in subsection (2A) to a clearance officer at either or both ports.

1244. New paragraph 170(1)(c) is similar to subsection 170(2) (which is repealed by the amendments at Item 16 except that the new paragraph 170(1)(c)):

- is expanded to also apply to citizens,
- no longer compels a clearance authority to require a personal identifier in “prescribed circumstances” (instead a clearance officer is given a discretion to require a person to provide a personal identifier),

- allows a clearance officer to require a person to provide a personal identifier to either a “clearance officer” or an “authorised system” (due to the use of the term “clearance authority” which is defined in section 165).

1245. This item also inserts new paragraph 170(1)(d). The effect of new paragraph 170(1)(d) is that if under paragraph 170(1)(a) a person presents evidence to an authorised system, the person must also provide to the authorised system a photograph or any other personal identifier referred to in subsection 170(2A) that is prescribed by the regulations. New subsection 170(4) ensures that these personal identifiers must be provided by way of an identification test.

1246. The purpose of this amendment is to ensure that authorised systems such as eGate can collect and retain personal identifiers without having to “require” a person to provide those personal identifiers. This reflects that facial images will always be collected and retained when a person uses an authorised system.

Item 16 – Subsection 170(2)

1247. This item repeals subsection 170(2) and substitutes new subsection 170(2). Current subsection 170(2) provides that where prescribed circumstances exist, a non-citizen who travels, or appears to intend to travel, on an overseas vessel from a port to another port must be required by a clearance authority at either or both ports to provide one or more personal identifiers referred to in subsection (2A) to a clearance officer.

1248. The effect of current subsection 170(2) has now been re-located to paragraphs (1)(c) and (d) and amended slightly as explained in item 15 above.

1249. New subsection 170(2) provides a new heading ‘*Complying with subsection (1)*’ and provides that a person is to comply with subsection (1) in a prescribed way, similar to the way that subsection 166(3) operates.

Item 17 – Subsection 170(2AA)

1250. This item omits “present evidence, or provide information” and substitutes “present or provide evidence, information or personal identifiers” in subsection 170(2AA) in Division 5 of Part 2 of the Migration Act.

1251. The amendment is consequential to amendments made to section 170 which ensure that personal identifiers may be provided to an authorised system.

Item 18 – Subparagraph 170(2AA)(c)(i)

1252. This amendment removes the reference to the system from subparagraph 170(2AA)(c)(i).

1253. This amendment ensures that a person may only use an authorised system if, amongst other requirements, a clearance officer does not require evidence to be provided to a clearance officer.

1254. The effect is that s170(1) is only complied with by way of using an authorised system so long as a clearance officer has not also required the person to present or provide evidence, information or personal identifiers.

Item 19 – Subsection 170(2A) (heading)

1255. This item repeals the heading in subsection 170(2A) of the Migration Act and substitutes ‘*Personal identifiers provided under paragraph (1)(c) or (d)*’ to reflect amendments made to subsection 170(1) above.

Item 20 – Subsection 170(2A)

1256. This item omits “paragraph (1)(a) and subsection (2), a person may only be required to present or” and substitutes “paragraphs (1)(c) and (d), a person may only be required to”.

1257. This amendment is consequential to amendments made to subsections 170(1) and (2) and ensures that subsection 170(2A) refers to the relevant provisions in light of those amendments.

Item 21 – Paragraph 170(2A)(c)

1258. This item makes a technical amendment to paragraph 170(2A)(c) of Division 5 of Part 2 of the Migration Act and inserts the terms “of a type” after “identifier” in this paragraph.

1259. This amendment ensures that identifiers of a type found in a passport or travel document may be collected by way of identification test.

Item 22 – Subsection 170(3)

1260. This item repeals subsection 170(3) of Part 2 of Division 5 of the Migration Act as it is considered redundant. It is considered redundant to provide that subsection 170(2) does not limit a clearance authority’s power under paragraph (1)(a) as paragraph 170(1)(a) clearly provides that the evidence might include a personal identifier.

1261. This is a technical change only and no substantive change to the operation of the provisions is intended by the repeal of subclause (3).

Item 23 – Subsection 170(4)

1262. This item repeals subsection 170(4) (including the note) and substitutes new 170(4) in Division 5 of Part 2 of the Migration Act.

1263. New subsection 170(4) provides that a person is taken not to have complied with a requirement to provide a personal identifier under new paragraphs (1)(c) or (d), unless the personal identifier is provided by way of one or more identification tests carried out by an authorised officer or authorised system.

1264. New subsection 170(4) is similar to repealed subsection 170(4) except that it:

- expands the provision to apply to citizens as well as non-citizens (by referring to “persons”)
- adds in a reference to new paragraphs 170(1)(c) and (d), and
- refers to identification tests carried out by an authorised system, as well as by an authorised officer.

1265. These amendments are consequential to amendments made to section 170(1) which ensure that personal identifiers may also be obtained by an authorised system and may also be obtained from citizens.

1266. The effect and purpose of these amendments is to ensure that the requirements to provide personal identifiers in paragraphs 170(1)(c) and (d) cannot be met, by either a citizen or non-citizen, unless they are provided by way of an identification test carried out by an authorised officer or authorised system. This ensures that the requirements cannot be met by providing personal identifiers as already contained in a passport, for example, but must be collected by an authorised officer or authorised system by way of an identification test.

1267. The amendment also repeals the note from beneath subsection 170(4) as it was considered unnecessary. There is no change to the operation of section 5D or how it relates to subsection 170(4) in relation to authorised officers. This is a technical change only.

Items 24 to 25 – Subsection 170(5) and paragraph 170(5)(a)

1268. Subsection 170(5) is amended to:

- expand the provision to apply to citizens as well as non-citizens, by referring to “persons” in subsection 170(5), and
- refer to identification tests carried out by an authorised system, as well as by an authorised officer, in paragraph 170(5)(a).

1269. These amendments are consequential to amendments made to section 170(1) which ensure that personal identifiers may also be obtained by an authorised system and may also be obtained from citizens.

Item 26 – Subsection 175(1)

1270. This item makes a technical amendment to replace the reference to “to leave Australia (whether or not after calling at places in Australia” with a reference to “due to depart from a place in Australia to a place outside Australia (whether or not after calling at other places in Australia”.

1271. The amendment is to provide consistency with terminology in other sections in the Act.

1272. This is a technical change only and no change to the operation of the provision is intended.

Item 27 – Paragraphs 175(1)(a) and (b)

1273. This item replaces the reference to “the officer or authorised system” with a reference to “a clearance authority”. Clearance authority is defined to mean a clearance officer or an authorised system.

1274. This amendment simplifies the terminology as well as ensuring that the officer who requires the personal identifiers does not have to be same officer as the officer to whom the personal identifiers are provided.

Item 28 – At the end of subsection 175(1)

1275. This item adds new paragraphs 175(1)(c) and (d) to the end of subsection 175(1) of the Migration Act and is similar to amendments at Item 3 which insert paragraphs 166(1)(c) and (d).

1276. Paragraphs 175(1)(a) and (b) empower a clearance officer to require a person who is on board, or about to board, a vessel that is due to depart from a place in Australia to present certain evidence and provide certain information to the clearance officer or an authorised system at either or both ports. Subsection 175(2) currently provides that if prescribed circumstances exist, a non-citizen must be required by a clearance authority to provide one or more personal identifiers referred to in subsection (2A) to a clearance officer at either or both ports.

1277. New paragraph 175(1)(c) is similar to subsection 175(2) (which is repealed by the amendments at Item 16 except that the new paragraph 170(1)(c)):

- is expanded to also apply to citizens,
- no longer compels a clearance authority to require a personal identifier in “prescribed circumstances” (instead a clearance officer is given a discretion to require a person to provide a personal identifier),
- allows a clearance officer to require a person to provide a personal identifier to either a “clearance officer” or an “authorised system” (due to the use of the term “clearance authority” which is defined in section 165).

1278. This item also inserts new paragraph 175(1)(d). The effect of new paragraph 175(1)(d) is that if under paragraph 175(1)(a) a person presents evidence to an authorised system, the person must also provide to the authorised system a photograph or any other personal identifier referred to in subsection 175(2A) that is prescribed by the regulations. New subsection 175(4) ensures that these personal identifiers must be provided by way of an identification test.

1279. The purpose of this amendment is to ensure that authorised systems such as eGate can collect and retain personal identifiers without having to “require” a person to provide those personal identifiers. This reflects that facial images will always be collected and retained when a person uses an authorised system.

Item 29 – Subsection 175(2)

1280. This item repeals subsection 175(2) and substitutes new subsection 170(2).

1281. Current subsection 175 (2) provides that where prescribed circumstances exist, a non-citizen who travels, or appears to intend to travel, on an overseas vessel from a port to another port must be required by a clearance authority at either or both ports to provide one or more personal identifiers referred to in subsection (2A) to a clearance officer.

1282. The effect of current subsection 175(2) has now been re-located to paragraphs (1)(c) and (d) and amended slightly as explained in item 28 above.

1283. New subsection 175(2) provides a new heading ‘*Complying with subsection (1)*’ and provides that a person is to comply with subsection (1) in a prescribed way, similar to the way that subsection 166(3) operates.

Item 30 – Subsection 175(2AA)

1284. This item omits “present evidence, or provide information” and substitutes “present or provide evidence, information or personal identifiers” in subsection 175(2AA) in Division 5 of Part 2 of the Migration Act.

1285. The amendment is consequential to amendments made to section 175 which ensure that personal identifiers may be provided to an authorised system.

Item 31 – Subparagraph 175(2AA)(c)(i)

1286. This amendment removes the reference to ‘the system’ from subparagraph 175(2AA)(c)(i).

1287. This amendment ensures that a person may only use an authorised system if, amongst other requirements, a clearance officer does not require evidence to be provided to a clearance officer.

1288. The effect is that s175(1) is only complied with by way of using an authorised system so long as a clearance officer has not also required the person to present or provide evidence, information or personal identifiers.

1289. This item also makes a consequential amendment to remove the reference to subsection (2) the effect of subsection (2) has now been subsumed into subsection (1) as explained in item 27 above.

Item 32 – Subsection 175(2A) (heading)

1290. This item amends the heading to subsection 175(2A) as a consequence of amendments made to restructure subsection 175(1). The amendment ensures that the heading refers to the relevant provisions in subsection 175(1) after its amendment and to clarify what this subsection is about.

Item 33 – Subsection 175(2A)

1291. This item amends subsection 175(2A) as a consequence of amendments made to subsection 175(1). The amendment ensures that subsection 175(2A) refers to the relevant provisions in subsection 175(1) after its amendment and that the terminology is consistent.

Item 34 – Paragraph 175(2A)(c)

1292. This item makes a technical amendment to paragraph 175(2A)(c) of Division 5 of Part 2 of the Migration Act and inserts the terms “of a type” after “identifier” in this paragraph.

1293. This amendment ensures that identifiers of a type found in a passport or travel document may be collected by way of identification test

Item 35 – Subsection 175(3)

1294. This item repeals subsection 175(3) of Part 2 of Division 5 of the Migration Act as it is considered redundant. It is considered redundant to provide that subsection 175(2) does not limit a clearance authority’s power under paragraph (1)(a) as paragraph 175(1)(a) clearly provides that the evidence might include a personal identifier.

1295. This is a technical change only and no substantive change to the operation of the provisions is intended by the repeal of subsection (3).

Item 36 – Subsection 175(4)

1296. Subsection 175(4) currently provides that where there is a requirement for a non-citizen to provide personal identifiers under certain provisions in section 175, the requirement is taken not to have been met unless it was given by way of one or more identification tests carried out by an authorised officer.

1297. This amendment adds a reference to an “authorised system” to ensure that the requirement is met if the identification test was carried out by an authorised system as well as by an authorised officer. This amendment is consequential to other amendments made that ensure that an authorised system can collect personal identifiers by way of an identification test.

1298. The amendment also replaces the reference to “non-citizens” with “persons”. The effect and purpose of the amendment is to ensure that that the provision applies to both Australian citizens and non-citizens. This amendment is consequential to other amendments made to section 175 which ensure that personal identifiers may be collected from Australian citizens when departing Australia, as well as from non-citizens.

1299. This amendment also replaces the reference to subsection 175(2) with a reference to paragraphs 175(1)(c) and (d). These amendments are consequential to amendments made which restructure subsections 175(1) and (2). It ensures that the relevant provisions are now referred to in light of the amendments to subsections 175(1) and (2).

1300. The amendment also repeals the note from beneath subsection 175(4) as it was considered unnecessary. There is no change to the operation of section 5D or how it relates to subsection 175(4) in relation to authorised officers. This is a technical change only.

Item 37 – Subsection 175(5)

1301. The amendment replaces the reference to “non-citizen” with “person”. The effect and purpose of the amendment is to ensure that that the provision applies to both Australian citizens and non-citizens.

1302. This amendment is consequential to other amendments made to section 175 which ensure that personal identifiers can be collected from Australian citizens, as well as from non-citizens.

Item 38 – Paragraph 175(5)(a)

1303. This amendment adds a reference to “an authorised system” after “an authorised officer”. The amendment is consequential to other amendments made to ensure that an authorised system can collect personal identifiers.

Item 39 – At the end of Division 5 of Part 2

1304. This item inserts a new provision, section 175B, into Division 5 of Part 2 of the Act.

1305. The purpose of new subsection 175B(1) is to ensure that where a person presents a ‘document’ (within the meaning set out in the *Acts Interpretation Act 1901*) to a clearance authority, the information, including any personal identifiers, in the document may be collected and retained by DIBP. It is intended that this would include copying or scanning the document. It would also include collecting any information stored electronically in the document.

1306. For example, where a passport is presented to a clearance authority, the clearance authority may make a copy of, or scan, the passport, including collecting any information stored electronically in the passport.

1307. The purpose of new subsection 175B(2) is to ensure that any personal information collected under Division 5 of Part 2 of the Act may be accessed, used and disclosed in the same way as identifying information, as defined in Part 4A of the Act, may be accessed, used and disclosed. The offences provided in Part 4A do not apply to the access, use and disclosure of personal information under this Division.

1308. For example, where information is collected from a passport, which contains both personal identifiers (such as a photo and signature) and personal information (such as a name and date of birth), this information may be accessed, used and disclosed together and in the same way without having to identify separate authorisation under the Privacy Act for the personal information.

1309. The purpose of new subsection 175B(3) is to ensure that these provisions only relate to information collected, accessed, used and disclosed under Division 5 of Part 2 of the Act and do not impact on the interpretation of any other provision in the Act or instrument made under the Act.

Item 40 – Section 258

1310. This item amends section 258 of the Migration Act by omitting all references to “non-citizens” and substituting the word “persons”. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4).

1311. This amendment ensures that the Minister may make a determination under section 258 that a personal identifier is not required from certain Australian citizens and non-citizens.

Item 41 – Section 258A (heading)

1312. This item repeals the heading to section 258A of the Migration Act and substitutes a new heading “258A When person cannot be required to provide personal identifier”. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4).

1313. The new heading uses the term “person” (instead of “non-citizen”) to ensure that the prohibition on requiring a person to provide a personal identifier in certain circumstances operates to prevent Australian citizens and non-citizens from being required to provide a personal identifier in those circumstances.

Item 42 – Subsection 258B(1)

1314. This item amends subsection 258B(1) of the Migration Act by omitting the words “carrying out an identification test on a non-citizen” and substituting the words “an authorised officer carries out an identification test on a person”. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow an authorised officer or authorised system to obtain personal identifiers from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4).

1315. The reference to an “authorised officer” carrying out an identification test in amended subsection 258B(1) ensures that section 258B does not apply to an identification test carried out by an “authorised system”. Section 258B only applies to an identification test undertaken by an “authorised officer” because it would be impractical for an “authorised system” such as eGate to inform a person of the matters prescribed under section 258B as the person passes through the gate. Although section 258 does not apply to identification tests carried out by an “authorised system”, Australian Privacy Principle 5 of the *Privacy Act 1988* will require certain information to be provided “as soon as practicable after” a person provides a personal identifier to an “authorised system”. The use of the word “person” (instead of “non-citizen”) in amended subsection 258B(1) ensures that an Australian citizen must be informed of the same matters as a non-citizen before an identification test is carried out by an authorised officer.

Item 43 – Paragraphs 258B(1)(a) and (b)

1316. This item amends paragraphs 258B(1)(a) and (b) of the Migration Act by omitting the words “the non-citizen” and substituting the words “the person”. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4). The amendment ensures that an Australian citizen must be informed of the same matters as a non-citizen before an identification test is carried out by an authorised officer.

Item 44 – Subsections 258B(2) and (3)

1317. This item amends subsections 258B(2) and (3) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4).

The amendment ensures that an Australian citizen must be informed of the same matters as a non-citizen before an identification test is carried out by an authorised officer.

Item 45 — Section 258C (heading)

1318. This item repeals the heading to Section 258C of the Migration Act and substitutes a new heading: “258C Information to be provided when identification tests not carried out”. This amendment is consequential to the amendments at Items 13, 25 and 38 which allow either an “authorised officer” or “authorised system” to obtain personal identifiers under amended subsections 166(8), 170(5) and 175(5) otherwise than by way of an identification test. The heading no longer refers to an identification test carried out by an “authorised officer” to reflect that either an “authorised officer” or “authorised system” can obtain personal identifiers otherwise than by way of an identification test.

Item 46 – Section 258C

1319. This item amends section 258C of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments at Items 12, 25 and 38 which allow personal identifiers to be obtained from Australian citizens under amended subsections 166(8), 170(5) and 175(5) otherwise than by way of an identification test.

The amendment ensures that an Australian citizen must be informed of the same prescribed matters as a non-citizen before a personal identifier is provided otherwise than by way of an identification test carried out by an “authorised officer” or “authorised system”.

Item 47 – Subsection 258D(1)

1320. This item repeals subsection 258D(1) of the Migration Act and substitutes a new subsection 258D(1) which provides that the regulations may prescribe the manner in which an identification test is to be carried out on a person under section 40, 46, 166, 170, 175, 188 or 192. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow an “authorised officer” or an “authorised system” to obtain personal identifiers from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4). New subsection 258D(1) refers to “an identification test” (instead of an identification test carried out by an authorised officer) to ensure that any regulations made under subsection 258D(1) can prescribe the manner in which either an “authorised officer” or “authorised system” carries out an identification test. New subsection 258D(1) also uses the term “person” (instead of non-citizen) to ensure that any regulations made under subsection 258D(1) can also prescribe the manner in which an identification test is carried out on Australian citizens (as well as on non-citizens).

Item 48 – Subsection 258D(2)

1321. This item amends subsection 258D(2) of the Migration Act by omitting the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments to subsections 166(8), 170(5) and 175(5) at Items 12, 24 and 37 which allow Australian citizens and non-citizens to provide personal identifiers otherwise than by way of an identification test. The use of the term “person” (instead of non-citizen) in subsection 258D(2) ensures that regulations can prescribe the procedure and requirements that apply to both Australian citizens and non-citizens who provide a personal identifier otherwise than by way of an identification test.

Item 49 – Subsection 258D(2)

1322. This item amends subsection 258D(2) of the Migration Act by omitting the words “carried out by an authorised officer”. This amendment is consequential to the amendments to subsections 166(7), 170(4) and 175(4) at Items 11, 23 and 36 which provide that a person is taken not to have complied with a requirement to provide a personal identifier under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) or paragraphs 175(1)(c) or (d) unless the personal identifier is provided by way of one or more identification tests carried out by an “authorised officer” or “authorised system”.

1323. The amendment ensures that any regulations made under subsection 258D(2) can prescribe the procedure and requirements that apply if a personal identifier is provided otherwise than by way of an identification test carried out by either an “authorised officer” or an “authorised system”.

Item 50 – Section 258E

1324. This item amends section 258E of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments at Items 3, 11, 15, 23, 28 and 36 which allow an “authorised officer” or an “authorised system” to obtain personal identifiers from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4). The amendment ensures that an identification test carried out by an authorised officer to obtain a personal identifier from an Australian citizen is subject to the same rules and safeguards that apply when an authorised officer carries out an identification test to obtain a personal identifier from a non-citizen.

1325. Section 258E does not apply to an identification test undertaken by an “authorised system” because the safeguards in that section are ill-suited to authorised systems such as eGate. For example, it is not possible for eGates to carry out an identification test to obtain a facial image away from the view of other people because the systems are in public places (subsections 258E(a) and (b) refer). Similarly, the rules limiting the amount of visual inspection and the removal of clothing (subsections 258E(d) and (e) refer) are not relevant to identification tests undertaken by authorised systems.

Item 51 – Subsection 261AL(1)

1326. This item amends subsection 261AL(1) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is

consequential to the amendments at Items 3, 11, 15, 32, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4). The amendment ensures that all persons under 15 years old (whether an Australian citizen or non-citizen) must not be required to provide a personal identifier other than a measurement of their height and weight or photograph or other image of their face and shoulders.

Item 52 – Paragraphs 261AL(1)(a) and (b)

1327. This item amends paragraphs 261AL(1)(a) and (b) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment achieves the same result as the amendment to subsection 261AL(1) at Item 51.

Item 53 – Subsection 261AL(5)

1328. This item amends subsection 261AL(5) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments at Items 3, 11, 15, 32, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4). The amendment ensures that an identification test carried out by an authorised officer to obtain a personal identifier from a minor who is an Australian citizen, must be carried out in the presence of a parent or guardian of the minor or an independent person. The effect of the amendment is that minors who are Australian citizens are subject to the same safeguards as minors who are non-citizens. Subsection 261AL(5) of the Migration Act does not apply to an identification test undertaken by an authorised system. This is because it is not possible for more than one person to be present in an eGate booth which is designed to only allow one person through at a time to prevent other persons passing through the gates without authorisation.

Item 54 – Subsection 261AM(1)

1329. This item amends subsection 261AM(1) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments at Items 3, 11, 15, 32, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4).

1330. The amendment ensures that an “incapable person” who is an Australian citizen must not be required to provide a personal identifier other than a measurement of their height and weight or photograph or other image of their face and shoulders. The terms “incapable person” is defined in subsection 5(1) of the Migration Act to mean “a person who is incapable of understanding the general nature and effect of, and purposes of, a requirement to provide a personal identifier”. The amendment ensures that “incapable persons” who are Australian citizens are subject to the same safeguards as “incapable persons” who are non-citizens.

Item 55 – Paragraphs 261AM(1)(a) and (b)

1331. This item amends paragraphs 261AM(1)(a) and (b) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendment at Item 54 and achieves the same result.

Item 56 – Subsection 261AM(4)

1332. This item amends subsection 261AM(4) of the Migration Act by omitting all references to the word “non-citizen” and substituting the word “person”. This amendment is consequential to the amendments at Items 3, 11, 15, 32, 28 and 36 which allow personal identifiers to be obtained from Australian citizens as well as non-citizens under new paragraphs 166(1)(c) or (d), paragraph 170(1)(c) or (d) and paragraphs 175(1)(c) or (d) as read with new subsections 166(7), 170(4) and 175(4). The amendment ensures that an identification test carried out by an authorised officer to obtain a personal identifier from an “incapable person” who is an Australian citizen, must be carried out in the presence of a parent or guardian of the “incapable person” or an independent person. The effect of the amendment is that “incapable persons” who are Australian citizens are subject to the same safeguards as “incapable persons” who are non-citizens.

1333. Subsection 261AM(4) of the Migration Act does not apply to an identification test undertaken by an authorised system. This is because it is not possible for more than one person to be present in an eGate booth which is designed to only allow one person through at a time to prevent unauthorised passage through the gate.

Item 57 – Paragraph 336D(2)(g)

1334. This item amends paragraph 336D(2)(g) of the Migration Act by repealing the existing paragraph and substituting new paragraph 336D(2)(g). This amendment ensures that the Secretary may authorise access to identifying information for the purpose of:

- the Migration Act or instruments made under the Migration Act, or
- the Citizenship Act or instruments made under that Act, or
- the Customs Act or instruments made under that Act, or
- any other law of the Commonwealth prescribed by regulations.

Item 58 – Subparagraph 336E(2)(a)(iii)

1335. This item amends paragraph 336E(2)(a) of the Migration Act by repealing existing subparagraph 336E(2)(a)(iii) and substituting new subparagraphs 336E(2)(a)(iii) and (iiia).

1336. New subparagraph 336E(2)(a)(iii) is identical to repealed subparagraph 336E(2)(a)(iii) except that it no longer refers to “non-citizens who are of national security concern” as the disclosure of identifying information regarding these persons is now permitted by new subparagraph 336E(2)(a)(iiia).

1337. New subparagraph 336E(2)(a)(iiia) is similar to the amendment to paragraph 5A(3)(g) at Item 1 and ensures that it is permissible to disclose identifying information for the purpose of data-matching in order to identify, or authenticate the identity of persons who may be a security concern to Australia or a foreign country.

Item 59 – After paragraph 336E(2)(b)

1338. This item amends subsection 336E(2) of the Migration Act by inserting new paragraph 336E(2)(ba) after paragraph 336E(2)(b). This amendment ensures that it is also permissible to disclose identifying information for the purpose of:

- the Migration Act or instruments made under the Migration Act, or
- the Citizenship Act or instruments made under that Act, or
- the Customs Act or instruments made under that Act, or
- any other law of the Commonwealth prescribed by regulations.

Item 60 – After paragraph 366E(2)(eb)

1339. This item amends subsection 336E(2) of the Migration Act by inserting new paragraphs 336E(2)(ec) and (ed) after paragraph 366E(2)(eb).

1340. New paragraph 336E(2)(ec) ensures that it is permissible to disclose identifying information for the purpose of “identifying non-citizens who have a criminal history or who are of character concern. An identical ground for disclosure already exists in subparagraph 336E(2)(a)(iii), however, that paragraph only applies if the disclosure is also for the purpose of “data-matching”. New paragraph 336E(2)(ec) ensures that identifying information may be disclosed for the purpose of “identifying non-citizens who have a criminal history or who are of character concern in circumstances where the disclosure is not for the purpose of data-matching (for example when responding to case specific enquiries).

1341. New paragraph 336E(2)(ed) ensures that it is permissible to disclose identifying information for the purpose of identifying persons who may be a security concern to Australia or a foreign country in circumstances where the disclosure is not for the purpose of data-matching. Similar disclosures grounds for data-matching purposes are permitted by new subparagraph 336E(2)(a)(iii) which is inserted by the amendments at Item 58.

Part 2 – Application of amendments

Item 61 – Application of amendments

1342. Item 61 provides that the amendments to the Migration Act made by Part 1 of this Schedule apply as follows:

- The amendment made by Item 1 of this Schedule, as it affects section 336A, 336D or 336F of the Migration Act, applies in relation to personal identifiers provided before or after the commencement of this Schedule.
- The amendment made item 39 of this Schedule applies in relation to (a) documents or information presented or provided; or (b) personal information collected before or after the commencement of this Schedule.
- The amendments made by items 57 to 60 apply in relation to personal identifiers and personal information collected before or after the commencement of this Schedule.

Schedule 6 – Identifying persons entering or leaving Australia through advanced passenger processing

Part 1 – Amendment of the *Migration Act 1958*

Division 1 – Amendments

Items 1 to 2 – Paragraph 5A(3)(c) and paragraph 5A(3)(ca)

1343. These items omit the words “, including passenger processing at Australia’s border” from paragraph 5A(3)(c) and insert new paragraph 5A(3)(ca).

1344. Subsection 5A(1) defines the meaning of personal identifier. Subsection 5A(3) sets out the purposes that must be promoted before any new personal identifiers are prescribed under paragraph 5A(1)(g). The purposes in subsection 5A(3) are also cross referenced in paragraphs 336D(2)(a) and 336F(2) which provide for the access and disclosure of “identifying information” which is relevantly defined in section 336A to include “any personal identifier obtained by the Department for one or more of the purposes referred to in subsection 5A(3)”.

1345. New paragraph 5A(3)(ca) provides that one of the purposes under paragraph 5A(2)(c) is to improve passenger processing at Australia’s border. Purposes identified under paragraph 5A(2)(c) are the purposes for which the Governor-General may prescribe an identifier as a personal identifier under paragraph 5A(1)(g).

1346. Existing paragraph 5A(3)(c) provides that one purpose is “to improve the integrity of entry programs, including passenger processing at Australia’s border”. The amended paragraph 5A(3)(c) will omit the clarifying passage, as it would be redundant due to the insertion of new paragraph 5A(3)(ca).

1347. In combination, these items ensure that personal identifiers may be obtained, accessed, used and disclosed for the purposes of improving passenger processing at Australia’s borders.

Item 3 – Paragraph 5A(3)(ca)

1348. This item inserts the words “or from” after the words “voyage to” in 245I(2)(b). This amendment is a technical amendment and is consequential to the insertion of new section 245LA by item 12.

Item 4 – Subsections 245J(3) and 245K(2)

1349. This item inserts the words “(including personal identifiers)” after the word “information” in subsections 245J(3) and 245K(2).

1350. Current subsection 245J(3) requires that an instrument of approval of a system for reporting on passengers or crew must specify the information about passengers and crew that is to be reported by that system.

1351. Current subsection 245K(2) provides a similar requirement for instruments of approval for fall-back reporting systems.

1352. The purpose of this amendment is to clarify that information that an approved system may be required to report on can include personal identifiers.

Item 5 – Section 245L (heading)

1353. This item repeals the current heading “245L Obligation to report on passengers and crew” and substitutes the new heading “245L Obligation to report on persons arriving in Australia”.

1354. The purpose of this amendment is to provide greater clarity that section 245L deals only with reports on arriving persons, not reports on all passengers and crew, which would include departing persons. It also assists in distinguishing the function of section 245L from new section 245LA.

Items 6 to 7 – Subsection 245L(1) and paragraphs 245L(2)(a) and (b)

1355. These items omit the words “an airport or port” from subsection 245L(1) and paragraphs 245L(2)(a) and 245L(2)(b) and substitutes them with the words “a place”, in the case of subsection 245L(1), and “place in Australia”, in the case of paragraphs 245L(2)(a) and 245L(2)(b).

1356. Current subsection 245L(1) provides that section 245L applies to an aircraft or ship of a kind to which Division 12B applies that is due to arrive at an airport or port in Australia from a place outside Australia. Current subsection 245L(2) relevantly provides that the operator of the aircraft or ship must report on each passenger and crew member who will be on board the aircraft or ship at the time of its arrival at the airport or port.\

1357. The purpose of these amendments is to ensure that an aircraft or ship to which Division 12B applies cannot avoid the reporting requirements under the Division by arriving in Australia otherwise than at an airport or port. The equivalent provisions for departure under section 245LA are similarly broad.

1358. It is intended that this consistency in reporting will provide a more complete picture of who is arriving in and departing from Australia, which will aid in the management of the departure from and arrival in Australia of persons of concern.

Item 8 – Subsection 245L(2) (note 1)

1359. This item omits the words “(and the obligation in subsection (6))” from note 1 under subsection 245L(2).

1360. This amendment is a technical amendment and is consequential to the repeal of subsection 245L(6).

Item 9 – Paragraphs 245L(4)(a) and (b)

1361. This item omits the word “airport” (wherever occurring) and substitutes the word “place” in paragraphs 245L(4)(a) and 245L(4)(b).

1362. Current paragraphs 245L(4)(a) and (b) provide timeframes for reporting based on an aircraft’s likely time of arrival at the airport in Australia.

1363. This amendment is a technical amendment and is consequential to the broadening of subsection 245L(1) to “a place in Australia”.

Item 10 – Paragraphs 245L(5)(a) and (b)

1364. This item inserts the words “at the place in Australia” after the word “arrival” in paragraphs 245L(5)(a) and 245L(5)(b).

1365. Current paragraphs 245L(5)(a) and (b) provide timeframes for reporting based on the period before a ship’s time of arrival.

1366. This amendment is a technical amendment and is consequential to the broadening of subsection 245L(1) to “a place in Australia”.

Item 11 – Subsections 245L(6) and (7)

1367. This item repeals subsections 245L(6) and (7). This amendment is a technical amendment and is consequential to the creation of new requirements in new section 245LB that apply to both section 245L and new section 245LA.

Item 12 – Section 245LA

1368. This item inserts new section 245LA into Division 12B of the Act.

1369. New section 245LA is entitled “245LA Obligation to report on persons departing from Australia”. New section 245LA contains similar requirements to section 245L, but where section 245L requires reports on persons arriving in Australia, section 245LA requires reports on persons departing from Australia.

1370. New subsection 245LA(1) provides that section 245LA applies to an aircraft or ship of a kind to which Division 12B applies that is due to depart from a place in Australia on a flight or voyage to a place outside Australia, whether or not after calling at other places in Australia.

1371. The phrase ‘whether or not after calling at places in Australia’, which is included in new subsection 245LA(1), but not subsection 245L(1), is included to reflect that a person may board a flight or voyage that will depart Australia before that flight or voyage’s final stop in Australia, and it may be desirable to receive a report about that person before they board the aircraft or ship, rather than before the aircraft or ship departs Australia. This reflects a fundamental difference between departing and arriving flights or voyages.

1372. Flights and voyages departing Australia may make stops in Australia, and reports on persons on those parts of the flight or voyage may assist in managing the departure of the flight and voyage regardless of whether the persons are present on the final departure part of the flight or voyage. Arriving flights or voyages may also go on to make further stops in Australia, however at that point they have already passed the point of arrival, so further reports would be of no use in managing that arrival.

1373. However, under new subsection 245LA(3), regulations may limit the reporting requirements to only the part of the flight or voyage where the aircraft or ship actually leaves Australia.

1374. New subsection 245LA(2) provides that the operator of the aircraft or ship must, using approved primary reporting systems, report on each passenger or crew member who is on, or is expected to be on the flight or voyage including any part of the flight or voyage. This subsection is similar to subsection 245L(2) in that they both require the operator of an aircraft or ship to use an approved system to report on passengers and crew.

1375. New subsection 245LA(2) is broader than subsection 245L(2) as it extends to people ‘expected to be on’ the flight or voyage. This is intended to address the different levels of certainty on passenger information available at arrival and departure. While arriving aircraft and ships can be definite about who is on board the vessel for several hours or longer prior to arrival, departing aircraft and ships may be expecting passengers who do not eventually board the aircraft or ship, or may not be expecting passengers who join the flight or voyage at the last minute. It is intended that the term ‘expected to be’ will require reports on passengers even if it cannot be definitely ascertained that they will be on the voyage.

1376. It is intended that the words ‘expected to be’ do not limit the operator’s responsibility under new subsection 245LA(2) to report on passengers who are on a flight or voyage. For example, failing to report on a stowaway on a ship would be failing to meet the requirements of new subsection 245LA(2) despite the operator not expecting the stowaway to be on the ship.

1377. To effectively manage the movement of persons of concern, it is necessary that DIBP receive the reports with time to respond, and waiting for absolute certainty on passenger and crew details on departing flights or voyages will not allow adequate response time.

1378. New subsection 245LA(2) is also broader than subsection 245L(2) because it includes the words “including any part of the flight or voyage”. This is to clarify that, subject to the operation of subsection 245LA(3), if a flight or voyage travels to multiple places in Australia before departing Australia, then reports would need to be provided for persons on board each leg of those trips, and that the prescribed times, events and periods in new subsection 245LA(5) may refer to these earlier parts of the flight or journey.

1379. Note 1 under new subsection 245LA(2) provides that the obligation to report under subsection 245LA(2) must be complied with even if the information concerned is personal information

1380. The purpose of this note is to clarify that disclosure by the operator of the aircraft or ship of personal information under subsection 245LA is authorised by law, and so falls under the exception provided by paragraph 6.2(b) of Australian Privacy Principle 6.

1381. New subsection 245LA(3) limits new subsection 245LA(2) by requiring that if:

- on the flight or voyage, the aircraft or ship calls at one or more places in Australia before departing to the place outside Australia and
- the regulations prescribe that a report under subsection 245LA(2) must only relate to the part of the flight or voyage that is from the last place in Australia to the place outside Australia

then the report must be for each passenger or crew member who is on, or is expected to be on, that part of the flight or voyage.

1382. The purpose of new subsection 245LA(2) is to ensure that in the situation where a flight or voyage is calling in multiple places in Australia before departing Australia, there is the flexibility to determine whether a report is necessary on every person on each part of the flight or voyage; there is flexibility to prescribe reporting on every person who is or is expected to be on the final part of the flight or voyage only under subsection 245LA(3).

1383. The intention behind enabling these requirements to be prescribed in regulation is to provide flexibility to deal with a number of complex operating situations, for example in cases where an aircraft or ship may be leaving a major airport or port, calling on a remote place in Australia where reporting is limited and then departing Australia. In these cases it may be desirable to receive reports on all persons on both parts of the voyage, rather than just the part from the remote place.

1384. By prescribing the requirement in the regulations rather than in the Act it allows the flexibility to modify the arrangements more easily to match changes in the operating environment.

1385. While regulations made under new subsection 245LA(3) may only require a report on the passengers who are on a specific part of the flight or voyage, paragraph 254LA(5)(b) is intended to provide sufficient flexibility that a report on a passenger who will be travelling on the specified part of the flight or voyage could be required from the point that they check in for their flight or voyage, even if they are first travelling on a part of the flight or voyage on for which a report is not required.

1386. New subsection 245LA(4) provides that a report under new subsection 245LA(2) must include the information relating to a passenger or crew member specified in relation to the relevant approved primary reporting system. The information required by an approved primary reporting system is specified in an instrument made under subsection 245J(3).

1387. The purpose of new subsection 245LA(4) is to require information specified under the relevant approved reporting system to be provided. Different reports may be required from different modes of transport as well as from different types of flights and voyages, where different systems may be used or different information may be specified.

1388. New subsection 245LA(5) provides that a report on a passenger or crew member under subsection 245LA(2) must be provided:

- if the regulations prescribe a period or periods before the aircraft's or ship's departure from a place for the giving of a report under subsection 245LA(2) in relation to the passenger or crew member—not later than that period or each of those periods, and
- if the regulations prescribe an event or events for the giving of a report under subsection (2) in relation to the passenger or crew member—at the time of that event or each of those events, and
- if the regulations prescribe a time or times for the giving of a report under subsection (2) in relation to the passenger or crew member—at that time or each of those times.

1389. This provides the flexibility to match the deadline to the operating realities of the different modes of transport, and the long-term flexibility to modify the deadline should those

realities change. It also explicitly allows for multiple periods, events and times to be prescribed, and requires a report for each of those points.

1390. Additionally, given different transport modes may have different processes for boarding passengers and crew, it is not possible to give a specific point in time at which a person is a person ‘expected to be on, any part of the flight or voyage’ that would be appropriate in all cases. Instead, new subsection 245LA(5) effectively provides that the relevant point in time can be prescribed for each mode of travel.

1391. New subsection 245LA(6) provides that to avoid doubt, more than one report may be required to be provided under subsection 245LA(2) in relation to a passenger or crew member. This reflects the explicit reference to multiple periods, events and times that can be prescribed for the purposes of new subsection 245LA(5).

1392. The purpose of explicitly providing for the requirement to provide multiple reports is to ensure that an operator can be required to provide a later report even if they have provided an earlier report. Again, this reflects the uncertainty that can exist on departure data up until the point that the aircraft or ship actually departs. It is intended that when multiple reports are required, the information will likely become increasingly accurate as the time of the report gets closer to the time of departure.

1393. The purpose of the note under paragraph 245LA(6) is to provide an example that further clarifies that if reports are required under multiple paragraphs of new subsection 245LA(5), then all those reports must be made.

1394. The overall purpose of new section 245LA is to ensure that reports on departing persons can be required in a sufficient time in advance of the person’s departure from Australia that DIBP can more efficiently manage the departure of persons from Australia, particularly the departure of persons of concern.

Item 13 – Before section 245M

1395. This item inserts new section 245LB into Division 12B of the Act. The new section is entitled “245LB Dealing with information collected under this Division etc.”

1396. New subsection 245LB(1) provides that DIBP may collect information (including personal identifiers) provided in a report provided under Division 12B.

1397. The purpose of new subsection 245LB(1) is to ensure that where an operator provides a report required under section 245L or 245LA to DIBP, the information, including any personal identifiers, in the report may be collected and retained by DIBP.

1398. New subsection 245LB(2) provides that the following provisions:

- section 336D (which authorises access to identifying information)
- section 336E (other than subsection 336E(1)) and section 336F (which authorise disclosure of identifying information), and
- a provision of an instrument made under section 336D or 336F

apply to personal information (other than personal identifiers) collected under Division 12B or under subsection 64ACA(11) or 64ACB(8) of the Customs Act in the same way as they apply to identifying information.

1399. The purpose of new subsection 245LB(2) is to ensure that any personal information collected under Division 12B may be accessed, used and disclosed in the same way as identifying information, as defined in Part 4A of the Act, may be accessed, used and disclosed. The offences provided in Part 4A do not apply to the access, use and disclosure of personal information under this Division.

1400. For example, where a report included both identifying information (such as a photo or signature) and personal information (such as a name or date of birth), this information may be accessed, used and disclosed together and in the same way without having to identify separate authorisation under the Privacy Act for the personal information.

1401. New subsection 245LB(3) provides that as soon as practicable after information is reported under section 245L or 245LA, DIBP must provide the information to Customs. This requirement mirrors and replaces the current requirement in subsection 245L(6) being repealed by this bill in item 11, and extends that requirement to include information received on departing persons under new section 245LA. This extension is consequential to the creation of the new reporting requirements under section 245LA.

1402. The purpose of including the phrase ‘including personal identifiers’ is to clarify that personal identifiers are not exempt from the requirement that information be provided to Customs.

1403. New subsection 245LB(4) provides that 245LB does not, by implication, affect the interpretation of any other provision of the Migration Act or an instrument made under the Migration Act.

1404. The purpose of new subsection 245LB(4) is to ensure that these provisions only relate to information collected, accessed, used and disclosed under Division 12B of Part 2 of the Act and do not impact on the interpretation of any other provision in the Act or instrument made under the Act.

Item 14 – Subsection 245M(2)

1405. This item omits the words “Section 245L applies” from subsection 245M(2) and substitutes the words “Sections 245L and 245LA apply”.

1406. This amendment is a technical amendment and is consequential to the insertion of new section 245LA by item 12.

Item 15 – Paragraph 245M(2)(a)

1407. This item omits the words “paragraph 245L(2)(a) or (b)” from paragraph 245M(2)(a) and substitutes the words “subsections 245L(2) and 245LA(2)”.

1408. This amendment is a technical amendment and is consequential to the insertion of new section 245LA by item 12.

Item 16 – Paragraph 245M(2)(b)

1409. This item omits the words “subsection 245L(3)” from paragraph 245M(2)(b) and substitutes the words “subsections 245L(3) and 245LA(4)”.

1410. This amendment is a technical amendment and is consequential to the insertion of new section 245LA by item 12.

Item 17 – Subsections 245N(1), (2) and (4)

1411. This item inserts the words “or 245LA(2)” after “245L(2)” in subsections 245N(1), 245N(2) 245N(4) and 245M(2)(b).

1412. This amendment is a technical amendment and is consequential to the insertion of new section 245LA by item 12.

Division 2 – Application of amendments made by Part 1

Item 18 – Application of amendments made by Part 1

1413. Sub-item 18(1) provides that the amendments made by items 1 and 2 of this schedule, as they affect section 336A, 336D or 336F of the Migration Act, apply in relation to personal identifiers and personal information provided before, on or after the commencement of this Schedule.

1414. The purpose of these sections is to ensure that after commencement, relevant personal identifiers and personal information are able to be accessed and disclosed regardless of when they are collected.

1415. Sub-item 18(2) provides that the amendments made by item 4 apply in relation to an aircraft or ship arriving at a place in Australia on or after that commencement.

Sub-item 18(3) provides that sub-item 18(2) does not apply to the extent that it would require a report given before that commencement to include a personal identifier.

1416. Sub-item 18(4) provides that the amendments made by items 6, 7, 9 and 10 apply in relation to an aircraft or ship arriving at a place in Australia (whether or not an airport or a port) on or after that commencement. However sub-item 18(5) provides that, if the aircraft or ship arrives at a place that is not an airport or port, then sub-item 18(4) does not apply to the extent that it would require a report in relation to that arrival to be given before that commencement.

1417. Sub-item 18(6) provides that the amendments made by items 3,4,12,14,15,16 and 17 apply in relation to an aircraft or ship departing from a place in Australia on or after that commencement. Sub-item 18 (7) provides however that, sub-item 18(6) does not apply to the extent that it would require a report to be given before that commencement.

1418. The combined effect of sub-items 18(2) through 18(7) is to ensure that the new reporting requirements consistently apply to all arrivals and departures from commencement of the Schedule, but that they do not do so retrospectively to require reports from before commencement under the new framework.

1419. It is intended that this may mean that in the departure context, where multiple reports may be required under new subsection 245LA(5), that only the reports that fall due after commencement would be required.

1420. Sub-item 18(8) provides that the amendment made by item 13 applies in relation to information in reports provided on or after that commencement.

As reports under the new provision are only required from the time of commencement, it is appropriate for item 13 to apply from time of commencement.

1421. Sub-item 18(9) provides that if:

- an instrument was made for the purposes of a provision of the Migration Act, and
- the instrument was in force immediately before the commencement of this Schedule, and
- the provision is amended by Schedule 6

then the instrument continues in force (and may be dealt with) as if it were made for the purposes of that provision as amended.

1422. Sub-item 18(9) is a saving provision, the purpose of the sub-item is to ensure that existing instruments, for example instruments made under 245J(1), continue in force on the commencement of these provisions.

Part 2 – Amendment of the *Customs Act 1901*

Item 19 – Paragraphs 64ACA(12)(B) and 64ACB(9)(b)

1423. This item omits the words “subsection 245L(6)” and substitutes the words “section 245LB” in paragraphs 64ACA(12)(b) and 64ACB(9)(b) of the Customs Act. This substitution is consequential to the repeal of subsection 245L(6) and its replacement by the similar but broader section 245LB.

Schedule 7 – Seizing bogus documents

Part 1 – Amendment of the *Migration Act 1958*

Division 1 – Main amendments

Item 1 – Section 103

1424. Item 1 inserts “, produce” after the word “present” in section 103 of the Migration Act.

Item 2 – Section 103

1425. Item 2 inserts “, produced” after the word “presented” in section 103 of the Migration Act.

1426. Section 103 currently requires that a non-citizen must not “give, present or provide” bogus documents or cause such documents to be “given, presented or provided” to an officer, an authorised system, the Minister, or a tribunal performing a function or purpose under the Migration Act.

1427. These amendments clarify that relevant documents must also not be “produced” or “caused to be produced” to a person, system or body mentioned above.

1428. The purpose of these amendments is to clarify that a non-citizen may not use bogus documents when dealing with DIBP, regardless of how the documents are brought to the attention of DIBP.

1429. It is intended that a non-citizen who does so may have his or her visa cancelled under section 109 of the Migration Act or visa application refused under section 65 of that Act, as appropriate.

Item 3 – Before section 487 (heading)

1430. This item inserts a new Division 1, entitled “Bogus documents”, and a new heading of “Division 2 – Other” into Part 9 of the Migration Act. New Division 1 contains new sections 487ZI, 487ZJ, 487ZK and 487ZL. Division 2 contains the existing sections of Part 9.

1431. The provisions in new Division 1 impose a penalty for the use of bogus documents by any person; the penalty being that those documents are “forfeited to the Commonwealth”. The provisions also set out the circumstances in which documents so forfeited would be “condemned as forfeited” to the Commonwealth.

1432. The defined term “bogus document” is proposed to be re-located by the *Migration Amendment (Protection and Other Measures) Bill 2014* from section 97 of the Migration Act into subsection 5(1) of that Act to ensure that the definition applies to the whole Act.

1433. Documents are automatically “forfeited to the Commonwealth” by operation of law where those documents are bogus documents, under new subsection 487ZI(2). When forfeiture takes place, the right to the possession of the forfeited documents rests with the Commonwealth.

1434. Where the right to the possession of the forfeited document is not contested or a court with competent jurisdiction does not support the release of the document to the relevant person (including the owner), the Commonwealth's right to the possession of the forfeited document becomes exclusive. The relevant document is then "condemned as forfeited" to the Commonwealth.

1435. New section 487ZI provides for a prohibition on a person giving, presenting, producing or providing bogus documents (referred to in this Explanatory Memorandum, as "using" the document), and for the forfeiture of such documents if "used".

1436. New subsection 487ZI(1) provides that a person (whether a citizen or non-citizen) must not give, present, produce or provide a bogus document to an officer, an authorised system, the Minister, a tribunal or any other person or body performing a function or purpose under, or in relation to, the Migration Act (the official), or cause such a document to be so given, presented, produced or provided.

1437. Subsection 487ZI(1) partially mirrors the prohibition on the use of bogus documents under section 103 of the Migration Act, but is broader than that provision as it also applies to citizens and prohibits the provision of documents to a wider range of persons and bodies.

1438. New subsection 487ZI(2) provides that a bogus document given, presented, produced or provided in contravention of subsection 487ZI(1) is forfeited to the Commonwealth.

1439. The purpose of this amendment is to remove bogus documents from circulation in the community. By seizing and retaining documents that are bogus, DIBP will assist to prevent such documents from being available to be used for further fraudulent purposes. Fraudulent documents are a known facilitator of crime, including identity theft.

1440. In addition, the purpose is also to deter persons from using bogus documents by imposing a penalty on the use of those documents; that penalty being the forfeiture of relevant documents to the Commonwealth.

1441. When documents are forfeited to the Commonwealth, new section 487ZK sets out the circumstances in which those documents are "condemned as forfeited" to the Commonwealth. The forfeited documents may then be dealt with in accordance with new section 487ZL.

1442. These provisions do not have any impact on the operation of provisions which permit the refusal of a visa application or the cancellation of a visa where a bogus document has been provided. It is not intended that such action would be dependent on the documents being condemned as forfeited.

1443. New section 487ZJ concerns seizure of bogus documents.

1444. New subsection 487ZJ(1) provides that, if an officer reasonably suspects that a document is forfeited under subsection 487ZI(2), then the officer may seize the document.

1445. The purpose of subsection 487ZJ(1) is to ensure that a document that is suspected to be forfeited under new section 487ZI, may be seized.

1446. Providing an officer with discretion to decide whether or not to seize a document that the officer reasonably suspects to be a bogus document, ensures that DIBP has the flexibility to deal appropriately with the broad range of situations that may arise.

1447. New subsection 487ZJ(2) provides that, as soon as practicable after seizing the document, the officer must give written notice of the seizure to the person who gave, presented, produced or provided the document to the official under subsection 487ZI(1).

1448. New subsection 487ZJ(3) provides that the notice must:

- identify the document, and
- state that the document has been seized, and
- specify the reason for the seizure, and
- state that the document will be condemned as forfeited unless the person institutes proceedings against the Commonwealth before the end of the period specified in the notice:
 - to recover the document, or
 - for a declaration that the document is not forfeited.

1449. New subsection 487ZJ(4) provides that, for the purposes of paragraph 487ZJ(3)(d), the period (being the period required to be specified in the notice under subsection 487ZJ(3)) must:

- start on the date of the notice, and
- end 90 days after that date.

1450. The purpose of subsections 487ZJ(2) to (4) is to provide that, when a document is seized under new subsection 487ZJ(1), the relevant person must be notified and the notice must meet the minimum requirements for notification.

1451. New section 487ZK concerns documents condemned as forfeited to the Commonwealth.

1452. New subsection 487ZK(1) provides that, if a document is seized under subsection 487ZJ(1), then:

- the person who gave, presented, produced or provided the document to the official under subsection 487ZI(1), and
- if that person is not the owner of the document – the owner

may, subject to paragraph 487ZK(2)(b), institute proceedings in a court of competent jurisdiction:

- to recover the document, or
- for a declaration that the document is not forfeited.

1453. New subsection 487ZK(2) provides that the proceedings:

- may be instituted even if the seizure notice required to be given under subsection 487ZJ(2) in relation to the document has not yet been given, and

- may only be instituted before the end of the period specified in the seizure notice.

1454. Ensuring that court proceedings could be initiated at any time prior to the end of the period specified in the seizure notice to contest the forfeiture of relevant documents, also ensures that the rights of all affected persons can be considered and decided by a court before those documents are condemned as forfeited to the Commonwealth.

1455. New subsection 487ZK(3) provides that if, before the end of the period specified in the seizure notice, the person or owner does not institute the proceedings, the document is condemned as forfeited to the Commonwealth immediately after the end of that period.

1456. New subsection 487ZK(4) provides that if, before the end of the period specified in the seizure notice, the person or owner does institute the proceedings, the document is condemned as forfeited to the Commonwealth at the end of the proceedings unless there is:

- an order for the person or owner to recover the document, or
- a declaration that the document is not forfeited.

1457. New subsection 487ZK(5) provides that, for the purposes of subsection 487ZK(4), if the proceedings go to judgment, they end:

- if no appeal against the judgment is lodged within the period for lodging such an appeal—at the end of that period, or
- if an appeal against the judgment is lodged within that period—when the appeal lapses or is finally determined.

1458. New section 487ZK sets out the circumstance in which documents forfeited to the Commonwealth under section 487ZI are condemned as forfeited to the Commonwealth, and when that event is taken to have occurred.

1459. This amendment is made for two purposes. The first purpose is to provide people with a mechanism to challenge the forfeiture of their documents and the second is to provide certainty as to when the Commonwealth obtains exclusive ownership of the forfeited documents.

1460. New section 487ZL is about dealing with a document after it is condemned as forfeited to the Commonwealth.

1461. New subsection 487ZL(1) provides that if, under section 487ZK, a document is condemned as forfeited to the Commonwealth, it must be dealt with or disposed of (including by being given to another person) in accordance with the directions of the Minister made under section 499 of the Migration Act.

1462. New subsection 487ZL(2) provides that, if the Minister considers that the document may be relevant to proceedings in a court or tribunal, then the Minister:

- must give a direction for the safe keeping of the document, and
- must authorise access to the document for the purposes of those proceedings.

1463. The directions made under section 499 are not legislative instruments. That is, a direction referred to in section 487ZL is not a legislative instrument as it does not determine the law by its own force.

1464. The purpose of this new section is to provide the Minister with the authority to specify directions on how to deal with documents that have been condemned as forfeited to the Commonwealth. Allowing the process to be specified in directions rather than setting them out in the Migration Act or prescribing them in the Migration Regulations, provides the flexibility to deal appropriately with the broad range of documents and situations that may arise.

1465. By requiring the Minister to direct for the safe keeping of documents condemned as forfeited and authorising access to those documents where they are relevant to ongoing proceedings in a court or tribunal, it ensures that the Commonwealth does not interfere with a court or tribunal's need to have all relevant evidence available for their consideration.

1466. It is intended that the directions may allow for documents that are condemned as forfeited to be given to other government document issuing agencies or foreign issuing authorities, where appropriate, to retain the documents for research or other purposes, or to arrange for their destruction, subject to the application of the *Archives Act 1983* (Archives Act) and the action of subsection 487ZL(2).

Division 2—Other (heading)

1467. The purpose of this amendment is to distinguish the provisions in new “Division 1—Bogus documents” from the existing provisions under Part 9 of the Migration Act.

Division 2 – Contingent amendments

Item 4 – Subsection 487ZI(1)

1468. Item 4 inserts “(within the meaning of section 97)” after the words “bogus document” in new subsection 487ZI(1) of the Migration Act.

Item 5 – Subsection 487ZI(1)

1469. Item 5 omits the reference to “(within the meaning of section 97)” in new subsection 487ZI(1) of the Migration Act.

1470. Currently, the term “bogus document” is defined in section 97 of the Migration Act. This term is defined for the purposes of Subdivision C of Division 3 of Part 2 of the Migration Act. However, the Migration Amendment (Protection and Other Measures) Bill 2014 would repeal the definition in section 97 and create a new but identical definition in subsection 5(1) of the Migration Act.

1471. The new definition in subsection 5(1) of the Migration Act would not be restricted to Subdivision C of Division 3 of Part 2, and would apply to all uses of the term “bogus document” in that Act.

1472. The purpose of these contingent amendments is to ensure that the term “bogus document” referenced in the new Division inserted by item 3 has the meaning given to “bogus document” by section 97 of the Migration Act while that definition remains in

section 97. In the event that the definition is relocated into subsection 5(1) the reference to section 97 will no longer be relevant and will be removed by item 5. The commencement provisions give effect to this.

1473. These amendments are consequential to the amendments in the Migration Amendment (Protection and Other Measures) Bill 2014.

Division 3 – Application of amendments made by Part 1

Item 6 – Application of amendments

1474. This item provides that the amendments made by Part 1 of this Schedule apply to documents given, presented, produced or provided to the official after the commencement of item 1 of this Schedule.

Part 2 – Amendment of the *Australian Citizenship Act 2007*

Division 1 – Main amendments

Item 7 – Section 3

1475. This item inserts a definition of “bogus document” into section 3 of the Citizenship Act.

1476. The Citizenship Act currently does not contain provisions relating to, or a definition of “bogus document”.

1477. The new defined term “bogus document” is provided to have the same meaning as in subsection 5(1) of the Migration Act.

1478. This is a consequential amendment as a result of the amendments made by item 8, which insert a new Division that deals with bogus documents given under the Citizenship Act.

Item 8 – Before section 46

1479. This item inserts a new Division 1, entitled “Bogus documents”, and a new heading of “Division 2 – Other” into Part 3 of the Citizenship Act. New Division 1 contains new sections 45A, 45B, 45C and 45D. Division 2 contains the existing sections of Part 3.

1480. The Citizenship Act currently does not contain requirements that “bogus documents” can be prohibited, seized, forfeited or condemned to be forfeited to the Commonwealth.

1481. Similar to the amendments made by item 3 of this Schedule above, the provisions in new Division 1 impose a penalty for the use of bogus documents by any person; the penalty being that those documents are “forfeited to the Commonwealth”. The provisions also set out the circumstances in which documents so forfeited would be “condemned as forfeited” to the Commonwealth.

1482. Documents are automatically “forfeited to the Commonwealth” by operation of law where those documents are bogus documents, under new subsection 45A(2). When forfeiture

takes place, the right to the possession of the forfeited documents rests with the Commonwealth.

1483. Where the right to the possession of the forfeited document is not contested or a court with competent jurisdiction does not support the release of the document to the relevant person, the Commonwealth's right to the possession of the forfeited document becomes exclusive. The relevant document is then "condemned as forfeited" to the Commonwealth.

1484. While these provisions are substantially similar to those inserted by item 3 above, there are some differences based on structural differences between the two Acts.

- The Citizenship Act only provides for documents to be "given", as a result the sections inserted by this item only refer to documents that are given rather than documents that are "given, presented, produced or provided", however the same meaning is intended.
- Under the Citizenship Act the Minister is provided with powers, while under the Migration Act, powers have been provided to a number of persons and bodies, including the Minister, the Secretary and officers. As a result, the sections inserted by this item only vest power in the Minister, although the Minister may still delegate those powers.

1485. New section 45A provides for a prohibition on a person giving bogus documents, and for the forfeiture of documents so given.

1486. New section 45A partially mirrors the prohibition on the use and the forfeiture of bogus documents in new section 487ZI inserted into the Migration Act by item 3 of this Schedule, but relevantly specifies that bogus documents must also not be given, or caused to be given, to a person acting under a delegation or authorisation of the Minister.

1487. The purpose of this amendment is to remove bogus documents from circulation in the community. By seizing and retaining documents that are bogus, DIBP will assist to prevent such documents from being available to be used for further fraudulent purposes. Fraudulent documents are a known facilitator of crime, including identity theft.

1488. In addition, the purpose is also to deter persons from using bogus documents by imposing a penalty on the use of those documents; that penalty being the forfeiture of relevant documents to the Commonwealth.

1489. When documents are forfeited to the Commonwealth, new section 45C sets out the circumstances in which those documents are "condemned as forfeited" to the Commonwealth. The forfeited documents may then be dealt with in accordance with new section 45D.

1490. New section 45B concerns seizure of bogus documents and is substantially similar to section 487ZJ inserted into the Migration Act by item 3 of this Schedule.

1491. The purpose of subsection 45B(1) is to ensure that a document that is suspected to be forfeited under new section 45A, may be seized.

1492. The purpose of the remaining provisions, subsections 45B(2) to (4) is to provide that, when a document is seized under subsection 45B(1), the relevant person must be notified and the notice must meet the minimum requirements for notification.

1493. New section 45C concerns documents condemned as forfeited to the Commonwealth and substantially similar to section 487ZK inserted into the Migration Act by item 3 of this Schedule.

1494. New section 45C sets out the circumstance in which documents forfeited to the Commonwealth under section 45A are condemned as forfeited to the Commonwealth, and when that event is taken to have occurred.

1495. This amendment is made for two purposes. The first purpose is to provide people with a mechanism to challenge the forfeiture of their documents and the second is to provide certainty as to the Commonwealth's exclusive ownership of the forfeited documents.

1496. New section 45D concerns dealing with a document after it is condemned as forfeited to the Commonwealth and is substantially similar to section 487ZL inserted into the Migration Act by item 3 of this Schedule.

1497. The purpose of this amendment is to provide the Minister with the authority to specify directions on how to deal with documents that have been condemned as forfeited to the Commonwealth. Allowing the process to be specified in directions rather than setting them out in the Citizenship Act or prescribing them in the *Australian Citizenship Regulations 2007*, provides the flexibility to deal appropriately with the broad range of documents and situations that may arise.

1498. It is intended that the directions may allow for documents that are condemned as forfeited to be given to other government document issuing agencies or foreign issuing authorities, where appropriate, to retain the documents for research or other purposes, or to arrange for their destruction, subject to the application of the Archives Act and the action of subsection 45D(2).

1499. In addition, the purpose of new subsection 45B(3) is to explain to the reader that a direction under new subsections 45B(1) and (2) is not a legislative instrument within the meaning of the Legislative Instruments Act. That is, new subsection 45B(3) merely declares that a direction under subsections 45B(1) and (2) are not legislative instruments. A direction made under new subsection 45B(3) is not a legislative instrument as it does not determine the law by its own force.

Division 2 – Other

1500. The purpose of this amendment is to distinguish the provisions in new “Division 1 – Bogus documents” from the existing provisions under Part 3 of the Citizenship Act.

Division 2 – Contingent amendments

Items 9 and 10 – Section 3

1501. These items and item 7 insert into the Citizenship Act a definition of “bogus documents” that refers to the definition used in the Migration Act.

1502. Multiple items are necessary to achieve this as similarly to the amendments made by items 4 and 5 of this schedule, these items provide for the term “bogus documents” to be differently defined, contingent on the status of the Migration Amendment (Protection and Other Measures) Bill 2014.

1503. The Migration Amendment (Protection and Other Measures) Bill 2014 proposes to move the definition from section 97 of the Migration Act into subsection 5(1) of that Act.

1504. These amendments ensure that the definition in the Citizenship Act will correctly refer to the definition in the Migration Act, regardless of the status of the Migration Amendment (Protection and Other Measures) Bill 2014.

Division 3 – Application of amendments made by Part 2

Item 11 – Application of amendments

1505. This item provides that the amendments made by Part 2 of this Schedule apply to documents given to the official after the commencement of item 1 of this Schedule.