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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

SENATE

COUNTER-TERRORISM LEGISLATION AMENDMENT BILL (NO. 1) 2014

EXPLANATORY MEMORANDUM

(Circulated by authority of the

Attorney-General, Senator the Honourable George Brandis QC)

COUNTER-TERRORISM LEGISLATION AMENDMENT BILL (NO. 1) 2014

GENERAL OUTLINE

1. The Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the Bill) contains a package of amendments to the *Criminal Code Act 1995* (Criminal Code) and the *Intelligence Services Act 2001* (ISA). The measures in the Bill have been included as a result of instances of operational need identified by relevant agencies and have been brought forward together to ensure that the Parliamentary Joint Committee on Intelligence and Security (the Committee) has an opportunity to conduct a review of them, and report to the Parliament on its findings.

Criminal Code

2. Australia faces a serious and ongoing terrorist threat which has recently been raised by the return of Australians who have participated in foreign conflicts or undertaken training with extremist groups overseas ('foreign fighters'). This heightened threat environment has seen an increased operational tempo from Australia's law enforcement agencies to protect the public from terrorist acts, including some widely noted counter-terrorism operations conducted by Joint Counter-Terrorism Teams comprising the Australian Federal Police and state police.

3. The amendments in this Bill to further strengthen and enhance the operation of the control order regime in Part 5.3 of the Criminal Code have been developed in response to operational issues identified following these counter-terrorism raids.

4. The Bill will also amend the Criminal Code in response to the Committee's *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. Recommendation 8 of the Committee's report proposed that the Attorney-General advise the Committee before amending a regulation that lists a terrorist organisation by adding an alias or removing a former name and to allow the Committee to review any proposed change during the disallowable period. This recommendation was not included in the government amendments to the Counter Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 introduced on 28 October 2014 as it required further consultation with states and territories in accordance with the *Intergovernmental Agreement on Counter-Terrorism Laws 2004.*

Intelligence Services Act

5. In the context of the Government's decision to authorise the Australian Defence Force (ADF) to undertake operations against the Islamic State terrorist organisation in Iraq, there is an urgent need to make amendments to the ISA.

6. The amendments are directed to two key areas. First, the primary purpose of the amendments is to better facilitate the Australian Secret Intelligence Service (ASIS) providing timely assistance to the ADF in support of military operations, and its cooperation with the ADF on intelligence matters.

7. Secondly, the amendments also address practical limitations identified in the arrangements for emergency ministerial authorisations which apply to all three ISA agencies, ASIS, the Australian Signals Directorate (ASD) and the Australian Geospatial-Intelligence Organisation (AGO).

Support to the ADF

8. The requirement for these amendments arises out of the different circumstances of Iraq to Afghanistan.

9. ASIS provided essential support to the ADF in Afghanistan. The support ranged from force protection reporting at the tactical level, through to strategic level reporting on the Taliban leadership. ASIS reporting was instrumental in saving the lives of Australian soldiers and civilians (including victims of kidnapping incidents), and in enabling operations conducted by Australian Special Forces. However, differences in the circumstances in Iraq mean that reliance on existing provisions of the ISA in relation to the functions of ASIS (which are not specific to the provision of assistance to the ADF) is likely to severely limit ASIS's ability to provide such assistance in a timely way.

10. The amendments will remedy this by making explicit that it is a statutory function of ASIS to provide assistance to the ADF in support of military operations, and to cooperate with the ADF on intelligence matters.

11. In addition, there are a small number of amendments to facilitate the timely performance by ASIS of the new function. These address the provision of Ministerial authorisation (by the Minister responsible for ASIS) for relevant activities and the requirement for the agreement of the Attorney-General as the Minister responsible for ASIO to that authorisation in specified circumstances. All of the existing safeguards in the ISA will apply to the performance of the new function, including the thresholds for granting authorisations in subsection 9(1), Ministerial reporting requirements on the relevant activities undertaken in accordance with an authorisation, and the independent oversight of the Inspector-General of Intelligence and Security (IGIS).

Emergency Ministerial authorisations

12. Experience in responding to urgent requirements for ministerial authorisations has identified that the existing emergency authorisation arrangements under section 9A of the ISA do not sufficiently address the need for ASIS, ASD and AGO to be able to obtain a Ministerial authorisation in an extreme emergency. The proposed amendments will address limitations identified in this provision.

13. Currently, section 9A requires an emergency Ministerial authorisation to be provided by one of the Prime Minister, the Defence Minister, the Foreign Minister or the Attorney-General. Section 9A does not provide for the contingency that none of these Ministers may be available to issue an emergency authorisation.

14. Further, section 9A does not make provision for the contingency that the Attorney-General may not be readily available or contactable to provide his or her agreement to the making of an authorisation, in the circumstances in which such agreement is required. (Namely, if the activity or activities in respect of which an authorisation is sought relate to an Australian person who is, or is likely to be, involved in activities that are, or are likely to be, a threat to security.)

15. In addition, section 9A requires emergency authorisations to be issued in writing, and does not accommodate the necessity for such authorisations to be issued orally, and documented in a written record. This stands in contrast to a number of other emergency

authorisation or warrant based provisions that permit oral authorisations, including those applicable to law enforcement warrants authorising the searching of premises, the interception of telecommunications and the use of surveillance devices; and the authorisation by the Attorney-General of special intelligence operations conducted by the Australian Security Intelligence Organisation (ASIO).

16. Such limitations mean that, in practice, the arrangements for the issuing of emergency authorisations are not as streamlined as they need to be, and are incompatible with the circumstances of extreme urgency in which emergency authorisations are intended to operate. These limitations may mean that time critical opportunities to collect vital intelligence are lost or compromised if requirements in relation to matters of form cannot be met, or particular individuals are not available, and legislative provision is not made for contingency arrangements in such cases.

17. Accordingly, the proposed amendments make provision for the following contingency arrangements:

- one of the relevant Ministers may issue an emergency authorisation orally, to be followed with a written record of the authorisation;
- if none of the relevant Ministers are readily available and contactable, the head of an ISA agency may issue a limited emergency authorisation; and
- where the Attorney-General's agreement is required to the issuing of an emergency authorisation, and the Attorney-General is not readily available or contactable, the agreement to the issuing of an emergency authorisation must be sought from the Director-General of Security (if readily available or contactable).

18. The improvements to the emergency authorisation requirements are subject to rigorous safeguards. These include a maximum duration of 48 hours (without any ability to renew), and notification and reporting requirements to the responsible Minister and IGIS.

FINANCIAL IMPACT STATEMENT

19. The measures in the Bill do not have a financial impact.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Counter-Terrorism Legislation Amendment Bill (No. 1) 2014

20. 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

21. The Counter-Terrorism Legislation Amendment Bill (No. 1) 2014 (the Bill) amends the *Criminal Code Act 1995* and the *Intelligence Services Act 2001*.

Overview of measures

Criminal Code Act 1995

22. The amendments to the Criminal Code confer the authority on the Parliamentary Joint Committee on Intelligence and Security to review an instrument either adding an alias or removing a former name from a regulation that lists a terrorist organisation.

23. The amendments to the Criminal Code also include enhancements to the control order regime to:

- expand the objects of the control order regime to include prevention of the provision of support for or the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country
- replace the current requirement for the AFP to provide all documents that will subsequently be provided to the issuing court with a requirement that the AFP provide the Attorney-General with a draft of the interim control order, information about the person's age and the grounds for the request, which may include national security information within the meaning of the *National Security Information (Criminal and Civil Proceedings) Act 2004* (NSI Act), when seeking the Attorney-General's consent to apply for a control order
- expand the grounds upon which a senior AFP member can seek the Attorney-General's consent to request an interim control order to circumstances where the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country
- expand the grounds upon which an issuing court can make a control order to circumstances where the court is satisfied on the balance of probabilities that making the order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country
- replace the existing requirement for the AFP member to provide an explanation as to why 'each' obligation, prohibition and restriction should be imposed with a requirement to provide an explanation as to why 'the control order' should be made or varied

- replace the existing requirement for the issuing court to be satisfied on the balance of probabilities that 'each' obligation, prohibition and restriction 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects in section 104.1 with a requirement to be satisfied on the balance of probabilities that 'the control order' to be made or varied 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of those objects
- authorise an issuing court to make, confirm or vary a control order by removing one or more of the requested obligations, prohibitions or restrictions where doing so would allow the court to be satisfied that the order 'is reasonably necessary, and reasonably appropriate and adapted' to achieving one of the objects in section 104.1
- provide that an issuing court must take into account that the parties may need to prepare when setting a day for the confirmation hearing
- extend the time before the material provided to an issuing court must subsequently be provided to the Attorney-General from 4 hours to 12 hours where an request for an urgent interim control order has been made to an issuing court, and
- ensure the AFP Commissioner can apply for a variation of a control order where the Commissioner 'suspects' on reasonable grounds that:
    - the varied order would substantially assist in preventing a terrorist act or the provision of support for or the facilitation of a terrorist act, or
    - the person the subject of the order has:
        - participated in training with a terrorist organisation, or
        - engaged in or support for or otherwise facilitated engagement in a hostile activity in a foreign country, or
        - been convicted of a terrorism related offence in Australia or overseas.

Intelligence Service Act 2004

24. The amendments to the ISA will better facilitate the provision by ASIS of assistance to the ADF in support of military operations, and in cooperating with the ADF on intelligence matters by:

- making explicit that such actions are a function of ASIS;
- enabling the issuing of Ministerial authorisations for ASIS to undertake activities in relation to classes of Australian persons, for the purpose of performing the abovementioned functions; and
- enabling the Attorney-General to specify classes of Australian persons who are, or who are likely to be, involved in activities that are, or are likely to be, a threat to security, and to give his or her agreement to the making of a Ministerial authorisation in relation to any Australian person in that specified class.

25. The amendments further address a number of limitations identified in the emergency authorisation provisions of the ISA, in the course of their practical application by ISA agencies. In particular, the proposed amendments:

- enable emergency Ministerial authorisations, of up to 48 hours' duration, to be issued orally, and followed by a written record within 48 hours;

- provide for contingency arrangements in the event that none of the Ministers able to issue emergency authorisations (the Prime Minister, Foreign Minister, Defence Minister and Attorney-General) are readily available or contactable. In these circumstances, the head of the relevant ISA agency may grant an emergency authorisation; and
- provide for contingency arrangements in the event that the Attorney-General is not readily available or contactable to provide his or her agreement to the making of an emergency Ministerial authorisation, where such agreement is required because the authorisation concerns the undertaking of activities in relation to an Australian person who is, or who is likely to be, engaged in activities that are, or are likely to be, a threat to security.

Human rights implications

26. The Bill engages the following human rights:

- the right to freedom from arbitrary detention and the right to liberty of the person in Article 9 of the *International Covenant on Civil and Political Rights* (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, and
- the right to work in Article 6 of the *International Covenant on Economic, Social and Cultural Rights* (ICESCR).

Schedule 1

PJCIS review of changes terrorist organisation listings

27. This amendment relates to an amendment in the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014 which 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 amendment in this Bill requires the Attorney-General to advise the Parliamentary Joint Committee on Intelligence and Security before amending a regulation that lists a terrorist organisation by adding an alias or removing a former name and to allow the Committee to review any proposed change during the disallowable period. This amendment will implement recommendation 8 of the Committee's *Advisory Report on the Counter-Terrorism Legislation Amendment (Foreign Fighters) Bill 2014*. This amendment adds an additional safeguard to the process of amending terrorist organisation listings and does not engage any human rights.

Control order amendments

28. 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 Parliamentary Joint Committee on Human Rights acknowledged in its recent report that the objective of the control order regime

> 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 in Australia'… may properly be regarded as a legitimate objective for the purposes of international human rights law.[1]

29. 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.

30. The amendments to the control order regime in the Bill:

- expand the objects of the control order regime, and subsequently grounds upon which a control order can be requested and issued, to include prevention of the provision of support for or the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country
- reduce the documentation the AFP is required to provide when seeking the Attorney-General's consent to apply for a control order
- streamline the requirements in relation to the obligations, prohibitions and restrictions to be imposed under a control order for the purposes of requesting, issuing, confirming or varying a control order
- provide that an issuing court must take into account that the parties may need to prepare when setting a day for the confirmation hearing , and
- ensure the AFP Commissioner can apply for a variation of a control order in appropriate circumstances.

31. These amendments engage several human rights, including on the basis that the new grounds upon which a control order can be requested and issued may potentially increase the number of individuals who be subject to a control order. 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.

32. Outlined below are the rights that are likely to be engaged by the control order provisions in the Bill.

Right to freedom of movement in Article 12 of the ICCPR

33. 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

[1] Parliamentary Joint Committee on Human Rights, 'Examination of legislation in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011: Bills introduced 30 September - 2 October 2014, Legislative Instruments received 13 – 19 September 2014: Fourteenth Report of the 44th Parliament', 28 October 2014

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.

34. 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
    - would 'substantially assist in preventing the provision of support for or the facilitation of 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
    - convicted in Australia or a foreign country of an offence relating to terrorism, a terrorist organisation or terrorist act, or
    - providing support for or otherwise facilitated the engagement in a hostile activity in a foreign country.

35. 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.

Freedom of association in Article 22 of the ICCPR

36. 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.

37. 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.

38. Moreover, the overarching requirement that a court be satisfied that the control 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.

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

Right to privacy in Article 17 of the ICCPR

40. 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.

41. 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.

42. 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.

Right to freedom of expression in Article 19(2) of the ICCPR

43. 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.

44. 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.

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

45. 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. Under section 104.5(3)(c), a control order can impose a requirement on an individual to remain at specified premises between specified times each day, or on specified day, which could be considered a form of detention (by requiring an individual to be in one place for up to twelve hours).

46. 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' (paragraph104.4(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.

Right to work under Article 6 of ICESCR

47. 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)).

48. 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.

Right to a fair trial in Article 14 of the ICCPR

49. More broadly, the control order regime is confined in its scope and is protected from 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).

50. In addition, amendments in this Bill will improve access to a fair hearing by providing that an issuing court must take into account that the parties may need to prepare when setting a day for the confirmation hearing.

Schedule 2

51. The Government is of the view that the provisions of Schedule 2 to the Bill do not engage any human rights, on the basis that the provisions are directed to clarifying and streamlining – without reducing safeguards – the procedural arrangements that enable ISA agencies to undertake activities, with appropriate authorisation to do so.

52. Importantly, the amendments do not expand the functions of ASIS or the other ISA agencies. The new ASIS function makes explicit that ASIS's functions include assistance to the ADF and in cooperating with the ADF on intelligence matters, but as reflected in subsection 6(7), ASIS is already able to undertake such activities under its existing functions. What is changed is the means by which the Minister responsible for ASIS is able to authorise ASIS to undertake activities in accordance with a direction issued under subsection 8(1) of the ISA. Also changed is the means by which the Attorney-General can, where required to do so, provide agreement to a Minister providing an authorisation to an ISA agency. Similarly the new emergency authorisation arrangements change the means for obtaining authorisation and agreement respectively and in an extreme circumstance would allow an

agency head in very limited circumstances to provide an authorisation which would last for no more than 48 hours.

53. However, the Government acknowledges that contrary arguments may be advanced, on the basis that amendments which streamline authorisation processes might be said to extend the ability of ISA agencies to obtain an authorisation to engage in activities for the purpose of collecting intelligence on, or undertaking other activities in relation to, persons or entities outside Australia. The Statement of Compatibility has been prepared to address such contentions, in the event that the Government's position is not preferred or accepted by those scrutinising the Bill. The following analysis identifies the rights that might be said to be engaged for the above reason, and explains how any limitations thought to be imposed are adapted to a legitimate objective, and are necessary for, and proportionate to, the achievement of that objective.

54. It may be suggested that the measures in Schedule 2 to the Bill engage the following rights:

- Right to protection against arbitrary and unlawful interferences with privacy and reputation – Article 17 of the International Covenant on Civil and Political Rights (ICCPR); and
- Right to an effective remedy – Article 2 of the ICCPR

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

55. To the extent that the measures in the Bill extend the ability of ISA agencies to obtain a Ministerial authorisation to undertake activities permitted under the ISA for the purpose of collecting intelligence on, or undertaking other activities in relation to, persons or entities outside Australia, they might be said to engage the right to protection against arbitrary and unlawful interferences with privacy and reputation of persons who may be the subject of, or otherwise affected by, such activities.

56. Any interference with personal privacy as a result of the authorised activities of ISA agencies relevant to the performance by those agencies of their statutory functions is necessary for the achievement of a legitimate objective. In the case of the amendments to the statutory functions of ASIS, this legitimate objective is to ensure that ASIS is able to provide critical support to the ADF in support of military operations, and for the purpose of cooperating with the ADF on intelligence matters, in a timely way (including in circumstances that may enable ASIS to assist in saving lives of Australian soldiers and other personnel deployed to conflict zones).

57. The amendments in Schedule 2 concerning emergency authorisations are further necessary to achieve the legitimate purpose of enabling intelligence agencies to act quickly (by reason of an agile emergency authorisation process) to collect vital intelligence in circumstances of extreme urgency or to take other action in accordance with the ISA, where to follow the normal processes governing Ministerial authorisations would preclude agencies from obtaining such intelligence, or otherwise compromise their ability to do so. (This may arise if, for example, none of the Ministers who are able to grant an authorisation are readily available or contactable, as no contingency arrangements are presently made in the ISA for this. Such an undesirable outcome may also arise if the requirement that emergency Ministerial authorisations must be in writing cannot be satisfied in a particular case – for

example, by reason of a Minister's remote location without access to means of instantaneous written communication, or because the circumstances are so time-critical that the time taken to reduce an authorisation to writing may cause the relevant intelligence collection opportunity to be lost.)

58. Any such interference with personal privacy as a result of the measures in Schedule 2 is also subject to extensive and appropriate safeguards to ensure that it is necessary, appropriate and adapted to the legitimate objectives to which the amendments are directed as noted above.

59. In particular, any such interference will be limited, because activities may only be authorised if the relevant criteria are satisfied. (These criteria are applied by a Minister, or an agency head in the case of emergency authorisations in the event that a Minister is not readily available or contactable). These include that the Minister (or agency head, in the case of emergency authorisation) must be satisfied, before giving an authorisation, that any activities done in reliance on the authorisation will be necessary for the proper performance of a function by an agency, there are satisfactory arrangements in place to ensure that nothing will be done in reliance on the authorisation beyond what is necessary for the proper performance of a function of the agency, and there are satisfactory arrangements in place to ensure that the nature and consequences of acts done in reliance on the authorisation will be reasonable, having regard to the purpose for which they are carried out. In addition, authorisations that are issued on an emergency basis are subject to a strictly limited maximum duration of 48 hours and cannot be extended.

60. There are appropriate safeguards and oversight mechanisms in place to ensure the proportionality of activities undertaken by ASIS for the purpose of performing the new statutory functions inserted by Schedule 2 to the Bill, and activities undertaken in reliance on emergency authorisations. In particular, the activities of ISA agencies are subject to the independent oversight of the IGIS in accordance with the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).

61. In addition, the ability of an ISA agency head to provide an emergency authorisation in place of a Minister (and the Director-General of Security to provide agreement to the making of an emergency authorisation in place of the Attorney-General) are subject to extensive limitations and safeguards. The emergency powers of authorisation are only exercisable if the agency head is satisfied that none of the relevant Ministers are readily available or contactable. The agency head must be satisfied not only that it would have been open to the relevant Minister, on the facts of the case and the statutory authorisation criteria, to issue the authorisation; but further satisfied that the relevant Minister would have made the decision to issue (which requires consideration of how that particular Minister might have weighted different considerations, including based on an awareness of any authorisations issued for previous activities). To ensure it only applies in an extreme emergency, the agency head must also be satisfied that if the activity was not authorised security would be seriously prejudiced or there would be a serious risk to a person's safety. The relevant agency head must also report on the making of any authorisation to the responsible Minister (to whom the agency head is accountable) and to the IGIS (who may conduct oversight of issuing decisions). The responsible Minister is also under a positive obligation, on receipt of such a report, to consider whether to cancel the authorisation, or to issue a Ministerial authorisation, or to decline to do either of these things and allow the emergency authorisation to run to its 48-hour maximum, after which time it will cease. The relevant agency head must, in

reporting to the Minister on the issuing of an emergency authorisation by that agency head, specifically advise the Minister of his or her obligation to make a decision.

62. Further, any intelligence produced can only be retained and communicated in accordance with the rules to protect the privacy of Australians, made in accordance with section 15 of the ISA. In making the rules, the relevant Minister must have regard to the need to ensure the privacy of Australian persons is preserved as far as is consistent with the proper performance by the agency of its functions. The ISA also requires that agencies must not communicate intelligence information, except in accordance with the rules. The IGIS must brief the Parliamentary Joint Committee on Intelligence and Security (PJCIS) on the content and effect of the rules if requested or if the rules change.

Right to an effective remedy – Article 2 of the ICCPR

63. To the extent that the measures in the Bill might be said to expand the ability of the ISA agencies to obtain a Ministerial authorisation to undertake activities permitted under the ISA, they might also be said to expand the circumstances in which the immunity from criminal or civil liability under section 14 of the ISA applies, in respect of staff members or agents of an ISA agency who carry out activities in reliance on an authorisation.

64. Subsection 14(1) of the ISA relevantly provides that a staff member or agent of an ISA agency is not subject to legal liability for any act done outside Australia, if the act is done in the proper performance of a function of the agency. Subsection 14(2) relevantly provides that a person is not subject to legal liability for acts done inside or outside Australia, which are preparatory or ancillary to the overseas activities of an ISA agency.

65. Accordingly, any broader application of an immunity from legal liability may mean that persons who may otherwise have been able to obtain judicial remedies in respect of loss, injury or damage caused by staff members or agents of an ISA agency would no longer be able to do so.

66. To the extent that the amendments in Schedule 2 to the Bill may engage the right to an effective remedy, they are necessary to achieve a legitimate purpose – namely, to ensure that ASIS is able to provide critical support to the ADF in support of military operations, and for the purpose of cooperating with the ADF on intelligence matters, in a timely way (including in circumstances that may enable ASIS to assist in saving lives of Australian soldiers and other personnel deployed to conflict zones). The amendments in Schedule 2 are further necessary to achieve the legitimate purpose of enabling intelligence agencies to act quickly (by reason of an agile emergency authorisation process) to collect vital intelligence or to undertake other activities in accordance with the ISA, in circumstances of extreme urgency.

67. The proposed amendments are also caveated by significant and appropriate safeguards, which ensure that the right to a remedy is only limited (by the enlivening of s 14) to the extent that is reasonable, necessary and proportionate to ensure that the above legitimate purposes are achieved. In particular, if a person's act was not done in the proper performance of an ISA agency's functions (including within the limits of a Ministerial authorisation in force), the immunity in section 14 will not apply and the relevant staff member or agent may be subject to legal liability. This outcome could also apply where the issuing criteria for a Ministerial authorisation are not satisfied – for example, in the event that a Minister responsible for an ISA agency issues a Ministerial authorisation in the absence of

obtaining the agreement of the Attorney-General to the issuing of an authorisation, where such agreement is required under the ISA because the activity purportedly authorised involves an Australian person who is, or is likely to be, engaged in activities that are, or are likely to be, a threat to security.

68. The activities of ISA agencies are also subject to the extensive, independent oversight of the IGIS in accordance with the IGIS Act. In addition, subsections 14(2B) and (2C) of the ISA provide that, in any proceedings involving the operation of section 14 of that Act, the IGIS may issue a certificate in relation to the question of whether a particular act was done in the proper performance of an agency's functions. Such a certificate is prima facie evidence of the facts certified therein.

NOTES ON CLAUSES

Clause 1 – Short title

70. This clause provides for the Bill to be cited as the Counter-Terrorism Legislation Amendment Act (No. 1) 2014.

Clause 2 -- Commencement

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

72. Clauses 1-2 will commence the day after Royal Assent. Schedule 1 commences the 28th day after Royal Assent. Schedule 2 commences the day after Royal Assent, in recognition of the urgent nature of the amendments to the *Intelligence Services Act 2001* (ISA) contained in that Schedule.

Clause 3 – Schedules

73. Each Act specified in a Schedule to this Act is amended 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

Items 1 to 5 – Parliamentary Joint Committee on Intelligence and Security review

74. Items 1 to 5 implements Recommendation 8 of the of the Report of the Parliamentary Joint Committee on Intelligence and Security by providing authority for the Committee to review each instrument made under section 102.1AA of the Criminal Code listing an alias of a terrorist organisation or removing a former name of a terrorist organisation.

Item 1 – Subsection 102.1A(1)

75. This item repeals subsection 102.1A(1) of the Criminal Code and replaces it with a revised subsection and a new subsection 102.1A(2).

76. Revised subsection 102.1A(1) provides that section 102.1A applies in relation to two types of disallowable instruments:

- a regulation that specifies an organisation for the purposes of paragraph (b) of the definition of terrorist organisation in section 102.1 of the Criminal Code, and
- an instrument made under section 102.1AA of the Criminal Code.

77. Section 102.1AA provides that the Attorney-General may add an alias and/or remove a former name from a regulation prescribing a terrorist organisation by legislative instrument.

78. New subsection 102.1A(2) provides that the Parliamentary Joint Committee on Intelligence and Security may review the disallowable instrument as soon as possible after the making of the instrument and report the Committee's comments and recommendations to each House of the Parliament before the end of the applicable disallowance period for that House.

Item 2 – Subsection 102.1A(3) (heading)

79. This item repeals the existing heading 'Review of listing regulation—extension of disallowance period' and replaces it with a new heading 'Review of disallowable instrument—extension of disallowance period'. This item is consequential to the amendments to subsection 102.1A(1).

Item 3 – Subsection 102.1A(3)

80. This item removes the first instance of the word 'regulation' in subsection 102.1A(3) of the Criminal Code and replaces it with the term 'disallowable instrument'. This item is consequential to the amendments to subsection 102.1A(1).

Item 4 – Subsection 102.1A(3)

81. This item amends subsection 102.1A(3) of the Criminal Code by omitting the following words:

> then whichever of the following provisions is applicable:
>
> > (c) subsections 48(4), (5) and (5A) and section 48B of the *Acts Interpretation Act 1901*;
> >
> > (d) Part 5 of the Legislative Instruments Act 2003;

have or has effect, in relation to that regulation and that House, as if each period of 15 sitting days referred to in those provisions were extended in accordance with the table:

82. These words are replaced by the following words:

then Part 5 of the *Legislative Instruments Act 2003* has effect, in relation to that disallowable instrument and that House, as if each period of 15 sitting days referred to in that Part were extended in accordance with the table.

83. The amendments to this subsection removing reference to sections 48 and 48B of the *Acts Interpretation Act 1901* have been made as these sections of that Act no longer exist.

Item 5 – Subsection 102.1A(4)

84. This item repeals subsection 102.1A(4) of the Criminal Code and replaces it with a revised subsection. The revised subsection removes reference to paragraph 48(1)(c) of the *Acts Interpretation Act 1901* as section 48 of that Act no longer exists.

Items 6 to 30 – Enhancing the control order regime

Item 6 – Subdivision A of Division 104 of the *Criminal Code*

85. This item repeals existing Subdivision A of Division 104 of the Criminal Code and replaces it with a revised Subdivision. This amendment expands the objects of the Division by replacing the existing heading for Subdivision A and section 104.1.

86. The revised heading 'Subdivision A–Objects of this Division' acknowledges that Division 104 now has more than one object.

87. Revised section 104.1 sets out each of the objects of the Division. The objects still include protecting the public for a terrorist act. The new objects are preventing the provision of support for or the facilitation of a terrorist act and preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

88. These amendments reflect the importance of being able to place appropriate controls on all individuals assessed as representing a threat to the security of Australia by not only engaging in terrorism themselves, but also engaging in facilitating or supporting conduct that could result in the commission a terrorist act.

Item 7 – At the end of subsection 104.2(2) of the Criminal Code

89. This item inserts two new paragraphs 104.2(2)(c) and (d) into subsection 104.2(2). The new paragraphs provide two new grounds upon which a senior AFP member can seek the Attorney-General's consent to request an interim control order.

90. New paragraph 104.2(2)(c) authorises a senior AFP member to seek the Attorney-General's consent to request an interim control order where the member suspects on reasonable grounds that the order in the terms requested would substantially assist in preventing the provision of support for or the facilitation of a terrorist act. This amendment reflects the expansion of the objects of the Division in paragraph 104.1(b) and the fact that the provision of support and the facilitation of terrorist acts represent a real threat to the safety and security of Australians because without that support and facilitation, it may be impossible for the intended perpetrator to undertake the terrorist act.

91. New paragraph 104.2(2)(d) authorises a senior AFP member to seek the Attorney-General's consent to request an interim control order where the member suspects on reasonable grounds that the order in the terms requested would substantially assist in preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country. This amendment reflects the expansion of the objects of the Division in paragraph 104.1(c) and supplements the existing ground for making an interim control order on the basis that the person has participated in training with a terrorist organisation and the new ground in subparagraph 104.4(1)(c)(v). It is appropriate to include this additional ground on the basis that a person who has actually provided support or facilitated a hostile activity in a foreign country has not only a demonstrated ability but also a demonstrated propensity to engage in conduct in support or facilitation of conduct akin to a terrorist act.

Item 8 – Subsections 104.2(3) to (4) of the Criminal Code

92. This item repeals existing subsections 104.2(3), (3A) and (4) of the Criminal Code and replaces them with revised subsections.

93. Revised subsection 104.2(3) requires a senior AFP member to provide the following material when seeking the Attorney-General's consent to request an interim control order:

- a draft of the interim control order to be requested
- information (if any) the member has about the person's age, and
- a summary of the grounds on which the order should be made.

94. This differs from existing subsection 104.2(3), which requires all material that will eventually be provided to an issuing court when requesting an interim control order to first be provided to the Attorney-General when seeking consent to make a request. It is not necessary for the Attorney-General to consider all material when determining whether to consent to such a request. The role of the Attorney-General is to be satisfied that it is appropriate for an application for an interim control to be made, rather than to exercise the same role as the issuing court in considering the application.

95. This amendment provides greater flexibility when seeking the Attorney-General's consent. In the event the information provided to the Attorney-General is not sufficient to satisfy the threshold for providing consent, it is open to the AFP member to provide additional information or documents to ensure the Attorney-General is satisfied that the threshold for giving consent has been met.

96. The note to subsection 104.2(3) is a reminder that an interim control order cannot be requested in relation to a person under the age of 16 years (see section 104.28).

97. Revised subsection 104.2(3A) is consequential to the amendment to subsection 104.2(3). It replicates existing subsection 104.2(3A) but replaces the cross reference to paragraph 104.2(3)(f), which currently refers to the summary of grounds, with a cross reference to revised paragraph 104.2(3)(c), which now refers to the summary of grounds. This amendment continues the operation of the protection for information that is likely to prejudice national security within the meaning of the NSI Act by providing that the summary of grounds is not required to include such information.

98. Revised subsection 104.2(4) provides that, when giving consent, the Attorney-General may require the AFP member to make changes to the draft of the interim control order to be requested. This differs from existing subsection 104.2(4), which provides that the Attorney-General's consent may be subject to changes being made to the draft request. This revision clarifies that, in practice, the Attorney-General does not physically make those changes, but may require the AFP to make changes before making a request to an issuing court.

Item 9 – Section 104.3 of the *Criminal Code*

99. This item repeals existing section 104.3 of the Criminal Code and replaces it with a revised section. This amendment is consequential to the amendment to subsection 104.2(3) that reduces the amount of documentation that must be provided to the Attorney-General when seeking consent to request an interim control order.

100. Revised subsection 104.3(1) provides that, when requesting an interim consent order from an issuing court, a senior AFP member must provide:

- a request sworn or affirmed by the member
- the draft interim control and summary of grounds provided to the Attorney-General when seeking his or her consent to request an interim control order as amended to incorporate any changes to the order required by the Attorney-General
- a statement of any facts as to why the order should or should not be made
- an explanation as to why the proposed obligations, prohibitions or restrictions should or should not be imposed on the person
- the outcomes and particulars of all previous requests for interim control orders and variations of control orders made in relation to the person
- the outcomes of all previous applications for revocations of control orders made in relation to the person
- the outcomes and particulars of all previous applications for preventative detention orders in relation to the person
- information (if any) that the member has about any periods for which the person has been detained under an order made under a corresponding State preventative detention law, and
- a copy of the Attorney-General's consent.

101. This requirement reflects the information currently required to be provided to both the Attorney-General when seeking consent and an issuing court when requesting an interim control order. The only change of substance with respect to the material that must be provided to an issuing court relates to the obligation, prohibitions and restrictions sought to be imposed on the person. Under existing subparagraphs 104.2(d)(i) and (ii) and paragraph 104.3(a), a senior AFP member is required to provide the court with an explanation of 'each' obligation, prohibition and restriction as well as information regarding why 'any of those' obligations, prohibitions or restrictions should not be imposed. New subparagraphs 104.3(d)(i) and (ii) reduce the burden by only requiring the member to provide an explanation as to why 'the' proposed obligations, prohibition or restrictions should be

imposed and, to the extent known, a statement of facts as to why 'the' proposed obligations, prohibitions or restrictions – as a whole rather than individually – should not be imposed.

102. The note to subsection 104.3(1) is a reminder that it is an offence if the draft request is false or misleading (see sections 137.1 and 137.2).

Item 10 – Subparagraph 104.4(1)(c)(v) of the *Criminal Code*

103. This item omits the word 'and' at the end of subparagraph 104.4(1)(c)(v) as amended by the Bill and replaces it with the word 'or'. This amendment is consequential to the insertion of two new subparagraphs after subparagraph 104.4(1)(c)(v).

Item 11 – At the end of paragraph 104.4(1)(c) of the *Criminal Code*

104. This item amends paragraph 104.4(1)(c) by adding two new subparagraphs after subparagraph 104.4(1)(c)(v). This amendment expands the grounds upon which an issuing court can make an interim control order consistent with the expanded grounds set out in revised section 104.1 of the Criminal Code and the additional grounds upon which a senior AFP member can request an interim control order in subsection 104.2(2).

105. New subparagraph 104.4(1)(c)(vi) authorises an issuing court to make an interim control order where the court is satisfied on the balance of probabilities that making the order would substantially assist in preventing the provision of support for of the facilitation of a terrorist act. This amendment reflects the fact that the provision of support and the facilitation of terrorist acts represent a real threat to the safety and security of Australians because without that support and facilitation, it may be impossible for the intended perpetrator to undertake the terrorist act.

106. New subparagraph 104.4(1)(c)(vii) authorises an issuing court to make an interim control order are where the court is satisfied on the balance of probabilities that the person has provided support for or otherwise facilitated the engagement in a hostile activity in a foreign country. This amendment supplements the existing grounds for making an interim control order on the basis that the person has participated in training with a terrorist organisation, been convicted in Australia of an offence relating to terrorism, a terrorist organisation or been convicted in a foreign country of an offence that is constituted by conduct that, if engaged in in Australia, would constitute a terrorism. It is appropriate to include this additional ground on the basis that a person who has actually provided support or facilitated a hostile activity in a foreign country has not only a demonstrated ability but also a demonstrated propensity to engage in conduct in support or facilitation of conduct akin to a terrorist act.

Item 12 – Paragraph 104.4(1)(d) of the *Criminal Code*

107. This item repeals and replaces existing paragraph 104.4(1)(d) of the Criminal Code.

108. The revision to paragraph 104.4(1)(d) is consequential to the expansion of the objects of Division 104 and the insertion of subparagraphs 104.3(d)(i) and (ii), which reduce the burden on a senior AFP member when requesting an interim control order to a requirement that the member provide an explanation as to why 'the' proposed obligations, prohibition or restrictions should be imposed and, to the extent known, a statement of facts as to why 'the' proposed obligations, prohibitions or restrictions should not be imposed.

109. Revised paragraph 104.4(1)(d) authorises an issuing court to make an interim control order where the court is satisfied on the balance of probabilities that 'the order' is reasonably necessary, and reasonably appropriate and adapted, for the purpose of one of the objects of the Division. This replaces the current requirement under existing paragraph 104.4(1)(d) for the issuing court to be 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 one of the objects of the Division.

Item 13 – Subsections 104.4(2) and (3) of the *Criminal Code*

110. This item repeals and replaces existing subsections 104.4(2) and (3) of the Criminal Code.

111. The revision to subsection 104.4(2) is consequential to the expansion of the objects of Division 104 and the insertion of subparagraphs 104.3(d)(i) and (ii), which reduce the burden on a senior AFP member when requesting an interim control order to a requirement that the member provide an explanation as to why 'the' proposed obligations, prohibition or restrictions should be imposed and, to the extent known, a statement of facts as to why 'the' proposed obligations, prohibitions or restrictions should not be imposed.

112. Revised subsection 104.4(2) requires an issuing court to take into account the person's circumstances, including the person's financial and personal circumstances, when determining whether 'the order' is reasonably necessary, and reasonably appropriate and adapted to the objects of the Division. This replaces the current requirement under existing subsection 104.4(2) for the court to take into the impact of 'each of the obligations, prohibitions and restrictions to be imposed on the person by the order'.

113. Revised subsection 104.4(3) authorises an issuing court to make a control order by removing one or more of the requested obligations, prohibitions or restrictions where doing so would allow the court to be satisfied that the order is reasonably necessary, and reasonably appropriate and adapted to achieving one of the objects of the Division. This provision is an important safeguard in light of the removal of the requirements for a senior AFP member to provide an explanation as to why 'each' obligation, prohibition or restriction should or should not be imposed and the removal of the requirement for an issuing court to be satisfied in relation to 'each' obligation, prohibition or restriction when both making the order and considering its impact on the person. This provision would authorise a court, for example, to remove a curfew proposed to be imposed under paragraph 104.5(3)(c) where the proposed curfew would prevent the person from continuing in their employment.

Item 14 – After subsection 104.5(1A) of the *Criminal Code*

114. This item inserts new subsection 104.5(1B) into the Criminal. New subsection 104.5(1B) provides that, when specifying a day for the purposes of a confirmation hearing, the issuing court must take into consideration the fact that the person the subject of the interim control order, the AFP, or another party, may need time to prepare in order to adduce evidence or make submissions, as well as any other matter the court considers relevant.

115. This amendment affords an additional protection to a person the subject of an interim control order who may need to obtain the assistance, for example, of an interpreter to fully

understand the terms of the order or a legal representative to fully understand the implications of the order. It would also allow sufficient time for the person to contact other individuals to adduce evidence or make submissions, including where those persons might be located overseas.

Item 15 – Subsection 104.6(2) of the *Criminal Code* (note)

116. This item removes the words '4 hours' and replaces them with '12 hours' in the note to existing paragraph 104.6(1)(b) of the Criminal Code. This amendment is consequential to the amendment to section 104.10, which extends the time for seeking the Attorney-General's consent after obtaining an urgent interim control order from an issuing court by telephone, fax, email or other electronic means from 4 hours to 12 hours.

Item 16 – Paragraph 104.6(4)(a) of the *Criminal Code*

117. This item repeals existing paragraph 104.6(4)(a) and replaces it with a revised paragraph. This amendment is consequential to the amendment to subsection 104.2(3), which reduces the amount of documentation that must be provided to the Attorney-General when seeking consent to request an interim control order. This amendment provides that the same documents that would be provided to the Attorney-General when requesting an interim control order in ordinary circumstances must be provided to the issuing court when making a request for an interim control order in urgent circumstances by telephone, fax, email or other electronic means (without the Attorney-General's prior consent).

Item 17 – Subsection 104.8(1) of the *Criminal Code* (note)

118. This item removes the words '4 hours' and replaces them with '12 hours' in the note to existing subsection 104.8(1) of the Criminal Code. This amendment is consequential to the amendment to section 104.10, which extends the time for seeking the Attorney-General's consent after obtaining an urgent interim control order from an issuing court in person from 4 hours to 12 hours.

Item 18 – Paragraph 104.8(2)(a) of the *Criminal Code*

119. This item repeals existing paragraph 104.8(2)(a) and replaces it with a new paragraph. This amendment is consequential to the amendment to subsection 104.2(3), which reduces the amount of documentation that must be provided to the Attorney-General when seeking consent to request an interim control order. This amendment provides that the same documents that would be provided to the Attorney-General when requesting an interim control order in ordinary circumstances must be provided to the issuing court when making a request for an interim control order in urgent circumstances in person (without the Attorney-General's prior consent).

Item 19 – Section 104.10 of the *Criminal Code* (heading)

120. This item repeals the heading to existing section 104.10 and replaces it with a new heading '104.10 Obtaining the Attorney-General's consent within 12 hours'. This amendment is consequential to the amendment to section 104.10, which extends the time for seeking the Attorney-General's consent after obtaining an urgent interim control order from an issuing court from 4 hours to 12 hours.

Item 20 – Subsections 104.10(1) and (2) of the *Criminal Code*

121. This item removes the words '4 hours' and replaces them with '12 hours' in existing subsections 104.10(1) and (2) of the Criminal Code.

122. The amendment to subsection 104.10(1) provides that, where an urgent interim control order has been requested without the Attorney-General's consent, the senior AFP member who made the request must seek the Attorney-General's consent within 12 hours of making the request. The amendment extends the existing timeframe of 4 hours, and reflects the fact that it may not always be practical or even possible to seek the Attorney-General's consent within 4 hours of making a request for an urgent interim control order. For example, the Attorney-General may be in transit between the east and west coasts of Australia and unable to be contacted for a period of more than 4 hours.

123. The amendment to subsection 104.10(2) provides that, where an urgent interim control order has been requested without the Attorney-General's consent, if the Attorney-General refuses to consent or has not given consent within 12 hours of making the request, any urgent interim control that was made by the issuing court immediately ceases to be in force. The amendment extends the existing timeframe of 4 hours, and reflects the fact that it may not always be practical or even possible for the Attorney-General to consider a request and give consent within 4 hours of making a request for an urgent interim control order.

Item 21 – Subsection 104.10(2) of the *Criminal Code* (note)

124. This item removes the words 'vary the request and' from the note to subsection 104.10(2). The note advises that, where the Attorney-General has not consented within 12 hours of making the request to the issuing court, the senior AFP member may seek the Attorney-General's consent to request a new interim control order. This amendment is consequential to the amendments to subsections 104.10(1) and (2), and reflects the fact that subsection 104.2(5) authorises the making of a new request in relation to a person where a previous request has been made. Accordingly, it would not be necessary to vary the request.

Item 22 – Subparagraph 104.12A(2)(a)(ii) of the *Criminal Code*

125. This item amends subparagraph 104.12A(2)(a)(ii) of the Criminal Code, which provides for the confirmation of an interim control order.

126. This item omits the reference to paragraphs '104.2(3)(b) and (c)' from subparagraph 104.12A(2)(a)(ii) and replaces them with a reference to paragraphs '104.3(1)(c) and (d)'. This amendment is consequential to the amendment to subsection 104.2(3), which reduces the amount of documentation that must be provided to the Attorney-General when seeking consent to request an interim control order.

Item 23 – Paragraph 104.14(7)(b) of the *Criminal Code*

127. This item amends paragraph 104.14(7)(b) of the Criminal Code, which provides for the confirmation of an interim control order.

128. This item repeals paragraph 104.14(7)(b) of the Criminal Code and replaces it with a revised paragraph. Revised paragraph 104.14(7)(b) provides that, when confirming or varying an interim control order, the court may remove one or more obligations, prohibitions

or restrictions if doing so would allow the court to be satisfied on the balance of probabilities that the order as varied would substantially assist in preventing the provision of support for or the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country. This amendment is consistent with the amendment to subsection 104.4(3), which authorises an issuing court to make an interim control order by removing one or more of the requested obligations, prohibitions or restrictions.

Item 24 – Paragraph 104.20(1)(b) of the *Criminal Code*

129. This item repeals paragraph 104.20(1)(b) which relates to varying a control order and replaces it with a revised paragraph. Revised paragraph 104.20(1)(b) provides that, when varying a confirmed control order, the court may remove one or more obligations, prohibitions or restrictions if doing so would allow the court to be satisfied on the balance of probabilities that the order as varied would substantially assist in preventing the provision of support for or the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country. This amendment is consistent with the amendments to subsection 104.4(3) and paragraph 104.14(7)(b), which authorise an issuing court to remove one or more of the requested obligations, prohibitions or restrictions.

Item 25 – At the end of subsection 104.23(1) of the *Criminal Code*

130. This item repeals subsection 104.23(1) which relates to varying a control order and replaces it with a revised subsection. Revised subsection 104.23(1) provides that the Commissioner of the AFP may apply to an issuing court to add one or more obligations, prohibitions or restrictions to a confirmed control order where the Commissioner suspects on reasonable grounds that either:

- the varied order would substantially assist in preventing the provision of support for or the facilitation of a terrorist act, or
- the person the subject of the order has either:
    - participated in training with a terrorist organisation
    - engaged in or support for or otherwise facilitated engagement in a hostile activity in a foreign country
    - been convicted of a terrorism related offence in Australia, or
    - been convicted of a terrorism related offence overseas.

131. This amendment reflects the amendments expanding the objects and grounds on which an interim control order can be requested and made.

Item 26 – Subparagraph 104.23(2)(b)(i) of the *Criminal Code*

132. This item repeals subparagraph 104.23(2)(b)(i) which relates to varying a control order and replaces it with a revised subparagraph. Revised subparagraph 104.23(2)(b)(i) requires the Commissioner to provide an explanation as to why 'the order' should be varied when applying for additional obligations, prohibitions or restrictions to be added to a confirmed control order. This amendment replaces the existing requirement for the Commissioner to provide an explanation as to why 'each of' the obligations, prohibitions and restrictions should be imposed, and is consistent with the amendments to paragraph 104.4(1)(d) and subsection 104.4(2).

Item 27 – Subparagraph 104.23(2)(b)(ii) of the *Criminal Code*

133. This item removes the words 'any of those obligations, prohibitions or restrictions' from subparagraph 104.23(2)(b)(ii) of the Criminal Code and replaces them with the words 'the proposed additional obligations, prohibitions or restrictions'. This amendment requires the Commissioner to provide a statement of any facts the Commissioner is aware of relating to why 'the' proposed additional obligations, prohibitions or restrictions should not be imposed on the person. This amendment replaces the existing requirement for the Commissioner to provide a statement of any facts the Commissioner is aware of relating to why 'any of those' obligations, prohibitions or restrictions should not be imposed on the person, and is consequential to the amendment to subparagraph 104.23(2)(b)(i).

Item 28 – Paragraph 104.24(1)(b) of the *Criminal Code*

134. This item repeals existing paragraph 104.24(1)(b) of the Criminal Code and replaces it with a revised paragraph. Revised paragraph 104.24(1)(b) authorises an issuing court to vary a confirmed control order on application by the Commissioner provided the court is satisfied on the balance of probabilities that the varied control order is reasonably necessary, and reasonably appropriate and adapted, for the one of the purposes set out in new section 104.1, specifically:

- protecting the public from a terrorist act
- preventing the provision of support for or the facilitation of a terrorist act, or
- preventing the provision of support for or the facilitation of the engagement in a hostile activity in a foreign country.

135. This amendment reflects the amendments expanding the objects and grounds on which an interim control order can be requested.

Item 29 – Subsections 104.24(2) and (3) of the *Criminal Code*

136. This item repeals subsections 104.24(2) and (3) and replaces them with revised subsections.

137. Revised subsection 104.24(2) provides that, when determining whether to amend a control order on application from the Commissioner, the court must take into account the impact of the varied order on the person's circumstances, including the person's financial and personal circumstances. This amendment is consistent with the amendments to paragraph 104.4(1)(d) and subsection 104.4(2), which require an issuing court to take into account the person's circumstances, including the person's financial and personal circumstances, when determining whether 'the order' is reasonably necessary, and reasonably appropriate and adapted to the objects of the Division. This replaces the current requirement under existing subsection 104.4(2) for the court to take into the impact of 'each of the obligations, prohibitions and restrictions to be imposed on the person by the order'.

138. Revised subsection 104.24(3) provides that, when determining whether to amend a control order on application from the Commissioner, the issuing court may remove one or more obligations, prohibitions or restrictions if doing so would allow the court to be satisfied on the balance of probabilities that the order as varied would substantially assist in preventing the provision of support for of the facilitation of a terrorist act or the engagement in a hostile activity in a foreign country. This amendment is consistent with the amendments to

subsection 104.4(3) paragraph 104.14(7)(b), which authorise an issuing court to remove one or more of the requested obligations, prohibitions or restrictions

Item 30 – At the end of Division 106 of the *Criminal Code*

139. This item adds new section 106.6 at the end of Division 106 of the Criminal Code. New section 106.6 sets out the application provisions for certain amendments to Divisions 104 made by the Counter-Terrorism Legislation Amendment Act (No. 1) 2014.

140. New subsection 106.6(1) provides that the amendment to section 104.1 made by Schedule 1 to the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 only applies in relation to control orders where the relevant interim control order is requested after that commencement.

141. New subsection 106.6(2) provides that the amendments to sections 104.2, 104.3, 104.10 and 104.12A made by Schedule 1 to the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 apply to requests for interim control orders made after the commencement of section 106.6 where the conduct in relation to which the request is made occurs before or after that commencement.

142. New subsection 106.6(3) provides that amendments made to section 104.4 and subsection 104.5(1B) made by Schedule 1 to the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 apply to the making of interim control orders requested after the commencement of section 106.6 where the conduct in relation to which the request is made occurs before or after that commencement.

143. New subsection 106.6(4) provides that the amendments to sections 104.6 and 104.8, as amended by Schedule 1 to the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 apply to the making of requests after the commencement of this section, where the conduct in relation to which the request is made occurs before or after that commencement.

144. New subsection 106.6(5) provides that the amendment to section 104.14 made by Schedule 1 to the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 applies to confirmations of control orders where the relevant interim control order is requested after that commencement.

145. New subsection 106.6(6) provides that the amendments to sections 104.20, 104.23 and 104.24 made by Schedule 1 to the Counter-Terrorism Legislation Amendment Act (No. 1) 2014 apply to variations of control orders where the relevant interim control order is requested after that commencement.

Schedule 2

ASIS support to the ADF and related measures

Statutory functions of ASIS (items 1 to 2)

146. Item 1 of Schedule 2 amends subsection 6(1) of the ISA to make explicit that it is a statutory function of ASIS to provide assistance to the Defence Force in support of military operations, and to cooperate with the Defence Force on intelligence matters. This replicates an identical provision in paragraph (7)(d) of the ISA, which confers such a function on ASD.

147. Item 2 is a consequential change which amends subsection 6(7) to remove specific reference to ASIS's support to the Defence Force, which no longer needs to be highlighted. This does not mean that subsection 6(7) no longer has any application to the ADF. Where relevant subsection 6(7) of the ISA can still apply to ASIS's support to the ADF (as it is a Commonwealth authority).

Class authorisations (items 4, 8-11, 17, 22, 26, 31)

148. Items 4, 8-11, 17, 22, 26 and 31 amend sections 8, 9, 10 and 10A of the ISA to enable the Minister responsible for ASIS to give an authorisation to undertake activities for the specific purpose or for purposes which include the specific purpose of producing intelligence on a specified class of Australian persons or to undertake activities or a series of activities that will, or is likely to, have a direct effect on a specified class of Australian persons. The arrangements for class authorisations will only apply to support to the ADF following a request from the Defence Minister. Any support to foreign authorities could only arise in the context of support to the ADF. The usual individual authorisation arrangements apply to all other ASIS activities.

149. In giving the authorisation relating to the specified class, the Minister responsible for ASIS must be satisfied of the preconditions set out in subsection 9(1) of the ISA. The Minister must also be satisfied that the class relates to support to the Defence Force in military operations as requested by the Defence Minister and that all persons in the class of Australian persons will or are likely to be involved in one or more of the activities set out in paragraph 9(1A)(a).

150. The authorisation must be in writing and must specify how long it will have effect, but must not exceed six months. It can be renewed in writing but each renewal must not be for a period exceeding six months.

151. The Director-General of ASIS must ensure that a copy of the request from the Defence Minister and a copy of the authorisation is kept by ASIS and is available for inspection on request by the IGIS.

152. The Minister may vary or cancel the authorisation at any time in writing.

153. The Minister must consider cancelling the authorisation where advised by the relevant agency head that the grounds for the authorisation have ceased to exist. For this purpose, section 10 of the ISA is amended to state that the grounds would cease to exist where the Minister for Defence withdraws his request for ASIS support to the Defence Force or the Defence Force is no longer deployed on the operation to which the original request related.

154. In relation to each class authorisation, the Director-General must give the Minister a written report in respect of activities undertaken by ASIS during the period of the authorisation which must be provided as soon as practicable, and no later than three months, after the authorisation ceased to have effect or the renewal of the authorisation. The amendments to section 10A of the ISA reflect the current ASIS practice which is to provide a report to the Minister whenever an individual authorisation is renewed and add a requirement that this be provided as soon as practicable. This specific reporting requirement will ensure that the Minister has appropriate visibility of the relevant activities, and that reports are provided as soon as practicable within the relevant three-month period, and not merely at any time within three months (as is required for reports on activities undertaken pursuant to a Ministerial authorisation issued under section 9, as per subsection 10A(2)).

155. The other limits on ASIS continue to apply, including under:

- subsections 6(4) and 6(6) if the ISA (prohibition on paramilitary activities, violence against the person, or the use of weapons by ASIS staff members and agencies, other than the provision and use of weapons or self-defence techniques in accordance with Schedule 2); and
- sections 11, 12 and 13 of the ISA.

156. The privacy rules under section 15 of the ISA would continue to apply in relation to an Australian person within the class of Australian persons.

Class agreement of the Attorney-General (Item 14)

157. The agreement of the Attorney-General, as the Minister responsible for ASIO, is also required to the granting of an authorisation where the relevant Australian person is, or is likely to be, involved in an activity or activities that are, or are likely to be, a threat to security. As a related amendment, subsection 9(1A) will be amended to enable the Attorney-General to provide agreement to a ministerial authorisation for an ISA agency in relation to an individual Australian person, or an identified class of Australian persons. This amendment will have a broader application than solely where ASIS is providing assistance to the ADF in support of military operations. For example, it might also be relevant in other situations such as a class of Australian persons involved in people smuggling.

158. Item 14 adds new subsections 9(1AA), (1AB) and (1AC) of the ISA to specify that the Attorney-General, as the Minister responsible for ASIO, can choose to give, in writing, his or her agreement in relation to the Minister responsible for an ISA agency authorising an activity to produce intelligence in relation to a particular class of Australian persons – as an alternative to the existing requirement that the Attorney-General provide agreement to the Minister authorising an activity for an individual Australian person.

159. Similarly, the Attorney-General can choose to give his or her agreement in relation to the Minister responsible for ASIS authorising an activity that will, or is likely to, have a 'direct effect' on a particular class of Australian persons in circumstances where they are, or are likely to be involved in activities that are, or are likely to be, a threat to security.

160. The class agreement may specify the period for which it could have effect, and is subject to renewal. Where the period of effect of a class agreement ceases, this will not mean that a ground on which the authorisation was issued has ceased to have effect. However,

once the period of an agreement has ceased, no new authorisations may be made in reliance on that agreement. A new agreement would need to be sought to support a new authorisation.

Technical and consequential amendments (items 6, 12, 13, 15, 16, 17)

161. Items 6, 13, 15 and 17 make a number of technical amendments (relating primarily to the re-ordering of provisions) to accommodate the insertion of the new authorisation and class agreement provisions outlined above.

162. Item 6 inserts a new heading in section 9, to make clear that subsection 9(1) sets out the preconditions for the issuing of an authorisation.

163. Item 12 clarifies the existing position that the Attorney-General's agreement to the issuing of a Ministerial authorisation under paragraph 9(1A)(b) of the ISA can be provided orally or in writing, and updates this provision to make reference to the requirement in new subsection 9(1AA) of the ISA that any class agreement provided by the Attorney-General is required to be in writing. This form requirement is an appropriate and proportionate requirement to ensure appropriate record-keeping arrangements in relation to class agreements, noting that such agreements would generally be provided as part of broader planning or preparations for activities, rather than in urgent circumstances.

164. Item 13 is a technical amendment that inserts a note, at the end of subsection 9(1A), to cross-refer to the meaning of a defined term ('serious crime') that is used in the activities specified in paragraph 9(1A)(a) of the ISA, in respect of which a Ministerial authorisation can be issued. It is consequential to item 15, which repeals the relevant provision currently containing this note, subsection 9(1B). Subsection 9(1B), which defines terms used in subsection 9(1A) is consolidated into new subsection 9(7) (inserted by item 17).

165. In addition, item 17 (together with item 16) repeals existing subsection 9(5) and inserts new subsections 9(4A)-(6). These provisions deal with the technical and form-related matters currently in subsections 9(4) and 9(5), which require authorisations to be issued in writing, and impose obligations on the relevant agency head to retain copies of the authorisation and provide them to the IGIS. In addition, item 17 extends these provisions to cover authorisations made in relation to ASIS support for the ADF, a request from the Defence Minister, and agreements provided by the Attorney-General.

166. Item 17 further clarifies, by the insertion of new subsection 9(6), that requests, authorisations, and the Attorney-General's agreement to the issuing of an authorisation are not legislative instruments. This is declaratory of the non-legislative character of such instruments.

Emergency authorisations (items 18, 29, 30, 31)

167. Items 18, 29, 30 and 31 implement the key amendments in relation to emergency authorisations.

168. Item 18 repeals and substitutes section 9A (Ministerial authorisations in an emergency) and inserts new section 9B (contingency if authorising Ministers are unavailable) and new section 9C (contingency if the Attorney-General is unavailable to provide agreement to the making of an emergency Ministerial authorisation).

169. Items 29, 30 and 31 insert reporting requirements in section 10A in relation to emergency authorisations issued under sections 9A and 9B.

Section 9A – authorisations in an emergency – Ministerial authorisations (item 18)

Circumstances in which an emergency authorisation may be issued under section 9A

170. New section 9A applies if the requirements in subsection (1) exist. There must exist an emergency situation in which an agency head considers it necessary or desirable to undertake an activity or series of activities. There must also exist a direction issued by the responsible Minister for the relevant agency, under subsection 8(1), that requires the agency to obtain an authorisation under section 9, 9A or 9B before undertaking the relevant activity or series of activities.

171. Authorisations in relation to classes of persons to undertake the activities specified in new subparagraphs 8(1)(a)(ia) and (ib) are excluded from the emergency Ministerial authorisation scheme. This is in recognition that any authorisation of activities under these subparagraphs, in relation to classes of persons, should be sought and obtained in advance of the commencement of the relevant ADF operations or activities (such as in the course of planning) or otherwise in circumstances that do not constitute an emergency. An emergency authorisation could still be sought in relation to an individual if there were no applicable class authorisation in effect.

Issuing criteria, form of issuing, record keeping and notification requirements

172. In the event that the requirements of subsection (1) are satisfied, subsection (2) operates to provide that a Minister specified in subsection (3) may orally give an authorisation if (subject to section 9C) the conditions in subsections 9(1) and 9(1A) are met.

173. As the note to subsection (2) clarifies, new section 9C operates to provide for contingency arrangements if the Attorney-General is not readily available or contactable in order to provide his or her agreement to the making of an authorisation, where such agreement is required by paragraph 9(1A)(b) (because the relevant Australian person in relation to whom the activity is proposed to be undertaken is, or is likely to be involved in, activities that are, or are likely to be, a threat to security).

174. The ability of relevant Ministers to orally issue an emergency authorisation removes an identified limitation in the emergency authorisation provisions, which may preclude their timely issuing, having regard to the time critical circumstances in which the emergency authorisation scheme is designed to operate. Despite the availability of instantaneous, or close to instantaneous, forms of written communication by electronic means (such as via email or SMS), there may nonetheless arise circumstances in which it is neither possible nor practicable for a Minister to issue an authorisation by those means. (This may occur, for example, if the authorising Minister is only contactable by telephone or videoconference by reason of his or her remote location; or if the circumstances are of such urgency that the time required for an authorisation to be drafted may mean that the opportunity to conduct the relevant activity is lost or compromised.)

175. It is appropriate that the legislative framework for the issuing of emergency authorisations should accommodate this possibility, given the potentially serious, adverse consequences to Australia's security and other vital national interests should an intelligence

agency miss an opportunity to collect critical intelligence as a result of delay occasioned by a form-related requirement.

176. The ability to issue emergency authorisations on an oral basis is consistent with established practice in the issuing of numerous types of law enforcement warrants (including search, telecommunications interception and surveillance warrants), and for authorisations issued by the Attorney-General enabling ASIO to conduct special intelligence operations under the *Australian Security Intelligence Organisation Act 1979*.

177. Subsection (5) provides that the agency head must ensure that a written record of an oral authorisation is made as soon as practicable after the authorisation is given, and no later than 48 hours after this time. The agency head is further required to give to the IGIS a copy of the record within three days of the giving of the authorisation. These requirements ensure that records are made of emergency authorisations within a short time of their making, while accommodating the legitimate operational need for flexibility in the form in which such authorisations are issued. The IGIS notification requirement ensures that the IGIS is afforded an opportunity to exercise his or her statutory oversight powers in relation to an emergency authorisation, and the activities carried out in reliance upon it, from an early stage.

178. The term 'practicable' is used to denote the intention that records must be made as soon as possible, unless the first (or subsequent) available opportunity is not feasible or viable having regard to the circumstances of the particular case. (For example, on an assessment of any significant opportunity cost in making a record at a particular point in time – for example, if making the record at a particular time in question would require the diversion of operational resources from undertaking the relevant activities in accordance with the emergency authorisation.)

Ministers who may issue an emergency authorisation

179. Subsection (3) provides that the Ministers who may issue an emergency authorisation are either the Minister responsible for the relevant ISA agency, or if the relevant agency head is satisfied that the responsible Minister is not readily available or contactable, any of the Prime Minister, Foreign Minister, Defence Minister or Attorney-General. This reflects the requirements in the existing subsection 9A in relation to the Ministers who may issue emergency authorisations.

Period of effect

180. Subsection (4) provides that an emergency authorisation has a non-renewable maximum duration of 48 hours. An emergency authorisation will therefore cease to have effect at the earlier of the 48 hour maximum, or when an authorisation for the activity or series of activities is given under section 9.

181. The strictly limited maximum duration of 48 hours makes clear that the arrangements provided for in new subsection 9A are of an extraordinary nature, and are designed only to operate in time critical circumstances. The expectation is that, if it is considered necessary to carry out the relevant activities after 48 hours, the agency must obtain an ordinary Ministerial authorisation, from their responsible Minister, in accordance with the requirements of section 9.

Section 9B – authorisations in an emergency – Ministers unavailable (item 18)

182. New section 9B provides for the contingency that none of the Ministers specified in subsection 9A(3) are readily available or contactable to issue an emergency Ministerial authorisation under section 9A. In these instances, section 9B enables the relevant agency head to issue an emergency authorisation. This will ensure that emergency authorisations can be granted, subject to appropriate safeguards, notwithstanding that none of the available Ministers are readily available or contactable.

183. The ability of an agency head to grant an emergency authorisation under section 9B is not delegable, ensuring that the only persons who can issue emergency authorisations are those who have overall control of, and responsibility for, the relevant agency and are subject to the special duties in section 12A. (Section 12A imposes an obligation on ISA agency heads to ensure that their respective agencies are kept free of any influences or considerations not relevant to activities that are necessary for the proper performance of their agency, or authorised or required by another Act. ISA agency heads are further obliged to ensure that nothing is done that might lend colour to any suggestion that their respective agency is concerned to further or protect the interests of any particular section of the community, or a suggestion that the agency is undertaking activities other than those which are necessary for the proper performance of the agency's functions, or authorised or required by another Act.)

Circumstances in which section 9B applies

184. Subsection (1) provides that the arrangements in subsection 9B are available if the agency head considers it necessary or desirable to undertake an activity or series of activities, an emergency Ministerial authorisation is sought under section 9A, and the agency head is satisfied that none of the Ministers specified in subsection 9A(3) are readily available or contactable.

185. This requirement ensures that the ability for agency heads to issue an emergency authorisation is limited to those cases in which it is strictly necessary, because there would otherwise be no ability to obtain the relevant emergency authorisation. Importantly, it requires the agency head to make reasonable attempts to contact a relevant Minister, by seeking an authorisation under section 9A, and satisfying himself or herself that none of the relevant Ministers listed in subsection 9A(3) are readily available or contactable. The actions of an agency head under subsection 9B(1) will be subject to the independent oversight of the IGIS, as well as Ministerial accountability.

Authorisation criteria

186. Subsection (2) sets out the criteria for the issuing of emergency authorisations by agency heads under section 9B. An agency head may give an authorisation if satisfied of the matters set out in paragraphs (a)-(c). These are that:

- the facts of the case would justify the responsible Minister in relation to the relevant agency given an authorisation under section 9 because (subject to section 9C) the agency head is satisfied that the conditions in subsections 9(1) and (1A) are met; and
- the responsible Minister would have given the authorisation; and
- if the activity or activities is not undertaken before an ordinary (section 9) or emergency (section 9A) Ministerial authorisation is issued – security (within the

meaning of that term in section 4 of the ASIO Act) will be, or is likely to be, seriously prejudiced; or there will be, or is likely to be a serious risk to a person's safety.

187. These criteria ensure that the ability of agency heads to issue emergency authorisations is limited to those extraordinary circumstances in which such an authorisation is necessary and proportionate to a legitimate operational need. In particular, the agency head must be satisfied that not only would it be open to the responsible Minister to issue an authorisation (on the basis of the criteria in subsections (1) and (1A) of section 9), but also that the responsible Minister would have done so. This ensures that an agency head will expressly consider the particular way in which the relevant Minister was likely to exercise the discretion (including consideration of the weight the Minister would be likely to have placed on relevant matters).

188. The ability of agency heads to issue emergency authorisations is further limited to those circumstances in which there would be serious prejudice to security or a serious risk to a person's safety. This effectively limits authorisations issued under section 9B to circumstances of the most urgent kind, consistent with the fact that section 9B is a contingency arrangement for those instances in which Ministerial decision makers are unavailable.

189. Importantly, issuing decisions made by agency heads under section 9B will be subject to the independent statutory oversight of the IGIS in accordance with the IGIS Act, in addition to Ministerial accountability.

190. Paragraph 9B(2)(a) provides that the agency head must be satisfied that the requirements in subsections 9(1) and (1A) are met. This includes, subject to section 9C, the requirement in paragraph 9(1A)(b) that the Attorney-General's agreement must be obtained to the issuing of an authorisation in relation to activities that involve, or are likely to involve, an Australian person whose activities are, or are likely to be, a threat to security (as that term is defined in section 4 of the ASIO Act).

191. As the note to subsection 9B(2) makes clear, section 9C relevantly requires the agency head to obtain the agreement of the Director-General of Security (if readily available or contactable) to the making of an authorisation under section 9A or 9B where the relevant agency head is satisfied that the Attorney-General is not readily available or contactable. The combined effect of paragraph 9B(2)(a) and section 9C is significant because it ensures that, where a proposed authorisation is also relevant to matters of security, the decision maker is provided with all relevant information in relation to Australian persons and security (of which the decision maker may not have had visibility) and that all authorisation decisions take account of such information.

Content and form

192. Subsection 9B(3) provides that an authorisation given under section 9B may be given in relation to the same matters as an ordinary (non-emergency) authorisation may be given under subsection 9(2) (being a specified activity or class of activities; acts of a staff member or agent, or a class of such persons whether identified by name or otherwise; and activities done for a particular purpose connected with the agency's functions).

193. Subsection 9B(3) further provides that an authorisation given under section 9B is subject to the requirements in subsection 9(3) (which are that an authorisation is subject to

any conditions specified in it) and new subsection 9(4A) (which is that an authorisation must be in writing). These requirements are appropriate safeguards, in that agency heads can, in appropriate cases, place further limitations on the activities or other matters specified in an authorisation in the form of conditions. In addition, the requirement that emergency authorisations issued under section 9B are in writing ensures appropriate standards of record keeping in the circumstances, having regard to the status of the decision maker as an agency head rather than a Minister, as is the case under section 9A.

Period of effect

194. Subsection (4) provides that an authorisation issued under section 9B has a maximum duration of 48 hours. An emergency authorisation will end sooner if an authorisation for the activity or series of activities is given under section 9, or if the authorisation is cancelled by the responsible Minister in accordance with subsection (8).

195. This is consistent with the maximum duration for emergency Ministerial authorisations issued under new section 9A. A maximum duration of 48 hours makes clear that emergency authorisations are of an extraordinary nature, and are designed only to operate in time critical circumstances. The expectation is that, if it is considered necessary to carry out the relevant activities after 48 hours, the agency must obtain an ordinary Ministerial authorisation, from the responsible Minister, in accordance with the requirements of section 9.

Copies of authorisation and other documents

196. Subsections (5) and (6) provide that the agency head must give certain documents to the responsible Minister as soon as practicable and no later than within 48 hours of the giving of the authorisation; and to the IGIS as soon as practicable and no later than within three days of the giving of the authorisation. These documents are a copy of the authorisation itself, a summary of the facts of the case that the agency head was satisfied justified giving the authorisation under section 9B, and an explanation of the Minister's obligation under subsection (7). (Under subsection (7), the Minister is obliged to consider, as soon as practicable after being given the documents, whether to cancel the authorisation under subsection (8); or give a new authorisation for the activities or series of activities under section 9 or 9A; or, by necessary implication, to allowing the emergency authorisation to simply continue to run until it expires 48 hours after issuing.)

197. These provisions ensure that the responsible Minister has appropriate early awareness and oversight of the making of emergency authorisations by the relevant agency head. Not only must the Minister be informed as soon as practicable of the making of an emergency authorisation under section 9B and the basis upon which such an authorisation is made, but he or she is under a positive obligation to make a decision about whether it should be cancelled, replaced with a Ministerial authorisation (of an emergency or ordinary variety as considered appropriate in the circumstances) or allowed to run to its maximum duration of 48 hours and cease in accordance with paragraph 9B(4)(c). The relevant agency head is under an obligation (which is subject to scrutiny by the IGIS) to bring this obligation to the Minister's attention and explain it, as part of providing notice of the authorisation under subsection (5).

198. Subsections (5) and (6) further ensure that the IGIS is afforded an opportunity to exercise his or her statutory oversight powers in relation to the issuing of emergency

authorisations under section 9B in a timely way. This includes an opportunity for the IGIS to scrutinise not only the grounds on which an emergency authorisation was issued under section 9B, but also the agency head's advice to the Minister in respect of the Minister's positive obligation to make a decision on continuation (or otherwise) under subsection (7).

199. Subsections (5) and (6) are of a similar effect to the existing requirements under subsection 10(2A), which apply to the agency head's duty to inform and advise the Minister if the agency head is satisfied that the grounds on which an authorisation made under section 9 have ceased to exist. (In these cases, subsection 10(2A) provides that the agency head's obligations relevantly include to inform the Minister accordingly, and as soon as practicable after being so informed, the Minister must consider cancelling the authorisation.)

200. As noted above, the term 'practicable' is used to denote the intention that the relevant documents must be provided as soon as possible within 48 hours (in the case of the Minister) or three days (in the case of the IGIS), unless the first (or subsequent) available opportunity within this maximum period is not feasible or viable having regard to the circumstances of the particular case. (For example, on an assessment of any significant opportunity cost in providing documents at a particular point in time – for example, if providing them at a particular time would require the diversion of operational resources from undertaking the relevant activities in accordance with the emergency authorisation.)

Responsible Minister must consider cancelling authorisation or giving new authorisation

201. Subsection (7) provides that the Minister responsible for the relevant ISA agency in respect of which an emergency authorisation is issued under section 9B must, as soon as practicable after being given the documents referred to in subsection (5), consider whether to exercise his or her power under subsection (8) to cancel the authorisation; or give a new authorisation for the activity or series of activities under section 9 or 9A.

202. This provision ensures that the Minister retains appropriate oversight and control of the activities of the agency for which he or she is responsible, and in particular does so by placing a positive obligation on the Minister to determine whether the emergency authorisation should continue for its maximum duration of up to 48 hours, be cancelled, or be replaced by a Ministerial authorisation of either an emergency (s 9A) or ordinary (s 9) kind.

Responsible Minister may cancel authorisation

203. Subsection (8) invests the Minister with discretion to cancel, in writing, an emergency authorisation issued by an agency head under section 9B.

204. This provision, in conjunction with subsections 9B (4)-(7) ensure that the responsible Minister has appropriate oversight and control over emergency authorisation decisions made by the head of the relevant agency under section 9B. Not only must the Minister be informed of the making of an authorisation under section 9B as soon as practicable and no later than 48 hours, but he or she must also be specifically advised of his or her powers to decide to allow an emergency authorisation to continue, or to cancel it, or to replace it with a new Ministerial authorisation made under section 9 or section 9A. Further, the Minister is under a positive obligation to consider whether or not to exercise these powers, as soon as practicable after being provided with the relevant documents containing this advice.

Authorisation not a legislative instrument

205. Subsection (9) provides that an authorisation and a cancellation under section 9B are not legislative instruments. This provision is declaratory of the non-legislative character of such authorisation and cancellation decisions, and has been included to assist readers in this regard.

Section 9C – authorisations in an emergency – ASIO Minister unavailable (item 18)

206. New section 9C provides for the further contingency that one of the Prime Minister, Foreign Minister or Defence Minister may be available to issue an emergency authorisation under section 9A, but the Attorney-General – as the Minister responsible for ASIO – is not readily available or contactable to provide his or her agreement to the making of an emergency authorisation, where such agreement is required under paragraph 9(1A)(b). (As noted above, paragraph 9(1A)(b) is imported into the requirements of section 9A emergency authorisation by subsection 9A(2). It applies if the proposed activity relates to an Australian person who is, or who is likely to be, involved in activities that are, or are likely to be, a threat to security, as that term is defined in section (4) of the ASIO Act.)

Circumstances in which section 9C applies

207. Subsection (1) provides that section 9C applies if the conditions in paragraphs (a)-(c) are met. These are that:

- an agency head considers it necessary or desirable to undertake an activity or series of activities;
- an authorisation is sought under section 9A or 9B; and
- all of the following apply:
- the agreement of the Attorney-General (as Minister responsible for administering the ASIO Act) is required to be obtained under paragraph 9(1A)(b);
- the agreement has not been obtained; and
- the agency head is satisfied that the Attorney-General is not readily available or contactable.

208. These requirements make clear that section 9C is intended to operate as an exceptional, contingency measure in those circumstances in which the Attorney-General is unavailable and an authorisation is sought in time critical circumstances of emergency. Section 9C does not, and is not designed to, circumvent the usual requirements of paragraph 9(1A)(b).

Giving authorisation

209. Subsection (2) explains the effect of section 9C on the requirement in paragraph 9(1A)(b). It provides that, where subsection 9C applies, the authorisation may, subject to subsection (3), be given without obtaining the agreement of the Attorney-General.

Obtaining the agreement of the Director-General of Security

210. Subsection (3) provides that, before an authorisation is given under section 9A or section 9B, the agency head must obtain the agreement of the Director-General of Security to the authorisation being given, unless the agency head is satisfied that the Director-General is not readily available or contactable.

211. The requirement that the agreement of the Director-General of Security must be obtained to the making of an authorisation that concerns activities relevant to security will ensure that the decision maker is provided with all relevant information in relation to Australian persons and security (of which the decision maker may not have had visibility), and that all authorisation decisions take account of such information. The requirement that the agency head must be satisfied the Director-General is readily available and contactable also provides for appropriate operational flexibility, in that authorisations can be made in the absence of the Director-General's agreement if the relevant agency head is not satisfied that the Director-General is readily available or contactable.

Advising the ASIO Minister and the IGIS

212. Subsection (4) provides that the relevant agency head must advise the Attorney-General and the IGIS that an authorisation was given under section 9C. The advice must specifically state whether the agreement of the Director-General of Security was obtained to the issuing of the authorisation.

213. Subsection (5) provides that advice to the Attorney-General must be provided as soon as practicable and no later than 48 hours after the authorisation is issued. Advice to the IGIS must be provided as soon as practicable and no later than three days after the authorisation is given.

214. These provisions ensure that there is an appropriate opportunity for Ministerial oversight by the Attorney-General, as the Minister responsible for ASIO, and appropriate independent oversight by the IGIS, from the earliest practicable time after which an authorisation is issued, consistent with operational requirements.

215. As noted above, the term 'practicable' is used to denote the intention that this advice must be provided as soon as practicable within the maximum period (48 hours in the case of the Attorney-General, and three days in the case of the IGIS), unless the first (or next subsequent) available opportunity within this maximum is not feasible or viable having regard to the circumstances of the particular case. (For example, on an assessment of any significant opportunity cost in providing the advice a particular point in time – for example, if providing advice at a particular time would require the diversion of operational resources from undertaking the relevant activities in accordance with the emergency authorisation.)

Section 10A – reporting requirements – emergency authorisations (items 29-31)

216. Item 29 extends the obligation on agency heads in subsection 10A(1) to give to the responsible Minister a written report on each activity or series of activities carried out in reliance on a Ministerial authorisation issued under section 9, to cover activities carried out in reliance on an authorisation issued under section 9A or section 9B. This will ensure that the responsible Minister continues to have appropriate visibility of activities carried out in reliance on emergency authorisations.

217. Item 30 makes a technical amendment to subsection 10A(2), to accommodate new subsections 10A(3) and (4), as inserted by item 31 (discussed above).

218. Item 31 also inserts new subsection 10(4), which provides that reports in respect of activities undertaken in reliance on an emergency authorisation issued under section 9A or section 9B must be provided to the relevant Minister as soon as practicable, but no later than one month after the day on which the authorisation ceased to have effect. The shorter reporting period compared to that in section 10A(2), which applies to Ministerial authorisations issued under section 9, is proportionate to the limited maximum duration (48 hours) of emergency authorisations, and thereby ensures an appropriate degree of Ministerial oversight of emergency authorisations. (The term 'practicable', for the purpose of new subsection 10(4), is intended to have the same meaning as outlined above in this Explanatory Memorandum. That is, as soon as possible unless the first or subsequent opportunity is not feasible in the circumstances of the case, having regard to all relevant considerations.)

Technical and consequential amendments – emergency authorisations (items 3, 5, 19, 20, 21, 23, 24, 25, 27, 28)

219. Items 3 and 5 make technical amendments to paragraphs 8(1)(a) and 8(1)(b) (Ministerial directions requiring agency heads to obtain Ministerial authorisation under section 9, in relation to the activities specified in those paragraphs) to make reference to the new emergency Ministerial authorisation provisions in sections 9A and 9B. These amendments will ensure that Ministers must issue written directions to the relevant agency head, requiring the agency to obtain an authorisation under section 9 (ordinary Ministerial authorisation) or 9A or 9B (emergency authorisation) in relation to the activities listed in subsection 8(1).

220. The remaining items listed above (19, 20, 21, 23, 24, 25, 27 and 28) make largely technical amendments to the provisions of section 10 (the period during which an authorisation has effect etc) and section 10A (Ministerial reporting on authorised activities) to make clear the specific requirements applying to Ministerial authorisations issued under section 9, which are discrete to those applying to emergency authorisations issued under section 9A or section 9B.

221. In particular, these items make clear that the existing requirements set out in section 10 (period of effect of a Ministerial authorisation) apply exclusively to ordinary (non-emergency) Ministerial authorisations issued under section 9. This is because provision is made for the requirements applicable to emergency authorisations issued under section 9A or 9B in those sections (as per the commentary on item 18 above).