

2002-2003-2004

THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

**ANTI-TERRORISM BILL (No 2) 2004**

**EXPLANATORY MEMORANDUM**

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

## OUTLINE

The Bill contains, in Schedule 1 amendments to the *Passports Act 1938*; in Schedule 2 amendments to the *Australian Intelligence Security Act 1979*; in Schedule 3 amendments to the Schedule of the *Criminal Code Act 1995* ('the *Criminal Code*'); in Schedule 4 amendments to the *Administrative Decisions (Judicial Review) Act 1977* and to the *Transfer of Prisoners Act 1983*; and in Schedule 5 amendments to the *Crimes Act 1914*. The proposed amendments improve Australia's counter-terrorism legal framework.

The objects of this Bill are:

- (a) to amend the *Passports Act 1938* to ensure that those subject to a warrant for an indictable offence or serious foreign offence, prevented from travelling internationally by force of an order of a court, a law of the Commonwealth or a condition of parole, or suspected of engaging in harmful conduct (such as terrorist activities) are prevented from leaving Australia on a foreign passport
- (b) to amend the *Australian Security Intelligence Organisation Act 1979* to ensure that those subject to a request by the Director-General of Australian Security Intelligence Organisation (ASIO) to the Minister for consent to apply for a questioning warrant are prevented from leaving Australia
- (c) to amend the *Criminal Code Act 1995* to strengthen the counter-terrorism legislation by extending the application of offence provisions under Division 102 of the Code to people whose associations with a listed terrorist organisation, or with a person who is a member or who promotes or directs the activities of such an organisation, assists the organisation to continue to exist or to expand.
- (d) to amend the *Transfer of Prisoners Act 1983* to include security as a third ground for transfer between State or Territory prisons for federal, State and Territory prisoners, as well as for persons charged with and remanded in custody for an offence. The amendments to the Transfer of Prisoners Act will also provide for the return transfer of such persons, as well as the transfer of such persons for court proceedings.

- (e) To amend the *Administrative Decisions (Judicial Review) Act 1977* to make decisions of the Attorney-General under Part IV of the *Transfer of Prisoners Act 1983*, as well as any decision of the Attorney-General under the Act on the grounds of security, exempt from the application of the Act.
- (f) To amend the forensic procedure provisions in the *Crimes Act 1914* to facilitate effective disaster victim identification in the event that a disaster causing mass casualties (such as a terrorist attack or an aircraft disaster) were to occur within Australia.

### Passports Act 1938

The Bill will amend the *Passports Act 1938* (Passports Act) to create powers to demand, confiscate and seize foreign travel documents to ensure that those suspected of serious offences or harmful conduct are prevented from leaving Australia on a foreign travel document. The Bill will also insert new offences for making false statements in relation to foreign travel document applications, giving false information in relation to foreign travel document applications, providing false documents in relation to foreign travel document applications, improper use or possession of a foreign travel document, making, possessing or using false foreign travel documents, failure to surrender a suspicious foreign travel document, and failure to surrender a foreign travel document when required to do so.

The proposed provisions and offences are similar to those that apply to Australian passports and are necessary to combat the misuse of foreign travel documents in Australia. The misuse of foreign travel documents can be associated with terrorist and other criminal activity.

Currently, it is possible for a person to depart Australia on a foreign passport despite the cancellation and seizure of that person's Australian passport on security or law enforcement grounds. The new foreign passport provisions will enable the competent authorities to seek an order from the Minister for Foreign Affairs requiring a person to surrender the person's foreign travel documents, and will authorise an enforcement officer to request and, if necessary, seize foreign travel documents, whether or not a person has used the documents to enter Australia.

### Australian Security Intelligence Organisation Act 1979

The Bill will amend the *Australian Security Intelligence Act 1979* (ASIO Act) to create a power for ASIO to demand the surrender of a person's passports (both Australian and foreign) to prevent that person from leaving Australia, where the person is subject to a request by the Director-General of ASIO to the Minister for consent to apply for a questioning warrant. In practice, for operational security reasons, the power would only be exercised if the person who is the subject of the request attempts to leave Australia or there is a concern that the person may attempt to leave Australia.

The Bill will also create new offences under the ASIO Act for failure to comply with a demand for the surrender of a person's passport and for leaving Australia when a person is subject to a request for consent to apply for a questioning warrant.

### Division 102 of the Criminal Code

The Bill would insert a new offence provision, "Association with a Terrorist Organisation", in Division 102 of the Criminal Code which would make it an offence to intentionally associate with a person who is a member or who promotes or directs the activities of a listed terrorist organisation where that association provides support that would help the terrorist organisation to continue to exist or to expand. The offence would only apply to organisations which are listed as terrorist organisations under the *Criminal Code Regulations 2002* and where the person knew that the organisation was a listed terrorist organisation. Exceptions to the offence are provided for in relation to associations with close family members; associations for the purpose of public religious worship; associations for the purpose of the provision of aid of a humanitarian nature; and associations for the purpose of providing legal advice or representation in criminal proceedings, or related proceedings, or proceedings relating to whether the organisation in question is a terrorist organisation.

The provision draws on concepts from the offence of consorting (which is a State and Territory offence aimed against criminal gangs), and fairly recently enacted New South Wales legislation which provides for the use of non-association orders as part of sentencing (*Crimes (Sentencing Procedure) Act 1999 (NSW) No. 92.*). Just as

consorting offences can be used to break up criminal gangs, the proposed offence can be used to break up terrorist groups.

### Transfer of Prisoners Act 1983

Schedule 4 amends the *Transfer of Prisoners Act 1983* to include security as a third ground for transfer between State or Territory prisons for federal, State and Territory prisoners, as well as for persons charged with and remanded in custody for an offence. The amendments to the Transfer of Prisoners Act will also provide for the return transfer of such persons, as well as the transfer of such persons for court proceedings.

### Crimes Act 1914

Schedule 5 amends Division 11A of Part 1D of the *Crimes Act 1914* to facilitate effective disaster victim identification if a mass casualty incident (such as a terrorist attack or an aircraft disaster) were to occur within Australia.

Part 1D of the Crimes Act (which contains Division 11A) establishes a framework for a cooperative legislative scheme with States and Territories in relation to forensic procedures which has the potential, when fully implemented, to facilitate effective disaster victim identification in relation to domestic incidents. However, that cooperative scheme is not yet fully operative, and the inter-jurisdictional arrangements in place at the time of these amendments are limited to law enforcement purposes only, and could not be used solely for the purpose of disaster victim identification.

Division 11A was inserted into Part 1D shortly after the Bali bombings to facilitate the identification of the victims of the bombings and the criminal investigation in relation to the incident. Its application is currently limited to the Bali bombings and any other incident occurring outside Australia and Norfolk Island that the Minister determines in writing. It overrides State and Territory legislation and enables, for the purposes of the identification of victims of the relevant incident and the criminal investigation of the incident, access to the National Criminal Investigation DNA Database, the transfer of DNA information between the Australian government and

the States and Territories, the matching of DNA profiles, and the disclosure of the results of those matchings.

Section 23YUK of the *Crimes Act 1914* requires that the operation of Division 11A be independently reviewed as soon as possible after the first anniversary of the commencement of the Division. That review is being undertaken at the time of these amendments. The Chair of the review committee has written to the Minister for Justice and Customs advising that existing forensics legislation may be inadequate to facilitate effective disaster victim identification if a mass casualty incident were to occur within Australia. The Chair raised this issue in advance of the Committee's report because he considered it was of an "important and urgent" nature.

The purpose of Schedule 5 is to broaden the scope of Division 11A to ensure that Australia can adequately respond to a wide range of domestic incidents which are within the legislative capacity of the Federal Parliament. This will reduce the risk of delays in disaster victim identification which may otherwise be caused by gaps in the cooperative legislative scheme being developed with States and Territories under Part 1D.

The report of the Division 11A review committee is expected to be completed in July 2004. The domestic incidents issue raised by the Chair of the review is considered sufficiently important to warrant these urgent amendments. Any further issues that may be raised by the review will need to be addressed in subsequent amendments.

## **FINANCIAL IMPACT STATEMENT**

The Bill is not expected to have a significant financial impact.

## **NOTES ON ITEMS**

### **Clause 1 – Short Title**

It is proposed that the short title of the Act will be the Anti-terrorism (No. 2) Act 2004.

### **Clause 2 – Commencement**

Item 2 of the table provides that Schedule 1 commences on the 28th day after the day on which this Act receives the Royal Assent.

Item 3 of the table provides that Schedule 2 commences on the 28th day after the day on which this Act receives the Royal Assent.

Item 4 of the table provides that Schedule 3 commences on the day after the day on which this Act receives the Royal Assent.

Item 5 of the table provides that Schedule 4 commences on the day on which this Act receives the Royal Assent.

Item 6 of the table provides that Schedule 5, items 1 to 5, commences on the day on which this Act receives the Royal Assent.

Item 7 of the table provides that Schedule 5, item 6, commences on the later of: (a) the start of the day on which this Act receives the Royal Assent; and (b) immediately after the commencement of Schedule 3 to the *Australian Federal Police and Other Legislation Amendment Act 2004*. However, the provisions do not commence at all if the event mentioned in paragraph (b) does not occur.

### **Clause 3 – Schedule(s)**

This clause provides that Acts specified in Schedule 1 (*Passports Act 1938*); in Schedule 2 (*Australian Security Intelligence Organisation Act 1979*); in Schedule 3 (*Criminal Code Act 1995*); in Schedule 4 (*Administrative Decisions (Judicial Review) Act 1977* and *Transfer of Prisoners Act 1983*); and in Schedule 5 (*Crimes Act 1914*) are amended as set out in each case.



## **SCHEDULE 1 – FOREIGN TRAVEL DOCUMENTS**

### **Item 1**

This item will insert a new heading ‘Part 1—Preliminary’ at the start of the existing provisions to separate the preliminary provisions from the Australian passport provisions (Part 1A), the new provisions on enforcement officers’ powers in relation to foreign travel documents (Part 2), the new provisions on offences relating to foreign travel documents (Part 3), and the new miscellaneous provisions (Part 4).

### **Item 2**

Item 2 will amend section 4A, which provides for extra-territorial operation of the Act, so that it will not apply to the new Parts in the Passports Act that deal with foreign travel documents. Instead, standard geographical jurisdiction will apply to these Parts. It would be inappropriate for offences relating to foreign travel documents to apply outside of the standard geographical jurisdiction.

### **Items 3, 4, 5, 6, 7 and 8 – Definitions**

These items will amend subsection 5(1) of the Passports Act by inserting new definitions of *competent authority*, *document*, *enforcement officer*, *foreign passport*, *foreign travel document* and *Minister’s determination*.

The definition of competent authority will refer the reader to the relevant definitions in the new sections 13, 14 and 15 of the Passports Act. These sections confer a power on a competent authority to request the Minister to order the surrender of a person’s foreign travel document where the person is subject to a warrant for an indictable offence or serious foreign offence, and prevented from travelling internationally by force of an order of a court, a law of the Commonwealth or a condition of parole, or suspected of engaging in harmful conduct.

The definition of document will be based on the definition of document in section 143.1 of the *Criminal Code Act 1995*. This definition takes account of emerging technologies.

The definition of enforcement officer will limit those with the responsibility and power for demanding and seizing foreign travel documents to Customs officers, police officers or persons authorised by the Minister to exercise the powers or perform the functions of an enforcement officer. The definition of enforcement officer will be narrower than the existing definition of officer, which defines the class of people who exercise less intrusive powers in relation to Australian passports.

The term foreign passport will mean a passport issued by or on behalf of the government of a foreign country.

The term foreign travel document will include a document of identity issued for a travel purpose as well as a passport.

The term Minister's determination will mean an instrument made by the Minister under new section 24, which will allow the Minister to make instruments to specify matters that may be specified in a Minister's determination under the Passports Act. Details concerning the content of the determinations are included in the notes to that new section.

### **Items 8, 9, 10 and 11 – references to repealed provisions**

These items remove references to paragraph 9A(1)(f) and section 9B, which will be repealed by items 16 and 18, from subsection 5(3) and 5(4).

Paragraph 9A(1)(f) makes it an offence to possess or control a falsified foreign passport or a document purporting to be a foreign passport that is not a foreign passport. Section 9B makes it an offence to falsify a foreign passport or document. New section 22 will create similar offences to the offences in paragraph 9A(1)(f) and section 9B.

Subsection 5(3) provides that a reference in specified sections to a passport, Australian passport or passport granted in pursuance of the Passports Act includes a reference to a certificate of identity or other document of identity issued by virtue of those regulations. Sections 9A (other than paragraph (f)) and 9B (other than paragraph (b)) are specified sections.

Section 5(4) provides that a reference in paragraph 9A(f) or 9B(b) to a passport issued by or on behalf of the government of a foreign country includes a reference to a document of identity issued by or on behalf of the government of a foreign country for travel purposes (whether or not also issued for any other purpose).

The new definition of *foreign travel document* in subsection 5(1) includes a document of identity issued by or on behalf of the government of a foreign country for travel purposes (whether or not also issued for any other purpose)

### **Item 12**

This item will insert a new heading ‘Part 1A—Australian Passports’ at the start of the existing provisions on Australian passports to separate these provisions from the new provisions on foreign travel documents.

### **Items 12, 13, 14, 15, 16, 17, 18 and 19 – Offences relating to foreign passports**

These items amend various provisions to limit the application of the existing offences to Australian passports. Foreign passports and documents will now be dealt with under new Parts 2 and 3 of the Passports Act.

Items 13 and 14 will limit the definition of *prescribed document* to an Australian passport or other document so that the offence in subsection 9(1A) for failure to surrender a prescribed document on demand will only apply to Australian passports or documents. A similar offence for foreign travel documents will be included under the new section 17.

Item 16 will repeal paragraph 9A(1)(f) so that the offence in section 9A will not apply to foreign passports or documents. Paragraph 9A(1)(f) makes it an offence to possess or control a falsified foreign passport or a document purporting to be a foreign passport that is not a foreign passport. Items 15 and 17 make consequential amendments to section 9A. A similar offence for foreign travel documents will be included under the new section 22.

Item 18 will repeal section 9B, which makes it an offence to falsify a foreign passport or document. A similar offence will be included under the new section 22.

Item 19 will repeal subsection 10(2) so that the offence of making a false statement in connection with an application of a passport will not apply to foreign passports. A similar offence for foreign travel documents will be included under the new section 18.

### **Item 20**

Item 20 will amend section 11 so that it will not apply to the new Parts in the Passports Act that deal with foreign travel documents. Section 11 lists the offences that are indictable offences and where a court of summary jurisdiction may determine an indictable offence charge summarily.

Instead, sections 4G and 4J of the *Crimes Act 1914* will apply to the new Parts. The application of section 4G will mean that new offences punishable by imprisonment for a period exceeding 12 months in the new Parts will be indictable offences. Section 4J provides that certain indictable offences may be dealt with summarily.

### **Item 21**

Item 21 will amend the regulation making power in section 12 so that it will not apply to the new Parts in the Passports Act that deal with foreign travel documents. The existing regulation making power in section 12 of the Passports Act specifies matters that may be prescribed that are specific to Australian passports. Section 12 also permits the regulations to prescribe a penalty of imprisonment (not exceeding 3 months) for breaches of regulations. This is not consistent with Commonwealth criminal law policy and principles and it is not appropriate that it apply to the new Parts.

Instead, a regulation making power for the new Parts of the Passports Act will be included in new section 25.

### **Item 22**

This item will insert new Part 2, new Part 3 and new Part 4 at the end of the Passports Act. The purpose of Part 2 is to include in the Passport Act the powers of enforcement officers in relation to foreign passport documents and related offences. Part 3 will create offences in relation to false and misleading statements, information

and documents made or produced in connection with an application for a foreign travel document, and improper use or possession of a foreign travel document. Part 4 will provide for administrative review, minister's determinations and regulations.

## *Part 2—Enforcement officers’ powers in relation to foreign travel documents*

### *Division 1 – Requesting the Minister to order surrender of foreign travel documents*

New Division 1 will confer a power on a competent authority to request the Minister to order the surrender of a person’s foreign travel documents where

- the competent authority believes on reasonable grounds that the person is prevented from travelling internationally by force of an arrest warrant or an order, condition or direction under a Commonwealth or foreign law; or
- the competent authority suspects on reasonable grounds that the person is likely to engage in harmful conduct.

The circumstances in this Division for ordering the seizure of a person’s foreign passport are based on the existing reasons for cancelling and not issuing an Australian passport under the Passports Act. The circumstances are more fully set out in the Division to ensure the circumstances when an order can be sought by a competent authority are clear.

Currently, it is possible for a person who holds a foreign passport to depart Australia on that foreign passport despite the cancellation and seizure of the person’s Australian passport on security or law enforcement grounds. The new provisions will ensure that, where those grounds exist, a person can also be prevented from leaving Australia on a foreign passport.

### *Section 13 – Request relating to Australian law enforcement matters*

New section 13 will allow a competent authority to request the Minister to order the surrender of a person’s foreign travel documents if it believes on reasonable grounds that the person is the subject of an arrest warrant for an indictable offence, or the subject of an Australian judicial or a law enforcement order or direction.

This provision will clarify and apply the policy underpinning section 7B of the Passports Act to foreign travel documents.

## Orders

New paragraph (1)(a) will describe the most frequently used order – a person is the subject of an arrest warrant issued in Australia in respect of an indictable offence against a law of the Commonwealth, a State or Territory.

New paragraph (1)(b) will describe other categories of orders which have the effect of preventing a person from travelling internationally – an order of an Australian court and an order under a law of the Commonwealth.

New subparagraphs (1)(b)(i) and (ii) will describe in some detail the possible relevant court (or similar) orders, to avoid ambiguity, in relation to prison sentences and other criminal sanctions. New subparagraph (ii) will cover all the types of orders and directions which are covered in subparagraphs 7B(b)(ii) and (iii) of the Passports Act, that is, a condition of parole, or of recognisance, surety, bail bond or licence for early release from prison.

New subparagraph (1)(b)(iii) will complement the provisions in Commonwealth legislation that permit a competent authority to prohibit a person from travelling internationally (this is often called a departure prohibition order).

It is imperative that persons the subject of warrants or other orders, conditions or directions are not able to depart Australia.

## Competent authority

New section 13 will provide that a competent authority can request the Minister to order the surrender of foreign travel documents. Under section 7B of the Passports Act, officers within the Department have nominal responsibility for administration of these law enforcement matters.

New subsection 13(2) will define a competent authority as a person with responsibility for, or powers, functions or duties in relation to, that circumstance under a law of the Commonwealth, a State or Territory. This will include law enforcement and security agencies.

New paragraph (b) of the definition will allow for any ambiguity about this category of authorities to be corrected by specifying, in a Minister's determination, that a person is a competent authority.

#### Interpretation – Travelling internationally

New subsection 13(2) will also define *prevented from travelling internationally*. There are four situations when a person is considered to be prevented from travelling internationally under new paragraph 13(1)(b). These circumstances are when the order or other document indicates that the person is required to remain in Australia, the person is required to surrender the person's passport, the person is not permitted to apply for a passport, or the person is not permitted to obtain a passport. The inclusion of the four separate paragraphs is designed to ensure that a person the subject of any of these requirements can be prevented from departing Australia, and will ensure the provision is activated regardless of the expression used by the legislation or the Court. These expressions are also used in paragraph 7B(b) of the Passports Act, the ASIO Act and the *Crimes Act 1914* (paragraphs 22(1)(c) and (d)).

#### *Section 14 – Request relating to international law enforcement co-operation*

New section 14 will provide that a competent authority can request the Minister to order the surrender of a person's foreign travel documents if it believes on reasonable grounds that the person is the subject of a foreign judicial or similar law enforcement order. If the order is an arrest warrant, this section only applies where the warrant relates to a serious foreign offence.

New subsection 14(2) will define the *competent authority* for the purposes of new subsection 14(1). A competent authority is limited to an approved representative, an agency or an employee of the Commonwealth of a class specified in a Minister's determination. This definition appropriately limits the persons who can make a request.

New subsection 14(2) will also define *serious foreign offence*. The offences that can be regarded as a serious foreign offence for the purposes of new subsection 14(1) are listed in detail. The threshold is essentially the same as a Commonwealth indictable offence, for example, terrorism, drug trafficking, child sex tourism, people smuggling,



sexual servitude, fraud and corruption offences. The definition is drawn from the definition of extradition offence in the *Extradition Act 1988* (section 5). A serious foreign offence will also be defined by reference to an indictable offence against the Passports Act or an offence specified in a Minister's determination made under new subparagraph 15(1)(a)(v).

This provision will complement new section 13. It seeks to meet Australian law enforcement objectives. There are circumstances where the most appropriate law enforcement action is for a person to be dealt with under the jurisdiction of a foreign country. For example, in general a person cannot be convicted of an offence where the person has been convicted or acquitted in another country.

If a person is able to travel on foreign travel documents while subject to court orders not to travel internationally, the Australian law enforcement objective would be circumvented.

#### *Section 15 – Requests relating to potential for harmful conduct*

New section 15 will provide that a competent authority can request the Minister to order the surrender of a person's foreign travel documents if it suspects on reasonable grounds that that: (a) the person is likely to engage in specified forms of harmful conduct; and (b) the person should be required to surrender the person's foreign travel documents in order to prevent the person from engaging in the conduct. This provision will clarify and apply the policy in section 7E of the Passports Act to foreign travel documents.

The dual purposes of new section 15 are to ensure greater accountability of the competent authorities responsible for making the assessments of the likely conduct and to ensure that all appropriate types of conduct will be covered.

Under new subsection 15(1), the competent authority can make a request to the Minister if the competent authority suspects on reasonable grounds that both of the circumstances set out in new paragraphs 15(1)(a) and (b) exist. That is, a competent authority will only be able to request the Minister to order the surrender of foreign travel documents where the competent authority suspects on reasonable grounds that the person is likely to engage in the conduct specified in the provision, and that the

person should be required to surrender their foreign travel documents in order to prevent them from engaging in the conduct listed.

### Types of conduct

The types of conduct specified in new paragraph 15(1)(a) will be the types of conduct listed in paragraph 7E(1)(a) of the Passports Act, conduct that might constitute an indictable offence against the Passports Act, and indictable offences against laws of the Commonwealth that are specified in a Minister's determination.

The conduct listed in paragraph 7E(1)(a) of the Passports Act, and that will be listed in new subparagraphs 15(1)(a)(i)–(iii), is conduct that might cause: (i) prejudice to the security of Australia or a foreign country; (ii) danger to the health or physical safety of other persons; and (iii) interference with rights of other persons under the International Covenant on Civil and Political Rights.

New subparagraph 15(1)(a)(iv) will list conduct that might constitute an indictable offence against the Passports Act. For example, if a competent authority suspects on reasonable grounds that an applicant is likely to provide his or her passport to another person so that other person may use it for travel or identification (in breach of new subsection 21(3)) the competent authority can request the Minister to order the surrender of the person's foreign travel documents.

The offences that will be listed in a Minister's determination under new subparagraph 15(1)(a)(v) will include many of the offences in the *Criminal Code Act 1995* that have an extended geographical jurisdiction, such as: terrorism (Divisions 72 and 102), people smuggling (Division 73) and offences against humanity (Division 268 and 270). Offences under other legislation which could be listed include drug trafficking (*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, sections 9 to 14 and 15A to 15C), child sex tourism (*Crimes Act 1914*, Part IIIA) and child abduction (*Family Law Act 1975*, Division 6).

There will be some duplication between the types of conduct covered under new subparagraphs (i)–(iii) and the conduct covered under a Minister's determination in new subparagraph (v). New subparagraphs (i)–(iii) will replicate paragraph 7E(1)(a) of the Passports Act to ensure the existing law and practice concerning their

implementation is maintained. The elements of most of the relevant offences in the *Criminal Code Act 1995* that relate to making, providing or possessing travel or identity documents (subsections 73.8, 73.10 and 73.11) do not come within the terms of the new subparagraphs (i)–(iii). New subparagraph (v) will cover such conduct, as well as other conduct that would amount to an indictable offence and that merits an order for the surrender of foreign travel documents but that might not come within the terms of new subparagraphs (i)–(iii).

The reference, in new paragraph 15(1)(a), to offences against this Act or against a law of the Commonwealth includes a reference to an offence against sections 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of the *Criminal Code Act 1995* that relates to that particular offence.

#### Competent authority

The definition of a ***competent authority*** in new subsection 34(2) is the same as the definition of competent authority in new subsections 32(2) and 33(2).

The competent authorities that most frequently provide advice or information to the Minister are the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP).

One of ASIO's functions is to advise the Minister for Foreign Affairs in respect of matters relating to security (in accordance with the ASIO Act, section 17(1)(c)). It does so by furnishing a security assessment (ASIO Act, section 37). ASIO, or another competent authority, can request the Minister to order the surrender of a person's foreign travel documents if it suspects on reasonable grounds that: (a) the person is likely to engage in conduct which might prejudice the security of a foreign country; and (b) the person should be refused a passport in order to prevent the person from engaging in the conduct.

If an order for the surrender of foreign travel documents is made on the basis of advice of an adverse ASIO assessment, that person must be given a copy of the assessment (ASIO Act, section 38). The person may apply to the Administrative Appeals Tribunal for a review of ASIO's security assessment (ASIO Act 1979, section 54). If the Tribunal does not confirm the assessment, the Minister shall treat

the Tribunal's findings as superseding ASIO's assessment (ASIO Act 1979, section 61).

The other important competent authority is the AFP. If AFP suspects on reasonable grounds that: (a) a person is likely to engage in conduct that might constitute a specified indictable offence; and (b) the person should be refused a passport in order to prevent the person from engaging in the conduct, it can request the Minister to order the surrender of a person's foreign travel documents. The person may complain about the AFP's action in requesting the Minister to do so, in accordance with the *Complaints (Australian Federal Police) Act 1981* (section 5(1)).

### Interpretation

The term 'likely to engage' is based on the test in section 7E of the Passports Act. The expression was used to ensure that a competent authority can only make a request to the Minister where there is a real, and not remote, possibility of a person engaging in the specified conduct.

### ***Division 2 – Demands for foreign travel documents***

New Division 2 will create the power of the Minister to order the surrender of a person's foreign travel documents, the power of an enforcement officer to demand, seize and retain a person's foreign travel documents, and offences for failure to comply with an enforcement officer's demand.

#### *Section 16 – Demand for foreign travel document if authorised by Minister*

New subsection 16(1) will confer a power on the Minister for Foreign Affairs to order the surrender of foreign travel documents if a competent authority makes a request under new sections 13, 14 and 15. The Minister for Foreign Affairs also has similar powers in relation to Australian passports and has responsibility for external affairs. This provision will ensure consistency in decision-making about the cancellation or decision not to issue an Australian passport and the decision to order the surrender of a foreign passport. It will also avoid the need to have multiple administrative processes.

In making decisions under this subsection, the Minister will also apply the principle that Australian passports law should not be used as an extension of the judicial system and should not be expected to impose any more restraint on an individual than an Australian court would be prepared to impose. The decision will be subject to review in accordance with new subsection 23(1).

New subsection 16(2) will authorise an enforcement officer to demand that a person surrender their travel documents if the Minister has made an order under new subsection 16(1). *Enforcement officer* will be defined in section 5(1).

New subsection 16(3) will authorise an enforcement officer to seize the persons foreign travel documents, including those not in the person's possession or control, if the person does not immediately surrender the documents on demand. New subsection 16(4) makes it clear that new subsection 16(3) does not authorise an enforcement officer to enter premises that the officer would not otherwise be authorised to enter.

New subsection 16(5) will make it an offence for a person to fail to immediately surrender the person's foreign travel documents in the person's possession or control to an enforcement officer if demanded to do so under new subsection 16(2).

The offence is drafted in Criminal Code style and contains several safeguards. A person will only be guilty of an offence if the officer informs the person that the Minister has ordered the surrender of the documents, that the officer has authority to make the demand, and that it is an offence not to comply with the demand.

The offence will carry the same penalty as the offences relating to a refusal to surrender Australian travel documents in section 9 of the Passports Act: imprisonment for 1 year or 20 (\$2200) penalty units, or both. (Section 9 refers to \$2000 rather than 20 penalty units).

New subsection 16(6) will authorise an enforcement officer to retain a foreign travel document obtained under this section. There will be a right to retain foreign travel documents under this subsection so long as reasons for requesting an order under new sections 13, 14 and 15 exist and the order has not been overturned. This provision will not create an obligation to retain the foreign travel documents and so, for

example, will not prevent an enforcement officer from returning foreign travel documents to the country that issued those documents on the request of that country, where that is appropriate.

### *Section 17 – Demand for suspicious foreign travel document*

New subsection 17(1) will authorise an enforcement officer to demand a person surrender a foreign travel document that has been obtained by means of a false or misleading statement, information or document, or used in the commission of an offence against the Passports Act. This power currently exists under subsection 9(1A) of the Passports Act and will be moved to this Part of the Passports Act so that the provisions dealing with foreign travel documents will be together. Items 13 and 14 amend subsection 9(1) so that the power under subsection 9(1A) will only apply to Australian passports and travel documents.

New subsection 17(1) will be broadened from subsection 9(1) to include false and misleading information and documents as well as statements. This is consistent with the approach to false and misleading communications in the *Criminal Code Act 1995*, and with the new false and misleading offences for foreign travel documents in the Passports Act.

New subsection 17(2) will make it an offence for a person to fail to immediately surrender the person's foreign travel documents to an enforcement officer if demanded to do so under new subsection 17(1). This offence corresponds to the offence in subsection 9(1A) of the Passports Act and will have the same penalty: imprisonment for 1 year or 20 (\$2200) penalty units, or both. (Section 9 refers to \$2000 rather than 20 penalty units).

The offence is redrafted in Criminal Code style and contains several additional safeguards. A person will only be guilty of an offence if the documents are in the person's possession or control, and the officer informs the person that the Minister has ordered the surrender of the documents, that the officer has authority to make the demand and that it is an offence not to comply with the demand.

New subsection 17(3) will authorise an enforcement officer to retain a foreign travel documents obtained under this section. Consistent with new section 16, there will be

a right to retain foreign travel documents under this subsection so long as reasons for requesting an order under this section exist. This provision will not create an obligation to retain the foreign travel documents and so, for example, will not prevent an enforcement officer from returning foreign travel documents to country responsible for those documents on the request of that country.

### ***Part 3 – Offences relating to foreign travel documents***

New Part 3 describes certain activities that constitute an offence if performed on or with a foreign travel document. Similar offences are currently contained in sections 9A, 9B, and 10 of the Passports Act. Items 16, 18 and 19 will amend these offences so that they will only apply to Australian passports and documents. The offences relating to foreign travel documents will be included in this Part of the Passports Act so that the provisions dealing with foreign travel documents are together.

The provisions have also been modified to achieve three goals. First, there will be a greater deterrence factor through increased penalties. Second, the new provisions will be consistent with the network of legislation designed to prevent false identity and citizenship documents from being used in Australia. Finally, the provisions will be consistent with the language of the *Criminal Code Act 1995* and will cover all foreign travel documents and not just foreign passports.

The Bill will increase the penalties to 10 years imprisonment or 1000 penalty units (\$110,000), or both. This increase in penalties is to deter identity document fraud, which has been identified as a serious national and international problem. The new penalties will also be consistent with those in related legislation.

Passports legislation constitutes an important part of a network of legislation designed to protect Australia from the use of false identity and citizenship documents and related criminal activity (including people smuggling, terrorism and drug smuggling). Penalties for offences against the Passports Act are significantly lower than those in related legislation such as the *Criminal Code Act 1995* (Division 73 – People smuggling and related offences) and the *Migration Act 1958* (section 234). Both of these Acts provide for penalties of 10 years imprisonment or fines of 1000 penalty units or both. The increased penalties in the Bill will ensure offences in relation to

foreign travel documents are consistent with penalties for comparable conduct in those other Acts.

*Section 18 – Making false or misleading statements in relation to foreign travel document applications*

New section 18 will reflect section 10(2) of the Act, and its structure is modelled on section 136.1 of the *Criminal Code Act 1995*. The penalty will be 10 years imprisonment or 1000 penalty units (\$110,000).

The new section will specify that, in a ‘statement’ that relates to a foreign travel document, it is an offence to omit any matter or fact which makes the statement false or misleading in a material particular.

Consistent with section 136.1 of the *Criminal Code Act 1995*, new subsection 18(2) will provide for a defence where the statement was not false or misleading in a material particular.

Recklessness will apply to the circumstance that the statement is misleading or omits any matter or thing without which the statement is misleading. This is consistent with the fault element in section 10 of the Passports Act.

*Section 19 – Giving false or misleading information in relation to foreign travel document applications*

New section 19 is in similar terms to new section 18, but covers ‘information’. The structure of new section 19 is modelled on section 137.1 of the *Criminal Code Act 1995*. The penalty of 10 years imprisonment or 1000 penalty units (\$110,000) for false and misleading information will be consistent with the penalties for false and misleading statements and documents, and reflects the seriousness of passport-related fraud.

Recklessness will apply to the circumstance that the information is misleading or omits any matter or thing without which the information is misleading. This will be consistent with the similar offence in new section 18 for false and misleading statements.



*Section 20 – Producing false or misleading documents in relation to foreign travel document applications*

New section 20 is in similar terms to new section 18, but covers ‘documents’.

Its structure is modelled on section 137.2 of the *Criminal Code Act 1995*. The penalty of 10 years imprisonment or 1000 penalty units (\$110,000) for false and misleading documents will be consistent with the penalties for false and misleading information and statements, and reflects the seriousness of passport-related fraud

Recklessness will apply to the circumstance that the information is misleading or omits any matter or thing without which the information is misleading. This will be consistent with the similar offences in new sections 18 and 19 for false and misleading statements and information.

*Section 21 – Improper use or possession of a foreign travel document*

New section 21 will reflect the offences currently contained in paragraphs 9A(1)(a)–(d) of the Passports Act and will apply them to foreign travel documents. New section 21 will cover the use of a cancelled foreign travel document, the use, possession or control of another person’s foreign travel document, and allowing another person to use foreign travel document that has been issued to that person. The penalty will be 10 years imprisonment or 1000 penalty units (\$110,000).

Consistent with 9A(2) of the Passports Act, new subsection 21(5) will provide for a defence of reasonable excuse.

*Section 22 – Possessing, making or providing false foreign travel documents*

New subsection 22(1) will reflect the offence of possessing or controlling a false foreign travel document currently contained in section 9A(f) of the Passports Act, which will be repealed by item 16. A fault element of knowledge applies to the circumstance that the document is a false foreign travel document. The penalty will be 10 years imprisonment or 1000 penalty units (\$110,000).

New subsection 22(2) will reflect the offence of falsifying a foreign passport or document currently contained in section 9B of the Passports Act, which will be

repealed by item 18. It will also be an offence for a person to provide a false foreign travel document to another person. A fault element of intention applies to the circumstance that the false foreign travel document may be used, acted on or accepted as if it were a foreign travel document. The new offence and penalty of 10 years imprisonment or 1000 penalty units (\$110,000) will be consistent with similar offences and penalties under Part 7.7 and Division 73 of the *Criminal Code Act 1995*.

Part 7.7 of the *Criminal Code Act 1995* contains forgery and related offences and Division 73 contains document offences related to people smuggling and unlawful entry into foreign countries. However, there are situations where Part 7.7 or Division 73 would not apply. The new offence will cover those situations. One example is where a person makes a false foreign travel document with the intention that the person himself or herself (and not a third person) would use the document to enter another country.

Consistent with section 9A(2) of the Passports Act, new section 22(3) will provide for a defence of reasonable excuse.

#### ***Part 4—Miscellaneous***

New Part 4 will provide for the administrative review of decisions made under new section 16 of the Passports Act, Minister's determinations and regulations.

##### *Section 23 – Administrative review*

New subsection 23(1) will provide that an application can be made to the Administrative Appeals Tribunal for review of a decision by the Minister to order the surrender of foreign travel documents.

New subsection 23(2) will mean that only a person whose foreign travel documents are ordered to be surrendered can apply for review under subsection 23(1).

New subsection 23(3) will provide that the Minister may certify that a decision made in response to a request relating to potential for harmful conduct involves matters of international relations or criminal intelligence.

Where the Minister has certified that a decision involves matters of international relations, new subsection 23(4) will provide that the Tribunal may only affirm the decision or remit it to the Minister for consideration.

#### *Section 24 – Minister’s Determinations*

New subsection 24(1) will allow the Minister to make instruments to specify matters that may be specified in a Minister’s determination under the Passports Act. New subsection 24(2) will provide that such an instrument is a disallowable instrument.

Minister’s determinations may modify the definition of **competent authority** under new subsections 13(2), 14(2) and 15(2), the relevant conduct in new subparagraph 15(1)(a)(v), and consequently the definition of **serious foreign offence** in new subsection 14(2).

In the definitions of **competent authority** in new subsections 13(2) and 15(2) (paragraph (a) of the definition), a Minister’s determination will narrow the class of people who can exercise power under those sections by allowing for any ambiguity in relation to the broad category of authorities to be corrected. In the definitions of **competent authority** in new subsections 14(2) and 15(2) (paragraph (b) of the definition), a Minister’s determination will allow a specific agency or employee of the Commonwealth to exercise the power under those sections. For example, this would be used in a situation where information and requests are being made in relation to circumstances that relate to a foreign country. This provision is necessary as it is not practicable to list all relevant people or agencies that might, at different times, be competent authorities.

New subparagraph 15(1)(a)(v) will allow the Minister to specify offences to be included in the conduct in new paragraph 15(1)(a). It will be used to include many of the offences in the *Criminal Code Act 1995* that have an extended geographical jurisdiction, such as: terrorism (Divisions 72 and 102), people smuggling (Division 73) and offences against humanity (Division 268 and 270). Offences under other legislation which could be listed include drug trafficking (*Crimes (Traffic in Narcotic Drugs and Psychotropic Substances) Act 1990*, sections 9 to 14 and 15A to 15C), child sex tourism (*Crimes Act 1914*, Part IIIA) and child abduction (*Family Law Act 1975*, Division 6).

The instruments that can be made under new section 24 will be readily accessible and new section 24 contains appropriate safeguards. Instruments made will be subject to Parliamentary scrutiny because they will be disallowable instruments. The *Legislative Instruments Act 2003* regime will also apply to these instruments once that Act comes into operation.

#### *Section 25 – Regulations*

New section 25 will authorise the Governor-General to make regulations prescribing matters required or permitted by the new Parts to be prescribed, or necessary or convenient to be prescribed for carrying out or giving effect to the new Parts.

The existing regulation making power in section 12 of the Passports Act specifies matters that may be prescribed that are specific to Australian passports. Section 12 also permits the regulations to prescribe a penalty of imprisonment (not exceeding 3 months) for breaches of regulations. This is not consistent with Commonwealth criminal law policy and principles and it is not appropriate that it apply to the new Parts. Accordingly, item 21 will limit the application of section 12 so that it does not apply to the new Parts.

## **SCHEDULE 2—PASSPORTS AND ASIO QUESTIONING WARRANTS**

### **Item 1**

This item will insert two new provisions in the ASIO Act that apply to people in relation to whom a questioning warrant has been sought.

Section 34JC of the ASIO Act currently provides that the subject of a questioning warrant issued under section 34D, who is notified of the issue of the warrant, is required to surrender all passports (both Australian and foreign) in that person's possession or control. That provision prevents persons who are the subject of such a warrant from departing Australia to avoid questioning. A warrant issued under section 34D requires a person to appear before a prescribed authority for questioning and, in limited circumstances, can also authorise a police officer to take the person into custody immediately for the purpose of that questioning. It is an offence to refuse to surrender the passports when required to do so by a person exercising authority under a questioning warrant. The offence carries a penalty of 5 years imprisonment. This provision is comparable with the new powers under new Part 2 of the Passports Act. However, it is more appropriate that these provisions are contained in the ASIO Act because they parallel existing provisions and only relate to ASIO and security matters.

New section 34JBA will minimise the risk that a person who may have information that would substantially assist the collection of intelligence that is important in relation to a terrorism offence could depart Australia before a questioning warrant can be issued.

New subsection 34JBA(1) will require a person who is the subject of a request for the issue of a section 34D warrant to surrender, on demand, all Australian and foreign passports in his or her possession or control. The new subsection is based on existing subsection 34JC(1) so that, where a person attempts to leave Australia or there is a risk the person will leave the country, the power will be activated, and the person can be required to surrender all passports in the person's possession or control. A person's passports can only be retained until a questioning warrant is refused or

issued. Following the issue of a questioning warrant, section 34JC of the ASIO Act would come into operation.

Such a power will be exercised in circumstances, where, for example, ASIO receives information about a planned terrorist act, and discovers that a person who could provide vital information is about to leave the country. Once the Director-General makes a request for a questioning warrant in relation to that person, the person's passports could be seized.

The person's passports could be retained only for a limited time. New subsection 34JBA(2) will provide that ASIO may retain the passports until one of a number of specified events occurs. Those events are that the Minister refuses consent to apply for a questioning warrant, an issuing authority refuses to issue a questioning warrant, or, if a questioning warrant is issued, until the time specified in the warrant under paragraph 34D(6)(b) ends. This is consistent with section 34JC.

Subsection 34JD(1) of the ASIO Act currently provides that it is an offence for a person who is the subject of a questioning warrant to leave Australia without the written permission of the Director-General. This offence also carries a penalty of 5 years imprisonment.

New section 34JBB creates a parallel offence to subsection 34JD(1) making it an offence for a person who is specified in a request to the Minister to leave Australia without the written permission of the Director-General. Before demanding the surrender of a person's passports, the provision requires the person to be notified that a request has been made in relation to that person and that they are required to surrender their passports and not leave the country.

## **Item 2**

This item will ensure that new sections 34JBA and 34JBB will not apply to a person in relation to whom consent to request the issue of a questioning warrant was sought before the new sections commenced.

### **SCHEDULE 3 – ASSOCIATING WITH A TERRORIST ORGANISATION**

#### **Item 1**

This item defines ‘associate’. It provides that a person associates with another person if the person meets or communicates with the other person. This definition is intended to include all modern forms of communication.

#### **Item 2**

This item defines ‘close family member’ as the person’s spouse, de facto spouse or same-sex partner; parent, step-parent or grandparent; child, step-child or grandchild; brother, sister, step-brother or step-sister; guardian or carer. This definition is provided for the purpose of an exception to the application of the offence in the case of a person’s association with close family members who may be members or who may promote or direct the activities of organisations specified in regulations as terrorist organisations.

#### **Item 3 – New Section 102.8 of the Criminal Code**

This item inserts a new section 102.8 “Association with a Terrorist Organisation” into Division 102 of the Criminal Code.

The new section 102.8 makes it an offence for a person to intentionally associate on two or more occasions, or on any occasion subsequent to a conviction for the same offence, with a person who is a member or who promotes or directs the activities of an organisation which is listed as a terrorist organisation under the *Criminal Code Regulations 2002*. Two or more occasions is a limitation found in the approach of courts and legislatures to the offence of consorting and related provisions (see section 100.A of the *Crimes Act 1900 (NSW) No. 40.*) and is a safeguard that only has relevance to the first offence.

A person who is convicted of an offence under the new subsection 102.8 (1) in relation to the person’s conduct on 2 or more occasions is not liable to be punished for an offence under subsection (1) for other conduct of the person that takes place at the

same time as that conduct or within 7 days before or after any of those occasions. This will avoid raising the prospect of a multiplicity of charges concerning the same course of conduct.

The amendment extends the application of Division 102 to persons who have links with a listed terrorist organisation or a person who is a member or who promotes or directs the activities of a listed terrorist organisation, but who themselves are not members of the organisation but through the association provide support to the organisation.

Strict liability applies to the element in paragraphs (1)(b) and (2)(g) (that the organisation is a terrorist organisation specified in regulations). Consequently, the prosecution would not have to prove that the person was aware that the organisation is a terrorist organisation specified in regulations. However, the prosecution must still prove that the person intentionally associated with a person who is a member or who promotes or directs the activities of the organisation, and that the person knew that the organisation was a terrorist organisation.

Application of paragraph 6.1(2)(b) of the Criminal Code (which concerns the rules that govern strict liability) means that the person would have a mistake of fact defence available under section 9.2 of the Criminal Code. In the case of the new subsections 102.8(1) and (2), this would mean that a person is not criminally responsible if before the time of the offending conduct the person considered whether or not the organisation was an organisation specified in regulations and the person was under a mistaken but reasonable belief that it was not such an organisation. The defendant bears the evidential burden in this case. If the person can point to evidence that they had such a mistaken belief then it is for the prosecution to prove beyond reasonable doubt that there was no mistaken belief.

In addition to the normal mistake of fact defence attaching to strict liability, subsection (5) also includes a recklessness exception. The offences in the new subsections 102.8(1) and (2) will not apply if the person is not reckless as to whether the organisation is a terrorist organisation specified in regulations. Application of subsection 13.3(3) of the Criminal Code means that the person bears an evidential



burden in relation to this matter. If the person can point to evidence suggesting a reasonable possibility that the exception applies, then it is for the prosecution to prove beyond reasonable doubt that the exception has no application. This is consistent with proposed amendments to section 102.5 in the *Anti-Terrorism Bill* (terrorism training offence) which were acceptable to the Senate Legal and Constitutional Legislation Committee in its report on that Bill.

It is intended that the offence will apply in relation to the provision of support to the terrorist organisation as an entity, rather than with respect to the activities of the organisation. The offence is therefore designed to address the fundamental unacceptability of the organisation itself by making meeting or communicating (“associating”) with the organisation in a manner which assists the continued existence or the expansion of the organisation illegal. This is an acknowledgement that because membership of such organisations is illegal, playing a role in supporting the existence or expansion of an illegal organisation should also be a crime.

The person must intend to help the organisation continue to exist or to expand on each occasion of associating with a person who is a member of the organisation. The person must know that the associate is a member of an organisation and that the organisation is a terrorist organisation.

Exceptions are provided for in the case of associations with ‘close family members’ relating to matters that could be regarded (taking into account the person’s cultural background) as matters of family or domestic concern, and associations at a place being used for public religious worship which take place in the course of practicing a religion. These exceptions are based upon similar exceptions provided for in section 100A of the *Crimes (Sentencing Procedure) Act 1999 No. 92 (NSW)*. Exceptions under the NSW law relating to education, employment and residence are not included because of the potential for misuse of these kinds of exception by those with links to a terrorist organisation.

Exceptions are also provided for in relation to associations only for the purpose of providing aid of a humanitarian nature and associations only for the purpose of providing legal advice or legal representation in connection with criminal proceedings

or proceedings connected with criminal proceedings or proceedings relating to whether the organisation in question is a terrorist organisation. The exception in relation to humanitarian aid is intended to apply to persons undertaking humanitarian aid who, through the course of providing such humanitarian aid, associate with a person who is a member of a terrorist organisation or who promotes or directs the activities of a terrorist organisation. The exception in relation to legal advice and representation is designed to ensure that lawyers who provide advice to, or act on behalf of, a person who is a member of a terrorist organisation or who promotes or directs the activities of a terrorist organisation are not liable under the provision. It is important that even those suspected of associating with terrorists have adequate legal advice so that the courts can be sure there is an adequate array of evidence and argument in specific cases. The Government is committed to a trial process that identifies genuine cases of terrorist-related wrongdoing.

The amendment is by necessity wide-ranging in terms of the types of activities or persons who might be subject to it. For this reason, the new section 102.8 has been designed to avoid impugning the implied constitutional freedom of political communication. This exception can be established by the defendant if he or she establishes the evidential burden. If the person can point to evidence suggesting a reasonable possibility that the association was a purely political communication for the purposes of the Constitution, then it is for the prosecution to prove beyond reasonable doubt that the exception would have no application. For example, a journalist interviewing a terrorist for a documentary could make use of the exception.

The new section 102.8 will also provide an alternative charge with lower penalties than section 102.7 “Providing Support to a Terrorist Organisation” in the Criminal Code. Section 102.7 is concerned with more serious activities. Under section 102.7, it is an offence to provide support or resources to a terrorist organisation that would assist the organisation to engage in, prepare, plan, assist in or foster the doing of a terrorist act.

The existing ancillary offences dealing with the aiding and abetting, counselling or procuring the commission of an offence under section 11.2(1) of the Criminal Code, and the offence provisions designed to capture the facilitation of terrorist acts such as

those in Division 101 of the Criminal Code, are more difficult to prove than the proposed offence because they contain a causal element that is linked to the commission of a terrorist act.

## **SCHEDULE 4 – TRANSFER OF PRISONERS**

### **Item 1 – Administrative Decisions (Judicial Review) Act 1977**

Item 1 amends Schedule 1 of the *Administrative Decisions (Judicial Review) Act 1977* to include decisions made by the Attorney-General under the *Transfer of Prisoners Act 1983*. The effect of this is that the Administrative Decisions (Judicial Review) Act does not apply.

Subsection 3(1) of the Administrative Decisions (Judicial Review) Act defines ‘decisions to which that Act applies’. These are decisions of an administrative character made, proposed to be made, or required to be made (whether in the exercise of a discretion or not) under a specified enactment or by a Commonwealth authority or officer under a specified enactment. However, the definition excludes a decision in any of the classes of decisions set out in Schedule 1 to the Administrative Decisions (Judicial Review) Act.

New paragraph (xb) provides that decisions of the Attorney-General under Part II or III of the Transfer of Prisoners Act refusing applications or requests, or refusing to give consent, on the ground that, or on grounds that include the ground that, refusal is necessary in the interests of security, within the meaning of the Transfer of Prisoners Act will be excluded from the Administrative Decisions (Judicial Review) Act.

Item 1 also amends Schedule 1 to the Administrative Decisions (Judicial Review) Act by inserting new paragraph (xc) to provide that decisions of the Attorney-General under Part IV of the Transfer of Prisoners Act are also excluded from the Administrative Decisions (Judicial Review) Act.

### Transfer of Prisoners Act 1983

Part IV will deal with the security transfers of persons sentenced under Commonwealth, State or Territory legislation or who are charged with an offence and are remanded in custody. The definitions contained in subsection 3(1) of the Transfer of Prisoners Act need to be amended to provide for the effective operation of Part IV, as well as other amendments to the Transfer of Prisoners Act made by the Bill.

#### **Item 2 – definition of ‘prison’**

Item 2 repeals the definition of the term ‘prison’ in subsection 3(1) and substitutes it with a broader definition.

Subsection 3(1) of the Transfer of Prisoners Act currently defines the term ‘prison’ to “include any place where a person who has been sentenced to imprisonment may be detained to undergo that imprisonment”. This definition of the term ‘prison’ is limited to where the person has been sentenced to imprisonment.

Transfers under new Part IV apply not only to persons who are serving a sentence of imprisonment, but also to ‘remand prisoners’. Accordingly, the definition of ‘prison’ has been extended to cover any place where a person who has been charged with an offence may be remanded in custody for that offence.

#### **Item 3 – definition of ‘remand prisoner’**

Item 3 inserts a definition of ‘remand prisoner’ in subsection 3(1) of the *Transfer of Prisoners Act 1983*. The definition is particularly relevant in Part IV of the Transfer of Prisoners Act.

#### **Item 4 – definition of ‘return transfer order’**

Item 4 expands the definition of the term ‘return transfer order’ in subsection 3(1) of the *Transfer of Prisoners Act 1983* to insert a reference to new section 16C.

Subsection 3(1) defines ‘return transfer order’ as an order for the transfer of a prisoner made under section 14 or 16A. The Transfer of Prisoners Act currently contains two provisions dealing with the return of a prisoner transferred under that Act, namely sections 14 and 16A. Section 14 provides for the return of a prisoner to the State or Territory from where he or she was transferred for the purposes of trial in certain circumstances. Section 16A provides for the return of a prisoner transferred for appeal purposes under section 16. However, these provisions would not deal with returning a prisoner transferred under Part IV on security grounds.

The Bill will insert new section 16C into the Transfer of Prisoners Act to provide for the return transfer of persons who are subject to a security transfer order or a return transfer order under new Part IV.

#### **Item 5 – definition of ‘security’**

Item 5 inserts into subsection 3(1) of the *Transfer of Prisoners Act 1983* a definition of the term ‘security’. The new definition of ‘security’ is broad and is designed to deal with various forms of harm directed at the Commonwealth, States and Territories whether directed from, or committed within Australia or not, as well as the carrying out of Australia’s responsibilities in relation to a range of matters listed.

The definition is necessary as it forms the basis of new Part IV which is designed to allow for the transfer of persons who are imprisoned or remanded in custody in relation to a Commonwealth, State or Territory offence in order to protect the security of Australia. The definition is consistent with the definition of security in the *Australian Security Intelligence Organisation Act 1979*.

#### **Item 6 – definition of ‘security transfer order’**

Item 6 inserts a definition of the term ‘security transfer order’ into subsection 3(1) of the Transfer of Prisoners Act. A security transfer order is an order under new section 16B. New subsection 16B(1) will enable the Attorney-General to make a security transfer order in writing where he believes on reasonable grounds that it is necessary in the interests of security to transfer a prisoner or remand prisoner.

### **Items 7, 8 and 9 - definition of ‘transfer order’**

Items 7, 8 and 9 expand the definition of ‘transfer order’ in subsection 3(1) of the *Transfer of Prisoners Act 1983* to include a ‘security transfer order’ and ‘an order made under section 16D or 16E’.

This definition requires amendment to include references to security transfer orders, as will be made under new Part IV, section 16D orders (transfer for court proceedings) and orders under section 16E for a transfer for trial of a remand prisoner. This will ensure that for the purposes of the Transfer of Prisoners Act the term ‘transfer order’ covers the new types of orders introduced under the Bill.

Item 8 inserts the term ‘or’ to the end of paragraph (a) of the definition of ‘transfer order’ in subsection 3(1) to provide for the addition of ‘security transfer order’ and to indicate that the definition includes any of the types of orders listed, rather than a consolidation of those orders.

Item 9 also inserts a reference to “or (d) an order under section 16D or 16E” after the end paragraph (c) of the definition of “transfer order” in subsection 3(1).

### **Item 10 – amending subsection 3(10)**

Item 10 inserts into subsection 3(10) of the *Transfer of Prisoners Act 1983* after the term ‘transfer order’ reference to “(other than a security transfer order or an order under section 16D or 16E)”.

Subsection 3(10) prevents the making or execution of a transfer order while the relevant person is subject to a sentence of imprisonment for contempt of court, a sentence of imprisonment for breaches of privileges of Parliament and a sentence of imprisonment that involves periodic detention.

Item 10 amends subsection 3(10) so that it does not apply to a person being transferred pursuant to a security transfer order, a transfer for court proceedings or the transfer for trial of a remand prisoner. For example, a person can be transferred for

security reasons if he or she is serving a sentence of imprisonment that involves periodic detention. Orders made under those new provisions give rise to overriding circumstances where the predominant consideration should be the necessity of making the order for the reasons outlined in those provisions relating to security.

### **Items 11 and 13 - Consolidating Parts III and IV into a single Part III**

The new items amend the *Transfer of Prisoners Act 1983* to consolidate Parts III and Part IV of the Act into a single new Part III.

Currently, Part III of the Transfer of Prisoners Act deals with transfers for trial purposes and Part IV of the deals with the return of prisoners transferred for trial purposes under Part III, or who are required to attend court proceedings for appeal purposes. The Bill consolidates Parts III and IV into a single Part, namely Part III.

The Bill achieves this by dividing Part III into two Divisions, with Division 1 dealing with trial transfer orders and Division 2 dealing with the return of prisoners.

Item 11 inserts a reference to ‘Division 1 – Trial transfer order’.

Item 12 repeals the heading ‘Part IV’ and Item 13 inserts before section 14 of the *Transfer of Prisoners Act 1983* ‘Division 2 – Return of Prisoner’.

### **Item 14**

Item 14 inserts a new subsection 16(1A) to subsection 16(1) of the *Transfer of Prisoners Act 1983*. Section 16 enables the court to order that a person who is undergoing a sentence to be brought before the court for certain purposes (e.g. appeal) where that person was transferred to another State or Territory pursuant to a transfer order.

As a consequence of this Bill the definition of transfer order is being extended to include orders under new Part IV dealing with security transfer orders. New Part IV of the Transfer of Prisoners Act deals with the return of prisoners who are the subject



of a security transfer order. Consequentially, new subsection 16(1A) provides that a court cannot make such an order under subsection 16(1) if the transfer order is an order under new Part IV.

### **Item 15 – Transfer for purpose of security**

Item 15 inserts a new Part IV into the *Transfer of Prisoners Act 1983* to govern transfers on security grounds.

Prisoners and remand prisoners will be dealt with in accordance with the sentence administration arrangements of the State or Territory in which they are held.

New Part IV consists of sections 16B, 16C, 16D, 16E and 16F.

#### **New section 16B**

New section 16B establishes a third ground for transfer under the Transfer of Prisoners Act, being transfers on security grounds. New section 16B is designed to deal with situations where there are reasonable grounds for believing that the transfer of a prisoner or a person charged with an offence under the law of the Commonwealth, a State or Territory is necessary in the interests of security.

#### *New subsection 16B(1)*

New subsection 16B(1) provides the Commonwealth Attorney-General with the discretion to make a written order for the transfer of a prisoner or a remand prisoner imprisoned in a State or Territory to another State or Territory if the Attorney-General believes on reasonable grounds that it is necessary in the interests of security to order such a transfer.

The requirement that the Attorney-General believe on ‘reasonable grounds’ enables the Attorney-General to take advice from appropriate bodies including bodies that may be constituted in the future for the purpose of advising on these transfers.

Under new subsection 16B(1) the Attorney-General is able to make such an order for a prisoner serving a federal, Territory or State sentence of imprisonment or a remand prisoner. Accordingly, new section 16B will regulate security transfers for all prisoners and remand prisoners within Australia, regardless of whether the person is serving a sentence of imprisonment imposed under a law of the Commonwealth, a State or Territory, or if the person is remanded in custody in relation to an offence against the law of the Commonwealth, a State or Territory.

*New subsection 16B(2)*

New subsection 16B(2) provides that in making a decision under new subsection 16B(1), the Attorney-General may consider all matters he or she considers relevant as well as the administration of justice and the welfare of the prisoner or remand prisoner.

*New subsection 16B(3)*

New subsection 16B(3) stipulates that the Attorney-General must not make an order under new subsection 16B(1) without the written consent of relevant Ministers in writing. The relevant Ministers who must consent to the transfer are the appropriate Minister in the State or Territory in which the prisoner or remand prisoner is in prison and the appropriate Minister in the State or Territory to which the prisoner or remand prisoner is to be transferred.

Requiring the consent of both State or Territory Ministers will ensure that the State or Territory in which the prisoner is in prison or a remand prisoner is remanded, and the receiving State or Territory, is informed of the transfer and has no objections to the transfer. For example, the receiving State may not have adequate facilities for the particular offender.

**New section 16C**

New subsection 16C provides for the return of a prisoner or remand prisoner transferred to a State or Territory under a security transfer order or a return order made under section 16C.

*New subsection 16C(1)*

New subsection 16C(1) provides that the Attorney-General may in certain circumstances make a written order for the return transfer of a prisoner or remand prisoner to either the State or Territory in which they were initially imprisoned or remanded, or to any other State or Territory to which the prisoner or remand prisoner was transferred under a security transfer order.

Such orders will be made where the Attorney-General reviews the order and as a result of that review, believes on reasonable grounds that in the current circumstances the order would not be made.

This provides a legislative mechanism for the return of a prisoner or remand prisoner to the State or Territory in which the prisoner was initially imprisoned or remanded, or any subsequent State or Territory to which that person was transferred under Part IV, where the Attorney-General believes on reasonable grounds that there is no longer a threat associated with the detention of that person in that State or Territory.

*New subsection 16C(2)*

New subsection 16C(2) requires the Attorney-General to periodically review a security transfer order made under new subsection 16B(1) or a return order made under new subsection 16C(1), unless the prisoner has been returned to the originating State in which case the process has been concluded. Such reviews must be conducted within either three months of the day on which the Attorney-General made the order or last reviewed the order.

The Attorney-General is required under new subsection 16B(1) to make an order for the return transfer of a prisoner or remand prisoner where after such a review it is reasonable to believe that there is no longer a basis for making a security transfer order under new subsection 16B(1) or a return order under new subsection 16C(1). This requirement does not apply if the Attorney-General has made a new security transfer order under new subsection 16B(1) within the three months.

*New subsection 16C(3)*

New subsection 16C(3) outlines the matters the Attorney-General must consider when making a written return order under new subsection 16C(1). In making the determination the Attorney-General must have regard to all matters that he or she considers relevant including the administration of justice and the welfare of the prisoner or remand prisoner.

As with new subsection 16B(2), this allows the Attorney-General to consider various information that may impact on his decision whether to make a return transfer order.

*New subsection 16C(4)*

New subsection 16C(4) establishes the consent requirements necessary to authorise a return transfer under new subsection 16C(1). New subsection 16C(4) requires that the Attorney-General must not make an order for the return of a prisoner or remand prisoner without the written consent of the relevant State Ministers.

The consent required is that of the appropriate Minister of the State or Territory in which the prisoner or remand prisoner was imprisoned or remanded and of the State or Territory to which the prisoner or remand prisoner is to be transferred. Requiring the consent of such Ministers will ensure that the State or Territory in which the prisoner is imprisoned or a remand prisoner is remanded, and the receiving State or Territory, is informed of the transfer and has no objections to it.

*New subsection 16C(5)*

New subsection 16C(5) defines an ‘originating State or Territory’ for the purposes of new section 16C. The originating State or Territory means the State or Territory in which the prisoner was held prior to becoming subject to a security transfer order under the *Transfer of Prisoners Act 1983*.

## **New section 16D**

New section 16D provides for the transfer of a prisoner or remand prisoner who is subject to a security transfer order, or a return transfer order under new section 16C, to a State or Territory to attend court proceedings.

### *New subsection 16D(1)*

New subsection 16D(1) empowers the Attorney-General to make an order in writing for a prisoner or remand prisoner who is subject to a security transfer order or a return transfer order to attend court proceedings, as well as the transfer of that prisoner back to the first-mentioned State or Territory as soon as practicable after that appearance has concluded.

This provision provides a mechanism for the transfer of persons who are subject to a security transfer order or return transfer order for court proceedings and their return after the legal proceedings are finalised. The provision covers the return after the conclusion of court proceedings to avoid another transfer order having to be made.

### *New subsection 16D(2)*

New subsection 16D(2) outlines situations where it is inappropriate to make an order for transfer of court proceedings. For example, new paragraph 16D(2)(a) provides that the Attorney-General must not make an order if the Attorney-General believes on reasonable grounds that it would be contrary to the interests of security.

New paragraph 16D(2)(b) provides that new section 16D does not apply where the purpose for that transfer is to allow a remand prisoner to appear in proceedings for the offence with which he or she has been charged and for which he or she had been remanded in custody. This circumstance is specifically dealt with in new subsection 16E.

Once a person who is subject to a security transfer order or an order under new subsection 16C(1) has been returned to the originating State, as will be defined in the

*Transfer of Prisoners Act 1983*, new section 16D will no longer apply. In such circumstances the Attorney-General will have determined as a result of a review of the security transfer order or return order that there is no longer a risk to security in that originating State or Territory. Where this occurs the prisoner will be subject to the general provisions of the Transfer of Prisoners Act, as well as the interstate transfer of prisoners legislation in the relevant State or Territory.

*New subsection 16D(3)*

New subsection 16D(3) outlines the matters the Attorney-General must have regard to when considering whether to order a transfer for the purposes of attending court proceedings. This provision requires the Attorney-General to have regard to all matters that he or she considers relevant, including the administration of justice and the welfare of the prisoner or remand prisoner.

This discretion enables the Attorney-General to consider information from a range of sources including those bodies that may be constituted in the future for the purpose of advising on these transfers.

*New subsection 16D(4)*

New subsection 16D(4) establishes the consent requirements necessary for transfer for court proceedings. The consent of the appropriate Minister of the State or Territory in which the prisoner or remand prisoner is imprisoned or remanded at the time the order was made is required in writing.

This provides an opportunity for the State or Territory from which the prisoner or remand prisoner is being transferred, as well as the receiving State or Territory, to provide input into the transfer. This is appropriate as the relevant States or Territories will need to ensure that adequate facilities and measures are in place to deal with persons subject to a security transfer order.

## **New section 16E**

New section 16E seeks to regulate the transfer of remand prisoners for trial purposes. In the interests of justice it is necessary to provide for the transfer of a person who is charged with an offence and who is remanded in custody for that offence to attend court for the offence with which he or she is charged and for which he or she has been remanded in custody.

### *New subsection 16E(1)*

New subsection 16E(1) provides that the Attorney-General must make an order in writing for the transfer of a remand prisoner to attend court where: (a) there is a security order or a return transfer order under new section 16C for that person, (b) the remand prisoner is required to appear in court for proceedings for the offence for which they have been remanded in custody, and (c) the remand prisoner is not in the jurisdiction in which the proceedings are being conducted.

The new provision also ensures that the Attorney-General can order the transfer of such a remand prisoner back from the State or Territory in which they appeared to the other State or Territory in which they were remanded as soon as practicable after that appearance. This would allow for security concerns arising from the presence of the prisoner in the State or Territory in which he or she was required to appear to be minimised.

### *New subsection 16E(2)*

Under new subsection 16E(2) the Attorney-General has a discretion not to make an order under new subsection 16E(1) if the Attorney-General believes on reasonable grounds that it is essential in the interests of security that the order not be made and the court that remanded the remand prisoner in custody orders the continued detention of the remand prisoner.

The word 'essential' has been used to reflect that the starting obligation is that remand prisoners must be returned to appear in court proceedings and that it is only if it is

‘essential’ in the interests of security that the transfer be denied and that the court has ordered that the remand prisoners detention be continued. This is to ensure that the criminal charges against the remanded prisoner are not unreasonably delayed.

New subsection 16E(2) precludes the application of new section 16E once the prisoner or remand prisoner has been returned to the originating State or Territory as defined.

### **New section 16F**

New section 16F stipulates that where a prisoner or remand prisoner is subject to an order under new Part IV of the *Transfer of Prisoners Act 1983*, applications or orders for transfer on welfare or trial grounds under State complementary transfer of prisoner legislation cannot be made without the Attorney-General’s written consent.

The purpose of new section 16F is to ensure that the Attorney-General is involved in the transfer of any State prisoner or remand prisoner who is subject to a security transfer order under Part IV from one State or Territory to another State or Territory. This is appropriate given that the Attorney-General is responsible for national security.

#### *New subsection 16F(1)*

New subsection 16F(1) stipulates that transfers under State transfer laws (trial or welfare) for person subject to an order under new Part IV cannot be made unless the Attorney-General consents in writing to the transfer.

#### *New subsection 16F(2)*

New subsection 16F(2) provides that new section 16F does not apply once the person has been returned to the originating State or Territory under new section 16C.



In such circumstances new Part IV would have no further application and the prisoner or remand prisoner is again solely subject to the interstate transfer of prisoners legislation in the originating State.

### **Items 16 and 17**

These new items preclude the application of subsection 17(5) and subsection 17(6) of the *Transfer of Prisoners Act 1983* to orders under new Part IV.

Section 17 of the Transfer of Prisoners Act provides for the transfer, custody and handing over of prisoners transferred under the Transfer of Prisoners Act. Subsection 17(5) provides amongst other things that where a prisoner is a joint prisoner a transfer order under the Transfer of Prisoners Act has no effect until there is a complementary State order of transfer made pursuant to State interstate transfer of prisoners legislation.

Subsection 17(6) provides that a transfer order has no effect where it purports to authorise the transfer of a State prisoner from a State to another State or Territory.

Retaining subsections 17(5) and 17(6) would have inhibited the new security transfer scheme and consequently those subsections have been excluded from applying to persons subject to orders under Part IV.

### **Item 18**

Item 18 inserts into subsection 29(1) of the *Transfer of Prisoners Act 1983* a reference to powers under Part IV.

Section 29 of the Transfer of Prisoners Act provides for the delegation of powers under that Act. Subsection 29(1) grants the Attorney-General discretion to delegate his or powers under the Transfer of Prisoners Act. The compulsory nature of security transfers and return transfers under Part IV, as well as other relevant requirements, such as periodical review of security transfer orders or return orders, requires the

consideration and authorisation of the Attorney-General. It is inappropriate to delegate such powers in such circumstances.

### **Item 19**

Item 19 inserts a new subsection 29(1A) to further limit the delegation powers under subsection 19(1) of the *Transfer of Prisoners Act 1983*.

New subsection 29(1A) will preclude the Attorney-General from delegating identified powers under Part II or III of the Transfer of Prisoners Act associated with security transfers. As outlined above, it is inappropriate for a delegate of the Attorney-General to make orders, consider applications, give consent or serve notices that relate to a prisoner or remand prisoner subject to an order under new Part IV in circumstances that involve consideration of questions of security.

### **Item 20**

Item 20 inserts a reference to ‘or powers under Part IV’ to the end of subsection 29(4) of the *Transfer of Prisoners Act 1983*.

Subsection 29(4) allows the appropriate Minister of a State to delegate in writing any or all of his powers under the Transfer of Prisoners Act other than the power of delegation. The new amendment will preclude the Minister of a relevant State from being able to delegate any of his or her powers under Part IV, such as the power to consent to a transfer on security grounds under new subsections 16B(3), 16C(4) and 16D(4).

## **SCHEDULE 5 – FORENSIC PROCEDURES**

### **Item 1**

This item defines ‘State offence’ as an offence against a law of a State or the Australian Capital Territory. This definition ensures that ‘State offence’ will include all State and Territory offences, as ‘State’ is already defined in subsection 3(1) of *the Crimes Act 1914* as including the Northern Territory.

### **Item 2**

Item 2 broadens the heading of Division 11A of Part 1D to refer to ‘certain incidents’ rather than ‘overseas incidents’.

### **Item 3, 4, 5 and 6**

Section 23YUF defines the incidents to which Division 11A applies. The purpose of items 3 - 6 is to broaden the scope of Division 11A so that, in addition to overseas incidents where Australians have died, it can also apply to:

- incidents within Australia which are suspected to involve the commission of Commonwealth offences (such as terrorism offences) or State offences of federal concern (such as an offence affecting interstate or international aviation),
- incidents within Australia where it is suspected that some of the victims may be persons in respect of whom the Federal Parliament can make laws (such as foreign nationals),
- incidents within Australia which the Minister considers to be, or to have created, a national emergency, and
- incidents occurring partially inside Australia and partially outside Australia.

To ensure that there is certainty as to the incidents in relation to which Division 11A applies, the Division will only apply to an incident that the Minister has determined in writing. A determination may only be made where the Minister is satisfied that it is appropriate in the circumstances for Division 11A to apply to the incident.

The new subsection 23YUF(2B) provides some examples of persons in respect to whom the Federal Parliament can make laws.

The purpose of the new subsection 23YUF(2C) in item 5 and item 6 is to define ‘State offences with a federal aspect’ until such time as a definition for that term is inserted into the *Crimes Act 1914* by Schedule 3 of the *Australian Federal Police and Other Legislation Amendment Act 2004*. The interim definition in subsection 23YUF(2C) adopts the definition in section 4A of the *Australian Crime Commission Act 2002* with the modification that references to the Australian Crime Commission in that definition are also to include references to the Australian Federal Police. The interim definition in section 4A of the *Australian Crime Commission Act 2002*, and the subsequent definition in Schedule 3 to the *Australian Federal Police and Other Legislation Amendment Act 2004* are very similar. A State offence may be identified as having a federal aspect where it potentially falls within Commonwealth legislative powers because of the elements of the State offence or the circumstances in which the State offence was committed, or because the investigation of that State offence is incidental to an investigation of a Commonwealth or Territory offence.