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HOUSE OF REPRESENTATIVES

**AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION  
AMENDMENT (TERRORISM) BILL 2002**

EXPLANATORY MEMORANDUM

(Circulated by authority of the Attorney-General,  
the Honourable Daryl Williams AM QC MP)

**AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION**  
**AMENDMENT (TERRORISM) BILL 2002**

**GENERAL OUTLINE**

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enhance the capacity of the Australian Security Intelligence Organisation (ASIO) to combat terrorism.

It achieves this by giving ASIO powers with regard to the collection of intelligence that may substantially assist in the investigation of terrorism offences. The Bill will provide ASIO with the ability to seek a warrant to question people for a period of up to 48 hours for the purposes of investigating terrorism offences.

Under this Bill, a person can be required under a warrant issued by an issuing authority to appear before a prescribed authority to provide information or produce records or things. An issuing authority will be a federal judge, federal magistrate or another authority nominated in regulations. Depending on the circumstances, a prescribed authority may be a former judge of a superior court, a current judge of a State or Territory Supreme or District Court or a President or Deputy President of the Administrative Appeals Tribunal.

Before the Director-General may seek a warrant, the Attorney-General must give consent. Before giving his or her consent, the Attorney-General must be satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence and that relying on other methods of collecting the intelligence would be ineffective.

A warrant may only be issued by an issuing authority if the issuing authority is satisfied that there are reasonable grounds for believing that such action will substantially assist in the collection of intelligence that is important in relation to a terrorism offence.

A warrant may only authorise the person to be immediately taken into custody by the police and detained if the Attorney-General is satisfied that there are reasonable grounds for believing that the person may: alert a person involved in a terrorist offence that the offence is being investigated; not appear before a prescribed authority; or destroy, damage or alter a record or thing the person may be requested under the warrant to produce.

It will be an offence to fail to appear before a prescribed authority, to fail to give information in accordance with the warrant, to knowingly make a false or misleading statement, or to fail to produce any record or thing requested in accordance with the warrant unless the person can prove that he or she does not have the record or thing. These offences attract a maximum penalty of five years imprisonment.

The Bill includes a number of safeguards to ensure that the new powers are exercised reasonably.

The prescribed authority must be present throughout the questioning process and the Bill specifically provides that a person being detained under a warrant must be treated with humanity and not subjected to cruel, inhuman or degrading treatment.

The Director-General must ensure that video recordings are made of the proceedings before the prescribed authority or any other matter that the prescribed authority directs. These recordings must be provided to the Inspector-General of Intelligence and Security (IGIS).

The Bill requires the prescribed authority to inform the person being detained under the warrant of: the effect of the warrant; the length of time the warrant is in force; the role of any person present at questioning and the reason for their presence; the legal consequences of non-compliance with the warrant; the right of the person being detained to communicate with the IGIS and the Ombudsman and the right of the person to seek a remedy from a federal court. Interpreting services must be provided before any questioning can take place if the person detained is unable to communicate in English.

Persons detained under a warrant will at all times have the right to contact a security cleared lawyer unless exceptional circumstances exist to delay that right for up to 48 hours. After 48 hours all persons detained under a warrant will have the absolute right to contact a security cleared lawyer.

The Bill includes a special regime for questioning young people. Warrants will not be able to be issued in relation to a person who is under the age of 14. A warrant may be issued in relation to young people between the ages of 14 and 18 if the Attorney-General is satisfied on reasonable grounds that the person will commit, is committing or has committed a terrorism offence. Young people questioned under a warrant will have the right to contact a security cleared lawyer and to have a parent, guardian or other representative present at all times.

Persons detained will have the right to make a complaint relating to ASIO to the IGIS or, if their complaint relates to the AFP, the Ombudsman. On request, the person detained is to be provided with the facilities to communicate with the IGIS or the Ombudsman.

The Bill requires ASIO to give a copy of any warrant issued and a statement containing details of any detention that has taken place to the IGIS. The Attorney-General will also receive a report from ASIO on each warrant.

The IGIS may advise the prescribed authority of any concerns it has about an illegal act or impropriety committed by ASIO. The prescribed authority is empowered to suspend questioning until satisfied that the IGIS's concerns have been addressed.

It will be an offence punishable by a maximum of two years imprisonment for an official exercising powers under a warrant to fail to comply with the safeguards in the Bill. The Bill includes the following amendments made by the Senate which were agreed to by the House of Representatives in December 2002:

(1), (3), (5), (7), (29), (38), (39), (48), (49), (50), (52), (53), (57), and (58).

The Bill includes the following amendments made by the Senate which were not agreed to by the House of Representatives in December 2002:

(16), (40) and (41).

**Financial Impact**

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

## NOTES ON CLAUSES

### Part 1 – Preliminary

#### Clause 1: Short Title

This clause is a formal provision specifying the short title of the Bill.

#### Clause 2: Commencement

Subclause 2(1) provides that each provision of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* (the Act) listed in column 1 of the table in clause 2 commences, or is taken to have commenced, on the day specified in column 2 of the table.

Item 1 of the table provides that sections 1 to 3 of the Bill and any other clauses not covered in the table commence on the day on which the Act receives the Royal Assent.

Item 2 of the table provides that Schedule 1 to the Act, items 1 to 8, which insert new and amend existing definitions in the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), commence on the start of the day after the day on which this Act receives the Royal Assent.

Item 3 of the table provides that Schedule 1, items 10 and 11, commence immediately after the commencement of Division 72 of the *Criminal Code Act 1995*. Item 10 makes a minor consequential amendment. Item 11 is an application provision.

Item 4 of the table provides that Schedule 1, items 15 to 29, which amend definitions and substitute words in the ASIO Act (items 15 to 23), insert a new Division 3- Powers relating to terrorism offences (item 24) and make a number of additional amendments (items 25 to 29), commence on the start of the day after the day on which this Act receives the Royal Assent.

Subclause 2(2) provides that Column 3 of the table is for additional information that is not part of the Act.

#### Clause 3: Schedule(s)

Clause 3 provides that each Act specified in a schedule is amended as set out in the Schedule concerned.

#### Clause 4: Cessation of operation of Act

Clause 4 provides that this Act will no longer be in force at the end of three years after Royal Assent.

### **Schedule 1 – Amendments relating to ASIO**

#### Item 1 – Section 4

This item inserts a definition of “frisk search” into the ASIO Act.

#### **Item 2 – Section 4**

This item inserts a definition of “ordinary search” into the ASIO Act.

#### **Item 3 – Section 4 (at the end of paragraphs (a) and (b) of the definition of *politically motivated violence*)**

This item is a minor drafting amendment to the definition of *politically motivated violence* to provide for the insertion of a new paragraph (ba) into the definition.

#### **Item 4 – (after paragraph (b) of the definition of *politically motivated violence*)**

This item amends the definition of *politically motivated violence* in the ASIO Act to include acts that are offences punishable under Division 72 or Part 5.3 of the *Criminal Code Act 1995* (Criminal Code) within the definition. The definition of *politically motivated violence* is central to the issue of a warrant under proposed new section 34D of the ASIO Act.

#### **Item 5 - Application**

This item clarifies that the amendments in this schedule to the definition of “politically motivated violence” in the ASIO Act are applicable in relation to an act, matter or thing done, existing or happening after the commencement of the amendments (including an act under a warrant or other instrument issued under that Act before that commencement).

#### **Item 6 – Section 4**

This item inserts a definition of “seizable item” into the ASIO Act.

#### **Item 7 – Section 4**

This item inserts a definition of “strip search” into the ASIO Act.

#### **Item 8 - Section 4**

This item inserts a definition of “terrorism offence” into the ASIO Act. A “terrorism offence” is defined as an offence against Part 5.3 of the *Criminal Code*. Part 5.3 of the *Criminal Code* deals with terrorist organisation offences, general terrorism offences and financing of terrorism offences.

The terrorism offences in Part 5.3 are: engaging in a terrorist act; providing or receiving training connected with terrorist acts; possessing things connected with terrorist acts; collecting or making documents likely to facilitate terrorist acts; acts done in preparation for, or planning, terrorist acts; offences relating to terrorist organisations; and providing or collecting funds used to facilitate or engage in terrorism. With the exception of the offence engaging in a terrorist act, the offences in Part 5.3 are committed even if the terrorist act does not occur. As a result, the collection of intelligence that is important in relation to a terrorism offence includes the collection of intelligence in relation to terrorist acts that have not actually occurred.

#### **Item 10 - Section 4 (definition of *terrorism offence*)**

This item is a minor consequential amendment to the definition of “terrorism offence” to ensure that the definition will refer to both Division 72 and Part 5.3 of the *Criminal Code*.

#### **Item 11 - Application**

This item clarifies that the amendments in this schedule to the definition of “terrorism offence” in the ASIO Act, are applicable in relation to an act, matter or thing done, existing or happening after the commencement of the amendments (including an act under a warrant or other instrument issued under that Act before that commencement).

#### **Items 15 to 19 – Subsection 18(1), paragraph 18(2)(b), subsection 18(3) and paragraph 18(3)(b)**

Items 15 to 19 substitute references to “an officer of the Organisation” in subsection 18(1), paragraph 18(2)(b), subsection 18(3) and paragraph 18(3)(b) with references to “a person” so that people other than ASIO officers may communicate intelligence on behalf of ASIO, when authorised by the Director-General of Security.

#### **Item 20 – Saving of authority and authorisations**

Item 20 has been included so it is clear that any authorisations conferred on an officer of ASIO before the commencement of the proposed amendments to section 18 are not affected by the amendments.

#### **Item 21 – Section 23**

This item repeals section 23 of the ASIO Act. Section 23 deals with references to “Minister” in Division 2 of the ASIO Act and is made unnecessary by section 18C of the *Acts Interpretation Act 1901*.

#### **Item 22 – Subsection 24(3) (definition of relevant warrant)**

This item amends subsection 24(3) of the ASIO Act so that the subsection includes a reference to the warrants in proposed section 34D. Section 24 of the Act sets out who may approve officers and employees of ASIO and other people, to exercise on behalf of ASIO, the authority conferred by relevant warrants or device recovery provisions.

#### **Item 23 – After subsection 25(4)**

This item inserts new subsections 25(4A) and (4B) into section 25 of the ASIO Act. Section 25 of the Act sets out ASIO’s powers in relation to search warrants.

Proposed subsection 25(4A) lists the things that the Minister may specify in the warrant if he or she considers it appropriate in the circumstances:

- conducting of an ordinary or frisk search of a person at or near premises that are the subject of a search warrant issued under subsection 25(1) where the person authorised to

execute the warrant has reasonable cause to believe that the person has material or seizable items relevant to the security matter;

- inspecting or otherwise examining any things found and making copies that appear relevant to the collection of intelligence by ASIO in accordance with the ASIO Act; and
- removing or retaining for a reasonable time any thing found for the purpose of inspection and examination and, in the case of a record, making a copy, in accordance with the warrant.

Proposed subsection 25(4B) provides that subsection 25(4A) does not authorise a strip search or a search of a person's body cavities.

### **Item 23A - After section 25**

This item inserts new section 25AA into the ASIO Act.

Proposed section 25AA outlines the procedures for the conduct of an ordinary or frisk search under a search warrant. Proposed section 25AA provides that a search conducted under paragraph 25(4A)(a) must, if practicable, be conducted by a person of the same sex as the person being searched.

### **Item 24 – At the end of Part III**

This item inserts into the ASIO Act a new Division 3 – Special Powers relating to terrorism offences. Division 3 will be inserted at the end of Part III of the ASIO Act.

## **Division 3 – Special powers relating to terrorism offences**

### **Subdivision A – Preliminary**

#### **Proposed new section 34A – Definitions**

##### **Subdivision A - Preliminary**

Proposed section 34A defines certain terms for the purposes of proposed new Division 3.

“approved lawyer” is defined to mean a legal practitioner approved by the Minister under proposed section 34AA.

“Federal Magistrate” has the same meaning as in the *Federal Magistrates Act 1999*. Section 5 of that Act defines Federal Magistrate as:

- a Federal Magistrate (including the Chief Federal Magistrate) who holds office under this Act; and
- when used in the expression *the Federal Magistrates Court or a Federal Magistrate*, a Federal Magistrate sitting in Chambers.

“issuing authority” is defined to mean a person appointed under proposed section 34AB or a member of a class of persons declared by regulations for the purposes of proposed section 34AB to be issuing authorities.

“police officer” is defined to mean a member or special member of the Australian Federal Police or a member of a State or Territory police force.

“prescribed authority” is defined to mean a person appointed as a prescribed authority under proposed section 34B.

“record” has the same meaning as in Division 2 of the ASIO Act. Section 22 of the ASIO Act defines *record*, when used as a noun, to mean a document (including any written or printed material) or an object by which words, images, sounds, or signals are recorded or stored, or from which information can be obtained.

“superior court” is defined to mean the High Court, Federal Court, Family Court, the Supreme Court of a State or Territory or a District Court of a State or Territory or an equivalent.

### **Proposed section 34AA – Approved Lawyers**

Proposed subsection 34AA(1) empowers the Minister to approve a legal practitioner for the purposes of Division 3 of the ASIO Act.

Proposed subsection 34AA(2) provides that the Minister may only approve a legal practitioner if he or she is enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory and has been so enrolled for at least five years, the practitioner has consented in writing to being approved, the consent is in force and the Minister has considered a security assessment and any other relevant material in respect of the legal practitioner.

### **Proposed section 34AB – Issuing Authorities**

Proposed subsection 34AB(1) empowers the Minister to appoint a federal magistrate or a judge as an issuing authority. “Judge” is defined in section 4 of the ASIO Act as a “Judge of a court created by the Parliament”.

Proposed subsection 34AB(2) provides that the Minister may only appoint a federal magistrate or judge as an issuing authority if the federal magistrate or judge has consented in writing to be appointed and the consent is in force.

Proposed subsection 34AB(3) provides that a specified class of persons may be declared to be issuing authorities by regulation. Proposed subsection 34AB(4) clarifies that one of the bases for specifying a class may be that the members of the class have consented to being issuing authorities and their consents are in force.

### **Proposed section 34B – Prescribed Authorities**

Proposed subsection 34B(1) empowers the Minister to appoint as a prescribed authority a former judge who has served for at least 5 years on the bench of a superior court. This person may be appointed by the Minister in writing.

Proposed subsection 34B(2) provides that if the Minister is of the view that there is an insufficient number of former judges to act as a prescribed authority as provided for in subsection (1), then the Minister may appoint as a prescribed authority a person who is currently serving as a judge in a State or Territory Supreme or District Court (or an equivalent). Such a person must have served as a judge in the appropriate court for a period of at least 5 years. This person may be appointed by the Minister in writing.

Proposed subsection 34B(3) provides that if the Minister is of the view that there are insufficient persons available to act as prescribed authorities as provided for under subsections (1) and (2), then the Minister may appoint either a President or Deputy President of the Administrative Appeals Tribunal to act as a prescribed authority. In order to be appointed as a prescribed authority, such a person must be enrolled as a legal practitioner of a federal court or of a Supreme Court of a State or Territory for at least 5 years prior to appointment. This person may be appointed by the Minister in writing.

Proposed subsection 34B(4) prevents the Minister from appointing a person under subsections (1), (2) or (3) as a prescribed authority unless the person has consented to being appointed in writing and such consent is in force.

Proposed subsection 34B(5) provides that a person can only be appointed as a prescribed authority for a maximum single three-year term.

Proposed subsection 34B(6) provides that the Minister must keep a list of the names of the persons who have consented to being appointed as a prescribed authority.

Proposed subsection 34B(7) provides that if a person who is listed as having consented to being appointed as a prescribed authority, requests that the Minister remove their name from the list, the Minister must remove that person's name from the list.

Proposed subsection 34B(8) provides that the Minister may remove a person's name from the list at any time.

Proposed subsection 34B(9) provides that a person acting as a prescribed authority shall be paid in accordance with a decision made by the Remuneration Tribunal. Until the Remuneration Tribunal makes such a decision, the prescribed authority will be paid what is prescribed.

### **Subdivision B – Questioning, detention etc.**

#### **Proposed section 34C – Requesting warrants**

Proposed subsection 34C(1) provides that the Director-General may seek the Minister's consent to the issue of a warrant under proposed section 34D in relation to a person. A warrant under proposed section 34D is for questioning a person and requiring the production of records or things.

While proposed subsection 34C(1) provides that the Director-General "may" seek the Minister's consent, the effect of section 34C is that the Director-General must seek the

Minister's consent before requesting the prescribed authority to issue the warrant. In this context "may" is used rather than "must" as the Director-General is being empowered to seek the Minister's consent for a warrant under proposed new section 34D. The use of "must" would not be appropriate as the Director-General is not being compelled to seek the issue of a warrant under proposed new section 34D.

Proposed subsection 34C(1A) clarifies that proposed section 34C operates in relation to every request for a warrant under proposed section 34D, even if a request for a warrant has previously been made in relation to the person.

Proposed subsection 34C(2) sets out what the Director-General must include when seeking the Minister's consent to a request for the issue of a warrant under proposed subsection 34C(1). In addition to a draft of the warrant, the draft request must include a statement of the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued and a statement of the particulars and outcomes of all previous requests for the issue of a section 34D warrant in relation to the person.

Proposed subsection 34C(2) has been included to ensure that the Minister, in giving consent to the issue of a section 34D warrant, is fully aware of all the relevant circumstances in relation to the request for the warrant.

Proposed subsection 34C(3) provides that the Minister may, by writing, consent to the request, but only if the Minister is satisfied:

- (a) that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
- (b) that relying on other methods of collecting that intelligence would be ineffective.

Terrorism offences are the offences in Part 5.3 and Division 72 of the *Criminal Code*. Part 5.3 of the *Criminal Code* deals with terrorist organisation offences, general terrorism offences and financing of terrorism offences. Division 72 of the *Criminal Code* includes the terrorism offences dealing with terrorist bombings.

With the exception of the offence of engaging in a terrorist act, the offences in Part 5.3 are committed even if the terrorist act does not occur. As a result, the collection of intelligence that is important in relation to a terrorism offence includes the collection of intelligence in relation to terrorist acts that have not actually occurred.

Proposed subsection 34C(3)(ba) also provides that the Minister may not consent to the making of a request for a warrant unless the acts described in proposed subsection 34C(3A) have been done. Proposed subsection 34C(3A) deals with the creation and adoption of a written statement of procedures to be followed in the exercise of authority under a warrant. The effect of these provisions is to prevent the issue of a valid warrant before the written statement of procedures is developed and adopted.

Proposed subsection 34C(3A) also requires the Director-General of Security to develop a written statement in consultation with the IGIS and the Australian Federal Police

Commissioner. The statement must be approved by the Minister. The subsection also requires the Parliamentary Joint Committee on ASIO, ASIS and DSD to be briefed on the statement and the statement to be tabled in Parliament.

If the warrant to be requested is to authorise the person to be taken into custody, brought before a prescribed authority and detained, proposed subsection 34C(3) requires that the Minister must also be satisfied that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person may: alert a person involved in a terrorism offence that the offence is being investigated; not appear before a prescribed authority; or destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

In addition, if the person has already been detained under a warrant, the Minister must be satisfied that the additional warrant would not result in the person being detained for a continuous period of more than 168 hours. The effect of this is to prevent a person being detained for a continuous period of more than 168 hours, or 7 days.

The Minister may make his or her consent subject to changes being made to the draft request.

Proposed subsection 34C(3B) requires the Minister to ensure that all warrants requested would permit the subject of the warrant to contact an approved lawyer at any time when the person is in custody or detention. (Proposed section 34AA explains the meaning of “approved lawyer”).

Proposed subsection 34C(3C) provides that proposed subsection 34C(3B) does not apply in relation to people over the age of 18 if the Minister is satisfied on reasonable grounds that:

- it is likely that a terrorism offence is occurring, or is about to occur, and will have serious consequences; and
- in all the circumstances, it is appropriate that the detained person not be given access to a lawyer for a certain period less than 48 hours.

If so satisfied, the Minister may make it a condition of the warrant that the detained person not have access to a lawyer for up to 48 hours. At the expiry of 48 hours, all detained persons will have access to an approved lawyer.

Proposed subsection 34C(4) provides that, if the Minister has consented to the request from the Director-General, the Director-General may then request the warrant by giving the issuing authority a request that incorporates any changes required by the Minister and a copy of the Minister’s consent.

Proposed subsection 34C(5) provides that, if the Director-General seeks a further warrant in relation to a person who has already been detained under two consecutive warrants (so that the warrant would result in detention for more than 96 hours), the Director-General must seek the warrant from a Judge or a member of a class specified by regulations.

### **Proposed section 34D – Warrants for questioning etc.**

Proposed subsection 34D(1) provides that an issuing authority may issue a warrant relating to a person only if the Director-General requests the warrant in accordance with proposed

subsection 34C(4), and with subsection 34C(5) if relevant, and the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

Proposed subsection 34D(1) also provides that the issuing authority must be satisfied that there are reasonable grounds for believing that the warrant does not authorise the detention of a person that would result in the person being detained for a continuous period of more than 168 hours. The effect of this is to prevent a person being detained for a continuous period of more than 168 hours, or 7 days.

Proposed subsection 34D(2) provides that the warrant must, in the same terms as the draft warrant given to the issuing authority as part of the request, either require the person specified in the warrant to appear before a prescribed authority for questioning under the warrant, or do both of the following:

- authorise the person to be immediately taken into custody by a police officer, brought before a prescribed authority for questioning under the warrant and detained by a police officer for a specified period of not more than 48 hours starting when the person is brought before the authority; and
- permit the person to contact identified persons at specified times whilst the person is in custody or detention.

Proposed subsection 34D(3) provides that the warrant may specify the end of a period for which the person is to be detained by reference to the opinion of a person exercising authority under the warrant that ASIO does not have any further requests to make of the person to provide information or things under the warrant.

Proposed subsection 34D(4) provides that the warrant may specify someone whom the person is permitted to contact by reference to the fact that he or she is an approved lawyer or has a particular legal or familial relationship with the person.

Proposed subsection 34D(5) requires that the warrant must, in the same terms as the draft warrant, authorise ASIO, subject to any restrictions or conditions, to question the person before a prescribed authority by requesting the person to either give information that is or may be relevant to intelligence that is relevant to a terrorism offence or to produce records or things that are, or may be, relevant to intelligence that is relevant to a terrorism offence. Proposed subsection 34D(5) also requires that the warrant must authorise ASIO to make copies of a record produced by the person before a prescribed authority in response to a request in accordance with the warrant.

Proposed subsection 34D(6) provides that the warrant must be signed by the issuing authority who issues it and specify the period during which the warrant remains in force (which may not be more than 28 days).

### **Proposed section 34DA – Person taken into custody under warrant to be immediately brought before prescribed authority**

Proposed section 34DA requires that a police officer who takes a person into custody under a warrant must make arrangements for the person to be immediately brought before a prescribed authority for questioning.

### **Proposed section 34E – Prescribed authority must explain warrant**

Proposed subsection 34E(1) requires a prescribed authority, when a person first appears before the prescribed authority for questioning under the warrant, to inform the person of the following:

- whether the warrant authorises detention of the person by a police officer and, if it does, the period for which the warrant authorises that detention;
- what the warrant authorises ASIO to do;
- the effect of section 34G, including the fact that section 34G creates offences;
- the period for which the warrant is in force;
- the person's right to make a complaint to the Inspector-General of Intelligence and Security in relation to ASIO or to the Ombudsman in relation to the Australian Federal Police;
- the person's right to seek a remedy from a federal court relating to the warrant or their treatment under the warrant; and
- whether there is any limit on the person contacting others.

Proposed subsection 34E(2) provides that subsection 34E(1) does not apply to a prescribed authority if a person has previously appeared before another prescribed authority for questioning under the warrant.

Proposed subsection 34E(2A) requires the prescribed authority to inform a person appearing before them for questioning of: the role of the prescribed authority and the role and reason for the attendance of each other person who is present during questioning. The prescribed authority does not have to name any person present (except if that person has given consent to be named) and the prescribed authority need only comply this obligation once (even if a person leaves and subsequently returns to the questioning).

Proposed subsection 34E(3) requires the prescribed authority to advise a detained person of their right to seek a remedy from a federal court at least once in every 24 hour period during which they are detained.

### **Proposed section 34F – Detention of persons**

Proposed subsection 34F(1) sets out the directions that a prescribed authority may give at any time when a person is before a prescribed authority for questioning under a warrant. The prescribed authority may give: a direction to detain the person; a direction for the further detention of a person; a direction about arrangements for the person's detention; a direction permitting the person to contact an identified person or any person; a direction for the person's further appearance before the prescribed authority for questioning under the warrant; or a direction that the person be released from detention.

Proposed subsection 34F(2) provides that the prescribed authority may only give a direction under subsection (1) that is consistent with the warrant, or if it is not consistent with the warrant, has been approved by the Minister in writing. However, a direction that is not consistent with the warrant or approved by the Minister may be given by the prescribed

authority if he or she has been informed under proposed section 34HA of a concern of the IGIS and the direction is necessary to address the concern.

Proposed subsection 34F(3) limits the directions that a prescribed authority may give under subsection (1) to detain a person or for the further detention of a person. The prescribed authority may only give such a direction if he or she is satisfied that there are reasonable grounds for believing that the person: may alert a person involved in a terrorist offence that the offence is being investigated; may not continue to appear, or may not appear again, before a prescribed authority; or may destroy, damage or alter a record or thing the person has been requested, or may be requested, under the warrant to produce.

Proposed subsection 34F(4) places special limits on directions that may be given by a prescribed authority under proposed subsection 34F(1). These are that a direction must not result in: a person being detained for more than 48 hours after a person first appears before the prescribed authority for questioning under the warrant; a person being detained under a subsequent warrant for a continuous period of more than 168 hours after a person first appears before the prescribed authority; or detention being arranged by a person who is not a police officer.

Proposed subsection 34F(5) provides that directions given by a prescribed authority have effect, and may be implemented or enforced, according to their terms.

Proposed subsection 34F(6) provides that a police officer may take a person into custody and bring the person before a prescribed authority for questioning under the warrant issued under section 34D if the person fails to appear before a prescribed authority as required by the warrant or a direction given by a prescribed authority under section 34F.

Proposed subsection 34F(7) provides that section 34F does not prevent a person who was detained in connection with a section 34D warrant being the subject of a subsequent warrant under section 34D or being detained under a subsequent warrant under section 34D. This section has been included to ensure that it is clear that a person may be the subject of more than one section 34D warrant.

Proposed subsection 34F(8) provides that a person who has been taken into custody or detained under Division 3 of the ASIO Act is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.

Proposed subsection 34F(8) has been included because, if a person has been taken into custody or is detained under Division 3 of the ASIO Act it is because the person may have critical information concerning terrorism offences and contact could alert other persons involved in such activities. In this case it is the security of the community, rather than the ordinary rights of the individual, which are paramount.

Proposed paragraph 34F(9)(a) provides that the person in custody or detention may contact anyone whom a warrant under which he or she is detained, or a direction described under paragraph 34F(1)(d), permits the person to contact.

Proposed paragraph 34F(9)(b) provides that subsection 34F(8) does not affect the right of a person in detention to communicate with the Inspector-General of Intelligence and Security

(IGIS) (if the person wishes to make a complaint about ASIO) or the Ombudsman (if the person wishes to make a complaint about the Australian Federal Police).

Proposed paragraph 34F(9)(c) requires anyone who is holding the person in custody or detention under Division 3 to give to the person facilities for making a complaint to the IGIS or the Ombudsman, if the person wishes to make an oral complaint. The requirement to provide a person with the facilities to make a complaint in writing is contained in section 13 of the *Inspector-General of Intelligence and Security Act 1986* and section 22 of the *Complaints (Australian Federal Police) Act 1981*.

### **Proposed section 34G – Giving information and producing things etc.**

Proposed subsection 34G(1) provides that a person must appear before a prescribed authority for questioning as required by a warrant issued under proposed section 34D or a direction under proposed section 34F. The maximum penalty for failure to comply is 5 years imprisonment.

Subsection 34G(1) does not specify the fault elements that apply to the offence. As a consequence, the fault element of intention will apply by default to a person's failure to appear (section 5.6, *Criminal Code*). However, proposed subsection 34G(2) provides that strict liability applies to the circumstance that the warrant was issued under section 34D or the direction was given under section 34G. The meaning of *strict liability* is contained in section 6.1 of the *Criminal Code*. The application of strict liability to this element of the offence means that the prosecution does not have to prove that the defendant knew, or was reckless as to whether, the warrant or direction was issued under those particular sections of the Act.

Proposed subsection 34G(3) provides that a person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant. The maximum penalty for failure to comply is 5 years imprisonment.

As subsection 34G(3) does not specify the fault elements that apply to the offence, the fault element of intention will apply by default to a person's failure to provide the information requested (section 5.6, *Criminal Code*).

Proposed subsection 34G(4) provides that subsection (3) does not apply if the person does not have the information. In accordance with subsection 13.3 of the *Criminal Code*, it is the defendant who must adduce evidence that suggests a reasonable possibility that he or she does not have the information requested. The evidential burden has been placed on the defendant because the matter is peculiarly within the defendant's knowledge and would be too difficult for the prosecution to prove.

Proposed subsection 34G(5) provides that if a person makes a statement when they are before a prescribed authority for questioning under a warrant that they know to be false or misleading and the statement is made in purported compliance with a request for information made in accordance with a warrant, the person is guilty of an offence. The maximum penalty that applies to the offence is 5 years imprisonment.

Subsection 34G(5) does not specify the fault elements that apply to the offence. As a consequence, the fault element of intention will apply by default to a person's failure to provide the information requested (section 5.6, *Criminal Code*).

Proposed subsection 34G(6) provides that a person who is before a prescribed authority for questioning under a warrant must not fail to produce any record or thing that the person is requested in accordance with the warrant to produce. The maximum penalty for the offence is 5 years imprisonment.

Proposed subsection 34G(7) provides that subsection (6) does not apply if the person does not have possession or control of the record or thing. In accordance with subsection 13.3 of the *Criminal Code*, it is the defendant who must adduce evidence that suggests a reasonable possibility that he or she does not have the information requested.

Proposed subsection 34G(8) provides that, for the purposes of subsections (3) and (6), the person must not fail to give information or produce a record or thing on the grounds that the giving of the information or the production of the record or thing might tend to incriminate the person or make the person liable to a penalty. The normal privilege against self-incrimination does not apply in relation to proposed new subsection 34G(8) to maximise the likelihood that information will be given or records or things produced that may assist to avert terrorism offences. The protection of the community from such violence is, in this special case, considered to be more important than the privilege against self-incrimination.

Proposed new subsection 34G(9) limits the use which can be made of information, records or things obtained as a result of warrant for the purposes of criminal prosecution. The information, records or things provided by a person while before a prescribed authority for questioning under a warrant may only be used in criminal prosecutions for an offence against section 34G.

### **Proposed section 34H – Interpreter provided at request of prescribed authority**

Proposed section 34H provides that if the prescribed authority before whom a person specified in a warrant first appears believes on reasonable grounds that the person specified in the warrant is unable to communicate in English the prescribed authority must arrange for an interpreter and defer the questioning under the warrant until the interpreter arrives.

### **Proposed section 34HAA - Interpreter provided at request of person being questioned**

Proposed section 34HAA applies when a person who is appearing before a prescribed authority for questioning requests an interpreter.

Proposed subsection 34HAA(2) requires the prescribed authority to arrange for an interpreter to be present at the questioning, unless the prescribed authority believes, on reasonable grounds, that the person being questioned is able to adequately communicate in English.

Under proposed subsection 34HAA(3), if questioning has not commenced and the prescribed authority determines that an interpreter is to be present, then the prescribed authority must

defer informing the person under section 34E. In addition, a person exercising authority under the warrant must defer questioning until the interpreter is present at the questioning.

If questioning under the warrant commences before the person being questioned requests an interpreter (and the prescribed authority determines that an interpreter is to be present), subsection 34HAA(4)(a) provides that a person exercising authority under the warrant must defer questioning until the interpreter is present. In addition, subsection 34HAA(4)(b) provides that when the interpreter is present at the questioning, the prescribed authority must inform the person again of anything which he or she was already informed of under section 34E when the interpreter was not present.

### **Proposed section 34HAB - Inspector-General of Intelligence and Security may be present at questioning or taking into custody**

Proposed section 34HAB clarifies, for the avoidance of doubt under the functions of the *Inspector-General of Intelligence and Security Act 1986*, that the Inspector-General of Intelligence and Security, or an Australian Public Service employee assisting the Inspector-General, may attend the questioning or taking into custody of a person.

### **Proposed section 34HA – Suspension of questioning etc. in response to concern of Inspector-General of Intelligence and Security**

Proposed subsection 34HA(1) provides that the section will apply in cases where the IGIS is concerned about impropriety or illegality in relation to an interview being conducted under the warrant procedures.

Proposed subsection 34HA(2) provides that the IGIS may inform the prescribed authority of his or her concern, and if he or she does so, the IGIS must then also inform the Director-General of Security as soon as practicable.

Proposed subsection 34HA(3) requires the prescribed authority to consider the IGIS's concern.

Proposed subsection 34HA(4) enables the prescribed authority to give directions suspending the questioning or deferring the exercise of any other power under the warrant until satisfied that the IGIS's concern has been satisfactorily addressed. The prescribed authority would also have the power to make any other directions under proposed section 34F.

### **Subdivision C – Miscellaneous**

#### **Proposed section 34J – Humane treatment of person specified in warrant**

Proposed section 34J requires that a person specified in a warrant be treated humanely while anything is being done to the person under the warrant or a direction given under section 34F.

### **Proposed section 34K – Video recording of procedures**

Proposed subsection 34K(1) provides that the Director-General must ensure that video recordings are made of a person's appearance before a prescribed authority for questioning under a warrant and any other matter or thing that the prescribed authority directs is to be video recorded. Proposed subsection 34K(2) provides that the Director-General must ensure that, if practicable, video recordings are made of any complaint by a person specified in a warrant issued under section 34D when he or she is not appearing before a prescribed authority for questioning under the warrant.

Generally a complaint made by a person who is required to appear before a prescribed authority for questioning under a warrant would be expected to be made during the person's appearance before a prescribed authority, which is required to be recorded on video. If a complaint is made at a time other than when the person appears before a prescribed authority for questioning under the warrant it may not be practicable for the complaint to be recorded on video.

### **Proposed section 34L – Power to conduct an ordinary or strip search**

Proposed subsection 34L(1) provides that, if a person is detained under Division 3 of the ASIO Act, a police officer may conduct an ordinary search of the person or a strip search of the person. A strip search may only be conducted in accordance with proposed section 34M. 'Ordinary search' is defined in item 2 of Schedule 1 and 'strip search' is defined in item 7 of Schedule 1.

Proposed subsection 34L(1A) provides that where practicable, an ordinary search of a person under this section must be conducted by a police officer of the same sex as the person being searched.

Proposed subsection 34L(2) provides that a strip search may be conducted if a police officer suspects on reasonable grounds that both the person has a seizable item on his or her person and it is necessary to conduct a strip search to recover that item and a prescribed authority has approved the conduct of the strip search. Item 6 of Schedule 1 defines 'seizable item'.

Proposed subsection 34L(3) provides that the approval of the prescribed authority to conduct the strip search may be obtained by telephone, fax or other electronic means. The provision has been included so it is clear that the approval does not have to be obtained from the prescribed authority in person.

Proposed subsection 34L(4) provides that a strip search may also be conducted if the person consents to the search in writing. If the person consents, the approval of the prescribed authority is not required.

Proposed subsection 34L(5) provides that a medical practitioner may be present during a strip search and may assist in the search.

Proposed subsection 34L(6) provides that the prescribed authority must make a record of any refusal to approve a request for a strip search and the reasons for the decision.

Proposed subsection 34L(7) provides that such force that is reasonable and necessary in the circumstances may be used to conduct a strip search.

Proposed subsection 34L(8) provides that any seizable item or any item that is relevant to collection of intelligence that is important in relation to a terrorism offence found during a search may be seized.

### **Proposed section 34M – Rules for conduct of strip search**

Proposed subsection 34M(1) sets out the rules that apply to the conduct of a strip search under proposed new section 34L. A strip search:

- must be conducted in a private area;
- must be conducted by a police officer of the same sex as the person being searched;
- must not be conducted in the presence or view of a person of the opposite sex to the person being searched (unless the person of the opposite sex is a medical practitioner and a medical practitioner of the same sex is not available within a reasonable time (proposed subsection 34M(3)) However, this does not apply to a parent, guardian or personal representative of the person being searched if that person does not have an objection to the person being present (proposed subsection 34M(3A));
- must not be conducted in the presence or view of a person whose presence is not necessary for the search;
- must not be conducted on a person under 14 years of age;
- if, in the prescribed authority's opinion, the person being searched is over 14 and less than 18 years of age, or is incapable of managing his or her affairs, the search may only be conducted in the presence of a parent or guardian of the person, or if that is unacceptable to the person, in the presence of someone else who can represent the person's interests (proposed subsection 34M(2) provides that a police officer, the Director-General, an officer or employee of ASIO or a person approved to exercise authority under a warrant under subsection 24(1) of the Act cannot represent the person's interests);
- must not involve a search of a person's body cavities;
- must not involve the removal of more garments than the police officer believes is necessary to determine whether the person has a seizable item; and
- must not involve more than a visual inspection than the police officer believes is necessary to determine whether the person has a seizable item.

Proposed subsection 34M(4) provides that the person must be provided with adequate clothing if any of the person's garments are seized as a result of the search.

### **Proposed section 34N – Power to remove, retain and copy materials etc**

Proposed subsection 34N(1) provides that, in addition to the things that ASIO is authorised to do that are specified in the warrant, ASIO is also authorised:

- to remove and retain any record or thing produced before a prescribed authority;
- subject to proposed Section 34M, to examine items removed;

- to retain for such time as is reasonable, and make copies of, any item seized under proposed paragraph 34L(8)(b); and
- to do any other thing reasonably incidental to paragraphs (a), (b) or (c), or any of the things that ASIO is authorised to do that are specified in the warrant.

Proposed subsection 34N(2) provides that a police officer may retain for such time as is reasonable any seizable item seized by the officer under paragraph 34L(8)(a).

### **Proposed section 34NA – Special rules for young people**

Proposed subsections 34NA(1) to (3) have the effect of excluding children under the age of 14 from the operation of the new warrant procedures established by the Bill. Any warrant issued would have no effect if the subject of the warrant is under 14. If the prescribed authority is satisfied on reasonable grounds that a person appearing before it is under 14, then the prescribed authority must give directions that the person not be questioned and (if the person is in detention) that the person be released from detention.

Proposed subsections 34NA(4) to (9) establish a special regime for persons aged between 14 and 18. Proposed subsection 34NA(4) provides that the Minister may consent to a request for the issue of a warrant in relation to such persons only if the Minister is satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence. The Minister must also be satisfied on reasonable grounds that the draft warrant meets the requirements in proposed subsection (6) (concerning contact with a parent, guardian or other person). Proposed subsection 34NA(5) requires an issuing authority to be satisfied of this latter ground in order to issue a warrant.

Proposed subsection 34NA(6) requires the draft warrant to permit the person to contact a parent or guardian or another acceptable representative (as described in proposed subsection (7)) and an approved lawyer. It also requires the draft warrant to authorise questioning before a prescribed authority only in the presence of a parent, guardian or another acceptable representative and for no longer than 2 hours without a break. Under proposed subsection 34NA(7), an “acceptable representative” is another person who can represent the person’s interests and who, as far as practicable, is acceptable to the person and to the prescribed authority, but who is not a police officer, the Director-General, an officer or employee of ASIO or a person approved to exercise authority under a warrant under subsection 24(1) of the ASIO Act. (This is consistent with proposed subsection 34M(2)).

Proposed subsection 34NA(8) requires the prescribed authority, if satisfied on reasonable grounds that the person appearing before it for questioning is between 14 and 18 years of age, to inform the person of his or her rights to request a parent, guardian or other acceptable representative to be present during questioning, and to contact such persons and an approved lawyer at any time. The proposed subsection also sets out the directions the prescribed authority must make in order to ensure that the person is not questioned in the absence of a parent or guardian (or another person who meets the requirements under proposed subsection 34NA(7) if appropriate), to ensure that the person may contact a parent, guardian, other acceptable representative and an approved lawyer, and to ensure that questioning not continue for longer than 2 hours without appropriate breaks.

Proposed subsection 34NA(9) clarifies that proposed subsection 34F(2) (which prevents the prescribed authority from making a determination that is inconsistent with the terms of a warrant) would not prevent the prescribed authority from directing that a child may contact a parent, guardian or other representative, or an approved lawyer.

### **Proposed section 34NB – Offences of contravening safeguards**

Proposed section 34NB provides penalties for officials who do not comply with relevant provisions of the Bill.

The proposed new subsection creates offences with a maximum penalty of 2 years imprisonment, in relation to:

- a person approved to exercise authority under a warrant who exercises, or purports to exercise, the authority in a way that contravenes a condition or restriction in the warrant, and the person knows of the contravention (proposed subsection 34NB(1));
- a police officer who engages in conduct that contravenes proposed section 34DA (which requires the officer to make arrangements for a person taken into custody to be immediately brought before a prescribed authority), and the officer knows of the contravention (proposed subsection 34NB(2));
- a person responsible for implementing a direction of a prescribed authority (relating to detention arrangements, contact with other persons while in detention, further appearance before a prescribed authority for questioning, release from detention, addressing a concern of the IGIS, special procedures for persons aged less than 18, and removal of a person’s parent, guardian or representative during questioning) who engages in conduct that contravenes the direction, and the person knows of the contravention (proposed subsection 34NB(3));
- a person who engages in conduct that contravenes certain provisions (relating to provision of facilities for contacting the IGIS or Ombudsman, deferral of questioning until an interpreter is present, and treating a detained person with humanity and respect for human dignity), and the person knows of the contravention (proposed subsection 34NB(4));
- a police officer who conducts a strip search without the approval of a prescribed authority or the consent of the detained person, or in a way that contravenes proposed subsection 34M(1) (which sets out rules for the conduct of strip searches), and the police officer knows of the lack of approval and consent or of the contravention (proposed subsection 34NB(5));
- a police officer who conducts a strip search and engages in conduct that contravenes proposed subsection 34M(4) (which requires a person to be provided with adequate clothing if the person’s garments are seized), and the police officer knows of the contravention (proposed subsection 34NB(6)).

Proposed subsection 34NB(7) provides that, for the purposes of proposed section 34NB, to “engage in conduct” means to do an act or to omit to perform an act.

### **Proposed section 34NC - Complaints about contravention of procedural statement**

Proposed section 34NC provides that a contravention of the procedural statement (as provided for in section 34C) may be the subject of a complaint to the Inspector-General of Intelligence and Security or to the Ombudsman (proposed subsection 34NC(1). Proposed subsection 34NC(2) further provides that this section does not limit the subjects of complaints available under the *Inspector-General of Intelligence and Security Act 1986* or Part III of the *Complaints (Australian Federal Police) Act 1981*.

### **Proposed section 34P – Providing reports to the Minister**

Proposed section 34P requires the Director-General to give to the Minister a report on each warrant issued under proposed section 34D. The report must address the extent to which action taken under the warrant has assisted ASIO to carry out its functions. In addition to this report, proposed section 34Q requires details of action under proposed Division 3 of the ASIO Act to be provided to the IGIS.

### **Proposed section 34Q – Providing information to the Inspector-General**

Proposed section 34Q provides that the Director-General must, as soon as practicable, give to the IGIS: a copy of any draft request given to the Minister seeking the Minister's consent to request the issue of a warrant; a copy of any warrant issued under proposed section 34D; a copy of any video recording made under proposed section 34K; a statement containing details of any seizure, taking into custody, or detention under proposed Division 3; and a statement describing any action the Director-General has taken as a result of being informed of a concern of the Inspector-General of Intelligence and Security under proposed section 34HA.

### **Proposed section 34R – Discontinuing action before warrants expire**

Proposed section 34R places an obligation on the Director-General to take certain action if the Director-General is satisfied that the grounds on which the warrant under proposed section 34D was issued have ceased to exist. The Director-General must both inform the Minister and the issuing authority who issued the warrant and take steps to ensure that action under the warrant is discontinued.

### **Proposed section 34S – Certain records obtained under warrant to be destroyed**

Proposed section 34S requires the Director-General to cause a record or copy to be destroyed if: the record or copy was made because of a warrant issued under section 34D; the record or copy is in the possession or custody of ASIO; and if the Director-General is satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under the ASIO Act.

### **Proposed section 34SA – Status of issuing authorities and prescribed authorities**

Proposed subsection 34SA(1) provides that an issuing authority or prescribed authority has, in the performance of their duties under Division 3 of the ASIO Act, the same protection and immunity as a Justice of the High Court.

Proposed subsection 34SA(2) provides that if a function, power or duty that is neither judicial nor incidental to a judicial function is vested in a person who is a member of a court created by the Parliament, the person has the function, power or duty in a personal capacity and not as a court or a member of a court. This proposed subsection has been included to ensure that it is clear that the function of issuing authority is conferred on federal magistrates, federal judges and prescribed persons in their personal capacity. The provision is in similar terms to section 4AAA of the *Crimes Act 1914* which regulates the conferral of functions on judicial officers under Commonwealth law in relation to ‘criminal matters’.

### **Proposed section 34T – Certain functions and powers not affected**

Proposed section 34T provides that Division 3 of the ASIO Act does not affect a function or power of the IGIS under the *Inspector-General of Intelligence and Security Act 1986* or the Ombudsman under the *Complaints (Australian Federal Police) Act 1981*. It has been included to ensure that it is clear that a person being detained incommunicado under Division 3 of the ASIO Act has the right to communicate with the IGIS or the Ombudsman in relation to matters relevant to their detention. This right of communication with the IGIS is contained in section 13 of the *Inspector-General of Intelligence and Security Act 1986*. The right of communication with the Ombudsman in relation to a complaint about the Australian Federal Police is contained in subsections 22(4), (4A) and (4B) of the *Complaints (Australian Federal Police) Act 1981*. The IGIS deals with complaints about ASIO whereas the Ombudsman, among other things, investigates complaints about the Australian Federal Police.

### **Proposed section 34U – Involvement of lawyers**

Proposed section 34U sets out provisions relating to the involvement of lawyers in the questioning process. The effect of the proposed section is to require that:

- contact between the detained person and the legal adviser be made in a way that can be monitored by a person exercising authority under the warrant (an ASIO officer or other appropriate officer) (proposed subsection 34U(2));
- the prescribed authority provide a reasonable opportunity for the legal adviser to advise the detained person during breaks in the questioning (proposed subsection 34U(3)); and
- the legal adviser not intervene in questioning or address the prescribed authority except to request clarification of an ambiguous question (proposed subsection 34U(4)).

Proposed subsection 34U(5) enables the prescribed authority, if it considers that the legal adviser’s conduct is unduly disrupting the questioning, to make a direction for the removal of the legal adviser from the place of questioning. Proposed subsection 34U(6) provides that if the prescribed authority so directs, the prescribed authority must also direct that the person may contact another approved lawyer.

Proposed subsections 34U(7) to (11) deal with disclosure of information by the legal adviser. Proposed subsection 34U(7) creates an offence with a penalty of a maximum of 2 years imprisonment. A legal adviser will commit the offence if, during the period that a person is being detained, the legal adviser communicates to a third person (who is not a prescribed authority, a person exercising authority under a warrant, the IGIS or the Ombudsman) information relating to the questioning or detention of the person, and the communication is not authorised by a prescribed authority under proposed subsection 34U(8) or by regulations under proposed subsection 34U(10).

Proposed subsections 34U(9) and 34U(11) provide that the legal adviser must not be prevented by a direction of the prescribed authority under proposed subsection 34U(8) or by regulations under proposed subsection 34U(10) from communicating such information to a member or Registrar of a federal court for the purposes of seeking a remedy relating to a warrant or the treatment of a person in connection with a warrant.

Proposed subsection 34U(12) makes it clear that if proposed section 34V also applies to the legal adviser in another capacity in relation to the person, then proposed section 34U does not apply to conduct of the legal adviser in that other capacity.

### **Proposed section 34V – Conduct of parents etc.**

Proposed section 34V sets out provisions relating to the conduct of parents, guardians or other persons pursuant to proposed subsection 34NA(7) who have been contacted by a young person or are present when a young person is questioned before a prescribed authority ('a representative'). The proposed section also sets out provisions relating to the disclosure of information by a representative and the persons with whom the representative communicates.

Proposed subsection 34V(2) enables the prescribed authority, if it considers that the representative's conduct is unduly disrupting the questioning, to make a direction for the removal of the representative from the place of questioning. This is in similar terms to proposed subsection 34U(5) relating to legal advisers.

Proposed subsection 34V(3) sets out the directions and actions the prescribed authority must take if the prescribed authority directs the removal of a representative. The prescribed authority is required to inform the person of his or her rights to request a representative (other than the one removed) to be present during questioning, and to contact such a person. The prescribed authority is also required to make directions to ensure that the person is not questioned in the absence of a representative, and to ensure that the person may contact a representative.

Proposed subsections 34V(4) and (5) deal with the disclosure of information by a representative. Proposed subsection 34V(5) creates an offence with a maximum penalty of 2 years imprisonment. A representative will commit the offence if, during the period that a person is being detained, the representative communicates to a third person (who is not a parent, guardian or sibling of the person, a prescribed authority, a person exercising authority under a warrant, the IGIS or the Ombudsman) information relating to the questioning or detention of the person, and the prescribed authority has not given permission for the communication under proposed subsection 34V(4).

Proposed subsection 34V(6) deals with the disclosure of information by parents, guardians or siblings of a person who is being detained and creates an offence, with a maximum penalty of 2 years imprisonment. A parent, guardian or sibling of a person who has information relating to the questioning or detention of the person communicated to them by a representative or another parent, guardian or sibling of the person will commit an offence if, during the period that the person is detained, they communicate that information to another person. The offence will not be committed if the person to whom the information is communicated is another parent, guardian or sibling of the person, a representative, a prescribed authority, a person exercising authority under a warrant, the IGIS or the Ombudsman.

It is intended that the effect of proposed subsections 34V(4), (5) and (6) is to allow the communication of information about the questioning or detention of a young person among members of the person's immediate family and to the relevant authorities, but to prevent the unauthorised disclosure of that information outside of the person's immediate family or the relevant authorities.

### **Proposed section 34W – Rules of Court about proceedings connected with warrants**

Proposed section 34W provides that Rules of Court of the High Court or Federal Court may make special provision in relation to proceedings for a remedy relating to a warrant issued under proposed section 34D or the treatment of a person in connection with a warrant.

### **Proposed section 34WA - Law relating to legal professional privilege not affected**

Proposed section 34WA provides that the law relating to legal professional privilege is not affected by the operation of Division 3 of the Act.

### **34X – Jurisdiction of State and Territory courts excluded**

Proposed section 34X provides that, despite any other law of the Commonwealth, a court of a State or Territory does not have jurisdiction in proceedings for a remedy relating to a warrant issued under proposed section 34D or the treatment of a person in connection with a warrant that are commenced while the warrant is in force.

### **Item 25 – Section 35 (definition of *year 2000 Games matters*)**

Item 25 repeals the definition of *year 2000 Games matters* in section 35 of the ASIO Act as the Games have taken place. Section 35 is the definition section of Part IV of the Act. Part IV of the ASIO Act sets out when ASIO may provide security assessments. Section 40 of the ASIO Act provides, among other things, that ASIO may provide security assessments to a State or authority of a State in relation to the year 2000 Olympic Games.

### **Item 26 – Paragraph 40(1)(b)**

Item 26 repeals paragraph 40(1)(b) of the ASIO Act and substitutes a new paragraph. The effect of paragraph 40(1)(b) is that ASIO may provide security assessments to State authorities in relation to the year 2000 Games. The proposed new paragraph provides that the Minister may designate a special event in writing in relation to which ASIO may provide security assessments to a State or State authority.

The proposed new paragraph will ensure that special temporary amendments to the ASIO Act, such as that made for the year 2000 Games, will not need to be made in the future.

#### **Item 27 – At the end of section 40**

Item 27 proposes a new subsection 40(3) that is specific to the proposed amendment of paragraph 40(1)(b) at item 26 above. Proposed subsection 40(3) requires the Minister to notify the Director-General in writing of an event that is designated as a special event.

#### **Item 27A – After subsection 94(1)**

Item 27A inserts a new proposed subsection 94(1A) in the ASIO Act. Section 94 of the ASIO Act deals with ASIO's Annual Report. The proposed new subsection requires the report to include a statement of the total number of warrants sought from an issuing authority during the year and the total number of warrants issued during the year:

- under proposed section 34D;
- that relate to appearing before a prescribed authority for questioning;
- that relate to being taken into custody, brought before a prescribed authority and detained;
- the total number of hours each person appeared before a prescribed authority and the total number of hours each person spent in detention and the total of all those hours for all those persons; and
- the number of times each prescribed authority had persons appear for questioning before him or her.

In addition, proposed subsection 94(1B) provides that a statement included in a report under the requirements of proposed subsection 94(1A) must not identify in any way any person to whom information in the report relates to. The note to proposed subsection 94(1B) notes that, under subsection (4) of the Act, the Minister may delete any information provided under subsection (1A) for the purposes of subsection (3) if the Minister considers that the release of that information may prejudice the security or defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals.

#### **Item 27B – At the end of section 94**

Item 27B inserts a new proposed paragraph 94(5) in the ASIO Act. The proposed paragraph prevents the Minister from deleting the statement referred to in item 27A for the purposes of ASIO's unclassified report.

#### **Item 27C – Application of amendments to section 94**

Item 27C provides that the amendments effected by items 27A and 27B apply to each report for a year ending after the commencement of this item.

## **Intelligence Services Act 2001**

### **Item 27D**

Item 27D inserts a new paragraph 29(1)(bb) into the *Intelligence Services Act 2001* to provide for the Parliamentary Joint Committee on ASIO, ASIS and DSD to review the operation, effectiveness and implications of amendments made by the Bill. The review will be conducted three years after the Bill receives Royal Assent.

The Committee is required to report its comments and recommendations arising from the review to each House of the Parliament and to the responsible Minister (section 29(1)(c) of the *Intelligence Services Act 2001*). Schedule 1 to the *Intelligence Services Act 2001* contains provisions empowering the Committee to obtain information and documents, take evidence, and publish evidence and the contents of documents.

## **Telecommunications (Interception) Act 1979**

### **Item 28 – Subsection 65(1)**

Item 28 amends subsection 65(1) of the *Telecommunications (Interception) Act 1979* so that people other than ASIO officers may communicate intelligence on behalf of ASIO, when authorised by the Director-General.

### **Item 29 – Saving of authorisations**

Item 29 saves authorisations to ASIO officers that are in place immediately before the commencement of the Act so that they remain in place after the commencement of this item.