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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ASIO LEGISLATION AMENDMENT BILL 2006

EXPLANATORY MEMORANDUM

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

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GENERAL OUTLINE

This Bill amends the *Australian Security Intelligence Organisation Act 1979* ('the Act'). The Bill responds to recommendations of the Parliamentary Joint Committee on ASIO, ASIS and DSD in November 2005 ('the PJC') (now named the Parliamentary Joint Committee on Intelligence and Security) concerning the operation, effectiveness and implications of Division 3 of Part III of the Act, which contains ASIO's questioning and detention powers in relation to terrorism.

The Act contains a sunset clause (existing section 34Y will become section 34ZZ in Item 2 of Schedule 1) which provides that Division 3 will cease to be in force three years after commencement (23 July 2006). The Bill extends the existing sunset provision and prior review by the PJC by 10 years (requiring review by 22 January 2016, and Division 3 ceasing to have effect on 22 July 2016).

The Bill seeks to improve the clarity and operation of the warrant regimes under Division 3. These warrants permit ASIO to question, and in limited circumstances detain, a person where there are reasonable grounds for believing that doing so will substantially assist the collection of intelligence in relation to a terrorism offence (as defined by section 4 of the Act).

The other principal features of the Bill are amendments to Division 3 to:

- strengthen and clarify rights under the warrant regime, including an explicit right for a subject to contact a lawyer, a statutory right to apply for financial assistance relating to the questioning proceedings, and better facilitate the subject's ability to make complaints to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman, or a State or Territory complaints agency;
- clarify the role of the prescribed authority, and the ability of the subject's lawyer to address the prescribed authority during breaks in questioning; and
- inform users of the legislation how time is recorded for actual questioning and to point to the primary legal bases for judicial review.

FINANCIAL IMPACT STATEMENT

There is no financial impact flowing directly from the provisions in this Bill.

NOTES ON CLAUSES

General

Unless otherwise indicated, any reference to a 'section', 'subsection' or 'paragraph' in these notes is a reference to a section, subsection or paragraph in the *Australian Security Intelligence Organisation Act 1979*.

Clause 1: Short title

This is a formal clause which provides for the citation of the Bill. This clause provides that the Bill when passed by Parliament may be cited as the *ASIO Legislation Amendment Act 2006*.

Clause 2: Commencement

This clause sets out when the various parts of the Bill will commence.

Sections 1 to 3 of the Bill (the short title, the commencement and the schedules provision) and anything in the Bill not covered elsewhere in the table in clause 2 will commence on the day the Bill receives Royal Assent.

Schedule 1 of the Bill, which restructures the existing regime without making any substantive changes to the operation of the Act, will commence on the day after the Bill receives Royal Assent.

Schedule 2 of the Bill, which will make substantive changes to the Act, will commence immediately after the commencement of the provisions covered by table item 2 (that is, provisions contained in Schedule 1). This means that Schedule 2 will amend Schedule 1 when it commences.

Clause 3: Schedule(s)

This clause makes it clear that the Schedules to the Bill will amend the Acts set out in those Schedules in accordance with the provisions set out in each Schedule.

Schedule 1- Restructuring amendments

The purpose of this Schedule is to amend the structure and language of the provisions in Division 3 of Part III of the Act to separate and make clear the operation of the questioning-only, and questioning and detention, warrant regimes. This Schedule has been developed primarily in response to recommendation 2 of the PJC's report. The PJC recommended that, in order to provide for greater certainty and clarity to the operation of the Act, the legislation be amended to distinguish more clearly between the regime that applies to a person subject to a questioning-only warrant and the regime that applies to detention. The PJC also recommended that in particular, the Act be amended to clarify the connection between the period of detention and the allowable period of questioning (recommendation 3).

Schedule 1 is not intended to make substantive changes to the operation of the regime. The Schedule repeals Subdivisions B and C of Division 3 completely. The substantive requirements for issuing a warrant and for the questioning process remain the same aside from some modifications and changes for clarity. The provisions have also been renumbered.

Part 1 – Main amendments

Item 1

This item inserts a new section 34C at the end of Subdivision A of Division 3 of Part III of the Act. The new section will provide for the Director-General to prepare and the Minister to make a statement of procedures to be followed in the exercise of authority for warrants issued under Division 3. This statement of procedures is in force under the existing provisions and is known as the Australian Security Intelligence Organisation Protocol. The existing Protocol will continue in force (see item 20 of Schedule 1).

Item 1 will enable the Protocol to be updated or remade as appropriate. This item mirrors the existing requirement for the making of a Protocol in order to meet the requirement for the issuing of a questioning, or questioning and detention, warrant under existing subsection 34C(3A). The item requires the Director-General to consult with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police about preparing the Protocol.

Once the Director-General gives the Protocol to the Minister, the Minister may approve the Protocol. The Director-General must then brief the PJC orally or in writing on the statement.

When the Minister approves the Protocol, the Protocol will become a legislative instrument. The Protocol will be a legislative instrument that is exempted from disallowance that would ordinarily apply under section 42 of the *Legislative Instruments Act 2003*. This is because the instrument has been developed as a policy document giving effect to Parliament's intent for the basic standards applicable when a person is questioned, or questioned and detained, under a warrant issued under Division 3.

The Protocol will also be exempted from sunset requirements under Part 6 of the Legislative Instruments Act. Items 32 and 33 of Schedule 2 will insert a 10 year sunset provision with a review by the PJC six months before it sunsets for the powers in Division 3. This review and sunset mechanism may involve making significant changes to the Protocol at that time. For this reason it is not necessary for the default sunset procedures in the Legislative Instruments Act to apply.

Item 2

This item repeals current Subdivisions B and C of Division 3 of the Act, and substitutes a new set of Subdivisions, split according to the two separate regimes currently existing under the Act – the questioning-only regime, and the questioning and detention regime.

Subdivisions B and C - Questioning-only and questioning and detention warrants

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill was introduced into Parliament in 2002 to improve the legislative framework in place to effectively counter the threat posed by terrorism. The Bill was passed and assented to on 22 July 2003. The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* commenced on 23 July 2003, inserting Division 3 into Part III of the ASIO Act. The legislation was originally designed as a detention regime but was subsequently split into two separate regimes which require separate warrants for questioning and for questioning and detention.

Division 3 currently contains a dual warrant system – one type of warrant is available for questioning a person, and the other type of warrant is used to detain a person for questioning. In responding to the PJC's recommendations to more clearly distinguish between the requirement and operation of the warrant regimes, the two regimes have been separated by Subdivision. There is no substantive impact on the current operation of either regime.

Subdivision B sets out the core provisions relating to warrants which require a person to appear for questioning (questioning-only warrants). This involves the Director-General of Security, seeking the Minister's consent to the request for a warrant, requesting a warrant, and the issuing of a warrant by an issuing authority once the Minister has consented to the request. These provisions contain particulars of what the draft request must contain, and what must be considered by the Minister and the issuing authority respectively in consenting to and issuing a warrant for questioning.

Subdivision C sets out the core provisions relating to warrants which authorise questioning and detention (questioning and detention warrants). The procedure for requesting, consenting to, and issuing a warrant in Subdivision C is similar to the requirements in Subdivision B. However, Subdivision C provides a separate threshold that must be met before a questioning and detention warrant can be issued.

Amendments in Subdivision B and C are not intended to change the existing requirements for, or existing obligations arising under, either type of warrant.

Subdivisions D and E - Obligations and protections relating to a warrant issued under Subdivisions B or C

These provisions (currently contained in Subdivision C of Division 3) have been split into two new Subdivisions. Many of the provisions apply equally to both regimes. Some amendments have been made to make it clear which provisions apply to questioning-only, and questioning and detention, warrants. For example, a previous reference to section 34D (Warrants for questioning etc.), where it applies to both regimes in the Act will refer to two sections – one covering questioning-only warrants (new section 34E) and the other covering questioning and detention warrants (new section 34G) (or otherwise warrants issued under this Division). As with all changes made by Schedule 1 of this Bill, amendments in Subdivisions D and E are not intended to change the current operation of the Act.

Part 2 – Consequential amendments

Items 3-15

These items will replace the provision numbers in the Act and other legislation referring to the Act with the new provision numbering for Division 3.

Part 3 – Saving and transitional provisions

Item 16

This item is a transitional item. It will ensure that despite the amendments made by Part 1 of Schedule 1 of this Bill (restructuring of Division 3 to delineate between the questioning-only and questioning and detention warrant regimes), Division 3 will continue to apply in certain circumstances after the Bill passes Parliament and commences as an Act. Current Division 3 continues to apply:

- (a) if the Director-General seeks the Minister's consent to issue a warrant under current subsection 34C(1) before commencement of this Bill as an Act;
- (b) following a consent by the Minister, where the Director-General makes a request under current subsection 34C(4) to an issuing authority that a Division 3 warrant be issued before commencement of this Bill as an Act;
- (c) following a warrant being issued (by an issuing authority) under current section 34D of the Act (this could apply to either a questioning or a questioning and detention warrant) before commencement of this Bill as an Act; and

- (d) for any other thing done under the current Division 3 of the Act (before commencement of this Bill as an Act) in connection with a warrant issued under section 34D of the Act before commencement (as stated above), or any questioning or detention which has been authorised by such a warrant (this could apply to either a questioning or a questioning and detention warrant).

In the circumstances above, existing Division 3 will continue to apply as if those amendments had not been made. That is, the current operation of any process contained within the current Division 3 of the Act will not be affected by any amendment made by this Schedule of the Bill.

For example, if, prior to the commencement of this Bill as an Act, the Director-General has sought the Minister's consent to request the issue of a warrant and the subject of that warrant has subsequently delivered their passport(s) to an enforcement officer, the Director-General is still under the obligation outlined in current subsection 34JBA(2) of the Act to return the passport to its owner even after this Bill has received Royal Assent and commenced (that subsection continues to apply as if the amendments in this Bill had not been made).

Item 17

This item is a transitional item that that will ensure that the *Australian Security Intelligence Organisation Regulations 1980* currently in force under current sections 34VAA or 34VA immediately before commencement remain in force after passage of this Bill as if they had been made under the renumbered provisions.

Item 18

This item is a transitional item that will ensure that any Rules of the High Court or the Federal Court of Australia for the purposes of the current section 34W of the Act remain in force after passage of this Bill as if they were made under the renumbered provision.

Item 19

This item is a transitional item that will ensure that an approval in force under subsection 24(1), authorising persons to exercise authority under a warrant issued under current section 34D, continues to have effect as if it were an approval for a warrant issued under Division 3.

Item 20

This item is a transitional item that will provide for the existing Protocol to continue in force after commencement of the Bill as an Act. The Protocol will be taken to continue as if it was made under Item 1 of this Schedule in relation to a warrant issued under the current numbering in Division 3. This means that the Protocol continues to have effect even though the section numbers it refers to will no longer match those in Division 3.

Subitem (2) provides that the existing Protocol ceases to be in force once the Minister makes a Protocol under the new section inserted by Item 1 of Schedule 2. Subitem (3) defines the Protocol within the context of the Act and this Bill. The Protocol will mean a written statement of procedures, referred to in paragraph 34C(3)(ba) and subsection 34C(3A) of the current Act. The existing Protocol was tabled in the House of Representatives by the Minister, the Attorney-General, on 12 August 2003.

Item 21

This item is a transitional item that will provide for ASIO to include information in its annual Report to Parliament about questioning, and questioning and detention, warrants issued prior to the Bill commencing. ASIO provides such information in accordance with subsection 94(1A) of the Act. This item applies to the report for the year ending 30 June 2006.

Schedule 2 – Other amendments

Items 1, 2 and 3

These items will amend paragraph 25A(4)(a) of the Act to correct a drafting error in an amendment made by the *Anti-Terrorism Act (No. 2) 2005*. The Explanatory Memorandum for that Act makes it clear that the intention was for new item (iv) to follow item (iii). The paragraph commencing “for the purpose...” should apply to (i) to (iv). The intention was for the use of a 'data storage device' to be used to access a computer under a section 25A warrant, with the requirement that it be for the purpose currently applying to the other provisions.

Item 4

This item will insert a new definition into section 34A of ‘complaints agency’ to facilitate other amendments to be made by Schedule 2 of this Bill (see items 9, 13, 14, 25 and 28 of this Schedule). The PJC report recommended (recommendation 12) creating an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers. This item implements that recommendation.

A complaints agency means an Ombudsman, agency or body appointed or established by a law of a State or Territory that is permitted or required to investigate complaints about the police force or service of the State or Territory. The definition relies on the complaints agency to have its own legislative basis to receive and investigate complaints. There is no intention to confer any new functions on State and Territory investigative agencies.

Since the responsibility for complaints mechanisms regarding police conduct differ in each State and Territory, this definition is intended to cover all appropriate agencies, including commissions, the ombudsman (where that ombudsman has jurisdiction or responsibility) or, in relevant cases, the internal mechanisms of the police force of the State or Territory.

The item includes the capacity to specify in regulations bodies that do not fall within the definition of complaints agency. This is considered necessary to ensure there is no unintended coverage of bodies flowing from the non-prescriptive definition.

Items 5 and 6

These items clarify existing rights of a person questioned under a questioning-only warrant to have contact with a lawyer at any time while the person is before a prescribed authority for questioning.

The PJC recommended in recommendation 4 that:

- “a person who is the subject of a questioning-only warrant have a statutory right to consult a lawyer of choice; and

- the legal adviser be entitled to be present during the questioning process and only be excluded on the same grounds as for a detention warrant, ie where there are substantial reasons for believing the person or the person’s conduct may pose a threat to national security.”

These items implement this recommendation in part to ensure the warrant specifies the right to contact a lawyer by the subject being questioned.

Item 5 explicitly provides that the Minister, in consenting to the making of a request by the Director-General, must ensure that the questioning-only warrant to be requested permits the subject of the warrant to contact a lawyer at any time while the person is before a prescribed authority for questioning under the warrant. This permission is subject to section 34ZO (previous section 34TA) of the Act. Item 21 of Schedule 2 provides that ASIO may challenge the lawyer chosen by the subject where the subject is detained in connection with a warrant.

Item 6 will also explicitly provide for a person subject to a questioning-only warrant to contact a lawyer. In response to the second aspect of PJC recommendation 4, the existing implication that a person can contact a lawyer (because there is nothing to limit that right) is made explicit for a questioning-only warrant in the same manner as it is under a questioning and detention warrant. All persons questioned are entitled to have a lawyer of choice present during proceedings. There is no requirement for a lawyer to be present. A person is permitted under section 34ZS (previous section 34VAA) to contact a lawyer from the point where the person is served with the warrant.

Consistent with item 21, if the person is detained in connection with or under a Division 3 warrant, the person may contact a single lawyer of the person’s choice. In order to contact a lawyer, the person must inform the prescribed authority in the presence of the person exercising authority under the warrant of the identity of the lawyer. The person exercising authority under the warrant must also be given an opportunity to request that the person be prevented from contacting the lawyer in accordance with section 34ZO.

Items 7 and 8

These items will implement PJC recommendation 3 to provide a clearer understanding between periods of questioning and those of detention. Subparagraph 34G(3)(a)(iii) (previous subparagraph 34D(2)(b)(i)) refers to the period in which a person is detained by a police officer and brought before a prescribed authority as the ‘questioning period’. The questioning period is in fact a period in which detention is measured from. The maximum questioning period in this context is 168 hours. But time limits on actual questioning are set separately in section 34R (previous section 34HB) (a maximum of 24 hours, or 48 hours where an interpreter is used).

By removing the word ‘questioning’, the Act will now only refer to the ‘period’, which, together with item 17 of this Schedule, will separate the overlapping meaning between periods when time is counted involving questioning and those involving detention. It is intended that these amendments will not have a different legal or practical effect.

Item 9

This item, consistent with item 4, will require the prescribed authority to explain to the subject, in addition to the other items in section 34J (previous section 34E), that the person has a right to make an oral or written complaint about a State or Territory police service. The complaint may be made to a complaints agency established under a law of that State or Territory to investigate such complaints.

Item 10

This item responds to PJC recommendation 10 to clearly express the supervisory role of the prescribed authority. The item will require the prescribed authority to inform the person of the role of the prescribed authority. The prescribed authority must explain that particular functions of this role include supervising proceedings and making directions in appropriate circumstances.

Consistent with previous subsection 34E(2A), the item will insert a new subsection 34J(4) to require the prescribed authority to inform the subject of the reason for the presence of each other person who is present at any time during the questioning. The prescribed authority must not name any person present except where those persons consent. The item makes it clear that the prescribed authority need only comply with this requirement once.

Item 11

This item will insert a note at the end of section 34J (previous section 34E) as a signpost to the legal bases for judicial review for a remedy relating to a warrant issued under Division 3 in response to PJC recommendation 8. The note provides an example of these legal bases whereby a person may be able to apply to the Federal Court of Australia under subsection 39B(1) of the *Judiciary Act 1903*, or the High Court of Australia under paragraph 75(v) of the Constitution. The note will not create any new legal bases of review, nor provide any remedies. It is simply a signpost for users of the legislation to be aware of the legal bases upon which they may seek a remedy in relation to the warrant or the treatment of the subject in connection with the warrant.

Item 12

This item will create a new direction for the prescribed authority to direct to defer questioning of a subject under the warrant. At present, the subject can make directions for the further appearance of a subject under paragraph 34K(1)(f) (previous paragraph 34F(1)(e)). Although this is legally broad enough to cover circumstances where the prescribed authority wishes to defer questioning proceedings for procedural matters, the legislation could be made clearer on this point.

By adding this direction, the prescribed authority will be able to direct to defer the questioning for procedural matters that arise during questioning. This could include where the subject wishes to seek legal advice from a lawyer, make a complaint,

observe religious worship, or seek medical attention. It would also cover short breaks and changing of audio and videotapes. Item 17 sets out time that is not included as part of the questioning time.

Where the prescribed authority makes a direction under paragraph 34K(1)(f), it will provide the prescribed authority with a clearer basis to require further appearance. For instance, this could include breaks in questioning either during the day or for questioning on a subsequent day. Where a person is detained other directions under section 34K may be required.

Items 13, 14, and 15

These items will provide for a person who is appearing before a prescribed authority for questioning, or in custody or detention to be given facilities for complaints to be made. These items implement PJC recommendations 11 and 12 that a subject be provided with adequate facilities to make a complaint to have a clear right of access to the IGIS, the Ombudsman, and a State or Territory police complaints body.

Item 13 will operate where a subject is before the prescribed authority for questioning. The item will require that where a subject informs the prescribed authority that he or she wishes to make a complaint and requests facilities to do so, then the prescribed authority may give a direction to defer questioning to allow the complaint to occur (in accordance with item 12). In these circumstances, anyone exercising authority under the warrant must give the person facilities for making the complaint.

Item 14 will provide for a person who is detained in connection with a warrant to be able to make a complaint to a complaints agency of a police service of a State or Territory (item 4 explains the meaning of ‘complaints agency’ and is in response to PJC recommendation 12).

This item provides that subsection 34K(10) (previous subsection 34F(8)), which limits the contact rights of a subject when the person is in custody or detention under a warrant, does not apply where a person wishes to make a complaint to a complaints agency concerning the police force of a State and Territory.

The item will extend the requirement under paragraphs 34K(11)(d) and (e) (previous paragraph 34F(9)(c)) that anyone holding the subject in custody or detention must give the subject facilities for contacting the Inspector-General of Intelligence and Security, or the Commonwealth Ombudsman, or a complaints agency to make an oral or written complaint.

The intention is that this item would operate in circumstances where a person is in actual detention, not where the person is appearing before the prescribed authority.

Item 15 will remove the note at the end of section 34K, which states that facilities entitle the subject to make a complaint in writing to the IGIS or Commonwealth Ombudsman as the note is reinserted under item 14.

Item 16

This item will change the reference in subsection 34Q(4) (previous subsection 34HA(4)) from ‘deferring’ to ‘suspending’. This is consequential on the amendment made by Item 12 to ensure there is no confusion where the prescribed authority suspends proceedings in section 34Q, and also, if necessary, suspends the exercise of another power under Division 3. Using the word ‘suspending’ is also consistent with the heading of section 34Q, “Suspending of questioning etc. in response to concern of Inspector-General of Intelligence and Security”.

Item 17

This item will insert a new subsection in section 34R (previous section 34HB) to provide that certain time is not to be counted as time that accumulates under the questioning time limits. This item is in response to PJC recommendation 6 to provide a clearer distinction between questioning and procedural time.

This item will expressly provide that the initial time where a person appears, or is brought to appear, before a prescribed authority, the initial speech of the prescribed authority is not included in time involving questioning. This item will also provide that other things are not to be considered questioning time, including where the prescribed authority defers questioning to allow for the changing of a thing being used to record the questioning (ie an audio or video tape, or other media). It would also cover circumstances where questioning is deferred to allow the person to:

- make a complaint to the IGIS, the Commonwealth Ombudsman or a complaints agency;
- contact a lawyer or another person as permitted by the legislation;
- receive medical attention;
- engage in religious practices as required by the person’s religion; or
- rest or recuperate.

This item will also cover any time during which the prescribed authority has suspended questioning of the person under the warrant in response to a concern of the IGIS under section 34Q (previous section 34HA).

The prescribed authority may otherwise determine that certain time is not to be included in questioning time. For example, this will include time when the prescribed authority gives a direction under new paragraph 34K(1)(e) (see item 12) to defer questioning, or where the prescribed authority agrees to allow a lawyer to address him or her during breaks in questioning (under item 24).

Item 18

This item will apply to a young person in circumstances where the person is detained. This may occur under a warrant authorising detention or where the person is detained by direction of the prescribed authority under a questioning-only warrant.

The item will require the prescribed authority to inform that person under subparagraphs 34ZE(8)(a)(ii) and (iii) (previously subparagraphs 34NA(8)(a)(ii) and (iii)) of their ability to contact a parent, guardian or another person provided for in subsection 34ZE(7), or a single lawyer of the person's choice (the prescribed authority must only do this under a warrant authorising questioning and detention). The policy rationale is to extend the rights conferred under a questioning and detention warrant to a person who is detained under a questioning-only warrant by direction of the prescribed authority.

Items 19 and 20

These items will provide for officials who are subject to offences in section 34ZF (previously section 34NB) to also be subject to offences relating to new directions of the prescribed authority created in this Schedule.

Item 19 relates to the amendment made by item 12 of this Schedule (providing for the prescribed authority to direct that questioning be deferred). It will include these directions in the list of subsection 34K(1) directions (previously in section 34F) under paragraph 34ZF(3)(a) (previously paragraph 34NB(3)(a)) where an official fails to carry out that direction. In this subsection, a person may commit an offence if the person is identified in a direction by the prescribed authority as a person who must implement the direction. A person may commit the offence, punishable by two years imprisonment, if the person engages in conduct which would contravene the direction and the person knows of the contravention.

Item 20 will make similar consequential changes from implementation of items 13 and 14 of this Schedule to paragraph 34ZF(4)(b) (previously paragraph 34NB(4)(b)) in response to PJC recommendation 12. Under this subsection, a person may commit an offence if the person engages in conduct which would contravene certain legislative requirements, in particular where facilities are not provided to a person in accordance with the amendments made by items 13 and 14. In particular, the offence will extend to failing to provide the subject with facilities as required for the subject to make a complaint against the police service of a State or Territory to a complaints agency established under a law of that jurisdiction. The maximum penalty for this offence is two years imprisonment.

Items 21 and 22

These items will modify subsections 34ZO(1) and 34ZQ(2) (previously subsections 34TA(1) and 34U(2)) to apply in circumstances where a person is

detained, both under a warrant authorising detention and where the person is detained by direction of the prescribed authority under a questioning-only warrant.

Item 21 extends and clarifies the current subsection 34ZO(1) providing for a lawyer to be removed. The provision is interpreted only to apply to a lawyer who is present for the subject of a questioning and detention warrant. This item will implement PJC recommendation 4. The PJC recommended that the legal adviser be able to be excluded during the questioning process on the same grounds they can currently be excluded for a detention warrant. That is, where the prescribed authority is satisfied on the basis of circumstances applying to that lawyer, that if the subject is permitted to contact the lawyer:

- a person involved in a terrorism offence may be alerted that the offence is being investigated; or
- a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.

The item will have the effect that if the subject is questioned under a warrant and detained by the prescribed authority in connection with that warrant, or is detained under a questioning and detention warrant, the subject may be prevented from contacting a particular lawyer. The subject would then be able to choose another lawyer (but that choice of lawyer may also be challenged).

Item 22 will make it clear that a person's communications with his or her lawyer in all circumstances of detention in connection with a Division 3 warrant must be done in a way that can be monitored (subsection 34ZQ(2) currently applies to any communication with a lawyer under both types of warrant regardless of detention). This addresses concerns raised by the PJC for recommendation 7 to ensure that monitoring is not permissible under Division 3 where a person is questioned, but not detained, in connection with a warrant.

Item 24

This item will insert new subsections (7) and (8) in section 34ZQ (previous section 34U) to provide for the legal adviser of a subject to have a right of intervention during procedural time while the subject is before a prescribed authority. The PJC recommended in recommendation 5 that the previous subsection 34U(4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority.

This item will implement the PJC's recommendation by providing that during a break in the questioning of the subject, the legal adviser is permitted to approach the prescribed authority to seek an opportunity to address the prescribed authority on a matter. The prescribed authority must then approve or refuse the legal adviser's request. These issues may only be raised in procedural time and not during the actual questioning time of the subject.

In practice this item will ensure that the lawyer has an opportunity to raise issues as they arise. This is because there are many breaks that occur during questioning, for example, tapes recording the questioning are generally changed every 35 minutes or so. However, a lawyer is not permitted to intervene to make a request in pauses in questioning except where the prescribed authority has made an appropriate direction. Breaks in questioning include circumstances set out in item 17 which sets out where questioning is deferred as procedural time, in addition to other periods determined by the prescribed authority not to be questioning time.

The proceedings are not intended to be adversarial (where the prescribed authority hears arguments from both sides during questioning). It would therefore not be appropriate for the lawyer to have a right to address the prescribed authority at a time while the subject is being questioned, as to do so may interrupt the flow of the questioning to elicit vital intelligence.

Items 25, 26, 27, and 28

These items will make consequential amendments to the secrecy provision setting out exceptions to the non-disclosure obligations concerning information relating to a person's questioning or detention under Division 3 in response to PJC recommendations. A 'permitted disclosure' is an exception to the secrecy obligations and is defined in subsection 34ZS(5) (previously subsection 34VAA(5)), which allows for certain disclosures to facilitate the questioning of a person under a warrant. These items make simpler what is already possible by seeking the consent of the prescribed authority, the Director-General of Security, or the Attorney-General to permit a particular disclosure where those items apply.

Item 25 will make it clear that it is a permitted disclosure for a person to make, or a person in a complaints agency of a State or Territory (as defined in item 4) who receives and wishes to receive and investigate, a complaint made to a complaints agency under a law of a State or Territory about a police service of that jurisdiction.

Items 26 and 27 will make it clear that the subject can make a disclosure to bring it into line with that available to the persons listed in paragraph 34ZS(5)(f). This item will make a drafting correction to ensure a young person between 16 and 18 years of age is able to make a disclosure to relevant persons outlined in that paragraph. This addresses a technical issue whereby specific agreement to permit a disclosure under subsections 34ZS(6) (by the prescribed authority), (7) (by the Director-General of Security) and (8) (by the Attorney-General) may be required for the young person to make a disclosure covered by the secrecy provision (ie the fact of the warrant while the warrant is in force) to discuss a matter relating to a warrant with, for example, the young person's lawyer, parent, guardian or representative.

Item 28 will make it clear that a young person can also make a disclosure to the complaints agency (as defined in item 4) of a State or Territory as a permitted disclosure (consistent with item 25).

Item 29

This item will insert a new subsection (9) in section 34ZS (previous section 34VAA) to require a person mentioned in subsections 34ZS(6) (the prescribed authority), (7) (the Director-General of Security) and (8) (the Attorney-General) to be required to take into account certain factors in deciding whether to specifically permit a disclosure. This item is in response to PJC recommendation 17 which recommended expanding the circumstances in which a person can make a disclosure of the existence of the warrant.

The current regime provides sufficient flexibility for permitted disclosures to be made in certain circumstances on a discretionary basis either in anticipation of or in response to a request to disclose particular information. Although the disclosure of the fact that a person is being questioned under a warrant may not be in the interests of security, there may be situations where the disclosure of the existence of the warrant before it expires would not harm security.

This item will address that situation by requiring decision-makers to take the following factors into account:

- the subject's family and employment interests to the extent that the decision-makers are aware of these interests;
- the public interest; and
- the risk to security if the permission were given.

Other factors may also be taken into account in deciding whether to permit a particular disclosure of information.

Item 30

This item will insert a new section 34ZX to provide for subjects to apply for financial assistance to respond to PJC recommendation 13. The PJC recommended that reasonable financial assistance for legal representation be made available automatically to the subject of the warrant.

This item will provide that once a person has been notified of a warrant for which they are the subject, the person may apply to the Minister for a provision of financial assistance to cover the person's appearance before a prescribed authority for questioning under the warrant. On this basis a person is automatically eligible to apply for financial assistance.

Once the application has been made, the Minister may authorise the provision of assistance and on such conditions (if any) as the Minister determines.

The Minister will be able to determine written guidelines that are to be applied in authorising the provision of assistance under this item. Applications for assistance and costs claimed under a grant of assistance will be assessed in accordance with the guidelines issued by the Minister.

The financial assistance will only be available for reasonable legal and related costs for the period of questioning before the prescribed authority. The provision of

financial assistance in this item does not extend to any complaint made or legal proceedings for a remedy in relation to the warrant. The person would therefore need to apply for other means of legal assistance in those circumstances as appropriate for the complaint or remedy they would be seeking.

Item 31

This item will insert a new section 34ZY to provide that an instrument made under Division 3 is not a legislative instrument other than the Protocol made under Item 1 of Schedule 1. This is to prevent things done under Division 3 from unintentionally becoming a legislative instrument. The only legislative instrument under Division 3 is the Protocol (made under Item 1 of Schedule 1).

Items 32 and 33

These items will extend the existing sunset provision and review requirements by 10 years. The item is in response to PJC recommendation 19, in which the PJC recommended an extension of the sunset and review period by 5½ years.

The experience of recent statutory reviews has shown that such reviews are resource-intensive and impact on operational priorities. Given these considerations and the fact that the Government is continuously reviewing the effectiveness of legislation, the Government does not consider that an earlier review is warranted. State and Territory Governments were of the same view about the time needed to properly make an assessment of the recent anti-terrorism legislation. A longer period is also consistent with the period the Government assesses there is likely to be a need for this legislation.

Item 32 will amend section 34ZZ (previous section 34Y) of the Act to encompass a sunset clause to come into effect on 22 July 2016 (10 years after the powers would otherwise sunset under the current provision).

Item 33 will amend paragraph 29(1)(bb) of the *Intelligence Services Act 2001* to require the PJC to review the operation, effectiveness, and implications of the Division 3 powers and for the Committee to report to the Parliament by 22 January 2016.