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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION AMENDMENT BILL  
2020

EXPLANATORY MEMORANDUM

(Circulated by authority of the  
Minister for Home Affairs, the Hon Peter Dutton MP)

## AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION AMENDMENT BILL 2020

1. The Australian Security Intelligence Organisation Amendment Bill 2020 (the Bill) amends the Australian Security Intelligence Organisation's (ASIO's) compulsory questioning and surveillance device powers under the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). In doing so, the Bill implements the Government's response to the report by the Parliamentary Joint Committee on Intelligence and Security into the operation, effectiveness and implications of the ASIO Act's existing compulsory questioning framework.<sup>1</sup>
2. The Bill amends the compulsory questioning framework in the ASIO Act by:
  - enabling ASIO's continued use of questioning warrants, but removing its ability to use questioning and detention warrants;
  - replacing the existing detention framework with a more limited apprehension framework to ensure attendance during questioning and to prevent contact with others or the destruction of information;
  - enabling the use of questioning warrants in relation to espionage, politically motivated violence (including terrorism) and acts of foreign interference, as defined in section 4 of the ASIO Act, rather than only in relation to terrorism offences;
  - streamlining the process for requesting and issuing a questioning warrant by enabling the Attorney-General to issue questioning warrants directly, removing the role of the issuing authority;
  - enabling ASIO to request, and the Attorney-General to issue, questioning warrants orally in an emergency;
  - amending the eligibility requirements for appointment of prescribed authorities, to enable a broader pool of qualified persons to be appointed to this role;
  - providing the power for a police officer to conduct a search of a person who is apprehended in connection with a questioning warrant, and the ability to seize dangerous items and items that could be used to communicate the existence of the warrant or escape from custody, with an additional ability to seize items of intelligence relevant to the questioning matter, when authorised by the Attorney-General;
  - introducing screening measures and person searches for people attending questioning, either as the subject of the questioning warrant or others involved in

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<sup>1</sup> [https://www.aph.gov.au/Parliamentary\\_Business/Committees/Joint/Intelligence\\_and\\_Security/ASIO](https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO)

the questioning process such as parents, and the ability of a police officer to retain any dangerous items and communications devices found in order to ensure the safety of those involved in questioning, and the integrity of the questioning;

- subject to a number of safeguards - permitting ASIO to seek a questioning warrant in relation to minors aged 14 to 18 years old, but only where the minor is themselves the target of an ASIO investigation in relation to politically motivated violence;
  - strengthening the right to legal representation during questioning while retaining the ability to prevent contact with specific lawyers due to security concerns, and to remove a lawyer who is unduly disruptive during questioning;
  - introducing the ability of the independent prescribed authority to appoint a lawyer for the subject of a questioning warrant in certain circumstances; and
  - enabling a questioning warrant to be executed following the laying of charges against the person who is the subject of a questioning warrant, or where charges against that person are likely, and allow for the questioning to cover matters that are the subject of those charges with appropriate protections in relation to the person's fair trial.
3. To support this new framework, the Bill also retains existing provisions in relation to the exercise of a questioning warrant, including:
- oversight, including the presence of the Inspector-General of Intelligence and Security at questioning;
  - the existing 28 day limit for a questioning warrant to be in force;
  - the prescribed authority's obligation to explain that the subject of a questioning warrant may seek a remedy from a federal court relating to their treatment in connection with the warrant;
  - the immunities from criminal liability in providing information, records or other things during questioning;
  - offences for non-compliance with the questioning warrant;
  - secrecy obligations and related offences;
  - access to interpreters where required; and
  - the humane treatment of the subject of a questioning warrant.
4. The Bill also amends the surveillance device framework in the ASIO Act to promote increased operational agility, mitigate the risk to ASIO surveillance operatives engaging in physical surveillance and to help resolve the current disadvantage faced by ASIO when

engaging in joint operations with law enforcement. The Bill amends the ASIO Act in this regard by:

- enabling ASIO to use tracking devices with internal authorisation in certain circumstances, rather than requiring a warrant;
- clarifying that the surveillance device framework is permissive and does not require ASIO to obtain a warrant where conduct would not otherwise be unlawful; and
- updating the definition of ‘tracking device’ and effectively modernising ASIO’s capabilities.

5. The Bill also makes consequential technical amendments to the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Foreign Evidence Act 1994* and the *Inspector-General of Intelligence and Security Act 1986*.

#### **FINANCIAL IMPACT**

6. This Bill does not have a financial impact.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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

### Overview of the Bill

8. The Australian Security Intelligence Organisation Amendment Bill 2020 amends the ASIO Act. It also makes consequential amendments to the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Foreign Evidence Act 1994* and the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act).
9. The Bill contains high-priority amendments to address the changing security environment in which ASIO is expected to work. It is essential that ASIO has comprehensive human intelligence powers to assist in filling the gap posed by technological advancement, such as encryption and anonymising technologies.
10. Schedule 1 of the Bill reforms ASIO's compulsory questioning framework. The reforms will ensure the framework is fit for purpose, operationally effective and responsive to some of the most serious security threats facing Australia, namely, espionage, foreign interference and politically motivated violence. The ASIO Act's compulsory questioning framework was originally introduced following the 11 September 2001 terrorist attacks in the United States to improve ASIO's capacity to identify and counter threats of terrorism in Australia. The current threat environment has evolved considerably since 11 September 2001 and is steadily worsening. Accordingly, it is critical that these powers are reformed and remain available to ASIO, to ensure that ASIO has the appropriate powers to respond to evolving threats.
11. The Parliamentary Joint Committee on Intelligence and Security (PJCIS) reviewed ASIO's questioning and detention powers in their 2018 report on the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (PJCIS report). The Commonwealth responded to this report, accepting all recommendations on 3 April 2019. The Bill implements the Government's response to the PJCIS report.
12. Part 3 of Schedule 1 makes consequential amendments to the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Foreign Evidence Act 1994* and the *Inspector-General of Intelligence and Security Act 1986*. These amendments are in respect of video evidence in proceedings for terrorism and related offences, release from detention under a preventative detention order for questioning warrant, and oversight.
13. Schedule 2 of the Bill makes amendments to the surveillance device framework in the ASIO Act to improve ASIO's ability to monitor potential security threats and to bring

ASIO's ability to use surveillance devices in line with those of its law enforcement partners. The amendments introduce the ability for ASIO to internally authorise the use of a tracking device without a warrant in limited circumstances. These amendments will ensure ASIO has greater operational ability to respond to time critical threats, mitigate the risk to ASIO operatives engaging in physical surveillance and help resolve the operational difficulties faced by ASIO when engaged in joint operations with law enforcement agencies, which already have equivalent powers.

14. The amendments also update the definition of 'tracking device' more generally. Under the new definition, a 'tracking device' will be any device capable of being used to determine or monitor the specific location of a person or object or the status of an object. The term 'device' will also be updated to include any electronic or non-electronic device, instrument, apparatus, equipment, and any other thing. The amendments remove the requirement for a tracking device to be 'installed' and will allow ASIO, subject to obtaining a warrant, to remotely track a person or object using modern technology, which will enhance the intelligence gathering techniques available to ASIO. Facilitating remote tracking will also improve safety protections for ASIO employees, who may become the target of violence if their identity or activities are discovered.
15. Schedule 2 also clarifies that the surveillance device framework is permissive and provides a mechanism to obtain a warrant or internal authorisation for the use of a surveillance device in circumstances where it would otherwise be unlawful in certain states and territories.

## **Human rights implications**

16. The Bill engages the following human rights:
  - the right to freedom from torture, cruel, inhuman or degrading treatment or punishment in Article 7 of the *International Covenant on Civil and Political Rights* (ICCPR) and Articles 2 and 16 of the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (CAT);
  - the right to humane treatment in detention in Article 10 of the ICCPR;
  - the right to freedom from arbitrary detention and arrest, and the right to liberty and security of the person in Article 9 of the ICCPR and the right of the child to liberty and security of person and the freedom from arbitrary arrest, detention or imprisonment in Article 37 of the *Convention on the Rights of the Child* (CRC);
  - the right to freedom of movement in Article 12 of the ICCPR;
  - the right to fair trial in Article 14 of the ICCPR and Article 40 of the CRC;
  - the right to protection against arbitrary and unlawful interferences with one's privacy or home in Article 17 of the ICCPR and non-interference with privacy in Article 16 of the CRC;

- the right to freedom of expression in Article 19 of the ICCPR and Article 13 of the CRC;
- the right to freedom of association in Article 22 of the ICCPR and Article 15 of the CRC;
- the right of the child to have their best interests as a primary consideration by courts of law, administrative authorities or legislative bodies in Article 3 of the CRC; and
- the right to support in exercising legal capacity for people with disabilities in Article 12(3) of the *Convention on the Rights of Persons with Disabilities* (CRPD).

*Freedom from cruel, inhuman or degrading treatment or punishment in Article 7 of the ICCPR and Articles 2 and 16 of the CAT and the right to humane treatment in detention in Article 10 of the ICCPR*

17. Article 7 of the ICCPR and Articles 2 and 16 of the CAT provide that no one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. Article 10 of the ICCPR provides that all people who are deprived of their liberty shall be treated with humanity and respect for the inherent dignity of the human person. Division 3 engages these obligations, because people who are the subject of questioning warrants may be deprived of their liberty due to the requirement to attend questioning at specified times if the apprehension power is exercised in relation to that person.
18. Division 3 provides for an extensive range of safeguards to ensure the humane treatment of people who are subject to questioning warrants. This includes an express obligation, under section 34AG, on people exercising authority under a warrant (or implementing or enforcing a direction given by a prescribed authority) to treat the subject with humanity and respect for human dignity, and a prohibition on subjecting them to torture, cruel, inhuman or degrading treatment. Criminal offences, carrying maximum penalties of two years' imprisonment, also apply to people who knowingly contravene safeguards, including directions given by prescribed authorities.
19. In addition, the Statement of Procedures issued under section 34AF, and made in consultation with the Inspector-General of Intelligence and Security (IGIS) and the Australian Federal Police Commissioner, sets out a number of requirements in relation to the humane treatment of people subject to questioning warrants. These include requirements to ensure the health and welfare of people while in custody (including while being transported), to ensure that the manner of questioning is humane and courteous, and that people are offered appropriate breaks in questioning (30 minute breaks after every four hours of continuous questioning).
20. A person who is the subject of a questioning warrant has the ability to seek a judicial remedy in relation to the warrant, is permitted to contact the IGIS or the Commonwealth

Ombudsman, and has the opportunity to make complaints about their treatment. They are also to be informed by the prescribed authority of their rights.

*Freedom from arbitrary detention and arrest, and the right to liberty and security of the person in Article 9 of the ICCPR and the right of the child to liberty and security of person and the freedom from arbitrary arrest, detention or imprisonment under Article 37 of the CRC*

21. The ability to apprehend a person aged 14 years and above who is the subject of a questioning warrant engages the rights in Article 9 of the ICCPR and Article 37 of the CRC.
22. Article 9 of the ICCPR provides that no one shall be subjected to arbitrary arrest or detention or deprived of their liberty except on such grounds and in accordance with such procedure as are established by law.
23. Article 9 regulates, rather than prohibits, detention. Only detention that is ‘arbitrary’ is prohibited. The United Nations Human Rights Committee has stated that ‘arbitrariness’ includes the elements of inappropriateness, injustice and a lack of predictability. Arrest or detention must be reasonable and necessary in all circumstances with reference to the recurrence of crime, interference with evidence or the prevention of flight. Detention is not considered arbitrary where it is reasonable, necessary and proportionate to achieving a legitimate objective. The legitimate objective of the compulsory questioning powers is to protect Australia’s national security interests.
24. Article 37(b) of the CRC prohibits arbitrary detention of children, and states that detention of a child should only occur as a measure of last resort and for the shortest appropriate period of time. Article 37(c) of the CRC provides the child’s right to be treated with humanity and respect for their inherent dignity. Article 37(d) of the CRC provides the right to legal assistance and the right to challenge their detention.
25. The power to apprehend is distinct from detention, as it consists of immediately taking a person subject to a questioning warrant to the location of questioning in order for questioning to begin. The purpose of apprehension is to mitigate the risks of the questioning warrant being frustrated due to the person not attending questioning, alerting another person involved in an activity prejudicial to security that the activity is being investigated or destroying security relevant records or other things. This achieves the legitimate objective of ensuring the integrity of questioning and accordingly protecting Australia’s national security interests. The apprehension power is reasonable, necessary and proportionate to achieving the legitimate objective, as it only lasts for such time as is necessary to bring the person before the prescribed authority for questioning, enabling ASIO to then obtain the relevant intelligence. That is, apprehension will be for the minimum time possible, as the police officer is required to take the person immediately (without unnecessary delay) to appear before the prescribed authority for questioning. A



person is no longer apprehended when they appear before the prescribed authority for questioning.

26. The power to apprehend a person under an ASIO questioning warrant is further justified as it is appropriately limited to circumstances where:
- the Attorney-General has issued a questioning warrant with a notice for immediate attendance, which the Attorney-General may only do if satisfied that requiring immediate attendance is reasonable and necessary in the circumstances, and
  - there are reasonable grounds for believing that, if the person is not apprehended, the person is likely to, or where the person makes a representation that they intend to:
    - not appear, or continue to appear, before the prescribed authority for questioning
    - alert a person involved in an activity prejudicial to security that the activity is being investigated, or
    - destroy, damage or alter a record or thing, or cause another person to destroy, damage or alter record or thing the person has been, or may be requested to produce under the warrant.
27. In relation to children, the ability to obtain a questioning warrant, and apprehend the child, is limited to circumstances where the child is the target of an investigation in relation to politically motivated violence (including terrorism) and where the child is at least 14 years of age. There is no ability to obtain a questioning warrant, and subsequently apprehension, in relation to a child who is less than 14 years old. Lowering the minimum age to 14 was supported by the Parliamentary Joint Committee on Intelligence and Security in its 2018 review of the operation, effectiveness and implications of Division 3 of Part 3 of the *Australian Security Intelligence Organisation Act 1979*. The need for the lowered age is illustrated by the 2015 politically motivated shooting of New South Wales Police Force employee by a 15 year old. The exclusion of people under the age of 18 years from questioning warrants, including the apprehension power, would leave a significant gap in ASIO's ability to collect crucial intelligence on threats to Australia's security.
28. There are robust additional safeguards that apply to the questioning and apprehension of children. This includes the high threshold to obtain a questioning warrant, specifically the requirement that the person has likely engaged in, is likely engaged in or is likely to engage in activities prejudicial to the protection of Australia from politically motivated violence and that it is reasonable in all the circumstances that the warrant be issued, having regard to any other methods of collecting the intelligence that are likely to be as effective. The requirement to consider other methods available to collect intelligence, such as other warranted powers, before considering whether to issue a questioning

warrant ensures that any apprehension flowing from the questioning warrant is a measure of last resort.

29. Australia's compliance with Article 37 is further supported by the requirement that the Attorney-General consider the best interests of the child when issuing a questioning warrant in relation to a person aged between 14 and 18. The warrant must also meet all of the special requirements in subsection 34BD(2) and subsection 34FA(1). These requirements include the presence of a lawyer during questioning, as well as a parent, guardian or other appropriate person (which could include the lawyer in certain circumstances), and that questioning is only to occur for continuous periods of two hours or less, separated by breaks. Due to these safeguards, the measure also adheres to humane treatment obligations in relation to children in detention.
30. A person who is the subject of a questioning warrant, whether an adult or a minor, has the ability to seek a judicial remedy in relation to the warrant. The person is permitted to contact the IGIS or the Commonwealth Ombudsman, and has the opportunity to make complaints about their treatment. They are also to be informed by the prescribed authority of their rights. Division 3 remains consistent with Article 9 of the ICCPR and Article 37 of the CRC as it is reasonable, necessary and proportionate to achieving the legitimate objective of maintaining national security.

*Freedom of movement in Article 12 of the ICCPR*

31. Article 12 of the ICCPR provides that everyone lawfully within the territory of a State shall, within the territory, have the right to liberty of movement. A questioning warrant restricts this right to the extent that the issuing of such a warrant requires the person to attend questioning at a time specified in the warrant, or requires the person to attend questioning immediately. The ability to apprehend the subject of a questioning warrant, in order to immediately take the person to the location of questioning in order for questioning to begin, also restricts the right to freedom of movement.
32. The limitation on the right to freedom of movement achieves the legitimate objective of protecting Australia's national security interests. The legitimate objective is reflected in the threshold that the Attorney-General must be satisfied that the warrant will substantially assist in the collection of intelligence that is important in relation to the questioning matter (paragraphs 34BA(1)(b) and 34BB(1)(c)) in issuing a questioning warrant.
33. The limitation on the right to freedom of movement is reasonable, necessary and proportionate. This is based on the safeguards already built into the questioning warrant framework. There are also specific guidelines which are issued to the Director-General of Security under subsections 8A(1) and 8A(2) of the ASIO Act which provide a safeguard for the appropriate use of ASIO's powers, including its Division 3 powers. The *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and*

*communicating intelligence relevant to security (including politically motivated violence)* (the ASIO Guidelines) require ASIO to consider the intrusiveness and proportionality of its avenues for obtaining information and state that:

- any method for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence;
- inquiries and investigations should be undertaken using as little intrusion into a person's privacy as is possible; and
- wherever possible the least intrusive techniques of information gathering should be used before resorting to the more intrusive techniques (where a threat is assessed as likely to develop quickly, a greater degree of intrusion may be justified).

34. A person who is the subject of a questioning warrant is permitted to contact the IGIS or the Commonwealth Ombudsman, and has the opportunity to make complaints about their treatment. To the extent that questioning warrants restrict the right to freedom of movement, the restriction is reasonable, necessary and proportionate to achieving the legitimate objective of gathering important intelligence in relation to espionage, politically motivated violence and acts of foreign interference.

*Right to fair trial in Article 14 of the ICCPR and Article 40 of the CRC*

35. Article 14 of the ICCPR and Article 40(2) of the CRC relates to the right to a fair trial. The post-charge questioning provisions engage these articles. The legitimate objective is to obtain information that is available in the mind of the person subject to a questioning warrant in order to collect intelligence in relation to ongoing security threats, even where criminal proceedings are likely or have commenced. The ability to question a person where charges are likely, or where the person has been charged, is necessary to achieve the legitimate aim of intelligence collection in light of the potential harm caused by ongoing security threats.

36. The measure is reasonable in the context of ASIO investigations, particularly as ASIO's remit is not linked to criminal offences or prosecutions and questioning is not used for criminal justice purposes. There is also an obligation on the prescribed authority, who presides over the questioning, to make directions in relation to the use of questioning material where failure to give the direction might prejudice a person's safety or would reasonably be expected to prejudice the subject's fair trial. This safeguard, combined with the criminal immunity under subsection 34GD(6) and that questioning material can only be disclosed to a prosecutor under a court order, ensures that the measure is proportionate and represents the least rights restrictive means of achieving this necessary purpose.

37. The measure which enables a prescribed authority to prevent a person subject to a questioning warrant from contacting a specific lawyer (subsection 34F(4)) also engages Article 14. There is a legitimate objective in ensuring that a lawyer is not used to communicate information to others involved in the security matter that may result in

detrimental outcomes for Australia's security. The potential impact on the subject's right to choose their lawyer is justified as it is necessary, reasonable and proportionate to the security objective and is supported by strong safeguards. Safeguards include the right of the person subject to a questioning warrant to seek legal advice, have a lawyer present, including the ability to contact another lawyer if their chosen lawyer is excluded, and the ability of the independent prescribed authority to appoint a lawyer. A person subject to an adult questioning warrant can only be questioned without a lawyer present in the following circumstances:

- where that person has waived their right to have a lawyer present; or
- where that person has not been required to immediately attend questioning, has had a reasonable opportunity to contact a lawyer and the prescribed authority has directed that the person may be questioned in the absence of a lawyer.

38. The ability of the prescribed authority to direct that an adult may be questioned in the absence of a lawyer, under section 34FB(3)(b) is necessary to ensure that the person does not frustrate the questioning process. The prescribed authority's ability to make this direction is only enlivened where the person has not been required to attend immediately, questioning has been deferred to enable a lawyer to be present and the person has already had a reasonable opportunity to contact a lawyer. It is imperative to ensure that questioning can occur in a timely manner in order to prevent any delay in obtaining time critical information from the subject of the warrant. Due to the limited application of the measure, it is reasonable, necessary and proportionate to achieving the legitimate aim of intelligence collection in relation to national security threats.
39. In contrast, the subject of a minor questioning warrant may only be questioned in the presence of a lawyer (subsection 34FA(1)). There is no ability for a child to waive their right to having a lawyer present. Where a warrant is issued under section 34BB, which is a warrant in relation to a person that is aged at least 14 but less than 18, the prescribed authority has the ability, under section 34FC, to appoint a lawyer for the minor. This ensures that in all circumstances, a minor will have a lawyer during questioning.
40. Any subject of a questioning warrant has the ability, under section 34JE, to apply to the Attorney-General for financial assistance in relation to the costs for their lawyer in appearing before a prescribed authority for questioning.
41. Subsection 34GD(5) also engages Article 14, as it requires the subject to provide information, records or things that are requested under a questioning warrant even where it might incriminate the subject. This measure achieves the legitimate objective of ensuring that a questioning warrant can be used to obtain crucial intelligence. It is reasonable, necessary and proportionate, as it is accompanied by subsection 34GD(6) which prevents anything said or produced by the subject from being admissible as evidence in criminal proceedings, except in limited circumstances, such as an offence for failing to give information under a questioning warrant.

*Right to protection against arbitrary and unlawful interferences with one's privacy or home in Article 17 of the ICCPR and non-interference with privacy in Article 16 of the CRC*

42. Article 17 of the ICCPR provides that no one shall be subjected to arbitrary or unlawful interference with their privacy or home. The use of the term 'arbitrary' means that any interference with privacy must be in accordance with the provisions, aims and objectives of the ICCPR and should be reasonable in the particular circumstances. The United Nations Human Rights Committee interpreted 'reasonableness' to imply that any limitation must be proportionate and necessary in the circumstances.
43. Article 16 of the CRC provides that no child shall be subject to arbitrary or unlawful interference with his or her privacy. Lawful and non-arbitrary interferences with a child's privacy are permissible limitations.
44. Section 34CA provides a police officer with a power to enter a premises in order to apprehend a subject under a questioning warrant where the police officer believes on reasonable grounds that the subject is at the premises.
45. This power is necessary and proportionate to achieve the legitimate objective of ensuring a subject appears before the prescribed authority for questioning and does not alert another person involved in the security matter or destroy, damage or alter a record or thing that has been, or may be, required to be produced under the questioning warrant. The legitimate objective aims to protect the Australian community from detrimental security threats in relation to espionage, politically motivated violence and acts of foreign interference. Such security threats may include the commission of a terrorist attack or clandestine actions from foreign powers. The imminence of some security threats requires ASIO to be able to respond quickly to ensure the preservation of information that may be important in relation to the particular security matter.
46. The framework also engages Article 17 of the ICCPR and Article 16 of the CRC as a questioning warrant may compel the person to provide information that would otherwise be private. A permissible limitation on Article 17 is by public authorities where the information about an individual's private life is essential in the interests of society, which includes national security.<sup>2</sup> The high threshold to obtain a questioning warrant, particularly that the Attorney-General must be satisfied that it will *substantially assist* in the collection of intelligence, ensures that the information to be obtained from questioning a person is indispensable to Australia's national security.
47. In addition to this, in the current national security environment, the powers are reasonable and proportionate measures that are necessary to ensure that ASIO can gather information in relation to matters of security. Security threats, including politically motivated violence, which poses an imminent threat to life by way of terrorism, and espionage and acts of foreign interference are now occurring at an unprecedented scale and level of

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<sup>2</sup> United Nations Human Rights Committee *General Comment No 16* at paragraph 7: *Article 17 (Right to Privacy)*.

sophistication. In addition, rapid technological advances, such as encryption, also hamper ASIO's technical tools resulting in potential intelligence gaps. Human intelligence is vital in assisting to overcome these challenges posed by technological advancements.

48. There are a number of safeguards that protect an individual's private information. In carrying out questioning, ASIO is bound by the ASIO Guidelines, which relevantly provide that information must be obtained by ASIO using as little intrusion into individual privacy as possible. This is consistent with the performance of ASIO's functions. ASIO's functions dictate that ASIO must only collect information that is relevant to security, meaning that ASIO will be precluded from collecting personal information which is not connected to a national security issue. The ASIO Guidelines also provide that the means used for obtaining information must be proportionate to the gravity of the threat and the probability of its occurrence.
49. If private information is obtained, specific safeguards exist which prevent it from being unlawfully disclosed. Under section 34HC, if the Director-General is satisfied that private information obtained under a warrant is not required for the purposes of ASIO's functions, ASIO must cause any record or copy of this information to be destroyed.
50. Questioning represents a legitimate objective, as there is a need to obtain information that is only contained in the mind of the person being questioned, irrespective of whether the person subject to questioning is an adult or a minor between 14 and 18 years old. The following safeguards, specific to minors, ensure the power is exercised in a manner that is reasonable, necessary and proportionate in relation to the objective of obtaining information that is only contained in the mind of the minor:
  - the extra threshold requiring the Attorney-General to be satisfied on reasonable grounds that the minor is the target of the investigation;
  - questioning may only occur in the presence of a lawyer and a parent, guardian or other acceptable person;
  - questioning may only occur for continuous periods of two hours or less;
  - the right to legal advice, including representation during questioning sessions; and
  - permitted disclosures to particular persons.
51. Before requesting a questioning warrant, ASIO considers the application of the ASIO Guidelines, including the requirement that the use of powers under the warrant is appropriate. The ASIO guidelines require ASIO, in the conduct of its inquiries and investigations, to ensure that:
  - the means used to obtain information are proportionate to the gravity of the threat posed and the probability of its occurrence
  - the more intrusive the investigation technique, the higher the level of officer required to approve its use

- wherever possible, the least intrusive techniques of information collection should be used before more intrusive techniques, and
- ASIO should conduct inquiries and investigations into individuals and groups:
  - with as little intrusion into individual privacy as is possible consistent with the performance of its functions, and
  - with due regard for the cultural values and sensitivities of individuals of particular cultural or racial backgrounds, consistent with the national interest.

52. The IGIS may be present at the questioning of an individual and it remains open to the IGIS to raise any concern about the impropriety or illegality of any exercise of the powers under Division 3. If such a concern is raised, the prescribed authority is required to consider the concern and may give a direction to suspend questioning under the warrant until satisfied that the concern has been satisfactorily addressed. The IGIS has broad powers under the IGIS Act to inquire into any matter relating to compliance by ASIO with laws of the Commonwealth, the states and territories or with ministerial directions or guidelines. The IGIS may also enquire into the propriety of ASIO's actions and the effectiveness and appropriateness of procedures relating to legality or propriety. The IGIS has significant powers to compulsorily obtain information and documents and enter premises, as well as obligations to provide procedural fairness and reporting obligations. Specifically, under sections 9A and 19B of the IGIS Act, the IGIS has the ability enter any place where a person is being questioned or apprehended in relation to a questioning warrant at any reasonable time.

53. These amendments to ASIO's compulsory questioning powers are subject to significant safeguards which ensure that these powers are used consistently with the right to protection against arbitrary and unlawful interferences with privacy. Safeguards include the high thresholds prescribed by the statutory criteria for the issuing of warrants and the exercise of powers under them, ministerial level issuing decisions, and the independent oversight role of the IGIS.

54. In relation to the tracking device framework, section 22 engages the obligation under Article 17 of the ICCPR and Article 16 of the CRC as it broadens the definition of 'device' to allow ASIO to use modern capabilities to track people which may interfere with people's privacy. The requirement for ASIO to seek a surveillance device warrant in relation to tracking devices that require ASIO officers to enter a premises or private vehicle in order to install the device, or use a remote tracking device, from the Attorney-General, in conjunction with a number of safeguards built into the surveillance device framework, ensures that ASIO acts lawfully and not arbitrarily. These safeguards include the high thresholds prescribed by the statutory criteria for the issuing of warrants and the exercise of powers under them, ministerial level issuing decisions, and the independent oversight role of the IGIS. An amendment to the definition of 'track' has been made to reflect the updated meaning of a 'tracking device' as something that enables the

determination or monitoring of the location of a person or object or status of an object, such as whether the object is in working order. Given the less intrusive nature of these devices, ASIO will now have the ability to internally authorise the use of these devices in circumstances where a warrant is not required – in line with the powers of law enforcement agencies. That is, where there ASIO officers are not required to enter a private premises or vehicle to install the device and the device cannot be used to listen or record a person. There are a number of safeguards associated with these internal authorisations, including periodic reporting to the Attorney-General in relation to the number of internal authorisations and information pertaining to those activities, as well as the requirement to maintain a register of this information to allow IGIS oversight.

55. The legitimate objective of the amendment is to allow ASIO to use modern capabilities and technology to monitor an individuals' location by remotely deploying tracking devices. The limitation on the right to privacy achieves the legitimate objective of protecting Australia's national security interests. The power to track an individual is reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security interests as it allows ASIO to monitor the movements of individuals who pose a risk to Australia's national security.
56. The power to track a person using modern capabilities under the new definition is further justified as it is appropriately limited to circumstances where the Attorney-General is satisfied:
  - the person is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and
  - the use by ASIO of a surveillance device in relation to that person will, or is likely to, assist ASIO in carrying out its function of obtaining intelligence relevant to security; and
  - if the warrant is requested in relation to an object or class of object:
    - that object, or an object of that class, is used or worn, or likely to be used or worn by a person engaged in or reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and
    - the use by ASIO of a surveillance device in or on that object, or an object of that class, will, or is likely to, assist ASIO in carrying out its function of obtaining intelligence relevant to security.
57. ASIO only requests the issuing of warrants after considering the application of the ASIO Guidelines, as referenced in paragraph 51 above, including the requirement that the use of powers under warrant is appropriate.
58. Under section 30 of the ASIO Act, if the Director-General is satisfied that the grounds on which a warrant was issued under Division 2 have ceased to exist, then he or she must



take steps to inform the Attorney-General and ensure that action under the warrant is discontinued. If a surveillance device warrant is issued in relation to a combination of a person, premises, and an object under paragraph 26(2)(a) and the Director-General is satisfied that the grounds on which the warrant was issued continue to apply to at least one of those matters, the obligation to discontinue action and notify the Attorney-General applies only in relation to the matters for which the grounds have ceased to exist.

59. As outlined above at paragraph 52 and also applicable here, the IGIS has broad powers under the IGIS Act to inquire into any matter relating to compliance by ASIO with laws of the Commonwealth, the states and territories or with ministerial directions or guidelines. The IGIS may also enquire into the propriety of ASIO's actions and the effectiveness and appropriateness of procedures relating to legality or propriety. The IGIS also has powers to compulsorily obtain information and documents and enter premises, obligations to provide procedural fairness and reporting obligations, as well as the ability to conduct an inspection in relation to an intelligence agency at such time as determined by the IGIS, in consultation with the head of the agency.
60. These measures provide appropriate safeguards to ensure that interferences with privacy under tracking device warrants are reasonable, necessary and proportionate to achieving the outcome of protecting national security.
61. Section 26G provides ASIO the ability to rapidly deploy tracking devices, in certain circumstances, under an internal authorisation given by either the Director-General or a Senior Executive Service (SES) ASIO employee or ASIO affiliate. There are explicit protections, for example under section 26K, to ensure that internal authorisations for the use of tracking devices cannot be given where ASIO should in fact seek a warrant from the Attorney-General (see further paragraph 63, below). The framework engages Article 17 of the ICCPR and Article 16 of the CRC as the use of an internally authorised tracking device may be used to track a person's location and limits their right to privacy. The requirement for an ASIO employee or affiliate (a person performing functions or services for ASIO in accordance with a contract, agreement or other arrangement) to seek an authorisation from the Director-General or a SES employee of ASIO in order to deploy a tracking device, in conjunction with the safeguards detailed at paragraph 63, ensures that ASIO acts lawfully and not arbitrarily.
62. The legitimate objective of the ability to track people is to protect the Australian community and Australia's national security interests. The power to track a person is reasonable, necessary and proportionate to achieving the legitimate objective of protecting Australia's national security interests as it allows ASIO to monitor the location of a person who poses a risk to the Australian community. The power is limited to circumstances in which either the Director-General or a SES employee of ASIO is satisfied that the use of the device will *substantially assist* the collection of intelligence in relation to a security matter.

63. The framework protects an individual's right to privacy by prohibiting the internal authorisation of the following acts (section 26K), which all required warrants from the Attorney-General:
- a. entering premises or interfering with the interior of a vehicle without permission;
  - b. the remote installation of a tracking device or enhancement equipment in relation to the device;
  - c. the installation, use or maintenance of a tracking device, or enhancement equipment in relation to the device, to listen to, record, observe or monitor the words, sounds or signals communicated to or by a person;
  - d. the doing of any thing by ASIO if, apart from section 26G, ASIO could not do the thing without it being authorised by a computer access warrant issued under section 25A.
64. Further, as mentioned above in paragraphs 48 and 57, ASIO is bound by the ASIO Guidelines, which require that the use of its powers are appropriate and the means for obtaining information must be proportionate to the gravity of the threat and the probability of its occurrence. The ASIO Guidelines also provide that information obtained by ASIO must be collected with as little intrusion to privacy as possible and that information may only be collected that is relevant to security.
65. Section 26P provides a further safeguard by requiring the Director-General or an SES ASIO employee or ASIO affiliate to take such steps as are necessary to ensure action under the internal authorisation is discontinued where that person is satisfied that the grounds for the internal authorisation have ceased to exist.
66. As outlined above, the IGIS has broad powers to oversee the activities of ASIO. In carrying out this oversight role, the IGIS has full access to information held by ASIO and undertakes regular inspections of ASIO's operational activities.
67. Section 26R provides the power for the Attorney-General to issue a warrant for the recovery of a tracking device. This engages Article 17 of the ICCPR and Article 16 of the CRC as it allows ASIO to recover tracking devices deployed by ASIO under an internal authorisation that may be on private premises or in the interior of a vehicle. The ability for ASIO to seek a warrant to recover a tracking device from the Attorney-General ensures that ASIO acts lawfully and the warrant framework has a number of safeguards in place to ensure that ASIO does not act in an arbitrary way.
68. The legitimate objective in allowing ASIO the ability to recover tracking devices under this warrant framework is to ensure that ASIO does not act unlawfully by trespassing onto private premises or interfering with the interior of a vehicle when recovering tracking devices. Pursuant to section 26R, the Attorney-General will have the power to issue a

warrant to recover a tracking device or relevant equipment where failure to do so would be prejudicial to security. The ability to (under a warrant) recover tracking devices deployed under internal authorisations is reasonable, necessary and proportionate to achieving the legitimate objective of ASIO in acting lawfully and protecting Australia's national security interests by enabling ASIO to conduct its surveillance covertly.

69. ASIO only requests the issuing of warrants after considering the application of the ASIO Guidelines, as referenced in paragraph 57 above, including the requirement that the use of powers under a warrant is appropriate and within ASIO's functions provided under section 17 of the ASIO Act.

70. These measures provide appropriate safeguards to ensure that interferences with privacy under warrants that provide for the ability to recover tracking devices are reasonable, necessary and proportionate to achieving the outcome of protecting national security.

*Right to freedom of expression in Article 19 of the ICCPR and Article 13 of the CRC*

71. Article 19 of the ICCPR and Article 13 of the CRC provide that everyone has the right to freedom of expression, including the freedom to impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art or through any other media. Division 3 engages this right through its compulsory questioning powers, including secrecy provisions and the limitations it places on making disclosures to other people such as family members or contacting specified legal representatives. Article 19 of the ICCPR and Article 13 of the CRC also relevantly provide that the right to freedom of expression may be limited on grounds of national security, provided that any limitation is necessary and has been prescribed by legislation.

72. The compulsory questioning framework contains secrecy provisions which engage the right to freedom of expression by restricting the disclosure of information. These secrecy provisions are necessary to ensure the effectiveness of intelligence gathering operations which are conducted in relation to particular matters of security. While a warrant is in force, subsection 34GF(1) prevents the disclosure of information that could have significant implications for the integrity of the questioning process under the warrant and the effectiveness of related investigations. The additional protections provided under subsection 34GF(2) operate to protect ASIO's sources, holdings of intelligence and its method of operations, as the release of this information could seriously affect ongoing and related investigations, which can be long-running.

73. These secrecy laws also contain a number of safeguards that allow them to function in a reasonable and proportionate manner. Persons who are subject to a warrant may disclose information that would ordinarily be subject to secrecy laws if authorised to do so by the prescribed authority, Director-General or the Attorney-General. A person may also disclose information to a lawyer for the purpose of seeking legal advice, to a court for the purpose of seeking a remedy in connection to a warrant or to the IGIS or the Commonwealth Ombudsman for the purposes of making a complaint in relation to a

questioning warrant. In relation to a minor, disclosures about the existence of the warrant or operational information may be made by the minor, a parent, guardian or sibling to a range of people including to a parent, guardian, sibling, prescribed authority, the IGIS and the Commonwealth Ombudsman. These permitted disclosures ensure that the rights of the subject of a warrant are maintained while appropriately protecting sensitive information.

*Right to freedom of association in Article 22 of the ICCPR and Article 15 of the CRC*

74. Article 22 of the ICCPR and Article 15 of the CRC protect the right of all persons to freedom of association, with the exception that this right may be limited for the purpose of national security.
75. Under a questioning warrant, the subject is limited in their abilities to freely associate with others during the scheduled questioning sessions, and, if authorised, during apprehension. This limitation on the right to freedom of association achieves the legitimate objective of protecting Australia's national security interests. This legitimate objective is reflected in the legislative requirement that the Attorney-General must be satisfied that there are reasonable grounds for believing the warrant will substantially assist in the collection of intelligence that is important in relation to security and that it is reasonable in all the circumstances for the warrant to be issued. The legitimate objective in relation to apprehension is further reflected by the requirement that the Attorney-General must be satisfied that it is reasonable and necessary for the person to attend questioning immediately. There must also be reasonable grounds for believing the person is likely to not attend, alert another person or destroy, damage or alter relevant records or things if not apprehended. By ensuring that the Attorney-General is satisfied of these requirements, the framework ensures that any limitation on the right to the freedom of association is appropriate to the threat and necessity of the situation. The right is only limited for the duration of questioning, and apprehension, if applicable, and only when the above criteria have been satisfied.
76. As established above, the questioning warrant framework contains a multitude of safeguards which ensure that any limitation on the right to freedom of association is reasonably adapted, necessary and proportionate. Any contravention of these safeguards may constitute an offence under section 34GE, which is punishable by imprisonment for up to two years.
77. In addition to this, the person may also seek a remedy from a federal court in relation to the warrant or their treatment in connection with the warrant, and under paragraph 34DC(1)(k) the prescribed authority is obliged to inform the person of this right.

*Right of the child to have their best interests as a primary consideration in all actions concerning them in Article 3 of the CRC*

78. Article 3 of the CRC requires that the best interests of the child shall be a primary consideration in all actions. The best interests of the child are not the sole consideration, and other legitimate considerations such as national security, including the gathering of intelligence, may be considered alongside the best interests of the child.
79. The questioning warrant framework engages Article 3 as questioning warrants are available in relation to persons who are at least 14 years old. There can be a legitimate need to issue a warrant in relation to a child where the child is themselves engaged in activities prejudicial to security in relation to politically motivated violence.
80. In deciding whether to issue a questioning warrant in relation to a person who is at least 14 but less than 18 years old, the Attorney-General must consider the best interests of the person (section 34BB). It is intended that this consideration is a primary consideration in deciding whether to issue a minor questioning warrant, but will also be considered alongside other legitimate considerations, such as public safety and national security. In considering the best interests of the child, the Attorney-General must take into account the following matters, to the extent known:
- The age, maturity, sex and background of the person;
  - The physical and mental health of the person;
  - The benefit to the person of having a meaningful relationship with the person's family and friends;
  - The right of the person to receive an education;
  - The right of the person to practise their religion; and
  - Any other matter the Attorney-General considers relevant.
81. Subsections 34BD(2) and 34FA(1) protect the best interests of the child during questioning by providing that questioning cannot occur without the presence of a parent, guardian or other appropriate person and a lawyer, and that questioning can only occur for continuous periods of two hours, separated by breaks. In addition to this, further protections are provided by the independent prescribed authority, who has directions powers in relation to the conduct of questioning, including the ability to suspend questioning, and the oversight role of the IGIS.
82. These measures ensure the ability to issue a warrant in relation to a minor is reasonable, necessary and proportionate.

*Right to support in exercising legal capacity for people with disabilities in Article 12(3) of the CRPD*

83. Article 12(3) of the CRPD provides that appropriate measures should be taken to provide persons with disabilities access to the support they may require in exercising their legal

capacity. The ability to obtain a questioning warrant in relation to any person, provided they are at least 14 years of age, may engage this right.

84. There may be circumstances where it is appropriate to issue a questioning warrant in relation to a person who has a disability. The exclusion of people with disabilities from questioning warrants would leave a significant gap in ASIO's ability to collect crucial intelligence on threats to Australia's security. Therefore, the legitimate objective is to obtain information that is available in the mind of the person subject to a questioning warrant in order to collect intelligence on security threats relating to espionage, foreign interference and politically motivated violence.
85. The compulsory questioning framework contains various measures to support the exercise of legal capacity for people with disabilities. In issuing a questioning warrant, under either section 34BA or 34BB, the Attorney-General must meet a high threshold, including the requirement that it is reasonable in all the circumstances for the warrant to be issued. Further to this, the Attorney-General may also authorise ASIO to question a person subject to restrictions or conditions. Such restrictions or conditions could include the requirement that the person only be questioned in the presence of a lawyer. As detailed above in paragraphs 39 and 40:
- the independent prescribed authority has the ability to appoint a lawyer for adults who have been apprehended and minors to ensure that a lawyer will be present;
  - a subject under 18 must be questioned in the presence of a lawyer; and
  - a subject over the age of 18 may only be questioned without a lawyer present where they waived their right to have a lawyer present or, where the subject has not been apprehended, if the prescribed authority has directed that the adult subject may be questioned in the absence of a lawyer on the basis that the subject has had a reasonable opportunity to contact a lawyer.
86. Once at questioning, the prescribed authority is required to explain various matters under section 34DC. These matters include, but are not limited to, the subject's right to a lawyer and the ability to make complaints. The prescribed authority must also inform the subject of the prescribed authority's role to supervise the questioning and give appropriate directions and, under paragraph 34DE(1)(d), to make a direction to defer questioning. The oversight role of the IGIS is also important here, particularly the ability for the IGIS to be present at questioning or apprehension under section 34JB and the ability to raise a concern under section 34DM which may result in the suspension of questioning.
87. These measures ensure that the ability to question a person with a disability is reasonable, necessary and proportionate and supports such a person to exercise their legal capacity.

## **Conclusion**

88. While the Bill engages a range of human rights, it is compatible with human rights because to the extent that it limits any rights, those limitations are reasonable, necessary and proportionate to achieving a legitimate objective.

## NOTES ON CLAUSES

### Preliminary

#### **Clause 1 – Short title**

1. This clause provides for the short title of the Act to be the *Australian Security Intelligence Organisation Amendment Act 2020* (ASIO Amendment Act).

#### **Clause 2 – Commencement**

2. This clause provides for the commencement of each provision in the ASIO Amendment Act, as set out in the table.
3. Subclause 2(1) provides that each provision of the ASIO Amendment Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table, and that any other statement in column 2 has effect according to its terms.
4. Item 1 of the table provides that sections 1 to 3 and any provisions that are not covered by the table will commence on the day of Royal Assent.
5. Item 2 of the table provides that Parts 1, 2 and 3 of Schedule 1 of the ASIO Amendment Act are to commence on a single day to be fixed by proclamation, or on 7 September 2020 – whichever is earlier.
6. Item 3 of the table provides that items 27 and 28 of Schedule 1 commence immediately after the commencement of Parts 1, 2 and 3 of Schedule 1. However, these provisions will not commence at all unless Schedule 2 of the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020* commences before Parts 1, 2 and 3 of Schedule 1.
7. Item 4 of the table provides that Item 29 of Schedule 1 is to commence immediately after the commencement of Item 2 or immediately after the commencement of Schedule 2 to the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020* – whichever is later. Item 3 will not commence if the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020* does not commence.
8. Item 5 of the table provides that Schedule 2 of the ASIO Amendment Act is to commence on the earlier of the start of the day after Royal Assent, and immediately before the commencement of the provisions covered by table item 2, being parts 1 to 3 of Schedule 1.
9. A note to the table provides that the table relates only to the provisions of this Act as originally enacted. It will not be amended to deal with any later amendments of this Act.
10. Subclause 2(2) provides that any information in column 3 of the table is not part of this Act and may be amended, in any published version of this Act.



### **Clause 3 – Schedules**

11. This clause provides that legislation that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the respective Schedule, and that any other item in a Schedule to this Act has effect according to the terms outlined in that Schedule.

## **Schedule 1 - amendments relating to compulsory questioning powers**

### **Part 1 – Amendments**

#### **Item 1 – Section 4**

12. This item inserts the definition of *computer* into section 4 of the Act. This replicates and replaces the definition currently contained at section 22 in relation to the interpretation of Division 2 of Part III. This reflects the fact that the term *computer* is now referred to in both Division 2 and Division 3 of Part III.

#### **Item 2 – Section 4 (paragraph (ba) of the definition of *politically motivated violence*)**

13. This item will repeal paragraph (ba) of the definition of politically motivated violence as Item 3 has repealed the defined term ‘terrorism offence’. This item substitutes this defined term with reference to acts that are considered terrorism offences currently at Subdivision A of Division 72, or Part 5.3 of the *Criminal Code*. This replicates the current definition of ‘terrorism offence’.

#### **Item 3 - Section 4 (definition of *terrorism offence*)**

14. This item repeals the definition of terrorism offence.

#### **Item 4 – Section 22 (definition of *computer*)**

15. This item repeals the definition of computer in section 22. This is a consequential amendment to Item 1, which inserts the definition of *computer* into Section 4 - Definitions.

#### **Item 5 - Subsection 25A(2) (note)**

16. This item amends the note after subsection 25A(2) to reflect that the definition of *computer* is removed from section 22 and reinserted at section 4. This item is a consequential amendment of Items 1 and 4.

#### **Item 6 – Section 34A(1A)**

17. This item amends existing subsection 34A(1A) to update section references in line with the amendments in the Bill. Specifically the Bill removes the reference to subsection 34AAA(2) and substitutes new subsection 34AAD(2).

#### **Item 7 – Section 34A (first occurring) (heading)**

18. This item repeals the first occurring heading at 34A, and inserts a new heading ‘34AAA Director-General to report to Attorney-General – concealment of access’. This item renumbers the existing ‘Director-General to report to Attorney-General’ section.

### **Item 8 – Section 34AA (heading)**

19. This item repeals the heading at 34AA, and inserts a new heading ‘34AAC Evidentiary Certificates’. This item renumbers the existing ‘Evidentiary Certificates’ section.

### **Item 9 – Section 34AAA (heading)**

20. This item repeals the heading at 34AAA, and inserts a new heading ‘34AAD Person with knowledge of a computer or a data storage device to assist access to data’. This item renumbers the existing ‘Person with knowledge of a computer or a data storage device to assist access to data’ section.

### **Item 10 – Division 3 of Part III**

21. This item repeals Division 3 of Part III – Special Powers relating to terrorism offences, and substitutes Division 3 of Part III – Compulsory questioning powers. This item repeals the existing questioning warrant, and questioning and detention warrant, framework and inserts a new compulsory questioning framework as outlined below.

## **Division 3 – Compulsory questioning powers**

### **Subdivision A – General provisions**

#### **34A – Definitions**

##### *‘adult questioning matter’*

22. The term is used to refer to the heads of security, as defined in section 4 of the Act, for which an adult questioning warrant may be obtained. These heads of security are espionage, politically motivated violence and acts of foreign interference. It limits the scope of questioning under an adult questioning warrant to matters that concern the protection of, and of the people of, the Commonwealth and the States and Territories from espionage, politically motivated violence and acts of foreign interference, whether directed from, or committed within, Australia or not.

##### *‘adult questioning warrant’*

23. This term is used to refer to a warrant issued under section 34BA – a warrant issued in relation to a person who is at least 18 years old.

##### *‘against’*

24. The term *against* is used to explain the circumstances when confiscation proceedings are against a person. A confiscation proceeding is against a person if, for a proceeding under the *Proceeds of Crime Act 2002* (POC Act 2002), or equivalent State and Territory legislation, the person is a suspect (within the meaning of that Act) for the proceeding.
25. A confiscation proceeding is said to be brought against a person where he or she is a suspect in that proceeding. The definition relies on the definition of ‘suspect’ in section 338 of the POC Act 2002, which sets out the circumstances in which a person will be a suspect, depending on whether the relevant proceedings are for a restraining

order, confiscation order, unexplained wealth restraining order or unexplained wealth order. In the case of proceedings for a restraining order or confiscation order, a person will be a suspect where they committed (or are suspected of having committed) the offence to which the order relates. In the case of proceedings for an unexplained wealth restraining order or unexplained wealth order, a person will be a suspect where he or she is the person whose wealth is suspected of being unexplained.

26. This term is used in the definitions of pre-confiscation application and post-confiscation application.

*'charged'*

27. The term charged is intended to provide for a range of circumstances in which a person may be the subject of a prosecution for a criminal offence. In addition to including circumstances where the person has been charged with an offence, it is also intended to apply to situations where the person is the subject of a court process that may lead to the laying of charges and the commencement of a prosecution. The term is not intended to apply to persons who are the subject of proceedings that are not criminal in nature.

*'communication device'*

28. The term is intended to capture all devices that could be used by a person in order to communicate information to another person. These devices are prohibited at the place of questioning, in order to ensure the integrity of questioning. This includes a device that may be used to communicate information to another person, such as a mobile phone, and a 'surveillance device', which takes the same meaning as in section 22 of the ASIO Act. A communication device may be seized by a police officer under subsection 34CC(4) while conducting a search under subsections 34CC(2). Subsection 34D(4) also provides that a police officer may also conduct an ordinary search or a frisk search of a person if the officer suspects on reasonable grounds that it is prudent to do so in order to ascertain whether the person is carrying a dangerous item or a communication device.

*'complaints agency'*

29. This term is intended to capture the relevant Ombudsman or other integrity agency or body permitted or required to investigate complaints about police officers executing powers in accordance with this Division. This excludes agencies or bodies prescribed by the regulations for the purposes of this definition.

*'confiscation proceeding'*

30. This term is used to capture all proceedings under the *Proceeds of Crime Act 1987* (POC Act 1987) or the POC Act 2002, or any other corresponding law. This excludes criminal prosecution for an offence under either of those Acts or a corresponding law. Confiscation proceedings will be against a person where he or she is a suspect in those proceedings. Section 34BD provides that a written warrant must include the matters in relation to which ASIO may require a person to give information or produce records or

things relevant to intelligence that is important in relation to an adult or minor questioning matter.

*'criminal proceeding'*

31. This term is used to capture a prosecution for an offence against a State, Territory or Commonwealth law, or a confiscation proceeding. Section 34EE provides that if material is lawfully in the possession of a prosecutor of the subject, the fact that the material is questioning material or derivative material does not prevent the prosecutor using the material, including for the purposes of making a decision whether to prosecute the subject, and prosecuting the subject.

*'dangerous item'*

32. This term is used to capture weapons or any other items that could be used in a dangerous or threatening way towards those involved in the execution of a questioning warrant. Section 34D provides that a police officer may request that a person attending questioning undergo a screening procedure, and/or conduct an ordinary or frisk search of a person attending questioning and subsequently seize any dangerous items found. Subsection 34D(6) provides that dangerous item may be retained for such time as is reasonable.

*'derivative material'*

33. This term is intended to capture any information, document or other thing that is identified, understood or created because of, or based on, questioning material.
34. The term derivative material is used in relation to questioning material. It is intended to be a broad definition and to capture all evidence, information, documents, records or other things that have been obtained directly or indirectly from questioning material.

*'disclose'*

35. The term disclose is intended to capture the ways in which information may be made available in relation to questioning material or derivative material, and also includes the disclosure of copies, contents or descriptions of that material.

*'extra permitted questioning period'*

36. This term describes the additional time a subject of a warrant may be questioned for where an interpreter is present at any time in accordance with section 34DN or section 34DO. Subsection 34DK(3) provides that this time may be 24 hours, or if a prescribed authority before whom the subject is being questioned has extended the period in accordance with subsections 34DK(4) and (5), either 32 hours or 40 hours.

*'immediate appearance requirement'*

37. This term is used to describe the requirement that the subject of a questioning warrant appear before a prescribed authority for questioning under the warrant immediately after the subject is given notice of the warrant in accordance with section 34BH. Section 34BE provides that a questioning warrant may include an immediate

appearance requirement if the Attorney-General is satisfied that it is reasonable and necessary in the circumstances.

*'imminent'*

38. The term imminent is used in relation to a charge or a confiscation proceeding.
39. When it is used in relation to a charge, it is intended to capture the circumstances in which criminal proceedings are about to be brought against a person.
40. The term has been broadly defined to include three circumstances in which a charge will be imminent against a person:
  - where the person is a protected suspect under the *Crimes Act 1914* (Crimes Act) (or would be, if that Act applied to State and Territory offences)
  - where the person has been arrested for an offence but is yet to be charged, and
  - where a person with authority to initiate the criminal process for the person's prosecution has decided to initiate the process, but has not yet done so.
41. The term is intended to capture circumstances where there is sufficient evidence to initiate the relevant criminal process for the person's prosecution (for example, to lay a charge or issue a court attendance notice), and a person with authority (such as a senior officer) has decided to do so, but that process has not yet been initiated against the person. It is not intended to capture circumstances where a junior officer has made a preliminary decision to initiate a criminal process for the prosecution of a person, but a person with appropriate authority to initiate the process has not yet made a final decision. It is also intended to capture circumstances where a court has decided not to commit a person on a charge, but where the Director of Public Prosecutions has decided to file an ex officio indictment.
42. When the term imminent is used in relation to confiscation proceedings, it is intended to capture the circumstances in which those proceedings are about to be brought against a person, but have not yet commenced. As with a charge, those proceedings will be imminent where an officer with the relevant authority has decided to commence them, but where the proceedings have not yet been instituted.
43. The concept of 'imminent' is used to ensure that the obligations and restrictions that apply in relation to questioning warrants and to the use and disclosure of questioning material and derivative material in circumstances where the subject has been charged with an offence or where confiscation proceedings have commenced will also apply where those charges or proceedings are imminent. Using the concept of charges or proceedings being imminent makes it clear to the Attorney-General when considering whether to issue a questioning warrant, that they must take account of the fact that the potential subject is about to be charged with an offence, or confiscation proceedings are about to commence against that person.

*'lawyer'*

44. The term refers to a person who is enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory, and holds a practising certificate granted under a law of a State or Territory.

*'minor questioning matter'*

45. The term is used to refer to the politically motivated violence head of security, as defined in section 4 of the Act, for which a minor questioning warrant may be obtained. This term limits the scope of questioning under a minor questioning warrant to matters that concern the protection of, and of the people of, the Commonwealth and the States Territories from politically motivated violence, whether directed from, or committed within, Australia or not.

*'minor questioning warrant'*

46. This term is used to refer to a warrant issued under section 34BB – a warrant issued in relation to persons who are at least 14 years of age. A minor questioning warrant may be obtained in relation to a person who is over the age of 18, where ASIO is not satisfied that the potential subject is at least 18 years of age, but it is clear that the person is at least 14 years of age. In these circumstances, ASIO should request a minor questioning warrant despite the fact that the person may be over the age of 18. This ensures that where there is uncertainty about a person's age, the additional safeguards in relation to minor questioning warrants will apply.

*'minor's representative'*

47. This term is used to refer to a parent, guardian or other person (who meets the criteria set out at subsection 34AA(2)) who is present during questioning under a minor questioning warrant. The role of the minor's representative is to represent the interests of the subject during questioning before a prescribed authority.

*'permitted questioning period'*

48. This term is used to describe the time limit for questioning a subject under a questioning warrant. Subsection 34DJ provides that the subject of a questioning warrant must not be questioned under the warrant for longer than the permitted questioning period. The permitted questioning period is eight hours, or if a prescribed authority before whom the subject is being questioned has extended the period in accordance with subsections 34DJ(3) or (4). The permitted questioning period is longer where an interpreter for the subject is present at any time while the subject is being questioned. See 'extra permitted questioning period'.

*'police officer'*

49. This term is used to describe a police officer who may exercise powers under this Division. The term has been defined to include a member or special member of the Australian Federal Police, a protective service officer or special protective service officer, or a member of the police force or police service of a State or Territory.

*'post-charge'*

50. The term post-charge is used to describe the time at which:
  - the use of questioning material or derivative material becomes a post-charge use or disclosure
  - material becomes post-charge questioning material
  - questioning under a questioning warrant becomes post-charge questioning, or
  - a questioning warrant becomes a post-charge questioning warrant.
51. These events will occur post-charge if, at the time, charges are on foot against a subject (or they are imminent). The events will not occur post-charge if charges against the subject of questioning have been resolved, whether by conviction and sentence, withdrawal, quashing or otherwise.
52. The term relies on the concept of a related offence.
53. Under paragraph (a), in order for material to be used or disclosed post-charge, the subject matter of the questioning from which that material came or was derived must relate to the subject matter of the offence with which the subject has been charged.
54. Under paragraph (b), in order for material to be post-charge questioning material, the subject matter of the questioning warrant from which that material came must relate to the subject matter of the offence with which the subject has been charged. There does not have to be a connection between the subject matter of the questioning material and the offence in order for it to be post-charge questioning material. It is enough that there is a connection between the matters covered in the questioning warrant and the offence.
55. New Subdivision E will set out additional obligations and restrictions on how to deal with post-charge questioning material. These obligations and limitations are designed to protect the particularly sensitive status of this material and ensure that it does not prejudice the fair trial of the subject.
56. Under paragraph (c), in order for questioning to be a post-charge questioning, the subject matter of the questioning warrant must relate to the subject matter of the offence with which the subject has been charged.
57. Under paragraph (d), in order for a warrant to be issued post-charge, the subject matter of the questioning warrant to which the person has been issued must relate to the subject matter of the offence with which the person has been charged.
58. The term post-charge will not apply where there is no relationship between the subjects canvassed in the questioning warrant and the subject matter of the offence with which the subject has been charged.
59. For example, material used or disclosed in relation to a person who has been charged with driving without a licence will not be post-charge if the relevant material came from a questioning warrant about engaging in terrorism related activity. In this case, such a use or disclosure would be pre-charge.

60. Similarly, material from a questioning warrant about the subject's involvement in terrorism related activity would not generally be post-charge questioning material if the person had been charged with driving without a licence. In this case, such material would be pre-charge questioning material.

*'post-confiscation application'*

61. The term post-confiscation application is used to describe the time at which:
- the use or disclosure of questioning material or derivative material becomes post-confiscation application use or disclosure;
  - material which becomes questioning material becomes post-confiscation application questioning material; and
  - the questioning under a questioning warrant becomes post-confiscation application questioning.
62. These events will occur post-confiscation application if, at the time, confiscation proceedings are on foot against a subject (or they are imminent). These events will not occur post-confiscation application if those proceedings have been resolved, whether by the making of a confiscation order, dismissal, discontinuance or settling of proceedings or otherwise.
63. The term relies on the concept of related confiscation proceeding.
64. Under paragraph (a), in order for material to be used or disclosed post-confiscation application, the subject matter of the questioning warrant from which that material came, or was derived, must relate to the subject matter of the confiscation proceedings against the subject.
65. Under paragraph (b), in order for material to be post-confiscation application material, the subject matter of the questioning warrant from which that material came must relate to the subject matter of the confiscation proceedings against the subject. There does not have to be a connection between the subject matter of the questioning material and the confiscation proceedings in order for it to be post-confiscation application questioning material. It is enough that there is a connection between the matters covered in the questioning warrant and the confiscation proceedings.
66. Under paragraph (c), in order for a questioning warrant to be a post-confiscation questioning, the subject matter of the questioning warrant must relate to the subject matter of the confiscation proceedings against the subject.
67. Under paragraph (d), in order for a warrant to be issued post-confiscation application, the subject matter of the questioning warrant to which the person has been issued must relate to the subject matter of the confiscation proceedings against the person.
68. The term post-confiscation application will not apply where there is no relationship between the subjects canvassed in the questioning warrant and the subject matter of the confiscation proceedings against the subject.

*'pre-charge'*



69. The term pre-charge is used to describe the time at which:
- questioning material or derivative material is used or disclosed
  - material becomes questioning material
  - questioning commences, or
  - when a warrant is issued to a person.
70. These events will occur pre-charge if, at the time, there are no related charges against the subject, and no related charges are imminent or contemplated.
71. The term relies on the concept of related offence and is intended to capture any time that is not post-charge. Using or disclosing material, providing material during questioning, commencing questioning, or issuing a warrant, will be pre-charge where:
- the subject is suspected of being involved in criminal activity that the questioning warrant has covered or will cover, but charges have not yet been laid against the person and are otherwise not imminent
  - the subject is not suspected of being involved in any criminal activity at all, but has some information that may be relevant or necessary in the relevant security matter
  - the subject has been charged with an offence that is not a related offence (or such a charge is imminent), or
  - a charge for a related offence against the subject has been resolved and he or she is later questioned about the subject matter of the offence.

*'pre-confiscation application'*

72. The term pre-confiscation application is used to describe the time at which:
- questioning material or derivative material is used or disclosed
  - material becomes questioning material
  - questioning commences, or
  - when a questioning warrant is executed on a person.
73. These events will occur pre-confiscation application if, at the time, there are no related confiscation proceedings against the subject, and no related confiscation proceedings are imminent or contemplated.
74. The term relies on the concept of related confiscation proceedings and is intended to capture any time that is not post-confiscation application. Using or disclosing material, providing material during questioning, commencing questioning or issuing a warrant, will be pre-confiscation application where:
- the subject is suspected of being involved in criminal activity that the questioning warrant has covered or will cover, and that may be the subject of

some future confiscation proceedings, but those proceedings have not yet commenced and are otherwise not imminent

- the subject is not suspected of being involved in any criminal activity at all, but has some information that may be relevant or necessary in the relevant security matter
- the subject has had confiscation proceedings commenced against him or her that are not related proceedings (or such proceedings are imminent), or
- related confiscation proceedings against the subject have been finalised and he or she is later questioned about the matters the subject of the confiscation proceedings.

*'prescribed authority'*

75. A term used to describe a person who is appointed by the Attorney-General in accordance with subsection 34AD(1). The role of the prescribed authority is to oversee the execution of a questioning warrant in accordance with this Division. Subsection 34DH(1) provides that a direction given by a prescribed authority has effect, and may be implemented or enforced, according to its terms.

*'proceeds of crime authority'*

76. The term proceeds of crime authority is intended to capture the bodies able to commence confiscation proceedings under the POC Act and equivalent State and Territory legislation. The term is used in new section 34EF, which clarifies when questioning and derivative material can be disclosed to proceeds of crime authorities.

*'prosecuting authority'*

77. The term prosecuting authority is intended to capture all individuals or authorities that are authorised to conduct a prosecution for an offence. The term is intended to include the Commonwealth Director of Public Prosecutions (CDPP) and his or her State and Territory counterparts. It is also intended to extend to other bodies that may have prosecutorial functions, such as State or Territory police.
78. This term is used in sections 34E and 34EE, which relate to the persons and bodies to whom questioning material and derivative material may be disclosed, and the uses to which those persons and bodies may put the material.

*'prosecutor'*

79. The term prosecutor is used in relation to a subject of a questioning warrant. An individual will only be a prosecutor of a subject if he or she satisfies both of the following two conditions:
- he or she must either be a prosecuting authority or employed or engaged by a prosecuting authority, and

- he or she must either make (or be involved in the making of) a decision to prosecute the subject for a related offence, or engaged in the prosecution of the subject for a related offence.
80. The definition is intended to capture only the persons who are directly involved in the prosecution of a subject for a related offence or the decision about whether to prosecute the subject. This would include:
- the Director of Public Prosecutions him or herself
  - the prosecutors who have carriage of the prosecution of the subject
  - other prosecutors who assist that prosecutor in the prosecution of the subject or who assist in making the decision to prosecute the subject
  - counsel engaged to assist in the prosecution of the subject, and
  - support staff who assist in the prosecution of the subject.
81. The definition is not intended to capture the following:
- police or law enforcement officers involved in the investigation which led to the subject being charged
  - police or law enforcement officers who are witnesses in a prosecution of the subject for a related offence
  - persons involved in the prosecution of the subject for unrelated offences (whether that prosecution is by the same prosecuting authority or another prosecuting authority)
  - persons involved in the prosecution only of persons other than the subject (including for offences that are related to the subject's conduct).
82. This definition is used in sections 34E, 34EA, 34EB, 34EC, 34ED and 34EE, which set out when questioning material and derivative material can be disclosed to, and used by, the persons who are directly involved in the prosecution of the subject. Persons who are not involved in the prosecution of the subject should not be subject to the obligations set out in these sections. This is because the risk that the disclosure of questioning or derivative material to these persons could prejudice the fair trial of the subject is more appropriately dealt with by the relevant prosecuting authority placing internal restrictions on the disclosure or use of this material.

*'questioning material'*

83. This definition is located at subsection 34AB(1) and is used to describe any information given by a person while before a prescribed authority for questioning under a questioning warrant; or
- a record or thing produced by a person while before a prescribed authority for questioning under a questioning warrant; or

- any information that might enable a person, who has appeared before a prescribed authority for questioning under a questioning warrant, to be identified; or
- the fact that a person has appeared, or is required to appear, before a prescribed authority for questioning under a questioning warrant.

*‘questioning warrant’*

84. This term is used to describe an adult questioning warrant issued under section 34BA and a minor questioning warrant issued under section 34BB.

*‘record’*

85. This term has the same meaning as provided by Division 2 of Part III.

*‘related confiscation proceeding’*

86. This definition sets out when a confiscation proceeding is related to questioning.

87. A confiscation proceeding will be related to questioning if the matters covered in the questioning relate to the subject matter of the proceeding. There must be a connection between the activity, conduct or matter the subject of the questioning and those that are the subject the confiscation proceedings. If the confiscation proceedings do not have such a connection to the subject matter of the questioning, then the confiscation proceedings are not related to the questioning.

88. If a confiscation proceeding is related to questioning, this will affect how material that was given in, or produced during, questioning (questioning material) and material that was derived from information, documents or things given in or produced during questioning (derivative material) can be used in relation to that proceeding.

*‘related offence’*

89. This definition sets out when an offence is related to questioning.

90. An offence will be related to questioning if the matters covered in questioning relate to the subject matter of the offence. There must be a connection between the conduct, activities or matters the subject of the hearing and those that constitute or are the subject of the offence. If the offence does not have such a connection to the subject matter of the relevant questioning, then the offence is not related to questioning.

91. If an offence is related to questioning, this will affect how material that was given in or produced during questioning (questioning material) and material that was derived from information, documents or things given in or produced during questioning (derivative material) can be used in relation to the prosecution of the subject for that offence.

*‘resolved’*

92. This term is defined at section 34AC and is used to describe a situation where a person no longer has criminal charges against them.

*‘screening equipment’*

93. This term is used to describe metal detector or another device used for detecting objects or particular substances. Screening equipment may be used by police officers in order to conduct screenings of people attending questioning in accordance with section 34D.

*‘subject’*

94. This term is used to describe the person specified in a questioning warrant. In relation to references to questioning material or derivative material under section 34AB it describes the person to which the questioning material relates.

*‘superior court’*

95. This term is used to describe the courts in which a prescribed authority must have served as a judge in order to be eligible to be appointed as a prescribed authority under section 34AD. These courts are the High Court, the Federal Court of Australia, the Family Court of Australia or of a State, the Supreme Court of a State or Territory; or the District Court (or equivalent) of a State or Territory.

*‘undergo a screening procedure’*

96. This term is used to describe the requirement provided at subsection 34D(2), whereby a police officer may request a person attending for questioning to undergo a screening procedure. This may include the person walking, or being moved, through screening equipment, or handheld screening equipment being passed over or around the person or around things in the person’s possession or control at the place. This may also include passing a person’s possessions/things through screening equipment or examining them by X-ray.

*‘use’*

97. This term is used to describe the act of dealing with questioning material or derivative material. This includes use of copies, contents or descriptions of that material under Subdivision E.

**Section 34AA – Meaning of minor’s representative**

98. This section introduces the meaning of the minor’s representative as referring to a parent, guardian or other person who is able to represent the interests of the subject of a minor questioning warrant.
99. Subsection (2) outlines the requirements that must be met should the minor’s representative not be a parent or guardian of the subject. The representative must be able to represent the interests of the subject, and must, as far as practicable, be acceptable to the subject and if applicable, to the prescribed authority. A minor’s representative cannot be a police officer, the Director-General of Security, an ASIO employee or affiliate or a person who is approved under section 24 to exercise authority under a warrant under the Act.
100. The note under subsection (2) clarifies that a lawyer that is appointed by the prescribed authority may also meet the requirements to be a minor’s representative.

### **Section 34AB – Meaning of *questioning material and subject***

101. This new section introduces the meaning of questioning material as referring to any information given by a person or, a record or other thing produced by a person, while before a prescribed authority for questioning under a questioning warrant. In addition, while a person is before a prescribed authority for questioning under a questioning warrant, any information that may enable a person to be identified, or the fact that a person has appeared or is required to appear, is questioning material.
102. Subsection (2) clarifies that information, a record or other thing produced while not before a prescribed authority for questioning under a questioning warrant is not questioning material for the purposes of section 34AB.
103. Subsection (3) provides that the meaning of subject refers to the person questioned under a questioning warrant before a prescribed authority or, in relation to derivative material, the person who is the person from which the derivative material was obtained.

### **Section 34AC – Meaning of *resolved***

104. The purpose of section is to provide certainty about when a charge for an offence, and a confiscation proceeding, is resolved. This definition is consistent with the definition of resolved provided in section 4C of the ACC Act.

### **Section 34AD – Prescribed authority**

105. This section sets out who the Attorney-General may appoint in writing as a prescribed authority, who is not eligible for an appointment, and who the Attorney-General must not appoint. The prescribed authority's role is to oversee the execution of a questioning warrant, and provide directions in accordance with this Division.
106. The section outlines the preliminary matters the Attorney-General must have regard to, before appointing a person. In addition, subsection (4) specifically stipulates that the Attorney-General must not appoint a person, unless the person has given their written consent to the appointment and the consent is in force.
107. Subsection (5) ensures that the Attorney-General has regard to any conflicts or perceived conflict of interests of a person before appointing that person as a prescribed authority.
108. Subsections (6), (7) and (8) provide that all persons appointed as a prescribed authority have a duty to disclose, in writing to the Attorney-General, a material personal interest (including the nature and extent of the interest) that relates to the proper performance of their duty as a prescribed authority. The disclosure must be made as soon as practicable after the person becomes aware of the interest. If there is a change in the nature or extent of the interest, they must also make further disclosures to the Attorney-General as soon as practicable after the person becomes aware of the change.
109. The purpose of subsection (9) is to provide for circumstances, in relation to the actions of a prescribed authority, when the Attorney-General may terminate the appointment.

110. Subsection (10) provides a definition of paid work and unpaid work, which are referred to in relation to any conflicts of interest. Paid work takes its ordinary meaning of any work which received financial gain or reward. Unpaid work is any work that is not paid work.
111. For the avoidance of doubt, any person appointed as a prescribed authority under the existing subsection 34B(1) of the ASIO Act, will still be considered as a prescribed authority under the new Division, pursuant to Item 13 of Part 2 of Schedule 1 of this Bill. However, where that prescribed authority would not meet the additional requirements provided for in this new subsection, the prescribed authority would likely be terminated by the Attorney-General under new subsection 34AD(9).

#### **Section 34AE – Status of prescribed authorities**

112. The purpose of the section is to provide for the protection and immunity of a prescribed authority in the performance of their duties under the Division, and set out that the protection and immunity is the same as a Justice of the High Court.
113. The existing subsection 34ZM(2), which relates to judges acting in their personal capacity, has not been reflected in this section as it has been included in the transitional provisions to account for any existing prescribed authorities that are current judges and who will be transferred to the new framework.

#### **Section 34AF – Written statement of procedures**

114. This section replicates in full the repealed section 34C with the addition of the defined term questioning warrant in subsection (1) to account for the specific definition replacing the general term warrant.
115. The purpose of the section is to provide that the Director-General may prepare a written statement of procedures to be followed in the exercise of authority under a questioning warrant. In preparing the statement, the Director-General must consult the Inspector-General of Intelligence and Security (IGIS) and the Commissioner of the Australian Federal Police.
116. Subsection (2) provides that the statement of procedure must be given to the Attorney-General for approval. If approved, subsection (6) then provides that the Director-General must brief (either orally or in writing) the Parliamentary Joint Committee on Intelligence and Security on the statement approved by the Attorney-General.
117. The purpose of the statement is to set out standard operational procedures in relation to the execution of a questioning warrant, and may include, for example, operational procedures about the transportation of the subject, and matters pertaining to the health and wellbeing of the subject.
118. Subsection (5) provides that the statement of procedures becomes a legislative instrument on the day it is approved by the Attorney-General.

119. Consistent with existing subsection 34C(5), new subsection 34AF(5) expressly provides that section 42 of the *Legislation Act 2003* (the Legislation Act), relating to the disallowance of legislative instruments, does not apply. This exemption engages the operation of subsection 44(2) of the Legislation Act, which provides that the disallowance regime provided for under section 42 of that Act does not apply in relation to a legislative instrument if an Act declares that section 42 of the Legislation Act does not apply to the instrument.
120. As is the case under existing section 34C, it is appropriate to exclude the statement of procedures from the disallowance provisions because the statement is an instrument that is an internal management tool of government to ensure the basic standards applicable when a person is apprehended and/or questioned under a warrant issued under Division 3. In addition, given the nature of the questioning warrants to which the statement of procedures apply, the statement of procedures is an instrument that provides for specific security needs in relation to persons who are subject to these warrants. For these reasons, it is appropriate to exempt the statement of procedures from the disallowance regime in the Legislation Act.
121. In addition, and consistent with the arrangements for statements of procedures approved under existing section 34C, a statement of procedures approved under new section 34AF will be exempt from the sunseting regime provided for in Part 4 of Chapter 3 of the Legislation Act. As new section 34JF provides for the entire Division to cease to have effect on 7 September 2030, any statement of procedures in force at that time will also cease to have effect. It would be duplicative to also subject a statement of procedures to the sunseting regime in the Legislation Act and as such an exemption from that regime is appropriate.

### **Section 34AG – Humane treatment of subject of questioning warrant**

122. This section replicates the repealed section 34T and replaces the word ‘person’ with ‘subject’. The inclusion of this section is to provide that the subject specified in the questioning warrant is to be treated with humanity and with human dignity by anyone exercising authority the warrant or implementing or enforcing the direction. The provision expressly provides that the subject specified in the warrant must not be subjected to torture, or to cruel, inhumane or degrading treatment.

### **Subdivision B – Questioning warrants**

#### *Overview*

123. Subdivision B sets out the procedural framework for:
- the Director-General making a written or oral request to the Attorney-General for the issuing of a questioning warrant;
  - the issuing of a questioning warrant by the Attorney-General and the requirements that need to be satisfied;
  - the matters the questioning warrant may authorise;



- the process for making a variation to a questioning warrant; and
  - the requirement on the Director-General to notify the person who is the subject of the questioning warrant.
124. When a request is made to the Attorney-General, the subdivision sets out a list of preliminary requirements which the Attorney-General must be satisfied are met before a questioning warrant may be issued. It is a key requirement that the Attorney-General is satisfied that there are reasonable grounds for believing that a questioning warrant will substantially assist in the collection of intelligence important to the protection of, and the people of, the Commonwealth, States and Territories from any of the following, whether directed from, or committed within, Australia or not:
- espionage; or
  - politically motivated violence; or
  - acts of foreign interference.
125. Subdivision B provides that a questioning warrant can be issued in relation to a person, even if the person has been charged with an offence, or that charge or proceeding is imminent, if the Attorney-General is satisfied that the issuing of the warrant is necessary for the purposes of collecting the intelligence.
126. Section 34BB sets out an expanded test for the issue of a questioning warrant where a person is at least 14 but under 18 years old. Questioning of minors is confined to protecting the Commonwealth, States and Territories, and its people, from politically motivated violence whether directed from, or committed within, Australia or not.
127. Importantly, section 34BB introduces a best interest test for persons who are at least 14 but under 18. The test requires the Attorney-General to consider the best interests of the minor before issuing a minor questioning warrant.
128. In addition, section 34BC expressly states that a questioning warrant has no effect if the person specified in the warrant is under 14. In effect, this provision prevents the issuing of a questioning warrant in relation to a person under 14, and addresses circumstances where it is discovered, after the issuing of a questioning warrant, that the person is under 14.
129. Sections 34BD and 34BE stipulate matters that a questioning warrant may authorise, such as the requirement for the subject to attend questioning, the ability to question the subject and apprehension. Section 34BF then sets out the requirements for a warrant in respect of whether it is written or oral and how long it may be in force. Section 34BG provides the framework to vary a questioning warrant and section 34BH provides the framework to notify a subject of the questioning warrant and other related matters.
130. In all cases, there is a requirement for there to be, in force, a written statement of procedures approved by the Attorney-General to be followed in the exercise of authority under a questioning warrant.

131. For the avoidance of doubt, nothing would prevent ASIO from requesting or obtaining more than one warrant concurrently under the ASIO Act.

*Merits review*

132. Subdivision B includes certain administrative discretions, most significantly by authorising the Attorney-General to decide whether to issue questioning warrants. The Bill does not provide for merits review of such decisions. This approach to merits review is consistent with similar decisions made for national security and law enforcement purposes – for example other warrant-related decisions under the ASIO Act, as well as decisions made under the *Intelligence Services Act 2001*, the IGIS Act and the *Telecommunications (Interception and Access) Act 1979*. Decisions of a law enforcement nature were identified by the Administrative Review Council in its publication *What decisions should be subject to merits review?* as being unsuitable for merits review. A decision to issue a warrant as part of an investigation of politically motivated violence, espionage or acts of foreign interference is clearly analogous to decisions of a law enforcement nature.
133. Further, the utility of providing for merits review in relation to the issue of a questioning warrant is undermined by the strict and short time frames for the duration of questioning warrants contained in the Bill. The Administrative Review Council’s publication acknowledges that decisions with a short period of effect are unsuitable for merits review, as the effect of such decisions may be spent by the time of review.
134. In addition, the Bill does not affect a person’s right to seek from a federal court a remedy relating to the warrant or the treatment of the subject in connection with the warrant. The prescribed authority is required to inform the subject at least once every 24 hours that the subject may seek such a remedy. Although judicial review serves a different function from merits review, the provisions requiring notification of judicial review are an appropriate enhancement to the review mechanisms surrounding the issue and execution of questioning warrants and appropriately take into account the impact of the warrant on the interests of a subject.

***The framework for the Director-General to make a request for a questioning warrant***

**Section 34B – Request for questioning warrant**

135. New section 34B replaces the existing section 34D that relates to requests for questioning warrants.
136. New subsection 34B(1) provides that the Director-General may request the Attorney-General to issue a questioning warrant for a minor or adult.
137. New subsection 34B(2) enables ASIO to request a questioning warrant either in writing or orally. Introducing the ability to request a warrant orally enables ASIO to efficiently respond to time critical threats where the Director-General reasonably believes that the delay caused by making a written request may be prejudicial to security.

138. New subsection 34B(3) clarifies that this section operates for a request to issue a questioning warrant even if a previous request for a questioning warrant has been made in relation to the same person.
139. New subsection 34B(4) sets out the requirements for what the Director-General must provide to the Attorney-General in a request for a questioning warrant under subsection (1). This information must include a statement of facts and the grounds on which the Director-General considers it necessary for a warrant to be issued. This information is required for the Director-General to provide the Attorney-General with enough information to satisfy the relevant test in section 34BA and section 34BB. If there has been any previous request for the issue of a questioning warrant in relation to a person, the request must state the particulars and outcome of the previous requests, and if one or more warrants were issued, a statement about the period of time the person was questioned under each warrant, and whether the person was apprehended under any of those warrants. This will ensure the Attorney-General is informed of whether the person has been the subject of a questioning warrant before and the relevant details of that warrant.
140. In addition, the request must also include:
- whether immediate appearance is required; and
  - whether apprehension is required; and
  - if the request is for a minor warrant under section 34BB, the matters which the Attorney-General must take into account in considering the best interests of the minor under subsection 34BB(3).
141. New subsection 34B(5) provides that, in relation to an oral request for a questioning warrant, the Director-General must cause the IGIS to be notified before the request is made, or as soon as practicable after the request is made, that a request will or has been made. This is to ensure that the IGIS has adequate oversight of oral requests for questioning warrants.
142. New subsection 34B(6) provides a further safeguard by requiring the Director-General to make a written record about the request and provide it to the Attorney-General and IGIS as soon as practicable, but no later than 48 hours after the request is made. The written record must include the day and time the request was made, the reasons why the Director-General believed the delay caused by a written request may be prejudicial to security and the matters that are required in a written request for a warrant.

*The framework for the Attorney-General to issue a questioning warrant*

**Section 34BA – Test for issue of questioning warrants – persons who are at least 18**

143. The new section 34BA replaces the existing section 34E. The intent of this section is to provide a test for the Attorney-General when issuing a questioning warrant for persons who are at least 18. The effect of subsection (1) is that if the Director-General makes a request to issue a questioning warrant, the Attorney-General may issue the warrant

under this section in relation to the person if satisfied a range of specific requirements are met (including that the person is at least 18 years of age).

144. New paragraph 34BA(1)(b) enables the Attorney-General to authorise a questioning warrant if the Attorney-General is satisfied that there are reasonable grounds for believing that a questioning warrant will substantially assist in the collection of intelligence important to the protection of, and the people of, the Commonwealth, States and Territories from espionage, politically motivated violence and/or acts of foreign interference, whether directed from, or committed within, Australia or not.
145. This will enable the Attorney-General to issue questioning warrants to allow ASIO to respond to current and emerging threats to Australia's national security.
146. New paragraph 34BA(1)(c) requires the Attorney-General to be satisfied that it is reasonable in all the circumstances for the warrant to be issued, and in doing so the Attorney-General must have regard to other methods of collecting the intelligence that are likely to be as effective. Other methods of collecting the intelligence may include ASIO's other warranted powers.
147. New paragraph 34BA(1)(d) applies where:
  - (i) a person has been charged with an offence, or a confiscation proceeding has commenced; and,
  - (ii) a charge or confiscation proceeding is imminent.
148. In relation to subparagraph 34BA(1)(d)(i), the warrant is descriptively referred to as a post-charge questioning warrant.
149. In relation to subparagraph 34BA(1)(d)(ii), the warrant is descriptively referred to as a post-confiscation questioning warrant.
150. New paragraph 34BA(1)(d) enables a questioning warrant to be issued by the Attorney-General in order to question a person after they have been charged with an offence or where a confiscation proceeding has commenced or where that charge or proceeding is imminent. When issuing a (post-charge) questioning warrant the Attorney-General must be satisfied that the issuing of the warrant is necessary for the purposes of collecting the intelligence (as described in paragraph (1)(b)).
151. New paragraph 34BA(1)(e) provides that a written statement of procedures must be in force in order for the Attorney-General to issue a questioning warrant.
152. New subsection 34BA(2) is a severability clause. It allows section 34BA and the ASIO Act to be read as if either or both of subparagraphs 34BA(1)(d)(i) and (ii) had not been enacted, in the event that either paragraph is found to be beyond power.

#### **Section 34BB – Test for the issue of questioning warrant - persons who are at least 14**

153. The intent of new section 34BB is to enable the Attorney-General to issue warrants in relation to persons who are at least 14 years of age but under 18 years (a minor), with appropriate safeguards. The ability of the Attorney-General to issue a warrant under this section is limited to circumstances where the minor is the target of an investigation

in relation to politically motivated violence and only where the minor is at least 14 years of age. The minimum age has been lowered from 16 to 14 as a response to the increased threat posed by minors, which was supported by the Parliamentary Joint Committee on Intelligence and Security in its 2018 review of the operation, effectiveness and implications of Division 3 of Part 3 of the *Australian Security Intelligence Organisation Act 1979*. The need for the lowered age is further illustrated by the 2015 shooting of New South Wales Police Force employee by a 15 year old. The questioning of minors under this framework is accompanied by significant safeguards reflected in this section and in subsections 34BD(2) and 34FA(1).

154. New paragraph 34BB(1)(a) provides that the Attorney-General may only issue a warrant under this section where satisfied that the person is at least 14. While it is intended that a warrant under this section will generally be obtained for those who are at least 14 and less than 18 years old, it is not limited to those who are under 18. This is because where there is uncertainty as to the age of the person, i.e. the Attorney-General cannot be satisfied that the person is at least 18, then a minor questioning warrant under section 34BB should be obtained in the place of an adult questioning warrant under section 34BA. This will ensure that the additional safeguards for minors will apply where there is uncertainty as to the age of the person.
155. New paragraph 34BB(1)(b) provides that the Attorney-General may only issue a warrant in relation to a minor if satisfied that there are reasonable grounds for believing that the person has likely been, is likely, or will likely be engaged in activities prejudicial to Australia or the people of Australia from politically motivated violence, whether directed from, or committed within, Australia or not. This ensures that minors can only be questioned in relation to politically motivated violence, such as terrorism, and only where the minor is the target of the investigation.
156. New paragraph 34BB(1)(c) requires that the Attorney-General to be satisfied that there are reasonable grounds for believing that the questioning warrant will substantially assist in the collection of intelligence that is important in relation to the questioning matter.
157. In effect, new paragraphs 34BB(1)(b) and (c) ensure that a minor questioning warrant may only be issued in relation to politically motivated violence, where the minor is the target of the investigation and where the questioning under the warrant will substantially assist in the collection of intelligence.
158. Paragraph (1)(e) mirrors the wording set out in paragraph 34BA(1)(d) in relation to a post-charge or post-confiscation application, questioning warrant.
159. Paragraph (1)(f) mirrors the wording set out in paragraph 34BA(1)(e) in relation to an in force statement of procedures.

*Best interest of the person considerations*

160. New subsection 34BB(2) provides an additional safeguard in relation to questioning of minors by requiring the Attorney-General to consider the best interests of the person when issuing a warrant. It is intended that this consideration is a primary consideration

in deciding whether to issue a minor questioning warrant, taking into account the obligations and conditions to be imposed on the minor by the warrant, and also considering other legitimate matters, such as public safety and national security.

161. New subsection 34BB(3) sets out that the matters the Attorney-General must take into account in considering the best interest of a minor. These matters are a safeguard in ensuring that the Attorney-General must consider a specified list of matters, to the extent known. These matters include the age, maturity, sex and background (including lifestyle, culture and traditions) of the person, the physical and mental health of the person, the benefit to the person of having a meaningful relationship with the person's family and friends, the right of the person to receive an education, the right of the person to practise the person's religion and any other matter the Attorney-General considers relevant.
162. For example, the Attorney-General, as a primary consideration, would take into account the minor's practise of their religion in determining the time the minor should be required to attend a questioning session.
163. New subsection 34BB(4) provides that these matters are only required to be taken into account to the extent that they are known to the Attorney-General, and to the extent that the matters are relevant. This subsection operates in conjunction with paragraph 34B(4)(f), which requires all the information known to the Director-General in relation to these matters be included in the request for the warrant. For example, if ASIO and the Attorney-General have no knowledge about the person's lifestyle or traditions, then those matters need not be taken into account. In the alternative, aspects of the person's lifestyle or tradition may be known, but are not relevant in the context of a questioning warrant and the obligations and conditions imposed on the person by the warrant.

*Concluding provisions in relation to paragraph 34BB(1)(e)*

164. New subsection 34BB(5) is a severability clause. It allows section 34BB and the ASIO Act to be read as if either or both of sub-paragraphs 34BB(1)(e)(i) and (ii) had not been enacted, in the event that either paragraph is found to be beyond power.

**Section 34BC – Warrant has no effect if person under 14**

165. This section provides a safeguard that if the subject of a questioning warrant is under 14, the warrant has no effect. This means that any action under the warrant, including questioning, cannot occur.
166. This section explicitly ensures that a questioning warrant has no effect, in the rare and unlikely situation where a questioning warrant is issued and it is later discovered that the person subject to the warrant is under 14.

**Section 34BD – What a questioning warrant authorises**

167. New section 34BD sets out the specific matters which may be authorised in a questioning warrant.

168. New subsection 34BD(1) states that the questioning warrant must require the subject to appear for questioning, either immediately after being notified of the questioning warrant or at the time and date specified in the warrant. The questioning warrant can authorise ASIO to question the subject before a prescribed authority, including the ability to require the subject to give information and produce records or other things that are relevant to the questioning matter. The questioning warrant can also authorise ASIO to make copies and transcripts of things the subject produces. The questioning warrant can authorise any of these matters subject to restrictions and conditions, which if applicable, must be specified in the warrant.
169. New subsection 34BD(2) provides additional safeguards for questioning under a minor questioning warrant. It ensures that ASIO is only authorised to question the minor in the presence of a minor's representative and only for continuous periods of two hours or less, which must be separated by breaks.
170. The note in new subsection 34BD(2) clarifies that a subject of a minor questioning warrant may only be questioned in the presence of a lawyer, which is provided for under new subsection 34FA(1).
171. New subsection 34BD(3) clarifies that the requirement to question a minor only for continuous periods of 2 hours or less does not affect the permitted questioning time and additional permitted questioning time provided for in sections 34DJ and 34DK.
172. New subsection 34BD(4) clarifies that, in accordance with a questioning warrant, ASIO can request the subject to provide information, records or things that relate to the subject matter of any charge or confiscation proceeding or any imminent charge or confiscation proceeding against the subject. This subsection is part of the post-charge framework, which ensures that questioning can occur despite the laying of any charges or commencement of proceedings.
173. New subsection 34BD(5) is a severability clause. It allows section 34BD and the ASIO Act to be read as if subsection 34BD(4) had not been enacted, in the event that the subsection is found to be beyond power.

#### **Section 34BE – Other things that may be authorised in questioning warrant**

174. New section 34BE provides for additional matters, to those listed in section 34BDA, that may be authorised in the questioning warrant. These matters include immediate appearance requirements, apprehension, seizure of certain items found during the search for intelligence purposes, production of records or other things and further immediate appearance requirements.
175. New subsection 34BE(1) provides that, if the Attorney-General is satisfied that it is reasonable and necessary in the circumstances, the questioning warrant may include an immediate appearance requirement. For the purpose of assisting the reader, a note references the meaning of *immediate appearance requirement* as defined in section 34A.

176. In effect, an *immediate appearance requirement* requires the subject of the warrant to appear before a prescribed authority for questioning under the warrant, immediately after the subject is given notice of the warrant by the Director-General in accordance with section 34BH.

*Warrant may authorise apprehension*

177. New subsection 34BE(2) sets out the criteria that the Attorney-General must be satisfied of in order for a questioning warrant to authorisation apprehension of a subject. The purpose of apprehension is to:

- facilitate the subjects' immediate appearance before a prescribed authority for questioning; and
- preserve the integrity of intelligence gathering operations and investigations by mitigating the risk of the subject alerting others involved in a security matter or destroying security relevant records or other things.

178. New paragraph 34BE(2)(a) provides that an authorisation to apprehend a subject may only be given where the questioning warrant is to include an immediate appearance requirement under subsection (1), that is, where the Attorney-General is satisfied that immediate attendance of the subject is reasonable and necessary in the circumstances.

179. New paragraph 34BE(2)(b) provides that the Attorney-General must be also satisfied that there are reasonable grounds for believing that a subject is likely to:

- alert a person engaged in activities prejudicial to security that the activity is being investigated; or
- not appear before the prescribed authority for questioning; or
- either alter, damage or destroy a record or other thing that the subject may need to produce under the warrant or cause another person to do so.

180. If the threshold is met and the warrant authorises apprehension, a police officer is authorised to apprehend the subject to immediately bring them before the prescribed authority for questioning.

181. A note at the end of subsection (2) informs the reader that subsection 34C(2) provides that a policer officer may also apprehend the subject of a questioning warrant if the subject makes certain representations. The power to apprehend under section 34C(2) does not require the warrant to include an authorisation to apprehend.

*Warrant may authorise seizure of certain records or other things found during search*

182. New subsection 34BE(3) provides that the questioning warrant may authorise the seizure items found during a person search for the purposes of intelligence collection. The subsection relevantly provides that if the Attorney-General is satisfied that it is reasonable and necessary in the circumstances, a questioning warrant may provide that a police officer, in conducting a search under section 34CC, may also seize items found that the officer reasonably believes are relevant to the collection of intelligence that are important in relation to a minor or adult questioning matter (as the case may be).



183. The meanings of an *adult questioning matter* and *minor questioning matter* are defined in section 34A which, in effect, means a matter in relation to a questioning warrant issued under section 34BA or section 34BB.
184. In practice, a police officer will typically seize communication devices and dangerous weapons found during the search of the subject in connection to the questioning warrant. The police officer will also be able to seize items (including a communication device, or dangerous item) of intelligence relevance, where authorised by the Attorney-General in the questioning warrant.
185. The ability to search for, and seize, items relevant to the collection of intelligence is required to mitigate the risk of an apprehended person destroying or failing to produce such items. Requiring the Attorney-General to authorise such action provides a safeguard on the use of search powers for intelligence collection. For example, there may be situations where intelligence indicates that the subject of a warrant usually carries an item of intelligence value, and there is a risk that the item may be destroyed when they are made aware of the warrant. The Attorney-General may then choose to authorise the search and seizure of that item on the basis that, in the circumstances, this is necessary to ensure that the items are not destroyed before the person appears before the prescribed authority.

*Warrant may request production of records or things*

186. New subsection 34BE(4) provides that a questioning warrant may specify records or things, or classes of records or things which the subject of the warrant is required to produce when before a prescribed authority. In order to authorise this, the Attorney-General must be satisfied that the records or other things (whether specifically mentioned records or other things, or classes of records or other things) are, or may be, relevant to the gathering of intelligence that is important in relation to a questioning matter.
187. It is intended that this subsection will expedite the intelligence gathering process where it is known that the subject has particular records or things which would otherwise be requested to be produced when the subject appears before the prescribed authority for questioning. This will ensure the subject brings these items to questioning, and will prevent any unnecessary delays, such as the questioning being deferred in order for the subject to retrieve the records or other things.

*Warrant may require immediate further appearance etc.*

188. New subsection 34BE(5) sets out the criteria for when a warrant may authorise a further immediate appearance requirement in order to continue questioning the subject. For the warrant to require further immediate appearance, the Director-General must apply to the Attorney-General under new section 34BG to vary the warrant.
189. The warrant may authorise the subject's further immediate appearance if the following matters exist:
- the questioning warrant is already in force;

- the subject has already appeared before a prescribed authority for questioning;
  - the subject has not been questioned longer than the permitted questioning period, or, if applicable, the extra permitted questioning period; and
  - the Attorney-General is satisfied that it is reasonable and necessary in the circumstances (for the subject to be required to immediately appear in order for questioning to continue).
190. The warrant may be varied to require the subject to further appear before the prescribed authority for questioning immediately despite a direction by the prescribed authority under paragraph 34DE(1)(e) in relation to the subject's further appearance. That is, where the prescribed authority has given a direction for the subject to return for questioning in three days' time, the warrant may still be varied to require the subject to appear before the prescribed authority at an earlier time than directed by the prescribed authority.
191. A *permitted questioning period* is defined in section 34A and has the meaning given by subsection 34DJ(2), which is eight hours, or if the pre-requisite criteria is satisfied, extended by the effect of subsections 34DJ(3) and (4), for a total of 24 hours. An *extra permitted questioning period* is defined in section 34A and has the meaning given in subsection 34DK(3), which is 24 hours, or if the pre-requisite criteria is satisfied, extended by the effect of subsections 34DK(4) and (5) up to a total of 40 hours. The extra permitted questioning period applies where an interpreter has been present for the subject at any time during the questioning.
192. New subsection 34BE(6) provides that where the Attorney-General has considered it reasonable and necessary to vary the warrant to include a requirement for the further immediate attendance of the subject, the warrant may also authorise the apprehension of the subject by a police officer to immediately bring them before the prescribed authority for questioning. In order to authorise apprehension in these circumstances, the Attorney-General must be satisfied there are reasonable grounds for believing that the subject of the warrant is likely to:
- alert a person engaged in an activity prejudicial to security that the activity is being investigated; or
  - not comply with the further immediate appearance requirement; or
  - either destroy, damage or alter a record or other thing they are required or may be required to produce, or cause another person to destroy, damage or alter a record or other thing that they are required or may be required to produce.
193. The intent of subsections 34BE(5) and (6) is to provide an ability to require the subject to return for questioning earlier than directed by a prescribed authority in circumstances where ASIO obtains intelligence that the subject may be engaging in conduct or activities that would prejudice the questioning warrant. Such conduct may include making travel arrangements that would prevent the subject from appearing as directed

by the prescribed authority, destroying records that were requested to be produced or tipping other people off about ASIO's interest in the particular matter.

### **Section 34BF – Requirements for questioning warrant**

194. New section 34BF provides the administrative requirements for written and oral warrants.
195. New subsection 34BF(1) provides that a questioning warrant may be issued either by a written document signed by the Attorney-General, or orally. A questioning warrant may only be issued orally where the Attorney-General reasonably believes that the delay caused by issuing a written warrant may be prejudicial to security.

#### *Requirements for written warrants*

196. New subsection 34BF(2) provides that where a questioning warrant is issued by a written document, the warrant must specify what the warrant authorises and any relevant conditions or restrictions. This includes the authorisation to question a subject, including the ability to require them to attend immediately or at a specified time and to require them to provide information, records or things. It must also include whether any of the following has been authorised; immediate attendance, apprehension, seizure of items relevant to intelligence collection, production of specified records or other things, further immediate appearance and further apprehension. Finally, the written record must also include the duration for which the warrant is in force.

#### *Requirements for oral warrants*

197. New subsection 34BF(3) provides that where a questioning warrant is issued orally, a written record must be made which contains the matters in subsection 34BF(2). The Director-General must cause a written to be made as soon as practicable, but no later than 48 hours after the warrant is issued.

#### *Duration of warrant*

198. New subsection 34BF(4) provides that a questioning warrant may remain in force for a maximum of 28 days. It is a requirement for the written document or written record of a warrant to specify the period the warrant is to be in force.

#### *Issue of further warrants not prevented*

199. New subsection 34BF(5) provides that the issue of further warrant is not prevented by subsection 34BF(4).

#### *Written warrants and records not legislative instruments*

200. New subsection 34BF(6) provides that the following are not legislative instruments:
- a questioning warrant issued by means of a written document signed by the Attorney-General; and
  - a written record made under new subsection 34FB(3), being a written record of an orally issued questioning warrant.

201. This is consistent with Item 15 of the table in regulation 6 of the *Legislation (Exemption and Other Matters) Regulation 2015*, which provides that a warrant and an instrument supporting an application for a warrant are not legislative instruments.

### **Section 34BG – Variation of questioning warrant**

202. The purpose of this section is to provide an ability for a questioning warrant to be varied. The procedure replicates the procedural framework to request, approve and issue a questioning warrant as set out in sections 34B, 34BA and 34BB.

#### *Request for variation*

203. New subsection 34BG(1) provides the authority for the Attorney-General to vary a warrant on request by the Director-General.
204. New subsection 34BG(2) replicates subsection 34B(2), which in effect provides for a request to be in writing or, where it would be prejudicial to security to make the request in writing, orally.
205. New subsection 34BG(3) requires the request to provide the facts and other grounds on which the Director-General considers it necessary that the warrant should be varied.

#### *Requirements for oral requests*

206. New subsection 34BG(4) requires the Director-General to notify the IGIS of an oral request for variation of a warrant. This must occur either before or as soon as practicable after the request has been made. This subsection ensures the IGIS can effectively carry out oversight of questioning warrants.
207. New subsection 34BG(5) requires a written record to be made of an oral request and details the matters that must be included in the written record. This subsection mirrors the requirements set out in subsection 34B(4) in the context of a request to vary a warrant.

#### *Issue of variation*

208. New subsections 34BG(6) and (7) set out the manner by which a variation to a questioning warrant may be issued by the Attorney-General. Subsection 34BG(6) replicates how a warrant may be issued as set out in subsection 34BF(1). When a variation is issued orally, new subsection 34BG(7) provides that the Director-General must cause written record of the variation to be made as soon as practicable, but no later than 48 hours after the variation is issued. The intent of this requirement is to facilitate the record keeping of administrative decisions, accountability in decision-making and effective oversight.

#### *Limits on variations*

209. New subsection 34BG(8) provides that where a variation extends or further extends the period of time the warrant is in force, the total extended period of time cannot be longer than 28 days. The limit of 28 days is set by the operation of subsection 34BF(4).

*Warrants may be varied more than once*

210. New subsection 34BG(9) sets out that a warrant may be varied more than once.

*Written variations and records are not legislative instruments*

211. New subsection 34BG(10) provides that the following are not legislative instruments:

- a written variation of a warrant signed by the Attorney-General; and
- provides that a written record made under subsection 34BG(7), that is a written record of an orally issued variation to a questioning warrant.

212. This is consistent with the Item 15 in the table in regulation 6 of the *Legislation (Exemption and Other Matters) Regulation 2015*, which provides that a warrant, an application for a warrant or an instrument supporting an application for a warrant is not a legislative instrument

### **Section 34BH - Notification requirements in relation to questioning warrants**

213. New section 34BH requires the Director-General to provide a written notice to the subject of a questioning warrant where the Attorney-General issues a questioning warrant. The notice acts as a safeguard for the subject of a warrant as it informs the subject of their rights and obligations in respect of the questioning warrant.

214. New subsection 34BH(1) provides that the section applies where the Attorney-General has issued a questioning warrant. That is, the requirement to notify a subject of a questioning warrant only arises where the Attorney-General has issued the questioning warrant.

215. New subsection 34BH(2) provides a detailed list of matters which must be contained in the notice. These are:

- the existence of the warrant;
- the place, time and date the subject is required to attend questioning (which may be ‘immediately’ upon being provided with the notice);
- that the subject is able to contact a lawyer at any time;
- if it is a minor questioning warrant, that the subject may contact a minor’s representative at any time and may only be questioned in the presence of a minor’s representative;
- the subject’s obligations to give information and produce records or things;
- the subject’s secrecy obligations, including permitted disclosures; and
- the subject’s right to make complaints and seek remedies.

216. The intention of the notice is to ensure that the subject is fully aware of their obligations and rights under a questioning warrant. The notice should ensure that the subject understands what they may and may not do in connection with the questioning warrant, such as who they may contact and what matters they may disclose.

217. New subsection 34BH(3) provides that where the warrant is varied before the subject is given the notice of the warrant, the notice only need to contain details of the warrant as varied. This ensures that the subject is not being provided with information that is no longer accurate, such as the location of questioning or the time that the subject is required to attend questioning.
218. New subsection 34BH(4) provides that where the warrant is varied after the subject is given notice of the warrant and the variation impacts the subject's obligations or the information provided under the original notice, then the subject must be given a notice of the variation and the effect of the variation on the subject's obligations under the warrant.
219. New subsection 34BH(5) provides that if the warrant is revoked after the subject is given notice of the warrant, the subject must be given written notice of the revocation including the fact that they are no longer required to appear before a prescribed authority for questioning, the effect of their secrecy obligations and their right to contact a lawyer in relation to the warrant at any time. The intention of this subsection is to ensure that a subject is aware they are no longer required to attend, but that secrecy obligations flow on from the questioning warrant and that they may still seek legal advice in relation to the revoked questioning warrant.

### **Subdivision C – Apprehension and search powers etc.**

220. Subdivision C of the Bill introduces apprehension and search powers for a police officer exercising authority under a questioning warrant. This subdivision also provides for the seizure of certain items found during a search, and provides ASIO with the power to remove, retain and copy certain items.

### **Section 34C – Police officer may apprehend subject of questioning warrant in certain circumstances**

221. New section 34C provides for the apprehension of the subject of a questioning warrant in certain circumstances by a police officer in order to bring the subject immediately before the prescribed authority for questioning under the warrant.
222. Under new subsection 34C there are three circumstances in which a person may be apprehended in relation to the execution of a questioning warrant. These are:
- where the questioning warrant expressly authorises apprehension of the subject;
  - where the questioning warrant includes an immediate appearance requirement, (but does not expressly authorise apprehension) and the person makes certain representations; and
  - where a subject fails to appear before a prescribed authority when required to do so.
223. Where a police officer apprehends the subject of a questioning warrant under this section, the person will be taken into temporary custody by the police officer in order to

transport the person immediately (without unnecessary delay) to the place where questioning is to occur. The period of apprehension will end when the subject is before the prescribed authority for questioning under the warrant. At this point, the person will be subject to the offences in the Act for failing to give any information requested in accordance with the warrant.

224. For example, where apprehension is authorised, the period of apprehension will likely begin when the person is served with the notice under section 34BH. The duration of apprehension will likely span the time it takes to search the person, if necessary, and transport the person to the place of questioning. The period of apprehension will end when the subject is before the prescribed authority for questioning.
225. Practically speaking, a police officer will only be able to apprehend a subject where the prescribed authority will be ready for questioning to commence when the subject arrives before the prescribed authority. If questioning will not be ready to begin when the subject appears before the prescribed authority, the police officer would be unable to apprehend the subject.

*Apprehension where authorised by warrant*

226. New subsection 34C(1) provides that, if a questioning warrant authorises the apprehension of a person, a police officer may apprehend that person in order to bring them before a prescribed authority for questioning, in accordance with the warrant. The police officer must bring the person to the prescribed authority immediately (without unnecessary delay).
227. The Attorney-General may only issue a warrant authorising apprehension if the warrant includes an immediate appearance requirement and the Attorney-General is satisfied of the matters in new subsection 34BE(2) (namely that it is reasonable and necessary in the circumstances for the warrant to include this requirement, and that there are reasonable grounds for believing the subject is likely to alert a person, the subject is likely to not appear, or the subject is likely to destroy, damage or alter, or cause another person to destroy, damage or alter certain records or things). This is explicitly set out in the note following the subsection.

*Apprehension where certain representations made*

228. New subsection 34C(2) provides for a subject to be apprehended in circumstances where the questioning warrant does not expressly authorise apprehension of the subject, if the subject makes certain representations. If the relevant questioning warrant includes an immediate appearance requirement, but the warrant does not authorise apprehension, then, at the time of providing the subject with the notice under section 34BH, a police officer may apprehend the subject if the subject makes a representation that they intend to:
- alert a person that an activity prejudicial to security is being investigated; or
  - not appear before the prescribed authority; or

- destroy, damage or alter, or cause another person to destroy, damage or alter, a record or other thing the person has been or may be requested in accordance with the warrant to produce.
229. For example, this might occur where the police officer serves a notice at a time when the subject is in possession of security relevant records or things, and while still in the presence of the officer the subject takes steps to destroy those records or things.
230. This subsection only permits a police officer to apprehend a subject while the police office is before the subject for the purposes of serving the notice of the warrant. The power ends at the time the subject appears before a prescribed authority for questioning.

#### *Apprehension where person fails to appear*

231. New subsection 34C(3) provides that a police officer may apprehend a subject if a person fails to appear before a prescribed authority and the person is required to appear either:
- by a warrant, or
  - by a direction given by the prescribed authority under subsection 34DE(1).
232. This section reflects power in the existing framework under subsection 34K(7). The power to apprehend where a subject has failed to appear for questioning applies regardless of whether the warrant authorises apprehension or contains an immediate appearance requirement.

#### *Definitions*

233. Section 34C(4) provides clarification around how a subject can make a ‘representation’. It states that for the purposes of the section a ‘representation’ includes an express or implied representation, made either orally or in writing, a representation that is inferred from conduct, a representation that is not intended by its maker to be communicated to or seen by another person or a representation that for any reason is not communicated.

#### **Section 34CA – Entering premises to apprehend subject**

234. New section 34CA largely reflects existing section 34U and provides that, if a police officer is authorised to apprehend a person and the officer believes on reasonable grounds that the person is on particular premises the officer may enter for the purpose of searching the premises for the subject or apprehending the subject. This section authorises the officer to exercise this power at any time of day or night. The section also provides that, in entering the premises, a police officer may use such force as is necessary and reasonable in the circumstances. For example, this would allow an officer to force open a door in order to enter premises to apprehend a person in accordance with a properly issued questioning warrant.
235. New section 34CA does not include an equivalent of current subsection 34U(2), which restricts the times at which a police officer may enter a dwelling house to apprehend a person. Existing section 34U provides that a police officer must not enter a dwelling



house between 9pm on a day and 6am the following day, unless it would not be practicable to take the person into custody at another time. This time restriction on entry to premises will not apply under section 34CA.

236. This change reflects the limited circumstances in which apprehension is permitted. The only purpose of apprehension is to bring a person immediately before questioning. Excluding the circumstances in subsection 34C(3), in order for a person to be apprehended, the relevant questioning warrant must include an immediate appearance requirement. In order for a questioning warrant to include an immediate appearance requirement, the Attorney-General must be satisfied that it is reasonable and necessary in the circumstances. This requires the Attorney-General to turn his or her mind to the question of whether it is reasonable and necessary in the circumstances for the person to be required to attend questioning immediately at the time specified in the warrant. If it is reasonable and necessary that a person be immediately brought for questioning at a time between 9pm and 6am, then it is appropriate that the police officer apprehending the subject is able to exercise all of the powers available to him or her in bringing the person immediately before a prescribed authority. Similar reasoning applies in relation to subsection 34C(3), which permits apprehension where a person has not appeared for questioning and provides for the subject to be immediately brought for questioning at that time. In those circumstances it is not appropriate to time-limit the powers of police to apprehend the person.

#### **Section 34CB – Communications while apprehended**

237. New section 34CB reflects current subsections 34K(10) and 34K(11) and sets out restrictions on a subject's ability to contact other persons during the period of apprehension. These restrictions only last in the period between a subject being apprehended by police and the subject appearing before a prescribed authority. If a subject is being apprehended it is because they may have critical information concerning matters of important in relation to security, and because there is a risk that they may not attend questioning, may alert another person, or may destroy security relevant records or other things, or cause someone else to destroy those records or other things. As such, permitting a person to contact others during the course of apprehension would frustrate the purpose of apprehension.
238. For clarity, apprehension ends once the subject of the warrant is brought before the prescribed authority (who has the power to issue directions).
239. New subsection 34CB(1) provides that a subject who is apprehended is not permitted to contact, and may be prevented from contacting, anyone at any time from when the subject is apprehended until the subject appears before a prescribed authority for questioning.
240. New subsection 34CB(2) sets out the exceptions to the restrictions on communication contained in new subsection 34CB(1). New paragraph 34CB(2)(a) provides that, the subject may contact a lawyer, and, if the warrant is a minor questioning warrant, a minor's representative. Despite subsection 34CB(1), the subject may also contact

anyone whom the relevant questioning warrant, or a direction made by the prescribed authority under new paragraph 34DE(1)(b) permits the subject to contact. For example, if the warrant specifies that the subject may contact a specific person, then subsection 34CB(1) does not prevent the subject from contacting that specific person while apprehended.

241. New paragraph 34CB(2)(b) provides that subsection 34CB(1) does not affect the subject's right to communicate with the IGIS (if the person wishes to make a complaint about ASIO), the Ombudsman (if the person wishes to make a complaint about the Australian Federal Police or other relevant complaints agency (in relation to the police force of the relevant State or Territory)).
242. New paragraph 34CB(2)(c) provides that, if the subject requests, the officer apprehending the subject must give the subject facilities to contact a lawyer, minor's representative or person specified the warrant or in a direction. The officer must also give the subject facilities to contact, and make an oral complaint (or give oral information if relevant) to, the IGIS, the Ombudsman, the Commissioner of the Australian Federal Police, or the respective complaints agency in relation to the police force or service of the relevant State or Territory.
243. Practically speaking, it is likely that a police officer would facilitate contact permitted under this section by providing the subject with a mobile phone. For example, where the subject requests to contact the IGIS, the police officer would provide the subject with a phone that contains the IGIS' number.

### **Section 34CC – Power to conduct search of apprehended subject of questioning warrant**

244. New section 34CC sets out a police officer's powers to search a subject, who has been apprehended, and seize certain items under a questioning warrant.
245. New subsection 34CC(1) specifies that the powers in section 34CC apply where there is a questioning warrant in force and the subject of the warrant is apprehended in connection with the warrant.
246. New subsection 34CC(2) authorises a police officer to conduct an ordinary search or a frisk search of a subject of a questioning warrant during the period of apprehension. The subsection provides that this power can be exercised at any time between the time when the subject is apprehended and when the subject appears before a prescribed authority. A search is expressly permitted during the period of apprehension and therefore does not amount to unnecessary delay. This means that where a subject is searched while apprehended, the subject will still have been brought to the place of questioning immediately.
247. New subsection 34CC(3) requires that, if practicable, a search must be conducted by a police officer of the same sex as the subject.

### *Records or other things found during search*

248. New subsections 34CC(4) and (5) set out the circumstances in which items found during a search may be seized. Specific powers to deal with seized items are contained in new subsection 34CE.
249. New subsection 34CC(4)(b) relates to the seizure of ‘seizable items’ and ‘communication devices’. ‘Seizable item’ is defined in section 4 of the ASIO Act to mean ‘anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody’. ‘Communication device’ is defined broadly in new subsection 34A to mean ‘a device that a person may use to communicate information to another person or a surveillance device (within the meaning of Division 2)’. This could include, among other things, a phone, a laptop or any other smart device, as well as covert recording equipment.
250. New subsection 34CC(4) provides that, if a seizable item or a communication device is found during a search of the subject, the item may be seized. If an item is seized under subsection 34CC(4), it must be dealt with, by police officers, in accordance with new subsections 34CE(3) and (4).
251. Subsection 34CC(5) relates to the seizure of items for intelligence collection purposes. New paragraph 34CC(5)(b) provides that a police officer may seize an item if reasonably satisfied that the item is relevant to the collection of intelligence that is important in relation to a questioning matter (an item relevant to intelligence). New paragraph 34CC(5)(c) provides that an item may only be seized for intelligence collection purposes if the warrant authorises the seizure of such items (pursuant to subsection 34BE(3)).
252. The provisions for dealing with a seized item in section 34CE differ depending on whether an item is seized under subsection 34CC(4) or subsection 34CC(5). It is possible that a communication device or a seizable item could be seized under either of these sections. It is intended that a police officer will identify the relevant subsection under which an item is being seized at the time of seizing the item. The effect of seizing a device under each of these subsections is set out in detail below in relation to new section 34CE.
253. New subsection 34CC(6) clarifies that despite subsection 34CC(4) a seizable item or communication device is seized under subsection 34CC(5) if the item or device is found during a search of the subject under a questioning warrant by the police officer conducting the search, and where the requirements in paragraphs 34CC(5) (b) and (c) are met.

### **Section 34CD – Use of force in apprehending or searching subject**

254. New section 34CD reflects existing section 34V, which provides for the use of force by police officers.
255. New paragraph 34CD(a) authorises a police officer to use such force as is necessary and reasonable whilst apprehending the subject of a questioning warrant to bring them

immediately before a prescribed authority or preventing the escape of the subject from apprehension.

256. New paragraph 34CD(b) authorises a police officer to use such force as is necessary and reasonable in conducting an ordinary search or a frisk search of a subject.

### **Section 34CE – Power to remove, retain and copy materials etc.**

#### *Powers of the Organisation*

257. New section 34CE sets out the powers of both ASIO and police officers to remove, retain and copy:

- any records or other things produced under the warrant; and
- any items seized under subsections 34CC(4) or (5).

258. New subsections 34CE(1) and (2) outline ASIO's powers to deal with relevant records, things or items.

259. New subsection 34CE(1) reflects existing subsection 34ZD(1) and 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 other thing produced before a prescribed authority for the purposes of inspecting, examining and (in the case of a record) making copies or transcripts of the record;
- to retain any record or other thing seized under new subsection 34CC(5) for the purposes inspecting, examining and (in the case of a record) making copies or transcripts of the record; and
- to do any other thing reasonably incidental to the above or to do any of the things that ASIO is authorised to do that are specified in the warrant.

260. For the avoidance of doubt, this section explicitly provides the scope for what ASIO may do with any record or other thing that is either produced before the prescribed authority or seized as a result of a search under section 34CC. Those actions are limited to retaining, inspecting, examining, making copies or anything incidental to those actions.

261. The power to do anything reasonably incidental to the things ASIO is authorised to do in the warrant reflects existing paragraph 34ZD(1)(d) and is consistent with several of ASIO's other warrant powers (see for example, paragraphs 25A(4)(d), 26B(1)(h), 26B(2)(d), 26B(3)(e), 26B(4)(h), and 26B(5)(k) among others).

262. New subsection 34CE(2) specifies the time for which things retained under paragraphs 34CE(1)(a) or (b) may be retained. Paragraph 34CE(2)(a) provides that, if returning the thing would be prejudicial to security, the item may only be retained until returning the thing would no longer be prejudicial to security. In all other cases, paragraph 34CE(2)(b) applies and the thing may only be retained for such time as is reasonable.

### *Powers of police officers*

263. New subsections 34CE(3) and (4) outline police officers' powers to deal with relevant records, other things or items.
264. Subsection 34CE(3) provides that a police officer may retain a seizable item seized by a police officer under subsection 34CC(4) for such time as is reasonable.
265. Subsection 34CE(4) applies specifically to communication devices seized under subsection 34CC(4) or retained under subsection 34CE(3). A police officer may retain any such device until returning it would no longer be prejudicial to security to do so. In other cases, the police officer may only retain it for such time as the prescribed authority considers reasonable. If there is a risk that the subject may alert a person that a questioning matter is being investigated and the alerting would be prejudicial to security, then the device should not be returned during breaks.
266. It is possible that an item may be both a communication device and an item relevant to intelligence. This means it could be seized under either of subsection 34CC(4) or subsection 34CC(5). New subsection 34CC(6) addresses this by clarifying that if such an item could be seized under either subsection, then it will be taken to have been seized under subsection 34CC(5). If the device is seized pursuant to subsection 34CC(5), the following will apply:
- ASIO will be permitted to examine the device (paragraph 34CE(1)(a));
  - ASIO will be permitted to retain, and make copies of, the device (paragraph 34CE(1)(a));
  - ASIO will be permitted to do anything reasonably incidental to examining, retaining and making copies of the device (paragraph 34CE(1)(b)); and
  - ASIO may retain the device until returning the device would no longer be prejudicial to security, or for such time as is reasonable (subsection 34CE(2)).
267. If a communication device is seized under subsection 34CC(4), a police officer may retain the device until returning the device would no longer be prejudicial to security, or only for such time as the prescribed authority considers reasonable (subsection 34CE(4)).

### **Subdivision D – Matters relating to questioning under questioning warrants**

268. Subdivision D introduces new security arrangements to ensure the safety of those involved in questioning and ensure the integrity of questioning. Subdivision D also sets out matters pertinent to the conduct of questioning, such as directions, complaints, duration of questioning and interpreters.

### **Section 34D – Screening of persons**

269. New section 34D enables a police officer to request a person who seeks to enter a place where the subject of a questioning warrant is appearing, or due to appear for questioning, to undergo a screening procedure. The section also provides for the ability

of a police officer to retain dangerous items and communication devices for specified periods and to refuse entry of persons who do not comply with requests made by a police officer under this section. The purpose of this section is to ensure the safety of those involved in questioning and prevent the transmission of sensitive information disclosed during questioning by preventing the possession of dangerous items or communication devices at the questioning place.

270. New subsection 34D(1) provides that the section will apply in relation to a person who is seeking to enter a place where the subject of a questioning warrant is appearing, or is due to appear, before a prescribed authority for questioning under a warrant. This is not limited to the subject of a questioning warrant, and applies to any person involved in the questioning process. For example, this section applies to any person seeking to enter questioning as a minor's representative.
271. The note below subsection 34D(1) clarifies that the section applies to any person seeking to enter a questioning place, including the subject.

*Persons may be screened or searched*

272. New subsection 34D(2) gives a police officer the power to request a person to undergo a screening procedure. The police officer may request the person to produce a thing in the person's possession for inspection or examination, including anything worn or carried by the person that can be conveniently removed by the person. This may include requesting the person to remove any items from his or her pockets, or produce items held in an item of baggage for inspection.
273. Under new paragraph 34D(2)(c) a police officer may, where the police officer suspects on reasonable grounds that it is prudent to conduct the search, request the person to undergo an ordinary search or frisk search to ascertain whether the person is carrying a dangerous item or a communication device.
274. New subsection 34D(3) states the ordinary search or frisk search must if practicable be conducted by a police officer of the same sex as the person.
275. New subsection 34D(4) provides that a police officer may request that a person remove a thing in the person's possession, including anything worn or carried by the person that can be conveniently removed by the person, for the purpose of conducting a screening procedure or search. This may include requesting the person to remove items of outer clothing, including an overcoat, coat or jacket and any gloves, shoes or a hat.
276. Police officers are not expressly authorised to use force in the conduct of an ordinary or frisk search as part of screening persons under this section. This is unnecessary because unlike other search powers under this Division, these searches must be conducted on a voluntary basis.

*Certain items may be retained*

277. New subsections 34D(5) to (8) outline how items found by a police officer during an ordinary search or frisk search are to be retained. Before entering the questioning place, a police officer may request a person to give dangerous items or communication

devices to the officer for safekeeping whilst the questioning is being conducted. This ensures the safety of those involved in questioning, and protects information disclosed during questioning by preventing anyone present from recording or otherwise communicating proceedings.

278. New subsection 34D(6) allows dangerous items given to a police officer under subsection 34D(5) be retained by the police officer for such time as is reasonable.
279. New subsection 34D(7) allows any communication devices given to the police officer to be retained by the officer if returning the device would be prejudicial to security—only until returning the device would no longer be prejudicial to security, and otherwise, for only such time as the prescribed authority before whom the subject is appearing for questioning considers reasonable.
280. New subsection 34D(8) provides that any communications device given to a police officer under subsection 34D(5) by a person other than the subject must be returned to the person requesting the device if the person requests the officer to return the device, and at the time of the request, the person has left the questioning place.

*Person may be requested to answer questions about things*

281. New subsection 34D(9) provides that a police officer may request a person to answer reasonable questions about a thing that in the possession or control of a person while the person undergoes a screening procedure in accordance with paragraph 34D(2)(a), produced by a person for inspection or examination in accordance with paragraph 34D(2)(b), removed by a person in accordance with subsection 34D(4), or given by a person to a police officer for safekeeping in accordance with subsection 34D(5).

*Power to refuse entry*

282. New subsection 34D(10) gives a police officer the power to refuse a person entry to a questioning place if the police officer has made a request of the person under the section, and the person does not comply with the request. This subsection is necessary to ensure that dangerous items or communication devices are not taken into the questioning place.
283. The note below subsection 34D(10) provides that where the subject of a questioning warrant fails to comply with a request from a police officer under the section the person will be taken to have failed to appear and will commit an offence under section 34GD(2).

*Exceptions*

284. New subsection 34D(11) provides that this section does not apply where a communication device is in the possession of an ASIO employee or affiliate, or a police officer, or where a dangerous item is in the lawful possession of a police officer.

### **Section 34DA – Prohibition on possessing certain things during questioning**

285. New subsection 34DA imposes a prohibition on possessing a communication device or a dangerous item when the subject is appearing for questioning.
286. New subsection 34DA(1) provides that the section applies in relation to any person (including the subject) who is at a place where the subject of a questioning warrant is appearing before a prescribed authority for questioning under the warrant.
287. New subsection 34DA(2) states the person must not possess either a communication device or a dangerous item while appearing for questioning.
288. New subsection 34DA(3) states the section does not apply in relation to a communication device that is in the possession of an ASIO employee or affiliate, or a police officer. The section will also not apply to a dangerous item that is in the lawful possession of a police officer. This subsection further provides that a communication device or dangerous item in the possession of the subject is not subject to the prohibition if the device or item has been seized under section 34CC, or retained under section 34CE or 34D and the device or item is returned to the subject solely for the purpose of complying with a request made by the Organisation in accordance with the warrant.

### **Section 34DB – Questioning under a questioning warrant**

289. New section 34DB is intended to provide ASIO under that Act with the power to question a person under questioning warrant who has been charged with an offence and to ask questions about the subject matter of the offence.
290. New subsection 34DB(1) specifically provides that questioning under a questioning warrant may take place pre-charge, post-charge, pre-confiscation application or post-confiscation application.
291. New subsection 34DB(2) is a severability clause.
292. New paragraph 34DB(2)(a) allows for paragraph 34DB(1)(a) to be read down so as only to authorise pre-charge questioning.
293. New paragraph 34DB(2)(b) allows for paragraph 34DB(1)(b) to be read down so as only to authorise pre-confiscation application questioning.

### **Section 34DC – Prescribed authority must explain certain matters**

294. New section 34DC largely reflects existing section 34J but removes provisions relating to detention and makes certain other revisions to reflect changes to the questioning framework.
295. New subsection 34DC(1) requires a prescribed authority to inform a subject of the following when the subject first appears before the prescribed authority for questioning under the warrant:
- what the warrant authorises ASIO to do;
  - the period for which the warrant is in force;



- the circumstances in which the subject may be apprehended during the period the warrant is in force;
- the role of the prescribed authority, and specifically the prescribed authority's powers to supervise questioning and give directions;
- the subject's right to contact a lawyer in accordance with section 34F;
- the effect of section 34GD concerning requirements to give information and produce things (including the fact that the section creates offences);
- the effect of section 34GF concerning secrecy relating to warrants and questioning (including the fact that the section creates offences and allows the prescribed authority to permit certain disclosures to be made);
- the subject's right to apply to the Attorney-General for the provision of financial assistance under section 34JE;
- the subject's right to make a complaint to the IGIS in relation to ASIO, to the Ombudsman in relation to the Australian Federal Police, or to a relevant complaints agency in relation to a police force of a State or Territory;
- the subject's right to give information under Division 2 of Part V of the *Australian Federal Police Act 1979* to a person referred to under subsection 40SA(1) of that Act in relation to the Australian Federal Police; and
- the subject's right to seek a remedy from a federal court in relation to the warrant or their treatment under the warrant.

296. New subsection 34DC(2) clarifies that the requirement in subsection 34DC(1) does not apply if the subject has previously appeared before another prescribed authority for questioning under the same warrant.

297. New paragraph 34DC(3)(a) requires the prescribed authority to also inform the subject of the reason for the presence of each person present at any time during questioning. New paragraph 34DC(3)(b) requires that, at least once in every 24 hour period during which questioning occurs, the prescribed authority must inform the subject of the subject's right to seek a remedy from a federal court relating to the warrant or their treatment under the warrant.

298. New subsection 34DC(4) provides that, despite the requirement in paragraph 34DC(3)(a) to inform the subject of the reason for the presence of each person present during questioning, the prescribed authority must not name any person without the consent of that person. Subsection 34DC(4) further provides that the prescribed authority is only obliged to inform the subject about the reason for a particular person's presence once. If a person is present, and that person's presence is explained to the subject, there is no requirement to explain that person's presence to the subject a second time if that person leaves and returns later during questioning.

### **Section 34DD – Additional requirements for prescribed authorities in relation to minor questioning warrants**

299. New section 34DD provides additional safeguards where the subject of a warrant is a minor.
300. New subsection 34DD(1) provides that the section will apply where the subject of a minor questioning warrant appears before the prescribed authority for questioning.
301. New subsection 34DD(2) provides that, in addition to the requirements of section 34DC, the prescribed authority must, as soon as practicable, do the following:
- inform the subject that a lawyer must be present for the subject during questioning under the warrant;
  - direct any person proposing to question the subject under the warrant that questioning is to occur only when the lawyer is present;
  - inform the subject that the subject may request a representative (defined as a ‘minor’s representative’) who is not also a lawyer (non-lawyer representative) to be present during questioning;
  - if the subject requests a non-lawyer representative, give a direction under paragraph 34FD(2)(c) or (d) where the warrant includes an immediate appearance requirement or under paragraph 34FD(3)(c) or (d) where the warrant does not include an immediate appearance requirement;
  - if the subject chooses not to request the presence of a non-lawyer representative during questioning, give a direction under paragraph 34FD(2)(c) or subsection 34FD(4), as the case requires;
  - direct any person proposing to question the subject under the warrant that questioning is only to occur for continuous periods of two hours or less, separated by breaks directed by the prescribed authority.
302. New subsection 34DC(3) clarifies that even though questioning can only occur for continuous periods of two hours or less, this does not affect the operation of the permitted questioning period in section 34DJ or the additional permitted questioning time in section 34DK. It is intended that questioning under a minor warrant has the same permitted questioning time as other questioning warrants, it will however, be separated by more frequent breaks.

#### **Section 34DE – Directions while subject is before prescribed authority for questioning**

303. New section 34DE provides for the directions power of the prescribed authority during questioning.
304. New subsection 34DE(1) provides a non-exhaustive list of the directions that a prescribed authority may make, either orally or in writing, while the subject is appearing before the prescribed authority for questioning. These directions are:
- for the subject to make a disclosure of specified information to a specified person, in accordance with subsection 34GF(6);

- for the subject to contact an identified person, or any person, to disclose information other than specified information;
  - that a specified lawyer must be present while the subject is before the prescribed authority for questioning, in accordance with paragraph 34FB(2)(a) or paragraphs 34FC(2)(a) or (3)(b);
  - to defer questioning of the subject;
  - to provide for the subject's further appearance before the prescribed authority under the warrant, or for the subject to be excused or released from further attendance at questioning.
305. The note under subsection 34DE(1) provides that a questioning warrant may be varied to require the subject's further appearance before the prescribed authority at an earlier day and time than that specified in a direction given by the prescribed authority under the section.
306. New subsection 34DE(2) limits prescribed authority direction powers to directions which are consistent with the warrant. There are two exceptions to this limitation. First, where the direction is necessary to satisfy a concern of the IGIS raised under new section 34DM, and the prescribed authority is satisfied that giving the direction is necessary. Second, where the Attorney-General has approved the direction in writing.
307. New subsection 34DE(3) requires the prescribed authority to give a direction when a person exercising authority under the warrant requests in accordance with the warrant, to return an item to the subjects possession and control for only such time is necessary for the request. This section ensures the subject can give the prescribed authority any information or produce any record or thing, even if it is in the possession of a police officer under sections 34CC, 34CE or 34D, in order to comply with a request by a person exercising authority under the warrant.
308. New subsection 34DE(4) provides that any direction given under new subsection 34DE(1) or 34DE(3) can be varied or revoked by the prescribed authority.

### **Section 34DF – Directions in relation to confidentiality**

#### *Prohibition or limitation on use or disclosure*

309. New section 34DF sets out a prescribed authority's power to issue a direction to ensure the confidentiality of questioning material. It is an offence under new subsection 34GE(4) to contravene a confidentiality direction.
310. Subsection 34DF(1) requires a prescribed authority in certain circumstances to give a direction that questioning material must not be used or disclosed or may only be used by, or disclosed to, specified persons in specified ways or on specified conditions. There are two circumstances when a prescribed authority is required to make such a direction.
311. The first is where the failure to make the direction (or make it in such a way) might prejudice a person's safety.

312. The second circumstance is where the failure to make the direction (or make it in such a way) would reasonably be expected to prejudice the subject's fair trial. This obligation only applies where:
- the subject has been charged with an offence (or such a charge is imminent), and
  - that offence is a 'related offence' (that is, the subject matter of the questioning relates to the subject matter of the offence).
313. The threshold that material 'would reasonably be expected' to prejudice is intended to clarify that a prescribed authority is not required to make a direction to protect against unforeseeable risks that disclosure or use may prejudice the subject's fair trial. The court's power to manage any risk to the subject's fair trial will ensure that any unforeseeable risks will be appropriately mitigated.
314. For example, if the disclosure of certain questioning material to the prosecution of the subject would reasonably be expected to prejudice the subject's fair trial, the prescribed authority would be required to make a direction that the material cannot be used to inform the prosecution of the subject.
315. New subsection 34DF(2) sets out when a confidentiality direction may be made under subsection 34DF(1). Such a direction may only be made when the subject has not been excused or released from further attendance at questioning.
316. New subsections 34DF(3) and (4) limit the circumstances in which a confidentiality direction may be varied or revoked. New subsection 34DF(3) provides that, before a subject has been excused or released from further attendance at questioning, the prescribed authority may vary or revoke such a direction. After this point, the Director-General may vary or revoke a direction. New subsection 34DF(4) limits the variation and revocation power by specifying that neither the prescribed authority nor the Director-General may vary or revoke a direction if satisfied that the variation or revocation might prejudice a person's safety, or would reasonably be expected to prejudice the subject's fair trial.
317. New subsection 34DF(5) permits a court to override a confidentiality direction. Specifically, if a person has been charged with an offence before a federal court or a court of a State or Territory, and the court considers it may be desirable in the interests of justice that material subject to a confidentiality direction be available to the person charged (or their lawyer), the court may give the Director-General a certificate requiring the Director-General to make the material available to the court.
318. New subsection 34DF(6) applies where the Director-General has made information available to a court pursuant to a certificate under section 34DF(5). In those circumstances, the court has the power to make the material available to the person charged with the offence (or their lawyer), if satisfied that is required by the interests of justice.

### **Section 34DG – Direction that persons under 14 not be questioned**

319. New section 34DG requires the prescribed authority to make a direction not to question a subject where satisfied that the subject is under 14 years old.

### **Section 34DH – Other matters relating to the functions and powers of prescribed authorities**

320. New subsection 34DH(1) provides that a prescribed authority direction has effect, and may be implemented or enforced, according to its terms.

321. New subsection 34DH(2) clarifies the independence of the prescribed authority. It provides that a prescribed authority is not subject to direction by the Director-General or Attorney-General in relation to the prescribed authority's role, including the making of directions. The exception to this is where the Attorney-General has approved a direction under new paragraph 34DE(2)(b).

322. The notes below 34DH(1) and (2) emphasise that the prescribed authority must not give a direction that is inconsistent with the questioning warrant. There are exceptions in limited circumstances where the prescribed authority has been asked to do so by the IGIS and is satisfied giving the direction is necessary to address the concern satisfactorily, or the direction is approved in writing by the Attorney-General.

323. New subsection 34DH(3) further clarifies the independence of the prescribed authority by providing that a direction by a prescribed authority cannot be varied or revoked by the Director-General or Attorney-General. The exception to this is where the Director-General varies or revokes a confidentiality direction under new subsections 34BE(5) and 34DF(3).

### **Section 34DI – Complaints while appearing before prescribed authority for questioning**

324. New section 34DI reflects existing the safeguard in subsection 34K(9). It obliges a person exercising authority under a questioning warrant to give the subject facilities for making a complaint or giving information in certain circumstances. The obligation arises if, while appearing before the prescribed authority, the subject informs the prescribed authority that they would like to either make a complaint or apply for financial assistance and requests the facilities to do so. The prescribed authority would then make a direction to defer questioning, which enlivens the obligation of a person exercising authority under the warrant to give the subject facilities to make the complaint or request for financial assistance.

### **Section 34DJ – Permitted questioning time**

325. New section 34DJ applies when an interpreter is not present in accordance with section 34DN or 34DO while a subject is appearing for questioning. The note below

subsection 34DJ(1) provides for section 34DK to apply when an interpreter is present during questioning.

*Time for questioning*

326. New section 34DJ reflects existing section 34R. New subsection 34DJ(1) provides that the section applies if an interpreter is not present while the subject is appearing for questioning under the warrant.
327. New subsection 34DJ(2) provides that a subject cannot be questioned for longer than the permitted questioning period.
328. New subsection 34DJ(3) provides that the permitted questioning period is eight hours unless otherwise extended by the prescribed authority.

*Extension of time for questioning*

329. New subsection 34DJ(4) provides that where a subject has been questioned for less than eight hours, the prescribed authority may extend the permitted questioning period to 16 hours. This extension must be made just before the end of the initial eight hours. That is, the permitted questioning period can be extended when nearing the end of the eight hours, after consideration as to whether more time for questioning is required.
330. New subsection 34DJ(5) provides that where a subject has been questioned for more than eight hours, but less than 16 hours, the prescribed authority may extend the permitted questioning period to 24 hours. The extension must be made just before the end of the 16 hours. The permitted questioning period can be extended when nearing the end of 16 hours, after considering whether more time for questioning is required.
331. New subsection 34DJ(6) enables a person exercising authority under a questioning warrant to request that the prescribed authority extend the permitted questioning period. The subject, their lawyer, the minor's representative or any other person the subject is permitted to contact do not need to be present for this request.
332. New subsection 34DJ(7) provides the threshold that the prescribed authority must be satisfied of to extend the permitted questioning period. Questioning must have been conducted properly and without delay and there must be reasonable grounds for believing that the extension will substantially assist the collection of intelligence that is important in relation to an adult questioning matter if the warrant is an adult questioning warrant, or a minor questioning matter if the warrant is a minor questioning warrant. This subsection ensures that questioning can only be extended where the additional time will substantially assist the collection of intelligence.
333. New subsection 34DJ(8) enables the prescribed authority to revoke an extension of the permitted questioning period. If the prescribed authority revokes an extension period, it will not affect the legality of anything done under the warrant before the revocation. For example, where the prescribed authority extends the permitted questioning time from eight hours to 16 hours, the prescribed authority may revoke that extension after 12 hours of questioning. This revocation would not affect the legality of anything done under the warrant between eight hours and 12 hours.

### **Section 34DK – Extra permitted time if interpreter present**

- 334. This section enables the prescribed authority to extend the time for questioning where an interpreter is present at any time while the subject of a questioning warrant is appearing for questioning in accordance with section 34DN or 34DO.
- 335. New subsection 34DK(2) provides that the subject must not be questioned under the warrant by a person exercising authority under the warrant for longer than the extra permitted questioning period.
- 336. New subsection 34DK(3) provides that the extra permitted questioning period is 24 hours, or where the prescribed authority extends the period in accordance with subsection 34DK(4) or (5), that longer period.

#### *Extension of extra time for questioning*

- 337. New subsection 34DK(4) provides that where a subject has been questioned under the warrant for a total of less than 24 hours, and the prescribed authority is satisfied of matters in subsection 34DK(7), the prescribed authority may, just before the end of the 24 hours extend the extra permitted questioning period to 32 hours.
- 338. New subsection 34DK(5) provides that where the subject has been questioned under the warrant for more than 24 hours but less than 32 hours, and the prescribed authority is satisfied of matters in subsection 34DK(7), just before the end of the 32 hours the prescribed authority may extend extra permitted questioning period from 32 hours to 40 hours.
- 339. New subsection 34DK(6) states the person exercising authority under the questioning warrant may request the prescribed authority to extend the extra permitted questioning period in the absence of the subject of the warrant, the lawyer for the subject, a minor's representative or any other person the subject is permitted to contact.
- 340. New subsection 34K(7) permits the prescribed authority to extend the extra permitted questioning period only when the prescribed authority is satisfied the questioning of the subject was conducted properly and without delay, and there are reasonable grounds for believing the extension will substantially assist the collection of intelligence important to the questioning matter. This subsection ensures that questioning can only be extended where the additional time will substantially assist the collection of intelligence.
- 341. New subsection 34K(8) permits the prescribed authority to revoke the extension of the extra permitted questioning time without affecting the legality of anything done in relation to the subject under the warrant before the revocation.

### **Section 34DL Time that is not questioning time**

- 342. New subsection 34DL specifies time that should be disregarded when calculating the time that the subject of a questioning warrant has been questioning under the warrant. The following time is to be disregarded in making such a calculation:

- the time taken for the prescribed authority to fulfil the obligations in section 34DC and, if applicable, section 34DD;
- any time where the prescribed authority has deferred questioning in order for:
  - recording equipment to be changed;
  - the subject to make a complaint referred to in paragraph 34DC(1)(i);
  - the subject to give information referred to in paragraph 34DC(1)(j);
  - the subject to contact a lawyer or another person as permitted by the Division;
  - a lawyer to be present in accordance with a direction given under paragraph 34FB(2)(a) or 34FC(2)(a) or (3)(b);
  - the subject to receive medical attention;
  - the subject to engage in their religious practices;
  - the subject to rest or recuperate;
- any time for which questioning has been suspended as a result of an IGIS concern; and
- any other time determined by a prescribed authority that the subject is appearing before. For example, this may include the time where a prescribed authority has deferred questioning under paragraph 34DE(1)(d) where the lawyer of a subject has requested a copy of the warrant under section 34FE, or where a lawyer requests a break in order to provide advice under subsection 34FF(3).

**Section 34DM – Suspension of questioning etc. in response to concern of Inspector-General of Intelligence and Security**

343. New section 34DM reflects existing section 34Q and provides for the IGIS to request the suspension of questioning in certain circumstances.
344. New subsection 34DM(1) provides that the section will apply in cases where the IGIS is concerned about impropriety or illegality in relation to the exercise or purported exercise of powers under this Division in relation to the subject.
345. New subsection 34DM(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 as soon as practicable. The subsection rephrases existing subsection 34Q(2) for the purposes of clarity.
346. New subsection 34DM(3) requires the prescribed authority to consider the IGIS's concern.
347. New subsection 34DM(4) enables the prescribed authority to give directions suspending questioning or suspending the exercise of any other power under the warrant until satisfied that the IGIS's concern has been satisfactorily addressed.



### **Section 34DN – Interpreter provided at request of prescribed authority**

348. New section 34DN provides for an interpreter to be present at the request of the prescribed authority.
349. New subsection 34DN(1) provides that the section will apply if the subject is appearing before the prescribed authority for questioning under the warrant and the prescribed authority believes on reasonable grounds that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in English.
350. New subsection 34DN(2) provides that a person exercising authority under the warrant must arrange the presence of an interpreter.
351. New subsection 34DN(3) obliges the prescribed authority to defer informing the subject of the matters in section 34DC and, if applicable, section 34DD until the interpreter is present. It also obliges the prescribed authority to give a direction to defer the questioning of the subject under the warrant until the interpreter is present.

### **Section 34DO – Interpreter provided at request of subject**

352. New section 34DO provides for an interpreter to be present at the request of the subject.
353. New subsection 34DO(1) provides that the section will apply if the subject of a questioning warrant is appearing before a prescribed authority under a warrant requests the presence of an interpreter.
354. New subsection 34DO(2) obliges the prescribed authority to determine that an interpreter is to be present, unless the prescribed authority believes on reasonable grounds that the subject has an adequate knowledge of the English language to communicate with reasonable fluency or is physically able to communicate with reasonable fluency in English.
355. New subsection 34DO(3) provides that where a prescribed authority makes a determination under subsection 34DO(2) that an interpreter is to be present, a person exercising authority under the warrant must arrange for the presence of an interpreter.
356. New subsection 34DO(4) provides that, if questioning has not commenced and the prescribed authority has made a determination that an interpreter is to be present, the prescribed authority must defer informing the subject of the matters in section 34DC and, if applicable, section 34DD until the interpreter is present. It also obliges the prescribed authority to give a direction to defer the questioning until the interpreter is present.
357. New subsection 34DO(5) applies where a subject requests the presence of an interpreter *after* questioning has already commenced and the prescribed authority determines that an interpreter is to be present in accordance with the tests in subsection 34DO(2). In these circumstances, a person exercising authority under the warrant must defer any further questioning until the interpreter is present. When the interpreter is present, the

prescribed authority must inform the subject again of anything previously informed under sections 34DC or 34DD.

### **Section 34DP – Video recording of procedures**

358. New section 34DP reflects existing section 34K and imposes requirements on the Director-General to ensure that certain things are video recorded.
359. New subsection 34DP(1) provides that the Director-General must ensure that video recordings are made of a subject'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.
360. New subsection 34DP(2) provides that the Director-General must ensure that, if practicable, video recordings are made of any complaint by a subject when he or she is not appearing before a prescribed authority for questioning under the warrant.
361. 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.

### **Subdivision E – Particular uses and disclosures of questioning material and derivative material**

362. Subdivision E sets out the circumstances in which questioning material and derivative material may lawfully be used or disclosed. There are special restrictions on circumstances in which this material may be disclosed to a prosecutor of the subject. These provisions are modelled on respective provisions in Subdivision EAA of Division 2 of Part 9 of the *Law Enforcement Integrity Commissioner Act 2006* and Division 2 of Part 2 of the *Australian Crime Commission Act 2002*.

### **Section 34E – Obtaining derivative material**

363. New section 34E specifically authorises the use and disclosure of questioning material to find other material (derivative material). Derivative material will be admissible in a prosecution of the subject. However, there are restrictions on the circumstances in which some types of derivative material may be provided to a prosecutor of the subject (see new paragraph 34EB(1)(c)).
364. New section 34E does not create a new ability for a person or body listed in subsection (3) to disclose or use questioning material for the purposes of obtaining derivative material. Rather, that person or body must be permitted or required to make such a use or disclosure of the material under a law of the Commonwealth, a State or Territory (for example, under section 18 of the ASIO Act).
365. New subsection 34E(1) sets out the ability of a person or body (listed in subsection (3)) lawfully in possession of questioning material to use or disclose that material at any

time for the purposes of obtaining derivative material, subject to subsection 34E(2). Subsection 34E(1) allows questioning material to be used or disclosed irrespective of whether the subject has been charged with a related offence (or whether such a charge is imminent) or whether confiscation proceedings have commenced against the subject (or whether such proceedings are imminent).

366. New subsection 34E(2) provides that the ability to use or disclose questioning material for the purposes of obtaining derivative material under subsection 34E(1) is subject to a range of other provisions which may affect the way in which the person or body can use, or the persons to whom they may disclose, that material, including a direction under subsection 34DF(1) and paragraph 34EA(1)(b).
367. New subsections 34E(1) and (2) do not limit how any person or body in possession of questioning material may use or disclose that material. They only specify that one of the lawful uses or disclosures of questioning material is for the purposes of obtaining derivative material.
368. New subsection 34E(3) sets out those entities which may lawfully use or disclose questioning material for the purposes of obtaining derivative material. Its effect is that a listed person or body lawfully in possession of questioning material may use it in accordance with subsections 34E(1) and (2).
369. New subsection 34E(4) is a severability clause.
370. Paragraph 34E(4)(a) allows section 34E and the ASIO Act to be read as if any or all of paragraphs 34E(1)(b), (c), (e) or (f) had not been enacted, in the event that any of the disclosures authorised by those paragraphs are found to be beyond power.
371. Paragraph 34E(4)(b) allows for subsection 34E(3) to be read as not authorising prosecutors of the subject or proceeds of crime authorities to lawfully use or disclose questioning material or derivative material in the event that such use or disclosure is found to be beyond power.

### **Section 34EA – Disclosing questioning material to prosecutors of the subject**

372. New section 34EA sets out the circumstances in which questioning material may be disclosed to a person prosecuting the subject for a related offence.
373. Consistent with the definition of ‘prosecutor’ in section 34A, this provision only applies where the subject matter of the questioning from which the material came is related to the subject matter of the offence.
374. New section 34EA will apply to any disclosure of questioning material from one person to another, even if they are in the same agency. For example, this may include:
  - a disclosure of questioning material from an investigator to a prosecutor of the subject
  - a disclosure of questioning material from one prosecutor of the subject to another, and

- a disclosure of questioning material from a person engaged by a prosecuting authority who is not prosecuting the subject to a prosecutor of the subject.
375. The application of new section 34EA is limited to the disclosure of questioning material to a prosecutor of the subject. For example, new section 34EA does not affect the disclosure of questioning material to a person engaged in the prosecution of a person that is not the subject. The section does not affect or limit the use or disclosure of questioning material to other persons or bodies for other purposes.
376. New section 34EA does not create a new ability for a person or body to disclose questioning material to a prosecutor of the subject. Rather, such a person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (for example, under section 18 of the ASIO Act).
377. Under new subsection 34EA(1), questioning material may be disclosed to a prosecutor of the subject before the subject has been charged with a related offence (that is, to a person making a decision whether or not to prosecute the subject, or a person assisting with that decision), when such a charge is imminent and after he or she has been charged with an offence. The conditions that the person or body will need to satisfy before making that disclosure will depend on whether it is a pre or post-charge disclosure. Subdivision E sets out the conditions for such disclosures.
378. Before the person has been charged with a related offence, new paragraph 34EA(1)(a) allows the disclosure of questioning material to a prosecutor without restrictions additional to those set out in new subsection 34EA(2). This provision allows for the disclosure of relevant questioning material to a person who is making a decision about whether or not to prosecute the subject, and to allow for a prosecutor to give advice about the charges that may ultimately be laid against the subject. Questioning material will still be inadmissible in most criminal proceedings against the subject under subsection 34GD(6).
379. If the subject is later charged with a related offence, it is expected that the prosecuting authority will take steps to ensure that the material is not available to the prosecutors of the subject. This will minimise the risk that the subject's fair trial may be prejudiced by the prosecutors having access to his or her questioning material.
380. Once the subject has been charged with a related offence or where such a charge is imminent, paragraph 34EA(1)(b) allows the disclosure of questioning material to a prosecutor provided that the disclosure is in accordance with a court order under new subsection 34EC(1). That subsection allows a court to authorise the disclosure of questioning material to a prosecutor of the subject where disclosure is in the interests of justice.
381. Paragraph 34EA(1)(b) will ensure that the court controls the circumstances in which questioning material can be provided to a prosecutor once the subject has been charged with a related offence (or such charges are imminent). This is appropriate, as a person cannot rely on the privilege against self-incrimination to refuse to answer questions or produce records or other things during questioning. Giving the court control of the

circumstances in which questioning material may be provided to a prosecutor of the subject is intended to ensure the subject's fair trial and that the prosecutor is given access to all relevant and appropriate material (such as where the questioning material is exculpatory or where the subject wants the prosecutor to take matters in the questioning into account in making decisions about whether to prosecute).

382. New subsection 34EA(2) states that the ability to disclose questioning material to a prosecutor under subsection 34EA(1) is subject to any direction by a prescribed authority under subsection 34DF(1).
383. New subsection 34EA(3) ensures that paragraph 34EA(1)(b) and its two subparagraphs are severable from one another, the other provisions in section 34EA and the rest of the ASIO Act in the event that any provision is found to be beyond power. The validity of these provisions does not affect the validity of other provisions in section 34EA or of the ASIO Act.

### **Section 34EB – Disclosing derivative material to prosecutors of the subject**

384. New section 34EB sets out the circumstances in which derivative material may be disclosed to a prosecutor of the subject.
385. Consistent with the definition of 'prosecutor' in section 34A, this provision only applies where the subject matter of the questioning from which the material was derived is related to the subject matter of the offence. New section 34EB will apply to any disclosure of derivative material from one person to another, even if they are in the same agency. For example, this would include:
- a disclosure of derivative material from an investigator to a prosecutor of the subject
  - a disclosure of derivative material from one prosecutor of the subject to another, and
  - a disclosure of derivative material from a person engaged by a prosecuting authority who is not prosecuting the subject to a prosecutor of the subject.
386. The application of new section 34EB is limited to the disclosure of questioning material to a prosecutor of the subject. For example, new section 34EB does not affect the disclosure of derivative material to a person engaged in the prosecution of a person that is not the subject. It also does not affect or limit the use or disclosure of derivative material to other persons or bodies for other purposes.
387. New section 34EB does not create a new ability for a person or body to disclose derivative material to a prosecutor of the subject. Rather, such a person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (for example, under section 18 of the ASIO Act).
388. Under new subsection 34EB(1), derivative material may be disclosed to a prosecutor of the subject before the subject has been charged with a related offence, when such a charge is imminent and after he or she has been charged with an offence. The

conditions that the person or body will need to satisfy before making that disclosure will depend on whether it is pre or post-charge disclosure and when the relevant questioning occurred. Subdivision E sets out the conditions for such disclosures.

389. New paragraphs 34EB(1)(a) and (b) allow the disclosure of derivative material obtained from the pre-charge questioning of a subject to a prosecutor for use in any prosecution of the subject. New subsection 34EE(2) clarifies that derivative material is admissible in proceedings against the subject.
390. The provision enables the disclosure of such material irrespective of whether the subject has been charged with a related offence at the time of the disclosure (or such a charge is imminent) and whether the relevant derivative material was obtained before or after the subject has been charged.
391. It is appropriate that material derived from the pre-charge questioning of a person should be able to be provided to a prosecutor without additional restrictions. The ASIO Act overrides the privilege against self-incrimination in compulsory questioning, but provides that anything said or any record or thing produced by the subject while appearing before a prescribed authority for questioning under the warrant in order to comply with a requirement is inadmissible. While it is appropriate to ensure that there are strict limits on the disclosure of questioning material to a prosecutor of the subject, material derived from the pre-charge questioning of a subject stands in a different category.
392. The ASIO Act has always intended to authorise the derivative use of questioning material for a number of purposes, including to provide to law enforcement for use in the investigation and prosecution of the subject and other people. This is an important part of enabling ASIO to fulfil its statutory functions, which include communicating intelligence for purposes relevant to security and co-operating with and assisting law enforcement agencies in the performance of their functions.
393. ASIO's questioning powers will only be used to collect intelligence that is important in relation to the protection of, and of the people of, the Commonwealth and the States and Territories, from espionage, foreign interference and politically motivated violence. These activities cause significant harm to individuals in the Australian community, to Australian society, and ultimately undermine Australia's national security and potentially Australia's sovereignty. In light of the subject matter of questionings and the gravity of the activities involved, it is important that material derived from them can be used to disrupt and prevent serious harm to the community, including by prosecuting persons who have been subjects of questioning.
394. Further, previous experience under the *National Crime Authority Act 1984* (NCA Act) demonstrated that providing a derivative use immunity for examination material (the equivalent of questioning material under that Act) was inappropriate as it undermined the capacity of the National Crime Authority (NCA) to assist in the investigation of serious criminal activities. Prior to its removal under the *National Crime Authority Legislation Amendment Act 2001*, the derivative use immunity in the NCA Act required

the prosecution to prove the provenance of every piece of evidence in the trial of a person that the NCA had examined before it could be admitted. This position was unworkable and did not advance the interests of justice as pre-trial arguments could be used to inappropriately delay the resolution of charges against the accused.

395. These powers, in section 34EB and broadly in Subdivision E, are not intended to derogate from a court's overriding power to make any orders necessary to ensure that the subject's trial is fair (see new subsection 34EC(3)).
396. New paragraph 34EB(1)(c) imposes an additional requirement before a person or body can disclose certain types of derivative material to the prosecutor of the subject. Under new paragraph 34EB(1)(c), the person or body must first obtain a court order under new subsection 34EC(1). The order will only be made if the court is satisfied that the disclosure is in the interests of justice.
397. This requirement only applies:
- where the person or body is looking to make a disclosure to the prosecutor after the subject has been charged with a related offence (or when charges are imminent), and
  - where the material sought to be disclosed is derivative material obtained from the post-charge questioning in relation to the subject.
398. This provision is intended to ensure that the court controls the circumstances in which material derived from post-charge questioning can be provided to a prosecutor. Giving the court control of the circumstances in which this type of derivative material may be provided to a prosecutor of the subject is intended to ensure the subject's fair trial and that the prosecutor is given access to all relevant and appropriate material (such as where the derivative material is exculpatory or where the subject wants the prosecutor to take matters in the questioning into account in making decisions about whether to prosecute).
399. New subsection 34EB(2) is a severability clause. It allows section 34EB and the ASIO Act to be read as if either or both of paragraphs 34EB(1)(b) and (c) had not been enacted, in the event that either paragraph is found to be beyond power.

### **New section 34EC – Court's powers to order disclosure and to ensure a fair trial**

#### *Court may order that material may be disclosed*

400. New section 34EC clarifies a court's powers with respect to questioning material and derivative material. This provision is protective and ensures that a person's fair trial is not prejudiced by being questioned under the warrant or the use of questioning material or derivative material.
401. New subsection 34EC(1) allows a person or body in possession of questioning material or derivative material to apply to a court for an order authorising the disclosure of that material to a prosecutor of the subject, in accordance with paragraphs 34EA(1)(b) and 34EB(1)(c). A court may also make such an order on its own initiative.

402. A court may order disclosure of the material to the prosecutor if it is satisfied that the disclosure is required in the interests of justice and despite any direction under subsection 34DF(1), being a direction from the prescribed authority in relation to confidentiality. This provision allows the court flexibility in determining whether or not potentially prejudicial material should be disclosed to a prosecutor of the subject. Whether or not a disclosure is in the interests of justice will depend on the nature and content of the material sought to be disclosed, the circumstances of the case and the extent to which disclosure of the material may prejudice the subject's fair trial or safety.
403. New subsection 34EC(1) also allows a court to specify the prosecutors to whom the material may be disclosed either by class or position, or individually. The subsection allows the court to place appropriate limits on the prosecutors' use of the material to ensure that they use it consistently with the interests of justice.
404. New subsection 34EC(2) sets out the courts to which a person may apply for an order under subsection 34EC(1). If the subject has been charged with an offence, then the person or body should seek the order of the court hearing those charges. Where charges against a person are imminent but have not yet been laid, it is anticipated that a person or body would apply to the court that is likely to be hearing those charges for an order that material may be disclosed to the prosecution.

*Court's powers to ensure the subject's fair trial*

405. New subsection 34EC(3) makes explicit that nothing in new Subdivision E limits a court's power to make all order necessary to ensure the fair trial of the subject, including to limit or remove any prejudice from the prosecution's lawful possession or use of questioning material or derivative material. This provision makes it clear that these amendments are not to be regarded as inhibiting a court's ability to manage its own procedures and to make orders to prevent prejudice to the subject's fair trial. These orders could include refusing to admit evidence, temporarily staying the trial while a new prosecution team is appointed, or any other orders that the circumstances require.
406. New subsection 34EC(4) clarifies that a subject's fair trial is not to be considered unfair simply because the person has been the subject of a questioning warrant. This provision applies whether the questioning occurred pre-charge, post-charge or before or after charges were imminent.
407. New subsection 34EC(5) is a severability clause. It allows new section 34EC and the ASIO Act to be read as if new subsection 34EC(4) or paragraph 34EC(4)(d) had not been enacted, in the event that any provision is found to be beyond power.

**Section 34ED – Certain material may always be disclosed to prosecutors of the subject**

408. New section 34ED clarifies that certain types of questioning material and derivative material may always be provided to the prosecution.
409. New subsection 34ED(1) allows a person or body to disclose to the prosecutor of a subject the fact that he or she has been or will be questioned or information that enables the subject to be identified. This provision is necessary to allow the prosecutor to



understand the risks involved in the trial of the person that there may be applications for stays or to exclude particular evidence. This provision does not authorise the disclosure of any information about the information that the subject provided at questioning (though this may be allowed under other sections). The prosecution's knowledge of the fact that the subject has been questioned should not affect the fairness of the subject's trial.

410. New subsection 34ED(2) allows the disclosure of questioning material and derivative material to the prosecutor of a subject for an offence against:
- division 3 of Part III of the ASIO Act in relation to the questioning warrant;
  - section 137.1 of the Criminal Code – false or misleading information; and
  - section 137.2 of the Criminal Code – false or misleading documents.
411. Neither subsection 34ED(1) or (2) create a new ability for a person or body to disclose questioning material to a prosecutor of the subject. Rather, that person or body must be permitted or required to make such a disclosure of the material under a law of the Commonwealth, a State or Territory (for example, under section 18 of the ASIO Act).
412. New subsection 34ED(3) sets out the limitations on the disclosure of questioning material. The ability to disclose questioning material to a prosecutor under subsection 34ED(1) or (2) is subject to any direction under subsection 34DF(1).
413. New subsection 34ED(4) clarifies that a person or body may disclose questioning material under subsection 34ED(1), or questioning material or derivative material under subsection 34ED(2), at any time. It does not matter when the relevant questioning occurred nor when the disclosure is to be made or whether an order has been made by the Court under subsection 34EC(1).
414. New subsection 34ED(5) is a severability clause. It allows section 34ED and the ASIO Act to be read as if either or both of paragraphs 34ED(4)(b) and (c) had not been enacted, in the event that either provision is found to be beyond power.

### **Section 34EE – Other matters about prosecutors and subjects**

415. New section 34EE sets out a range of matters about the uses to which questioning material and derivative material may be put.
416. New subsection 34EE(1) allows a prosecutor of a subject who is lawfully in possession of questioning material or derivative material to be able to use that material for any lawful purpose. While subsection 34EE(1) specifically states that a prosecutor may use questioning material or derivative material in making a decision about whether to prosecute the subject and in prosecuting the subject, this does not limit the purposes for which the prosecutor may use that material. A prosecutor's use of questioning material will always be subject to the terms of the relevant direction under subsection 34DF(1) and the admissibility of such material under subsection 34GD(6).
417. New subsection 34EE(2) clarifies that questioning material and derivative material that a prosecutor of the subject lawfully possesses can be used in criminal proceedings

against the subject. This provision is intended only to allow questioning and derivative material to be tendered as evidence, subject to other sections in the ASIO Act that may make it inadmissible (for example, subsection 34GD(6)). Whether it is ultimately admitted into evidence will be a matter for the court, to be decided according to the applicable laws of evidence. This is explicitly set out in the note following the subsection.

418. New subsection 34EE(3) clarifies that subsections 34EE(1) and (2) only apply to the use of derivative material by, and the disclosure of that material to, the prosecutor of the subject. Nothing in those subsections limits the circumstances in which derivative material can be provided to an individual who is not prosecuting the subject. This includes investigators of the subject (including for his or her involvement in a related offence), as well as the prosecutors of other people (including for offences related to those with which the subject is charged) and persons prosecuting the subject for unrelated offences.
419. New subsection 34EE(4) clarifies that new section 34EE operates subject to other laws of the Commonwealth, a State or Territory which may affect the way in which questioning or derivative material can be used in a trial.

#### **Section 34EF – Proceeds of crime authorities and questioning under a questioning warrant**

420. New section 34EF authorises the disclosure of questioning material and derivative material to a proceeds of crime authority at any time, and sets out the circumstances in which that material is admissible in confiscation proceedings against the subject.
421. New subsection 34EF(1) clarifies that a person or body may disclose questioning material or derivative material to a proceeds of crime authority at any time. It does not matter when the relevant questioning occurred or when the disclosure is to be made.
422. New subsection 34EF(2) clarifies that the ability of a person or body to disclose questioning material or derivative material to a proceeds of crime authority under subsection 34EF(1) is subject to any direction under subsection 34DF(1).
423. New subsection 34EF(3) clarifies that questioning material and derivative material that a proceeds of crime authority lawfully possesses can be used in evidence in confiscation proceedings against the subject. This provision is intended to allow questioning material and derivative material to be tendered as evidence, subject to other sections in the ASIO Act that may make it inadmissible (for example, subsection 34GD(6)). Whether it is ultimately admitted into evidence will be a matter for the court, to be decided according to the applicable laws of evidence. This is explicitly set out in a note following the subsection, and is reinforced by new subsection 34EF(4).
424. New subsection 34EF(4) makes explicit that nothing in new subsections 34EF(3) or 34GD(6) limits a court's power to make all orders necessary to ensure the administration of justice in the case. This provision makes it clear that these amendments are not to be regarded as inhibiting a court's ability to manage its own

procedures and to make orders to prevent prejudice to the administration of justice, for example, by acting to prevent an abuse of process or contempt of court.

425. New subsection 34EF(5) is a severability clause. It allows section 34EF and the ASIO Act to be read as if either or both of paragraphs 34EF(1)(b) and (c) had not been enacted, in the event that either provision is found to be beyond power.

### **Subdivision F – Lawyers and minor’s representatives**

426. Subdivision F of the Bill outlines the right of a subject to contact a lawyer and to have a lawyer and (where relevant) a minor’s representative present at questioning. This subdivision sets out some limited exceptions to these rights where necessary to ensure the questioning of the subject under the questioning warrant is not frustrated.

### **Section 34F – Person specified in warrant may contact lawyer or minor’s representative**

#### *Right to contact lawyer or minor’s representative*

427. New section 34F provides subjects with the right to contact a lawyer, subject to limitations on contact in limited circumstances.
428. New subsection 34F(1) provides that a subject may contact a lawyer for the purpose of obtaining legal advice in relation to a warrant at any time after the subject is given notice of the warrant. Contact may be for the purpose of seeking legal advice, prior to or during the questioning, as well as contact to engage a lawyer to be present during questioning. The subsection also provides that, if the warrant is a minor questioning warrant the subject may contact a minor’s representative at any time.

#### *Limit on contacting lawyers*

429. New subsections 34F(2) to (3) restrict the right to a lawyer (or at least a particular lawyer of the subject’s choice) in limited circumstances
430. New subsection 34F(2) applies where a lawyer for the subject is present during questioning. In these circumstances, a prescribed authority is authorised to make a direction preventing a subject from contacting a different lawyer. This direction can be made either if the lawyer currently appearing for the subject is not a lawyer who has been appointed for the subject, or if the lawyer currently appearing for the subject has been appointed for the subject if the authority is satisfied that the subject has had a reasonable opportunity to contact another lawyer.
431. New subsection 34F(3) applies in relation to the subject of an adult questioning warrant where a lawyer is not present. In those circumstances, a prescribed authority may direct that the subject be prevented from contacting a lawyer if the authority is satisfied that the subject has had reasonable opportunity to contact a lawyer.
432. The directions in subsections 34F(2) and 34F(3) ensure that the subject is not able to disrupt questioning by making repeated requests to contact a lawyer in circumstances where they have a lawyer present, or have had a reasonable opportunity to contact a lawyer. The subject may have had a reasonable opportunity where the prescribed authority has already deferred questioning to afford them this opportunity, or where the

subject had a reasonable period of notice prior to questioning commencing to contact a lawyer. For example, a notice may have been served several days in advance, providing sufficient opportunity for the subject to contact a lawyer prior to their appearance for questioning.

#### *Limit on choice of lawyer*

433. New subsection 34F(4) limits the subject's right to a particular lawyer of their choosing in some circumstances. This subsection will have the effect that the subject may be prevented from contacting a particular lawyer. The subject would then be able to choose another lawyer (but contact with that lawyer may also be prevented).
434. New subsection 34F(4) provides that the prescribed authority may make a direction preventing contact with a particular lawyer if the prescribed authority is satisfied, based on circumstances relating to the lawyer, that, if the subject is permitted to contact the lawyer, a person involved in activity prejudicial to security may be alerted that the activity is being investigated, or that a record or other thing the subject may be requested to produce might be destroyed, damaged or altered.
435. The decision to prevent contact with a lawyer must be based on circumstances relating to that particular lawyer. For example, it would be appropriate to prevent contact with a particular lawyer under this section if there is information that suggests the lawyer is involved in an espionage activity related to the questioning matter, and consequently may alert others that the matter is being investigated.
436. New subsection 34F(5) clarifies that in nothing subsection 34F(4) prevents the subject from choosing another lawyer to contact. However, section 34F applies equally to the contact with that other lawyer; that is, the prescribed authority retains the ability to prevent contact with subsequent specified lawyers where the thresholds in subsection 34F(4) are met.

#### *Effect of section*

437. New subsection 34F(6) provides that section 34F has effect despite new paragraph 34CB(2)(a), which provides that a subject may contact any person whom the warrant or a direction made by the prescribed authority permits the subject to contact.

#### **Section 34FA – Questioning in absence of lawyer for subject**

438. New section 34FA sets out the circumstances in which a person can be questioned in the absence of a lawyer. In short, a minor must never be questioned in the absence of a lawyer. An adult subject as provided under this subdivision, may be questioned in the absence of a lawyer either voluntarily or where the subject has had reasonable opportunity to contact a lawyer and the prescribed authority directs that questioning take place in the absence of the lawyer.
439. New subsection 34FA(1) provides that the subject of a minor questioning warrant must not be questioned under the warrant in the absence of a lawyer for the subject.

440. New subsection 34FA(2) provides that the subject of an adult questioning warrant may be questioned under the warrant in the absence of a lawyer for the subject in two circumstances. The first is where the subject chooses to be questioned in the absence of a lawyer. The second is where the prescribed authority has made a direction under either paragraph 34FB(3)(b) or subparagraph 34FF(7)(c)(i) for the adult subject to be questioned in the absence of a lawyer.
441. New subsection 34FA(3) clarifies that section 34FA does not permit a subject to be questioned at a time when another section provides that the subject is not to be questioned. Section 34FA limits the circumstances in which questioning can take place – it does not permit questioning in additional circumstances beyond where otherwise authorised in the Act. For example, section 34FA does not operate to permit a person to question the subject in the absence of an interpreter where this would be prevented by section 34DN or 34DO.

### **Section 34FB – Directions in relation to lawyers for subjects of adult questioning warrants**

442. New section 34FB sets out the procedures for deferring questioning to enable a lawyer to be present for questioning and outlines the limited circumstances in which the subject of an adult questioning warrant may be questioned without a lawyer without their voluntary consent to do so.
443. New subsection 34FB(1) provides that the section applies in relation to an adult subject where a lawyer is not present while the subject is before the prescribed authority for questioning under the warrant, and the subject requests at any time that a lawyer be present during questioning. This may occur, for example where a person has been required to appear immediately, and therefore has had limited opportunity to ensure the presence of a lawyer, or where a subject has had enough prior notice to arrange for a lawyer to be present, but has chosen not to engage a lawyer to be present.

#### *If warrant includes immediate appearance requirement*

444. New subsection 34FB(2) provides for the appointment of a lawyer in relation to a subject of a warrant that includes an immediate appearance requirement. In those circumstances, subsection 34FB(2) provides that the prescribed authority must give a direction appointing a specified person to be a lawyer for the subject. The prescribed authority must also direct that the appointed lawyer be present during questioning and give a direction that a person exercising authority under the warrant give the subject facilities for contacting another lawyer of their choice. A ‘specified person’ would be a lawyer of the prescribed authority’s choosing, who is available to appear immediately for the subject.
445. Where a subject has been required to attend immediately, it is unlikely they will have had sufficient time to arrange for a lawyer to be present. However, there would likely be a risk to security where questioning were deferred to enable them to arrange for a lawyer to be present. For example where a person has been apprehended to comply with an immediate appearance requirement, due to the assessment that they are likely to

abscond, tip-off others, or destroy security relevant records or things, the effectiveness of apprehension would be significantly undermined by subsequently deferring questioning. In these instances, it is necessary for the prescribed authority to appoint a lawyer to the subject to allow questioning to commence immediately in the presence of the appointed lawyer.

*If warrant does not include immediate appearance requirement*

446. New subsection 34FB(3) provides for the prescribed authority to make certain directions relating to lawyers in relation to a subject of a warrant that does not include an immediate appearance requirement. In those circumstances the prescribed authority must give one or both of the following directions:
- a direction deferring questioning for such time as is reasonable to enable a lawyer for the subject to be present and that the subject be given facilities to contact a lawyer of choice; or
  - a direction that the subject may be questioned in the absence of a lawyer, if the prescribed authority is satisfied that a reasonable time has passed as to enable a lawyer to be present.
447. In determining what amount of time would be ‘reasonable’ the prescribed authority may take into account the time the subject has already had to arrange for a lawyer to be present, for example, where the person has had several days’ notice of the questioning, the prescribed authority may consider that a reasonable time has already been provided. The intention of these sections is to overcome the possibility of questioning being indefinitely deferred if the subject either refuses to contact a lawyer (but does not agree to be questioned without one), or contacts a lawyer who cannot be present in a reasonable time, for example because they are overseas. It is necessary to curtail the person’s right to choose a specific lawyer in these circumstances, to prevent the possibility that the purpose of the questioning framework could be frustrated entirely simply by a person refusing to contact a lawyer, or by choosing a lawyer who is not able to arrive at questioning in a reasonable time.

*When lawyer of choice is present*

448. New subsection 34FB(4) sets out the procedure where the subject contacts a lawyer and the subject’s chosen lawyer arrives at questioning in circumstances where a lawyer has been appointed for the subject in the interim (whether or not the subject has been required to attend immediately). In those circumstances, the prescribed authority must direct that questioning be deferred for a reasonable period to enable the appointed lawyer to brief the lawyer of choice and for the lawyer of choice to then provide advice to the subject. To ensure that the appointed lawyer is permitted to leave, the prescribed authority must also revoke the directions appointing the lawyer and requiring their presence at questioning.

*If subject chooses to be questioned in absence of lawyer*

449. New subsection 34FB(5) provides that, if a lawyer has been appointed for an adult subject, the subject may nevertheless choose to be questioned in the absence of a lawyer. In these circumstances, any direction appointing a lawyer is revoked.

**Section 34FC – Directions in relation to lawyers for subjects of minor questioning warrants**

450. New section 34FC provides for a prescribed authority to appoint a specified lawyer for a minor. This power is necessary largely to avoid the possibility of undue disruption arising as a result of the requirement that a minor must not be questioned in the absence of a lawyer. The circumstances in which a lawyer is to be appointed differ depending on whether the minor has been required to appear immediately or not.

451. New subsection 34FC(1) sets out the circumstances in which the section applies. The section applies where the subject of a minor questioning warrant is appearing for questioning and a lawyer for the subject is not present.

452. In those circumstances, new subsection 34FC(2) provides for the prescribed authority to appoint a lawyer where the warrant includes an immediate appearance requirement. New subsection 34FC(2) provides that, in these circumstances, a prescribed authority *must* give a direction appointing a specified person as the minor’s lawyer and requiring the person to be present while the subject is being questioned. The authority must also give a direction that a person exercising authority under the warrant must give the subject facilities to contact a lawyer of their choice. A ‘specified person’ would be a lawyer of the prescribed authority’s choosing, who is available to appear immediately for the subject.

453. The intention of this provision is to ensure that a lawyer for a minor will always be present, even where it is not appropriate to defer questioning while awaiting the minor’s lawyer of choice to be present. In order to include an immediate appearance requirement in a warrant, the Attorney-General must have considered whether it is reasonable and necessary in the circumstances that the subject appears for questioning immediately. In these circumstances, it would not be appropriate to defer questioning while awaiting the subject’s lawyer of choice to attend. However, it remains important that a minor has appropriate support from a lawyer – as such it is appropriate to empower the prescribed authority to identify and appoint a lawyer for the minor to allow questioning to commence immediately in the presence of the appointed lawyer.

454. Subsection 34FC(3) applies to a minor where the warrant does not include an immediate appearance requirement. In those circumstances, the prescribed authority may direct that questioning be deferred for such period as the prescribed authority considers reasonable to enable a lawyer for the minor to be present, and that the subject be given facilities for contacting a lawyer. If, however, the prescribed authority is satisfied a reasonable time has passed as to enable a lawyer to be present, the prescribed authority may make a direction appointing a specified person as the minor’s lawyer and requiring that lawyer to be present during questioning.

455. In determining what amount of time would be ‘reasonable’ the prescribed authority may take into account the time the subject has already had to arrange for a lawyer to be present, for example, where the person has had several days’ notice of the questioning, the prescribed authority may consider that a reasonable time has already been provided.
456. The intention of permitting the prescribed authority to appoint a lawyer is to overcome the possibility of questioning being indefinitely deferred if the subject of a minor’s warrant either refuses to contact a lawyer or contacts a lawyer who cannot be present in a reasonable time, for example because they are overseas. It is necessary to curtail the minor’s right to choose a particular lawyer in these circumstances, to prevent the possibility that the questioning framework could be frustrated simply by a person failing to identify or contact a lawyer.
457. New subsection 34FC(4) sets out the procedure where the minor contacts a lawyer and the minor’s chosen lawyer arrives at questioning in circumstances where a lawyer has been appointed for the minor in the interim (whether or not the minor has been apprehended). In those circumstances, the prescribed authority must direct that questioning be deferred for a reasonable period to enable the appointed lawyer to brief the lawyer of choice and for the lawyer of choice to then provide advice to the subject. To ensure that the appointed lawyer is permitted to leave, the prescribed authority must also revoke the directions appointing the lawyer and requiring their presence at questioning.

#### **Section 34FD – Directions in relation to minor’s representatives**

458. New section 34FD provides for a minor to be questioned in the absence of a minor’s requested representative in limited circumstances. Although there are some circumstances in which questioning may take place in the absence of a minor’s requested non-lawyer representative, questioning must never take place in the absence of a lawyer for the minor (whether an appointed lawyer or a lawyer chosen by the minor), who can serve as the minor’s representative in those circumstances. The provisions for questioning of minors in the absence of a minor’s requested representative differ depending on whether the minor’s questioning warrant includes an immediate appearance requirement or not.
459. New subsection 34FD(1) provides that the section applies when the subject of a minor questioning warrant is appearing for questioning and a minor’s representative who is not also a lawyer (a non-lawyer representative) is not present.
460. New subsection 34FD(2) applies where a minor’s questioning warrant includes an immediate appearance requirement. In these circumstances, and where a lawyer for the minor is present, the prescribed authority must give a direction that that the subject may be questioned in the absence of the non-lawyer representative (with the minor’s lawyer also performing the role of the minor’s representative in the interim). However, where the subject requests a non-lawyer representative to be present, the prescribed authority must give a direction that the subject must be able to contact a non-lawyer representative. The intention of this section is to ensure that, where necessary,



questioning can take place immediately and not be dependent on the time it will take for a particular minor's representative to arrive at questioning, if at all. The requirement that a lawyer for the minor be present ensures that the minor will be appropriately supported even in the absence of their requested minor's representative. As noted above, in the absence of a non-lawyer representative, the lawyer for the subject is also the minor's representative.

461. New subsection 34FD(3) applies where a minor's questioning warrant does not include an immediate appearance requirement and the subject requests a non-lawyer representative to be present. In these circumstances, the prescribed authority must give a direction deferring questioning for a reasonable period to enable the requested representative (who is not the minor's lawyer) to be present. If, however, the prescribed authority is satisfied that such time as is reasonable to enable the requested representative to be present has passed, the prescribed authority must make a direction that the minor may be questioned in the absence of the requested representative, with the minor's lawyer also performing the role of the minor's representative in the interim. This ensures that questioning cannot be frustrated by a particular minor's representative's inability or refusal to attend at questioning. The requirement that a lawyer for the minor be present ensures that the minor will be appropriately supported even in the absence of a non-lawyer minor's representative.
462. In determining what amount of time would be 'reasonable' the prescribed authority may take into account the time the subject has already had to arrange for their representative of choice to be present, for example, where the minor has had several days' notice of the questioning, the prescribed authority may consider that a reasonable time has already been provided.
463. New subsection 34FD(4) applies where a minor's questioning warrant does not include an immediate appearance requirement, the subject chooses not to request a non-lawyer representative and a lawyer for the subject is present. In these circumstances, the prescribed authority must give a direction that the subject may be questioned without a non-lawyer representative present. This clarifies that questioning can take place in the absence of a non-lawyer representative, provided a lawyer is present, where requested by the subject. As above, the requirement for a lawyer to be present ensures the minor will be appropriately supported where the minor requests that a non-lawyer representative not be present during questioning.
464. New subsection 34FD(5) concerns situations when a non-lawyer representative is contacted and appears at questioning. It provides that any directions given by the prescribed authority that the minor may be questioned in the absence of a non-lawyer representative cease to have effect at such time as the subject contacts a non-lawyer representative and that representative is present. This section has effect whether or not the warrant includes an immediate appearance requirement.

### **Section 34FE – Lawyer may request copy of warrant**

465. New section 34FE provides that a lawyer for a subject may request a copy of a questioning warrant and any variations of that warrant, subject to any deletions required to avoid prejudice to security, defence of the Commonwealth, the conduct of the Commonwealth's international affairs or the privacy of individuals. The section applies in relation to any lawyer acting for the subject of a questioning warrant in connection with the warrant, including an appointed lawyer.
466. New subsection 34FE(2) provides that, on request by a lawyer for the subject, a person exercising authority under the warrant must give the lawyer a copy of a warrant or (if the warrant is issued orally) a copy of the written record of a warrant. This is subject to the power to make necessary deletions in subsection 34FE(4).
467. New subsection 34FE(3) applies where a warrant is varied and provides that, on request by a lawyer for the subject, a person exercising authority under the warrant must give a copy of the variation or (if the variation is issued orally) a copy of the written record of the variation. This is subject to the power to make necessary deletions in subsection 34FE(4).
468. New subsection 34FE(4) provides that, in response to a request for a document under subsections 34FE(2) and (3), the Director-General may make deletions from a warrant, variation or written record of a warrant or variation. The Director-General may make such deletions as the Director-General considers necessary to avoid prejudice to:
- security;
  - the defence of the Commonwealth;
  - the conduct of the Commonwealth's international affairs; or
  - the privacy of individuals.
469. It is appropriate to limit the lawyer's ability to see the entirety of these documents given the high likelihood that such documents will contain highly sensitive national security information.
470. New subsection 34FE(6) clarifies that the requirements in subsections 34FE(2) and (3) to provide documents do not require more than one person to give the lawyer a copy of the documents. That is, a lawyer cannot use these sections to require several different persons exercising authority under the warrant to provide multiple copies of the requested documents. These requirements also only entitle the lawyer to be given a copy of the warrant, variation, or written record of the warrant or variation (as required) they do not authorise the lawyer to see copies of any other document.

### **Section 34FF – Involvement of lawyers**

471. New section 34FF outlines what a lawyer may and may not do during questioning.

472. New subsection 34FF(1) sets out that the section applies if the subject of a warrant is appearing before a prescribed authority for questioning and a lawyer for the subject is present during questioning.

*Breaks in questioning*

473. New subsection 34FF(2) requires the prescribed authority to provide a reasonable opportunity for the lawyer to advise the subject during breaks. What will constitute a reasonable opportunity will depend on the circumstances of the questioning (such as, for example, the location of questioning) as well as circumstances relating to the subject. This includes any breaks taken pursuant to a direction given by the prescribed authority under paragraph 34DE(1)(e) or any time during which a prescribed authority has deferred questioning, for example to allow equipment to be changed, for a complaint to be made, for the subject to rest or recuperate.
474. New subsection 34FF(3) sets out the circumstances in which a lawyer may intervene in questioning. A lawyer must not intervene or address the prescribed authority except to request clarification of an ambiguous question, or to request a break to provide advice to the subject. This means a lawyer may not, for example, intervene in questioning to tell a subject how to respond to particular questions.
475. New subsection 34FF(4) provides that a lawyer may request a prescribed authority for an opportunity to address the prescribed authority during a break in questioning.
476. Under new subsection 34FF(5) the prescribed authority is required to consider and approve or refuse any request by a lawyer for a break to provide advice and any request by a lawyer to address the prescribed authority.

*Removal of lawyer for disrupting questioning*

477. New subsection 34FF(6) sets out the circumstances in which a lawyer may be removed from questioning. The prescribed authority may direct that a lawyer be removed if the lawyer's conduct is unduly disrupting questioning. This may be the case where, for example, a lawyer repeatedly interrupts questioning (other than to make reasonable requests for clarification or a break to provide advice), in a way that prevents or hinders questions being asked or answered.
478. The intention of permitting the prescribed authority to remove a lawyer who is unduly disruptive during questioning is to ensure that unnecessary delays of questioning can be prevented. While the compulsory questioning framework in the ACC Act addresses this by creating an offence for any person, including a lawyer, who hinders or disrupts the examination or examiner (section 35 of the ACC Act), this is not appropriate in the ASIO model. The ability to remove a lawyer for being unduly disruptive, and then replace that lawyer, ensures that the questioning is not frustrated and can continue in circumstances where it is being used to obtain critical and time sensitive national security information. While an offence may serve as an appropriate deterrence mechanism, the primary intention of this provisions is to prevent the frustration of questioning in high risk situations.

479. Subsection 34FF(7) sets out the process for contacting a replacement lawyer, deferring questioning and/or, in the case of a minor, appointing a replacement lawyer when the first lawyer is removed.
480. New paragraph 34FF(7)(a) requires the prescribed authority to direct that the subject may contact another lawyer where a lawyer has been removed.
481. New paragraph 34FF(7)(b) provides that, if a lawyer has been removed and the subject chooses to contact another lawyer, the prescribed authority must direct that questioning be deferred for a time that is reasonable to enable the other lawyer to be present.
482. New paragraph 34FF(7)(c) provides that, the time for which questioning has been deferred pursuant to paragraph 34FF(7)(b) passes and the other lawyer is not present, the prescribed authority must give certain directions. In relation to an adult questioning warrant, the authority must direction that the subject may be questioned in the absence of a lawyer. If the subject is a minor, the authority must give a direction appointing a specified person as the minor's lawyer and requiring that lawyer to be present during questioning.
483. New subsection 34FF(8) sets out the interaction of section 34FF with section 34FG in circumstances in which the person's lawyer is also the subject's minor's representative. Subsection 34FF(8) provides that, in those circumstances, section 34FF does not apply to conduct of the lawyer in their capacity as a minor's representative.

#### **Section 34FG – Conduct of minor's representative**

484. New section 34FG outlines the limited circumstances in which a minor's representative may be removed from questioning.
485. New subsection 34FG(1) sets out when the section applies. The section applies to a person who is a minor's representatives for the purposes of the Division, and who is, or has been, either contacted by the subject or present during questioning.
486. New subsection 34FG(2) provides that, if the conduct of a minor's representative is unduly disrupting questioning, the prescribed authority may direct that the minor's representative be removed from the place of questioning.
487. This would apply, for example, where a minor's representative repeatedly interjects in questioning or otherwise behaves in a way that prevents or hinders questions being asked or answered.
488. New subsection 34FG(3) provides for the appointment of a replacement representative when a minor's representative has been removed.
489. New paragraph 34FG(3)(a) provides that, if a minor's representative is removed, the prescribed authority must inform the subject that the subject may request a replacement representative and may contact the replacement representative.
490. New paragraph 34FG(3)(b) requires the prescribed authority to direct that the subject may contact their replacement representative and must be given facilities to do so.

491. New subsection 34FG(4) applies where the prescribed authority has informed the subject under subsection 34FG(3) of their ability to contact a replacement representative, a lawyer is present and the subject requests a non-lawyer representative be present. The subsection then provides for the following:
- in circumstances where subsection 34FG(4) applies and the minor questioning warrant includes an immediate appearance requirement, the prescribed authority must give a direction that the subject may be questioned in the absence of a replacement non-lawyer representative (with the minor's lawyer also performing the role of the minor's representative in the interim); and
  - in circumstances where subsection 34FG(4) applies and the minor questioning warrant does not include an immediate appearance requirement, the prescribed authority must give a direction deferring questioning for a reasonable period to enable the requested non-lawyer representative to be present. If however, the prescribed authority is satisfied that such time as is reasonable to enable the requested non-lawyer representative to be present has passed, the prescribed authority must make a direction that the minor may be questioned in the absence of the requested non-lawyer representative. The minor's lawyer would perform the role of the minor's representative in the interim.
492. Subsection 34FG(4) ensures that questioning cannot be frustrated by a particular minor's representative's inability or refusal to attend questioning. The requirement that a lawyer for the minor be present ensures that the minor will be appropriately supported even in the absence of a non-lawyer minor's representative.
493. New subsection 34FG(5) applies where the prescribed authority has informed the subject under subsection 34FG(3) of their ability to contact a replacement representative, a lawyer is present and the subject chooses not to request a replacement non-lawyer representative be present. In these circumstances, the prescribed authority must give a direction that the subject may be questioned without a replacement non-lawyer representative present. This clarifies that questioning can take place in the absence of a replacement non-lawyer representative, provided a lawyer is present, where requested by the subject. As above, the requirement for a lawyer to be present ensures the minor will be appropriately supported where the minor requests that a non-lawyer representative not be present during questioning.
494. Nothing in this section affects the overarching requirement in section 34BD(2) that a minor may only be questioned in the presence of a minor's representative.

#### **Section 34FH – Lawyers' access to information for proceedings relating to warrant**

495. New section 34FH provides that the regulations may prohibit or regulate the access to information by a lawyer or lawyers, acting on behalf of the subject of a warrant in proceedings relating to the warrant or the treatment of the person in connection with the warrant. Access to information may be prohibited or regulated where it has been otherwise controlled or limited on security grounds.

### **Section 34FI – Law relating to legal professional privilege not affected**

496. New section 34FI provides that the law relating to legal professional privilege is not affected by the operation of Division 3 of Part III of the Act.

### **Subdivision G – Offences**

497. Subdivision G inserts a series of offences that are necessary to ensure the proper operation of ASIO's compulsory questioning framework.
498. Subdivision G creates certain obligations in relation to surrendering travel documents and not leaving Australia, and imposes relevant offences. These offences are necessary to ensure that a person does not abscond from Australia in advance of questioning. These provisions are particularly significant given the expansion of the remit of questioning to include espionage and foreign interference.
499. Subdivision G also creates offences in relation to not appearing or providing information, retains the offences for contravening safeguards, and creates certain secrecy-related offences.
500. New sections 34G and 34GA apply where a warrant has been requested. New sections 34GB and 34GC apply where a warrant has been issued.

### **Section 34G – Surrender of travel documents by person in relation to whom questioning warrant is sought**

501. New section 34G sets out the circumstances in which a person is required to surrender their travel documents after the Director-General has requested a questioning warrant. New section 34GB separately deals with the requirement for a subject of a questioning warrant to surrender travel documents after the warrant has been issued.
502. In the period before a questioning warrant is issued, the requirement to surrender Australian or foreign travel documents is enlivened when the following requirements are met:
- the Director-General has requested the Attorney-General to issue a questioning warrant;
  - the Director-General is satisfied the person may leave Australia and this would impact compliance with the warrant; and
  - the Director-General has notified the person of the request for a warrant and that the subject is required to surrender their travel documents.
503. New subsection 34G(1) provides that if:
- the Director-General has requested the Attorney-General issue a questioning warrant; and
  - the Director-General believes on reasonable grounds that the person may leave Australia; and

- that the leaving would likely impact the person's ability to comply with the requested warrant

the Director-General may cause the person who is the subject of that warrant to be notified of the request, and of the fact that the person is required to surrender their travel documents.

504. New subsection 34G(2) provides that, as soon as practicable after being notified pursuant to subsection 34G(1), the person who is the subject of a questioning warrant must deliver to an enforcement officer (as defined in new subsection 34G(7)), any Australian or foreign travel documents issued to, and in the possession of, the person. This includes Australian passports and travel-related documents, and passports and other documents of identity issued for travel purposes by a foreign government. It is anticipated that the notification from the Director-General will provide guidance and instruction as to an appropriate enforcement officer to whom documents should be surrendered.
505. New subsection 34G(3) creates an offence where the person fails to surrender their travel documents after having been notified in accordance with new subsection 34G(1). The maximum penalty for failure to surrender documents is five years imprisonment. Subsection 34G(3) does not specify the fault element that applies to the offence. As such, the fault element of intention will apply to a person's failure to surrender documents (as per section 5.6 of the *Criminal Code*).
506. New subsection 34G(4) sets out when travel documents surrendered under subsection 34G(2) must be returned to the subject of the warrant. Specifically, under paragraph 34G(4)(a), if the Attorney-General refuses to issue the requested warrant in relation to that person, the documents must be returned as soon as practicable after refusal. On the other hand, under paragraph 34G(4)(b), if the Attorney-General issues the requested questioning warrant, the documents must be returned as soon as practicable after the warrant ceases to be in force. However, subsection 34G(4) also provides that the Director-General may return the documents to the person at an earlier time than provided for under paragraphs 34(4)(a) and (b).
507. New paragraph 34G(5)(a) provides that the requirement to return surrendered documents in subsection 34G(4) does not oblige the Director-General to return a document if (at the time the document would need to be returned under subsection 34G(4)) there is another, separate questioning warrant in force in relation to the person.
508. New paragraph 34G(5)(b) provides that the requirement to return surrendered documents in subsection 34G(4) does not oblige the Director-General to return a document that has been cancelled.
509. New subsection 34G(6) permits certain persons to inspect, examine and make copies or transcripts of a document after it has been surrendered and before it is returned. This power may be exercised by a person approved to exercise authority under a warrant pursuant to section 24 of the Act.

510. Section 24 of the Act provides that authority under a warrant may be exercised only by:

- the Director-General; or
- a person approved by the Director-General; or
- a person included in a class of persons approved by the Director-General under subsection 24(2) of the Act.

511. New subsection 34G(7) defines ‘enforcement officer’, for the purposes of determining to whom a person may surrender travel documents in accordance with subsection 34G(2). For the purposes of section 34G, ‘enforcement officer’ means a member of the Australian Federal Police, an officer of a State or Territory police force, or an officer of Customs as defined in the *Customs Act 1901*.

**Section 34GA – Person in relation to whom questioning warrant is requested must not leave Australia without permission**

512. New section 34GA provides that it is an offence for a person who is the subject of a questioning warrant requested by the Director-General to leave Australia without the Director-General’s permission. Section 34GC specifically provides for the offence for leaving Australia once a warrant has been issued.

513. New subsection 34GA(1) provides that a person will have committed an offence in the following circumstances:

- the Director-General has requested a questioning warrant in relation to that person;
- the person has been notified of the making of a request for a questioning warrant;
- the person has been notified of the effect of new subsection 34GA(1);
- the person leaves Australia after being notified;
- the leaving occurs either:
  - if the warrant is not issued, before the Attorney-General refuses to issue a questioning warrant; or
  - if the warrant is issued, before the warrant expires; and
- the person does not have written permission from the Director-General to leave Australia at the time the person leaves (including where the permission is not in force because a condition has not been complied with).

514. Subsection 34GA(1) also provides that the maximum penalty for leaving Australia without permission is five years imprisonment.

515. Under new subsection 34GA(2), the Director-General has the power to give a person written permission to leave Australia at a specified time, either unconditionally or subject to conditions. For example, the Director-General may impose a condition that



the person must book a return airplane ticket for a flight that arrives in Australia at a date and time before questioning would commence under the warrant if issued.

516. New subsection 34GA(3) specifies that, if the Director-General's permission is subject to a condition and the person does not comply with the condition, the permission is not in force. At the point at which the person does not comply with the condition, there is no permission in force, and it would be considered an offence for the person to leave Australia.
517. For example, if permission to leave Australia was conditional on the person buying a return airplane ticket, and the person did not buy a return airplane ticket before leaving Australia, the permission would not be in force. This means the person would commit an offence if they left Australia without having bought a return airplane ticket.

### **Section 34GB – Surrender of travel documents by subject of questioning warrant**

518. New section 34GB sets out the circumstances in which a person is required to surrender their travel documents once a questioning warrant has been issued.
519. After a questioning warrant is issued, the requirement to surrender Australian or foreign travel documents is enlivened when the following requirements are met:
- the Attorney-General has issued a questioning warrant; and
  - the Director-General is satisfied the subject may leave Australia and this would impact compliance with the warrant; and
  - the Director-General has notified the subject of the issue of the warrant and that the subject is required to surrender their travel documents (pursuant to new subsection 34GB(1)).
520. New subsection 34GB(1) provides that if:
- the Attorney-General has issued a questioning warrant; and
  - the Director-General believes on reasonable grounds that:
    - the person may leave Australia; and
    - that leaving Australia would impact the person's ability to comply with the requested warrant,

the Director-General may cause the person who is the subject of the questioning warrant to be notified of the issue of the warrant, either in accordance with section 34BH or otherwise, and the effect of subsection 34GB(2) requiring the subject of the warrant to surrender travel documents.

521. Notification pursuant to subsection 34GB(1) may be given at any time. For example, notification may be given to the subject at the time the person is provided with written notice of the questioning warrant in accordance with section 34BH. However, if after issuance but before questioning, the Director-General becomes aware of a risk that the subject may leave Australia, the Director-General may then notify the subject of the requirement to surrender their travel documents.

522. New subsection 34GB(2) provides that, as soon as practicable after being notified of the requirement to surrender travel documents pursuant to subsection 34GB(1), the person must deliver to a person exercising authority under the warrant any Australian or foreign travel documents issued to, and in the possession of, the person. This includes Australian passports and travel-related documents, and passports and other documents of identity issued for travel purposes by a foreign government.
523. New subsection 34GB(3) provides that a person who is the subject of a questioning warrant commits an offence if that person fails to surrender their travel documents after having been notified. The maximum penalty for failure to surrender documents is five years imprisonment. Subsection 34GB(3) does not specify the fault element that applies to the failure to comply. As such, the fault element of intention will apply to a person's failure to surrender documents (as per section 5.6 of the *Criminal Code*).
524. New subsection 34GB(4) provides when surrendered travel documents must be returned to the person. The documents must be returned as soon as practicable after the warrant ceases to be in force. The Director-General is permitted to return the documents to the person at any earlier time.
525. New paragraph 34GB(5)(a) provides that the requirement to return surrendered documents in subsection 34GB(4) does not oblige the Director-General to return a document if (at the time the document would need to be returned under subsection 34GB(4)) there is another, separate questioning warrant in force in relation to the person.
526. New paragraph 34G(5)(b) provides that the requirement to return surrendered documents in subsection 34GB(4) does not oblige the Director-General to return a document that has been cancelled.
527. New subsection 34GB(6) permits certain persons to inspect, examine and make copies or transcripts of a document after it has been surrendered and before it is returned. This power may be exercised by a person approved to exercise authority under a warrant pursuant to section 24 of the Act, which includes the Director-General, and a person approved by the Director-General, or a person in a class of persons approved by the Director-General in accordance with subsection 24(2) of the Act.

### **Section 34GC – Subject of questioning warrant must not leave Australia without permission**

528. New section 34GC provides that a person who is the subject of a questioning warrant has committed an offence if that person leaves Australia without permission, after they been notified of the issue of a questioning warrant and the effect of subsection 34GC(1).
529. Under subsection 34GC(1), the subject of a questioning warrant will commit an offence in the following circumstances:
- a warrant has been issued in relation to a subject;

- the subject has been notified of the issue of the warrant, whether in accordance with section 34BH or otherwise;
- the subject has been notified of the effect of new subsection 34GC(1);
- the subject leaves Australia after being notified;
- the leaving occurs:
  - after the subject is notified; and
  - before the warrant expires; and
- the person does not have written permission from the Director-General to leave at the time the person leaves (including where the permission is not in force because a condition has not been complied with).

530. New subsection 34GC(2) provides that the Director-General has the power to give written permission for the person who is the subject of a questioning warrant to leave Australia at a specified time, either unconditionally or subject to conditions. For example, the Director-General may impose a condition that the subject must book a return airplane ticket for a flight arriving in Australia before the specified date and time of questioning.

531. New subsection 34GC(3) specifies that, if the Director-General's permission is subject to a condition and the subject of the questioning warrant does not comply with the condition, the permission is not in force. At the point at which the subject does not comply with the condition, there is no permission in force, and as such, it would be an offence for the subject to leave Australia. For example, if the permission were conditional on the person buying a return airplane ticket, and that person did not buy a return ticket before leaving Australia, the permission would not be in force. This means the person would commit an offence if they left Australia without having bought a return airplane ticket.

### **Section 34GD – Giving information and producing things etc.**

532. New section 34GD provides that a person who is the subject of a questioning warrant may commit an offence in relation to questioning. Specifically, the section provides that the person has committed an offence if they:

- fail to appear before a prescribed authority in accordance with the warrant;
- fail to give information in accordance with the warrant; or
- knowingly make a false or misleading statement.

533. Section 34GD also provides for the abrogation of the subject's privilege against self-incrimination, and includes important protections concerning the admissibility of answers given in, or records or things produced at, questioning.

*Failure to appear*

534. New subsection 34GD(1) makes it an offence to fail to appear before a prescribed authority for questioning in accordance with a warrant or a direction given by the prescribed authority. The maximum penalty for failure to appear is five years imprisonment. Subsection 34GD(1) does not specify the fault element that applies to the offence. As such, the fault element of intention will apply to a person's failure to appear (as per section 5.6 of the *Criminal Code*).
535. New subsection 34GD(2) provides that, for the purposes of the offence of failure to appear, a person is taken to fail to appear if the subject is refused entry under new subsection 34D(10). This means that, if the subject does not comply with a request made by a police officer under subsection 34D(10) and, consequently, the subject is refused entry to questioning, this will constitute failure to appear for the purposes of new subsection 34GD(1), and the subject will have committed an offence.

*Failure to give information etc.*

536. New subsection 34GD(3) provides that a person who is before a prescribed authority for questioning under a warrant must not fail to give any information or produce any record or thing that ASIO requests the person to give or produce in accordance with the warrant. The maximum penalty for failure to comply is 5 years imprisonment. As subsection 34GD(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 (as per section 5.6 of the *Criminal Code*).
537. New subsection 34GD(4) provides that subsection 34GD(3) does not apply if the person does not have the information or does not have possession or control of the record or thing. The defendant bears an evidential burden in relation to this defence. In accordance with subsection 13.3(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.

*Self-incrimination etc.*

538. New subsection 34GD(5) expressly abrogates a subject's privilege against self-incrimination in relation to information or records or things requested by ASIO in accordance with a questioning warrant. However, there are strict limitations on the way in which answers given in, or records or things produced at, questioning (whether those answers, records or things are self-incriminatory or not) can be used against a subject in criminal proceedings and proceedings for the imposition of a penalty. It is necessary to exclude the normal privilege against self-incrimination to maximise the likelihood that information will be given that may assist ASIO to collect vital intelligence in relation to politically motivated violence, espionage or foreign interference. The importance of protecting Australians and Australia from these threats outweighs the importance of the privilege against self-incrimination in these circumstances, and the strict limitations on

the admissibility of any information given during questioning will mitigate the risk of unfairness to a subject in future criminal proceedings.

539. New subsection 34GD(6) limits the admissibility of any answers given by the subject and any records or things produced by the subject in questioning. New paragraphs 34GD(6)(a) and (b) set out the general position that all such answers, records or things are inadmissible against the subject in a criminal proceeding.
540. New paragraphs 34GD(6)(c)-(f) set out some limited exceptions to this general position, when such answers, records or things will be admissible.
541. New paragraph 34GD(6)(c) sets out when answers, records or things will be admissible in any confiscation proceedings. Broadly, the effect of this section is that answers, records or things given in questioning will be admissible against the subject in most confiscation proceedings. The only circumstance where they will not be admissible is where the questioning from which those answers, records or things came occurred after confiscation proceedings had commenced against the subject (or such proceedings were imminent). This makes it clear that questioning is not conducted for the purpose of bolstering the case against a subject in confiscation proceedings.
542. New paragraphs 34GD(6)(d)-(f) provide that answers given, or records or things produced at, questioning will be admissible in proceedings for offences against:
  - section 34GD – this section contains offences for failure to appear for questioning, failure to give information or produce records or things at questioning and, most significantly, giving false or misleading statements at questioning;
  - section 34GF – this section contains offence for disclosing information in relation to the warrant before a warrant ceases to be in force, and disclosing operational information after the warrant ceases to be in force;
  - sections 137.1 or 137.2 of the Criminal Code relating to new section 34GD – these offences relate to giving false or misleading information to a Commonwealth entity in compliance with a law of the Commonwealth.
543. Each of these offences is so closely connected with the questioning that it is necessary and appropriate for any answers given in, or records or things produced at, questioning to be admissible. This is particularly important in relation to the offences for giving false or misleading information in new section 34GD and in sections 137.1 and 137.2 of the *Criminal Code*, as it would be impossible to prove these offences if answers given in, or records or things produced at, questioning were inadmissible.
544. New subsection 34GD(7) abrogates the common law privilege against self-exposure to penalties when complying with a requirement to give information or produce a record or thing.

*False or misleading statements*

545. New subsection 34GD(8) creates an offence for giving false or misleading information. It 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 the warrant, the person is guilty of an offence. The maximum penalty that applies to the offence is five years imprisonment.
546. New subsection 34GD(9) provides a defence to the offence in subsection 34GD(8), if the statement made is not false or misleading in a material particular. The defendant bears an evidential burden in relation to this defence. In accordance with subsection 13.3(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. A person should not commit a criminal offence by making a false or misleading statement on a matter which is immaterial, but it will often be difficult to determine whether a matter is material. The person best placed to know whether a matter is material or not, and consequently to give evidence on this matter, is the defendant.

*Rendering records or things illegible etc.*

547. New subsection 34GD(10) makes it an offence for persons to engage in conduct in relation to a record or a thing which has been requested to be produced under a warrant, with the result that the record or thing is unable to be produced or produced in wholly legible or useable form. The intention of this offence is to deter the wilful destruction of, or tampering with, records or things which have been requested to be produced under a questioning warrant. This ensures there are no unforeseen gaps in the offence provision concerning persons who fail to produce a record or thing to a prescribed authority. The offence carries a maximum penalty of five years' imprisonment.
548. The elements of the offence are that the person is required, in connection with a questioning warrant, to produce a record or thing; and he or she intentionally engages in conduct, the result of which is that the record or thing is unable to be produced, or is unable to be produced in a wholly legible or useable form. There is no fault element specified for the result in paragraph 34GD(10)(c). As a result, the person must be reckless as to the result of his or her conduct (as per subsection 5.6(2) of the *Criminal Code*). This means that a person must be aware of a substantial risk that his or her conduct would result in the non-production, or production in an illegible or unusable form, of the record or thing requested under a warrant, and nonetheless and unjustifiably in the circumstances known to him or her at the time took the risk of engaging in the conduct (as per section 5.4(2) of the *Criminal Code*).
549. It would be counter-productive to require the prosecution to specifically prove that the person intended to destroy or otherwise interfere with a thing or record, and that the person engaged in that conduct with the specific intention of preventing the thing or record from being produced under a warrant. The inclusion of such elements in the

proposed offence would create an arbitrary distinction between culpable and non-culpable conduct on the basis of evidence in relation to a person's specific intent in engaging in the relevant conduct, and the particular nature of his or her actions, notwithstanding that the result of conduct is an inability to produce the records or things specifically requested under the warrant. Unlike offences applying to persons who destroy or tamper with materials that they know are, or may be, required in judicial proceedings (for example, section 39 of the *Crimes Act*), the offence in proposed subsection 34GD(9) is limited to the subject of a questioning warrant, who is placed on notice to produce materials as a result of the issuing of that warrant to him or her.

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

#### **Section 34GE – Offences of contravening safeguards**

551. New section 34GE creates certain offences in relation to contravention of safeguards under Division 3 of Part III of the Act.
552. New subsection 34GE(1) creates an offence where a person exercises, or purports to exercise, authority under a questioning warrant in a way that contravenes a condition or restriction in the warrant. The fault element for the circumstance of a contravention is knowledge. As per section 5.3 of the *Criminal Code*, this means that the person must be aware that the contravention exists or will exist in the ordinary course of events. New subsection 34GE(1) is limited to contravention of conditions or restrictions that are specified in the warrant.
553. New subsection 34GE(2) creates an offence where a police officer engages in conduct that contravenes new section 34C, which requires the officer to bring the subject before a prescribed authority immediately. The fault element for the circumstance of a contravention is knowledge. As per section 5.3 of the *Criminal Code*, this means that the police officer must be aware that the contravention of section 34C exists or will exist in the ordinary course of events.
554. New subsection 34GE(3) creates an offence for contravention of certain kinds of direction made by a prescribed authority. This applies to contravention of directions under:
- subsection 34DD(2) – a direction in relation to the questioning of minors, such as a direction that questioning is only to occur when a lawyer for the subject is present, or a direction that questioning is to occur only for continuous periods of two hours or less;

- paragraph 34DE(1)(b) – a direction permitting the subject to contact certain persons and to disclose information;
- paragraph 34DE(1)(d) – a direction to defer questioning;
- paragraph 34DE(1)(e) – a direction for further appearance at questioning, or for the subject to be excused or released from further questioning; or
- section 34DG – a direction that a person under 14 years old not be questioned; or
- subsection 34DM(4) – a direction suspending questioning or the exercise of a specified power while a concern of the IGIS is addressed.

555. The offence only applies to a person identified in a direction given by a prescribed authority as a person who is to implement the direction. A person may be identified by name, by reference to a class, or by other means. The fault element for the circumstance of a contravention is knowledge. As per section 5.3 of the *Criminal Code*, this means that the person must be aware that the contravention exists or will exist in the ordinary course of events. For example, if a prescribed authority makes a direction that any person exercising authority under the warrant must defer questioning of a subject, it would be an offence for a person exercising authority under the warrant not to defer questioning if the person is aware that this failure to defer will contravene the direction.

556. New subsection 34GE(4) creates an offence for use or disclosure of questioning material in contravention of a direction given by the prescribed authority under new subsection 34DF(1). These directions relate to restrictions on the use or disclosure of questioning material, where such use or disclosure might prejudice a person's safety or would reasonably be expected to prejudice the subject's fair trial in proceedings for a related offence. The fault element for the circumstance of a contravention is knowledge. As per section 5.3 of the *Criminal Code*, this means that the person must be aware that the contravention exists or will exist in the ordinary course of events.

557. The offence in subsection 34GE(4) does not apply to :

- use or disclosure made pursuant to a certificate given under subsection 34DF(5) by a court to the Director-General, requiring the Director-General to make material available to the court;
- the subsequent use or disclosure by the court under subsection 34DF(6), in making the material available to the person charged with the defence or that person's lawyer;
- the post-charge disclosure of pre- or post-charge material to a prosecutor, pursuant to an order of the court under section 34EC.

558. In contrast to subsection 34GE(3), subsection 34GE(4) does not require that a person must be identified as a person who is to implement a confidentiality direction in order to commit the offence. This reflects the fact that such a direction might be framed as a wholesale restriction on use or disclosure, meaning it may be somewhat artificial to



identify a person or class of persons who is to ‘implement’ such a direction. It also reflects that the offence applies whether or not the person is the first person to disclose the material. That is, the information may be disclosed beyond those who might be said to be specified as implementing the direction; the offence will also apply to relevant use or disclosure by those persons where the elements of the offence are satisfied.

559. New subsection 34GE(5) makes it an offence for a person to engage in conduct that contravenes any of the following provisions:
- subsection 34AG(2) – this provides, among other things, that a person exercising authority under a warrant or implementing a direction must treat the subject with humanity and with respect for human dignity, and must not subject the subject to torture or to cruel, inhuman or degrading treatment;
  - paragraph 34CB(2)(c) – this provides that any person apprehending the subject must, on request, give the subject facilities to contact the IGIS, the Ombudsman, the Commissioner of the Australian Federal Police, or a relevant State or Territory complaints agency;
  - section 34DI – this provides that, while a subject is appearing for questioning, a person exercising authority under a warrant must, on request, give the subject facilities to make a complaint to the IGIS, the Ombudsman, the Commissioner of the Australian Federal Police, or a relevant State or Territory complaints agency, or to give information under Division 2 of Part V of the *Australian Federal Police Act 1979*;
  - paragraph 34DN(3)(b) – this requires a person exercising authority under a warrant to defer questioning (before the commencement of questioning) until an interpreter arrives at the request of the prescribed authority in certain circumstances;
  - paragraphs 34DO(4)(b) or (5)(a) – these require a person exercising authority under a warrant to defer questioning (after the commencement of questioning) until an interpreter arrives at the request of the subject in certain circumstances.
560. The fault element for the circumstance of contravention is knowledge. As per section 5.3 of the *Criminal Code*, this means that the person must be aware that the contravention exists or will exist in the ordinary course of events.
561. New subsection 34GE(6) makes it an offence to question a person otherwise than in accordance with the permitted timeframes for questioning contained in sections 34DJ and 34DK. The fault element for the circumstance of contravention of section 34DJ or 34DK is knowledge. As per section 5.3 of the *Criminal Code*, this means that the person must be aware that the contravention exists or will exist in the ordinary course of events.
562. Each of the offences in this section carries a maximum penalty of two years’ imprisonment.

## **Section 34GF – Secrecy relating to warrants and questioning**

### *Before warrant ceases to be in force*

563. New section 34GF creates offences for unauthorised disclosures and provides the framework to allow for certain disclosures, referred to as permitted disclosures. This section is necessary as the unauthorised disclosure of information pertaining to questioning warrants carries a great risk of harm, both in jeopardising the safety of officers involved and in potentially limiting ASIO's intelligence gathering capabilities by compromising the integrity of the questioning warrant.
564. New subsection 34GF(1) reflects existing subsection 34ZS(1). It creates an offence, where a questioning warrant has been issued, for a person who discloses the existence of the warrant, a fact of questioning or apprehension in relation to the warrant and/or any operational information for the life of the warrant (which can be no more than 28 days). If the disclosure is only in relation to operational information, the person who made the disclosure must have the information as a direct or indirect result of the issue of the warrant or the doing of anything authorised by the warrant or the Division in connection with the warrant, such as a prescribed authority direction. The offence does not apply where the disclosure is a permitted disclosure.
565. The penalty for the offence in subsection 34GF(1) is imprisonment for five years. This is consistent with other penalties in the Act for non-compliance with the person's obligations under a questioning warrant. This provision is intended to deter the subject of a warrant, and any other persons that are lawfully aware of the warrant, such as lawyers or a minor's representative, from notifying others about the questioning. The disclosure of such information could result in an ASIO operation or investigation being compromised. The offence also protects sensitive information, such as information relating to ASIO's methods of operations, its sources and intelligence holdings.
566. New subsection 34GF(2) reflects existing subsection 34ZS(2). It creates an offence where a questioning warrant has been issued and a person discloses operational information that the person obtained as a direct or indirect result of the issue of the warrant or the doing of anything authorised by the warrant or the Division in connection with the warrant, such as a prescribed authority direction. The offence does not apply where the disclosure is a permitted disclosure, detailed below. The penalty for the offence is imprisonment for five years.

### *Strict liability*

567. New subsection 34GF(3) states that strict liability applies to the circumstances in paragraphs 34GF(1)(c) and (2)(c) where the unauthorised disclosure is made by the subject or a subject's lawyer. This means there is no need to prove fault in relation to the fact that the information relates to the issuance or content of the warrant or is operational information. If the disclosure is made by someone other than the subject or the subject's lawyer, the fault element applying, the fault element is recklessness.

*Extended geographical jurisdiction – category D*

568. New subsection 34GF(4) extends the geographical jurisdiction for offences under subsections 34GF(1) and (2) to Category D under section 15.4 of the *Criminal Code*. This will ensure that offences may apply to any person, in respect of conduct engaged in any country, whether or not the conduct is an offence under laws of the relevant local jurisdiction (if outside Australia). This extension is necessary due to the potential of information obtained under a questioning warrant to place at risk Australia's national security and intelligence gathering capabilities, in addition to potentially endangering the ASIO officers involved. Therefore, it is appropriate that the offences have the widest possible geographical application to target such wrongdoing. Prosecutions of non-Australians in relation to conduct outside Australia is subject to the safeguard in section 16.1 of the Criminal Code, which requires the Attorney-General to consent to the commencement of such prosecutions.

*Definitions*

569. New subsection 34GF(5) defines '*operational information*' and '*permitted disclosure*' for the purposes of the offences in section 34GF.

*'operational information'*

570. This term is intended to capture information that was or is in ASIO's possession, a source of information that ASIO had or has (other than the subject of the warrant) or an operational capability, method or plan of ASIO. The intention of this definition is to ensure that ASIO's intelligence holdings and its methods of operation receive appropriate protection from unauthorised disclosure.

*'permitted disclosure'*

571. This term means any of the following:

- a disclosure by a person exercising a power, function or duty under the Act or doing anything authorised by a questioning warrant or a prescribed authority direction or as authorised under legislation that allows a complaint to be made to the IGIS, Ombudsman or State or Territory complaints agency;
- a disclosure by a person during the questioning of the subject of a warrant;
- a disclosure to a lawyer for the purpose of obtaining legal advice or legal representation in relation to the warrant;
- a disclosure for the purpose of the initiation, conduct or conclusion by judgment or settlement of legal proceedings relation to a remedy for the treatment of a person under a questioning warrant;
- a disclosure that is permitted by a prescribed authority to be made;
- a disclosure of operational information by the subject of a minor questioning warrant or by a minor's representative to any of the following:
  - a minor's representative or sibling;

- the subject;
  - a prescribed authority or a person exercising authority under the warrant;  
or
  - the IGIS, Ombudsman or a complaints agency.
- a disclosure to make a financial assistance application under the Division;
  - a disclosure that is permitted by the Director-General or Attorney-General; or
  - a disclosure that is prescribed by the regulations.
572. New subsection 34GF(6) provides for disclosures permitted by the prescribed authority (under the definition of permitted disclosures). It provides that the prescribed authority may make a direction that permits the subject, their lawyer or a minor's representative to disclose specified information to a specified person. The direction must not be inconsistent with the regulations (if any), and can be made unconditionally or subject to conditions. The prescribed authority also has the ability to revoke or amend such a direction. New subsection 34GF(7) clarifies that the direction must be in writing and can be given on the prescribed authority's own initiative or as a result of an application by a person for such a disclosure.
573. New subsections 34GF(8) and 34GF(9) provide for disclosures permitted by the Director-General or Attorney-General (under the definition of permitted disclosures). The permission must be in writing and can be given unconditionally or subject to specified conditions. The Director-General and Attorney-General also have the ability to revoke or vary their own directions made under these subsections.
574. New subsection 34GF(10) provides guidance on giving permission to make disclosures for the prescribed authority, Director-General and Attorney-General, as the case requires. They must take into account the person's family and employment interests to the extent known, the public interest, the risk to security in giving permission and any submissions made by the person, their lawyer or ASIO. This does not limit the matters that may be taken into account in giving permission to make a disclosure.
575. New subsection 34GF(11) provides that where the prescribed authority, Director-General or Attorney-General has given permission for a permitted disclosure that is subject to a condition, where the condition is not met, the permission is taken to not be in force.
576. New subsection 34GF(12) provides for the regulations to prescribe certain disclosures so as to expand the number of disclosures that can be made. This provides a mechanism to resolve any unforeseen restrictions on disclosures if necessary.

*Offences apply to original and previously disclosed information*

577. New subsection 34GF(13) provides that the secrecy provisions in this section would apply regardless of the way in which the discloser obtained the information.

### *Relationship with other laws prohibiting disclosure*

578. New subsection 34GF(14) provides that the secrecy provisions in this section operate in conjunction with, and do not limit, other Commonwealth laws that prohibit the disclosure of information.

### **Subdivision H – Complaints, reporting and records**

579. Subdivision H of the Bill establishes clear and stringent reporting and information-sharing requirements, to ensure that the Director-General keeps accurate records of significant actions and documents that have been authorised under the Bill. Subdivision H of the Bill provides for complaints to be made in relation to contravention of the written statement of procedures. Subdivision H also contains requirements for records to be destroyed in certain circumstances.

### **Section 34H – Complaints and information about contravention of procedural statement**

580. New section 34H reflects the existing section 34ZG and relates to complaints concerning contravention of the written statement of procedures prepared by the Director-General under new section 34AF, to be followed in the exercise of authority under a questioning warrant.

581. New subsection 34H(1) provides that breaches of a current Director-General's written statement of procedures may attract complaints to other agencies, including to the IGIS, the Ombudsman, or a complaints agency in relation to the police force of the relevant State or Territory. Such a contravention may also be the subject of information given to the AFP Commissioner or AFP appointee in relation to a professional standards, conduct and practice issues pursuant to subsection 40SA of the *Australian Federal Police Act 1979*.

582. Paragraph 34H(2)(a) provides that section 34H does not limit the content of any complaints that can be made to the IGIS or the Ombudsman. Paragraph 34H(2)(a) similarly provides that section 34H does not limit the content of information that can be given to the AFP Commissioner or AFP appointee under Division 2 of Part V of the *Australian Federal Police Act 1979*. That is, such complaints can also be made in relation to conduct and activities under the warrant other than just those that constitute contraventions of the written statement of procedures. These other complaints are addressed in new sections 34BH, 34DI and 34CB.

### **Section 34HA – Providing reports to the Attorney-General**

583. New section 34HA reflects existing section 34ZH of the Act. The new section imposes reporting requirements on the Director-General to ensure the Attorney-General is made aware of any relevant information regarding questioning warrants carried out by ASIO. For each questioning warrant, a written report must be provided to the Attorney-General that provides details about:

- the extent to which action taken under the warrant has assisted ASIO in carrying out its functions; and
- apprehension, including whether any force was used in apprehending the subject; and
- any seizure of items found during a search of the subject; and
- the extent to which the carrying out of ASIO's functions was assisted by any order made under section 34AAD(2) requiring a person to provide information or assistance to allow ASIO to access data held in, or accessible from, a computer or data storage device that was seized under subsection 34CC(4) or (5).

584. It is intended that details of any item seized would include what the specific item was, how it was found, why it was seized and if or when it was returned.

585. New subsection 34HA(2) ensures this information is provided to the Attorney-General by the Director-General within three months of the day on which the warrant ceases to be in force.

586. The intent of this new section is to allow the Attorney-General to assess the performance of ASIO's function of obtaining, correlating, evaluating and communicating intelligence relevant to security. Reporting to the Attorney-General must occur promptly to ensure the Attorney-General is informed of any conduct or issues that may arise in relation to ASIO's use of special powers.

### **Section 34HB – Providing information to the Inspector-General**

587. New section 34HB reflects existing section 34ZI. The new section amends the required information that the Director-General must provide to the IGIS to align with new sections of the Bill.

588. Paragraphs 34HB(a) to (g) provide that, as soon as practicable, the Director-General must provide comprehensive information to the IGIS concerning apprehension. The information that must be provided to the IGIS is:

- a copy of each request for a questioning warrant;
- a copy of each questioning warrant issued or written record of a questioning warrant if issued orally;
- a copy of each request to vary a questioning warrant, or a written record of the request if requested orally;
- a copy of each variation to a question warrant, or a written record of the variation if issued orally;
- a statement containing details of any apprehension of a subject and details of any seizure of items;

- a statement describing any action the Director-General has taken as a result of being informed of a concern of the IGIS in relation to questioning under section 34DM ('Suspension of questioning etc. in response to concerns of Inspector-General of Intelligence and Security');
- a copy of any video recording made under section 34DP of questioning or of any complaints.

589. The requirement that this information be provided 'as soon as practicable' applies at the point each item specified in paragraphs 34HB(a) to (g) is created. That is, a copy of a request for a questioning warrant must be given to the IGIS as soon as practicable after it is made. Similarly, a copy of the warrant must be given to the IGIS as soon as practicable after the warrant is issued.

590. These requirements may be satisfied elsewhere in the Division. Where that is the case, the Director-General is not required to provide the IGIS with more than one copy of the relevant information. For example, new paragraph 34B(6)(b) provides that, if a request for a questioning warrant was made orally in response to an emergency situation, the Director-General is required to provide the written record of the request to the IGIS, no later than 48 hours after the request was made. Providing the written record of such an oral request to the IGIS within 48 hours would satisfy both the requirements in new paragraph 34B(6)(b) and new section 34HB.

591. Reporting under 34HB allows the IGIS to ensure ASIO is acting with propriety and in compliance with legislation, directions and guidelines. Section 34HB also provides that reporting must occur promptly so that any responses or investigations into impropriety or illegality can occur in a timely manner.

### **Section 34HC – Destruction of certain records obtains under warrant**

592. New section 34HC reflects existing section 34ZL. The section sets out the circumstances in which the Director-General must destroy a record or copy of a record. A record or copy must be destroyed if:

- the record or copy was made because of a questioning warrant; and
- the record or copy is in the possession or custody, or under the control, of ASIO; and
- 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.

593. This section may apply, for example if a subject's travel documents have been surrendered pursuant to section 34GB and copied pursuant to subsection 34GB(6). If the Director-General is satisfied that the copies of these travel documents are no longer required for the purposes of ASIO's functions, and the copies are under the control of ASIO, the Director-General must cause those copies to be destroyed.

## **Subdivision I—Miscellaneous**

### **Section 34J – Discontinuance of action before cessation of warrant**

594. New section 34J reflects existing section 34ZK. It obliges the Director-General to ensure action under an in force questioning warrant is discontinued where the grounds on which the warrant was issued no longer exist. The Director-General is also obliged to inform the Attorney-General and the IGIS if this occurs. This provision would be enlivened, for example, where the Attorney-General is satisfied that a person is at least 18 and subsequently issues an adult questioning warrant under section 34BA, but when the person appears for questioning, it becomes apparent that the person is under 18. The grounds for obtaining the warrant would cease to exist and ASIO would be required to discontinue all action under that warrant.

### **Section 34JA – Certain functions and powers not affected**

595. New section 34JA reflects existing section 34ZN. It expressly provides that Division 3 does not affect a function or power of:

- the IGIS under the IGIS Act;
- the Ombudsman under the *Ombudsman Act 1976* in relation to the Australian Federal Police;
- a person under Part V of the *Australian Federal Police Act 1979*.

### **Section 34JB – IGIS official may be present at questioning at questioning or apprehension**

596. New subsection 34JB reflects the existing section 34P, with the updated language of ‘IGIS official’. It is an avoidance of doubt provision which makes it clear that an IGIS official may be present at the questioning or apprehension of a person under Division 3.

597. This section ensures the effective oversight of the IGIS in relation to questioning warrants. It complements new sections 9B and 19A of the IGIS Act, which provide the IGIS with an express power to enter a place where a subject is being questioned or apprehended.

### **Section 34JC – Rules of Court about proceedings connected with warrants**

598. New subsection 34JC reflects the existing section 34ZU. It applies to the High Court and Federal Court of Australia where the subject of questioning warrant, or someone on their behalf, applies for a remedy relating to the questioning warrant or their treatment in connection to a questioning warrant.

599. The section makes reference to the Rules of Court which prescribe rules of procedure for proceedings in relation to the issuing court. This section provides that the Rules of Court of the High Court or the Federal Court of Australia may make special provision for proceedings for a remedy relating to a questioning warrant or the treatment of a person in connection to a questioning warrant.



### **Section 34JD – Jurisdiction of State and Territory courts excluded**

600. New section 34JD reflects existing section 34ZW. The purpose of this section is to expressly exclude a court of a State or Territory from having jurisdiction in proceedings for a remedy where proceedings are commenced while a questioning warrant is in force, and the remedy relates to a questioning warrant or the treatment of a person in connection to the warrant. This section has the effect of providing jurisdiction only to the Federal Court of Australia and the High Court in relation to proceedings commenced while the questioning warrant is in force. The section has effect despite any other law of the Commonwealth, including laws passed after the commencement of this section.

### **Section 34JE – Financial assistance**

601. New section 34JE is based on the existing section 34ZX. It sets out provisions for:

- financial assistance in relation to a subject appearing before a prescribed authority (for example, to assist with legal representation during questioning under the warrant);
- authorising the financial assistance;
- guidelines to be applied in authorising financial assistance; and
- limiting the application for assistance under the section.

#### *Application for assistance*

602. New subsection 34JE(1) provides that a subject of a questioning warrant can apply to the Attorney-General for financial assistance. It is intended that applications for financial assistance will be in relation to the cost of a lawyer for the purposes of appearing before the prescribed authority for questioning.

603. New subsection 34JE(2) provides that an application may be made by the subject, or by another person on behalf of the subject.

#### *Authorisation of assistance*

604. New subsection 34JE(3) provides that the Attorney-General may authorise the Commonwealth to provide the subject financial assistance in relation to the subject's appearance for questioning under a questioning warrant.

605. New subsection 34JE(4) provides that the Attorney-General may give financial assistance subject to any conditions determined by the Attorney-General.

#### *Guidelines*

606. New subsection 34JE(5) provides a discretionary power for the Attorney-General to make written guidelines to be applied in authorising the provision of financial assistance under the section.

607. New subsection 34JE(6) expressly provides that written guidelines made under subsection 34JE(5) in relation to the provision of financial assistance are not legislative

instruments. This section is merely declaratory of the law, rather than prescribing a substantive exemption from the requirements of the *Legislation Act 2003*. The guidelines made under proposed subsection 34JE(5) will not be legislative in character. Section 34JE sets out the circumstances in which financial assistance may be sought and received. It is expected that the guidelines will cover procedural issues such as the process for lodging an application and the level of fees available to barristers and solicitors appearing for a subject. While these guidelines may affect a person's interests, they will not determine or alter the content of the law. Though eligibility may be determined or assessed by reference to the guidelines, they will not affect a person's right to apply for financial assistance. Accordingly, the guidelines will be administrative in character.

#### *Limit on assistance*

608. New subsection 34JE(7) expressly provides that financial assistance under this section does not apply in relation to:
- any complaint made by the subject of the kind mentioned in paragraph 34DC(1)(i), which relates to complaints to the IGIS, the Ombudsman and State and Territory complaints agencies; or
  - any information given by the subject of a kind mentioned in paragraph 34DC(1)(j), which relates to providing information to the Australian Federal Police; or
  - any remedy the subject seeks of a kind mentioned in paragraph 34DC(1)(k), which relates to a federal court remedy for the warrant or the treatment of a person in connection with the warrant.
609. The effect of new subsection 34JE(7) is that financial assistance is only available in relation to the costs associated with the subject's appearance for questioning, and not any subsequent complaint or legal action taken by the subject.

#### **Section 34JF – Cessation of effect of Division**

610. The intent of new subsection 34JF is to expressly provide that the compulsory questioning framework in Division 3 will cease to have effect or sunset on 7 September 2030.

#### **Item 11 – Subsection 94(1)**

611. This item repeals the existing annual reporting requirements concerning questioning warrants and questioning and detention warrants. The item inserts new annual reporting requirements, updated to reflect the operation of the revised framework. Specifically, new subsection 94(1) requires the following to be included in the annual report prepared by the Director-General:
- the total number of requests made to the Attorney-General, including the number requested orally, for the issue of questioning warrants in the relevant period;

- the total number of questioning warrants issued, including the number issued orally, in the relevant period;
- the number of times persons were apprehended in the relevant period;
- the number of hours each person appeared for questioning in the relevant period, and the total of all those hours for all persons; and
- the number of times each prescribed authority had persons appear for questioning before that prescribed authority in the relevant period.

#### **Item 12 - Paragraph 94(2BC)(b)**

612. This item omits subsection 34AAA(2) and replaces it with subsection 34AAD(2).

## **Part 2 – Application and saving provisions**

### **Item 13 – Interpretation**

613. This item sets key definitions for the purposes of the application and saving provisions. Specifically:

- *commencement day* means the day on which Part 1 of Schedule 1 commences (being the earlier of a day fixed by proclamation and 7 September 2020 for Parts 1 to 3);
- *new law* means the Act as amended by Part 1 of Schedule 1 of the Bill; and
- *old law* means the Act as in force before commencement day.

### **Item 14 – Saving of warrants and requests under old law**

614. This item provides that existing Division 3 of Part III will continue to apply to any requests for questioning warrants (under existing section 34D) or questioning and detention warrants (under existing section 34F) that have not been finally determined before commencement day. The item similarly provides that existing Division 3 of Part III will continue to apply to a questioning warrant or questioning warrant that has been issued and is in force before commencement day (under existing sections 34E and 34G respectively).

### **Item 15 – Saving of appointment of prescribed authorities**

615. This item provides that a person who was a prescribed authority pursuant to existing section 34B will be taken to be a prescribed authority under new section 34AD. This ensures that anyone who is a prescribed authority at the time of commencement will continue as a prescribed authority without the need for reappointment by the Attorney-General.

616. It also provides that if the person is a member of a court, and has a function, power or duty as a prescribed authority that is neither judicial nor incidental to a judicial function or power, then the person has that function, power or duty in a personal capacity.

### **Item 16 – Saving of regulations**

617. This item provides for the saving of certain regulations.
618. Specifically, if at the time of commencement a regulation has been made for the purposes of existing subsection 34ZS(6) restricting the scope of a prescribed authority's power to make directions permitting disclosure of specified information to a specified persons, that regulation continues in force as if it have been made for the purposes of subsection 34GF(6).
619. Similarly, if at the time of commencement a regulation has been made pursuant to existing section 34ZT prohibiting or regulating access to certain information by lawyers acting for a person in connection with proceedings for a remedy relating to a warrant or the treatment of a person in connection with a warrant, those regulations continue in force as if they had been made pursuant to new section 34FH.

### **Item 17 – Requests for warrants made under old law**

620. This item provides that, for the purposes of establishing if a previous request has been made for the purposes of new subsections 34B(3) and (4), a request made for a questioning warrant or questioning warrant under existing sections 34D and 34F will be taken to be a previous request. The effect of new subsection 34B(3) is simply to clarify that a request for a questioning warrant may be made in relation to a person even if a previous request for a questioning warrant has been made in relation to the person.
621. Similarly, the item provides that, for the purposes of establishing whether a person the subject of a request for a warrant under new subsection 34B has previously been apprehended, apprehension will be taken to include a reference to detention under a questioning and detention warrant.

### **Item 18 – Annual reports**

622. This item sets out how requests and warrants issued under the existing Division 3 of Part III are to be included in an annual report following the commencement of the Bill. For the purposes of an annual report under new section 94, the following will apply:
- a reference to a request for a warrant under Division 3 of Part III will be taken to include a request for a questioning warrant or questioning and detention under existing Division 3 of Part III;
  - a reference to a warrant issued under Division 3 of Part III will be taken to include a questioning warrant or questioning and detention issued under existing Division 3 of Part III; and
  - a reference to the number of times persons were apprehended will be taken to include a reference to the number of hours persons spent in detention under a questioning and detention warrant.

623. The intention of this item is to ensure that annual reporting includes complete details of all questioning and questioning detention warrants for the relevant period, despite the introduction of the revised framework.

### **Part 3 – Consequential amendments**

624. Part 3 of Schedule 1 makes consequential technical amendments to the *Crimes Act 1914*, the *Criminal Code Act 1995*, the *Foreign Evidence Act 1994* and the IGIS Act.

#### ***Crimes Act 1914***

625. Item 19 amends paragraph 15YU(1)(a) of the *Crimes Act 1914*. The existing section 15YU of the *Crimes Act 1914* provides that criminal proceedings for specific offences may use video link evidence in accordance with Part IAE of that Act. These proceedings are limited to terrorism and related offences, including the offence in existing subsection 34L(4) of the ASIO Act, where a subject of a questioning warrant knowingly makes a false or misleading statement during questioning.
626. This item repeals the current paragraph 15YU(1)(a) of the *Crimes Act 1914* and substitutes that the relevant offence is an offence against new subsection 34GD(8) of the ASIO Act, which is the updated section reference in this Bill. This amendment also limits the offence under section 34GD(8) to circumstances where the false or misleading conduct was made in relation to questioning under a PMV-related questioning warrant.
627. Item 20 inserts a legislative note at the bottom of subsection 15YU(1) of the *Crimes Act 1914* to refer to the new definitions of questioning warrant and PMV-related questioning warrant, which are added in item 19.
628. Item 21 inserts new subsection 15YU(5) of the *Crimes Act 1914*. The item defines PMV-related questioning warrant, being a questioning warrant issued in relation to politically motivated violence. The item also inserts a new definition of questioning warrant, adopting the same definition as in new Division 3 of Part 3 of the ASIO Act.
629. The operation of items 19, 20 and 21 is that paragraph 15YU(1)(a) of the *Crimes Act 1914* will continue to apply in the same circumstances as under the existing questioning and detention warrant framework. That is, it would only be enlivened if the relevant questioning warrant relates to terrorism, and would not apply if it relates to espionage or acts of foreign interference.

#### ***Criminal Code 1995***

630. Item 22 amends subsection 105.25(4) of the *Criminal Code*, which relates to the interaction of preventative detention orders under the *Criminal Code* and questioning warrants under the ASIO Act. Item 22 removes the reference to a subject of a questioning warrant being detained under the warrant in connection with a questioning warrant. This amendment ensures that the *Criminal Code* is updated reflect that detention has been repealed under the ASIO questioning framework, while retaining the existing arrangements for a person who is subject to both a preventative detention order and a questioning warrant.

### ***Foreign Evidence Act 1994***

631. Item 23 amends the definition in paragraph (a) of designated offence in subsection 3(1) of the *Foreign Evidence Act 1994*. Similar to the above amendments to the *Crimes Act 1914*, item 23 updates the relevant offence to an offence against new subsection 34GD(8) of the ASIO Act, which is the updated section reference in this Bill, but only where the false or misleading conduct was made in relation to questioning under a PMV-related questioning warrant.
632. Item 24 inserts the definitions of PMV-related questioning warrant and questioning warrant into the *Foreign Evidence Act 1994*. The item defines PMV-related questioning warrant, being a questioning warrant issued in relation to politically motivated violence. The item also inserts a new definition of questioning warrant, adopting the same definition as in new Division 3 of Part 3 of the ASIO Act.
633. The operation of items 23 and 24 is that the definition of designated offence in the *Foreign Evidence Act 1994* will continue to have the same meaning as under the existing questioning and detention warrant framework. For example, an offence that constitutes a designated offence would only be enlivened if the relevant questioning warrant relates to politically motivated violence, and would not apply if it relates to espionage or acts of foreign interference. This has implications for the use of foreign material in criminal proceedings relating to an offence under new subsection 34GD(8).

### ***Inspector-General of Intelligence and Security Act 1986***

634. Item 25 amends section 9B of the IGIS Act to reflect that the Bill repeals detention. New section 9B of the IGIS Act provides an express right for the IGIS to enter any place, at any reasonable time, where a person is being questioned or apprehended in relation to a questioning warrant. Entry under section 9B of the IGIS Act must be for the purposes of an inspection under section 9A of that Act, and the IGIS must notify the Director-General before entering the place.
635. Item 26 amends section 19A of the IGIS Act to reflect that the Bill repeals detention. Similar to above, new subsection 19A of the IGIS Act provides an express right for the IGIS to enter any place, at any reasonable time, where a person is being questioned or apprehended in relation to a questioning warrant. Entry under section 19B of the IGIS Act must be for the purposes of an inquiry under that Act, and the IGIS must notify the Director-General before entering the place.
636. The intention of items 25 and 26 is to provide the IGIS with the necessary and appropriate powers to effectively oversee the execution of a questioning warrant.

### **Part 4 – Amendments contingent on the commencement of the Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020**

637. Part 4 of Schedule 1 makes amendments to the ASIO Act, contingent on the commencement of the *Federal Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020*. The purpose of the *Federal*

*Circuit and Family Court of Australia (Consequential Amendments and Transitional Provisions) Act 2020* is to make consequential amendments as a result of the newly created Federal Circuit and Family Court.

***Australian Security Intelligence Organisation 1979***

- 638. Item 27 amends paragraph (c) of the definition of *superior court* in section 34A. It inserts ‘the Federal Circuit Court and Family Court of Australia (Division 1)’.
- 639. Item 28 inserts an additional paragraph after (d) in the definition of *superior court* in section 34A. It inserts ‘a State Family Court (being a court to which section 41 of the *Family Law Act 1975* applies)’.
- 640. Item 29 updates the reference to the Family Court of Australia in paragraph 34EC(2)(b). It ensures that the subparagraph will refer to the ‘Federal Circuit and Family Court of Australia (Division 1)’.



## Schedule 2—Tracking Device Framework

### *Australian Security Intelligence Organisation Act 1979*

641. The Bill amends the surveillance device framework in the ASIO Act to promote increased operational agility, mitigate the risk to ASIO operatives engaging in physical surveillance and to help resolve the current disadvantage faced by ASIO when engaging in joint operations with law enforcement. These amendments have been modelled off equivalent provisions for law enforcement in the Surveillance Devices Act 2004. Modifications have been made to reflect the differences between a law enforcement operation, the purpose of which is to investigate a relevant offence in order to obtain evidence, and a covert intelligence collection operation, the purpose of which is to collect security intelligence consistent with ASIO's statutory functions.
642. The Bill amends the surveillance device framework in the ASIO Act by:
- enabling ASIO to use tracking devices with an internal authorisation in certain circumstances, rather than under a warrant
  - clarifying that the surveillance device framework is permissive and does not require ASIO to obtain a warrant where conduct would not otherwise be unlawful; and
  - modernising the definition of 'tracking device' 'device' and 'track' and in doing so effectively modernising ASIO's powers and capabilities.
643. As well as aligning ASIO's powers with those of law enforcement, these amendments are in response to the threat of politically motivated violence. This has evolved from traditional threats of large groups planning large scale attacks over a long period to the new threat environment where small groups or lone actors plan attacks within short timeframes.
644. The increase in lone wolf and opportunistic attacks means that immediately deployable capabilities are significant to ASIO's role of obtaining, correlating and evaluating intelligence relevant to security in the context of time critical threats to national security.

### **Item 1           Section 22 (definition of *authorising officer*)**

645. This item inserts a definition of 'authorising officer' in the definition section of Division 2. This item defines an authorising officer as the Director-General or any ASIO employee or affiliate who holds, or is acting in ASIO that is equivalent to or higher than a position occupied by a Senior Executive Service employee. This amendment will allow ASIO to seek an internal authorisation of a tracking device (under new section 26G) to allow sufficient operational efficiency to respond to time critical threats. This will also allow an officer with operational oversight of the security matter to authorise the use of tracking devices. The intelligence that will be collected

using the tracking devices under the internal authorisation framework will be subject to the Attorney-General's Guidelines.<sup>3</sup> The Guidelines provide that the more intrusive the intelligence collection, such as surveillance, the higher the officer level required to authorise its use.

**Item 2           Section 22 (definition of *device*)**

646. This item amends the definition of 'device' in the ASIO Act to ensure that the definition captures all relevant things that could be used to listen, observe or track a person or object. The new definition is technologically neutral and is intended to capture, among other things, electronic and non-electronic devices, instruments, apparatus, equipment, substances and any other things. The definition is not intended to be exhaustive and will apply to both tangible objects and non-tangible things, for example, remote tracking. This change will apply to the definitions of listening device and optical surveillance device and ensures that ASIO will be able to use the most technologically and operationally appropriate method of surveillance to give effect to a warrant issued under Subdivision D of Division 2 of Part III of the ASIO Act.

**Item 3           Section 22 (definition of *internal authorisation*)**

647. This item inserts a definition of 'internal authorisation' which means an authorisation given by an authorising officer under the internal authorisation framework under section 26G in Subdivision DA of Division 2 of the ASIO Act.

**Item 4           Section 22 (definition of *track*)**

648. This item will amend the definition of 'track' to reflect the updated meaning of a 'tracking device' as something that enables the determination or monitoring of the location of a person or object or status of an object, such as whether the object is in working order.

**Item 5           Section 22 (definition of *tracking device*)**

649. This item will update the definition of a tracking device to enable ASIO to maintain the effectiveness its intelligence gathering techniques and capabilities. This item will ensure that ASIO is able to conduct its operations in the most efficient and effective way, with the ability to use any technology it has access to, where appropriate and subject to strict accountability requirements and restrictions.

650. This amendment will better align the definitions of different surveillance devices within the ASIO Act, and between the ASIO Act and the *Surveillance Devices Act 2004*. The definitions of 'listening device' and 'optical surveillance device' in the ASIO Act closely reflect the definitions contained in the *Surveillance Devices Act 2004*, referring to 'any device capable of being used' for the relevant surveillance purpose. In contrast, the definition of 'tracking device' differs between each Act. More closely aligning the

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<sup>3</sup> *Attorney-General's Guidelines in relation to the performance by the Australian Security Intelligence Organisation of its function of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence)*, made under section 8A of the ASIO Act.

definitions is also intended to assist ASIO employees and affiliates in the practical application of the legislation.

651. Use of tracking devices will be subject to the approval of an authorising officer under the internal authorisation (new section 26G and new section 26K) or a warrant being obtained from the Attorney-General (as required) and the ASIO Guidelines, which provide guidance on proportionality and require ASIO to obtain information using as little intrusion into individual privacy as is possible.

**Item 6           Section 26E (at the end of the heading)**

652. This item expands the heading to section 26E to add the phrase ‘or internal authorisation’ and is consequential to the insertion of new Subdivision DA into Division 2 of Part III of the ASIO Act, relating to the use of tracking devices under internal authorisation.

**Item 7           Subsections 26E(1) and (2)**

653. This item inserts the phrase ‘or internal authorisation’ into subsections 26E(1) and (2) of the ASIO Act and is consequential to the insertion of new Subdivision DA into Division 2 of Part III of the Bill, relating to the use of tracking devices under internal authorisation (see item 7).

**Item 8           After Subdivision D of Division 2 of Part III**

654. This item inserts new Subdivision DA into Division 2 of Part III of the ASIO Act, relating to the use of tracking devices under internal authorisation.

**Section 26G - Use of tracking devices under internal authorisation**

*Request for authorisation*

655. New section 26G provides the ability for an ASIO employee or affiliate (the applicant) to request an authorising officer to give an authorisation for the installation, use, maintenance and recovery of tracking devices, in respect of a matter that is important in relation to security (the *security matter* in the internal authorisation framework).
656. New subsections 26G(1) to (5) set out the various requirements in relation to requests for internal authorisations. These requests can only be made in relation to a particular person and/or an object or a class of object.
657. New paragraphs 26G(3)(a) and (b) provide that the request may be made in writing or orally in person, by telephone or other means of communication.
658. Paragraphs 26G(4)(a), (b) and (c) require an applicant to include in a request a statement with information including: the facts and other grounds on which the applicant considers it necessary that the authorisation should be given; the extent to which the applicant considers that the authorisation will substantially assist the collection of intelligence in respect of the security matter; and the period for which the applicant considers the authorisation should remain in force, which must not exceed

90 days. This is to ensure that the request has enough information to enable the authorising officer to make a decision about the authorisation and what to include in the authorisation if issued. This also allows the IGIS effective oversight of the request.

659. If the request is made orally, new subsection 26G(5) requires ASIO to make a written record of the request that meets the requirements of subsection (4) to be made within 48 hours after the request is made. The ability to orally request an internal authorisation creates the operational agility ASIO employees or affiliates require in carrying out surveillance to respond to time critical threats. The requirement for a written request to be made within 48 hours after the request is made is to ensure that the oral request is adequately recorded in accordance with the requirement for a written request. This requirement will also allow IGIS to have oversight of any oral requests within a reasonable time period. A record of any request for an internal authorisation is also required to be included in the register of internal authorisation under the new section 26Q.

#### *Test for giving of internal authorisation*

660. New subsections 26G(6) and (7) provide the legislative test that an authorising officer must be satisfied of when giving of an internal authorisation. The authorising officer may issue the authorisation only if satisfied that there are reasonable grounds for believing that, if the authorisation is requested in relation to a particular person, the use by ASIO of a tracking device in relation to the person will, or is likely to, substantially assist the collection of intelligence in respect of the security matter.
661. If the authorisation is requested in relation to an object or class of object—the authorising officer must be satisfied that the use by ASIO of a tracking device in or on that object, or an object of that class, will, or is likely to, substantially assist the collection of intelligence in respect of the security matter.
662. New subsection 26G(7) is an avoidance of doubt provision which clarifies that the identity of the person referred to in paragraph 26G(6)(a) need not be known for the authorising officer to authorise the use of a tracking device. In circumstances where the person's identity may not be known, there would still need to be sufficient intelligence available about the person in order to satisfy the test for the issuance of an internal authorisation under new section 26G.
663. New subsection 26G(8) provides a safeguard in the internal authorisation framework that will allow the authorising officer to impose any relevant limitations on an authorisation. The internal authorisation will be subject to any restrictions or conditions specified in it.

#### **Section 26H – Requirements for internal authorisations**

664. New section 26H outlines the requirements of internal authorisations and provides that an internal authorisation may be given in writing, or orally in person or by telephone or other means of communication.

665. New subsection 26H(2) requires the authorisation to specify information including the security matter in respect of which the authorisation is given, the person's identity (if known), the object or class of objects to which the authorisation relates, the day and time the authorisation was given and the period of time for which the authorisation remains in force and the restrictions and conditions that the internal authorisation is subject to. The period that an internal authorisation may be in force cannot exceed 90 days, which is significantly shorter period than most warrants can remain of force.
666. New section 26H provides a range of safeguards relating to the internal authorisation framework including the ability for the authorising officer to specify a period that the authorisation is in force that is subject only to what the authorising officer considers reasonable and necessary in the circumstances. An additional safeguard that is provided by new section 26H is that an authorising officer may revoke an authorisation before the period that the authorisation is in force has expired.
667. New subsection 26H(4) provides that subsection 26H(3) does not restrict the giving of further internal authorisations in relation to the same security matter.
668. New subsection 26H(5) requires that if an internal authorisation is given orally, a written record of the authorisation must be made within 48 hours after the authorisation is given and must meet the requirements of subsection (2). The requirement for a written authorisation to be made within 48 hours after the authorisation is made is to ensure that the oral authorisation is adequately recorded in accordance with the requirement for a written authorisation. This requirement will also allow IGIS to have oversight of any oral authorisations within a reasonable time period. A record of any authorisation is also required to be included in the register of internal authorisations under the new section 26Q.
669. New section 26H(6) provides that the following are not legislative instruments:
- An internal authorisation issued by means of a written document by an authorising officer; and
  - A record made under new subsection 26H(5), being a written record of an orally issued internal authorisation.
670. This is consistent with Item 16 of the of the table in regulation 6 of the *Legislation (Exemption and Other Matters) Regulation 2015*, which provides that an instrument authorising the surveillance of a person or thing and an instrument supporting the application of such an instrument are not legislative instruments.

### **Section 26J – What an internal authorisation authorises**

671. New section 26J sets out what an internal authorisation authorises ASIO to do.
672. In the case of an internal authorisation given in relation to a particular person, under new section 26J ASIO may install use or maintain one or more tracking devices to track the person, and do any thing reasonably necessary to conceal the fact that any thing has been done in accordance with the authorisation.

673. In the case of an internal authorisation given in relation to a particular object (or class of object), under new section 26J ASIO may install, use or maintain one or more tracking devices to track the person or the specified object; and do any thing reasonably necessary to conceal the fact that any thing has been done in accordance with the authorisation.
674. Subsection 26J(2) authorises the use of a tracking device on an object or a class of objects. For example, if ASIO could use a tracking device to track a vehicle, this provision would enable the internal authorisation to specify all vehicles used or likely to be used by a particular person as a class of vehicle. The ability of ASIO to specify a class of objects in an internal authorisation would minimise the risk of ASIO's ability to track a person being thwarted by frequent vehicle changes of the person. In this circumstance, the ability for an authorisation to specify a class of object would avoid the need for ASIO to seek multiple new, or varied, internal authorisations for each vehicle used.
675. The ability of ASIO to undertake action in accordance with the internal authorisation differs from the power in section 39 of the *Surveillances Devices Act 2004*, which provides that a law enforcement officer who has obtained permission to use a tracking device without a warrant, may do so. In the ASIO context, it is not practical to limit the use of tracking devices via internal authorisation to only the applicant. For example, the use of the device or devices may span over many days, where the applicant is one of a group of ASIO employees involved in the operation. If the applicant were the only person able to undertake action in accordance with the internal authorisation, ASIO would not be provided with sufficient operational agility and may subsequently be prevented from obtaining crucial intelligence.

### **Section 26K – Certain acts not authorised**

676. New section 26K relates to limits on what action can be taken under an internal authorisation or an authorisation under new section 26L (which deals with the recovery of tracking devices - see next item). This section provides safeguards for the internal authorisation framework and distinguishes what ASIO can do under the internal authorisation framework when using tracking devices, from what ASIO can do under a surveillance device warrant that is issued by the Attorney-General. This section prohibits ASIO, when acting under a 26G authorisation or 26L authorisation (recovery) from:
- entering premises or interfering with the interior of a vehicle without permission;
  - remotely installing a tracking device or enhancement equipment;
  - the installation, use or maintenance of a tracking device, or enhancement equipment in relation to the device, to listen to, record, observe or monitor the words, sounds or signals communicated to or by a person;

- the doing of any act by ASIO if, ASIO could not do the act without it being authorised by a computer access warrant issued under section 25A.

677. In addition to new section 26K safeguards, the internal authorisation framework is subject to oversight by the IGIS through the register of internal authorisations under new section 26Q, and the ASIO Guidelines that require ASIO to conduct its activities in a lawful, timely and efficient manner, while applying the principle of proportionality to ensure the least intrusion necessary into an individual's privacy. Additionally, the framework also imposes an obligation under new section 26P, requiring that if the grounds on which the internal authorisation was given under have ceased to exist, then an authorising officer must ensure that action under that internal authorisation is discontinued.

### **Section 26L - Recovery of tracking devices**

678. New section 26L deals with the recovery of tracking devices and provides that if a tracking device is installed, used or maintained under an internal authorisation, ASIO is also authorised to recover the tracking device or devices (or any enhancement equipment in relation to the device) and do any thing reasonably necessary to conceal the fact that any thing has been done under this subsection.

679. If, for the purposes of subsection 26L(1), a tracking device (or enhancement equipment in relation to the device) is not recovered while the authorisation is in force, ASIO is also authorised to use the device or equipment solely for the purposes of the location and recovery of the device or equipment within 28 days of the authorisation ceasing to be in force. This does not allow ASIO to use the tracking device for the collection of intelligence. If the device or devices cannot be recovered within the 28 day period, ASIO can, at the earliest time after this period at which it is reasonably practicable, locate and recover the device. This is to ensure that the tracking devices deployed under the authorisation are recovered as soon as is reasonably possible after the authorisation ceases to be in force.

680. The recovery of the tracking devices under new section 26L is subject to the same safeguards as apply under the internal authorisation framework. If the recovery of a tracking device requires ASIO to enter private premises or interfere with the interior of a vehicle then ASIO is not permitted to recover the tracking device under an authorisation (under new section 26K) and must seek a recovery warrant (under new section 26R). The note at the end of new section 26L clarifies that subsections 26L(1) and (2) do not authorise any activity that would involve an activity or thing that cannot be authorised in section 26K (see previous item 'certain acts not authorised').

### **Section 26M – Exercise of authority under internal authorisations**

681. New section 26M relates to the exercise of authority under internal authorisations. This section provides that the authority conferred by an internal authorisation, or by section 26L (which deals with the recovery of tracking devices – see item 7) may be exercised on behalf of ASIO by an ASIO employee or an ASIO affiliate.

## Section 26N – Variation of internal authorisations

682. New section 26N provides the ability for ASIO to vary internal authorisations where required. This section sets out the requirements for variations to internal authorisations. Subsections 26N(1) to 26N(4) cover requests for variations and provide that an ASIO employee or ASIO affiliate (the applicant) may request an authorising officer to vary an internal authorisation. The request may be made in writing or orally in person, or by telephone or other means of communication.
683. A request under subsection 26N(1) must include a statement of: the facts; other grounds on which the applicant considers it necessary that the authorisation should be varied; and the extent to which the applicant considers that the authorisation, as varied, will substantially assist the collection of intelligence regarding the matter that is important in relation to security for which the authorisation is given.
684. If the request is made orally, a written record of the request that meets the requirements of subsection 26N(3) must be made within 48 hours after the request is made. This requirement will allow IGIS to have oversight of any requests for variations of internal authorisations within a reasonable time period.
685. Subsections 26N(5) to 26N(7) cover the giving of variations and provide that the authorising officer may vary the authorisation only if the authorising officer is satisfied that there are reasonable grounds for believing that the authorisation, as varied, will substantially assist the collection of intelligence in respect of the security matter.
686. If the variation extends, or further extends, the period during which the authorisation is in force, the total period during which the authorisation is in force must not exceed 90 days and an internal authorisation may be varied more than once under new section 26N.
687. Subsections 26N(8) to 26N(9) cover the requirements for variations and provide that a variation under new section 26N may be given in writing; or orally in person, or by telephone or other means of communication.
688. If the variation is given orally, a written record of the variation must be made within 48 hours after the variation is given. This requirement will allow IGIS to have oversight of any variations of internal authorisations within a reasonable time period.
689. New section 26N(10) provides that the following are not legislative instruments:
- A variation of an internal authorisation issued by means of a written document by an authorising officer;
  - A record made under new subsection 26N(9), being a written record of an orally issued variation of an internal authorisation.
690. This is consistent with Item 16 of the of the table in regulation 6 of the *Legislation (Exemption and Other Matters) Regulation 2015*, which provides that an instrument authorising the surveillance of a person or thing and an instrument supporting the application of such an instrument are not legislative instruments.



## **Section 26P – Discontinuance of action before expiration of internal authorisation**

691. New section 26P provides an additional safeguard in relation to the framework regarding the discontinuance of action before the expiration of an internal authorisation.
692. Subject to new subsections 26P(3) and (4), if an authorising officer is satisfied that the grounds on which an internal authorisation was given have ceased to exist, the authorising officer must, as soon as practicable, take such steps as are necessary to ensure that action under the internal authorisation is discontinued.
693. For the purposes of subsection 26P(1), action under an internal authorisation does not include the recovery of a tracking device or any enhancement equipment in relation to the device.
694. Subsection 26P(3) is a severability clause that provides where an internal authorisation was given in relation to more than one of the matters mentioned in subsection 26G(2) and the grounds on which the internal authorisation was given continue to exist for at least one of those matters, new subsection 26P(1) applies only in relation to the matters for which the grounds have ceased to exist.
695. New subsection 26P(1) does not apply to an authorising officer if another authorising officer has already taken, or started to take, such steps as are necessary to ensure that action under the internal authorisation is discontinued.
696. Subsection 26P(4) seeks to limit the obligation in subsection 26P(1) where a number of authorising officers become satisfied that the grounds on which an internal authorisation have ceased to exist. In this circumstance, the obligation does not apply to other authorising officers if an authorising officer has already taken, or started to take, such steps as are necessary to ensure that action under the internal authorisation is discontinued.

## **Section 26Q – Register of internal authorisations**

697. New section 26Q provides a safeguard requiring the Director-General of ASIO to comply with detailed record keeping requirements of the internal authorisation framework. This relates to the registering of internal authorisations and requires that the Director-General must establish and maintain a register, (which may be kept in electronic form), of information of internal authorisations. The register acts as an oversight mechanism to allow the IGIS to oversee the operation of the internal authorisation framework. Information contained in the register will include:
  - (a) the name of the person who made the request;
  - (b) the matter that is important in relation to security in respect of which the authorisation was requested;
  - (c) the day on which the authorisation was given or refused;
  - (d) the name of the authorising officer who gave or refused to give the authorisation;
  - (e) if the authorisation was given—the day on which the authorisation ceased to be in force; and

- (f) whether action under the authorisation was discontinued in accordance with section 26P, and if so, what day the action was discontinued; and
- (g) the location at which any record relating to the request (including the request) is kept by ASIO.

698. The note at the end of new subsection 26Q(3) provides that the ‘location’ mentioned in paragraph (f) may be a physical location or an electronic location.
699. New subsection 26Q(4) relevantly provides that the register of internal authorisations is not a legislative instrument within the meaning of subsection 8(1) of the *Legislation Act 2003* (Cth). This is because the register is administrative in nature as it doesn’t affect the rights and interests of individuals and subsection 26Q(4) is merely declaratory.

### **Section 26R - Issue of warrants for recovery of tracking devices**

700. New section 26R relates to the procedures for the issuing of warrants for the recovery of tracking devices. The Director-General may request the Attorney-General to issue a warrant under this section in respect of one or more tracking devices (the relevant devices), or enhancement equipment in relation to the device or devices (the relevant equipment). New subsection 26R(1) deals with the arrangements for requesting a warrant and provides that a warrant can be requested:
- (a) If the relevant devices, or relevant equipment, were:
    - i. installed in or on an object by ASIO; or
    - ii. used by ASIO; or
    - iii. maintained by ASIO; and
  - (b) the installation, use or maintenance was not under:
    - i. a surveillance device warrant; or
    - ii. a warrant issued under section 27A; or
    - iii. an identified person warrant; and
  - (c) recovery of the device or devices or equipment may involve either or both of the following:
    - i. entering premises without permission from the owner or occupier of the premises;
    - ii. interference with the interior of a vehicle without permission of the person having lawful possession or control of the vehicle.
701. New subsections 26R(2) and (3) deal with the requirements for issuing warrants and provide that the Attorney-General may issue a warrant in respect of the relevant devices or relevant equipment if the Attorney-General is satisfied that failure to recover the relevant devices or relevant equipment would be prejudicial to security.
702. In determining whether the warrant should be issued, the Attorney-General must also have regard to the risk that information relating to the operations, capabilities or technologies of, or methods or sources used by, ASIO will be communicated or made available to the public without the authority of the Commonwealth if the warrant is not issued.

703. New subsections 26R(4) and (5) deal with the requirements for warrants and provide that a warrant issued under this section must:
- (a) be signed by the Attorney-General; and
  - (b) specify:
    - i. details of the relevant devices or relevant equipment; and
    - ii. the day the warrant is issued; and
    - iii. the period during which the warrant is in force, which must not be more than 90 days; and
    - iv. any restrictions or conditions that the Attorney-General considers appropriate in the circumstances; and
  - (c) authorise the use of any force against persons and things that is necessary and reasonable to do the things authorised by the warrant; and
  - (d) state whether entry to premises is authorised to be made at any time of the day or night or during stated hours of the day or night.
704. Subparagraph (4)(b)(iii) does not prevent the issuing of further warrants in relation to the same devices or equipment.
705. New subsection 26R(6) deals with the authorisation in a warrant and provides that a warrant issued under this section in respect of relevant devices or relevant equipment authorises ASIO to:
- (a) recover a relevant device or any relevant equipment; and
  - (b) do any of the following:
    - i. use the device or equipment solely for the purposes of locating the device or equipment. To clarify, a recovery warrant does not permit ASIO to use the tracking device to collect intelligence;
    - ii. enter any premises where the device or equipment is reasonably believed to be, for the purpose of recovering the device or equipment;
    - iii. enter any other premises for the purpose of gaining entry to or exiting the premises where the device or equipment is reasonably believed to be. This is intended to capture circumstances where ASIO has no other way to gain access to the premises (for example, where the premises on which the tracking device is located is in an apartment block and entry is through common areas or adjoining premises);
    - iv. enter into or onto, or alter, an object for the purpose of recovering the device or equipment;
    - v. replace an object with an equivalent object for the purpose of recovering the device or equipment. This power provides that ASIO is authorised to replace the object, including where there is no operationally viable method of returning the removed part (for example, replacing a nail that is damaged during the course of ASIO recovering a tracking device or equipment);
    - vi. break open anything for the purpose of recovering the device or equipment;

- vii. if the device or equipment is installed in or on an object—temporarily remove the object from any place where it is situated for the purpose of recovering the device or equipment and returning the object to that place;
  - viii. use a nominal amount of electricity from any source to power the device or equipment. In some instances, the drawing of a nominal amount (that is, an insignificant or minimal amount) of electricity by the device or enhancement equipment, while the device or equipment is on site, is necessary before it can be recovered (for example, using a nominal amount of electricity to recover information stored on a tracking device before it is reasonably practicable to recover the device);
  - ix. any thing reasonably necessary to conceal the fact that any thing has been done under the warrant;
  - x. use any force against persons and things that is necessary and reasonable to do any of the above;
  - xi. any other thing reasonably incidental to any of the above. This power authorises ASIO to do anything reasonably incidental to the recover the tracking devices under the warrant (for example, this would permit ASIO to disable security measures in order to gain entry onto the premises).
706. A further safeguard that applies to recovery warrants under section 26R, is a reporting obligation on ASIO under section 31A of Subdivision H in the ASIO Act, to report the use of force under the warrant to ensure adequate oversight of ASIO’s warrant based activities. The warrant framework authorises the use of force against any person if it is reasonable and necessary to do the things authorised under the warrant. Section 31A imposes an obligation on the Director-General to notify the Attorney-General and the IGIS in writing and as soon as practicable after the use of force occurs in new section 26R warrants in the execution of a recovery warrant.

**Item 9            Subdivision H of Division 2 of Part III (at the end of the heading)**

707. This item expands the heading to Subdivision H of Division 2 of Part III of the ASIO Act to add the phrase ‘and authorisations’ and is consequential to the insertion of new Subdivision DA into Division 2 of Part III of the ASIO Act, relating to the use of tracking devices under internal authorisation.

**Item 10           Paragraph 29(1)(a)**

708. This item amends the text of paragraph 29(1)(a) of the ASIO Act to include a reference to new section 26R, to enable the Director-General to issue a recovery warrant in an emergency subject to the requirements of the section as inserted by this Bill.

**Item 11           Paragraph 29A(3)(a)**

709. This item amends the text of paragraph 29A(3)(a) of the ASIO Act to include a reference to new section 26R, as inserted by this Bill allowing a recovery warrant to be

varied or extended and which relates to the issuing of warrants for the recovery of tracking devices.

**Item 12        Subsections 30(2)**

710. This item repeals existing subsection 30(2) of the ASIO Act and replaces it with a new provision. Section 30 of the ASIO Act relates to the discontinuance of action before the expiration of a warrant issued under Division 2 of Part III of the ASIO Act.
711. Item 12 repeals and substitutes the current subsection 30(2) with a new paragraph 30(1)(b) that ensures that ‘action under a warrant’ includes action under a recovery warrant under the new section 26R.

**Item 13        Subsection 33(3)**

712. This item amends subsection 33(3) of the ASIO Act by adding a reference to ‘recovering’ of a surveillance device and is consequential to the amendments made by the Bill to insert new Subdivision DA of Division 2 of Part III of the ASIO Act (in particular, the amendments made by new sections 26L and 26R), which relate to the recovery of tracking devices.

**Item 14        Paragraph 33(3)(a)**

713. This item amends the text of paragraph 33(3)(a) of the ASIO Act to include a reference to new section 26R, as inserted by this Bill, which relates to the issuing of warrants for the recovery of tracking devices.

**Item 15        After paragraph 33(3)(a)**

714. This item inserts new paragraph (aa) into subsection 33(3) of the ASIO Act. Subsection 33(3) relates to the relationship between provisions in the ASIO Act about surveillance devices and other laws. This item adds a reference to new section 26G, as inserted by the Bill, which deals with the use of tracking devices under internal authorisation.
715. The item expands the scope of subsection 33(3) to mean that, despite any other law of the Commonwealth, a State or a Territory (including the common law), a person acting on behalf of ASIO does not act unlawfully by installing, using or maintaining a surveillance device if the person does so in accordance with an internal authorisation issued under new section 26G.

**Item 16        At the end of section 33**

716. This item adds new subsection (4) to section 33 of the ASIO Act, which deals with the relationship between provisions in the ASIO Act about listening devices or surveillance devices and other laws.
717. This item provides that nothing in Division 2 of Part III of the ASIO Act (‘special powers’) makes the use, installation, maintenance or recovery by ASIO of a surveillance device unlawful if the use, installation, maintenance or recovery would not

otherwise be unlawful under any other applicable law of the Commonwealth, a State or a Territory (including the common law).

718. The purpose of this item is to clarify that the ASIO Act does not require ASIO to obtain a warrant or internal authorisation under Division 2 of Part III of the ASIO Act in circumstances where the conduct is not unlawful in the State or Territory in which it takes place (or under any applicable Commonwealth law or the common law).

**Item 17      After section 34A (first occurring)**

719. This item inserts new section 34AAB into the ASIO Act, which provides the reporting requirements of the Director-General of ASIO to the Attorney-General in relation to internal authorisations.
720. New subsection 34AAB(1) provides that, if an internal authorisation is given under new Subdivision DA of Division 2 of Part III of the ASIO Act, the Director-General of ASIO must give the Attorney-General a written report that meets the requirements of subsection (2) within three months of the day on which the internal authorisation ceases to be in force. This is a safeguard of the internal authorisation framework as it ensures that the Attorney-General has oversight of all requests, refusals and authorisations under the framework.
721. New subsection 34AAB(2) relates to the content requirements of the report to the Attorney-General. The report must, firstly, state whether the authorisation was executed and, if so, must also:
- (a) give details of the extent to which anything done in accordance with the authorisation has assisted ASIO in carrying out its functions;
  - (b) give details of the matter (the security matter) that is important in relation to security in respect of which the authorisation is given;
  - (c) state the name, if known, of any person whose location was determined by the use of a tracking device in accordance with the authorisation;
  - (d) state the period during which a tracking device was used in accordance with the authorisation;
  - (e) give details of:
    - (i) any object in or on which a tracking device was installed in accordance with the authorisation; and
    - (ii) the premises where the object was located when the device was installed;
  - (f) give details of the compliance with the restrictions or conditions (if any) to which the authorisation was subject; and
  - (g) whether the authorisation was varied, and if so:
    - (i) the number of variations; and
    - (ii) the reasons for each variation.

**Item 18      After paragraph 34AA(3)(c)**

722. This item inserts new paragraphs (ca) and (cb) into subsection 34AA(3) of the ASIO Act. Section 34AA of the ASIO Act relates to the issuing of evidentiary certificates by the Director-General of ASIO in connection with a relevant warrant or authorising provision and subsection 34AA(3) lists the types of information or matters which may be set out in the certificate.

723. This item adds to that list the following:

- if the relevant authorising provision is section 26G—the matters required to be specified under subsection 26H(2) (new paragraph (ca)) (the requirements of internal authorisations); and
- if the warrant is issued under section 26R—the matters required to be specified under subsection 26R(4) (requirements of recovery warrants) for the warrant (new paragraph (cb)).

**Item 19      Subsection 34AA(5) (definition of *relevant authorising provision*)**

724. This item amends the text of subsection 34AA(5) of the ASIO Act to include a reference to new section 26G, as inserted by this Bill, which relates to the use of tracking devices under internal authorisation.

**Item 20      Subsection 34AA(5) (definition of *relevant warrant*)**

725. This item amends the text of subsection 34AA(5) of the ASIO Act to include a reference to new section 26R, as inserted by this Bill, which relates to the issue of warrants for the recovery of tracking devices.

**Item 21      After subsection 94(2BC)**

726. This item inserts new subsection 94(2BD) and provides that an annual report prepared by the Director-General of ASIO under subsection 94(1) of the ASIO Act must also include a statement of the total number of requests made under new subsection 26G(1) during the period and the total number of authorisations given under new section 26G during the period. This requirement introduces an additional safeguard to the amendments as it requires ASIO to be transparent about the use of authorisations under the framework.

**The Hon Peter Dutton MP, Minister for Home Affairs**