

EXPLANATORY STATEMENT

Issued by the authority of the Attorney-General

Australian Security Intelligence Organisation Act 1979

Statement of Procedures –warrants issued under Division 3 of Part III

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* inserted Division 3 into Part III of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) to provide ASIO with the ability to seek a warrant to question, and in limited circumstances detain, a person who may have information relevant to a terrorism offence. This Act required the development of a written Statement of Procedures (Protocol) to be followed in the exercise of authority under the new questioning and detention warrants. It also provided (in sections 34C(3)(ba) and 34C(3A)) that no warrant could be issued until the Protocol was made.

In accordance with the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* the Attorney-General approved a Protocol, which was developed by the Director-General of Security in consultation with the Australian Federal Police (AFP) and the Inspector-General of Intelligence and Security (IGIS). This Protocol was tabled in Parliament on 12 August 2003.

The Act contained a sunset clause providing that Division 3 would cease to be in force three years after commencement (23 July 2006). It also required the Parliamentary Joint Committee on Intelligence and Security (PJC) to review by 22 January 2006, the operation, effectiveness and implications of the new regime in Division 3.

The PJC tabled its report in November 2005. Following the PJC's findings that the powers were effective and should continue to operate beyond the original sunset period of July 2006, the *Australian Security Intelligence Organisation Amendment Act 2006* (Amendment Act) was enacted to continue the powers for a further 10 years, at which time they will be subject to further review.

The Amendment Act also responded to other recommendations of the PJC by clarifying and separating the requirements for the two separate (questioning, and questioning and detention) warrant regimes, and strengthening and clarifying various rights under the regime. The amendments included:

- better facilitation of the subject's ability to make complaints to the Inspector-General of Intelligence and Security, the Commonwealth Ombudsman, or a State or Territory complaints agency
- simplification, restructuring, correction and language changes, as well as renumbering, to Division 3, and
- insertion of a new section 34C in the ASIO Act, which changed the provisions governing the Protocol, to recognise that a Protocol was already in place and enabling a revised Protocol (or Statement of Procedures) to be made as appropriate.

To reflect the amendments made by the Amendment Act, the Protocol (Statement of Procedures) has been amended by the Director-General of Security in consultation with the AFP, IGIS and the Attorney-General's Department. In accordance with the Act, the Attorney-General has approved the new Statement of Procedures.

As for the earlier Protocol, the Statement of Procedures is designed to be read in conjunction with the Act. It sets out the basic standards that will apply in the questioning and detention of persons under a Division 3 warrant and deals with operational matters to guide the questioning and detention process. It addresses issues such as:

- i. transportation of a person under a warrant;
- ii. treatment of a person being questioned, eg the conditions applicable during questioning such as access to fresh drinking water and sanitary facilities at all time during questioning;
- iii. supervision of detention under a warrant, such as accommodation facilities and food and sleep requirements;
- iv. health and welfare of a person subject to a warrant, such as the accommodation facilities and food and sleep requirements;
- v. video recording of procedures;
- vi. contact with other persons and a complaint mechanism; and
- vii. arrangements for liaison with other persons such as the IGIS and the Commissioner of the relevant police service.

The main changes from the earlier Protocol relate to restructuring, changes to section number references and adding to the complaints mechanisms in line with the amendments made by the Amendment Act.

The Statement of Procedures is a legislative instrument for the purpose of the *Legislative Instruments Act 2003* (LIA). However the disallowance provisions in section 42 of the LIA do not apply to the Statement, and it is exempt from the sunset requirements in Part 6 of the LIA. The Amendment Act inserted section 34ZZ into the ASIO Act, providing that Division 3 will cease to have effect on 22 July 2016, as well as amending paragraph 29(1)(bb) of the *Intelligence Services Act 2001* to require the PJC to conduct another review of the Division before that sunset date. This review and sunset mechanism may involve making significant changes to the Protocol at that time. Accordingly it is not necessary for the LIA default sunset provisions to apply.

The ASIO Act (section 34C) requires the Director-General to consult the IGIS and AFP Commissioner, and the Minister to approve the Statement, before the Statement can be made as a legislative instrument. These requirements have been satisfied.

The Statement commenced on the day after it was registered on the Federal Register of Legislative Instruments.