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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

ASIO LEGISLATION AMENDMENT BILL 2003

EXPLANATORY MEMORANDUM

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

ASIO LEGISLATION AMENDMENT BILL 2003

OUTLINE

This Bill amends the *Australian Security Intelligence Organisation Act 1979* (the Act). It enhances the capacity of the Australian Security Intelligence Organisation (ASIO) to exercise its powers for questioning and detaining persons who have information important to the gathering of intelligence in relation to a terrorism offence. The Bill:

- extends the questioning time under a warrant where interpreters are used in recognition of the additional time involved in using an interpreter;
- reduces the risk of the subject of a warrant fleeing the country; and
- protects intelligence gathering operations by prohibiting, except in specified circumstances, disclosures of information about investigations or sensitive operational information.

To achieve these objectives, the Bill will:

- extend the maximum time available for questioning the subject of a warrant from 24 to 48 hours in cases where an interpreter is used;
- create offences if the subject of a warrant fails to surrender any passports issued to the subject, or leaves or attempts to leave the country after being notified of the issuing of a warrant;
- protect the effectiveness of intelligence gathering operations by:
 - preventing a person from making a primary or secondary disclosure of information without authorisation where the information relates to the warrant, the questioning or detention of a person under the warrant, or operational information while the warrant is in force; and
 - preventing a person from making a primary or secondary disclosure of operational information without authorisation for 2 years after the warrant ceases to be in force.

Persons making an unauthorised disclosure will be liable for a criminal offence.

The Bill will also remove any doubt about the ability of the prescribed authority to give directions consistent with questioning warrants, including in relation to detention.

The Bill also amends the *Intelligence Services Act 2001* to ensure that a review of ASIO's new terrorism-related powers required to be conducted by the Parliamentary Joint Committee on ASIO, ASIS and DSD focuses on the provisions as amended, rather than their original enacted form.

Financial impact statement

The Bill does not have any financial impact.

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NOTES ON CLAUSES

Clause 1: Short Title

1. Clause 1 is a formal provision specifying the short title of the Bill.

Clause 2: Commencement

2. The Bill will commence on the day after it receives Royal Assent.

Clause 3: Schedule(s)

3. Each Act specified in the Schedules are amended or repealed as set out in the Schedules.

Schedule 1 – Australian Security Intelligence Organisation Act 1979

Part 1 – Time for questioning through interpreter

Item 1 – At the end of section 34HB

4. This item will insert proposed subsections 34HB(8)-(12) into section 34HB of the Act. In effect, these subsections will double the maximum questioning time to 48 hours where an interpreter is used during the questioning of a person who is the subject of a warrant issued under section 34D of the Act. These subsections are necessary because questioning time is effectively halved where questions and answers need to pass through the interpreter to the recipient of the communication.
5. Proposed subsection (8) provides that proposed subsections (9)-(12) only apply where an interpreter is present at any time while a person is questioned under a warrant.
6. Proposed subsection 34HB(9) provides that a person must not be questioned under the warrant unless the prescribed authority permits the questioning to continue beyond the specified total times. These total times are 24, 32 or 40 hours. The effect is that there are 3 additional blocks of 8 hours in which a person can be questioned beyond the existing regime.
7. Proposed subsection 34HB(10) provides that procedures in subsections (3)-(5) and paragraph 7(b) also apply to subsection (9). The subsection makes it clear that the same procedure applies for the person exercising authority to request a prescribed authority to permit an extension of questioning blocks from 24 to 48 hours as that person would for the questioning blocks to 24 hours. A

prescribed authority will still only be able to permit questioning to continue where he or she is satisfied that:

- there are reasonable grounds for the continued questioning of the subject; and
- the questioning of the subject has been conducted properly or without delay.

A prescribed authority will also still be able to revoke permission at any time. The subsection also clarifies that a prescribed authority must direct that a person be removed from detention if the prescribed authority revokes permission for the further questioning of the subject of a warrant.

2. Proposed subsection 34HB(11) provides that subsection (6) and paragraph (7)(c) applies as if subsection (6) refers to a total of 48 hours. This means that in cases where an interpreter is used, the maximum questioning period is 48 hours. The prescribed authority must direct that the person be released from detention at the expiry of that time.
3. The effect that proposed subsection 34HB(12) is that the prescribed authority must direct that the subject of a warrant be released from detention if the prescribed authority does not permit the person to be questioned for a further questioning block.

Item 2 - Application

4. This item provides that the amendments made by item 1 apply to warrants issued on or after the commencement of Part 1.

Part 2 – Preventing unauthorised overseas travel by person specified in warrant

Item 3 – After section 34JB

5. This item inserts proposed sections 34JC and 34JD into the Act which create offence provisions to prevent unauthorised overseas travel by a person who is the subject of a warrant. These sections are designed to minimise the risk that the subject of a warrant will flee to avoid being questioned.
6. Proposed subsection 34JC(1) requires a person specified in a warrant to surrender any passports that person has possession of or control over as soon as practicable after being notified of the issue of the warrant and the effect of the subsection. The obligation applies to both Australian and foreign passports issued to the person. It is an offence not to comply with this provision with a maximum penalty of 5 years imprisonment.
7. Consistent with subsection 34D(5) of the Act, which provides the power to make copies or transcripts of records produced by the subject of a warrant, the provision permits a person who is authorised under the Act to exercise authority to inspect or examine the passport, and make copies or transcripts of it.
8. The provision also obliges the Director-General of Security to return a surrendered passport to a person as soon as is practicable after the warrant

expires. The Director-General may authorise return of the passport at an earlier time if appropriate.

9. Proposed section 34JD provides that it is an offence for the subject of a warrant that is in force to leave Australia without the permission of the Director-General after they have been notified of the warrant and the effect of this offence. By virtue of section 11.1 of the *Criminal Code Act 1995*, attempting to leave the country in these circumstances would also be an offence. The maximum penalty for failing to comply with this provision is 5 years imprisonment.
10. The section also provides that the Director-General can give written permission for a person to leave Australia at a specified time and to set conditions if necessary. It is possible that the person will have a demonstrable need to travel overseas for a limited period while the warrant is in force. The Director-General could permit such travel, subject to conditions and guarantees, in appropriate circumstances.
11. The 5 year penalties in item 3 for contravening proposed sections 34JC and 34JD are consistent with the other penalties for non-compliance with the Act, and reflect the potential for serious harm to occur if an investigation into a terrorist offence is compromised.

Item 4 – Application

12. This item provides that the section 34JC offence (surrender of passports) applies to a person who is notified about a warrant on or after commencement of this clause. It also provides that the section 34JD offence (leaving Australia) applies to a person leaving Australia on or after the commencement of this clause, regardless of when notice of the issue of the warrant was given to the person.

Part 3 – Direction by prescribed authority to detain

Item 5 – Proposed subsection 34F(2A)

13. This item inserts proposed subsection 34F(2A) into the Act. It clarifies that a direction made by a prescribed authority under subsection 34F(1) is not inconsistent with a warrant for the mere fact that the warrant is a questioning warrant as described in paragraph 34D(2)(a).
14. For example, the prescribed authority may form the view – in light of matters disclosed by the person during questioning – that the person may seek to avoid further appearances or to alert other persons to the investigation. In such circumstances (and subject to the conditions set out in subsection 34F(3) of the Act) the prescribed authority may give a direction for the detention of the person in accordance with paragraph 34F(1)(a). Proposed subsection 34F(2A) makes clear that such a direction may be given without first obtaining the written approval of the Minister, provided that such a direction is not precluded by any restrictions or conditions in the warrant.

Item 6 – Application

15. This item provides that item 5 applies in relation to warrants issued on or after the commencement of this Part.

Part 4 – Secrecy relating to warrants and questioning

Item 7 – Amendment to paragraph 34F(1)(d)

16. This item adds words to paragraph 34F(1)(d) to clarify that a prescribed authority is able to make a direction that the subject of a warrant be allowed to contact someone while being questioned and impose a condition to the effect that specified information must not be discussed. If a person fails to follow the condition in the direction, they may commit an offence under proposed subsection 34VAA(1).

Items 8 and 9 – Repeal

17. These items repeal subsections 34U(7)-(11) and 34V(4)-(6) of the Act. The repealed provisions are being replaced by item 10. As the current regulation making power under subsection 34U(10) of the Act will be repealed, regulations made under this power will no longer apply to warrants issued after the commencement of this Bill.

Item 10 – Secrecy relating to warrants and questioning

18. This item inserts proposed section 34VAA into the Act. Section 34VAA creates offences where a person discloses information and that information is not within the categories of permitted disclosures.

Proposed subsection 34VAA(1)

19. This provision establishes an offence for the direct or indirect disclosure of information by a person relating to the questioning and detention of the subject of a warrant. The offence applies while the warrant is in force and where a permitted disclosure exception does not apply.
20. Proposed subsection 34VAA(1) applies to various kinds of information. A person must not disclose information which indicates the fact that a warrant has been issued, or other facts relating to the content of the warrant or to the questioning or detention of persons in connection with the warrant.
21. The person must also not disclose operational information (defined in proposed subsection 34VAA(5)). Operational information may not be disclosed if a person has that information as a direct or indirect result of the issue of the warrant, or the doing of anything authorised by the warrant or other provisions under Division 3 of Part III of the Act.

22. This provision is intended to deter the subject of a warrant from notifying persons who have terrorist links that they are being questioned. The disclosure of such information could result in a terrorist investigation being compromised. The clause also protects sensitive information, such as information relating to ASIO's methods of operations, its sources, and intelligence holdings.
23. The maximum penalty for contravening this subsection is 5 years imprisonment which is consistent with the other penalties in the Act for non-compliance with the person's obligations under the warrant process. The penalty is also appropriate due to the sensitive nature of the information and the potential for serious harm to occur if an investigation into a terrorist offence is compromised.

Proposed subsection 34VAA(2)

24. Proposed subsection 34VAA(2) establishes an offence for the disclosure of operational information at any time before the end of 2 years starting at the end of the period during which a warrant is in force. The subsection applies where a person has the information as a direct or indirect result of the issue of a warrant or the doing of anything authorised under the warrant, a direction made by a prescribed authority during questioning, or by another provision of Division 3 of Part III of the Act.
25. The maximum penalty for contravening this subsection is 5 years imprisonment. The length of this penalty is consistent with the other penalties for non-compliance with a person's obligations under a warrant for questioning or detention. The penalty is also appropriate due to the sensitive nature of the information and the potential for serious harm to occur if an investigation into a terrorist offence is compromised.

Proposed subsection 34VAA(3)

26. Proposed subsection 34VAA(3) applies strict liability to the physical elements of proposed subparagraphs 34VAA(1)(c) and (2)(c) so that there is no need to prove fault in relation to those circumstances for disclosures made by:
- the subject of a warrant; or
 - a lawyer who is contacted by the subject for the purposes of questioning or other proceedings in connection with a warrant.
2. For disclosures by subjects of a warrant or their lawyers who are covered by the subsection, the prosecution will still need to prove that a person intended to disclose information and that the person was reckless in relation to the other elements of the offences.
3. For disclosures by other persons who are not covered by this subsection, the prosecution would need to prove that a person intended to disclose information and that the person was reckless in relation to the other elements of the offences.

Proposed subsection 34VAA(4)

4. Proposed subsection 34VAA(4) extends the geographical jurisdiction to category D under section 15.4 of the *Criminal Code Act 1995* for proposed subsections 34VAA(1) and (2). This means the offences apply whether a person makes the disclosure in Australia or overseas. The extension of the geographical jurisdiction will ensure that offences may apply for communications by persons outside of Australia with other persons outside of Australia which may lead to the compromising of terrorist investigations or ASIO's operational information.

Proposed subsection 34VAA(5)

5. Proposed subsection 34VAA(5) defines 'operational information' as information indicating:
 - information that was or is in ASIO's possession;
 - a source of information that ASIO has other than the subject of the warrant;or
 - an operational capability, method or plan of ASIO.
2. The intention of the definition of 'operational information' is to ensure that ASIO's intelligence holdings and its methods of operation receive appropriate protection from unauthorised disclosure.
3. Proposed subsection 34VAA(5) also defines a 'permitted disclosure'. A permitted disclosure can be made by a person who has authority or is given authority in accordance with the Act, a warrant issued under the Act, a direction by a prescribed authority under subsection 34F(1) of the Act, or as authorised under legislation that allows a complaint to be made to the Ombudsman or the Inspector-General of Intelligence and Security. Other permitted disclosures include:
 - a disclosure by a person during the questioning of the subject of a warrant;
 - a disclosure by a lawyer for the purpose of obtaining legal advice in connection with a warrant or legal representation for a remedy relating to a warrant or the treatment of the person in connection with the warrant;
 - a disclosure for the purpose of the initiation, conduct or conclusion by judgment or settlement of legal proceedings relating to such a remedy;
 - a disclosure that is permitted by a prescribed authority;
 - a disclosure by the representative of a child in accordance with subsection 34V(1) of the Act in relation to the warrant to:
 - a parent, guardian, representative, or sibling of the subject; or
 - to a prescribed authority, a person exercising authority under the warrant, the Inspector-General of Intelligence and Security or the Ombudsman.
 - a disclosure permitted by the Director-General, the Minister, or as prescribed by the regulations.

Proposed subsections 34VAA(6)-(8)

2. Proposed subsection 34VAA(6) provides that a prescribed authority may permit a disclosure to be made by a lawyer of the subject of a warrant (or a

parent or representative in the case of a young person) to disclose certain information to a specified person during questioning under the warrant. A prescribed authority may only give such permission where the permission is given in writing and where the permission is consistent with the regulations. The prescribed authority would be able to set conditions upon such a disclosure.

3. Proposed subsections 34VAA(7) and (8) provide that the Director-General and the Minister may also permit a person to make a disclosure by providing written permission for the disclosure. The Director-General and the Minister would be able to set conditions upon such a disclosure. However, the Minister would have to obtain advice from the Director-General before such permission could be given.
4. Where a condition of a permitted disclosure is not met under proposed subsections 34VAA(6)-(8), that permission is revoked. A permitted disclosure can be revoked or amended by the person who gave the permission. The effect is that if a person discloses information in contravention of a condition, or where permission is given for a disclosure to be made and is subsequently revoked, the person may commit an offence under proposed subsections 34VAA(1) and (2).

Proposed subsection 34VAA(9)

5. This subsection provides for the regulations to prescribe certain disclosures so as to expand the number of disclosures that can be made if necessary should any unforeseen restrictions on disclosure occur.

Proposed subsection 34VAA(10)

6. This proposed subsection provides that the secrecy provisions in proposed section 34VAA would apply regardless of the way in which the discloser obtained the information.

Proposed subsection 34VAA(11)

7. This proposed subsection provides that the secrecy provisions in proposed section 34VAA operate in conjunction with and do not affect other Commonwealth laws that prohibit the disclosure of information.

Proposed subsection 34VAA(12)

8. This proposed subsection clarifies that proposed section 34VAA does not apply to the extent, if any, that it would infringe any constitutional doctrine of implied freedom of political communication.

Item 11 – Application

9. This item provides that item 10 applies to warrants issued on or after the commencement of this Part.

Schedule 2 – *Intelligence Services Act 2001*

Item 1 - Proposed paragraph 29(1)(bb)

10. This item ensures that the Parliamentary Joint Committee on ASIO, ASIS and DSD reviews the amended version of Division 3 of Part III of the Act rather than the Division created under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the Amendment Act).
11. The amendment does not change the scope of the review or the period for undertaking it. The specific date of 22 January 2006 has been included by reference to the date in which the Amendment Act received Royal Assent.