

## Operation of the legislation

- 1.1 At the first hearing, an initial and central question on the operation of Division 3 Part III was put to both ASIO and the Attorney-General's Department:

Senator Ray: Putting aside the question of the sunset clause, in giving evidence today, are you arguing for any increased powers in the existing legislation ...?

Mr Richardson: No.

Mr McDonald: With us the answer is no as well. In fact the amendments we included in our submission are about clarifying the powers, probably in the direction of the rights of the individual.

Senator Ray: Director-General, you are satisfied that the existing powers equip you to do the job you need to do?

Mr Richardson: Yes.

- 1.2 The Committee reviewed the operations of the existing provisions. There is, therefore, no expectation that the Act which will be re-introduced into the Parliament next year will contain amendments which would increase any powers.

## Current provisions for questioning and detention

- 1.3 The relevant provisions of Division 3 of Part III of the ASIO Act are provided at [Appendix D](#).
- 1.4 The legislation enables ASIO to obtain a warrant from an ‘issuing authority’ for the questioning of a person before a ‘prescribed authority’ in order to obtain intelligence that is important in relation to a terrorism offence. A warrant may also provide for a person to be detained for questioning if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority, or may destroy or damage evidence.
- 1.5 Warrants for questioning and detention have no effect in relation to persons under 16 years of age and may only be issued in relation to persons aged between 16 and 18 years if it is likely that the child will commit, is committing, or has committed a terrorism offence.
- 1.6 The subject of a warrant cannot be detained for more than 168 hours. They can be questioned under a warrant for no more than a total of 24 hours and once they have been questioned for this period of time they must be released – unless they have used an interpreter, in which case they can be questioned for up to 48 hours. Questioning can occur in blocks of up to eight hours for adults and two hours for persons aged between 16 and 18 years. There appears to be some confusion in the Act as to the time limit of 168 hours, which appears to apply to both questioning and questioning and detention warrants, and the length of a warrant, which is 28 days.<sup>1</sup> The Attorney-General’s Department described this as an issue requiring clarification. The department’s submission asserts that the meaning of the ‘technical’ term ‘questioning period’ is used to cover the period in which a person is detained’ and presumably not to a questioning only warrant.<sup>2</sup> This is not clear in the current legislation.
- 1.7 Questioning is conducted in the presence of a ‘prescribed authority’. ‘Prescribed authorities’ are initially drawn from the ranks of former superior court judges. If there are insufficient former judges, then serving superior court judges can be appointed. If there are insufficient serving judges then a President or Deputy President of the

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1 See Chapter 2.

2 AGD submission, pp. 26-27.

Administrative Appeals Tribunal (AAT) can be appointed, so long as that person holds legal qualifications.

- 1.8 The ASIO Act also provides for a protocol setting out standards which must be adhered to when questioning and detention occur under a warrant.
- 1.9 The protocol has been developed and issued by the Director-General of Security after consulting with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police. The protocol was also approved by the Attorney-General and presented to each House of Parliament. The PJCAAD was briefed in writing, about the protocol.
- 1.10 The protocol covers such things as the treatment of a person undergoing questioning (eg when breaks in questioning must be taken, access to drinking water and toilet facilities), facilities related to health and welfare (such as food and accommodation), and video recording of procedures. The text of the Protocol is at [Appendix E](#).
- 1.11 As mentioned above, the *ASIO Legislation Amendment Act 2003* also introduced secrecy provisions into the legislation which prohibit:
  - (i) while a warrant is in force (up to 28 days), disclosure of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant; and
  - (ii) while a warrant is in force and during the period of two years after the expiry of the warrant, disclosure of any ASIO operational information acquired as a direct or indirect result of the issue of a warrant, unless the disclosure is permitted under another provision.
- 1.12 The penalty for infringing these provisions is a maximum of 5 years imprisonment.

## Operation of the legislation

- 1.13 The Attorney-General's Department (AGD), ASIO, the Australian Federal Police (AFP), and the Inspector General of Intelligence and Security (IGIS) all provided submissions and gave evidence on the operations of the Act. In addition, the Committee took evidence from one of the prescribed authorities, one of the issuing authorities and three of the lawyers for the subjects of warrants.

- 1.14 Prior to the conduct of the Committee's review, very few details about the operation of the legislation were publicly available. ASIO is concerned to maintain the security of sensitive counter-terrorism investigations. Moreover, as referred to above, the strict secrecy provisions of the legislation prevent the disclosure of certain information by persons subject to a warrant or by their legal representatives for up to two years after the expiry of the warrant.
- 1.15 However, it is the Committee's view that this process of review, without impinging on sensitive matters of national security, should make public as much information as possible about the operations of the Act. It is vital if public understanding of the processes is to be accurate and public confidence is to be maintained. It was clear to the Committee during the course of the inquiry that the secrecy surrounding the operation of the Act has sometimes been counter productive to these aims.<sup>3</sup> Moreover, although the Committee acknowledges that investigations can span long periods of time, the review, of its nature, will generally occur at some distance from any individual questioning warrant. Furthermore, in respect of the secrecy provisions of the Act (section 34VAA), evidence on the operations of the Act given to the Committee in its role of statutory oversight is protected, albeit subject to the caveats on disclosure in the *Intelligence Services Act 2001*.<sup>4</sup>
- 1.16 The extent of public reporting and the operations of the secrecy provisions will be canvassed in more detail in Chapter 5.

## Warrants

### Numbers and types

- 1.17 In accordance with the reporting requirements of subsection 94(1A) of the ASIO Act, ASIO provided the following information on the operation of the questioning and detention regime through its Annual Report to Parliament 2003-2004,<sup>5</sup> the first year of the operation of the legislation:

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3 Mr Richardson expressed frustration at misunderstandings in the community about the legislation: 'It does not always help when some people make over-the-top comments about the legislation - that is, that we have the right to go into anyone's home at any time of the day or night, pull them out of bed and detain them for seven days.' ASIO transcript, public hearing 19 May 2005, p. 28.

4 See advice from Mr Bret Walker on the Committee website.

5 ASIO Annual Report, 2003-2004, pp. 39-40

- The number of requests made under section 34C to issuing authorities during the year for the issue of warrants under section 34D: 3
- The number of warrants issued during the year under section 34D: 3
- The number of warrants issued during the year that meet the requirement in paragraph 34D(2)(a) (about requiring a person to appear before a prescribed authority): 3
- The number of hours each person appeared before a prescribed authority for questioning under a warrant issued during the year that meets the requirement in paragraph 34D(2)(a) and the total of all those hours for all those persons:

<b>Questioning Warrants 2003-2004</b>	
Person 1	15 hours, 57 minutes
Person 2	10 hours, 32 minutes
Person 3	42 hours, 36 minutes (interpreter required)
Total Hours	69 hours, 5 minutes

- The number of warrants issued during the year that meet the requirement in paragraph 34D(2)(b) (for authorising a person to be taken into custody, brought before a prescribed authority and detained): 0
- The number of times each prescribed authority had people appear for questioning before him or her under warrants issued during the year: 3 people appeared before the same authority.

1.18 In its submission to the Committee in May, ASIO advised that the following additional warrants were issued:

<b>Questioning warrants 2004-2005</b>	
Person 4	15 hours, 50 minutes
Person 5	5 hours, 17 minutes
Person 6	5 hours, 59 minutes
Person 7	12 hours, 49 minutes
Person 8	2 hours, 38 minutes
Total Hours for 8 warrants	111 hours 7 minutes

- 1.19 At the final hearing on 8 August 2005, ASIO notified the Committee of an additional six warrants:

<b>Questioning warrants 2005</b>	
Person 9	5 hours 24 minutes
Person 10	4 hours 5 minutes
Person 11	4hours 5 minutes
Person 12	1 hour 38 minutes
Person 13	5 hours 17 minutes
Person 14	6 hours 2 minutes
Total Hours for 14 warrants <sup>6</sup>	137hours 38 minutes

- 1.20 In a public speech on 23 March 2005, the Director-General of Security indicated that while the ASIO Act's questioning power had been utilised, the detention power had not.<sup>7</sup> However, Mr Richardson did report to the Committee that ASIO had considered issuing a detention warrant on one occasion. This was not pursued 'on the basis, firstly, of a judgement that we came to that the issue was not as imminent as we had initially thought and, secondly, on the basis of legal advice that the case was marginal.'<sup>8</sup> By the end of the review, there had still been no detention warrants issued.
- 1.21 No minor, between the ages of 16 and 18, has been detained or questioned. No one has been strip searched.<sup>9</sup>

### **Procedures: prescribed authorities & issuing authorities**

- 1.22 With respect to the issuing of warrants, the Attorney-General's Department must review the warrants to ensure they meet the legislative requirements. The department reported that it had made only minor amendments to warrants issued to date.<sup>10</sup>

6 Although 14 warrants have been issued they have covered 13 people as one person was the subject of two warrants.

7 Speech by the Director-General of Security, Mr Dennis Richardson, LawAsia Conference, 23 March 2005.

8 ASIO transcript, public hearing 19 May 2005, p. 11 and classified hearing 19 May 2005, p. 2.

9 ASIO transcript, public hearing 19 May 2005, p. 5.

10 AGD submission no. 84, p. 23.

- 1.23 The role of the Attorney-General's Department is largely a procedural one. The department's submission provided little specific evidence on the actual use of the powers, as they pertained to the department, in relation to any specific warrant. They reported to the Committee that the department was responsible for the appointment of the prescribed authorities and issuing authorities. At the time of writing, they had appointed and retained 25 people in five states as prescribed authorities, all former judges. It had not been necessary to use current, Territory Supreme or District Court judges or the President or Deputy President of the AAT. The officers from the Attorney-General's Department advised the Committee that '[they] have not had any difficulty with recruitment.'<sup>11</sup>
- 1.24 Senator Ray asked whether, in the light of this experience and given the anxieties over the potential conflict of interest associated with AAT appointments, this category of appointments should not be deleted from the legislation.<sup>12</sup> The department did not agree with the suggestion. They saw the prescribed authorities as performing a vital role and they foresaw problems if there were to be insufficient numbers in a particular jurisdiction in the future. They noted that the order of priority for selection of prescribed authorities was set in the act with precedence being given to former judges.<sup>13</sup>
- 1.25 Six issuing authorities have been appointed from four states, all in compliance with the Act. The Attorney-General's Department liaises with both authorities on questions of process in order 'to minimise direct contact between these authorities and ASIO [and]... to ensure the authorities are as impartial as possible during the questioning process.'<sup>14</sup>
- 1.26 ASIO has used four issuing authorities in various states:
- 1 for 11 warrants
  - 3 for 1 warrant each.
- 1.27 ASIO has used four prescribed authorities in various states:
- 1 for 8 warrants
  - 2 for 5 warrants
  - 1 for 1 warrant.
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11 AGD transcript, public hearing 19 May 2005, p. 25.

12 Transcript, public hearing 19 May 2005, p. 33.

13 AGD supplementary submission no.102, p. 19.

14 AGD submission no. 84, p. 24.

- 1.28 To date, the Attorney-General has not rejected any request for a warrant which the Director-General of Security has made. None of the issuing authorities has rejected a request for a warrant made by the Attorney-General.<sup>15</sup> The issuing authority, who gave evidence to the inquiry<sup>16</sup>, informed the Committee that the written briefs accompanying the requests for warrants were very extensive and the quality of information was appropriate.<sup>17</sup> The issuing authority also noted that there was usually an opinion within the brief that the information sought could not be obtained by other means.<sup>18</sup> This criterion is not a test required of the issuing authority under the Act and he did note that he had no way of testing the assertion. Moreover, he had no way of knowing whether the subsequent questioning remained within the terms of the warrant as issued.<sup>19</sup> The issuing authority who spoke to the Committee had not sought to make amendments to any of the draft warrants presented to him.
- 1.29 Neither the prescribed authority nor the lawyers for the subjects of warrants receives the comprehensive briefs of material supplied by ASIO to the Attorney-General or to the issuing authority when requesting a warrant. While the Committee believes that it is not appropriate for this brief to go to the lawyer, in respect of the prescribed authority, this raises the question of his capacity to control the scope or relevance of the questioning.<sup>20</sup>

### Specificity of warrants

- 1.30 A question was raised with the Committee about how specific the warrants were.<sup>21</sup> The issuing authority indicated that the briefs accompanying warrants had much quite specific information within them; however, there were questions about whether there was sufficient specificity in the warrants themselves to allow the lawyer to have a discussion with his client, to get instructions and prepare for

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15 ASIO transcript, public hearing 19 May 2005, pp.24-25

16 This issuing authority had issued 11 of the 14 warrants issued to date.

17 IA transcript, classified hearing 6 June 2005, p. 1.

18 IA transcript, classified hearing 6 June 2005, p. 1.

19 IA transcript, classified hearing 6 June 2005, p. 2. This, he said, was a problem with all warrants.

20 The implications of this arrangement and a recommendation on specificity of warrants and the level of information provided to the prescribed authority are provided in chapter 3.

21 The specificity on one warrant has been the subject of a complaint. See paragraph 1.61 below.



the questioning.<sup>22</sup> Lawyers for the subjects of warrants told the Committee that they and their clients did not see the supporting documentation for a warrant; they saw only the warrant itself. Their view was that 'the warrant on its face is lacking in detail'<sup>23</sup>. They argued that:

The trigger for the issue of a warrant is that somebody has information concerning terrorist related offences that are specified in a particular part of the Criminal Code. It might be a series of offences or it might be a series of suspected offences, but at the very least a warrant should have on its face what sections of the Criminal Code the agency is investigating because, in a sense, they are investigating whether or not somebody has information that relates to specific charges.<sup>24</sup>

[A]ny rights, such as they are, which exist in the act to make application to the Federal Court or to make complaint are in my experience rendered almost ineffective or inoperable because it is impossible as a responsible legal practitioner to give your client advice about the merits of any actions, causes of any actions or likelihood of any success in a vacuum or absence of information.<sup>25</sup>

- 1.31 One lawyer explained that the lack of specificity affected the possible scope of the questioning and appeared to infringe the intentions of the act:

[I]t seems to me that if after 12 hours of questioning I, as a reasonably intelligent lawyer, cannot work out what they are getting at then the scope of the questioning was just far too broad. ... that would not seem to me to satisfy the legislative requirements of the Act for having a warrant issued.<sup>26</sup>

- 1.32 This was a matter of some concern to the Committee. The Committee acknowledges that the detail on the warrant should not be such that it disclosed sensitive information with which ASIO is working; however, the secrecy provisions of the Act protect the information in the warrant not only from general public knowledge, but from disclosure beyond the people involved in the questioning itself.
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22 Lawyers transcript, classified hearing, 6 June 2005, p. 5.

23 Lawyers transcript, classified hearing, 6 June 2005, p. 5.

24 Lawyers transcript, classified hearing, 6 June 2005, p. 6.

25 Lawyers transcript, classified hearing, 7 June 2005, p. 1.

26 Lawyers transcript, classified hearing, 7 June 2005, p. 2.

Therefore the purpose of the detail is to guide the prescribed authority in his supervision of the questioning, the questioner in the focus of the questions, the lawyer for the subject of the warrant in his advice to his client, and the IGIS or the Federal Court in their judgement on any complaint or appeal. Specificity is therefore crucial. Mr Patrick Emerton, albeit on the basis of principle rather than specific knowledge, nevertheless expressed concern about the possibility of vague or overly general warrants.

If warrants are being worded in that way – ‘We suspect this person has information relevant to some terrorism offence or other’ – and that is all they say ... If they read like that, I would think that that is outrageous, to be frank.<sup>27</sup>

- 1.33 The Committee was supplied with a template for a warrant in the ASIO submission. In the course of the hearings, it sought copies of individual warrants from ASIO and the Attorney-General’s Department. It was informed that the only addition to the template was the name of the subject, dates and places to attend. At the final hearing on 8 August 2005, ASIO advised the Committee that:

The fact that no further information is included in the warrant is consistent with the fact that this is an intelligence gathering exercise. It is the practice in the warrant to specify the particular terrorism offences that we assess the person is likely to be able to give information in relation to. ... I know that, in one case only, the warrant did not refer to terrorism offence provisions. We then reverted to the practice of specifying the actual provisions. [However ASIO also explained] there must be a real, practical limitation on how you could address that concern [regarding specificity].<sup>28</sup>

- 1.34 The implications of this, specifically the need for better guidance as to the lawful scope of the questioning, are discussed in Chapter 3.

### Timing of the issuing of warrants

- 1.35 Mr Richardson reported that ASIO always sought to serve warrants at an appropriate time and place<sup>29</sup> and as discreetly as possible. Of the fourteen warrants served so far, twelve have been served at the

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27 Emerton transcript, public hearing 7 June 2005, p. 32.

28 ASIO transcript, classified hearing 8 August 2005, p. 5.

29 ASIO transcript, public hearing 19 May 2005, p.

person's home and two at the place of work.<sup>30</sup> All warrants have included a *Notice* which explained the terms of the warrant in plain English, and on one occasion in Arabic, and outlined both the rights and obligations of the subject.<sup>31</sup> To date, warrants have been served in sufficient time before the subject has been required for questioning, allowing the subject time to seek legal representation.<sup>32</sup> All persons served with a warrant attended on the appointed day and time; no one failed to attend.<sup>33</sup> In relation to the later warrants issued in this review period, there was a complaint about the timing of the questioning. That will be dealt with below when complaints are discussed.

## Legal representation

- 1.36 Almost all persons who have been subject to questioning warrants have had access to legal representation at all times.<sup>34</sup> There were two exceptions. One, where the legal representative 'did not attend questioning on some occasions.'<sup>35</sup> ASIO reported that the subject himself had dispensed with his legal representative.<sup>36</sup> Both ASIO and the department reported that the person confirmed that he was 'comfortable with questioning proceeding without the legal representative being present.'<sup>37</sup> A second circumstance occurred in one of the additional warrants issued in mid-2005 when a subject did not have a lawyer on the first day, but did after that. The Committee was told that 'it was his choice.'<sup>38</sup>
- 1.37 No legal representative has been removed under paragraph 34U(5), whereby the prescribed authority may remove a lawyer whose conduct has been unduly disruptive. However, a number of the legal representatives for the subjects of warrants argued that the

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30 ASIO classified submission, p. 25.

31 This includes the secrecy provisions of the Act, the right to legal representation, the need to provide all passports to ASIO as soon as practicable, details of the financial assistance scheme.

32 ASIO classified submission, p. 25.

33 ASIO transcript classified hearing, 19 May 2005, p. 19.

34 AGD submission no.84, p. 20.

35 AGD submission no. 84, p. 20.

36 ASIO classified submission, p. 33.

37 AGD submission no. 84, p. 20 and ASIO classified submission, p. 33.

38 ASIO transcript, classified hearing 8 August 2005, p. 4.

prohibition on legal representatives intervening on behalf of their clients was unfair.<sup>39</sup>

- 1.38 One of the issues raised by some witnesses was the provision in the legislation that relates to the right of ASIO to monitor consultations between lawyers and their clients. **[A sentence has been removed here under protest at the request of ASIO. The Committee did not accept that the content of this sentence constituted a national security concern. The Committee has a statutory responsibility to report to the Parliament on the operations of this provision and regards required deletions that cannot be justified as a violation of that duty.]** The prescribed authority who gave evidence to the Committee put forward the view that he believed that subjects of warrants should have access to a legal representative as a matter of right. He also explained that if a subject or a legal representative wanted to discuss something during a questioning period over which he presided, he, 'without their giving me any reasons, adjourned so that they might speak quietly among themselves.'<sup>40</sup> In noting this practice, the IGIS was asked whether the right of legal representatives for private consultation should be codified.<sup>41</sup> The IGIS expressed the view that:

Certainly, as a general proposition, where it is a questioning-only warrant, I do not believe there should be such monitoring ...the starting point ought to be that for questioning-only warrants, the sort of monitoring that section 34U envisages is not appropriate. With detention warrants, I can more readily see situations where monitoring - at least visual monitoring - is appropriate.<sup>42</sup>

- 1.39 The Attorney-General's Department has approved all applications made by the subjects of warrants for financial assistance to cover legal costs.
- 1.40 Issues arising from submissions and possible recommendations relating to legal representation and legal aid will be discussed in Chapter 3.

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39 See discussion on the nature of the questioning below.

40 PA transcript, classified hearing 19 May 2005, p.17.

41 IGIS transcript, public hearing 20 May 2005, p. 9.

42 IGIS transcript, public hearing 20 May 2005, p. 9. NB This matter will be addressed further in Chapter 3.

## Process of questioning

### The nature of the questioning

- 1.41 The Act provides that the questioning of subjects of warrants is to be videoed and that the Inspector-General of Intelligence and Security may attend. Mr Carnell informed the Committee that he attended 20 of the 21 days of questioning under the first three warrants.<sup>43</sup> For subsequent warrants, either he himself or someone from his office has attended the first day of questioning. Where neither he nor his staff has attended on other days, particular attention is paid to the transcript of the proceedings.<sup>44</sup> Copies of all transcripts and videos of questioning are available to the IGIS and to date have been supplied. The IGIS has asked that the transcripts should be made automatically available to his office, and that the provision be codified at section 34Q, rather than as at present at the discretion of ASIO. The Director-General of ASIO agreed.<sup>45</sup> The IGIS made a number of other suggestions for legislative amendment in relation to his experience of the operations of the Act. They will be canvassed in Chapter 3.
- 1.42 On request, the Committee was also provided with copies of the video tapes and the transcripts of the questioning for the first 8 warrants. However, the request for the video tapes and the transcripts for the last six warrants was not granted by ASIO. Questioning is conducted by ASIO officers and/or officers from the Australian Government Solicitor's Office. In addition to the prescribed authority and the IGIS, police officers, ASIO advisers, the legal representative of the subject, transcription and audio-visual service personnel are also present, in all more than 10 people. The designations of those present are explained to the subject. The level of potential supervision of the questioning process is, therefore, considerable. The Director-General of ASIO told the Committee that the process was very resource intensive.
- 1.43 Substantial briefs are prepared for the Attorney-General and for the issuing authority and the preparation of these briefs is itself time consuming and resource intensive.<sup>46</sup>

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43 IGIS transcript, public hearing 20 May 2005, p.2.

44 IGIS transcript, public hearing 20 May 2005, p.2.

45 ASIO transcript, public hearing 19 May 2005, p. 20. The Director General did point out that the IGIS had a right to copies of the transcripts under his Act; however Mr Carnell pointed out that he wanted the transcripts provided as a matter of course.

46 AGD transcript, classified hearing 19 May 2005, p.11.

- 1.44 The IGIS described the behaviour of officials in relation to the questioning warrants as 'professional and appropriate' and that 'the subjects of warrants were treated with humanity and respect for human dignity',<sup>47</sup> even in the face of 'abusive and evasive comments.'<sup>48</sup> The prescribed authority described the nature of the questioning as 'questions merely to get information' rather than cross examination. This, he believed, was 'much fairer'.<sup>49</sup> From the Committee's observations of the questioning, it was very formal and certainly polite and dispassionate, if persistent.
- 1.45 However, lawyers who represented subjects of warrants have raised concerns about both the general approach to questioning and the nature of the questions asked. They drew a distinction between proper treatment and professional behaviour, which they acknowledged, and the proper legal safeguards necessary for fair treatment.<sup>50</sup> They doubted whether the questioning was directed at the purpose of the legislation, that is, to gather intelligence that is important in relation to a terrorism offence or to prevent planned terrorist attacks.<sup>51</sup> They described much of the questioning as relating to historic circumstances and with no connection with any imminent terrorist threat. They also believed that the questioning powers were being used to supplement general policing powers, made possible by the lack of a derivative use immunity and by the presence at the questioning of police who seemed to be investigating police, on one occasion State police apparently concerned with a non-terrorist related matter.<sup>52</sup>
- 1.46 Thus ASIO questioning could become, in a real sense, a de facto police interrogation. These powers are as wide as they are and more powerful than police questioning powers because they are designed
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47 IGIS transcript, public hearing 20 May 2005, p. 1.

48 IGIS address to the Safeguarding Australia 2005 Conference, Canberra, July 2005, p. 12.

49 PA transcript, classified hearing 19 May 2005, p.18.

50 Lawyers transcript, classified hearing 7 June 2005, p.1.

51 The Attorney-General in the second reading speech on the Bill, both on 21 March 2002 and 26 June 2003, indicated that the purpose of the bill was 'to empower ASIO to seek a warrant which allows the questioning and detention of persons who may have information that may assist in preventing terrorist attacks or in prosecuting those who have committed terrorism offences.' And the warrants issued would 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence.' (HR Hansard 21 March 2002, p. 1390) And the powers were to 'give our intelligence agencies vital tools to deter and prevent terrorism ... to identify - and, more importantly, prevent - planned terrorist attacks.' (HR Hansard 26 June 2003, pp. 17668 - 69.)

52 Lawyers transcript, classified hearing 7 June 2005, p.5 and classified hearing 18 August 2005, p. 10.

for use in national security issues, to ward off the threat of imminent terrorist attacks.<sup>53</sup>

- 1.47 The lawyers objected to some questions on the basis that, in any other forum, including bodies with coercive questioning powers, the questions would be considered objectionable or improper.<sup>54</sup>

For example, it is common practice for ASIO's representatives to ask questions that repeatedly suggest answers<sup>55</sup> and to continue asking those questions even after they have been repeatedly refuted. ... [and]

It is common for the ASIO lawyer to warn the questioning subject of the dire position they are in if they lie or continue to lie. ... [and]

Some questions posed are not accurately based on the witness's previous answers. Such questions are arguably improper and would normally attract an objection.<sup>56</sup> [and]

We had had eight hours of questioning that was quite circular and rambling. ... If you are not getting at a particular point, why should you be able to continue with something that is a great imposition on someone's life?<sup>57</sup>

- 1.48 A further complaint was that some questioning was not designed to elicit information, as that information was already in ASIO's possession, but rather to create an offence under section 34G.<sup>58</sup>

[T]racts of questioning were not intelligence gathering; they were for no other purpose than preparing ground for a possible prosecution for giving false and misleading answers.<sup>59</sup>

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53 Lawyers transcript, classified hearing 6 June 2005, p. 2. See also comments at the conclusion of this chapter.

54 Whether lawyers should have some capacity to intervene will be considered in Chapter 3.

55 A complaint about suggesting answers was also made in relation to the identification of people. The view was that the methodology used in relation to this was flawed. Lawyers transcript, classified hearing 6 June 2005, p.7.

56 Lawyers transcript, classified hearing 6 June 2005, p. 2.

57 Lawyers transcript, classified hearing, 7 June 2005, p. 2.

58 Lawyers transcript, classified hearing 6 June 2005, p. 9.

59 Lawyers transcript, classified hearing 18 August 2005, p.3.

## Questioning periods

- 1.49 At the beginning of a questioning warrant, the prescribed authority is obliged (section 34E) to explain the warrant to the person. The requirements are very specific, covering the rights and obligations of a subject, and it is the Committee's view on the basis of its observations that each prescribed authority performed this function thoroughly. In some cases, these preliminary procedures took half an hour or longer. Questioning time is calculated separately from procedural time.
- 1.50 The ASIO Annual Report listed the questioning warrants issued and gave overall times for the questioning periods.<sup>60</sup> It should be made clear that this questioning does not take place in a continuous block of time<sup>61</sup>, but over a number of days and that questioning within a day is also broken at various times on the request of any of the parties and at the discretion of the prescribed authority. In fact, most questioning has been broken every couple of hours within any single day. A prescribed authority informed the Committee that:
- There were many breaks during the course of the day. There were morning tea breaks, lunch for an hour, prayers ... There were adjournments for legal discussions.<sup>62</sup>
- 1.51 It is also important to note that questioning warrants are not detention warrants; subjects have the right to, and do, return home each day.
- 1.52 In addition, questioning must be broken every four hours<sup>63</sup> and may not continue beyond eight hours without the permission of the prescribed authority. This requirement has been observed in practice; the prescribed authorities have reminded those questioning a subject that an eight hour period has been completed and that application should be made to continue.
- 1.53 This clarification is not meant to underestimate the burden constituted by long periods of questioning over a number of days. Indeed, a number of the lawyers for subjects of warrants noted the time spent under questioning, even though it was within the

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60 See paragraphs 1.17, 1.18 and 1.19 above. These questioning times exclude procedural time.

61 An assumption that many submissions have made.

62 PA transcript classified hearing 19 May 2005, p.18.

63 This is set out in the protocol.



**Example 1: Questioning over 23 days or 10 hours 35 minutes**

	<b>Day 1</b>	<b>Day 2</b> (3 days later)	<b>Day 3</b> (10 days later)	<b>Day 4</b> (9 days later)
<b>10.00</b>				10.05
10.15	10.20			
10.30				
10.45				
<b>11.00</b>				
11.15				
11.30				11.39
11.45				11.55
<b>12.00</b>				
12.15				
12.30				12.31
12.45	12.55			
<b>13.00</b>				
13.15				
13.30				
13.45		1.46		
<b>14.00</b>	2.04		2.10	
14.15				
14.30				
14.45	2.54			
<b>15.00</b>				
15.15	3.23	3.23		
15.30			3.44	
15.45		3.49		
<b>16.00</b>	4.13		4.03-10	
16.15				
16.30		4.38		
16.45			4.44 -5	
<b>17.00</b>		5.05	Prayers	
17.15			5.20	
17.30		5.30		
17.45			5.54	
<b>18.00</b>				

Times on shaded areas indicate exact time of start and finish.

**Example 2: Questioning over 21 days or 43 hours 43 minutes**

	Day 1	Day 2 (next day)	Day 3 (5 days later)	Day 4 (next day)	Day 5 (6 days later)	Day 6 (next day)	Day 7 (next day)	Day 8 (3 days later)	Day 9 (2 days later)
09.00		9.10				9.08	9.05		9.05
9.15			9.24						
9.30									
9.45									
10.00	10.11			10.09					
10.15		10.28			10.25				10.30
10.30							10.36		
10.45		10.47	10.46			10.52			10.50
11.00			11.03				10.58		
11.15						11.14			
11.30		^^		11.32	11.40			11.23	
11.45	11.36			11.55					11.58
12.00	12.02				12.14				Prayers
12.15									12.12
12.30									
12.45	12.50	12.55			12.53	12.53	12.56		12.56
13.00			1.00	1.01				1.02	
13.15									
13.30									
13.45									
14.00	2.04			2.03	2.02	2.02		2.05	2.02
14.15		2.18	2.13				2.15		
14.30									
14.45									
15.00					3.01			3.14	3.07
15.15				3.25		3.25			3.22
15.30	3.27	**		3.42				3.25	
15.45	3.43					3.42			
16.00			4.08	4.11			4.05		
16.15								4.25	
16.30									4.28
16.45		4.55							
17.00	5.13					5.08			
17.15									

^^ 2 minute toilet break.    \*\* 4 minute break by request.

prescribed limits, was significant – ‘far longer than you would normally have a witness in court.’<sup>64</sup>

- 1.54 By way of example, the tables on the previous pages illustrate the times for questioning for two actual warrants. In the first example the questioning took place on four separate days and within the 28 days of the warrant. The days and times were discussed with the officials, the subject of the warrant and his lawyer. Shaded areas are questioning times, although this also includes procedural time.
- 1.55 In the second example, the questioning took place on nine days and within the 28 day period of the warrant. Again the procedural time is included in the shaded area. This procedural time accounts for any discrepancies between the times on the table and those that might be noted in the ASIO Annual Report as the questioning period for a particular warrant.

### Use of an interpreter

- 1.56 Sections 34H, 34HAA and 34HB of the ASIO Act provide for the use of interpreters. This entitlement can be requested by the subject of the warrant and is decided by the prescribed authority based 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 that language. In the first eight questioning warrants, an interpreter was requested on four occasions and granted on one.<sup>65</sup> The Committee was not supplied with information regarding interpreters in relation to the last six warrants.
- 1.57 It was the view of the Director-General that ‘we would be open to real criticism if we served the warrant in a language that we knew the person did not understand’.<sup>66</sup> In one case where a person subject to a questioning warrant was denied an interpreter, ASIO’s view was that the subject’s fluency was adequate based on the agency’s experience of the person concerned. The Director-General told the Committee that ASIO had obtained statutory declarations from the employer attesting to the standard of the subject’s English.<sup>67</sup> This does not

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64 Lawyers transcript, classified hearing 6 June 2005, p. 3.

65 The first request for the use of an interpreter was the basis on which the Government sought additional amendments to the ASIO Act in November 2003 to extend the time for questioning using an interpreter to 48 hours.

66 ASIO transcript, classified hearing 19 May 2005, p.15.

67 ASIO transcript, public hearing 19 May 2005, p. 22.

appear to have been the case and ASIO corrected the record on this question.<sup>68</sup> In opposing the use of an interpreter, the questioner stressed to the prescribed authority the wording in the act that the requirement was 'an adequate knowledge of English' and 'reasonable fluency' not 'perfect fluency or complete mastery'. The decision of the prescribed authority was made on the basis of questions put to the subject as well as the submission of the questioner. In the second case where an interpreter was requested during a questioning warrant, the prescribed authority made a decision to refuse the request after representations from the Australian Government Solicitor. In a third case, the subject of a warrant requested an interpreter at the time of the issuing of a warrant, but then did not maintain his request for one when he came before the prescribed authority. This case took place after the introduction of the extended time period for the use of interpreters.

- 1.58 The Committee does not question the particular decisions made in the above cases. The Committee, however, would agree with the Director-General's assessment that it is an area where 'real criticism' might be levelled if the decision is not correct. The Committee also notes that the extended time for questioning where an interpreter is used (48 rather than 24 hours) is very likely to inhibit a subject asking for the use of one, even where that might be advisable.
- 1.59 Language skills and levels of proficiency are a complicated area of judgement. Reasonable fluency in common, office or everyday chat is not necessarily the same thing as reasonable fluency for prolonged questioning where precision of understanding, or lack of it, has serious consequences. It is not a judgement to be taken lightly and ASIO might be better to err on the side of caution.
- 1.60 If the agency were to unreasonably deny an interpreter which has been requested it might weaken ASIO's case in the event of a later prosecution. Similarly, if the extended time allocated to questioning with an interpreter should dissuade the subject from requesting one, this might have the same effect. Again, this could weaken ASIO's case in any subsequent court action, especially one involving the truthfulness and accuracy of answers to questions.

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68 ASIO transcript, classified hearing 8 August 2005, p. 8.

## Complaints

- 1.61 No appeals have been made to the Federal Court under subsection 34E(1)(f). No complaints have been made to the Ombudsman in relation to the Australian Federal Police under subsection 34E(1)(e)(ii).
- 1.62 The criticisms outlined above on the specificity of the warrants, the nature and purpose of the questioning and the ability of lawyers to intervene translated into three formal complaints made through the Inspector General of Intelligence and Security or his representative. These complaints were raised with the Inspector-General or his representative at questioning sessions: one related to the specificity of the warrant; another related to the right of a lawyer to object to a question, and a third involved issues about the prescribed authority and the solicitor representing ASIO. One further complaint was made as a result of additional warrants issued while this review was underway, although it did not directly relate to the terms of the warrant or the questioning.
- 1.63 The IGIS reported that on one occasion, after the legal representative having discussed with him the lack of information in the warrant, he (the IGIS) raised it with the prescribed authority pursuant to section 34HA. The prescribed authority heard submissions from the legal representative and the AGS officer representing ASIO, and ruled that the warrant was not flawed.<sup>69</sup>
- 1.64 One lawyer expressed concern to the IGIS about his inability to object to some of the questions. The IGIS did not raise the matter with the prescribed authority as a formal concern, but the prescribed authority chose to take a broad view of paragraph 34U(4).
- 1.65 In another instance, a legal representative was critical of the approach of the AGS lawyer, acting on behalf of ASIO, and of the prescribed authority. While there was not considered to be any illegality or impropriety, the Committee was advised that this was, in part, a prompt to the IGIS's suggestion that the Act be amended to provide clearer authority to the legal representatives to address the prescribed authority on some matters.
- 1.66 The most recent complaint was not in respect of the form of the warrant or the nature of the questioning, but whether the interests of the person had been prejudiced by media stories. In respect of this, the IGIS has initiated an inquiry, pursuant to section 14 of the IGIS

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<sup>69</sup> IGIS submission, p.4. See also Chapters 2 and 3.

Act and advised the complainant that whether there was unauthorised contact with the media by an ASIO staff member or a police officer was the subject of investigations by the relevant agencies. The outcomes of these investigations were to be monitored by the Commonwealth Ombudsman and the IGIS.<sup>70</sup>

1.67 This last complaint and others were made directly to the Committee as part of this review. They covered a range of matters in the operations of the Act, including legal process and practical arrangements. Lawyers who had had experience of different prescribed authorities, noted different approaches to the strictness with which the role of the lawyers was interpreted:

- A lawyer sought to make a complaint to the IGIS in the course of questioning. The IGIS was not present at the time and the request was refused by the prescribed authority, although agreed by the AGS solicitor, on the basis that there was no right under the legislation or the facilities to make a complaint (a telephone) or to stop the questioning.<sup>71</sup>
- A request for a break in the questioning so that a subject could seek legal advice was refused.<sup>72</sup>
- Secrecy provisions prevent any lawyers involved in the process from having professional discussions with colleagues who are also involved in the process.<sup>73</sup>
- The time for the conduct of questioning was rigidly set – for Saturdays or Fridays (mosque day) against the objections of the lawyers or the subjects of warrants.<sup>74</sup>
- Lawyers are not seated next to clients. ‘The first time ... there was a witness box. ... I was not next to my client. ... Effectively you have eye contact communication and that was all. The second time ... between my client and me there was an ASIO officer.’<sup>75</sup>
- Detrimental media coverage of searches under warrant occurred contemporaneously with questioning warrants, precluding subjects from publicly defending themselves:

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70 IGIS supplementary confidential submission no. 112, p. 3.

71 Lawyers transcript, classified hearing 18 August 2005, p.3.

72 Lawyers transcript, classified hearing 18 August 2005, p.3

73 Lawyers transcript, classified hearing 18 August 2005, p.8.

74 Lawyers transcript, classified hearing 18 August 2005, p.4.

75 Lawyers transcript, classified hearing 18 August 2005, p.4.

[The claim that secrecy provisions did not apply] is at the very least disingenuous because there were questioning warrants which were in force during that period. To suggest that our clients were free to respond in the media is, quite frankly, not right. ... [T]hese people have been labelled as terrorists without having been charged as terrorists, without having the capacity to defend themselves in the media at that time, without being able to point to anything that would dispute the specific allegations, because that is operational information. If there was a plot to blow up anything, charge them with conspiracy to commit an offence.<sup>76</sup>

- 1.68 The implications of these complaints and any recommendations consequent upon them will be dealt with in Chapters 3 and 5.

## Outcomes and usefulness

- 1.69 In commenting on the operations of Division 3 Part III powers in the first three years, the Director-General of Security noted that ASIO had been concerned that the compromises made by the Parliament might have made the legislation unduly complex. He reported to the Committee, however, that:

Our concerns were misplaced. We were wrong in worrying about it. As it has turned out, the balance in the legislation has so far been very workable and it has operated very smoothly, although it is very resource intensive.<sup>77</sup>

- 1.70 The Attorney-General's Department also reported that the 'legislation has achieved its objectives' and the Australian Federal Police stated that 'the powers have been used appropriately by ASIO ... [and] they have worked well in practice.'<sup>78</sup>

- 1.71 As to the usefulness of the powers the Director-General was emphatic that the powers had been valuable:

[T]he use of the questioning warrant was critical in the Brigitte investigation. That was an example of where there was actual planning being undertaken for a terrorist attack in Australia and the questioning regime materially assisted in

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76 Lawyers transcript, classified hearing 18 August 2005, p.1.

77 ASIO transcript, public hearing 19 May 2005, p. 4.

78 AGD and AFP transcript, public hearing 19 May 2005, p. 5.

understanding what lay behind that threat and what was going on.<sup>79</sup>

- 1.72 Although the purpose of the warrants is stated to be the collection of intelligence, charges have been laid. Of the 14 warrants issued to date, three people have been charged following questioning warrants issued in relation to them. One other person has been charged although not himself questioned under warrant. In all, at the time of writing, 15 charges have been laid in relation to these four people. The following specific charges have been laid as a result of the use of questioning warrants:

**The table has been removed at the request of ASIO. The Committee did not accept that the information contained in the table constituted a national security concern or was prejudicial to prospective trials.**

## Conclusions

- 1.73 On the actual operations of the Act, the Attorney-General's Department drew the conclusion that it had operated 'as intended', that ASIO had 'requested and used the powers judiciously and carefully'. The submission reported that 'AGD understands that use of the powers has provided valuable information'.<sup>80</sup> This view was reiterated in relation to the additional six warrants issued late in this review process. However, in the course of the inquiry, the number of warrants rose from three to 14.
- 1.74 The Committee questioned witnesses about the intentions of the provisions and the way they have, in fact, operated. Whether the questioning powers were intended to be purely for intelligence gathering or part of police investigations matters. Intelligence gathering, where compulsory questioning is the only way to elicit information, which is important in relation to a terrorist offence, was put forward on the introduction of the Bill as necessary for the protection of the community. It was to be a measure of last resort. The assumption was that extraordinary powers were necessary to protect the community in the face of terrorism threats. Secrecy, it was argued, was necessary because the powers are part of the intelligence gathering of ASIO, whose methods and collected information needed

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79 ASIO transcript, public hearing 19 May 2005, p. 4.

80 AGD submission, pp. 3-4.



to be protected on national security grounds. Because the powers were extraordinary, because they involved secret processes and a secret service, because they could not be scrutinised in the way that normal police powers are scrutinised, the Parliament inserted into the Act a series of protections, including the protection of immunity from prosecution, albeit not derivative use immunity, for any information given under compulsion.

- 1.75 The Committee, therefore, would be concerned if the use of the powers were to slip, in practice, into investigative and policing powers and to be simply part of ongoing policing operations. Separating police investigations from intelligence gathering is important. Maintaining the separate functions, methods and systems of accountability of ASIO and the criminal law is also important.<sup>81</sup>

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<sup>81</sup> There is a discussion of the legal implications of any such shift in Chapters 2 and 3.

