
The Parliament of the Commonwealth of Australia

ASIO's Questioning and Detention Powers

**Review of the operation, effectiveness and implications of
Division 3 of Part III in the *Australian Security Intelligence
Organisation Act 1979***

Parliamentary Joint Committee on ASIO, ASIS and DSD

November 2005
Canberra

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Foreword

The *ASIO Legislation Amendment (Terrorism) Bill 2002* was passed by the Parliament following three separate parliamentary committee reports, including a major review conducted by this Committee, and significant compromises to accommodate the range of views across the political spectrum. The questioning and detention powers were eventually passed by the Parliament with bipartisan support.

One amendment to the Bill arising from this long process of parliamentary review and debate was a three-year sunset clause. Section 34Y of the *ASIO Act 1979* provides that the questioning and detention powers established by Division 3 of Part III of the Act will cease to be in force from 23 July 2006. The Committee's review is thus designed to precede and inform consideration by the Government and the Parliament of the need to legislate again for these provisions or some variation of them.

The significance of January 2006 as the completion date of the Committee's review is that the emergency provisions of Division 3 of Part III cease to have effect in July 2006. The Committee's recommendations therefore form part of the process of deciding whether to re-enact these provisions, and if so with what, if any, amendment.

The PJCAAD's review covers the operation since July 2003 of the important new powers currently available under legislation to the Australian Security Intelligence Organisation (ASIO), the Commonwealth's domestic security intelligence agency.

ASIO is responsible for protecting Australia and its people from espionage, sabotage, politically motivated violence including terrorism, and the promotion of communal violence, attacks on Australia's defence system and acts of foreign interference. ASIO carries responsibility for these matters 'whether directed from, or committed within, Australia or not.' ASIO also has responsibility for 'the

carrying out of Australia 's responsibilities to any foreign country' in relation to the same matters.¹

Division 3 of Part III of the ASIO Act enables ASIO to obtain a warrant from an 'issuing authority' for a person to appear before a 'prescribed authority' for questioning 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.

Significantly, it is not necessary for an adult to be suspected of or charged with a terrorism offence for a questioning or detention warrant to be issued. The purpose of detention is to gain information, not to lay charges which might lead to prosecution. The primary threshold is whether there are 'reasonable grounds for believing that issuing the warrant ... will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.²

The conduct of this review

Information about the review was advertised in the *Australian* newspaper on Friday, 17 January 2005. Details about the inquiry and a background paper prepared by the Committee Secretariat were made available on the Committee's website. In addition, the Committee sought submissions from the Attorney-General, ASIO, a wide range of other government agencies, non-government organisations and individuals. One hundred and thirteen submissions were received.

An important issue in the conduct of the Committee's review has been the application of the secrecy provisions of the legislation to the conduct of the inquiry itself. Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* requires the Committee to review the 'operation, effectiveness and implications' of the legislation. At the same time, however, it appeared that persons who have been subject to questioning warrants and their legal advisers would be severely constrained, if not prohibited, from disclosing publicly or privately any information relating to the issuing of a warrant or the questioning or detention of a person in connection with the warrant.

This was a matter of concern to the Committee as it sought to undertake as thorough a review as possible, while not wishing to expose individuals who might wish to give evidence before the Committee to any serious legal ramifications.

¹ See the definition of 'security' in section 4 of the *ASIO Act 1979*.

² See paragraph 34C (3) (a) of the *ASIO Act 1979*.

While it is clear these secrecy provisions guard against the release of information that might jeopardise or compromise sensitive intelligence collection operations, such secrecy associated with new and controversial legislation is of concern both for the Committee's review and for the longer term scrutiny of the legislation.

The Committee sought advice from the Clerks of both Houses and then asked Mr Bret Walker, SC, for an opinion on the rights of witnesses and the powers of the Committee to hear evidence given the restrictions of both the *Intelligence Services Act 2001* under which the Committee operates and the *ASIO Act 1979*, with its strict secrecy provisions at section 34VAA.

The opinion from Mr Walker³ advised the Committee that the provisions of section 34VAA of the ASIO Act have no effect whatsoever on the activities of persons including members of the Committee, the Committee staff, prospective witnesses, witnesses and persons assisting, for example, agency heads in providing information required by the Committee (within lawful limits as noted above). So long as those activities comprise part of or are being engaged in for the purposes of conducting or complying with the requirements of the mandatory review entrusted to the Committee by Parliament in subpara 29(1)(bb)(i) of the Intelligence Services Act, those persons will not be committing any offence of the kind created by those provisions. However, the Committee was required to operate, in the taking of evidence, within the limits placed on it by the Intelligence Services Act. To allay fears that had been expressed to the Committee about the possible liability of witnesses, the Committee produced a statement to witnesses explaining their position and directing them to the legal opinion on the website.⁴

During the inquiry, the Committee received evidence from ASIO, Attorney-General's Department (AGD) and the Australian Federal Police (AFP) at a public hearing on 19 May. ASIO, AGD and AFP gave further evidence in-camera on 19 May, and evidence was also heard in-camera from the prescribed authority. On 6 June in Sydney and on 7 June in Melbourne evidence was heard in-camera from some of the lawyers for the subjects of warrants and from the issuing authority. Final in-camera hearings were held on 8 August and 18 August in Canberra.⁵

The report recommends a range of additional measures if Division 3 of Part III of the *ASIO Act* is to continue to have effect beyond 23 July 2006.

³ The full opinion is available on the Committee's website at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/Walker%20opinion.pdf

⁴ A copy of this statement to witnesses is available at Appendix E.

⁵ A list of witnesses appearing at the hearings can be found at Appendix B. Copies of the transcripts of evidence from the public hearings and the volumes of unclassified submissions are available from the Committee Secretariat and at the Committee's website.



Membership of the Committee

Chair	The Hon David Jull MP	
Members	Mr Stewart McArthur MP	Senator Alan Ferguson
	The Hon Duncan Kerr SC MP	Senator The Hon Robert Ray
	Mr Anthony Byrne MP	Senator Sandy Macdonald (till 6 July 2005) Senator Julian McGauran (from 8 September 2005)

Committee Secretariat

Secretary	Ms Margaret Swieringa
Inquiry Secretary	Ms Sonya Fladun (till 20 April 2005)
	Ms Jill Greenwell (from 2 May 2005 till 11 July 2005)
	Ms Jane Hearn (from 11 July 2005)
Research Officers	Dr Cathryn Ollif (from 16 May 2005)
	Mr Alexander Seccombe (from 8 June 2005 to 9 September 2005)
Executive Assistant	Mrs Donna Quintus-Bosz



Terms of reference

29 Functions of the Committee are:

(bb) To review, by 22 January 2006, the operation, effectiveness and implications of:

(i) Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*; and

(ii) the amendments made by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, except item 24 of Schedule 1 to that Act (which included Division 3 of Part III in the *Australian Security Intelligence Organisation Act 1979*); and

(c) to report the Committee's comments and recommendations to each House of the Parliament and to the responsible Minister.



List of abbreviations

AAT	Administrative Appeals Tribunal
ACC	Australian Crime Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
AGS	Australian Government Solicitor
AMCRAN	Australian Muslim Civil Rights Advocacy Network
ASIC	Australian Securities and Investment Commission
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
DSD	Defence Signals Directorate
FCLC	Federation of Community Legal Centres
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICNSW	Islamic Council of New South Wales
ICV	Islamic Council of Victoria

IGIS	Inspector-General of Intelligence and Security
LCA	Law Council of Australia
LIV	Law Institute of Victoria
NACLC	National Association of Community Legal Centres
PIAC	Public Interest Advocacy Centre
PJCAAD	Parliamentary Joint Committee on ASIO, ASIS and DSD (The Committee)
UTS	University of Technology Sydney
VCCR	Vienna Convention on Consular Relations
VLA	Victoria Legal Aid



List of recommendations

2 Questioning and detention regime

Recommendation 1

The Committee recommends that the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective.

Recommendation 2

The Committee recommends that, in order to provide greater certainty and clarity to the operation of the Act, the legislation be amended to distinguish more clearly between the regimes that apply to a person subject to a questioning-only warrant and that applying to detention.

Recommendation 3

The Committee recommends that the Act be amended to achieve a clearer understanding of the connection between the period of detention and the allowable period of questioning.

3 Legal representation and access to complaint mechanisms

Recommendation 4

The Committee recommends that:

- a person who is the subject of a questioning-only warrant have a statutory right to consult a lawyer of choice; and
- the legal adviser be entitled to be present during the questioning process and only be excluded on the same grounds as for a detention warrant, ie where there are substantial reasons for believing the person or the person's conduct may pose a threat to national security.

Recommendation 5

The Committee recommends that subsection 34U (4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority.

Recommendation 6

The Committee recommends that Division 3 Part III be amended to provide a clearer distinction between procedural time and questioning time.

Recommendation 7

The Committee recommends that:

- Subsection 34U (2) be amended and communications between a lawyer and his or her client be recognised as confidential; and
- adequate facilities be provided to ensure the confidentiality of communications between lawyer and client in all places of questioning and detention.

Recommendation 8

The Committee recommends that, in the absence of separate statutory right of judicial review, that a note to s34E be adopted as a signpost to existing legal bases for judicial review.

Recommendation 9

The Committee recommends that Regulation 3B be amended to allow the Secretary to consider disclosing information, which is not prejudicial to national security, to a lawyer during the questioning procedure.

Recommendation 10

The Committee recommends that:

- the supervisory role of the prescribed authority be clearly expressed; and
- ASIO be required to provide a copy of the statement of facts and grounds on which the warrant was issued to the prescribed authority before questioning commences.

Recommendation 11

The Committee recommends that:

- a subject of a questioning-only warrant have a clear right of access to the IGIS or the Ombudsman and be provided with reasonable facilities to do so; and
- there be an explicit provision for a prescribed authority to direct the suspension of questioning in order to facilitate access to the IGIS or Ombudsman provided the representation is not vexatious.

Recommendation 12

The Committee recommends that an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers be provided.

Recommendation 13

The Committee recommends that reasonable financial assistance for legal representation at rates applicable under the Special Circumstances Scheme be made available automatically to the subject of a section 34D warrant.

Recommendation 14

The Committee recommends that the Commonwealth establish a scheme for the payment of reasonable witness expenses.

5 Implications for democratic and liberal processes

Recommendation 15

The Committee recommends that the penalty for disclosure of operational information be similar to the maximum penalty for an official who contravenes safeguards.

Recommendation 16

The Committee recommends that the term 'operational information' be reconsidered to reflect more clearly the operational concerns and needs of ASIO. In particular, consideration be given to redefining section 34VAA(5).

Recommendation 17

The Committee recommends that:

- consideration be given to amending the Act so that the secrecy provisions affecting questioning-only warrants be revised to allow for disclosure of the existence of the warrant; and
- consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority.

Recommendation 18

The Committee recommends that ASIO include in its Annual Report, in addition to information required in the Act under section 94, the following information:

- the number and length of questioning sessions within any total questioning time for each warrant;
- the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court; and
- if any, the number and nature of charges laid under this Act, as a result of warrants issued.

6 Continuation of the legislation

Recommendation 19

The Committee recommends that:

- Section 34Y be maintained in Division 3 Part III of the *ASIO Act 1979*, but be amended to encompass a sunset clause to come into effect on 22 November 2011; and
- Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011.

