

## Legislation

The community is entitled to know whether the extraordinary powers it has granted to ASIO are being used only occasionally, or on hundreds or perhaps thousands of times a year.<sup>1</sup>

- 4.1 This view was expressed by Mr Nigel Waters from the Australian Privacy Charter Council, during an inquiry in 2000 by the Parliamentary Joint Committee on ASIO into ASIO's public reporting. The view is as pertinent today as then.
- 4.2 Since the first review in 2002, the Parliament has passed a large volume of new legislation that affects the functions and powers of Australia's intelligence and security agencies. These laws include:
- new terrorism offences incorporated in the *Commonwealth Criminal Code Act 1995*, including provisions for the listing of terrorist organisations;
  - the *Suppression for the Financing of Terrorism Act 2002*;
  - new questioning and detention powers in the *ASIO Act 1979*;
  - amendments to the *Intelligence Services Act 2001* to authorise ASIS officers to carry and use firearms; and
  - new assumed identities provisions in the *Crimes Act 1914*.
- 4.3 While recent legislative changes have had implications for all three agencies, the impacts have been most significant for ASIO. The Committee notes in the ASIO Report to Parliament 2003-2004, the information provided by the agency in accordance with the reporting requirements of section 94(1A) and the *ASIO Act 1979*. This publicly available information includes:

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1 Nigel Waters, Australian Privacy Charter Council, *Transcript of Evidence*, 17 July 2000, p.33.

- the number of requests made under section 34C to issuing authorities during the year for the issue of warrants under section 34D;
- the number of warrants issued during the year under section 34D
- 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)
- the number of hours each person appeared before a prescribed authority for questioning under a warrant issued during the year that meets the requirements in paragraph 34D(2)(a) and the total of all those hours for all those persons.
- the number of warrants issued during the year that meet the requirement in paragraph 34D(2)(b) (about authorising a person to be taken into custody, brought before a prescribed authority and detained; and,
- the number of times each prescribed authority had people appear for questioning before him or her under warrants issued during the year.

## **ASIO questioning relating to terrorism offences**

- 4.4 The Committee questioned the Director-General of Security, Mr Dennis Richardson, about ASIO's new questioning and detention powers.
- 4.5 Division 3 of the *ASIO Act 1979* provides that ASIO may seek warrants from the Attorney-General for questioning, and in certain circumstances detention, of a person if there are reasonable grounds for believing that questioning under the provisions of the Act will substantially assist the collection of intelligence that is important in relation to a terrorism offence.
- 4.6 The Committee was advised that, as of 6 May 2004, ASIO had sought questioning warrants on three occasions. Asked about the value of questioning warrants, the Director-General of ASIO stated that the power to compel a person to attend and answer questions was potentially very valuable to ASIO's intelligence collection efforts. Mr Richardson commented:

It has worked well. It has worked better than we thought it would work. When it went through, because of the range of compromises that were made, we had some trepidation that it would be unnecessarily complex. So far, that has not been the

case. So far, the processes with the issuing authority and the prescribed authority have worked very well.<sup>2</sup>

- 4.7 ASIO further commented on the protocols put in place to ensure that the new powers were properly administered:

The Inspector-General of Intelligence and Security, or someone from his office, has in fact been present while the questioning warrants were being executed. Again, the advice that we have had from them is that they have been satisfied in the way that they have been taken forward.<sup>3</sup>

- 4.8 The Committee is pleased to note the presence of the IGIS or a person from his office during the use of questioning warrants. However, given the limited resources available to the IGIS, the Committee has concerns that a person from the IGIS office may not always be available to attend questioning, especially in instances where the IGIS or his staff may have to travel some distance on short notice.

- 4.9 Aside from the value of any intelligence obtained from questioning, Mr Richardson also noted the ability of the Australian Federal Police to charge a person subject to a questioning warrant for providing false or misleading information or for refusing to answer questions.<sup>4</sup>

- 4.10 On being asked if there were any unforeseen consequences to the questioning warrants, Mr Richardson noted:

The thing that has surprised us is the resource intensity of it – if you have someone for questioning and if they say things, you need a range of people there and other people back in your office and overseas because you want to be able to test all of that.<sup>5</sup>

- 4.11 It was also noted that there had been some initial problems with questioning warrants resulting in further amendments to the Act which were passed in 2003. It was found that warrants could expire too soon in cases where an interpreter was required and perhaps had to be flown from interstate. In relation to this problem, Mr Richardson noted:

What they brought home to us, which we had not anticipated but which we should have, and made clear was that our clientele in this area would seek to use every damn tactic they could to engage in delay. What became very clear was that, if the first two that we ran in had got approval from the prescribed authority to use an

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2 *Transcript*, p.50.

3 *Transcript*, p.50.

4 *Transcript*, p.51.

5 *Transcript*, p.50.

interpreter, they would have used the interpreter..... quite strategically.<sup>6</sup>

- 4.12 This is not the first instance where the Committee has found that practical considerations arising in the day-to-day operation of new legislation have not been fully considered by agencies. In the event that there is to be introduced further counter-terrorism or intelligence legislation, the Committee recommends that greater consideration be given to the possible practical problems associated with the implementation of the legislation [such as the resource implications].

## **Assumed identities legislation**

- 4.13 The Committee notes that 2002-2003 was the first full year of the operation of Commonwealth legislation dealing with the acquisition and use of assumed identities. Although the Committee is aware that the issue of identities may relate to operational matters and therefore not in the Committee's ambit of responsibility it is obliged to question the agencies in regards to any personnel or administrative issues that may have arisen since the enactment of the legislation.
- 4.14 Part 1AC of the *Commonwealth Crimes Act 1914* entered into force on the 12 October 2001. This legislation establishes a Commonwealth scheme for the acquisition and use of assumed identities by members of the intelligence and law enforcement agencies. ASIO and ASIS are participating agencies under the legislation.
- 4.15 ASIO was asked by the Committee about the internal controls the agency applies in relation to assumed identities and whether there were any gaps in current assumed identities legislation. ASIO stated that the agency must report annually to the IGIS in relation to the use of assumed identities. This report must include the number of authorisations issued by the authorising person, a description of the activities being undertaken by the officers and a statement as to whether any fraud or other unlawful activity was identified by an internal audit.<sup>7</sup>
- 4.16 Further to this, ASIO indicated that it includes the number of approvals granted or revoked in the reporting period along with a description of duties undertaken by approved officers and the results of the audit of relevant records in its Annual Report.<sup>8</sup>

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6 Transcript, p.51.

7 ASIO, *Questions on Notice*, p.5.

8 ASIO, *Questions on Notice*, p.5.

- 4.17 According to ASIO's Annual Report 2002-2003, ASIO issued three authorisations under the legislation, none of which was varied and none revoked.<sup>9</sup> The first authorisations under the Commonwealth scheme were issued in June 2003. Accordingly, no audit was conducted of records of authorisations under the Commonwealth scheme during 2002-2003.<sup>10</sup>
- 4.18 The 2002-2003 Annual Report indicates that during that financial year, 40 assumed identity approvals were granted by ASIO in accordance with the *NSW Law Enforcement and National Security (Assumed Identities) Act 1998*. No approvals were varied and none was revoked. The Annual Report states that the general nature of the duties undertaken by officers under the assumed identities provision concerns surveillance duties, intelligence officers' duties, and support officer duties.<sup>11</sup> An audit required in accordance with Section 11 of the Act was conducted in August 2002 for the proceeding financial year. The audit did not disclose any fraudulent or other criminal behaviour.
- 4.19 The Committee notes that assumed identities are not covered by the Attorney-General's Guidelines for the Collection of Intelligence. However policy on the use of assumed identities is set out in a classified ASIO Policy and Procedures document.<sup>12</sup> The Committee further notes that ASIO is reviewing its previously approved assumed identities to bring them in line with the new legislation and that ASIO authorisations are audited by the Agency's Internal Auditor who reports the results to the Director-General through the ASIO Audit and Evaluation Committee. ASIO stated that there was a primary gap in the current legislation as it relates to:
- ...acquiring proofs of identity from Commonwealth agencies or non-government agencies. The legislation was enacted with the intention that States and Territories would pass complementary legislation. At this stage the only jurisdiction to enact such legislation is NSW.'<sup>13</sup>
- 4.20 The Committee also asked ASIS whether it used the assumed identities provisions of the *Crimes Act 1914* and the *NSW Assumed Identities Act*, and if so, what internal controls and guidelines were in place for the use of assumed identities. ASIS advised that:

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9 ASIO, *Annual Report 2002-2003*, p.108.

10 ASIO, *Annual Report 2002-2003*, p.108.

11 ASIO, *Annual Report 2002-2003*, p.108

12 ASIO, *Questions on Notice*, p.5.

13 ASIO, *Questions on Notice*, p.6.

The issuance of an assumed identity is governed through a formal approvals process. The issuance of documentation obtained under an assumed identity is approved by the Director-General or his delegate, a substantive SES officer, currently the Deputy Director-General, Corporate Services.<sup>14</sup>

- 4.21 Further to this, ASIS stated that before an officer can establish an assumed identity they must attend an appropriate training course.<sup>15</sup>
- 4.22 The Committee may choose to examine more closely the use of assumed identities legislation by ASIO and ASIS and seek more detailed briefings on this matter.

### **Section 6(1)(e) of the Intelligence Services Act, 2001**

- 4.23 Section 6(1)(e) of the *Intelligence Services Act, 2001* provides that in addition to its external intelligence collection role, ASIS may “undertake such other activities as the responsible Minister directs relating to the capabilities, intentions or activities of people or organisations outside Australia”.
- 4.24 Section 6A requires the responsible Minister to inform the Committee of any directions issued under Section 6(1)(e) as soon as practicable.
- 4.25 The Committee has received advice of a number of directions by the Minister for Foreign Affairs under Section 6(1)(e) since 2001. The Committee recently sought further information from the Minister for Foreign Affairs in relation to one direction.
- 4.26 The Committee is concerned that advice from the Minister for Foreign Affairs under Section 6A should be sufficiently detailed to ensure that the Committee is aware of the nature and circumstances of the activity to be undertaken by ASIS under the provisions of Section 6(1)(e). A mere notification that a direction has been given is insufficient.
- 4.27 It is the intention of the Committee to keep a watching brief on such directions and in the future may seek a briefing from ASIS in relation to directions issued by the Minister.

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14 ASIS, *Question on Notice*, p.5.

15 ASIS, *Question on Notice*, p.5.

## Report of the Inquiry into Australian intelligence agencies

- 4.28 The Committee welcomed the release of the report by Mr Philip Flood AO, Report of the Inquiry into Australian Intelligence Agencies.
- 4.29 Mr Flood recommended that the mandate of the Committee should be extended to all of Australia's, intelligence agencies – that is, it should cover also ONA, DIO and DIGO on the same basis as it presently covers ASIO, ASIS and DSD.
- 4.30 The Committee strongly supports this recommendation. If enacted, this proposed change to the *Intelligence Services Act 2001* will have significant implications of the Committee's work and the resources required to support its activities.<sup>16</sup>

## Future reviews of legislation

- 4.31 The Committee will be reviewing a number of pieces of legislation in the new Parliament.
- 4.32 Under Section 29(1)(ba) of the *Intelligence Services Act 2001*, the Committee must, as soon as possible after the third anniversary of the *Australian Security Intelligence Amendment (Terrorism) Act 2002*, review the operation, effectiveness and implications of amendments made by that Act and the following Acts:
- (i) the *Border Security Legislation Amendment Act 2002*;
  - (ii) the *Criminal Code Amendment (suppression of Terrorist Bombings) Act 2002*;
  - (iii) the *Suppression for the Financing of Terrorism Act 2002*.
- 4.33 The Committee must also 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) 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*).

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16 Philip Flood AO, *Report of the inquiry into Australian intelligence agencies*, p.180.

- 4.34 The Committee must at the 3<sup>rd</sup> anniversary review under S102.1A(2) the listing provision under the *Criminal Code Amendment (Terrorism Organisations) Act, 2004*. In addition to this, it is the intention of the Committee to question the agencies on a regular basis in regard to the administration of legislation that substantially affects the powers of intelligence agencies. This will involve a major commitment of the Committee's time and resources in this Parliament.