



Australian Government
Attorney-General's Department

**Deputy Secretary
National Security and
Criminal Justice**

04/1113

4 April 2005

Ms Margaret Swieringa
Secretary
Parliamentary Joint Committee on ASIO, ASIS & DSD
Parliament House
CANBERRA ACT 2600

Dear Ms Swieringa

PJC review of ASIO's questioning and detention powers

I am pleased to enclose the Attorney-General's Department submission for the Parliamentary Joint Committee's review of ASIO's terrorism-related questioning and detention powers under Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*.

Our key observations are that the questioning regime is operating as intended and is generally working well. It is yielding valuable information in an environment of stringent safeguards and accountability mechanisms, and is proving to be a useful tool in the fight against terrorism. While our view is that there is currently no demonstrated need for major changes to the regime, we recognise that there is always scope for legislative enhancement and have identified some possible amendments. Our strong view is that the current national security and counter-terrorism environment underlies the continued need for the powers. Accordingly we strongly recommend the removal of the sunset provision to enable ongoing application of the terrorism-related questioning and detention powers.

The contents of this submission are unclassified and suitable for public release.

The Department looks forward to providing the Committee with further information and assistance throughout the course of this review. If you wish to discuss any aspect of our submission or the review, please contact Geoff McDonald (6250 5430) or Annette Willing (6250 6731).

Yours sincerely

Miles Jordana

Parliamentary Joint Committee on ASIO, ASIS and DSD
Review of Division 3 of Part III of the *Australian Security Intelligence*
Organisation Act 1979
Questioning and Detention Powers

Attorney-General's Department Submission

April 2005

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1. INTRODUCTION AND OVERVIEW

The Parliamentary Joint Committee on ASIO, ASIS and DSD (PJC) is required to review, by 22 January 2006, the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act).¹ This Division contains ASIO's special terrorism-related questioning and detention powers.

The powers were enacted in July 2003. A sunset clause provides that Division 3 ceases to be in force three years after commencement.² This means the powers will cease to be in force after July 2006, unless the sunset provision is removed by legislation before that date.

The sunset provision, combined with the PJC review, was regarded as an important accountability mechanism in light of uncertainty in some quarters about the ongoing need for the new powers and how they would be used. The PJC is required to report by 22 January 2006 which enables time for removal of the sunset provision (before July 2006) and the ongoing application of the powers if deemed appropriate following the review.

The PJC is required to review Division 3 as it currently stands. This includes the amendments made by the original Act that inserted Division 3 in July 2003 (*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*), as well as the amendments made in December 2003 to respond to practical issues that arose in the implementation of the new regime (*ASIO Legislation Amendment Act 2003*). All amendments are incorporated in Division 3 of the consolidated version of the ASIO Act.

The PJC is also required to review other amendments made by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (that is, amendments other than the item that inserted Division 3 into the ASIO Act). Those amendments enabled personal searches to be authorised with ASIO search (of premises) warrants, and made other minor changes and amendments consequential on the insertion of the new Division 3.

This submission focuses on the Division 3 regime. It outlines the two different types of warrant (questioning only warrant, and questioning plus detention warrant), the steps involved in obtaining warrants, and the process for questioning. It covers the extensive safeguards and accountability mechanisms, and the role of the Attorney-General's Department (AGD). The submission provides AGD's views on the operation of the regime, and suggests some possible amendments.

AGD's assessment is that the new powers have operated as intended and have generally operated well. It was always intended that the powers should not be used

¹ Paragraph 29(1)(bb), *Intelligence Services Act 2001*.

² Section 34Y, *Australian Security Intelligence Organisation Act 1979* (ASIO Act).

lightly and that they should only be used as a last resort.³ There have to date been no warrant requests for detention, or for questioning of persons under 18 years of age. When the powers have been sought, AGD's assessment is that ASIO has requested and used the powers judiciously and carefully. In his 2003-2004 Annual Report, the Inspector-General of Intelligence and Security (IGIS) reported that for the relevant period all questioning had been conducted in a professional and appropriate manner.⁴

AGD understands that the use of the powers has provided valuable information and that the powers have proved to be an effective and useful addition in the fight against terrorism. It is clear that the need for the powers has not decreased since the legislation was enacted in 2003. Accordingly, AGD's key recommendation is that the sunset provision be removed to enable ongoing application of ASIO's terrorism-related questioning and detention powers.

2. BACKGROUND TO THE QUESTIONING AND DETENTION REGIME

As part of its efforts to provide ASIO with the tools needed to effectively counter the threat posed by terrorism, the Government introduced the Australian Security Intelligence Organisation Amendment (Terrorism) Bill into Parliament in 2002. After extensive scrutiny by parliamentary committees and intense Parliamentary debate, the Bill was passed and assented to on 22 July 2003. The *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* commenced on 23 July 2003.

That Act inserted Division 3 into Part III of the ASIO Act. It also made some amendments in other parts of the ASIO Act, including enabling personal searches to be authorised with ASIO search (of premises) warrants, and minor changes and amendments consequential on the insertion of the new Division 3.

Division 3 establishes a warrant regime whereby ASIO has the legal authority to question, and in limited circumstances detain, a person where there are reasonable grounds for believing that doing so will substantially assist the collection of intelligence that is important in relation to a terrorism offence. 'Terrorism offence' is defined as an offence against Division 72 (terrorist bombing offences) or Part 5.3 (offences relating to terrorist acts, terrorist organisations and financing terrorism) of the Criminal Code.⁵

The legislation required the development of a written statement of procedures to be followed in the exercise of authority under the new questioning and detention warrants. It also provided that no warrant could be issued until relevant approvals and briefings had taken place and the statement had been tabled in Parliament.⁶ This

³ Paragraph 34C(3)(b), ASIO Act, requires the Minister to be satisfied that relying on other methods of collecting intelligence would be ineffective, before consenting to the making of a request for a warrant.

⁴ Inspector-General of Intelligence and Security, *Inspector-General of Intelligence and Security Annual Report 2003-2004*, Canberra, 2004, pp. 2 and 18, viewed 30 March 2005, <http://www.igis.gov.au/fs_annual.html>.

⁵ Section 4, ASIO Act.

⁶ Subsections 34C(3) and 34C(3A), ASIO Act.

statement of procedures is set out in the Protocol which was tabled on 12 August 2003.⁷

The first questioning warrants were sought in the later part of 2003. Some practical issues were identified in the planning and execution of questioning warrants under the new regime. These issues included the need for extra time when interpreters were used, the prevention of unauthorised overseas travel by persons subject to a questioning warrant, and secrecy provisions relating to warrants and questioning. These matters were addressed in amending legislation (*ASIO Legislation Amendment Act 2003*) that was passed by Parliament in December 2003. These amendments are included in the current consolidated version of the ASIO Act.

The new questioning and detention powers are a significant tool in ASIO's counter-terrorism capabilities. The introduction of the warrant system means that a person in relation to whom a warrant is obtained is legally compellable to appear for questioning and to answer questions. Without this power, ASIO would be dependent on the goodwill of the subject to gather information that may be essential in preventing the commission of a terrorism offence.

Questioning takes place before a 'prescribed authority' and in a framework involving extensive safeguards and protections. The legislation was developed in an environment in which it is recognised that there is a need to protect the community without unfairly or unnecessarily encroaching on individual rights and liberties. The regime operates, and was always intended to operate, as a measure of last resort.

3. THE WARRANT SYSTEM

Obtaining a warrant

Division 3 of the Act creates a dual warrant system. One type of warrant is available for questioning a person, and the other type of warrant is used to detain a person for questioning.⁸

Consent of the Attorney-General

To obtain either of the two warrants, the Director-General of ASIO⁹ must seek the consent of the responsible minister, the Attorney-General, to request the issue of a warrant under section 34D.¹⁰

⁷ The Protocol is publicly available on the Government's National Security website at <<http://www.nationalsecurity.gov.au>> by following the 'legislation' and '*Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003*' links.

⁸ Refer to the 'What a warrant authorises' section below.

⁹ This term is used for ease of reference – the actual title is Director-General of Security.

¹⁰ Subsection 34C(1), ASIO Act.

For a new warrant, the Director-General must provide the Attorney-General with a draft request that includes a draft of the warrant to be requested and a statement of the facts and other grounds on which the Director-General considers it necessary for the warrant to be issued.¹¹

If a previous warrant has been requested for a person who is the subject of the draft warrant, the Attorney-General must be provided with an additional statement of the particulars and outcomes of all previous requests for the issue of a warrant, and the period for which the person was questioned.¹² If relevant, the statement must also include information about detention in connection with each previous warrant.¹³

After considering this information, the Attorney-General can only consent to the making of a request for a questioning warrant where the Attorney-General is satisfied that:

- there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence
- relying on other methods of collecting that intelligence would be ineffective, and
- the Protocol (statement of procedures) is in place, and all required actions in relation to the Protocol have been taken.¹⁴

If the Director-General has asked to request a questioning and detention warrant, the Attorney-General **must also** be satisfied that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person may:

- alert a person involved in a terrorism offence that the offence is being investigated
- not appear for questioning, or
- destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant.¹⁵

For a questioning and detention warrant the Attorney-General must also ensure that the warrant to be requested is to permit the person to contact a single lawyer of the person's choice during the person's detention and after the person has informed the

¹¹ Paragraphs 34C(2)(a) and (b), ASIO Act.

¹² Paragraph 34C(2)(c), ASIO Act.

¹³ Paragraph 34C(2)(d), ASIO Act.

¹⁴ Paragraphs 34C(3)(a), (b) and (ba), ASIO Act. Note that paragraph 34C(3)(ba) (which requires the Attorney-General to be satisfied that the Protocol is in force) was inserted to ensure the Protocol would be developed before a warrant for questioning under section 34D was issued. As the Protocol was tabled on 12 August 2003, this requirement is now always met.

¹⁵ Paragraph 34C(3)(c), ASIO Act.

prescribed authority of the identity of the lawyer whom the person proposes to contact.¹⁶

If a person has been previously detained under a warrant and a questioning and detention warrant has been requested, the Minister may only consent if the Minister is satisfied that the requested warrant is justified by information additional to or materially different from the information known at the time of the request for the previous warrant(s) under which a person was detained.¹⁷

Role of an issuing authority

An issuing authority is a federal judge or federal magistrate who has been appointed by the Attorney-General as an issuing authority for the purpose of the Act, or another class of person specified in regulations.¹⁸ A number of federal judges and federal magistrates have been appointed to perform this role following their consent to do so. No regulations have been made for this purpose.¹⁹

After receiving the Attorney-General's consent, ASIO may approach an issuing authority with a request for a warrant.²⁰

An issuing authority may only issue a warrant where the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.²¹ The issuing authority must also be satisfied that the Attorney-General has consented to the warrant and that the request is the same as the draft request presented to the Attorney-General except for any changes the Attorney-General required.²²

If the request is for a questioning and detention warrant, and the person has already been detained under another warrant, the issuing authority may issue the warrant only if satisfied that the issue of the requested warrant is justified by information additional to or materially different from that known to ASIO at the time of the request for the

¹⁶ Subsection 34C(3B), ASIO Act. This provision is subject to the operation of section 34TA, which permits the prescribed authority to direct that the subject of a questioning and detention warrant be prevented from contacting a particular lawyer of the subject's choice. The prescribed authority may only make such a direction in circumstances where the prescribed authority is satisfied that, if the subject contacts the lawyer,

- a person involved in a terrorism offence may be alerted that the offence is being investigated, or
- a record or thing the person may be requested under the warrant to produce may be destroyed, damaged or altered.

A direction to this effect does not prevent the person from contacting another lawyer of their choice.

¹⁷ Subsection 34C(3D), ASIO Act. This includes circumstances where a person was previously detained through a direction by a prescribed authority under a questioning warrant (see below).

¹⁸ Section 34A, 'issuing authority', and section 34AB, ASIO Act.

¹⁹ Refer to the section on appointment and administration of issuing authorities and prescribed authorities below.

²⁰ Subsection 34C(4), ASIO Act.

²¹ Paragraph 34D(1)(b), ASIO Act.

²² Paragraph 34D(1)(a) and subsection 34C(4), ASIO Act.

earlier warrant, and that the person is not currently being detained under an earlier warrant.²³

What a warrant authorises

The actions authorised by a warrant depend on whether the warrant issued is only for questioning a person, or whether the warrant also authorises a person to be detained.

A warrant authorises ASIO to question a person before a prescribed authority by requesting a person to give information, or produce records or things, that are or may be relevant to intelligence that is important in relation to a terrorism offence.²⁴ The warrant also authorises ASIO to make copies and/or transcripts of records produced by a person before a prescribed authority in response to a request in accordance with the warrant.²⁵

A warrant may be valid for up to 28 days once it is issued by the issuing authority.²⁶

There are offences for failing to comply with a request made in accordance with the warrant under section 34G. Each has a maximum penalty of five years imprisonment. These offences cover:

- failure to attend questioning after a warrant is issued or the prescribed authority gives a direction for further questioning
- failure to give any information or produce any record or thing requested if the person has that information, record or thing, and
- knowingly making a false or misleading statement in a material particular during questioning before a prescribed authority.

Section 34G does not permit a person to deny answering these questions for the reason that the answer may incriminate the person. However, anything said by or produced by the person while before a prescribed authority for questioning under a warrant in response to a request made in accordance with the warrant is not admissible in evidence against the person in criminal proceedings against the person except for an offence under section 34G.

This means that a person must comply with section 34G, but it provides the person with protection against prosecution in criminal proceedings for things that person said. However, if the same information is available from another source, that information may be admissible in criminal proceedings. This means that derivative use may be made of what is said or produced by the subject for the purpose of criminal investigations.

²³ Subsection 34D(1A), ASIO Act. This is similar to the requirement for the Attorney-General's consent to seek a warrant under subsection 34C(3D).

²⁴ Paragraph 34D(5)(a), ASIO Act.

²⁵ Paragraph 34D(5)(b), ASIO Act.

²⁶ Paragraph 34D(6)(b), ASIO Act.

The regime in this instance is different from that operating in the criminal context because of the different purposes. The ASIO regime is designed to collect intelligence, whereas the criminal regime (where questioning for the purposes of criminal investigation is conducted under Part 1C of the *Crimes Act 1914*) is designed to gather evidence to prove an offence.

Once a warrant is served on the subject, there are other requirements to ensure that a person does not seek to flee the country to avoid questioning. These include the following offences which both carry a maximum penalty of five years imprisonment:

- an offence where the subject of a warrant is given notice to surrender any passports issued to them and they do not do so,²⁷ and
- an offence where a subject of a warrant leaves or attempts to leave the country after being notified of the issue of the warrant.²⁸

The Director-General of ASIO may permit the subject to leave Australia or to have a passport returned earlier than the expiry of the warrant.

These restrictions are intended to protect the effectiveness of intelligence gathering operations by preventing the subject from fleeing the country.

Questioning under warrants authorising questioning

A warrant may be issued to question a person where there are reasonable grounds to believe that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.²⁹

This type of warrant requires the person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant.³⁰ In all cases to date, the person has been required to appear at a time specified in a warrant (rather than being required to appear immediately).

A warrant allows a person to be questioned for a maximum total of 24 hours except where an interpreter is used.³¹ If an interpreter is used, the maximum total questioning time is 48 hours.³² This recognises that the need to translate questions and answers effectively cuts the available questioning time in half.

Under the warrant, ASIO may initially question a person for up to eight hours. At the expiry of the initial eight hours, ASIO must seek an extension of time from the

²⁷ Section 34JC, ASIO Act.

²⁸ Section 34JD, ASIO Act.

²⁹ Paragraph 34D(1)(b), ASIO Act.

³⁰ Paragraph 34D(2)(a), ASIO Act.

³¹ Subsection 34HB(6), ASIO Act.

³² Subsection 34HB(11), ASIO Act.

prescribed authority for questioning to continue.³³ At the expiry of each subsequent eight hour block of time, ASIO must seek the prescribed authority's permission for questioning to continue.³⁴

The prescribed authority may only permit questioning to continue if the prescribed authority is satisfied that:

- there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and
- questioning of the person under the warrant is being conducted properly and without delay.³⁵

At any time after the initial eight hour block of questioning, the prescribed authority may revoke the permission for any further questioning of the subject.³⁶ Revocation of permission does not affect the legality of anything done under the warrant before revocation, but it does mean the subject cannot be questioned any further under the warrant.

The subject is therefore no longer legally compellable to attend for questioning in the following circumstances:

- the maximum total questioning time of 24 hours (48 hours if an interpreter is used) is reached, or
- the prescribed authority revokes or does not give permission for questioning to continue.

While a block of approved questioning time may be up to eight hours in total, a person may not be questioned for more than four continuous hours without being offered a break of at least 30 minutes.³⁷ During breaks or at the end of a day of questioning, the subject is given a time to return for questioning. The subject is then free to leave until questioning proceedings resume.

Depending on the questions asked and the answers given, questioning may be for shorter periods of time. For example, the questioning might take place on one day per week over four weeks so the total questioning period of 24 hours is spread over the duration of the warrant. While always operating within the framework of the legislation and Protocol, the timing of the questioning allowed will depend on the particular circumstances of each case.

Once a questioning warrant is issued, ASIO may only execute the warrant by having it served on the subject for up to 28 days. After this time, the warrant will not be valid

³³ Subsection 34HB(1), ASIO Act.

³⁴ Subsections 34HB(2) and (9), ASIO Act.

³⁵ Subsection 34HB(4), ASIO Act.

³⁶ Subsection 34HB(5), ASIO Act.

³⁷ Clause 4.4, the Protocol.

and a new warrant would be required if ASIO needs to compel the person to answer questions.

Questioning and detention warrants

Once a warrant for a person to be questioned and detained is executed, the subject of the warrant is brought before a prescribed authority for questioning immediately by a police officer exercising authority under the warrant.³⁸ As stated above, this type of warrant is only used where the Attorney-General is satisfied that there are reasonable grounds for believing that if the person is not immediately taken into custody and detained the person may:

- alert a person involved in a terrorism offence that the offence is being investigated
- not appear for questioning, or
- destroy, damage or alter a record or thing the person may be requested to produce in accordance with the warrant.³⁹

Once the warrant is executed, the warrant authorises a person to be:

- taken into custody immediately by a police officer
- brought before a prescribed authority immediately for questioning under the warrant, and
- detained under arrangements made by a police officer for the duration of the warrant.⁴⁰

Under this type of warrant a person may not be detained for more than 168 hours (seven days) during which time the person may be questioned.⁴¹ Questioning takes place under the warrant in a similar manner to under a questioning only warrant. The warrant allows a person to be questioned for a maximum total of 24 hours except where an interpreter is used.⁴² If an interpreter is used, the maximum total questioning time is 48 hours.⁴³

Under the warrant, ASIO may initially question a person for up to eight hours. At the expiry of the initial eight hours, ASIO must seek an extension of time from the prescribed authority for questioning to continue.⁴⁴ At the expiry of each subsequent

³⁸ Section 34DA, ASIO Act.

³⁹ Paragraph 34C(3)(c), ASIO Act.

⁴⁰ Paragraph 34D(2)(b), ASIO Act.

⁴¹ Section 34HC and paragraph 34D(3)(c), ASIO Act.

⁴² Subsection 34HB(6), ASIO Act.

⁴³ Subsection 34HB(11), ASIO Act.

⁴⁴ Subsection 34HB(1), ASIO Act.

eight hour block of time, ASIO must seek the prescribed authority's permission for questioning to continue.⁴⁵

The prescribed authority may only permit questioning to continue if the prescribed authority is satisfied that:

- there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and
- questioning of the person under the warrant is being conducted properly and without delay.⁴⁶

At any time after the initial 8 hour block of questioning, the prescribed authority may revoke the permission for any further questioning of the subject.⁴⁷ Revocation of permission does not affect the legality of anything done under the warrant before revocation, but it does mean the subject cannot be questioned any further under the warrant.

The prescribed authority is required to make a direction under paragraph 34F(1)(f) that the subject of the warrant be released immediately from detention in the following circumstances:

- the maximum total questioning time of 24 hours (48 hours if an interpreter is used) is reached⁴⁸
- the prescribed authority revokes or does not give permission for questioning to continue,⁴⁹ or
- once a person has been detained under the warrant for a continuous period of 168 hours.⁵⁰

While a block of questioning time may be up to eight hours in total, a person may not be questioned for more than four continuous hours without being offered a break of at least 30 minutes.⁵¹ During breaks or at the end of a day of questioning, the subject is detained by a police officer who exercises authority under the warrant.

Once a warrant is issued, ASIO may only execute the warrant by having it served on the subject for up to 28 days. After this time, the warrant will not be valid and a new warrant would be required if ASIO needs to compel the person to answer questions.

⁴⁵ Subsections 34HB(2) and (9), ASIO Act.

⁴⁶ Subsection 34HB(4), ASIO Act.

⁴⁷ Subsection 34HB(5), ASIO Act.

⁴⁸ Paragraph 34HB(7)(c) and subsection 34HB(11), ASIO Act.

⁴⁹ Paragraphs 34HB(7)(a) and (b), ASIO Act.

⁵⁰ Section 34HC and paragraph 34D(3)(c), ASIO Act.

⁵¹ Clause 4.4, the Protocol.

Role of the prescribed authority

The main role of the prescribed authority is to supervise the questioning of the subject of a warrant, inform the person of their rights, and ensure the terms of the warrant, the ASIO Act and the Protocol are complied with.

The Act provides that former judges of a federal court or State or Territory Supreme or District court may be appointed as a prescribed authority. If there are insufficient numbers of people in this category available to perform the role, then the Act provides that current judges of a State or Territory Supreme or District Court can be appointed. If there are insufficient numbers in these two categories, then the President or Deputy President of the Administrative Appeals Tribunal may also be appointed.⁵² To date, only people in the first tier (former judges) have been appointed as prescribed authorities, following their consent to perform this role.

Explanation of warrant

Clause 4.3 of the Protocol provides that a prescribed authority must explain to the subject the effect of the warrant in accordance with section 34E and must be satisfied that the subject has understood the explanations given. Subsection 34E(2A) requires that the prescribed authority explain to the subject his or her role and the reason for the presence of each other person who is present at any time during the questioning. This need only be done once, and the prescribed authority must not name any person present without their consent.

Subsection 34E(1) requires that the prescribed authority explain the warrant to the subject if that person has not previously appeared before a prescribed authority.⁵³ The content of this explanation varies depending on whether the warrant authorises the person's detention. It includes:

- whether the warrant authorises detention of the person by a police officer and, if so, for how long
- what the warrant authorises ASIO to do
- the effect of section 34G (offences with a penalty of 5 years imprisonment and issues about admissibility of evidence)
- the period for which the warrant is in force
- the person's right to make a complaint to the IGIS about ASIO or to the Commonwealth Ombudsman about the Australian Federal Police
- that the person may seek a remedy from a federal court relating to the warrant or the treatment of the person in connection with the warrant (the prescribed authority must inform the person of this at least once in every 24 hour period)⁵⁴

⁵² Section 34B, ASIO Act.

⁵³ Subsection 34E(2), ASIO Act.

⁵⁴ Subsection 34E(3), ASIO Act.

- that the questioning proceedings are being recorded, including the time and date of the questioning,⁵⁵ and
- what the warrant states about contacting others, that is
 - whether the warrant provides that there is a limit on the person contacting others, and
 - if specified, the identified persons the person may contact and the specified times for such contact.

Giving directions

A prescribed authority can make directions under section 34F. Subsection 34F(1) provides that a prescribed authority may give a direction:

- for the subject to be detained, further detained, or released from detention
- about arrangements for the subject's detention
- where the subject has been detained, permitting the subject to contact an identified person (including someone identified by a legal or familial relation) or any person, or
- for the subject's further appearance for questioning under the warrant.

The prescribed authority may direct that a person be detained, or further detained, only if satisfied that there are reasonable grounds for believing that, if the person is not detained, the person:

- may alert a person involved in a terrorism offence that the offence is being investigated
- may not continue to appear, or may not appear again, before a prescribed authority, or
- may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.⁵⁶

Any such direction must not result in a person being detained longer than permitted under the legislation, nor in a person's detention being arranged by a person who is not a police officer.⁵⁷

In accordance with subsection 34F(2), directions must be either consistent with the warrant or approved in writing by the Attorney-General (or to address a concern of the IGIS).

The fact that a prescribed authority can order a person's detention recognises there may be times when it becomes apparent through questioning that a person subject to a questioning warrant may need to be detained.⁵⁸

⁵⁵ Clause 7.2, the Protocol.

⁵⁶ Subsection 34F(3), ASIO Act.

⁵⁷ Subsection 34F(4), ASIO Act.

⁵⁸ See also subsection 34F(2A), ASIO Act.

Language issues

The prescribed authority has a primary role in assessing whether a subject requires an interpreter for the purposes of the questioning. During the opening statement or at any time during the questioning, the prescribed authority is required to assess whether the subject comprehends what is being said.

If the prescribed authority believes the subject is having difficulty understanding what is being said (because of an inadequate knowledge of English or a physical disability), the person exercising authority under the warrant must arrange for an interpreter to be present.⁵⁹ An interpreter may be provided upon request by a subject unless the prescribed authority believes on reasonable grounds that the person has an adequate knowledge of, or reasonable fluency in, the English language.⁶⁰

If the prescribed authority considers an interpreter is necessary, until the interpreter is present the prescribed authority must defer informing the person under section 34E, and ASIO must not question or continue to question the subject.⁶¹

Recording of proceedings

Section 34K of the ASIO Act and clause 7 of the Protocol require proceedings to be video recorded. The prescribed authority must suspend proceedings if there is a failure in the recording equipment, or if the recording has been suspended during the subject's appearance for questioning, until recording can be resumed.⁶²

The prescribed authority must also inform the subject that the questioning is being recorded, and state the date and time, at the commencement or resumption of questioning.⁶³

4. PROTECTION OF CIVIL LIBERTIES AND INDIVIDUAL RIGHTS

Division 3 contains provisions that provide significant safeguards against the abuse of civil liberties and individual rights.

Subsection 34J(2) provides a base protection to persons subject to a warrant. It mandates that a person must be “treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment” by anyone exercising authority under a warrant or following a direction given by a prescribed authority. A person who treats the subject of a warrant in a manner contrary to that detailed in this subsection is liable to imprisonment for two years.⁶⁴

The provisions establishing the warrant regime provide for independent oversight and observation of questioning proceedings. The IGIS may be present when a person is questioned or taken into detention, and subjects may make a complaint to the IGIS.⁶⁵

⁵⁹ Section 34H, ASIO Act.

⁶⁰ Section 34HAA, ASIO Act.

⁶¹ Subsections 34H(3) and 34HAA(3), ASIO Act.

⁶² Clause 7.1, the Protocol.

⁶³ Clause 7.2, the Protocol.

⁶⁴ Subsection 34NB(4), ASIO Act.

⁶⁵ Section 34HAB and subsection 34F(9), ASIO Act.

The IGIS may request that the prescribed authority suspend proceedings where the IGIS is concerned about impropriety or illegality in connection with the exercise of powers under a warrant.⁶⁶

Any person subject to a warrant has the right to make a complaint to the IGIS in relation to ASIO or the Ombudsman in relation to the AFP.⁶⁷ A person's appearance before a prescribed authority must be video recorded⁶⁸ and a sealed master version of every recording must be made available to the IGIS on request.⁶⁹

Within the oversight context it should also be emphasised that the prescribed authority, who has the power to, among other things, suspend proceedings until satisfied that the IGIS's concerns have been satisfactorily addressed,⁷⁰ is an independent authority.

The Protocol

The Protocol⁷¹ established pursuant to the requirement in subsection 34C(3A) of the ASIO Act provides additional details about the manner in which a person must be treated. The Protocol is a written statement of the procedures to be followed in the exercise of authority under a warrant. Among other things, it provides that:

- Questioning must occur in a humane and courteous manner and may not occur in a manner that is unfair or oppressive.⁷²
- Information must be conveyed in a language that the subject can understand.⁷³
- A subject shall have access to fresh drinking water and toilet and sanitary facilities at all times during questioning and be provided with three meals a day at the usual hours or times necessary to meet religious requirements. Food must be culturally appropriate and be of sufficient nutritional value so as to be adequate for health and wellbeing.⁷⁴
- A subject must not be questioned continuously for more than four hours without being offered a break which shall be of a minimum duration of 30 minutes.⁷⁵
- Detention shall be supervised by a police officer.⁷⁶

⁶⁶ Section 34HA, ASIO Act.

⁶⁷ Paragraph 34E(1)(e), ASIO Act.

⁶⁸ Subsection 34K(1), ASIO Act.

⁶⁹ Clause 7.3, the Protocol.

⁷⁰ Subsection 34HA(4), ASIO Act.

⁷¹ The Protocol is publicly available on the Government's National Security website at <<http://www.nationalsecurity.gov.au>> by following the 'legislation' and 'Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003' links.

⁷² Clause 4.1, the Protocol.

⁷³ Clause 4.2, the Protocol.

⁷⁴ Clauses 4.4, 6.2 and 6.4, the Protocol.

⁷⁵ Clause 4.4, the Protocol.

⁷⁶ Clause 5.1, the Protocol.

- Facilities employed for questioning must have adequate fresh air and ventilation, floor space, lighting, heating and cooling.⁷⁷
- A subject shall be provided with a separate bed and room in which to sleep and except where otherwise directed by the prescribed authority a subject must be accorded the opportunity for a minimum continuous and undisturbed period of eight hours sleep during any 24 hour period of detention.⁷⁸
- A subject shall be permitted to bathe and shower daily.⁷⁹
- A subject shall be provided with necessary medical or other health care when required.⁸⁰
- A person shall be permitted to engage in religious practices as required by their religion.⁸¹

While contravention of any one matter detailed in the Protocol would not necessarily amount to inhumane treatment contrary to section 34J, the Protocol contains the basic standards applicable to the detention and questioning of a person pursuant to a warrant. Contraventions of the Protocol may be the subject of complaints about ASIO to the IGIS or about the AFP to the Commonwealth Ombudsman.⁸²

As noted above, subsection 34NB(4) also creates an offence liable to a penalty of two years imprisonment if a person treats the subject of a warrant in a manner contrary to that required in subsection 34J(2). Section 34NB also contains penalties for officers who do not follow other processes and safeguards in the legislation.

Protection against incommunicado detention

Division 3 contains provisions which ensure that a person subject to a warrant is not held incommunicado.

Warrants authorising questioning only do not place restrictions on the subject's contact with others. A warrant authorising detention must permit the subject of the warrant to contact identified persons at specified times when the person is in custody or detention.⁸³ The person identified in the warrant may be a lawyer of the person's choice, a person with whom the subject of the warrant has a particular familial or legal relationship or other persons.⁸⁴ A warrant authorising detention must permit the person to contact a single lawyer of the person's choice.⁸⁵ A prescribed authority may prevent a person detained under a warrant from contacting a lawyer of the person's

⁷⁷ Clause 6.1, the Protocol.

⁷⁸ Clause 6.3, the Protocol.

⁷⁹ Clause 6.4, the Protocol.

⁸⁰ Clause 6.5, the Protocol.

⁸¹ Clause 6.6, the Protocol.

⁸² Subsection 34NC(1), ASIO Act.

⁸³ Subparagraph 34D(2)(b)(ii), ASIO Act.

⁸⁴ Subsection 34D(4), ASIO Act.

⁸⁵ Subsection 34C(3B), ASIO Act.

choice where a prescribed authority is satisfied, on the basis of circumstances relating to a particular lawyer, that if the subject is permitted to contact that lawyer:

- a person involved in a terrorism offence may be alerted that the offence is being investigated, or
- a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.⁸⁶

While subjects are permitted to contact persons, they must not reveal information to those persons contrary to section 34VAA titled ‘Secrecy relating to warrants and questioning’.

Section 34 VAA protects the effectiveness of intelligence gathering operations by prohibiting:

- while a warrant is in force, disclosure without authorisation 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
- while a warrant is in force and during the period of two years after the expiry of the warrant, disclosure without authorisation of any ASIO operational information.

Operational information is information that indicates one or more of the following:

- information that ASIO has or had
- a source of information that ASIO has or had
- an operational capability, method or plan of ASIO.⁸⁷

While section 34VAA imposes restrictions on the type of information that can be disclosed, exceptions exist where, among other things, a disclosure is:⁸⁸

- made for the purpose of obtaining legal advice in connection with a warrant or obtaining representation in legal proceedings seeking a remedy relating to such a warrant or the treatment of a person in connection with a warrant
- permitted by a prescribed authority
- permitted by the Director-General of ASIO
- made by a person representing the interests of a minor or made by a parent, guardian or sibling of a minor when the representation is made to a parent, guardian or sibling, or person representing the interest of a minor, or to the

⁸⁶ Section 34TA, ASIO Act.

⁸⁷ Subsection 34VAA(5), ASIO Act.

⁸⁸ Subsection 34VAA(5), ASIO Act.

IGIS, Ombudsman, prescribed authority, or person exercising authority under the warrant.

Protection of minors

Recognising that minors have particular needs and require extra care, special protections apply to persons aged between 16 and 18. To this date, no persons aged between 16 and 18 have been questioned or detained under the Act.

A warrant has no effect if the person specified in the warrant is under 16.⁸⁹ The Attorney-General may only consent to a request to seek the issue of a warrant for a person aged between 16 and 18 where the Attorney-General is satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence.⁹⁰

Minors can only be questioned in the presence of a parent, guardian, or another person who is capable of representing the minor's interests.⁹¹ In addition, a minor is permitted to contact, at any time when in custody or detention, a parent or guardian or another person who is able to represent the minor's interests.⁹² Minors cannot be questioned for more than two hours at a time without being permitted to take a break.⁹³

The Protocol also takes account of the special needs of minors and provides that:

where a subject is under the age of 18 years, any period of questioning or detention may only take place under conditions that take full account of the subject's particular needs and any special requirement having regard to their age.⁹⁴

Where the Protocol conflicts with the special protections specified in the Act, the Act takes precedence and the special protection applies (for example, the Protocol limits continuous questioning to four hour periods whereas the Act provides that a minor may not be questioned for more than two hours at a time).

Strip searches of persons aged between 16 and 18 can only be conducted if ordered by a prescribed authority. Such searches must be conducted in the presence of a parent or guardian or, if that is not acceptable to the person being searched, in the presence of someone else who can represent the person's interests and who is acceptable to the person.⁹⁵

⁸⁹ Subsection 34NA(1), ASIO Act.

⁹⁰ Subsection 34NA(4), ASIO Act.

⁹¹ Subsection 34NA(6) and paragraphs 34NA(8)(b) and (c), ASIO Act.

⁹² Subsection 34NA(6), ASIO Act. Subsection 34NA(7) specifically excludes a police officer, the Director-General of ASIO, or an officer or employee of ASIO, as persons who can represent the interests of a minor.

⁹³ Subsection 34NA(6) and paragraph 34NA(8)(e), ASIO Act.

⁹⁴ Clause 6.1, the Protocol.

⁹⁵ Paragraph 34M(1)(f), ASIO Act. Subsection 34M(2) specifically excludes a police officer, the Director-General of ASIO, or an officer or employee of ASIO, as persons who can represent the interests of a minor.

Contact with a lawyer

The Act contains provisions to regulate the ability of a subject to contact a lawyer. The extent of the regulation depends on whether a person is only to be questioned under a warrant, or whether the person is also to be detained.

Where a questioning warrant is executed, the warrant and the Act do not limit or prevent a subject from contacting a lawyer for the purposes of the questioning proceedings. This reflects a policy rationale that subjects are being questioned to elicit information only, and that as they are considered to comply with the terms of the warrant, there is no operational need to limit that person's contact with a lawyer.⁹⁶

In the case of a warrant authorising questioning and detention, the Act imposes stricter limitations on a subject's contact with a legal adviser. As stated above, the warrant must permit the subject to contact identified persons at specified times when the person is in custody or detention authorised by the warrant, including a single lawyer of the person's choice.⁹⁷

The prescribed authority may direct that a subject of a warrant issued for questioning and detention may be prevented from contacting a particular lawyer of the subject's choice in certain circumstances.⁹⁸ The prescribed authority may only make such a direction if the prescribed authority is satisfied, on the basis of circumstances relating to that lawyer, that if the subject is permitted to contact that lawyer:

- a person involved in a terrorism offence may be alerted that the offence is being investigated, or
- a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.⁹⁹

This exclusion may occur even if the subject is permitted under the warrant to contact the particular lawyer.¹⁰⁰ However, exclusion of one lawyer does not mean a subject is prevented from choosing another lawyer, but the subject may be prevented from contacting that other lawyer if the relevant circumstances arise.¹⁰¹

To date, AGD understands that all persons who have been the subject of questioning proceedings have had access to legal representation at all times during those proceedings. In one case, the legal representative for a person subject to a questioning warrant did not attend questioning on some occasions. The person subject to the questioning warrant confirmed that they were comfortable with questioning proceeding without the legal representative being present.

⁹⁶ The contact is still limited to the terms stated above as a permitted disclosure under subsection 34VAA(5) in the sense that the subject may commit an offence under subsection 34VAA(1).

⁹⁷ Subparagraph 34D(2)(b)(ii) and subsection 34C(3B), ASIO Act.

⁹⁸ Subsection 34TA(1), ASIO Act.

⁹⁹ Subsection 34TA(2), ASIO Act.

¹⁰⁰ Subsection 34TA(3), ASIO Act.

¹⁰¹ Subsection 34TA(4), ASIO Act.

Role of lawyers during questioning

The Act contains a lawyer of choice regime. This means that a subject will generally be able to choose their own lawyer to be present during questioning proceedings. As stated above, the Act permits the subject to disclose information about the warrant to a lawyer for the purposes of obtaining legal advice or legal representation in court proceedings relating to a warrant issued under section 34D.¹⁰²

The Act does not require a lawyer to be present during questioning proceedings.¹⁰³ This recognises that questioning may be time-critical. However, if a legal adviser is present, the prescribed authority must provide a reasonable opportunity for the legal adviser to advise the subject during breaks in the questioning.¹⁰⁴

The legal adviser must not intervene in the questioning of a subject except to request clarification of an ambiguous question.¹⁰⁵ Again, the lawyer's role is limited because these proceedings are designed to elicit information rather than being criminal proceedings against the person. The prescribed authority may direct that a subject's legal adviser be removed from the place where the questioning is occurring if the prescribed authority considers the legal adviser's conduct to be unduly disrupting the questioning.¹⁰⁶ If this occurs, the subject will be permitted to contact another legal adviser.¹⁰⁷ To date, no legal representatives have been removed from the proceedings under this provision.

Roles of the IGIS and the Commonwealth Ombudsman

The Commonwealth Ombudsman and the IGIS are important accountability and oversight mechanisms for Australia's law enforcement and intelligence agencies. The IGIS and the Commonwealth Ombudsman both operate independently of Government and have extensive investigatory powers. For the purposes of questioning and detention under a warrant, the Commonwealth Ombudsman is responsible for complaints against an officer of the Australian Federal Police and the IGIS is responsible for complaints against ASIO.

Complaints

A subject is required to be permitted to contact the IGIS or the Commonwealth Ombudsman during the period of the warrant or following, including during questioning or detention.¹⁰⁸

The subject must be provided with facilities that the prescribed authority views are appropriate for such contact in the circumstances, and the subject must be permitted to make a complaint outside of the hearing of officers present for the purposes of executing or supervising the execution of the warrant.

¹⁰² Definition of 'permitted disclosure' under subsection 34VAA(5), ASIO Act.

¹⁰³ Section 34TB, ASIO Act.

¹⁰⁴ Subsection 34U(3), ASIO Act. The prescribed authority may direct breaks to be set between periods of questioning by giving appropriate directions under paragraph 34F(1)(e).

¹⁰⁵ Subsection 34U(4), ASIO Act.

¹⁰⁶ Subsection 34U(5), ASIO Act.

¹⁰⁷ Subsection 34U(6), ASIO Act.

¹⁰⁸ Clause 9, the Protocol, and subsection 34F(9) and paragraph 34E(1)(e), ASIO Act.

Suspension of questioning

If the IGIS is concerned about an illegal act or an impropriety occurring during questioning he may advise the prescribed authority. If the IGIS does raise a concern with the prescribed authority, the IGIS must also inform the Director-General of ASIO of the concern as soon as is practicable.¹⁰⁹

The prescribed authority must consider this concern.¹¹⁰ The prescribed authority may give a direction to defer questioning of the person under the warrant or the exercise of a power under the Act until the IGIS's concern has been satisfactorily addressed.¹¹¹

Reporting role

ASIO is required, as soon as practicable, to provide the IGIS with various materials relating to questioning and detention warrants. These materials include a copy of any draft request given to the Attorney-General, any warrants issued, a copy of any video recordings made of questioning proceedings, a statement containing details of any seizure, taking into custody, or detention under the Division, and a statement of any action ASIO has taken as a result of being informed of any concern raised by the IGIS.¹¹²

The IGIS reports on the operation of the Division 3 regime in his Annual Report, and section 34QA of the ASIO Act imposes a specific reporting requirement on the IGIS where multiple warrants are issued in respect of an individual.

5. ROLE OF THE ATTORNEY-GENERAL'S DEPARTMENT

The Attorney-General's Department administers the ASIO Act. As the administering Department, AGD works closely with ASIO to ensure that the Act, including the warrant provisions, enable ASIO to obtain, correlate and evaluate intelligence relevant to security. AGD and ASIO carry on a continuing dialogue aimed at refining and where necessary improving the operation of the Act. In addition to considering ASIO's requirements, the dialogue also takes into account the civil liberties and rights of the individual. Ultimately, the aim is to strike the appropriate balance between protection of the Commonwealth and the people of Australia and individual rights and freedoms.

AGD's role in the warrant process

The Security Law Branch within AGD reviews ASIO's requests for the Attorney-General's permission to seek a warrant. Such requests must include a draft of the warrant, as well as other information detailing the basis on which the request is made. The Security Law Branch reviews the requests to check that all of the requisite

¹⁰⁹ Subsection 34HA(2), ASIO Act.

¹¹⁰ Subsection 34HA(3), ASIO Act.

¹¹¹ Subsection 34HA(4), ASIO Act.

¹¹² Section 34Q, ASIO Act.

materials are provided with the request and to ensure that the legislative requirements relating to the making of a request are complied with. Where necessary, the Security Law Branch may recommend that ASIO provide further information to assist the Attorney-General to make his decision. To date, AGD has only suggested minor modifications on some occasions.

AGD's role in the appointment and administration of issuing and prescribed authorities

AGD is responsible for identifying, and recommending the appointment of, persons to act as issuing or prescribed authorities. Appointments to these positions have been made based on nominations after consultations with the judiciary. AGD has conducted this appointment process independently from ASIO.

The appointment process initially involved the Attorney-General writing to the chief justices of the federal courts and the State and Territory Supreme courts, the chief judges of the State and Territory District courts, and the Chief Federal Magistrate of the Federal Magistrates Service. The Attorney-General requested each correspondent to advise of the availability or interest of members of their courts in being issuing or prescribed authorities, and asked for their assistance in locating and contacting former judges of their courts.

The Secretary of AGD then wrote to each of the identified persons to ask whether they were willing to perform the role of an issuing or prescribed authority.¹¹³ Each of these persons wrote back to advise AGD of their interest and availability to perform the role and, where appropriate, provided written consent to be appointed. Persons were only deemed to be eligible to be appointed as prescribed authorities if they do not hold a judicial appointment.¹¹⁴

All persons who provided written consent to be appointed and who were eligible and available to perform the appropriate role as an issuing or prescribed authority have been appointed.

A number of federal judges and federal magistrates have been appointed to perform the role of an issuing authority. While the appointment process is ongoing, the current number of appointees is considered to be sufficient for the execution of warrants. At this stage, AGD does not consider it necessary to make regulations for a wider class of persons to be appointed to this role.

As stated above, the prescribed authorities may be appointed from three tiers of classes.¹¹⁵ The first tier covers former judges of a federal court or State or Territory Supreme or District Court. The Attorney-General must be satisfied that there are insufficient numbers from the first tier to appoint a person from the second tier, that is

¹¹³ Consent in writing is required for the appointment of prescribed authorities under subsection 34B(4) of the ASIO Act and issuing authorities under subsection 34AB(2).

¹¹⁴ In accordance with the requirement in subsection 34B(1) of the ASIO Act, which requires that a prescribed authority 'no longer holds a commission as a judge of a superior court'.

¹¹⁵ Section 34B, ASIO Act.

current judges of a State or Territory Supreme or District court. Again, only if there are insufficient judges in the first and second tiers may a President or Deputy President of the Administrative Appeals Tribunal be appointed as a prescribed authority.

To date, only people in the first tier (former judges) have been appointed as prescribed authorities, following their consent to perform this role. This is because there has been a wide range of interest for these positions, and appointments are now in place across Australia. The current spread of appointments is such that questioning can be conducted at short notice with local prescribed authorities available in most capital cities.

AGD also acts as the point of contact between the Government and issuing and prescribed authorities. This means AGD coordinates the selection of appropriate issuing and prescribed authorities for questioning proceedings and ensures arrangements are in place concerning the timing of questioning.

AGD's role includes providing support to prescribed authorities where those authorities have questions about process or about policy or legal issues arising from the questioning. The Department has had the opportunity on a number of occasions when assisting the prescribed authorities to witness the practical operation of the scheme.

AGD coordination of contact with issuing and prescribed authorities is intended to minimise direct contact between the authorities and ASIO outside of the context of issuing a warrant or supervising questioning proceedings. This separation is intended to ensure the authorities are as impartial as possible during the questioning process.

AGD administration of financial assistance for subjects of warrants

AGD also has a role in the consideration of applications for financial assistance for persons questioned under a warrant.

A person who is subject to a warrant for questioning or detention is eligible to apply for financial assistance under the Special Circumstances Scheme of financial assistance administered by the Indigenous Justice and Legal Assistance Division of AGD. The Guidelines for the Special Circumstances Scheme are at **Attachment A**. ASIO is not involved in this process, and information provided by the subject of a questioning warrant or his or her lawyer in a financial assistance application is not passed to ASIO.

Financial assistance will cover reasonable costs and related expenses incurred during questioning before a prescribed authority. Generally, solicitors' fees are paid at 80% of the Federal Court Scale, and junior counsel's fees are paid up to a maximum of \$1,600 per day (excluding GST), depending on the experience of counsel. The costs of counsel are only allowed in circumstances where the delegate is satisfied that a solicitor is unable to adequately represent the interests of the client.

The applicant's financial circumstances are not a relevant consideration in deciding whether to make a grant for those purposes. Unlike the majority of financial assistance schemes, reasonable expenses are covered retrospectively where an applicant has been questioned or detained prior to being able to provide notice that an application for financial assistance will be lodged. To date, all applications for assistance have been approved and no applicant has been disadvantaged by the time taken to consider the application.

6. OPERATION TO DATE AND SUGGESTED MODIFICATIONS

AGD's overall assessment is that the new regime has operated as intended, providing ASIO with a legally compellable power to obtain intelligence important in relation to terrorism offences while ensuring protections for those subject to questioning.

The first questioning warrants were sought in the second half of 2003. Some practical issues were soon identified in the planning and execution of questioning warrants. These included the need for extra time when interpreters were used, the prevention of unauthorised overseas travel by persons subject to questioning warrants, and secrecy provisions relating to warrants and questioning. The Government proposed further amendments to the regime to deal with these matters. The amending legislation (*ASIO Legislation Amendment Act 2003*) was passed in early December 2003, and commenced on 18 December 2003.

Since then, no other practical issues have arisen that have justified the seeking of further legislative amendments. AGD consults with ASIO on an ongoing basis. AGD also liaises with issuing authorities and prescribed authorities, and welcomes their comments on the process. AGD is also consulted on some matters raised by the IGIS. AGD has assisted ASIO in responding to matters that have been raised and making procedural changes where appropriate, and the Department, in consultation with ASIO, is continuing to consider other issues as they arise.

As of the writing of this submission, there has not been a legal challenge to a warrant issued under Division 3 of Part III of the ASIO Act.

AGD is aware that some issues and complaints have been raised with the IGIS. These issues have been resolved between the IGIS, ASIO and the prescribed authority as appropriate. As AGD is not closely involved in the operational proceedings, the Department is not automatically involved in all these matters but AGD has been consulted when the issues have impacted on the operation of the legislation.

AGD's view is that the new regime has generally operated well. ASIO has confirmed that questioning warrants have produced valuable information.¹¹⁶ To date, no warrants for detention have been sought, nor has any person been searched pursuant to section 34L of the ASIO Act. ASIO also has not sought any warrants relating to persons younger than 18 years of age. ASIO has taken a judicious and careful

¹¹⁶ Australian Security Intelligence Organisation, *Report to Parliament 2003-2004*, Canberra, 2004, p. 5, viewed 30 March 2005, <<http://www.asio.gov.au/Publications/comp.htm>>.

approach, only seeking use of the powers when genuinely warranted and taking great care to ensure that legislative and other requirements are fully met.

While AGD's overall assessment of the operation of Division 3 is positive, AGD recognises the need for continued reflection, ensuring that the warrant provisions continue to meet evolving operational circumstances. To that end, AGD will continue to seek input from all those involved in the warrant process.

Recent consultations have revealed some desirable amendments which are outlined below. These suggested amendments are not due to any problems that have arisen in practice, but rather they have emerged through close scrutiny of the provisions and the benefit of hindsight. They are primarily directed at ensuring clarification of certain issues and greater consistency in circumstances regulated by Division 3.

Possible legislative amendments

- **Definition of 'permitted disclosure' – paragraph 34VAA(5)(f)**

The offences in section 34VAA apply to the disclosure of certain information unless the disclosure is a 'permitted disclosure'. Paragraph (f) permits disclosures where the subject of the warrant is younger than 18 years of age. It permits disclosures to a range of people by the subject's representative (defined in subsection 34V(1)) or by a parent, guardian or sibling of the subject. In addition to the existing provisions covering contact while a person is in custody or detention,¹¹⁷ it would seem appropriate that paragraph (f) also expressly permit disclosures by the (minor) subject themselves in circumstances outside of the questioning or detention context.

- **Clarification of the meaning of 'questioning period'**

Subparagraph 34D(2)(b)(i) and subsection 34D(3) refer to the concept of 'questioning period' as the period commencing from when a person is first brought before a prescribed authority under a warrant and ending when:

- ASIO no longer seeks to question a person or ask them to produce things under the warrant
- circumstances set out in section 34HB require the end of questioning under the warrant (including at the expiry of the relevant time period for questioning), or
- the maximum detention period of 168 hours expires.

¹¹⁷ Section 34NA requires that a warrant authorising a young person to be questioned and detained permit the person to contact a parent, guardian or other suitable person. The prescribed authority must also inform a young person that they may contact such persons as soon as practicable after being brought before the prescribed authority irrespective of whether the young person is to be detained.

This is a technical term that is used to cover the period in which a person is detained, including the actual period of questioning. The terminology ('questioning period') is potentially confusing and misleading as the term is only used in the context of a warrant authorising detention (and not for a questioning only warrant). The terminology could be changed to ensure that its literal meaning covers circumstances of detention including questioning, as opposed to its current literal meaning.

It may also be useful to have a distinct definition of the period involving questioning of a person before a prescribed authority. The legislation could specify what sort of time should be recorded for the purposes of the questioning under the warrant. For instance, this may involve a consideration of time spent on procedural issues that arise during the questioning process.

These possible amendments are not intended to have a different legal or practical effect. However, AGD considers it to be useful for the legislation to set out for the subject and his or her lawyer how time involving questioning or detention of the subject under the warrant is recorded.

- **Direction for detention – contact requirement – section 34F**

Section 34F enables the prescribed authority to give certain directions, including that a person be detained or further detained. As noted above, such directions could be given in cases where a person has been brought before the prescribed authority on a questioning only warrant (and has therefore not previously been subject to restrictions on contact with others).

While paragraph 34F(1)(d) enables the prescribed authority to make a direction permitting the subject to contact persons, it may be desirable to make it clear that the prescribed authority is *required* to issue a direction permitting the subject to contact certain persons in cases where the prescribed authority makes a direction to detain the person. It would seem desirable for the subject to expressly have the same rights of contact in these situations as if they had been detained under a detention warrant.¹¹⁸

7. Key recommendation – removal of sunset provision

In addition to these relatively minor amendments, AGD strongly recommends that the current sunset provision (section 34Y) be removed from the Act.

AGD understands that the use of the questioning powers has provided valuable information and that the powers have proved to be an effective and useful addition in the fight against terrorism. The regime is working well, providing valuable information within a framework of extensive safeguards and accountability mechanisms. While there will always be room for fine-tuning the legislative

¹¹⁸ For instance, as in subparagraph 34D(2)(b)(ii), and subsections 34C(3B) and 34NA(6) of the ASIO Act.

provisions through further practical experience, there is currently no demonstrated need for major changes to the regime.

Although some parts of the regime have not yet been utilised (for example, warrants for detention and persons younger than 18), it does not mean these provisions are not needed. The regime (and particularly the detention component of it) was always intended to be a measure of last resort. It is reassuring that ASIO is adopting a responsible and measured approach to the use of the powers. It is clear that the need for special terrorism-related questioning and detention powers has not decreased since the powers were conferred by the 2003 legislation. The current national security and counter-terrorism environment underlies the continued need for the powers.

Accordingly, AGD's key recommendation is that section 34Y (the sunset provision) be removed to enable ongoing application of ASIO's terrorism-related questioning and detention powers in Division 3 of Part III of the ASIO Act.



Australian Government
Attorney-General's Department

**Indigenous Justice and
Legal Assistance Division**

GUIDELINES

SPECIAL CIRCUMSTANCES SCHEME

SPECIAL CIRCUMSTANCES SCHEME

Guidelines for consideration of financial assistance for legal costs and related expenses in special circumstances in cases not covered by extant statutory and non-statutory schemes.

Financial assistance for legal costs and related expenses may be authorised:

- (a) where the matter in respect of which payment is sought is covered by specific legislation but application of the legislation would produce a result that was unintended, anomalous, inequitable or otherwise unacceptable in the particular circumstances; or
- (b) where the matter in respect of which payment is sought is not covered by legislation but it is intended to introduce legislation and for special reasons it is considered desirable in a particular case to apply the benefits of the proposed legislation prospectively by act of grace; or
- (c) where in a particular case there are other special circumstances which lead to the conclusion that there is a moral obligation on the Commonwealth to make a payment.

Applicants for payment of legal costs and related expenses in special circumstances should set out the matters which they consider constitute those special circumstances relating them, as appropriate, to the above guidelines.

Applications for assistance, or inquiries relating to the provision of legal or financial assistance by the Commonwealth, should be addressed to:

The Secretary
Attorney-General's Department
National Circuit
BARTON ACT 2600

Telephone: (02) 6250 6666
Fax: (02) 6250 5909