



INSPECTOR-GENERAL OF INTELLIGENCE AND SECURITY

2005/118

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

Dear Ms Swieringa

I am writing in response to the PJCAAD's request for submissions to its Review of ASIO's Detention and Questioning Powers, of which you notified me on 9 December 2004.

A submission for this purpose is attached.

I look forward to providing whatever further assistance the Committee requires of me.

The enclosed attachment is not classified, and could be made publicly available should the Committee so wish.

Yours sincerely

Ian Carnell
Inspector-General
of Intelligence and Security
30 March 2005

IGIS SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD'S REVIEW OF ASIO'S QUESTIONING AND DETENTION POWERS

INTRODUCTION

1. The Australian Parliament passed the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2002* on 26 June 2003.
2. The practical effect of this Act was to insert a new Division into Part III of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act), permitting the Director-General of Security, with the Attorney-General's consent, to seek a warrant authorising the questioning or detention of a person where doing so would substantially assist the collection of intelligence that is important in relation to a terrorism offence.
3. Several sections of the amending Act required the development of a written statement of procedures (namely a 'protocol') to be followed in the exercise of such warrants issued under section 34D of the ASIO Act. The then Attorney-General, the Hon Daryl Williams AM QC MP, tabled the protocol on 12 August 2003, from which date ASIO could legally seek to obtain special powers warrants under the authority of section 34D of the ASIO Act.
4. ASIO's publicly available Annual Report for 2003-2004 reported that the execution of the first questioning warrants granted under section 34D of the ASIO Act occurred in the later part of 2003. Practical experience derived from seeking and executing warrants led the government to propose further amendments to the ASIO Act.
5. The current Attorney-General, the Hon. Philip Ruddock MP, introduced the *ASIO Legislation Amendment Bill 2003* in late November 2003, which was then passed by the Parliament on 5 December 2003.

GENERAL ROLE OF THE IGIS

6. The office of Inspector-General of Intelligence and Security (IGIS) was established by the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act). The role and functions of the IGIS in respect of ASIO are specified in sections 8 and 9A of the IGIS Act.
7. Section 8 of the IGIS Act details the circumstances in which the Inspector-General can conduct formal inquiries into ASIO's activities, while section 9A provides a general right for the IGIS to inspect any of ASIO's activities which the Inspector-General considers appropriate, for the purpose of giving effect to the objects of the IGIS Act.
8. The objects of the IGIS Act are expressed in section 4 to include the legality, propriety and consistency with human rights of the activities of the Australian

intelligence and security agencies, and also the effectiveness and appropriateness of agency procedures in regard to legality, propriety and consistency with human rights.

9. There has not been a requirement to date to use the inquiry power in respect of warrants issued in accordance with section 34D of the ASIO Act. My predecessor (Mr Bill Blick PSM) and I have relied on the general powers conferred by section 9A of the IGIS Act and section 34HAB of the ASIO Act, to witness at first hand, the conduct of questioning under the section 34D warrants issued so far.

10. Section 34HAB of the ASIO Act expressly refers to the right of the Inspector-General to perform this function:

“To avoid doubt, for the purposes of performing functions under the Inspector-General of Intelligence and Security Act 1986, the Inspector-General of Intelligence and Security, or an APS employee assisting the Inspector-General, may be present at the questioning or taking into custody of a person under this Division.”

SPECIFIC SAFEGUARDS INVOLVING IGIS

11. The legislative provisions that provide ASIO with access to questioning and detention powers run to over 40 pages. The length of Division 3 of Part III of the ASIO Act reflects the considerable efforts of the Parliament to incorporate strong safeguards into the various sections of this Division.

12. Those safeguards which specifically involve the Inspector-General include the following:

- Section 34C(3A)(a)(i) requires that the IGIS be consulted in the development of a written statement of procedures to be followed in the exercise of authority under section 34D of the ASIO Act.
- Section 34E(1)(e)(i) requires the Prescribed Authority (who supervises the questioning, and is usually a former Judge) to explain to the subject of a section 34D warrant that they have the right to make a complaint to the IGIS about ASIO, either orally or in writing.
- Section 34F (9)(c) requires that anyone holding a person in custody or detention under Division 3 of the ASIO Act must give the person facilities for contacting the IGIS.
- Section 34HAB of the ASIO Act ensures that the IGIS (or his staff) can be present at the questioning or taking into custody of such a person.
- Section 34HA of the ASIO Act provides that where the IGIS has a concern about impropriety or illegality in connection with the exercise of powers under that warrant, they may raise that concern with the Prescribed Authority, who must consider the Inspector-General’s concern.

- Section 34Q of the ASIO Act details those materials which ASIO is required to provide to the IGIS in respect of section 34D warrants. These materials include a copy of any draft requests for a warrant given to the Attorney-General, any warrants issued, a copy of any video recordings made of the questioning of subjects, and a statement containing details of any seizure, taking into custody, or detention.
- Section 34QA imposes a reporting requirement on the IGIS where multiple warrants are issued in respect of an individual.

13. Comments on how these have operated in practice are set out below.

Protocol

14. In respect of the first dot point at paragraph 12 immediately above, my predecessor was fully consulted in the development of a protocol made pursuant to the requirements of subsection 34C(3A) of the ASIO Act. He provided a written statement on 28 July 2003 that he had no concerns with its contents.

15. The protocol, which sets out the standards applicable in relation to the detention and questioning of a person who is the subject of a warrant issued under section 34D of the ASIO Act, was tabled in the Commonwealth Parliament on 12 August 2003.

16. So as to give the protocol wide exposure, I included it as an annex in my most recent annual report, and it is also accessible via the website for my office.

Explanations by Prescribed Authority

17. The second safeguard referred to above, is the requirement for the Prescribed Authority to explain to the subject of a section 34D warrant that they have the right to make a complaint to the IGIS, either orally or in writing. This requirement has been satisfied on each occasion a section 34D warrant has been executed.

Facilities to contact

18. The requirement under section 34F (9)(c) of the ASIO Act that persons held in custody or detention must be provided with facilities for contacting the IGIS, has not been tested as no person has thus far been the subject of detention.

Attendance by IGIS or staff

19. The Director-General of Security has placed on the public record that in the 2003/04 financial year, ASIO executed section 34D warrants against three persons (see the publicly available ASIO Annual Report 2003-2004, pp 39-40).

20. Either Mr Blick, myself, or one of my staff, were present on all days when the subjects of these three warrants were questioned, for the full duration of the questioning, with the exception of a relatively brief period on one day (approximately three hours),

which was video-taped and for which a full written transcript was also provided to my office.

21. I or one of my staff have since attended on at least the first day of questioning for questioning warrants issued so far in 2004/05. We have usually not attended on subsequent days. I decided that we should make a judgement after the first day on whether further attendance was necessary. Considerations underpinning this approach are:

- If a problem were to arise it is most likely to do so on the first day that the subject is required to attend for questioning.
- Based on our attendance at the first three questioning warrants, my predecessor and I have been satisfied that proper regard has been paid to the legislative requirements and the welfare of the subjects of the warrants.
- Supervision by the Prescribed Authorities has been effective.
- I, or a member of my staff, can be contacted by phone or by other electronic means should the subject of a section 34D warrant wish to lodge a complaint and we are not physically present.
- Section 34K(1) of the ASIO Act requires that a video recording must be made of a person's appearance before a prescribed authority for questioning under a warrant, and section 34Q(b) requires that a copy of any such recording must be given to the IGIS.
- As a matter of practice, the Director-General of Security also provides a copy of the transcript of all questioning conducted under section 34D warrants. These are read carefully and if appropriate, relevant sections of the video recording can be viewed.

22. Importantly, on the basis of the questioning observed at first hand and scrutinised by means of the transcripts and video recordings, I can say that the subjects have been treated humanely (as required by section 34J). The questioning has been conducted in an appropriate manner and the individuals who have been the subject of questioning have been accorded dignity and respect. On some occasions this has been in the face of abusive or evasive comments – nonetheless professionalism was maintained by ASIO and Australian Government Solicitor staff involved.

Capacity to raise concern

23. Section 34HA provides the IGIS with the capacity to raise any concerns about impropriety or illegality with the Prescribed Authority, who must consider that concern.

24. This mechanism has been used in one instance, when I raised with the Prescribed Authority whether the warrant was specific enough in setting out the relevant terrorism offences. This issue was discussed with me by the subject's legal representative prior to

questioning commencing and using the section 34HA mechanism was a means of having the matter considered by the Prescribed Authority.

25. The Prescribed Authority heard argument from the AGS officer representing ASIO and from the subject's legal representative. Having considered those submissions the Prescribed Authority ruled that the warrant was not flawed. This was a suitable resolution of the issue and questioning then proceeded.

Provision of material

26. Section 34Q requires that certain materials be provided to the IGIS, as soon as practicable (eg. a copy of any draft request for a warrant given to the Attorney-General, a copy of any warrant issued, a copy of any video recording which is made under the questioning etc.). These requirements have been satisfied by ASIO.

27. The provision of the draft warrant provides me with an opportunity to check that the legislative requirements to that point have been complied with and that, on the face of the material, there is sufficient justification for seeking a warrant. I have not needed to query anything with the Director-General in this regard.

Multiple warrants

28. As mentioned in paragraph 12, section 34QA of the ASIO Act imposes a reporting requirement on the Inspector-General where multiple warrants are issued in respect of an individual. It has not been necessary to fulfil this requirement as no multiple warrants have yet been issued.

OTHER ISSUES

29. Mr Blick and I have corresponded with the Director-General of Security, giving our views on how the new powers have worked in practice and also raising several other issues (of a largely procedural nature) including:

- whether lawyers representing the subjects of such warrants should be given additional scope to address the Prescribed Authority
- distinguishing between 'questioning time' and 'procedural time' for the purposes of determining when questioning under a warrant should cease,
- the provision of legal aid to the subjects of warrants,
- the payment of expenses for the subjects of section 34D warrants,
- the degree of privacy which is afforded to the subject of such warrants to meet their religious obligations, consult their legal representatives or lodge complaints, and
- the timeliness of the reporting of outcomes to the Attorney-General.

Role of lawyers

30. The role of lawyers representing the subjects of section 34D warrants is limited by the provisions of section 34U of the ASIO Act.

31. The practical effect of this section is that a subject's legal representative may only provide legal advice during breaks in the questioning, and they may not intervene in the questioning of their client, except to request clarification of an ambiguous question.

32. Section 34U is constructed this way to ensure that questioning is not unduly disrupted. While this limitation exists for good reason, it has the potential to be the cause of some frustration when lawyers wish to raise procedural queries with the Prescribed Authority, but are unable to do so due to the limitations described above.

33. The subjects of section 34D warrants, as opposed to their legal representatives, are able to raise queries directly with the Prescribed Authority, but not surprisingly can sometimes have difficulty in fully expressing their point.

34. The Prescribed Authorities have, to date, generally interpreted section 34U fairly strictly, by not permitting any questions to be put to them by the lawyers of the subjects of section 34D warrants, other than to clarify ambiguity. Prescribed Authorities have, however, shown some flexibility on occasion eg in allowing a legal representative the opportunity to respond to an ASIO request that questioning be allowed to continue.

35. I would suggest that there should be clearer authority in the ASIO Act for legal representatives to address the Prescribed Authority, at least on some matters; and that in conjunction with another change this would not risk disruption to the questioning itself.

36. This second change would be to make clearer in the legislation the concepts of "procedural time" and "questioning time".

37. Section 34HB of the ASIO Act provides guidance on the periods of time during which individuals can be questioned. The provisions are expressed in terms of the calculation of time when 'questioning' occurs rather than the simple elapse of eight hour periods of time.

38. In practice, the Prescribed Authority and an ASIO timekeeper keep a strict log of periods during which questioning occurs. These timesheets are compared at regular intervals (eg. lunch and the end of the day) to ensure they coincide. The agreed timesheets form a record of the time during which questions were put (or 'questioning time').

39. The notion of 'procedural time' encompasses all other time when the Prescribed Authority is present. For example the Prescribed Authority is required to explain the meaning of the warrant when the subject first attends (section 34E refers). This process can often take 30 or more minutes. The explanation is often repeated in briefer form on subsequent days.

40. The Prescribed Authority must also break from questioning periodically to deal with 'housekeeping' matters (eg. to permit audio and video tapes to be changed), or to address the needs of the subject of the warrant (eg. to permit religious observance, attendance to medical conditions).

41. As mentioned, I believe there would be merit in clearly distinguishing between 'questioning time' and 'procedural time' in the ASIO Act for the purposes of section 34D warrants. If this were to occur the limitation on legal representatives during 'questioning time' could be maintained, but there would be an opportunity for legal representatives to raise procedural and other issues during periods of 'procedural time' (which does not count in the calculation of time during which questioning has occurred).

Legal aid

42. Another issue of interest identified by this office relates to the provision of legal aid. I am advised that when a warrant is served on a person pursuant to Division 3 of Part III of the ASIO Act, they are also provided with guidance on the Special Circumstances Scheme administered by the Attorney-General's Department, which may cover reasonable legal costs and related expenses, depending on an applicant's eligibility. The provision of legal aid under this scheme is discretionary and ASIO plays no part in the approval process.

43. I understand that all applications to date have been personally considered by the Secretary of the Attorney-General's Department and that all have been granted some level of assistance.

44. In the particular circumstances in which questioning warrants are sought, where the purpose is to obtain intelligence that cannot ordinarily be used in other proceedings, an argument can be made that there should be automatic provision of necessary legal assistance to the subject of these warrants, at the rate applicable under the Special Circumstances Scheme.

45. In practice this does not appear to have been an issue to date, but the Committee may wish to explore the point further.

Expenses

46. The Committee might also wish to consider whether reasonable expenses should be paid to persons required to attend for questioning, at least in some instances.

47. The strict secrecy provisions attached to section 34D warrants, and the requirement that subjects must make themselves available at a specified place and time for an initially undefined duration, have the potential to present employment related issues for the subjects of section 34D warrants.

48. The subjects of section 34D warrants may, if they are employed, experience practical difficulties in obtaining leave from their employment given that they are generally prohibited from advising their employer why they require leave and they are

unaware of the likely period of their absence. Such difficulties are compounded if the individual concerned does not have leave entitlements upon which they can call.

49. While ASIO and the Prescribed Authorities have shown some flexibility in determining when questioning sessions occur there will be circumstances when such flexibility is not possible or advisable.

50. While the payment of reasonable 'witness' expenses would not alleviate all of these problems, it would assist such individuals to meet their commitments, if they are not to be left out of pocket as a consequence of their compliance with a direction to attend.

51. In some instances the subject of a section 34D warrant has been in receipt of income support from Centrelink. ASIO representatives have indicated that if there could be a clash between attending a questioning session and Centrelink obligations, they will approach Centrelink to ensure there is no disruption to the income support payments by reason of attending the questioning session. I believe this is an appropriate approach.

Privacy

52. Another issue raised with the Director-General of Security concerns the degree of privacy which is afforded to the subject of section 34D warrants to meet their religious obligations, consult their legal representatives, or lodge complaints.

53. I can advise that after some very minor teething problems at the outset, the provision of facilities for the above purposes has been appropriate. ASIO and the various Prescribed Authorities have shown appropriate sensitivity to the needs of the subjects of section 34D warrants.

Reporting outcomes

54. A further issue which I have raised with the Director-General of Security concerns the timeliness with which the Organisation reports the outcome and value of warrants issued under section 34D of the ASIO Act.

55. Section 34P of the ASIO Act simply requires ASIO to provide a written report for each warrant issued under section 34D, on the extent to which action taken under the warrant has assisted the Organisation in carrying out its functions. No time frame is specified for the provision of these reports.

56. ASIO is required under section 17 of the *Telecommunications (Interception) Act 1979* to provide a report in writing to the Attorney-General on the extent to which the interception of communications made under the authority of a warrant, has assisted the Organisation, within three months of the expiry or revocation of those warrants.

57. As the use of section 34D powers is no less sensitive or intrusive than the use of telecommunication interception warrants, I think it would be reasonable to impose a

similar reporting requirement on the use of section 34D warrants as exists for telephone interception warrants.

58. I am advised that in practice the Director-General provides an early oral report to the Attorney-General, but in my view it is important that there be a documentary record within a reasonable time.

FURTHER POSSIBLE LEGISLATIVE REFINEMENTS

59. In addition to the above suggestions, there are two further legislative refinements which the Committee could consider.

60. There would be merit in having the greatest possible clarity in distinguishing between those provisions which are specific to 'questioning and detention' warrants, from those provisions which refer specifically to 'questioning' only warrants. This comment also applies to the protocol required by the ASIO Act.

61. The current arrangement is complex in parts and any move to simplify the existing structure would assist subjects, their legal representatives and the community generally to understand an important and sensitive piece of legislation.

62. The second issue concerns ASIO's practice of creating a transcript of each questioning session conducted under a section 34D warrant. The transcript is created by ASIO for its own purposes, but may be relied upon in court proceeding should the subject of a section 34D warrant be prosecuted for deliberately providing false or misleading information.

63. The Director-General of Security has kindly provided me with a copy of each transcript, as it becomes available, but this has been at his discretion.

64. I find these transcripts to be of significant value as it enables me to effectively monitor the questioning of the subjects of section 34D warrants, on those occasions when this office is not physically represented.

65. Section 34Q of the ASIO Act could be readily amended to require that when a transcript is produced, a copy must be provided to the Inspector-General.

CONCLUSION

66. Although I have proposed a number of technical amendments to Division 3 of Part III of the ASIO Act, I do not wish to convey a negative impression of its use to date. To the contrary, I have been reassured by what I have witnessed.

67. My predecessor, my staff and I have come to the same general conclusions in respect of each section 34D warrant we have witnessed being executed, namely:

- the questioning of the subjects of s34D warrants has been conducted in a professional and appropriate manner

- the individuals who have been the subject of questioning have been accorded dignity and respect
- the facilities used for each questioning session have been appropriate
- due consideration has been given in each case to the subject's physical comfort and religious needs, and
- the existing commitments of subjects have been properly taken into account in determining the timing of questioning.

68. I would be pleased to appear before the Committee to amplify any of the points made in this submission, should it so wish.

30 March 2005