

The Parliamentary Joint Committee on ASIO, ASIS and DSD's review of ASIO's questioning and detention powers

Under the Intelligence Services Act 2001 the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) is required to review the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* by 22 January 2006. These provisions enable ASIO to obtain questioning and detention warrants in relation to persons believed to have information about terrorist offences. The Committee's comments and recommendations must be provided to Parliament and to the responsible Minister.

The PJCAAD has now begun this review and is inviting submissions. Submission to the review must be received by Close of Business 24 March 2005, and should be sent to:

The Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
CANBERRA ACT 2600
Tel: (02) 6277 4348
Fax (02) 6277 2067
Email: Margaret.Swieringa.Reps@aph.gov.au

Background

History of the Legislation

On the 21 March 2002 the House of Representatives referred the *Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002* (ASIO Terrorism Bill) to the PJCAAD. The purpose of the ASIO Terrorism Bill was to amend the *Australian Security Intelligence Organisation Act 1979* to expand the special powers available to ASIO to deal with terrorism.

Specifically, the Bill proposed:

- including the definition of a terrorism offence in the ASIO Act 1979;
- permitting personal searches to be authorised in conjunction with warrants; and,
- providing a power to detain, search and question persons before a prescribed authority.

The PJCAAD's Advisory Report on the Bill was tabled on 5 June 2002 and can be found at:

<http://www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm>

The ASIO Terrorism Bill was also referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report along with five other Bills. The Senate Committee tabled a report on 18 June 2002 which can be found at:

http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/asio/report/report.pdf

The Senate Legal and Constitutional References Committee subsequently conducted a further inquiry into the Bill and related matters and a report was tabled on 3 December 2002. This report can be found at:

http://www.aph.gov.au/senate/committee/legcon_ctte/completed_inquiries/2002-04/asio_2/report/contents.htm

After the adoption of certain amendments, the Bill was passed by both Houses of Parliament and *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* was Assented to on 22 July 2003.

Questioning and Detention Warrants

The amendments to the ASIO Act made by the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* enable ASIO to obtain a warrant from an ‘issuing authority’ for the questioning of an adult when there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

The warrant may also enable the person to be detained if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority or may destroy or damage evidence.

ASIO warrants for questioning and detention may also be issued in relation to children aged between 16 and 18 years but only if it is likely that the child will commit or has committed a terrorism offence.

The subject of an ASIO warrant cannot be detained for more than 168 hours. They can be questioned under a warrant for no more than a total of 24 hours and once they have been questioned for this period of time they must be released—unless they have used an interpreter, in which case they can be questioned for up to 48 hours. Questioning can occur in blocks of up to eight hours for adults and two hours for children.

Questioning is conducted in the presence of a ‘prescribed authority’. ‘Prescribed authorities’ will initially be drawn from the ranks of former superior court judges. If there are insufficient former judges, then serving superior court judges can be appointed. If there are insufficient serving judges then a President or Deputy President of the AAT can be appointed, so long as that person holds legal qualifications.

A protocol setting out standards which must be adhered to when questioning and detention occur must be issued by the Director-General of Security after consulting with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police. The protocol must be approved by the Minister. It must also be presented to each House of Parliament and the Committee must be briefed, either orally or in writing (either before or after the presentation of the statement to each House of Parliament).

A protocol has been issued. It covers such things as the treatment of a person undergoing questioning (eg access to drinking water and toilet facilities, facilities related to health and welfare (such as food and accommodation), and video recording of procedures).

The text of the protocol can be found in 2003-2004 Annual Report of the Inspector-General of Intelligence and Security. (http://www.igis.gov.au/fs_annual.html)

ASIO Annual Report 2003-2004

ASIO's Annual Report for 2003-2004 (pp. 39-40) contains the following information in relation to Questioning Warrants:

Questioning warrants enhanced ASIO's capability in 2003-04 by authorising the questioning of people for the purposes of investigating terrorism. During the period ASIO executed three warrants under its new powers.

The following information is provided in accordance with the reporting requirements of section 94(1A) of the ASIO Act:

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

Person 1	Person 2	Person 3	Total hours
15 hours 57 min	10 hours 32 min	42 hours 36 min (interpreter required)	69 hours 5 min

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

Issues

Issues that the Committee may wish to examine include:

- how the legislation has operated since its enactment;
- what persons have been subjected to ASIO's special powers and what was achieved through their questioning.
- what problems, if any, have been encountered in the use of the legislation;
- what aspects of the legislation have not been used;
- what broader issues relating to the use of questioning and detention powers may need further consideration;
- what, if any, further legislative changes may need to be made; and
- what complaints, if any, have been made in relation to this legislation.

In addition, it should be noted that the PJCAAD is not given any specific statutory power to carry out periodic reviews of the warrant regime (Division 3 of Part III of the ASIO Act) which enables people to be questioned by ASIO and detained. Therefore this review by the Committee may represent the only opportunity for detailed parliamentary scrutiny of these powers.

December 2004