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# CONTAINING the **threat** within

A parliamentary review of ASIO's detention powers is asking how far we should go in protecting ourselves from terrorism. CHRIS UHLMANN reports.

IT'S EASY for Australians to forget that some of our laws were made to protect us from the state. In this cosy nook of the world, most of us don't lie awake at night worrying about the police kicking in the door. When governments say they need more power to protect us from real threats like terrorism, most view the request as reasonable, even necessary.

But how much power should we hand the state?

This question is at the core of the review of Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* by the Parliamentary Joint Committee on ASIO, ASIS and DSD. That section of the act was re-written by the *ASIO Legislation Amendment (Terrorism) Act 2003* and the review has been triggered by the legislation's sunset clause. It will cover the operation, effectiveness and implication of the changes.

The sunset clause is a reminder that parliamentary debate on this amendment was heated and resulted in changes to the government's bill. Even with those changes, the bulk of submissions to the review argue that the law goes too far, removing democratic keystones like the right to silence and access to a lawyer.

To measure those arguments we need to understand the law. In essence it is quite simple: the act allows ASIO to obtain warrants to question a person, if it has reasonable grounds for believing it will substantially assist in collecting intelligence on terrorism.

Some submissions question the need for warrants of any kind, but that is not their key complaint. What concerns most are the interrogation and detention powers.

Before examining the way interrogations can be conducted, it is important to note that some safeguards have been built into the act to balance the loss of rights. Chief among them is that a person can only be questioned in the presence of a "prescribed authority" which, in most cases, would be a retired judge.

For simplicity let's imagine you have been arrested, that the prescribed authority is a retired, male, Supreme Court judge and your lawyer, if you get one, is female.

On arrest you must immediately be brought before the judge who must explain what is happening, what ASIO can do to you under the terms of the warrant and how the warrant defines your rights and limits your freedom. You may be strip-searched. You have no right to remain silent. If you are asked a question you must answer it and, if you refuse, the potential penalty is five years in jail.

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You must be told whether there is any limit on who you can contact and when you can make contact.

You have a right to contact a single lawyer, but the judge may block that request if he believes she might alert someone involved in a terrorism offence that an investigation is underway, or that she might cause evidence to be destroyed. Another lawyer may be requested but she can also be blocked. Questioning can proceed in the absence of a lawyer.

A lawyer may be present at your interrogation but she may not intervene, except to ask that ambiguous questions be clarified. If the judge thinks the lawyer is being disruptive she may be removed. If that happens then another lawyer may be appointed. You may get advice from your lawyer during breaks in questioning but your contact with her may be monitored.

The judge must tell you what his role is and the reason for the presence of anyone else, but he must not name any of the people conducting the interrogation without their consent. He will say that you may seek a remedy from the warrant from the Federal Court and should tell you that at least once every 24 hours.

He will also say there is a right to complain to the Inspector General of Intelligence and Security, or the Ombudsman, and if that's what you want to do then ASIO must give you the facilities to contact one or both. The Inspector General or his designate may be present at any stage and may ask the Director General of ASIO to call a halt to the proceedings.

The way the questioning proceeds is covered in more detail by a set of protocols issued by ASIO, but the law says you must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment by anyone.

You can be held for seven days and subjected to 24 hours questioning, or 48 if an interpreter is required. You can be questioned in four hour blocks and then allowed a 30-minute break. After eight hours questioning you should be allowed to sleep for eight hours, however, the ASIO protocols indicate that the judge has the power to allow the questioning to continue beyond this mark.

The protocols also detail the manner in which you may be arrested, transported, restrained and detained. They also cover issues such as access to drinking water, toilets, clothing, food and accommodation, and the video recording of proceedings.

If, on release, you go home and your husband/wife demands, "where the hell have you been", try to resist the urge to explain. The law says that both you and your lawyer are forbidden from discussing "operational information" that has arisen as the result of the issuing of a warrant, or anything covered by the warrant. That is, basically, any information ASIO has, or had, or any operational capability, method or plan of the organisation. Which, of course, covers the fact that ASIO agents have been talking to you.

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So, who has been subjected to these laws? ASIO's 2003-04 annual report says that three warrants were requested and issued and all three people were questioned before a prescribed authority. The first person was questioned for 15 hours and 57 minutes, the second for 10 hours and 32 minutes and the third, who required an interpreter, was questioned for 42 hours and 36 minutes.

The bulk of submissions to the parliamentary committee review argue the law is draconian and unnecessary. Most traverse the same ground and many are identical. The key concerns concentrate on the breadth of the definition of terrorism, the removal of the right to silence, the possibility that someone could be denied a lawyer and forcing people to keep secret the fact that they have been interrogated.

The National Union of Students covers most of the ground traversed by all submissions, saying that the powers of detention and questioning are not limited to those suspected of involvement in terrorist activities. They contend the powers are so broad that, in previous times, they could have covered the African National Congress and East Timorese independence movements.

The union also raises concerns about the secrecy of interrogations and the denial of a right to silence.

"The right to silence is a fundamental principle of our justice system," the submission says. "It is of great concern to us that it is abrogated in such broad circumstances, in a scheme shrouded in secrecy and lack of public accountability."

The union says the right to legal representation is unduly limited by the act and, given the denial of the right to silence, it was "critical that people undergoing questioning have unfettered access to legal advice before and during questioning".

The Director General of ASIO, Dennis Richardson, recently told a conference that he believed the terrorism powers were vital. He said it was probable that less than 10 per cent of people in Australia who have, or have had, a substantive involvement with al-Qaeda, Jemaah Islamiah and other likeminded groups would ever face court.

"I suspect it would be a similar story in most other countries," he said. "In many cases the capacity to obtain evidence sufficient to meet proper legal standards is beyond reach... Through the ASIO Act the Australian parliament has recognised that it is possible for someone to pose a threat to security without necessarily being in breach of the law."

The community had an understandable expectation the government would lawfully protect it from the potential threat posed by terrorists. It was also important that any action taken against such people was within a proper legal framework.

Mr Richardson dismissed as "sheer nonsense" the notion that anti-terrorism laws constituted a victory for terrorists.

"Their victory lies in the death of innocent civilians; ours lies in its lawful prevention," he said.

It now falls to the committee to shine some parliamentary scrutiny on this law and balance the swag of submissions calling for it to be repealed against the government's view that desperate times require drastic action. It is no small task and a background paper issued by the committee hints that it is an opportunity that might not come again.

"It should be noted that the committee is not given any specific statutory power to carry out periodic reviews of the warrant power (Division 3 Part III of the ASIO Act) which enables people to be questioned by ASIO and detained," the paper says. "Therefore this review may represent the only opportunity for detailed scrutiny of these powers." ■

*For information on the parliamentary inquiry into ASIO's detention powers, visit [www.aph.gov.au/house/committee/pjcaad](http://www.aph.gov.au/house/committee/pjcaad) or email [pjcaad@aph.gov.au](mailto:pjcaad@aph.gov.au) or phone (02) 6277 2360.*