



**Review of certain questioning and detention powers in
relation to terrorism**

**Further submission to the Parliamentary Joint Committee on Intelligence
and Security**

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16 October 2017

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Background

The Parliamentary Joint Committee on Intelligence and Security (PJCIS) is currently reviewing ASIO's questioning and detention powers. The Inspector-General of Intelligence and Security (IGIS) has made two previous submissions to the Committee as part of this review. The first submission (12 April 2017) focused on IGIS's role in the questioning and detention process and the desirability of retaining provisions that guarantee access by the IGIS and other procedural safeguards relating to the IGIS. The second submission (8 June 2017) provides information from IGIS records relating to questioning warrants that have been executed in the past.

ASIO has provided the PJCIS with submissions about its preferred questioning model. The Committee has invited the Inspector-General to make a further submission about matters raised in evidence and in particular on ASIO's preferred questioning model.

ASIO's preferred model

The model for questioning and questioning and detention warrants proposed by ASIO is significantly different from the current model and is also different from the model recommended by the Independent National Security Legislation Monitor. This submission does not address all of the differences; rather it highlights some which may have particular implications for oversight.

Counter-Terrorism v Security

One of the most striking features of ASIO's preferred model is that it extends the use of compulsory questioning (and detention) beyond terrorism offences to all parts of the definition of security. ASIO cites "the potential value of compulsory questioning in particular in regard to foreign interference and espionage matters"¹ as a basis for extending questioning and questioning and detention warrants from terrorism to all aspects of security as defined in the ASIO Act. That definition includes much more than terrorism, espionage and foreign interference.² For example it also covers sabotage, attacks on Australia's defence system, foreign incursions and particular offences concerning ships, fixed platforms and aviation.³ The definition of security also encompasses carrying out Australia's responsibilities to any foreign country in relation to any other aspect of the definition of security. This could result in ASIO compulsorily questioning a person in Australia about a matter in another country in circumstances where the equivalent intelligence agency in that country would not be able to do such a thing.⁴

One of the key things that IGIS considers when looking at the propriety of ASIO operations is that the exercise of a power should be proportionate to the gravity of the threat posed, the probability of its

¹ ASIO submission 8.6 at paragraph 27 and also see paragraphs 16-19

² Some aspects of the scope of 'security' can also be extended by the Executive: see part (d)(ii) of the definition of *politically motivated violence* in s4 of the ASIO Act

³ See part (b) of the definition of *security* in s4 of the ASIO Act

⁴ Note that the Attorney-General's Department response a question from the Committee question noted they were unable to identify any comparable domestic intelligence agencies which have the power to conduct compulsory questioning for the purpose of gathering intelligence. See Attorney-General's Department supplementary submission p1.

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occurrence, as well as the imminence of the threat.⁵ The threat of an imminent major terrorist attack in Australia is at the top of the current scale of potential threats and would justify the use of the most intrusive powers. Other threats to Australia, including from espionage and foreign interference, can also be serious but this does not mean that there is no hierarchy of threats. It may be the case that currently, as the Attorney-General's submission states "terrorism is not necessarily a more serious threat than other matters that fall within the definition of 'security';⁶ however, it does not follow that questioning and questioning and detention warrants should always be available for every aspect of the definition of security.

If ASIO's most intrusive powers – compulsory questioning and detention – were to be available for all elements of security as defined, it would be necessary to reconsider what in those circumstances proportionality would involve.

Identified person warrants

ASIO's preferred model is for compulsory questioning to be included in the list of powers that can be pre-authorised by an identified person warrant:

The inclusion of the ability to include conditional approval for compulsory questioning as part of the identified person warrant (IPW) mechanism would be a very useful inclusion that sits with other suggested adjustments as a streamlining measure. Under this idea, conditional approval for compulsory questioning would be able to be obtained from the relevant minister at the same time as other special power warrants under the ASIO Act. If conditional approval were granted under an IPW, the Director-General or the minister could authorise compulsory questioning at a time during the life of the IPW (maximum of six months).⁷

Compulsory questioning and administrative detention are significant departures from the norms of the Australian legal system, particularly where those powers are to be given to a non law-enforcement agency such as ASIO. To include such measures in a routine warrant for a security agency because doing so would be 'a useful inclusion' and a 'streamlining measure' would certainly be an unusual if not unprecedented step. The identified person warrant scheme applies to search and surveillance powers that do not have the same level of intrusion into individual rights as questioning warrants. Although both powers can be used to obtain intelligence the differential levels of intrusion are recognised through the current questioning warrant scheme having higher thresholds and more safeguards than the identified person warrant scheme. There is no doubt that ASIO's preferred approach would 'streamline' obtaining a questioning warrant for ASIO in that it would make obtaining the authority to exercise a compulsory questioning power much quicker and easier. When combined with a reduction in the thresholds for obtaining such a warrant and the broadening of the power to all aspects of the definition of security it must be assumed that the resulting power would be used more often.

In effect identified person warrants allow for decision making to be devolved from the Minister to the Director-General. The Minister approves a range of search and surveillance powers that can be utilised against a person and the Director-General decides if and when those powers will be used during the period the warrant is in force (up to 6 months). Information about the number and type

⁵ See the Attorney-General's Guidelines issued under s8A of the ASIO Act.

⁶ See Attorney-General's submission 7 at paragraph 3.26

⁷ ASIO submission 8.6 at paragraph 100

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of warrants utilised by ASIO cannot be included in an unclassified submission. Questioning and questioning and detention warrants are currently the only ASIO warrant types subject to any public reporting. The ASIO submission is silent on whether there would be any public reporting of compulsory questioning under ASIO's preferred model.

Identified person warrants are currently able to be in force for up to six months. The Director-General is able to authorise multiple uses of each power approved under the warrant during the life of the warrant, though each authorisation in relation to a search power can only have effect for 90 days.⁸ Questioning warrants currently have effect for a maximum of 28 days and can only be used once in that period.⁹

Currently IGIS reviews a sample of ASIO warrants after the warrant has expired. If compulsory questioning is included in identified person warrants then, to maintain the current approach to reviewing questioning warrants, it would be necessary for IGIS to: examine the identified person warrant at the time (or before) it is issued; review the Director-General's later decision to authorise questioning; potentially be present for compulsory questioning if it occurred; and then review other powers exercised under the warrant at the conclusion of the warrant period. This would greatly increase the extent of IGIS oversight of each identified person warrant, even where compulsory questioning is pre-authorised by the Minister but ultimately not used. This degree of oversight could not be achieved within the current resources of the IGIS.

Furthermore, to enable oversight of compulsory questioning it would be necessary for the ASIO Act to require ASIO to notify IGIS not only when it sought any identified person warrant which included questioning but also when the Director-General (or Minister) decided to authorise that activity. Even with ASIO providing such double notification it may not be possible for IGIS officers to attend questioning (as has occurred in the past) because of the speed with which internal Director-General authorisation can be obtained.

Thresholds

If compulsory questioning is to be included in identified person warrants careful consideration should be given to what thresholds should be set for access to this power¹⁰, who should approve its use, whether there should be any judicial or quasi-judicial aspect to the process, how long the power to authorise questioning should be available, what protections there should be against multiple questioning authorisations being given during the period the warrant is in force and what reporting requirements are appropriate.

Currently to obtain a questioning warrant the Director-General must satisfy the Minister that:

- (a) 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*.
- (b) that, having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued; and

⁸ See s27C(4) and 27J(5) of the ASIO Act

⁹ s34G(8) ASIO Act

¹⁰ Both for issuing warrants that conditionally approve questioning and for giving authority to conduct questioning as well as whether a different threshold remains appropriate for minors.

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- (c) that there is in force under section 34C a written statement of procedures to be followed in the exercise of authority under [the warrant].¹¹

Once the Minister has consented the Director-General may apply to an issuing authority who can issue a questioning warrant if they are satisfied 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*.¹²

For detention warrants there are additional requirements including that other methods of collecting the intelligence would be ineffective and that if the person is not immediately detained they may do certain things including alerting a person involved in a terrorism offence that the offence is being investigated.¹³

ASIO is proposing that the threshold for issuing a questioning warrant be changed to:

- (a) There are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in respect of *a matter that is important in relation to security*
- (b) having regard to other methods (if any) of collecting the intelligence that are likely to be as effective, it is reasonable in all the circumstances for the warrant to be issued
- (c) there is in force a written statement of procedures to be followed in the exercise of authority under the warrant.¹⁴

ASIO proposes that the threshold be the same for questioning and questioning and detention warrants.¹⁵ Apart from the removal of the additional requirements for detention the main difference is the expansion from '*important in relation to a terrorism offence*' to '*a matter that is important in relation to security*'.

The current threshold for identified person warrants is that the Minister must be satisfied that:

- (a) the person is engaged in or is reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security; and
- (b) the issuing of the warrant in relation to the person will, or is likely to, substantially assist the collection of intelligence relevant to security.

If the identified person warrant threshold was to be applied to compulsory questioning warrants the changes would be:

- expansion from '*in relation to a terrorism offence*' to '*in relation to security*'
- reduction in availability from *any* person to only a person engaged in or reasonably suspected by the Director-General of being engaged in, or of being likely to engage in, activities prejudicial to security – however ASIO's proposal appears to be to modify the identified person warrant so that for questioning warrants the warrant would be available in relation to any person, not only those suspected of being engaged in matters prejudicial to security.

¹¹ S34D(4) of the ASIO Act.

¹² See s 34E ASIO Act

¹³ See s 34F(4) ASIO Act

¹⁴ See ASIO submission 8.6 at paragraph 30

¹⁵ See ASIO submission 8.6 at paragraph 30

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- reduction in threshold from *'important'* to *'relevant'*
- removal of the requirements that the Minister must be satisfied that it is reasonable in all of the circumstances for the warrant to be issued, having regard to other methods (if any) of collecting the intelligence that are as likely to be effective; and that there is in force a written statement of procedures to be followed in the exercise of authority under the warrant.¹⁶

Emergency authorisations

If some form of emergency questioning warrant regime is to be introduced, particularly one involving oral authorisation, the issue of effective notice to the IGIS will be more complex. Careful consideration also needs to be given to defining an 'emergency'. The IGIS' experience with emergency authorisations in other contexts demonstrates there can be differences of opinion about what constitutes an emergency and how long it continues. Clear guidance on what constitutes an emergency is necessary for effective oversight. Consideration could also be given to requiring that emergency authorisation not be used where other powers, such as the police power of arrest, are a more appropriate way to deal with the emergency.

Detention and use of force

ASIO's submission notes that it does not propose that conditional approval for detention linked to compulsory questioning be able to be obtained under an identified person warrant.¹⁷ However ASIO also proposes that under a questioning warrant police would be able to require a person to immediately accompany officers to the location of questioning, with the right to use necessary and reasonable force to ensure this occurs;¹⁸ such 'compulsory attendance' is detention. In any event administrative authority to detain a person, however described, deserves close oversight as well as an appropriate authorisation threshold and mechanism. In relation to the use of force it is worth noting that the current identified person warrants authorise ASIO officers to use force against a person to do the things covered by the authorisation.¹⁹

Removing external authorisation

Removing the role of an independent issuing authority is at odds with the position in other 5-eyes countries where the trend is to increase the requirement for external authorisation for intelligence activities. As far as I am aware none of the other 5-eyes countries has legislation authorising their intelligence services to conduct compulsory questioning²⁰ but the UK and New Zealand have recently introduced, and the US and Canada already had, judicial or quasi-judicial authorisation for other powers including telecommunications interception. These changes reflect concerns in these countries that there be better protection of human rights. ASIO's 'streamlining' proposal does not give weight to these concerns.

¹⁶ If the matters in the fourth point were only added to the criteria for the authorisation of compulsory questioning under an identified person warrant, and were not part of the criteria for the issuing of the warrant itself, this would mean that the Minister would no longer be required to consider them at the point of deciding whether or not ASIO should have access to compulsory questioning powers. Rather, decision-making responsibility would be devolved to the Director-General of Security at the point of making decisions about whether or not to exercise the compulsory questioning power that has been conditionally approved.

¹⁷ ASIO submission 8.6 at paragraph 100

¹⁸ ASIO submission 8.6 at paragraph 50

¹⁹ S27J(3)(d)

²⁰ Also see Attorney-General's submission supplementary submission p1