



Review of ASIO questioning and detention powers in relation to terrorism

**Submission to the
Parliamentary Joint Committee on Intelligence and Security**

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Introduction

This submission provides information about role of the Inspector-General of Intelligence and Security (IGIS) in oversight of ASIO's current questioning and detention powers. The submission also highlights a number of important safeguards that should be maintained to ensure effective oversight of any new regime of compulsory questioning powers for ASIO that may replace the current regime.

Some general background information about the role of the IGIS is at Attachment A.

IGIS's current role in ASIO's counter-terrorism related questioning and detention processes

Many of the safeguards in relation to the questioning and detention powers in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) relate to the role of the IGIS.

These include:

- the requirement in section 34C(2)(a) for the Director-General of Security to consult the IGIS in the development of a written statement of procedures to be followed in the exercise of authority under the warrants (and one of the conditions for the Attorney-General consenting to a request to be made to an issuing authority for the issue of a warrant is that such a statement of procedures is in force);
- the requirement in section 34J(1)(e) for the prescribed authority (who supervises the questioning proceedings and is usually a former Judge) to explain to the subject of a warrant that they have the right to make a complaint to the IGIS about ASIO, either orally or in writing;
- the requirement in subsections 34K(9) and (11) that anyone exercising authority under the warrant or holding the person in custody or detention must give the person facilities for contacting the IGIS;
- clear exceptions in the non-disclosure offence provisions in section 34ZS to enable disclosures to the IGIS and the exercise of any power or the performance of a function under the IGIS Act;
- the ability of the IGIS (or his or her staff) to be present at the questioning or taking into custody of a person under the Division, as expressly stated in section 34P;
- a specific role for the IGIS in section 34Q which provides that where the IGIS has a concern about impropriety or illegality in connection with the exercise of powers under a warrant, he or she may raise that concern with the prescribed authority who must consider the IGIS's concern and may make directions about the proceedings in order to address that concern;
- the specific statement in section 34ZG that contravention of the written statement of procedures in force under section 34C may be the subject of a complaint to IGIS, without limiting the ability to complain about any other aspects of ASIO's activities;
- the requirement in section 34ZI for the Director-General of Security to provide a range of materials to the IGIS to facilitate IGIS's oversight, including:
 - 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 made of the questioning of subjects

- a statement containing details of any seizure, taking into custody or detention under the Division, and
 - a statement describing any action the Director-General has taken as a result of being informed of any concern raised by the IGIS under section 34Q; and
- the requirement in section 34ZJ for the IGIS to inspect and report on any requests for multiple warrants relating to detention of an individual.

The specific IGIS role relating to the use of ASIO's terrorism-related questioning and detention powers is in addition to the IGIS's broad powers under the IGIS Act in relation to all operational activities of ASIO (and other Australian intelligence agencies).

IGIS oversight of ASIO's questioning and detention powers

IGIS oversight of the use of ASIO's questioning and detention powers under Division 3 of Part III of the ASIO Act extends to all aspects of the use of those powers, including the work leading up to the seeking of a warrant, the warrant documentation, the questioning process and any other actions taken under the warrant. As these powers have not been used for many years this submission provides advice about the general approach that would be taken if ASIO used the powers now and also our experience in relation to earlier use of the powers.

As with all IGIS inspections, IGIS staff have access to all relevant documents and the purpose of the oversight is to consider whether the ASIO activities are conducted with legality, with propriety and with due regard to human rights.

In considering issues of legality and propriety, we look at whether ASIO complies with relevant legislation as well as the Attorney-General's Guidelines made under section 8A of the ASIO Act. Among other things, the Guidelines include a requirement of proportionality – that is that any means used for obtaining information must be proportionate to the gravity of the threat posed and the probability of its occurrence. Additionally, we also consider ASIO's compliance with any relevant internal policies and procedures, and the IGIS may engage in dialogue with ASIO should we feel that there is a need for greater guidance to be provided to staff in relation to particular matters.

Some of the areas that we pay close attention to in our oversight of the questioning and detention regime include:

- real time (rather than retrospective) consideration of the basis for the seeking of a warrant, and whether it is justified and proper;
- compliance with all relevant legislative requirements and the statement of procedures under section 34C of the Act, consistency with the Attorney-General's Guidelines (including the requirement of proportionality), and adherence to internal policies providing further guidance on the use of these powers;
- actions taken under the warrant, including:
 - the manner and scope of questioning during the proceedings before a prescribed authority (noting the requirements in the statement of procedures that interactions should be humane and courteous, the subject should not be spoken to in a demeaning manner, and questioning should not be unfair or oppressive);

- the conducting of the questioning proceedings including the subject's understanding of the effect of the warrant and their right to complain to the IGIS (and other appropriate authorities) at any time, the use of an interpreter where required, the observing of time limits and required breaks, and the video recording of procedures;
 - compliance with the human rights and treatment aspects of the statement of procedures, including access to fresh drinking water, toilet and sanitary facilities and breaks for engaging in religious practices; and
- sufficiency of record-keeping and compliance with reporting requirements.

The normal practice with IGIS oversight and inspection activities is that where issues are identified they are raised with relevant senior officers and reported to the Director-General of Security. Should serious concerns arise, the IGIS may consider it appropriate to advise the Minister responsible for ASIO and/or the Prime Minister. In relation to these specific powers, the IGIS and staff members are able to attend questioning sessions and may raise any concerns about propriety or illegality during such a session. Any issues raised must be considered by the prescribed authority, including through suspending the questioning if necessary.

IGIS provides an Annual Report to Parliament each year. While there are limits on what can be said in an unclassified report, it is our usual practice to comment on inspection and oversight activities, including noting whether any issues of legality or propriety have been identified. IGIS has commented on the use of the ASIO questioning and detention powers in a number of Annual Reports since the powers were introduced.¹ ASIO is also required to identify the numbers of questioning and questioning and detention warrants in their Annual Report.

IGIS experience with ASIO's questioning and detention powers

Under the general powers conferred by section 9A of the IGIS Act and the provisions in Division 3 of Part III of the ASIO Act, the IGIS has been closely involved with all questioning warrants issued to date. While there is no statutory requirement for the IGIS to attend the questioning of individuals, the IGIS or a member of the IGIS's staff have attended at least part of the questioning proceedings conducted under every warrant. The ASIO Act contains a number of safeguards that play an important role in facilitating effective oversight in real time so that issues could be raised promptly by the IGIS. The safeguards that are relevant to IGIS oversight are discussed further below.

Statement of procedures

The IGIS was fully consulted on the development of the statement of procedures, as required by section 34C(2)(a) of the ASIO Act. These procedures are in the form of a legislative instrument which sets out the standards applicable to the questioning and detention of a person who is the subject of a relevant warrant. The statement of procedures has been one of the reference points for the IGIS's oversight of the use of the questioning powers.

Internal policies and procedures

The IGIS Office was consulted on the development of ASIO's internal policies and procedures surrounding the use of these powers. I am satisfied there are sound policies and procedures governing these activities.

¹ In particular, see IGIS Annual Reports for the years 2003-04, 2004-05, and 2005-06.

Provision of material to IGIS

Section 34ZI of the ASIO Act requires that certain material be provided to the IGIS, as soon as practicable (for example, a copy of any draft request for a warrant given to the Attorney-General, a copy of any warrant issued, and a copy of any video recording made of the questioning). These requirements have been satisfied by ASIO on all occasions.

The provision of the draft warrant provides the IGIS with an opportunity to check that 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. There have been no concerns raised by the IGIS on these aspects. It also provides the IGIS with sufficient opportunity to consider what specific oversight might be provided in relation to each use of the questioning powers.

Attendance at questioning proceedings

The Inspector-General, or a member of the IGIS's staff, has attended the questioning proceedings conducted under the supervision of a prescribed authority. The initial practice was to be present on all days when the subjects were questioned for the full duration of the questioning. This occurred (except for a relatively brief period on one day) for the first three warrants issued in the 2003-04 period. For proceedings since that time, the IGIS or one of the IGIS's staff has attended on at least the first day of questioning, and has usually not attended on subsequent days. The practice has been to make a judgement after the first day on whether further attendance is necessary. This practice was adopted in light of the following considerations²

- 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;
- in the first questioning warrants, the IGIS view was that proper regard had been paid to the legislative requirements and the welfare of the subjects of the warrants, and supervision of the prescribed authorities had been effective;
- the IGIS, or a member of staff, was able to be contacted by telephone or by other electronic means should the subject of a warrant wish to lodge a complaint when IGIS is not physically present;
- the Act requires a video recording to be made of a person's appearance before a prescribed authority for questioning and for a copy of any such recording to be given to the IGIS; and
- as a matter of practice, the Director-General of Security also provides a copy of the transcript of all questioning conducted under the warrants.

Should any further questioning, or questioning and detention, warrants be granted to ASIO, I intend to adopt the past practice of the Office, which is for either the IGIS or a senior staff member to be present for at least the first day of questioning with the option to extend that attendance depending on the circumstances of each case.

² These considerations were noted in the IGIS 2004-05 Annual Report and in the March 2005 submission by the then IGIS, Mr Ian Carnell AM, to the Parliamentary Joint Committee on ASIO, ASIS and DSD Review of ASIO's Detention and Questioning Powers.

Concerns and complaints raised during questioning proceedings

Some matters connected with questioning proceedings have been raised by or with the IGIS.

In terms of concerns raised by the IGIS during questioning proceedings, the mechanism in section 34Q has been used in only one instance where the then IGIS (Mr Carnell) raised with the prescribed authority whether the warrant was specific enough in setting out the relevant terrorism offences. The issue was discussed with the IGIS by the subject's legal representative prior to questioning commencing and using the section 34Q mechanism was a means of having the matter considered by the prescribed authority. The prescribed authority heard argument from the Australian Government Solicitor representing ASIO and from the subject's legal representative. Having considered those submissions the prescribed authority ruled that the warrant was not flawed, and questioning then proceeded.

There was another occasion where some matters were discussed with the IGIS's representative who chose not to raise them as concerns under section 34Q. In that case the prescribed authority adjourned the questioning to enable the subject's lawyer to make an oral complaint to the IGIS's representative. The matters raised included issues about the prescribed authority's decision to grant additional time for further questioning and issues relating to the conduct of the solicitor representing ASIO. The IGIS's representative did not agree with the criticisms and formed the view that there were not sufficient grounds to raise a concern about legality or propriety. The prescribed authority then allowed questioning to resume.

Other complaints by subjects of questioning warrants

There have been a small number of other complaints and concerns raised by subjects of questioning warrants with both the prescribed authority and IGIS. These were not directly related to the questioning warrant or the questioning process. Some subjects of the questioning warrants had also been the subject of ASIO search warrants a short time before the questioning took place. There were suggestions about unauthorised leaking of information to the media about the searches and complaints about property lawfully seized during the searches not being returned as quickly as the subjects would have liked. These matters were examined and resolved under the IGIS's normal complaint jurisdiction and were not directly linked to the questioning process.

Other matters that have arisen during or as a result of experience with questioning proceedings

Some teething issues arose during the early questioning proceedings but these were largely of a technical or procedural nature. They have been addressed since that time, including through changed practices and legislative amendments following the 2006 review of the questioning and detention regime by the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) and the former INSLM's review in 2012. These included matters such as the adequacy of the facilities and the degree of privacy to meet religious obligations, consult legal representatives and lodge complaints with the IGIS or others, the role of legal representatives in the questioning proceedings, ensuring accurate timekeeping and a clear distinction between 'procedural time' and 'questioning time' (so that there is no doubt about completion of the 'questioning time' and expiry of the warrant), and the timeliness of reporting on the outcomes of questioning warrants.

The IGIS's submission to the PJCAAD 2005 review and IGIS's 2003-04 and 2004-05 Annual Reports mentioned these technical and procedural matters but also made clear that the questioning powers

had been utilised appropriately. In particular, the then IGIS and his staff had come to the same general conclusions in respect of each warrant they had witnessed being executed, "namely:

- the questioning of the subjects ...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."³

Having been briefed by officers who attended subsequent proceedings and examined our office files, I have no reason to believe the situation changed in later proceedings, and I agree with the comment by the former INSLM that there has been no cause for concern as to compliance.

In our experience, there have been no significant concerns with the use of the powers and the procedural and technical matters that have arisen have been resolved satisfactorily.

Any future use of the provisions will be kept under ongoing review, through both our general oversight function under the IGIS Act and the IGIS's specific role in these matters through Division 3 of Part III of the ASIO Act.

Current oversight of ASIO cooperation with ACIC

IGIS oversight of ASIO includes ASIO's cooperation with other bodies, including law enforcement agencies such as the ACIC. In materials relating to such cooperation, IGIS staff have not identified significant issues of legality or propriety. ASIO is clearly conscious of the different functions and legislative mandates of other organisations involved in national security and counter-terrorism operations. There appear to be sound policies and processes in place for handling investigations of matters that are of interest to ASIO and law enforcement agencies. Should the committee require further information, details of specific oversight of ASIO and ACIC cooperation pertaining to questioning can be provided in a closed hearing.

Moving to a model based on *Australian Crime Commission Act 2001*

The INSLM recommended that the ASIO questioning and detention warrant provisions be repealed or allowed to cease when the sunset date is reached. The INSLM also recommended that the balance of Division 3 of Part III of the ASIO Act (the questioning warrant provisions) be replaced by a questioning power following the model of coercive questioning available under the *Australian Crime Commission Act 2002* as closely as possible. As noted earlier, we consider some of the safeguards in the current Act play an important role in facilitating effective IGIS oversight. Should the Government decide to adopt the INSLM's recommendation, we consider that some of the current safeguards relevant to the IGIS role should be maintained in relation to any new ASIO questioning powers.

³ IGIS Annual Report 2003-04, page 18.

Copies of key documents to be provided to IGIS

The current requirement to provide a copy of the warrant enables independent oversight of the legality and propriety of the decision to exercise the questioning powers. It also ensures the IGIS is aware of when questioning is taking place and is able to decide whether to attend. A statutory requirement to provide relevant initiating documents to IGIS is important to facilitate this role.

Right to complain to IGIS about ASIO conduct

Currently under 34J(1)(e)(i) when a person first appears before a prescribed authority for questioning under a warrant issued under this Division, the prescribed authority must inform the person of their right to make a complaint orally or in writing to IGIS about ASIO. We consider the proactive legislative requirement for the person presiding over or conducting questioning to explain the right to contact the IGIS, as an independent body, is important and should be maintained. The role of the IGIS office may not be known to subjects of questioning or their legal advisers, and the ability to have recourse to an independent oversight body is a particularly important right that the person must be made aware of.

Clear exceptions to allow disclosures to IGIS

Any legislative provisions that restrict the disclosure of information about questioning warrants should continue to include clear exceptions to allow the disclosure of any information to the IGIS.

Clear authority for IGIS or representative to attend questioning

Maintaining a clear legislative authority for the IGIS or a representative to attend questioning is another important safeguard for effective oversight. As with the current provisions, the decision as to whether to attend should be a matter for the IGIS' discretion, and the legislation should facilitate this through timely notification of when the powers are being used and clear authority to attend any place of questioning.

Other matters could be dealt with administratively

While the form of any new or amended provisions is a matter for the Government, it is our view that some other matters which are currently dealt with expressly in the ASIO Act questioning provisions could be dealt with administratively.

- We would expect to be consulted with ASIO's development of policies relating to the preparation and conduct of questioning.
- Procedures and processes for how the IGIS may raise concerns about the conduct of questioning (for example concerns may be raised with the 'examiner' or with ASIO as appropriate in the circumstances).
- Procedures for ensuring that the person being questioned understands their right to complain to the IGIS.
- Access to audio or video recordings of questioning, transcripts and any other material associated with the exercise of a questioning authority (as noted above, the initial notification to the IGIS and provision of the initiating documents should be a mandatory legislative requirement).

- Compliance with the human rights and treatment aspects of the statement of procedures, including access to fresh drinking water, toilet and sanitary facilities and breaks for engaging in religious practices.
- Consultation with the Ombudsman in relation to areas of potential overlapping jurisdiction⁴.

IGIS resources to provide oversight

As the Committee is aware, the IGIS office is small and decisions as to resourcing must be made judiciously. The use of coercive questioning powers is an area that has been closely monitored in the past, and we consider that this would continue to be the case if the current or any new questioning powers were exercised in future. Oversight of the use of any such is likely to be resource intensive, particularly if the IGIS or IGIS staff attends questioning. The current questioning powers have not been used since 2010. An increase in the use of ASIO questioning powers would impact on IGIS resources. If the increase was significant, we would need to consider whether current resourcing levels continue to be adequate to provide effective oversight of the use of these powers as well as all other areas of oversight of the six Australian intelligence agencies.

We also note that recommendation 10 of the INSLM report recommends a protocol be developed between ASIO, Australian Criminal Intelligence Commission (ACIC), and any relevant state body which shares information obtained by compulsory questioning, to avoid oppression by successive examinations. The INSLM recommends that the protocol be approved by the Attorney-General, and the INSLM and other supervisory bodies such as the IGIS and Commonwealth Ombudsman monitor how this protocol operates in practice. The IGIS could monitor ASIO's role under the protocol in accordance with the existing functions under the IGIS Act.

⁴ See s16 of the IGIS Act.

Attachment A – role of the IGIS

Role of the Inspector-General of Intelligence and Security

The IGIS is an independent statutory officer who reviews the activities of the Australian intelligence agencies:

- Australian Security Intelligence Organisation (ASIO)
- Australian Secret Intelligence Service (ASIS)
- Australian Signals Directorate (ASD)
- Australian Geospatial-Intelligence Organisation (AGO)
- Defence Intelligence Organisation (DIO)
- Office of National Assessments (ONA).

The Office of the IGIS is situated within the Prime Minister's portfolio. The IGIS is not subject to direction from the Prime Minister, or other ministers, on how responsibilities under the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) should be carried out. The Office is not part of the Department of the Prime Minister and Cabinet and has separate appropriation and staffing. The Office currently has 16 staff and an annual budget of \$3m.

The IGIS Act provides the legal basis for the IGIS to conduct inspections of the intelligence agencies and to conduct inquiries of the Inspector-General's own motion, at the request of a Minister, or in response to complaints.

The overarching purpose of the IGIS's activities is to ensure that each intelligence agency acts legally and with propriety, complies with ministerial guidelines and directives, and respects human rights. A significant proportion of the resources of the office are directed towards ongoing inspection and monitoring activities, so as to identify issues, including about the governance and control frameworks within agencies, before there is a need for major remedial action. IGIS staff have access to all documents of the intelligence agencies and the IGIS is often proactively briefed about sensitive operations.

The inspection role of the IGIS is complemented by an inquiry function. In undertaking inquiries the IGIS has strong investigative powers, including the power to require any person to answer questions and produce relevant documents, take sworn evidence, and enter agency premises. IGIS inquiries are conducted in private because they almost invariably involve highly classified or sensitive information, and the methods by which it is collected. Conducting an inquiry is resource intensive but provides a rigorous way of examining a particular complaint or systemic matter within an agency.