Parliamentary Joint Committee on Intelligence and Security

Report on the operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979*

Government response – March 2006

Recommendation 1: The Committee recommends that the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective.

Response: Not agreed.

The Government considers that it is not appropriate to explicitly require the issuing authority to be satisfied that relying on other methods of collecting the intelligence would be ineffective. This is because issuing authorities would not be in a position to make this assessment. Unlike the Attorney-General, they would not be briefed on or be fully across the security apparatus to know whether the criterion can be met. The Attorney-General, who has portfolio responsibility for ASIO and issues all of ASIO's special powers warrants, is best placed to make a judgment about ASIO's reliance on, and the value of, other intelligence collection methods.

The Government also considers that there is no need for the added requirement. The issuing authority is already required to be satisfied that the Director-General had made the request in the appropriate manner, and had satisfied the legislative requirements. To issue the warrant, the issuing authority must also be satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence. The Government considers that these requirements are adequate for the issuing authority to perform their role of issuing the warrant.

Recommendation 2: The Committee recommends that, in order to provide greater certainty and clarity to the operation of the Act, the legislation be amended to distinguish more clearly between the regimes that apply to a person subject to a questioning-only warrant and that applying to detention.

Response: Agreed.

The Government considers that the legislation could be clarified without altering its substantive effect.

Recommendation 3: The Committee recommends that the Act be amended to achieve a clearer understanding of the connection between the period of detention and the allowable period of questioning.

Response: Agreed.

The Government considers that the legislation could be amended to clarify how the time periods under each of the warrants operate to remove any confusion between periods of detention and questioning, and to set out how time involving questioning or detention under the warrant is recorded.

Recommendation 4: The Committee recommends that:

- a person who is the subject of a questioning-only warrant have a statutory right to consult a lawyer of choice; and
- the legal adviser be entitled to be present during the questioning process and only be excluded on the same grounds as for a detention warrant, ie where there are substantial reasons for believing the person or the person's conduct may pose a threat to national security.

Response: Agreed in part.

There are no contact limitations under a warrant that authorises questioning but not detention. Accordingly, under a questioning-only warrant a person is already free to contact a lawyer to be present if he or she wishes. The Government sees no difficulty in inserting a positive right of contact, as is the case with detention warrants.

The Government agrees that this right of contact should be limited appropriately. The Government considers that the limitations on contact with a lawyer of choice set out in current section 34TA should not be extended to the situation of a questioning warrant where there is no detention. However, it is appropriate for contact to be limited where a person is being detained. This should be the case not only where the warrant authorises a person to be detained (as currently applies under section 34TA), but also where a person is detained in connection with the warrant (by direction of the prescribed authority under a questioning-only warrant).

The Committee also recommends that a lawyer be entitled to be present during questioning proceedings. The current regime is premised on a lawyer being present during questioning proceedings (as reflected in section 34U). The Government does not consider that it would be appropriate to change the current regime in a way that would *require* a lawyer to be present at all times under either type of warrant. This policy is currently reflected in section 34TB. Imposing such a requirement could result in the delay of vital questioning relating to a potential terrorist attack while waiting for the availability of a particular lawyer. It could also undermine the choice of the subject as to whether the client wishes to have a lawyer present. However, a person's right to contact a lawyer of choice remains.

Recommendation 5: The Committee recommends that subsection 34U(4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority.

Response: Agreed in part.

At present the legislation is silent on whether a lawyer may approach the prescribed authority for permission to make a submission. However, the Government agrees that the legislation could allow the lawyer to address the prescribed authority. The Government considers it to be important for the flow of the questioning to be maintained to ensure the questioning process does not become adversarial and that it achieves its aim of gathering information. For this reason it would not be appropriate to elevate the role of the lawyer to one where intervening in questioning is permitted by the legislation.

Accordingly, the Government agrees that the lawyer should be entitled to address, with the prescribed authority's consent, the prescribed authority during time where questioning is not taking place (where the prescribed authority defers questioning to allow for procedural matters to be addressed).

Recommendation 6: The Committee recommends that Division 3 of Part III of the Act be amended to provide a clearer distinction between procedural time and questioning time.

Response: Agreed.

The Government agrees that the legislation could be amended to distinguish more clearly between the actual period of time during questioning and time spent on procedural matters.

Recommendation 7: The Committee recommends that:

- Subsection 34U(2) be amended and communications between a lawyer and his or her client be recognised as confidential; and
- Adequate facilities be provided to ensure the confidentiality of communications between lawyer and client in all places of questioning and detention.

Response: Agreed in part.

The Government considers that legislative amendments could be made to clarify that communications between a subject and their lawyer under a questioning-only warrant (unless detention occurs in connection with that warrant) are not required to be made in a way that can be monitored. This is consistent with the current practice, by which private facilities are already made available through administrative arrangements. However, the Government is concerned to ensure that ASIO can monitor communications of a person who is detained for questioning. This is because there is a serious potential that disclosure of any information could undermine the gathering of intelligence for a terrorism investigation.

Monitoring would only occur where the warrant authorises a person to be detained, or where the person is detained in connection with the warrant (by direction of the prescribed authority under a questioning-only warrant). However, the Government agrees that where a person is questioned but is *not* detained there should be no requirement for communications to be made in a way that can be monitored.

Retaining ASIO's ability to monitor contact in these circumstances does not necessarily mean that legal professional privilege does not apply. The communication must be confidential for the privilege to apply but the communication does not cease to be confidential simply through the presence of a third party. What must be considered is whether the communication is intended to be confidential and the circumstances of the third party's presence. Section 34WA makes it expressly clear that the detention and questioning regime established under the Act is not intended to affect the law relating to legal professional privilege.

Recommendation 8: The Committee recommends that, in the absence of separate statutory right of judicial review, that a note to S34E be adopted as a signpost to existing legal bases for judicial review.

Response: Agreed.

The Government agrees that an explanatory note could be inserted for section 34E of the Act describing in summary form existing legal bases for seeking a remedy. This could include a statement that a person may, for example, be able to seek judicial review in the Federal Court

under section 39B of the *Judiciary Act 1903* or in the High Court under section 75(v) of the Constitution.

Recommendation 9: The Committee recommends that Regulation 3B be amended to allow the Secretary to consider disclosing information, which is not prejudicial to national security, to a lawyer during the questioning procedure.

Response: Not agreed.

The Government considers that there is no need to extend the Regulations to this situation. The Regulations assist in protecting sensitive material in court proceedings relating to a warrant. In the case of the questioning proceedings, if ASIO is requested to provide a document to a subject or their lawyer because it may be relevant to questioning, ASIO can already do so subject to national security considerations. Involvement of another decision-making process would unnecessarily slow and complicate the process.

Recommendation 10: The Committee recommends that:

- the supervisory role of the prescribed authority be clearly expressed; and
- ASIO be required to provide a copy of the statement of facts and grounds on which the warrant was issued to the prescribed authority before questioning commences.

Response: Agreed in part.

The Government agrees that the supervisory role of the prescribed authority could be more clearly expressed through amending section 34E of the ASIO Act to require that the prescribed authority make clear that it is their role to supervise the questioning proceedings and give appropriate directions.

The Government considers that it is not appropriate for ASIO to give the prescribed authority a copy of the full statement of facts and grounds on which the warrant is based. However, the prescribed authority does receive a copy of the warrant prior to questioning commencing. Together with exposure to the questioning process, this is sufficient for the prescribed authority to fulfil his or her role in supervising proceedings, including determining whether the continuation of questioning is appropriate and that legislative requirements and safeguards are being complied with.

Recommendation 11: The Committee recommends that:

- a subject of a questioning-only warrant have a clear right of access to the IGIS or the Ombudsman and be provided with reasonable facilities to do so; and
- there be an explicit provision for a prescribed authority to direct the suspension of questioning in order to facilitate access to the IGIS or Ombudsman provided the representation is not vexatious.

Response: Agreed.

While there are already clear provisions in the legislation relating to the making of complaints in the case of detention, the Government considers that provisions could be inserted into the ASIO Act to further clarify the ability to make complaints. These provisions would enhance the requirements to inform a subject of their capacity to make, and facilitate the making of, complaints particularly in the questioning-only warrant context.

Recommendation 12: The Committee recommends that an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers be provided.

Response: Agreed.

Although the current legislation is flexible enough to enable complaints to be made to the appropriate bodies about the actions of State or Territory police, the Government considers that amendments could be made to clarify and facilitate complaints in appropriate cases (where State or Territory police are involved) to the complaints body for a police service in a State or a Territory in accordance with the laws in force in that jurisdiction. These measures would not affect the existing complaints mechanisms.

Recommendation 13: The Committee recommends that reasonable financial assistance for legal representation at rates applicable under the Special Circumstances Scheme be made available automatically to the subject of a section 34D warrant.

Response: Agreed in part.

At present all persons questioned or detained are automatically eligible to apply for financial assistance under the Special Circumstances Scheme of financial assistance. The Government does not agree to automatic provision of assistance, but is prepared to put forward an amendment to the Act to include a statutory right for a person who is questioned under a warrant to apply for financial assistance.

Recommendation 14: The Committee recommends that the Commonwealth establish a scheme for the payment of reasonable witness expenses.

Response: Not agreed at this stage.

The Government is not currently prepared to establish a witness expenses scheme because there is limited evidence of any significant practical impact of questioning to date. However it will keep the matter under review in light of further experience with the legislation. In such cases it is always possible for affected persons to make an application to the Attorney-General for an act of grace payment.

Recommendation 15: The Committee recommends that the penalty for disclosure of operational information be similar to the maximum penalty for an official who contravenes safeguards.

Response: Not agreed.

The Government considers that it would not be appropriate to arbitrarily equate the penalties for officials and subjects questioned under a warrant (and other persons who are disclosed information in contravention of the non-disclosure obligations). The provisions are directed at entirely different circumstances. It is also important to recognise that the penalties stated are maximum penalties – it is for the courts in sentencing a person to decide what level of penalty should apply once a person is convicted of an offence.

Reducing the 5 year penalty for breaching the non-disclosure provisions would reduce the deterrent effect of the provisions. This is not acceptable given the sensitivities of passing on operational information which may compromise sensitive terrorism investigations and potentially risk lives. It would also not be consistent with the level of the penalty that applies to the other offences in section 34G of the ASIO Act.

Increasing the penalty for officials who fail to comply with all requirements would be inconsistent with other legislation providing for officials who contravene safeguards in connection with a preventative detention order (under section 105.45 of the *Criminal Code Act 1995*), which is also a maximum of 2 years imprisonment. Increasing the penalty would not be appropriate in light of the extensive oversight mechanisms (including a range of safeguards to ensure that a person's rights are not abused by those exercising authority under a warrant), the possibility of additional avenues of redress (such as disciplinary proceedings), and the fact that other criminal offences may be available where official conduct amounts to an offence against the person.

Recommendation 16: The Committee recommends that the term 'operational information' be reconsidered to reflect more clearly the operational concerns and needs of ASIO. In particular, consideration be given to redefining section 34VAA(5).

Response: Not agreed.

The Government does not agree to redrafting the definition of 'operational information'. Redrafting for greater specificity in the definition may adversely complicate and alter the scope of the secrecy provision, while providing little more guidance to make a disclosure.

The 'operational information' offence is designed to protect ASIO's sources and holdings of intelligence, and its methods of operations. The term 'operational information' used in the secrecy provisions covers information ASIO has or had, a source of information or an operational capability, method or plan of ASIO. While this appears broad on its face, it must be read in context with the other elements of the offence.

Recommendation 17: The Committee recommends that:

- consideration be given to amending the Act so that the secrecy provisions affecting questioning-only warrants be revised to allow for disclosure of the existence of the warrant; and
- consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority.

Response: Not agreed.

The Government considers that the current regime provides sufficient flexibility for permitted disclosures to be made in certain circumstances on a discretionary basis. The disclosure of the fact that a person is being questioned under a warrant may not be in the interests of security, even if the disclosure were narrow and tightly regulated. This is why it is specifically an element of the offence applying to disclosures while a warrant is current (subsection 34VAA(1)). It is vital that this strict level of confidentiality remain until the warrant expires to ensure that ASIO investigations can be effectively carried out.

The Government recognises that there may be situations where the disclosure of the existence of the warrant before it expires would not harm security. The Government considers that the legislation could be amended for the relevant decision-maker(s) under the existing permitted disclosure regime to be required to take into account certain factors (including a person's family and employment interests and the public interest) on why the disclosure should be made in deciding whether to permit a particular disclosure.

Recommendation 18: The Committee recommends that ASIO include in its Annual Report, in addition to information required in the Act under section 94, the following information:

- the number and length of questioning sessions within any total questioning time for each warrant;
- the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court; and
- if any, the number and nature of charges laid under this Act, as a result of warrants issued.

Response: Not agreed.

- **Number and length of questioning sessions:** The Government considers that the reporting requirements already contained in the ASIO Act provide ample information on questioning and detention warrants. For example, section 94 of the ASIO Act requires the reporting of: the total number of requests made; the total number of warrants issued; the total number of questioning warrants issued; the number of hours each person has appeared before a prescribed authority and the total hours for each person; the number of detention warrants issued; the number of hours a person was detained and questioned under such a warrant and the total for each person; and the number of times a prescribed authority had persons appear for questioning before him or her. In addition, there are extensive safeguards in the Act which are designed to preclude the possibility of a person being questioned for longer than 4 hours (2 hours if the person is aged between 16 and 18 years of age).

- **IGIS and Ombudsman complaints, and Federal Court appeals:** The Government does not consider it appropriate for ASIO to be required to report on complaints made to the IGIS or the Ombudsman, or on appeals to the Federal Court. It is more appropriate for those agencies to report on any complaints or appeals made under the regime in their respective annual reports.

- **Charges laid under the ASIO Act:** The purpose of ASIO's questioning and detention regime is to gather intelligence in relation to terrorism, not to prosecute those questioned for failing to comply with the legislation. For this reason it would be inappropriate and unnecessary to include such information in ASIO's Annual Report. It would more appropriate for this information to be provided by other sources such as the Commonwealth Director of Public Prosecutions or the Australian Federal Police.

Recommendation 19: The Committee recommends that:

- section 34Y be maintained in Division 3 Part III of the ASIO Act, but be amended to encompass a sunset clause to come into effect on 22 November 2011; and
- paragraph 29(1)(bb) of the Intelligence Services Act be amended to require the Parliamentary Joint Committee on Intelligence and Security to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011.

Response: Agreed in part.

The Government accepts the Committee's arguments about the need for ongoing review and a further sunset period, but considers that the 5½ year period is insufficient. The Government considers that a 10 year sunset period would be more appropriate, and it is also consistent with the sunset period applying to the recently enacted *Anti-Terrorism Act (No. 2) 2005*.

The Committee concluded that for the foreseeable future there are threats of possible terrorist attacks in Australia and that some people in Australia might be inclined or induced to participate in such activity. The Committee also recognised that the questioning regime has been useful in dealing with this situation. The 10 year sunset period will ensure that the legislation can be used over a period the Government assesses there is likely to be a need for these powers.

During this period the Government will also continue to assess the operation of the legislation in light of practical experience and will review its effectiveness and the need for it on an ongoing basis. It is always open to the Parliament to repeal laws at any time if they regard them as no longer necessary.

The experience of recent statutory reviews has shown that such reviews are resource-intensive and impact on operational priorities. Given these considerations and the ongoing need for the legislation, together with the fact that the Government is continuously reviewing the effectiveness of legislation, the Government does not consider that an earlier review is warranted. State and Territory Governments were of the same view about the time needed to properly make an assessment of the recent anti-terrorism legislation.

Accordingly, the Government considers that section 34Y of the Act should be amended to encompass a sunset clause to come into effect on 22 July 2016 (10 years after the powers would otherwise sunset under the current provision), and that paragraph 29(1)(bb) of the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament by 22 January 2016.