



Appendix E – The Protocol

ATTORNEY-GENERAL
THE HON DARYL WILLIAMS AM QC MP

NEWS RELEASE

12 August 2003
98/03

ASIO PROTOCOL TO GUIDE WARRANT PROCESS

I have today tabled a Protocol to guide the execution of detention and questioning warrants under the new provisions of the *Australian Security Intelligence Organisation*

Legislation Amendment (Terrorism) Act 2003 (the Act).

This Protocol fleshes out the detail of the operation of warrants under the Act, which provides the Australian Security Intelligence Organisation (ASIO) with the tools it needs to identify and, where possible, prevent Australians from being hurt or killed by acts of terrorism.

The legislation was passed in June, in the final sitting week before the winter recess. Since that time, ASIO, together with the Australian Federal Police and the Attorney-General's Department have been working on the Protocol.

The Protocol covers, among other matters, arrangements for custody and detention, interview duration periods and breaks.

It sets out standards in relation to facilities for custody, arrangements for recording of interviews and measures to ensure the welfare of people subject to a warrant.

The Protocol also sets out measures for accountability and arrangements for the making of complaints.

Relevant standards, including United Nations Rules in relation to detained persons, have been taken into account in preparing the document.

The Act sets out a clear process for the finalisation of the Protocol, including formal consultation between the Director-General of Security, the Commissioner of the Australian Federal Police and the Inspector-General of Intelligence and Security.

Following approval by the AFP and the IGIS, the Protocol is then submitted to the Attorney-General for approval and, once approved, is presented to each House of Parliament and briefing provided to the Parliamentary Joint Committee on ASIO, ASIS and DSD.

**AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION
AMENDMENT (TERRORISM) ACT 2003**

BRIEFING ON PROTOCOL

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the Act) amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enhance the capacity of the Australian Security Intelligence Organisation (ASIO) to combat terrorism. It grants ASIO powers to collect intelligence that may substantially assist in the investigation of terrorism offences. The Act provides ASIO with the ability to seek a warrant to detain and question people for the purposes of investigating terrorism offences.

The Act provides in sections 34C(3)(ba) and 34C(3A) for the development of a written statement of procedures (Protocol) to be followed in the exercise of authority to take persons into custody, detain persons and conduct questioning under warrants issued under section 34D. The Act also provides that no action can be taken under the warrant until the Protocol has been made.

The Protocol has been developed in accordance with the requirements of sections 34C(3)(ba) and 34C(3A) of the Act. The Protocol has been developed by the Director-General of Security in consultation with the Australian Federal Police (AFP), the Inspector-General of Intelligence and Security (IGIS) and the Attorney-General's Department. The Protocol has been approved by the Attorney-General, the AFP and the IGIS in accordance with the requirements of the Act.

The Protocol is designed to be read in conjunction with the Act, and expands on the requirements of the Act. Wherever possible reference has been made in the Protocol to the corresponding provision of the Act. The Protocol is not a legislative instrument. This means that where a discrepancy exists between the Protocol and the Act, the provisions of the Act will prevail.

The Protocol sets out the basic standards that will apply in the questioning and detention of persons under a section 34D warrant. It clarifies concepts used in the Act and addresses issues such as the:

- (i) transportation of a person under a warrant;
- (ii) treatment of a person being questioned, e.g. the conditions applicable during questioning such as access to fresh drinking water and toilet and sanitary facilities at all times during questioning;
- (iii) supervision of detention under a warrant and the conduct of any searches undertaken pursuant to a warrant;
- (iv) health and welfare of a person subject to a warrant, such as the accommodation facilities and food and sleep requirements;
- (v) video recording of procedures;
- (vi) contact with other persons and a complaint mechanism; and
- (vii) arrangements for liaison with other persons such as the Inspector-General of Intelligence and Security and the Commissioner of the relevant police service.

COMMONWEALTH OF AUSTRALIA
Australian Security Intelligence Organisation

PROTOCOL

This Protocol is made pursuant to the requirement in subsection 34C(3A) that the Director-General make a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D of the *Australian Security Intelligence Organisation Act 1979*. The Protocol sets out the basic standards applicable in relation to the detention and questioning of a person pursuant to a warrant issued under section 34D of that Act.

This document is to be read in accordance with the provisions of Part III of the ASIO Act, and the terms of any warrant issued under section 34D.

Definitions

In this Protocol, the following terms have the meanings indicated:

ASIO Act means the *Australian Security Intelligence Organisation Act 1979*.

police officer and prescribed authority have the meanings given in section 34 A of the ASIO Act *subject* means a person:

- (a) specified in a warrant under section 34D of the ASIO Act as being required to appear before a prescribed authority for questioning under the warrant; or
- (b) in relation to whom a warrant under section 34D of the ASIO Act authorises the person to be brought before a prescribed authority for questioning and detained under arrangements made by a police officer.

General

A written record must be maintained recording the following information:

- (a) the identity of the subject;
- (b) the authority for the questioning or detention of the subject;
- (c) the date and time of detention and release of the subject;
- (d) details of any period during which the subject is questioned pursuant to the warrant; and
- (e) details as to the location(s) of any detention or questioning.

The Director-General must annex this report to any report made under section 34P.

Transport

In any case where a subject is to be transported, a police officer must arrange transportation. The transportation must be safe and dignified.

A police officer must remain present during the transportation of any subject who is being detained.

A subject must not be transported in any vehicle with inadequate ventilation or light, or in a way which would expose the subject to unnecessary physical hardship.

Questioning

4.1 Manner

All persons present during questioning or any period of detention pursuant to the warrant must interact with the subject in a manner that is both humane and courteous, and must not speak to a subject in a demeaning manner.

A subject must not be questioned in a manner that is unfair or oppressive in the circumstances.

A police officer must remain present at all times during the questioning of a subject.

4.2 Language

Information given to a subject must be conveyed in a language the subject can understand.

An interpreter must be provided for a subject who, in the opinion of the prescribed authority, does not understand, or cannot communicate effectively in, English as required by section 34H.

4.3 Explanation of effect of warrant

The prescribed authority must explain to a subject the effect of the warrant in accordance with section 34E, and must satisfy him or herself that the subject has understood the explanations given.

In particular, the prescribed authority must explain to the subject the use which may be made of any information or materials provided by the subject, including any derivative use for the purpose of criminal investigations.

The prescribed authority must explain to a subject the function or role of all officers present during questioning.

4.4 Conditions

A subject shall have access to fresh drinking water and toilet and sanitary facilities at all times during questioning.

A subject must not be questioned continuously for more than 4 hours without being offered a break.

Such break shall, at a minimum, be of 30 minutes duration.

A subject may elect to continue questioning without taking a break, or after taking a break shorter than 30 minutes, provided the prescribed authority is satisfied that this is entirely voluntary.

Detention

5.1 Police supervision

Taking into custody and subsequent detention shall be effected under arrangements made by a police officer. These arrangements shall be consistent with applicable police practices and procedures in relation to custody of persons, save where such practices are inconsistent with the terms of the warrant or this Protocol.

A police officer shall supervise all detention pursuant to a warrant.

The prescribed authority shall be responsible for issuing directions on any matters relating to the detention of the subject during questioning.

5.2 Personal effects

A subject shall not have access to, or be able to manufacture, any implement that could be used as a weapon.

A subject shall not be permitted to retain any listening or recording devices or any communications equipment during any periods of detention or questioning.

A subject must be permitted, upon request, to retain any clothing or personal effects during questioning unless the prescribed authority has reason to believe that the subject may use such items to:

- (a) injure him or herself, or other persons;
- (b) damage property; or

(c) attempt to escape.

During periods of detention in which the subject is not being questioned, decisions on the retention of items by the subject shall be the responsibility of a police officer supervising detention. Any effects belonging to a subject which he or she is not allowed to retain in detention must be itemised and placed in safe custody. An inventory of the property retained is to be signed by the subject where the subject is able and willing to do so.

On release from detention all such articles must be returned to the subject who must be asked to sign a receipt for them.

A subject who is not permitted to wear Ms or her own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to maintain good health and dignity. Such clothing shall in no manner be degrading or humiliating.

5.3 Searches

An ordinary or frisk search of a subject must, if practicable, be conducted by a police officer of the same sex as the subject.

Any strip search of a subject conducted pursuant to section 34L of the ASIO Act must comply with the requirements of section 34M, including the requirement that the search be conducted by a police officer of the same sex as the subject.

Any search of a subject must be conducted with appropriate sensitivity.

5.4 Use of force and restraint

A police officer may only use the minimum force reasonably necessary in the circumstances, and may only use instruments of restraint as is reasonably necessary in the circumstances.

In particular, the use of force or instruments of restraint must not be applied as a punishment.

Restraint may only be applied by a police officer, and must not be applied for a longer time than is necessary.

The Director-General must include in a report under section 34P advice about any force or restraint employed by a police officer in the execution of the warrant.

Health and Welfare

6.1 Facilities and Accommodation

Facilities employed for questioning or detention shall have adequate fresh air and ventilation, floor space, lighting and heating and cooling appropriate to the climatic conditions.

Facilities employed shall have sufficient natural or artificial light to permit reading.

Facilities employed for detention and questioning need not be the same throughout the warrant period.

Where a subject is under the age of 18 years, any period of questioning or detention may only take place under conditions that take full account of the subject's particular needs and any special requirements having regard to their age.

Food

A subject shall have access to fresh drinking water at all times.

A subject shall be provided with three meals a day at the usual hours or at the times necessary to meet religious requirements.

Food shall be of sufficient nutritional value, adequate for health and wellbeing, be culturally appropriate and well-prepared and served.

A subject shall be provided with special dietary food where such food is necessary for medical reasons, on account of a subject's religious beliefs, because the subject is a vegetarian, or where the subject has other special needs.

6.3 Sleep

A subject shall be provided with a separate bed, and must be accorded a separate room or cell in which to sleep where facilities permit.

A subject shall be provided with sufficient clean bedding, kept in good order and changed often enough to ensure its cleanliness.

Except where otherwise directed by the prescribed authority, a subject must be accorded the opportunity for a minimum continuous, undisturbed period of 8 hours sleep during any 24 hour period of detention.

6.4 Personal Hygiene

A subject shall be provided with access to clean toilet and sanitary facilities for the subject to use as required in a clean and decent manner.

A subject shall be permitted to bathe or shower daily in facilities that are clean, adequate, and at a temperature suitable for the climate.

A subject shall be provided with such toilet articles as are necessary for health and cleanliness and the maintenance of self-respect.

A subject shall be permitted to undertake bathing, toileting and dressing in private, subject to the requirements of safety and security.

6.5 Health Care

A subject shall be provided with necessary medical or other health care when required.

Arrangements shall be made for any recommendation made or treatment prescribed by a medical or health professional to be given effect.

6.6 Religion

A subject shall be permitted to engage in religious practices as required by their religion, subject to the requirements of safety and security.

6.7 Subjects under the age of 18 years

Where the subject is under the age of 18 years, the operation of this protocol is limited as provided in section 34NA of the ASIO Act, as well as by the particular provisions of this protocol applying to subjects under 18.

7 Video recording of procedures

7.1 Facilities for recording

ASIO shall be responsible for ensuring that there are facilities available for the making of video recordings in accordance with section 34K of the ASIO Act, and for ensuring that such recordings are made in compliance with that provision.

The facilities must be appropriate to enable a clear visual recording to be made of the subject's appearance before the prescribed authority for the duration of questioning.

The facilities must also enable a clear audio recording of all questions, answers and statements made during questioning, including any statements made by the prescribed authority in accordance with section 34E.

In the event that there is a failure in the recording equipment, or if the recording has to be suspended, during the subject's appearance before the prescribed authority for questioning, the prescribed authority must direct that questioning of the subject be suspended until recording may be resumed.

7.2 Notification to the subject

Upon the commencement or resumption of any recording for the purpose of questioning in accordance with subsection 34K(1), the prescribed authority shall inform the subject that the questioning is being recorded, and shall state the time and date of the questioning.

7.3 Security of recordings

ASIO shall ensure that a master version is retained of any video recording of the subject's appearance before a prescribed authority. The master version shall be sealed in the presence of the prescribed authority and the label shall be signed by the prescribed authority. The sealed master version shall be made available to the Inspector-General of Intelligence and Security on request.

ASIO shall be responsible for ensuring that any copies of video recordings made pursuant to section 34K are securely maintained and that a register is kept of any persons or agencies who have access to such copies.

As required under section 34S, the Director-General must cause the destruction of a video recording, or copy of a video recording, which is in ASIO's possession or custody or under ASIO's control, if the Director-General is satisfied that the video recording or copy is not required for the purposes of the performance of functions or the exercise of powers under the ASIO Act.

8 Contact

A subject who has been taken into custody or detained shall be permitted to contact a person specified in the warrant as a person with whom the subject may have contact, or a person falling within a class of persons so specified in the warrant, or, where applicable, a person identified in a direction described in paragraph 34F(1)(d).

A subject shall be provided with access to such facilities as are, in the view of the prescribed authority, appropriate for such contact in all the circumstances.

Except where directed otherwise by the prescribed authority, such contact shall only be permitted within the presence of officers present for the purposes of executing or supervising the execution of the warrant.

9 Complaints Mechanism

In accordance with subsection 34F(9), a subject must be permitted to contact the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman during the period of the warrant or following, including when the subject is being questioned or in detention.

A subject must be provided with such facilities as are, in the view of the prescribed authority, appropriate to make such complaint.

A subject shall be permitted to make such complaint outside of the hearing of officers present for the purposes of executing or supervising the execution of the warrant.

The Director-General must include in a report made under section 34P an account of any complaint made in relation to the execution of the warrant, to the extent known.

10 Arrangements for Liaison

As soon as possible following the issuing of a warrant, the Director-General shall ensure that the Inspector-General of Intelligence and Security, the nominated prescribed authority, and the Commissioner of the relevant police service(s) are informed as to the details of the warrant, and as to the proposed arrangements for its execution.

