

Attachment to AGD submission

ASIO views on streamlining options

Through its operational experience, ASIO has identified particular concerns with the issuing process for warrants under Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). These concerns are set out in AGD's public submission (available on the INSLM website). In ASIO's view, making a clearer distinction between the questioning and detention aspects of Part III Division 3 could facilitate more effective implementation of the regime.

While any legislative amendments are a matter for Government, the below points and table at Attachment A set out the possible changes that could facilitate the more effective authorisation and use of questioning warrants (QWs) and questioning and detention warrants (QDWs). These suggestions reflect comments made by the Director-General of Security at a public hearing before the INSLM on 19 August 2016.

Current authorisation process

The current authorisation process for warrants under Part III Division 3 is as follows:

- ASIO seeks consent from the Attorney-General to make a request for the issue of a QW or QDW.
- QWs and QDWs are issued by an Issuing Authority¹.
- Questioning under both QWs and QDWs is overseen by a Prescribed Authority.²
- The Prescribed Authority can make an order to detain a person, even if a QW (rather than a QDW) is in place.
- Any taking into custody and detention is carried out by law enforcement.

The changes proposed below would streamline the authorisation process for questioning while retaining existing safeguards for detention.

Proposed changes to Questioning Warrant authorisation process

- Under the streamlined approach, ASIO QWs should be issued by the Attorney-General, in line with other special powers warrants under Part III of the ASIO Act. This approach would still require a higher level of authority than other Australian Government agency coercive questioning regimes that can be authorised by persons from within that agency.
 - Coercive questioning regimes that do not require external authorisation for questioning (that is, authorisation by a person from outside the requesting

¹ An Issuing Authority is a current Judge appointed under section 34AB of the ASIO Act.

² A Prescribed Authority is a person appointed under section 34B of the ASIO Act, generally a former judge of a superior court.

agency) include the Australian Criminal Intelligence Commission (ACIC), the Commonwealth Ombudsman, the Australian Competition and Consumer Commission, the Australian Securities and Investments Commission, the INSLM, the former Australian Building and Construction Commission and the various state crime and corruption commissions.

- Questioning would continue to be overseen by the IGIS, preserving an important layer of oversight and protection for the individual. The IGIS would retain the power to interrupt questioning if any concerns regarding the questioning or treatment of the subject were to arise.
- Questioning would be supervised by an 'authorised person' – for example, an ASIO senior executive (SES) officer holding a legal practising certificate or a senior AGS lawyer. The authorised person would ensure that the questioning subject is informed of their rights and obligations under the warrant.
- A criterion could be added that requires the Attorney-General to consider previous questioning that has occurred under the ACIC powers (similar to consideration of previous Division 3 warrants as set out in paragraph 34D(3)(d)). This would address concerns raised by the Law Council of Australia in relation to 'rolling' warrants.
- If the Attorney-General is not available in an urgent situation to give written authorisation, authorisation could be given verbally, with confirmation in writing to be sought from the Attorney-General as soon as practicable. This is consistent with authorisation of special intelligence operations under Division 4 of Part III of the ASIO Act.

Proposed changes to detention under a Questioning Warrant

- If, after a QW has been issued by the Attorney-General, the authorised person believes that there are reasonable grounds to believe that the person subject to the QW:
 - may alert another person involved in a terrorism offence that the offence is being investigated;
 - may not appear for questioning; or
 - may destroy, damage or alter a relevant record or thing,they could then apply to an Issuing Authority to authorise detention. This would be consistent with the authorisation of QDWs, which require approval by both the Attorney-General and an Issuing Authority.
- The grounds under which an Issuing Authority can be asked by the authorised person to authorise detention are to be included in the warrant documentation signed by the Attorney-General.
- Additionally, a police officer could be given the power to arrest a person if the police officer believed that the person was not likely to comply with a warrant. This was a recommendation made by the previous INSLM in his last review of these powers.

Proposed changes to Questioning and Detention Warrant authorisation process

- It is accepted that there needs to be a distinction between the Questioning and the Questioning and Detention frameworks and that judicial oversight of detention is appropriate and necessary.
- The existing requirement for the Attorney-General to approve a QDW prior to authorisation being given by an independent Issuing Authority should remain.
- The secondary requirement for questioning to take place in front of a Prescribed Authority could be removed and replaced with the model proposed for QWs that sees the questioning supervised by an 'authorised person' – for example, an ASIO SES officer holding a legal practising certificate or a senior AGS lawyer.
- Questioning under a QDW would continue to be overseen by the IGIS, preserving an important layer of oversight and protection for the warrant subject. The IGIS would retain the power to interrupt questioning if any concerns regarding the questioning or treatment of the subject were to arise.
- Police would continue to be responsible for detention arrangements, and therefore the usual accountability mechanisms that apply to policing including oversight by the Ombudsman would also apply.

ATTACHMENT A

Summary of proposed changes to authorisation and oversight process for Questioning Warrants and Questioning and Detention Warrants under Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979*

	QW – current	QW – proposed	QDW – current	QDW – proposed
<i>Authorisation of Questioning Warrant</i>	Attorney-General Issuing Authority	Attorney-General	N/A	N/A
<i>Authorisation of Questioning and Detention Warrant</i>	N/A	N/A	Attorney-General Issuing Authority	Attorney-General Issuing Authority
<i>Authorisation of detention after issue of warrant</i>	Prescribed Authority	Issuing Authority	N/A	N/A
<i>Oversight of questioning</i>	Prescribed Authority IGIS	Authorised officer IGIS	Prescribed Authority IGIS	Authorised officer IGIS

Authorised Officer means an ASIO senior executive (SES) officer holding a legal practising certificate or a senior AGS lawyer.

Issuing Authority means a current Judge appointed under s 34AB of the ASIO Act.

Prescribed Authority means a person appointed under s 34B of the ASIO Act, generally a former judge of a superior court.