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AUSTRALIA

TERRORISM LAWS: QUESTIONING WARRANTS AND
QUESTIONING AND DETENTION WARRANTS

Executive Summary

The Australian Security Intelligence Organisation (ASIO) has the power to detain and question persons in relation to terrorism. In some instances, this detention extends to pre-charge detention. The ASIO may operate under either a Questioning Warrant or a Questioning and Detention Warrant.¹ Pursuant to these warrants, the ASIO may question, and in some circumstances detain, a person who they believe has information that is relevant to a terrorist offense.²

I. Introduction

Questioning Warrants and Questioning and Detention Warrants represent two tools available to the ASIO in conducting terrorism-related investigations. Issuance and use of these warrants is governed by the Australian Security Intelligence Organisation Act 1979 (Cth) [hereinafter, the ASIO Act]; the ASIO Regulations 1980 (Cth); and the Statement of Procedures – Warrants Issued under Division 3 of Part III, promulgated under § 34C of the ASIO Act.

Under a Questioning Warrant, the ASIO may question³ a person before a Prescribed Authority⁴ and require that person to provide information or produce records that are “relevant to intelligence that is important in relation to a terrorism offence.”⁵ A Questioning and Detention Warrant authorizes the police to take a person into custody and bring them before a Prescribed Authority for questioning and detention.⁶ The ASIO may make transcripts of any information provided or copies of any records produced pursuant to these warrants.⁷

¹ Australian Security Intelligence Organisation Act 1979 (Cth) [hereinafter, ASIO Act] Division 3.

² *Id.*

³ The warrant may require a person to appear before a Prescribed Authority immediately or at a time specified in the warrant for questioning. *Id.* § 34E(2).

⁴ Questioning must take place before a Prescribed Authority, that is, an ex-judicial officer or current judicial officer appointed by the Minister. *Id.* § 34B.

⁵ *Id.* §§ 34E(4)(a); 34G(7)(a).

⁶ *Id.* § 34G(3)(a).

⁷ *Id.* §§ 34E(4)(b), 34G(7)(b).

At any time that a person is before a Prescribed Authority for questioning, the Prescribed Authority may issue a directive that the person be detained, further detained, or released. The Prescribed Authority may also issue a directive in relation to any other matter regarding the person's detention.⁸ All such directives must be consistent with the issued warrant or otherwise approved by the Minister;⁹ however, a directive to detain a person is not per se inconsistent with a Questioning Warrant.¹⁰

A Prescribed Authority is a current or ex-judicial officer appointed by the Minister.¹¹ Generally, a Prescribed Authority is an ex-judicial officer from a superior court with at least five years experience as a superior court judge; however, they may also be a current judicial officer from a State or Territory Supreme or District Court of five years standing, or a President or Deputy President of the Administrative Appeals Tribunal, provided they are a lawyer of five years standing.¹² A person must consent to being appointed as a Prescribed Authority.¹³

II. Procedure and Grounds for Issuing Warrants

At the request of the Director-General of the ASIO, a Questioning Warrant or a Questioning and Detention Warrant may be issued by an "Issuing Authority,"¹⁴ provided the Issuing Authority is satisfied that the Director-General of the ASIO has sought and obtained the Minister's consent to the warrant¹⁵ and that there "are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence in that is important in relation to a terrorism offence."¹⁶

When seeking the Minister's consent to a Questioning Warrant or a Questioning and Detention Warrant, the Director-General of the ASIO must indicate whether the subject of the

⁸ *Id.* § 34K(1).

⁹ That is, the Minister responsible for the ASIO, currently the Attorney-General. Act Interpretation Act 1901 (Cth) § 19A.

¹⁰ ASIO Act § 34K(2), (3).

¹¹ *Id.* § 34B.

¹² *Id.* § 34B.

¹³ *Id.* § 34B(4).

¹⁴ That is, a Federal Magistrate or a Judge appointed by the Minister, or a person who is a member of a class of persons declared to be an Issuing Authority under the applicable regulations. *Id.* § 34A. An Issuing Authority has the same protection and immunity as a Justice of the High Court. *Id.* § 34ZM.

¹⁵ The Minister is the Minister responsible for ASIO, currently the Attorney-General. Ministerial consent will only be given where the Minister is satisfied on reasonable grounds that issuing the warrant will substantially assist in the collection of important intelligence in relation to a terrorism offense, that other collection methods would be ineffective, and, that there are in force procedures governing the exercise of authority under the warrants. *Id.* §§ 34D(4), 34F(4). The process for requesting permission from the Minister is detailed in the ASIO Act. The procedures governing the exercise of authority granted by a Questioning Warrant or a Detention and Questioning Warrants are prepared by the Director-General, approved by the Minister and are a legislative instrument (although § 42 and Part 6 of the Legislative Instruments Act 2003 (Cth) is not applicable to them). ASIO Act § 34C.

¹⁶ *Id.* §§ 34E(1), 34G(1).

warrant has previously been the subject of a warrant and, if so, for what period of time they were questioned and/or detained.¹⁷

Where the warrant is a Questioning and Detention Warrant (therefore involving detention), the Minister must also be satisfied that there are reasonable grounds for believing that, if not immediately taken into custody and detained, the person named in the warrant may: (1) alert a person involved in a terrorism offense of an investigation into that offense; (2) fail to appear for questioning by a Prescribed Authority; or (3) destroy, damage or alter any item or record that must be produced under the warrant.¹⁸

If at any time the Director-General of the ASIO believes that the grounds on which a warrant has been issued have ceased to exist, the Director-General must inform the Minister and the Issuing Authority and take any necessary steps to ensure that action under the warrant ceases.¹⁹

The Inspector-General of Intelligence and Security provides additional oversight of Questioning Warrants and Questioning and Detention Warrants.²⁰ The Director-General of the ASIO is obliged to provide the Inspector-General of Intelligence and Security with copies of: (1) requests for warrants, warrants, and video recordings of questioning under warrants; (2) information on any seizures, custody, or detention arrangements made under warrants; and (3) any actions taken to ameliorate a concern raised by the Inspector-General.²¹ The Inspector-General must proactively review any subsequent warrant issued in relation to a person who has previously been detained.²²

III. Time Periods

A. Duration of Warrants

A Questioning Warrant or a Questioning and Detention Warrant must specify the period for which it is in force, and this period may not be greater than twenty-eight days.²³

B. Period of Questioning and Detention

Questioning under a Questioning Warrant or a Questioning and Detention Warrant may not exceed eight hours absent the permission of the Prescribed Authority before whom the person being questioned has appeared.²⁴ The Prescribed Authority may grant permission for the questioning to be continued for an additional eight hours at a time, up to a maximum of twenty-four hours.²⁵ Where an interpreter is required, the Prescribed Authority may grant

¹⁷ *Id.* §§ 34D(3)(d), 34F(3)(d).

¹⁸ *Id.* § 34F(4)(d).

¹⁹ *Id.* § 34ZK.

²⁰ *Id.* §§ 34ZI, 34ZJ. See also the IGIS website, <http://www.igis.gov.au>.

²¹ *Id.* § 34ZI.

²² *Id.* § 34ZJ.

²³ *Id.* §§ 34E(5), 34G(8).

²⁴ *Id.* § 34R.

²⁵ *Id.* § 34R(6).

permission for questioning to be for twenty-four hours and thereafter in increments of eight hours, to a maximum of forty-eight hours.²⁶ Permission to extend the time for questioning on other grounds will only be granted where the Prescribed Authority believes that continued questioning will assist in the collection of intelligence related to terrorism offenses and that there has been no undue delay on the part of the questioners.²⁷

“Time-outs” (for example, periods required to change recording equipment, address complaints, or for rest, religious practice or medical attention) are not considered “questioning time” for purposes of calculating periods of questioning; however, a person may not be detained continuously under a Questioning and Detention Warrant for more than 168 hours from the time the person is first brought before the Prescribed Authority.²⁸

IV. Persons Below the Age of 18

Additional restrictions apply to persons below the age of sixteen, or above the age of sixteen but below the age of eighteen.²⁹

A person who is under the age of sixteen may not be the subject of a Questioning Warrant or a Questioning and Detention Warrant.³⁰ A Questioning Warrant or a Questioning and Detention Warrant may be issued in relation to a person who is above the age of sixteen but below the age of eighteen, provided the Minister is satisfied, on reasonable grounds, that the person has, will, or is committing a terrorist offense and that the warrant meets specific additional requirements, including permitting the person to contact their parent, guardian, or representative and that questioning be time limited to two-hour periods.³¹

V. Rights of Questioned or Detained Persons

A person detained or questioned under a Questioning Warrant or a Questioning and Detention Warrant may contact certain persons, including:

- Authorities – While in detention or custody under the warrant the person may contact identified persons at specified times, including the Inspector General of Intelligence and Security and the Commonwealth Ombudsman;³²
- Family, Lawyer, or Others – A person may be permitted to have contact with a person or persons identified in the warrant. Identification may be by class (e.g.,

²⁶ *Id.* § 34R(11).

²⁷ *Id.* § 34R(4).

²⁸ *Id.* §§ 34G(4), 34R(13), 34S.

²⁹ *Id.* § 34ZE.

³⁰ *Id.* § 34ZE.

³¹ *Id.* § 34ZE(4), (6). A person who is under the age of eighteen but above the age of sixteen must be informed by the Prescribed Authority that they may contact their parents, guardians, or other persons to represent their interests and have them present during questioning, and that when in detention they may contact a lawyer. *Id.* §34ZE(8). Conduct of parents is governed by § 34ZR.

³² *Id.* §§ 34J(1)(e), 34K(9), (11).

lawyers) or by relationship (e.g., familial).³³ Procedural limits may be placed on a person's contact with their lawyer, including a refusal to permit a person to contact an identified lawyer.³⁴

At a person's first appearance before a Prescribed Authority under a Questioning Warrant or a Questioning and Detention Warrant the Prescribed Authority must inform the person:³⁵

1. Whether the warrant authorizes the detention of the person and, if so, for what time period;
2. What the ASIO is authorized to do under the warrant;
3. That the person must provide the information or records sought during questioning, regardless of whether such information or records are self-incriminating, and must not provide knowingly false or misleading statements;
4. That it is an offense to fail to provide such information or records or to make false or misleading statements, but that any statement made by the person or any record produced in response to a request made under the warrant may not be used in criminal proceedings against that person (other than for the offense of failing to provide information or records, or making false or misleading statements);
5. Of the period for which the warrant is in force;
6. That the person may make a complaint either orally or in writing regarding the ASIO (to the Inspector-General of Intelligence and Security), the Australian Federal Police (to the Commonwealth Ombudsman), or a State or Territories' police (to the relevant complaints body);
7. That the person may seek a remedy for the warrant or treatment under the warrant from a federal court (this must be repeated at least once in every 24-hour period during which questioning occurs);
8. Whether the person is permitted to contact others and, if so, who the person may contact and when;
9. Of the Prescribed Authority's role, including supervising the questioning and providing directions; and
10. Of the role of any other person present during questioning, but not necessarily their name.

³³ *Id.* §§ 34G(5), (6), 34K(1)(d). A Prescribed Authority may issue a directive that a subject is permitted to contact identified persons. *Id.* § 34K(1)(d).

³⁴ *Id.* §§ 34E(3), 34ZO.

³⁵ *Id.* § 34J.

Video recordings must be made of both a persons' appearance before the Prescribed Authority for questioning and of any other matter directed by the Prescribed Authority to be recorded.³⁶ Where practicable, video recordings must be made of any complaint.³⁷

There is no privilege against self-incrimination per se; however, information or documents provided by a person under questioning may not be used against that person in subsequent criminal proceedings.³⁸

A person may request an interpreter and an interpreter must be provided prior to questioning or before information is provided by the Prescribed Authority unless the Prescribed Authority believes, on reasonable grounds, that the person has adequate knowledge and the physical ability to be reasonably fluent in English.³⁹

VI. Searches of Detained Persons

Where a person is detained either under a Questioning and Detention Warrant or in accordance with a directive from a Prescribed Authority, a police officer may conduct an ordinary search or a strip search of the person.⁴⁰ To the extent practicable, an ordinary search should be conducted by a police officer of the same sex as the person detained.⁴¹

The police may only conduct a strip search where they have the approval of a Prescribed Authority or written consent of the person, and where they reasonably believe that the strip search is necessary to retrieve a seizable item located on a person.⁴² Strip searches must be conducted in private and by a person of the same sex.⁴³ Reasonable force may be used to conduct the strip search.⁴⁴ Any seizable item or other item relevant to the collection of intelligence in relation to terrorism offenses located during a strip search may be seized.⁴⁵ Clothing worn by the searched person may be seized if adequate alternate clothing is

³⁶ *Id.* § 34ZA.

³⁷ *Id.* § 34ZA(2).

³⁸ This rule does not apply to a proceeding for an offense under the relevant section of the ASIO Act itself. *Id.* § 34L(9).

³⁹ *Id.* § 34N. The Prescribed Authority must delay providing such information until an interpreter is present, if it appears to the Prescribed Authority that the person appearing before them is unable to communicate fluently in English, either due to an inadequate knowledge of English or a physical disability. Similarly, if an interpreter is required, any questioning must be deferred until the interpreter is present. *Id.* § 34N.

⁴⁰ *Id.* §§ 34K(1)(a), (b), 34ZB(1).

⁴¹ *Id.* § 34ZB(2).

⁴² *Id.* § 34ZB(3), (5).

⁴³ *Id.* § 34ZC.

⁴⁴ *Id.* § 34ZB(8).

⁴⁵ *Id.* § 34ZB(9). A seizable item is defined as “anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody.” *Id.* § 4.

provided.⁴⁶ Strip searches must be conducted in accordance with rules specified in the ASIO Act.⁴⁷

Records and copies made in accordance with a Questioning Warrant or a Questioning and Detention Warrant must be destroyed, but only if they are no longer required for a purpose or function of, or to exercise a power under, the ASIO Act.⁴⁸

VII. Use of Reasonable Force & Entry Onto Premises

Police may use all necessary and reasonable force to: (1) take a person into custody or detain a person in accordance with a warrant or a directive issued by a Prescribed Authority; (2) prevent a person from escaping custody; or, (3) bring a person before a Prescribed Authority for questioning.⁴⁹ However, police may not use more force or subject the person to any greater indignity than is necessary, and, must not do anything that is likely to cause death or grievous bodily harm expect as is required to prevent death or serious injury to another person.⁵⁰ In exercising authority to take a person into custody, police may use any necessary and reasonable force to enter the premises where they reasonably believe the person is located.⁵¹ Police must not enter a dwelling house⁵² other than between 6:00 a.m. and 9:00 p.m. unless it is not practicable to take the person into custody at another time.⁵³

VIII. Surrender of Passports

As soon as practicable after a person has been notified that the ASIO has requested⁵⁴ a Questioning Warrant or a Questioning and Detention Warrant in relation to them, or that they are specified in an issued warrant, they must surrender all Australian or foreign passports

⁴⁶ *Id.* § 34ZC(5).

⁴⁷ These rules require that such searches must: (1) be conducted in a private area by a police officer of the same sex, not in the presence or view of a person of a different sex (unless that person is a medical practitioner, or a parent, guardian, or personal representative of the person present with the consent of the person); (2) not involve a cavity search; and (3) not involve the removal of more garments or more visual inspection than is reasonably necessary. *Id.* § 34ZC(1). A strip search may not be conducted on a person below the age of sixteen. *Id.* § 34ZC(1)(f). A strip search may only be conducted on a person above the age of sixteen but below the age of eighteen who is incapable of managing their own affairs, with the authority of the Prescribed Authority and in the presence of a parent, guardian, or other person who represents the person's interests. *Id.* § 34ZC(1)(f).

⁴⁸ *Id.* § 34ZL.

⁴⁹ *Id.* § 34V(1).

⁵⁰ *Id.* § 34V(2). In instances where a person is attempting to escape custody, the police may only use force where they have called on the person to surrender and where they believe, on reasonable grounds, that such force is necessary to take the person into custody. *Id.* § 34V(3)(b).

⁵¹ *Id.* § 34V(1).

⁵² A dwelling house includes "an aircraft, vehicle, or vessel, and a room in a hotel, motel, boarding house, or club, in which people ordinarily retire for the night." *Id.* § 34U(3).

⁵³ *Id.* § 34U(2).

⁵⁴ The warrant need not have been granted. *Id.* § 34W(1).

issued to them and in their possession or under their control⁵⁵ to the police, to an Australian Customs Officer, or to a person exercising authority under a warrant.⁵⁶

Prior to returning any passport, an ASIO officer or other persons authorized under the warrant may examine and make copies of the passport.⁵⁷ Any passports in the possession of the Australian Federal Police, State or Territory Police, or Australian Customs that have not been cancelled must be returned as soon as practicable if the warrant is not issued or ceases to be in force.⁵⁸

IX. Financial Support and Complaints

A person may apply to the Minister for financial assistance to appear before a Prescribed Authority for questioning.⁵⁹ When appearing before a Prescribed Authority for questioning or while in custody or detention, a person must be permitted to make an oral or written complaint regarding the ASIO or the police and must be given any necessary facilities to make such a complaint.⁶⁰

X. Offenses in Relation to Warrants

It is an offense to:

- Disclose, without permission, information regarding the existence or contents of a Questioning Warrant or a Questioning and Detention Warrant, or ASIO “operational information,”⁶¹ during the period in which the warrant is in force, or for two years subsequent to the expiration of the warrant;⁶²
- Fail to appear before a Prescribed Authority, either in accordance with a warrant, or in accordance with a directive from a Prescribed Authority;⁶³

⁵⁵ *Id.* §§ 34W, 34Y.

⁵⁶ *Id.* §§ 34W(1), 34Y(1). The authority to whom the passport must be surrendered will depend on the circumstances. *Id.* §§ 34W(1), 34Y(1).

⁵⁷ *Id.* §§ 34W(4), 34Y(4).

⁵⁸ *Id.* §§ 34W(2), 34Y(2). The passport may be retained if there is another warrant in force for the same person. *Id.* §§ 34W(3); 34Y(3).

⁵⁹ *Id.* § 34ZX.

⁶⁰ Complaints may be made to the Inspector-General of Intelligence and Security (regarding ASIO), to the Commonwealth Ombudsman (regarding the Australian Federal Police), or to an appropriate complaints body regarding a State or Territories' Police. Such contact is permitted even where a condition of the person's custody or detention prohibits them from contacting anyone. *Id.* §§ 34K(9)-(11).

⁶¹ Operational information includes information held by the ASIO, or information on sources or information regarding an operational capability, method, or plan of the ASIO. *Id.* § 34ZS(5).

⁶² *Id.* § 34ZS. The applicable fault element is recklessness unless the person making the disclosure is the subject of the warrant or their lawyer, in which case the fault element is strict liability. *Id.* § 34ZS(3).

⁶³ *Id.* § 34L(1)-(8).

- Fail to provide information or documents requested during questioning, or to make a knowingly false or misleading material statement in response to a question;⁶⁴
- Leave Australia after receiving notification of being the subject of, or specified in, a warrant request or being specified in a warrant.⁶⁵ However, it is not an offense to leave Australia after notification that the warrant has not been issued or is no longer in force, or to leave with the written permission of the Director-General;⁶⁶
- Fail to surrender any passport, if the passport holder is the subject of an existing warrant or has been notified that a warrant is being sought;⁶⁷
- Contravene a safeguard or condition regarding a Questioning Warrant or a Questioning and Detention Warrant.

With regard to contravening a safeguard or condition, it is, for example, an offense: (1) for any person authorized and exercising authority under a Questioning Warrant or a Questioning and Detention Warrant to knowingly contravene a restriction or condition of the warrant;⁶⁸ (2) for a police officer not to immediately bring a person before a Prescribed Authority for questioning; (3) for any person to defy a directive from a Prescribed Authority regarding a person's detention, contact with persons while detained, deferment of questioning, or the presence of an interpreter during questioning; (4) for any person to fail to comply with requirements to permit a detained person to make a complaint, including the provision of facilities necessary to make the complaint; (5) for any person to undertake questioning in excess of the permitted time for questioning; (6) for any person to fail to comply with the requirements regarding strip searches or fail to provide adequate clothing to replace clothing seized during a strip search; or (7) for any person to fail to treat a person with humanity or respect for human dignity, or to subject them to cruel, inhuman, or degrading treatment.⁶⁹

XI. Additional Oversight by the Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security or their representative may be present at any time during which a person is taken into custody or questioned under a Questioning Warrant or a Questioning and Detention Warrant.⁷⁰ The Inspector-General may raise concerns regarding the legality or propriety of action in relation to a person being questioned or detained with the Prescribed Authority and the Director-General of the ASIO.⁷¹ The Prescribed Authority must consider and address the Inspector-General's concerns and

⁶⁴ *Id.*

⁶⁵ *Id.* §§ 34X, 34Z.

⁶⁶ *Id.* §§ 34X(1)(c), (d), 34X(2), 34Z(1)(c), (d), 34Z(2).

⁶⁷ *Id.* §§ 34W, 34Y.

⁶⁸ *Id.* § 34ZF(1).

⁶⁹ *Id.* § 34ZF.

⁷⁰ This is, for the purpose of performing functions under the Inspector-General of Intelligence and Security Act 1986 (Cth). ASIO Act § 34P.

⁷¹ *Id.* § 34Q(2).

may give issue a directive suspending either the questioning or the exercise of any other power until those concerns are addressed.⁷²

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⁷² *Id.* § 34Q(3), (4).