



Inquiry into the attendance of legal representatives at ASIO interviews, and related matters

Public Report

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Inspector-General of Intelligence and Security
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Note on report

This report is an abridgement of a more comprehensive and detailed report that has been provided to the Attorney-General. This version of the report is unclassified and intended for public release. This report was prepared on the basis that it would contain as much information as possible while satisfying the requirement that such information would not prejudice security, the defence of Australia, Australia's relations with other countries, law enforcement operations or the privacy of individuals.

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Recommendations

Recommendation 1: ASIO should work with the Department of Immigration and Border Protection (Immigration) to ensure that:

- (a) when making interview arrangements in Australia, visa applicants are specifically asked whether they want to have a legal representative attend
- (b) the lawyer's personal details are obtained by Immigration and passed to ASIO
- (c) a decision is made about whether the lawyer may attend and is conveyed prior to the day of interview.

Recommendation 2: ASIO should:

- (a) review its training to reinforce that the attendance of a lawyer at a security assessment interview is not to be considered problematic, unless sound reasons exist for deciding otherwise
- (b) ensure that decisions about whether a lawyer may attend an interview are considered and recorded on a case-by-case basis
- (c) ensure that in the absence of a specific cause for concern, interviews should commence without efforts by interviewing officers to discourage the attendance of a legal representative.

Recommendation 3: ASIO should:

- (a) clarify the status of any person who wants to attend an interview to ascertain whether they are the interviewee's legal representative
- (b) further consider whether migration agents should be accorded the same status as lawyers, with their attendance at interviews being addressed on a case-by-case basis.

Recommendation 4: ASIO should:

- (a) provide guidance for interviewing officers on when a written or verbal confidentiality undertaking should be requested from a person
- (b) provide the template undertaking document to attendees before the interview commences
- (c) provide a copy of a written undertaking to the signatory.

Recommendation 5:

The details of this recommendation are afforded a national security classification and cannot be included in this abridged report.

ASIO has agreed to Recommendations 1 to 4.

ASIO has agreed, in part, to Recommendation 5.

PART 1 – THE INQUIRY

The complaint

1. On 19 March 2013, I received a complaint from the Refugee Advisory and Casework Service (RACS) alleging inconsistent and arbitrary practices by the Australian Security Intelligence Organisation (ASIO) in relation to the attendance of legal representatives at security assessment interviews.

2. RACS advised me that it is a not-for-profit community legal centre comprising a team of lawyers with expertise in refugee law who provide specialist pro-bono advice and representation to applicants seeking protection in Australia. It informed me that:

- RACS considers it important for their clients to have legal representation during an ASIO interview, given the serious implications of the security assessments for protection visa applicants, coupled with the inherent vulnerability of their clients
- the majority of RACS lawyers had been refused entry into security assessment interviews; however, the practice had not been uniform. RACS described, by way of example, two cases where RACS lawyers had not been permitted to attend security assessment interviews and two further cases where lawyers had been permitted to attend
- a lawyer had been obliged by ASIO to sign a confidentiality undertaking, but was not provided with a copy of that undertaking.

3. RACS had obtained independent legal advice, indicating that ASIO officers had no legal basis to exclude lawyers from interviews. The advice included that:

- there is no express statutory power in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) or *Migration Act 1958* to exclude legal representatives from security assessment interviews for protection visa applicants
- the exclusion of a legal representative from a security assessment interview could amount to a denial of procedural fairness
- there is no express power given to ASIO to require a lawyer who attends a security interview to sign a confidentiality undertaking
- case law indicated that investigative bodies (for example, the National Crime Authority and the Australian Securities Commission) could exclude a particular lawyer, for example where the organisation was satisfied on reasonable grounds that the particular lawyer would prejudice the proceedings.

Preliminary inquiries

4. On 27 March 2013 I advised the Director-General of Security that I had initiated a preliminary inquiry into the concerns raised by RACS, and requested:

- confirmation about which of ASIO policies and procedures applied to security assessment interviews
- access to ASIO's written records for the four interviews which had been referenced by RACS in its complaint
- any legal advice (internal or external) about the presence of lawyers at security assessment interviews
- advice as to whether persons attending a security assessment interview could be provided with a copy of the confidentiality agreement they sign
- advice on what arrangements ASIO had in place with the then Department of Immigration and Citizenship (Immigration) in relation to the scheduling and notification of security assessment interviews.

5. ASIO provided me with relevant information on 19 April 2013.

Inquiry

6. Having reviewed the information provided, I wrote to the Director-General of Security on 2 May 2013 to advise him that I had decided to initiate an inquiry into the attendance of legal representatives at ASIO interviews, and related matters. The inquiry initially examined the concerns raised by RACS, in relation to security assessment interviews, but also considered related issues which arose during the course of the inquiry in respect of ASIO's broader policies and practices for the conduct of voluntary interviews (that is, those which are not conducted under the authority of a questioning warrant or a questioning and detention warrant).

7. I issued a notice to ASIO under s. 18 of the IGIS Act which required it to provide me with information concerning the:

- confidentiality agreements which ASIO may require from a legal representative if they attend an ASIO interview
- voice recordings and contemporaneous handwritten notes made by case officers for the four interviews referred to in the RACS complaint
- training and guidance material provided to ASIO officers about how to manage the attendance of legal representatives at security assessment interviews, and the subsequent requirement to document any related internal decision-making and discussions with or about the lawyer concerned
- guidance or advice communicated by ASIO to Immigration concerning administrative arrangements for security assessment interviews

- circumstances surrounding any occasion, in the past three years, when ASIO has elected not to proceed with an interview because of the proposed attendance of a legal representative at the interview.

8. I also advised RACS that I was conducting further inquiries and invited it to provide additional relevant details. In its response, RACS advised me that all of its lawyers are also registered migration agents but suggested that, in any event, ASIO did not have a legal basis for excluding migration agents from security assessment interviews.

9. My staff conducted a review of ASIO's electronic records to identify additional cases which raised issues relevant to the inquiry. A total of thirty cases were subject to preliminary examination, four of which were selected for further inquiry (in addition to the four referenced by RACS).

10. Immigration was subsequently advised that I wished to consider the manner in which ASIO had sought assistance, and coordinated with Immigration officers, when arranging the security assessment interviews selected as case studies for this inquiry. I issued Immigration with a notice under s. 18 of the IGIS Act requiring the agency to produce:

- any general guidance or advice provided by ASIO to Immigration (either in writing or verbally) concerning administrative arrangements for the conduct of ASIO security assessment interviews with visa applicants
- all correspondence, or records otherwise held by Immigration, concerning the specific administrative arrangements made for the eight nominated security assessment interviews. This was inclusive of any information provided by, or on behalf of, the visa applicant to Immigration about the proposed attendance of a legal representative or migration agent at the interview; and whether that information was subsequently passed to ASIO
- any other material that Immigration considered might be relevant to my inquiry.

11. In each of the eight cases I reviewed:

- Immigration and ASIO records relating to the scheduling and notification of the security assessment interview, including advice from Immigration to ASIO regarding the attendance of lawyers
- ASIO's security assessment interview brief
- ASIO's audio recording of the interview
- interviewing officer's written notes of the interview (where available)
- ASIO's security assessment interview report.

12. After considering this material, my preliminary view was that four of the eight cases gave me no significant cause for concern and need not be considered further. However, I continued to investigate the remaining four cases – two which had originated from the RACS complaint and two identified by my staff.

13. I issued notices under s. 18 of the IGIS Act to the four legal representatives involved in these cases, seeking information from each (to the extent that they would not be in breach of legal professional privilege) about their recollection of the process by which the interview they had attended was arranged, and their interactions with public officials. They each provided this information by way of a statutory declaration.

14. I also issued notices to four ASIO officers to attend before me and answer questions, under oath or affirmation, relating to the management and conduct of each interview.

15. On 30 August 2013, I provided the Director-General of Security with a draft report and offered him an opportunity to make submissions to me about matters of which I was likely to be expressly or impliedly critical, and to comment on my draft report and recommendations in accordance with the IGIS Act. I received his response on 17 September 2013, and such of those comments as were relevant have been included in this report.

16. On 16 October 2013 I provided the Attorney-General with a copy of the proposed report and offered him the opportunity to discuss the report in accordance with the IGIS Act. I met with the Attorney-General on 22 January 2014 to discuss the report.

PART 2 – LEGAL REPRESENTATION AT SECURITY ASSESSMENT INTERVIEWS

ASIO's internal guidance on the conduct of interviews

17. ASIO provided me with detailed advice on the requirements of its current policies and procedures in respect of voluntary interviews, including security assessment interviews. The full text of these documents is afforded a national security classification and cannot therefore be included in this abridged report.

18. In summary, the guidance provides that ASIO officers cannot prevent an individual requiring the presence of their lawyer at a voluntary interview. Where an interviewee requires the presence of their lawyer, ASIO should request the contact details of the lawyer and their firm, as well as an undertaking of confidentiality. However, if interviewing officers assess that the presence of the lawyer is counterproductive to the conduct of the interview, they may inform the interviewee and, if appropriate, terminate the interview.

19. I understand the policy as instructing ASIO officers to work from a starting premise that the attendance of a lawyer will not be problematic, unless sound reasons exist for thinking otherwise.

20. I also understand that the attendance of legal representatives at ASIO interviews has not been a common occurrence, to date.

Legal requirements

21. Having regard to the legal opinion provided to me by RACS and other relevant material provided by ASIO, I consider that ASIO's internal guidance is both sound and appropriate in the circumstances.

22. RACS contend that the exclusion of legal representation from a security assessment interview could amount to a denial of procedural fairness. In *Plaintiff M47/2012 v Director General of Security [2012] HCA 46* members of the High Court considered that the presence of a legal representative was a factor to be considered in deciding whether a person had been accorded procedural fairness, but there was no suggestion that this particular factor was essential. Each case must be considered individually.

23. I have received copies of all of the reports, finalised to date, containing the opinions and recommendations of the Independent Reviewer of Adverse Assessments (the Reviewer). While the details of those reports are afforded a national security classification and therefore cannot be included in this abridged report, the Reviewer has typically noted that she has no basis for concluding any failure by ASIO to afford procedural fairness. Her comments in respect of procedural fairness support the view that ASIO generally complies with relevant requirements when conducting interviews, including in the absence of lawyers.

24. If my understanding is correct, ASIO's internal guidance is not in conflict with the summary of RACS' legal advice referred to in paragraph 3, as long as each request for attendance by a lawyer is considered by ASIO on a case-by-case basis.

Is legal representation necessarily required for a vulnerable client?

25. In addition to the procedural fairness issues mentioned above, one reason given by RACS for the attendance of lawyers at interviews is that clients are often vulnerable and may have experienced trauma.

26. My office reviewed a number of audio recordings of interviews for this inquiry and assessed that ASIO officers conducted themselves in a professional manner during those interviews. Comments made by the Reviewer also support the view that ASIO officers are generally sensitive to the circumstances of applicants and act professionally.

27. I conclude that, in my view, the attendance of a legal representative at an ASIO interview is not likely to be necessary on the basis of the vulnerability of an interviewee, but their presence could protect ASIO from claims of inappropriate questioning or conduct by ASIO interviewing officers.

Information flow - practical implications of ASIO's internal guidance

28. At present, all information and advice passed to a visa applicant about their security assessment interview, and received from the applicant or their legal representative / migration agent, is passed through Immigration. From the material reviewed during this inquiry it seems clear that processes are not currently in place to ensure that relevant information is consistently sought by Immigration (on behalf of ASIO) and then passed to ASIO for proper consideration in accordance with its internal guidelines.

29. In one case study, the legal representative provided Immigration with more than a week's prior notice that she intended being present at her client's ASIO interview. After obtaining advice from ASIO, Immigration responded as follows:

It is strongly preferred that case workers/friends/family/migration agent do not sit in on interviews. Should they insist, the interviews may not proceed. The case worker (and others) may remain on site should the clients wish to consult with them during breaks, which clients are free to take at any time.

When the lawyer questioned the reason for her being denied permission to attend, she was only advised that '... your attendance at this interview is not a service required of you or funded under [the Immigration Advice and Application Assistance Scheme] arrangements...'. Her personal details were not subsequently passed to the interviewing officers and they were therefore unprepared for her attendance on the day.

30. Migration agents and immigration legal practitioners often operate as part of a small business or not-for-profit organisation and may provide services on a pro bono basis. The cost of dealing with government requirements is often substantial for such businesses and individuals. Much of the funding for these organisations is provided by way of financial support from the community or government contracts.

31. In a policy setting where the attendance of lawyers at interviews is not necessarily problematic, the proper course of action would be for ASIO to put processes in place with Immigration that allow for correct information to be provided ahead of time. This would also allow for ASIO to make informed decisions about the attendance of legal representatives on a case-by-case basis and for legal representatives to plan accordingly.

Recommendation 1: ASIO should work with the Department of Immigration and Border Protection (Immigration) to ensure that:

- (a) when making interview arrangements in Australia, visa applicants are specifically asked whether they want to have a legal representative attend
- (b) the lawyer's personal details are obtained by Immigration and passed to ASIO
- (c) a decision is made about whether the lawyer may attend and is conveyed prior to the day of interview.

Considerations that would cause an interview to be cancelled, or a lawyer to be denied permission to attend

32. I questioned ASIO officers about when the presence of a lawyer might be considered counterproductive to the conduct of an interview, thereby justifying a decision to cancel the interview or to deny a particular lawyer permission to attend.

33. The three examples of relevant considerations were provided to me. The details of these examples are afforded a national security classification and cannot, therefore, be included in this abridged report.

34. In my view, the reasons given by ASIO officers for considering when to cancel an interview could apply to some, but certainly not most, situations. I found that the approach taken by ASIO officers (as generally described by officers that I interviewed) currently tends to a default of strongly discouraging the attendance of lawyers. I do not believe that this is consistent with ASIO's stated internal guidance and may not be consistent with the legal requirements.

35. Recorded interviews showed that, on occasion, ASIO officers discussed the proposed presence of a lawyer at an interview, with the interviewee and/or the lawyer, for up to 30 minutes. More than one lawyer who provided statements to this inquiry claimed they felt that ASIO had placed significant pressure on them to discontinue their request to attend the interview with their client.

36. From all of the information provided to me, I believe that ASIO has had an apparent practice of discouraging the attendance of lawyers at interviews, which seems inconsistent with the intent of its internal guidance. In my view this practice is inappropriate unless the interviewing officers have a specific basis for believing that the lawyer's attendance may be of security concern.

Recommendation 2: ASIO should:

- (a) review its training to reinforce that the attendance of a lawyer at a security assessment interview is not to be considered problematic, unless sound reasons exist for deciding otherwise
- (b) ensure that decisions about whether a lawyer may attend an interview are considered and recorded on a case-by-case basis
- (c) ensure that in the absence of a specific cause for concern, interviews should commence without efforts by interviewing officers to discourage the attendance of a legal representative.

Attendance of migration agents

37. In the 2011-12 reporting period, I received a complaint from a State legal aid commission alleging that a client had been denied the right to legal representation during an ASIO security assessment interview. After making inquiries, it was established that ASIO believed the representative to be a migration agent, rather than a lawyer. This misunderstanding resulted in ASIO terminating the interview. At the conclusion of that inquiry I highlighted ASIO's responsibility to clarify the role of any support person attending an interview, particularly where there is some doubt.

38. I was therefore particularly concerned that in one case study from this inquiry a lawyer was not allowed to attend their client's interview because ASIO officers misidentified her as a migration agent.

39. RACS has submitted that migration agents should be accorded the same status as lawyers. I note that:

- just as lawyers are subject to professional and ethical obligations to their clients and as officers of the court; migration agents are subject to a Code of Conduct which sets out rules to be adhered to and imposes obligations of confidentiality to current and former clients.
- The *Migration Act 1958* requires that 'immigration assistance' may only be provided by registered migration agents. In all of the RACS cases, I was advised that the legal representative concerned holds both a state legal practising certificate and registration as a migration agent. If ASIO officers had asked those individuals if they were 'a migration agent' the answer would not have been determinative of whether, or not, they were also the visa applicant's legal representative. ASIO officers need to be aware that this is the case and they must specifically ask if any third party attending an interview is, in fact, also the applicant's legal representative.

Recommendation 3: ASIO should:

- (a) clarify the status of any person who wants to attend an interview to ascertain whether they are the interviewee's legal representative
- (b) further consider whether migration agents should be accorded the same status as lawyers, with their attendance at interviews being addressed on a case-by-case basis.

Confidentiality undertakings

40. Where an interviewee requires the presence of their lawyer at an interview, ASIO will request the contact details of the lawyer and their firm, as well as an undertaking of confidentiality.

41. I was provided with a copy of a confidentiality undertaking and advised that it was the standard one that was used. The document's first page is headed 'Acknowledgement of confidentiality obligation' and continues:

I [name] hereby acknowledge that I have read subsections 18(2), 92(1) of the [ASIO Act] and subsections 79(2)-(4) of the *Crimes Act 1914*. ... I undertake to preserve the confidentiality of any information entrusted to me in confidence by or on behalf of the Director-General of Security and I will not communicate or publish any such information to any person other than in accordance with the provisions of the [ASIO Act] and the *Crimes Act 1914*. I understand that if I fail to preserve that confidentiality I may be guilty of offences against those Acts.

42. Attached to the front page are extracts of the relevant legislative provisions including penalty provisions and the person is required to sign each page. In summary, the information includes that:

- Subsection 18(2) of the ASIO Act generally provides that, subject to certain exceptions that are not relevant here, a person who makes a communication of any information or matter that has come to the knowledge or into the possession of the person by reason of their having entered into any contract, agreement or arrangement with ASIO is guilty of an offence.
- Subsection 92(1) of the ASIO Act generally provides for an offence for the publication of the identity of an officer of ASIO.
- Subsections 79(2) and 79(3) of the Crimes Act 1914 generally provides that a person that communicates a 'prescribed sketch, plan, photograph, model, cipher, note, document or article (the prescribed material), or prescribed information to a person (apart from exceptions not relevant here); or retains the material or information, or fails to comply with a direction given by a lawful authority with respect to the retention or disposal of the material or information is guilty of an offence. (Subsection 79(1) of the Crimes Act 1914 –which is not provided to the person as part of the undertaking – sets out what is prescribed material and would seem to include potentially secret information communicated by an ASIO officer during an interview.)

43. RACS suggested that there is no express power given to ASIO to require a lawyer who attends a security interview to sign a confidentiality undertaking. This is correct. However, in my view, it is not unreasonable for ASIO to require an explicit undertaking from a lawyer to preserve the confidentiality of any information and to draw their attention to potentially relevant statutory provisions.

44. In two of the case studies for this inquiry, the legal representative requested a copy of the confidentiality undertaking that they had signed and they were advised that was not possible. ASIO advised me during the course of this inquiry that it was allowed.

45. I have three concerns with the current process:

- The written confidentiality agreement sets out potentially relevant and complex statutory provisions, but is provided to the person at the interview. They do not have time to consider it fully and understand their obligations.
- The document is incomplete. In particular, subsections 79(2) and 79(3) of the *Crimes Act 1914* make no sense without a definition of what is 'prescribed'. In any event, a prudent lawyer would need to have regard to the provisions in context to understand their obligations. This problem would not be so acute if the undertaking was provided prior to the interview so that a person had some time to examine it.
- As the confidentiality obligations are ongoing, there should be a clear requirement to provide the signatory with a copy so that they can continue to have regard to it.

46. In a preliminary draft of this report, I noted that the unsigned template is not a confidential or classified document and, in my view, there is no reason why it could not be made generally available before the interview. ASIO has subsequently undertaken to provide new guidance to its officers, stipulating that interviewing officers must provide sufficient time at the start of an interview for the legal representative to read, clarify and understand the agreement; and they must take duplicates of the document with them to enable one copy to be left with the signatory.

Recommendation 4: ASIO should:

- (a) provide guidance for interviewing officers on when a written or verbal confidentiality undertaking should be requested from a person
- (b) provide the template undertaking document to attendees before the interview commences
- (c) provide a copy of a written undertaking to the signatory.

PART 3 – RELATED MATTERS

The voluntary nature of ASIO interviews

47. ASIO most recently provided general advice to Immigration about how its interviews with on-shore protection visa applicants are to be arranged on 4 July 2012:

Advice for booking interviews on behalf of [ASIO]

...

Contacting the visa applicant/migration agent

Immigration will contact the visa applicant (or their migration agent) directly to arrange the interview.

...

The visa applicant or migration agent can be told that the interview is a **necessary** part of the visa application process [*emphasis added*].

...

Immigration to advise [ASIO] prior to the interview

If the applicant or migration agent indicates a third party will attend the interview with the applicant, provision of the name and company details of the third party is desirable.

48. In my view, visa applicants should be clearly advised that interviews are voluntary.

49. I recently wrote to the Director-General of Security drawing his attention to correspondence between the President of the Law Council and the Attorney-General in 2010 in which the Law Council expressed concern that people who are approached by ASIO may be under certain misconceptions, such as not understanding that the discussions are voluntary, and requesting that he amend the Attorney-General's Guidelines to require that ASIO provide certain information prior to questioning. At the time, the Attorney-General responded to the Law Council:

The concerns you have raised about possible misconceptions about ASIO interviews are covered in detail in ASIO's internal policies and procedures. These internal documents provide extensive guidance to ASIO officers on requirements and procedures that should be followed in conducting interviews.

While I appreciate your concerns that ASIO internal policies and procedures are not publicly available, these documents provide practical guidance on operational matters that would not be appropriate to make public. Whilst ASIO's policies and procedures are classified documents, the IGIS is consulted on the development and update of any amendments to these documents. The IGIS also has access to all ASIO material in overseeing compliance with the internal policies and procedures.

... I am satisfied that ASIO's internal policies and procedures framework, coupled with training, experience and oversight accompanying ASIO investigations, ensure that interviews are conducted with propriety and cultural sensitivity, and sufficiently address the concerns raised in your letter.

50. Having reviewed the current guidance contained in ASIO's internal policies and procedures, I made a recommendation for adjustment concerning the conduct of interviews.

51. The details of my recommendation and its supporting text have been redacted from this abridged report on the advice of ASIO that their presence in a public document would be prejudicial to security.

Training on the use of interpreters

52. During the course of this inquiry, I was advised that ASIO had recently introduced training on the use of interpreters for staff who undertake visa security assessment interviews.

53. I note that this training post-dates the audio recordings of interviews which were reviewed during this inquiry. Notwithstanding this, I would draw ASIO's attention to the 2009 Commonwealth Ombudsman inquiry report into the use of interpreters by Australian government agencies and the better practice principles it contains, for reference when ASIO next updates the relevant training material.