



Muslim Legal Network NSW

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## Answering Questions:

### What are my rights and obligations when dealing with ASIO and Police?

This Fact Sheet is prepared by the Muslim Legal Network NSW as a resource for participants who attended the community information night, *Counter-Terrorism Laws and You* on Sunday 6 December 2015. This Fact Sheet is adapted from the Australian Muslim Civil Rights Advocacy Network's publication, *Anti-Terrorism Law: ASIO, the Police and You* (3<sup>rd</sup> edition).

This Fact Sheet is **not** intended as legal advice. You should seek legal advice if you or someone you know becomes directly affected by Australia's Counter-Terrorism laws.

The information contained in this Fact Sheet is accurate as of February 2016.

### Australian Security Intelligence Organisation (ASIO)

#### Who is ASIO?

The Australian Security Intelligence Organisation (ASIO) is an agency that gathers intelligence or information relating to security. ASIO gathers intelligence by looking at publicly available sources such as television, radio and social media; questioning people; using spies and informants; and intercepting communications such as mail and telephones under warrants.

ASIO is not responsible for law enforcement activities such as arresting or charging people. This is the responsibility of state and federal Police. ASIO officers do not carry firearms.

#### What powers does ASIO have?

ASIO has 'special powers' to collect intelligence under warrants. These include warrants to use listening and tracking devices, to access computers remotely, to enter and search premises, and to examine postal records. ASIO is not allowed to search a person or premise without a warrant.

ASIO also has the power to question people and detain people for questioning under warrants in terrorism-related matters.

ASIO must obtain the consent of the Minister before applying for a warrant from a Federal Magistrate or Judge. The Minister must reasonably believe that the warrant will substantially assist with the collection of intelligence about a terrorism matter before consenting to the making of the request.

#### What is a 'questioning' warrant by ASIO?

A 'questioning' warrant requires a person to present themselves at a specific time and place for questioning before a 'prescribed authority'. A 'prescribed authority' is a former or serving Judge or the President (or Deputy) of the Administrative Appeals Tribunal. A person has the right to contact a lawyer before appearing for questioning.

A 'questioning' warrant is issued in circumstances where there are reasonable grounds to believe that it will substantially assist in the collection of intelligence that is important in relation to a 'terrorism offence'.

The warrant must specify certain actions ASIO is authorised to do, such as requiring a person to provide information or produce records that are important in relation to a terrorism offence. A 'questioning' warrant may also authorise ASIO to make copies of records produced by the person.

A person **must** truthfully answer all questions permitted by a 'questioning' warrant. It is an offence to not appear for questioning or to give false and misleading answers under a 'questioning' warrant, punishable by up to 5 years imprisonment. A person should not, however, answer questions if the 'prescribed authority' is not present during the questioning process.

#### **How long can I be questioned under a 'questioning' warrant by ASIO?**

A person may be questioned by ASIO under a 'questioning' warrant for a maximum of 24 hours in eight-hour blocks. Where an interpreter is required, a person may be questioned for a maximum of 48 hours.

#### **What is a 'questioning and detention' warrant by ASIO?**

In certain circumstances, a person may be 'detained' for questioning by ASIO under a 'detention and questioning' warrant. This occurs where there are reasonable grounds to believe that a person may not appear before a 'prescribed authority', may destroy or damage a record, or may alert a person involved in a terrorism offence of the investigation.

As with 'questioning' warrants, ASIO must first obtain the consent of the Minister before applying for a 'detention and questioning' warrant from a Judge. A person detained by ASIO is not charged with a crime.

#### **How long can I be detained under a 'questioning and detention' warrant?**

Under a 'questioning and detention' warrant, a person may be detained for a maximum of seven days.

#### **What do I have to do if I am specified in a 'questioning and detention' warrant?**

In addition to the requirement of truthfully answering questions, a person specified in a 'questioning and detention' warrant:

- must surrender all Australian and foreign travel documents (for the period specified under the warrant);
- must not leave Australia without the permission of ASIO;
- must not tell others that they are being questioned or detained by ASIO if the warrant is still in force (which is no more than 28 days); and
- must not tell others about any operational information relating to the warrant for 2 years after it expires unless permitted to do so.

It is an offence to not comply with these conditions, punishable by maximum 5 years imprisonment.

#### **Can I be detained by ASIO if I am under 18 years?**

A person who is 16 or 17 years of age may be detained for questioning under a warrant by ASIO. The warrant must allow a young person to contact their parents, guardian or a person representing their interests to be present during the questioning process.

A person under 16 years of age cannot be detained or questioned by ASIO.

#### **What should I do if I am contacted by ASIO for a 'chat'?**

A person may be contacted by ASIO for an 'informal chat'. If there is no warrant to question or detain a person, then they **do not** have to go anywhere with ASIO officers and/or answer any of their questions.

It is important to know that any information given to ASIO in an 'informal chat' may later be used against that person and/or any other person, and may be provided to Police. A

person **should only voluntarily speak to ASIO after receiving legal advice.**

If a person is contacted by an ASIO officer for an 'informal chat', then they should:

- ask the officer to identify themselves and what they want;
- ask for some kind of confirmation that the officer is in fact from ASIO;
- seek legal advice before agreeing to meet with ASIO, particularly if unsure whether any information they have could have a detrimental effect on them or another person;
- if a person decides to meet with ASIO, then ask for a friend to sit in during the meeting and to take detailed notes of what is discussed as well as record the meeting;
- make a record of the names of the officers they meet with, and the date and place at which they meet;
- ensure that the meeting is held in a place that provides reasonable privacy; and
- keep a detailed record of questions asked and answers provided, as well as any documents shown.

## **Australian Federal Police (AFP) and NSW Police**

### **What is the AFP?**

The Australian Federal Police (AFP) investigates federal crimes, including terrorism offences, and enforces federal criminal law. The AFP and state Police are responsible for arresting and charging people.

### **What powers does the AFP have?**

AFP officers have general police powers of search, arrest and detention. Both the AFP and NSW Police have powers to search and detain a person without a warrant if they reasonably suspect that the person might have just committed, might be committing or might be about to commit, a 'terrorism act'.

The AFP can also ask a person for their name and address if they reasonably believe that the person can help with their inquiries into a serious crime. It is an offence for a person to fail to give their name and address if the officer tells them why they need their details.

If a person is in a Commonwealth place (such as an airport or shipping wharf) which has been declared as a 'prescribed security zone', then the officer is not required to have reasonable suspicion. Police can ask anyone found in the 'prescribed security zone' to provide their name, address, reason for being in the area and proof of identity. It is an offence for a person to not answer these questions if they are told that this applies to them.

The Minister can declare a place to be a 'prescribed security zone' if they believe that a terrorist act has occurred or is about to occur. The declaration remains in place for a maximum of 28 days (unless revoked beforehand) and is broadcast by a television or radio station, published in the *Gazette* and published on the internet.

### **What powers does the state Police have?**

NSW Police has the same powers as the AFP. The only difference is that NSW Police can 'strip search' a person without a warrant or without arresting a person if the officer has reasonable grounds to believe that there is a threat of a 'terrorism act' occurring in the near future and that the search will substantially assist in preventing it. NSW Police may also 'strip search' a person where there are reasonable grounds to suspect that it is necessary, serious and urgent in the circumstances.

### **How long can Police detain me when investigating a 'terrorism' offence?**

When investigating a 'terrorism' offence, Police can detain a person without charge for a maximum of four hours if they are over 18 years of age. A person under 18 years, or an

Aboriginal person or a Torres Strait Islander, can be detained for a maximum of two hours.

However, Police can make an application to a Magistrate to extend this period. It cannot be extended to more than 20 hours. Therefore, a person cannot be detained without charge for a total period of more than 24 hours.

It is important to note that 'dead time' **does not** count towards the period of detention. This includes the time it takes:

- to drive a person to their place of detention;
- for a person to contact their lawyer, friend, relative or parent;
- for a person's lawyer or family to arrive;
- for a person to rest during the questioning; and
- to carry out a forensic procedure.

Despite the 'dead time' that may be disregarded, a person may not be detained for longer than seven days. If, however, the AFP can establish that:

- a further offence was committed at the end of the person's first period of detention; or
- that an offence was committed in different circumstances to which the first detention arose

then a person may be detained for longer than seven days when investigating terrorism. They cannot, however, be questioned about the first offence they were detained for.

### **Can the Police search me?**

The AFP and NSW Police can conduct a 'frisk' or 'ordinary' search on a person for a terrorism-related item or for anything that is suspected on reasonable grounds to be under the person's immediate control. They do not need a warrant for this purpose.

A 'frisk' search is a where a Police officer quickly runs their hand over the person's

outer clothing. An 'ordinary' search requires a person to remove items like an overcoat, jacket, hat or gloves to be examined.

The AFP can also 'strip search' a person if they have been arrested for a terrorism offence. NSW Police can conduct a 'strip search' on a person regardless of whether they have been arrested. A 'strip search' involves a person removing all their clothes and an officer examining the clothes and external body.

### **Do I have to remove my head and/or face covering if I am being searched by Police?**

If a 'strip search' is being conducted, then a woman will be required to remove her face and head covering. 'Strip searches' **must** be conducted in a private place and by an officer of the same gender. The officer must not look at a person for longer than is necessary.

If an 'ordinary' search which allows an officer to ask a person to remove their hat is conducted, it is unclear whether a Muslim woman will be required to remove her head covering. If she is required to do so, then the search will be conducted by an officer of the same gender if practicable.

Even in situations where a woman is not subject to a 'search', a police officer may still request a woman to remove her face covering to provide photo identification or to identify herself. The viewing of the face must, as far as is reasonably practicable, be conducted in a way that provides reasonable privacy and as quickly as is reasonably practicable.

### **Can the Police search my car and house?**

Police can search a person's car for a terrorism-related item without a warrant.

Ordinarily, Police need a warrant to search a person's house. However, Police can do so without a warrant if they reasonably suspect that it is necessary to prevent an item at the house being used for a terrorism offence and that there is a serious and imminent threat to a person's life, health or safety.

### What else can the Police do?

For any investigation, Police can apply for warrants that assist them in gathering evidence. These include warrants for:

- intercepting telephones;
- photographic and video surveillance of a person through hidden cameras and undercover operatives;
- tracking devices that can be placed on a vehicle to monitor the location and times of travel;
- listening devices to record the audio in a place (such as a car or home) or on a particular person. Listening devices can be hidden on an undercover operative, known as a 'wire', to record conversation;
- intercepting the mail of a person; and
- obtaining internet/computer records.

### What should I do if the Police approach me on the street?

If a person is approached by Police on the street, they **do not** have to answer any questions unless they are under arrest. If, however, the officer reasonably believes that the person can help them with their inquiries in relation to a serious offence (such as 'terrorism'), then they can ask them their name and address. As previously noted, it is an offence to not provide this information if the officer explains why they need the details.

In any encounter with the Police, it is important to:

- remain calm;
- ask the officers to identify who they are and to explain what they want;
- provide your name and address if asked. However, **you are not obliged to make a statement or give an interview to the Police, particularly if you have not first spoken to a lawyer. You are also not obliged to sign anything.** This applies whether or not you are under an arrest;

- ask if you can speak to a lawyer before responding to any requests;
- if you have any trouble understanding anything they say, always ask for an interpreter. In the meantime, do not say anything, except to confirm your name and address;
- if they say they have a warrant, ask for a copy;
- if they have a warrant, check that the warrant has not expired;
- take note of exactly what the warrant authorises the officers to do; you do not have to do any more than what is stated on the warrant;
- check if there are any restrictions or conditions on what the officers can do;
- keep a record of the names and identity numbers of the Police officers visiting you, the date and the time;
- keep a detailed record of any contact, touching, harassment or intimidation by any officer that you experienced.

### What should I do if I am contacted by Police?

- Ask why they are contacting you. Are you under arrest or do they have a warrant?
- Whether you are under arrest or not, you are not obliged to answer any questions. Speak to a lawyer before you answer any questions.
- Make a record of all conversations with Police, including who you spoke to, time and date.

### Can I stop a Police officer of the opposite gender from touching me?

This depends on the situation. If an officer touches a person to perform a function of their job, such as an arrest, then they can ask for a same sex officer to be made available to do this. If it is reasonable in the circumstances, the Police should oblige. If it is not reasonable, it may not be possible.

## Right to Silence

### What is the 'right to silence'?

The 'right to silence' is the right to not give any information or answer any question by the Police. This right applies whether a person is in custody or at any other time the Police question a person, including on the street.

The only information a person is required to give Police, if asked and in certain circumstances, is their name and address. Anything else a person says to Police may be used against them in court. The fact that a person exercises their 'right to silence' cannot be used against them in court.

### Do I have the 'right to silence' if I am questioned by ASIO?

If there is no warrant, a person does not have to answer any question or speak to ASIO. If, however, a person is subject to a 'questioning' warrant by ASIO, then they **must** truthfully answer all questions permitted by the warrant. It is an offence not to do so.

Any information a person gives to ASIO under a warrant cannot be used against them in court. If, however, the person is charged with an offence under the ASIO Act (such as giving a false statement) then the information may be used against them. The information may also be used to further ASIO's investigation and lead them to other information that may be used against the person at a later time.

### What happens if the Police want me to participate in an interview?

A person is **not** required to participate in an interview with the Police. This is part of the 'right to silence'. A person should *not*, under any circumstance, participate in a Police interview without first getting legal advice.

It is *not* a good idea for a person to sit in an interview and say 'no comment' or answer some questions and not others. A person should tell the Police outright 'I do not want

to be interviewed'. There is no need to go into the interview room to say that.

If upon getting legal advice a person chooses to participate in an interview, they must ensure that they remain calm at all times and not react to questions. The interview is always recorded using audio and visual means. Police may also take a note of a person's reactions, like laughing and shrugging of shoulders, during questioning.

## Preventative Detention Orders

### What are Preventative Detention Orders?

The Police can detain a person under a 'Preventative Detention Order' where there is a threat of an imminent 'terrorist act' or after a recent 'terrorist act' where it is likely that evidence will be destroyed.

In order to obtain a 'Preventative Detention Order', AFP will start by applying to a senior officer for an 'Initial Preventative Detention Order'. This will allow the AFP to detain a person for up to 24 hours.

If the AFP want to detain a person for longer, they must apply to an 'issuing authority' (a serving or former Judge) for a 'Continued Preventative Detention Order'. This allows the AFP to continue to detain a person for up to 48 hours from the time they first took the person into custody under the 'Initial Preventative Detention Order'.

A person subject to a 'Preventative Detention Order' can make representations to the senior AFP officer to try and get the Order revoked. They also have the right to challenge the Order in the Federal Court.

The Police can also apply to the 'issuing authority' to prohibit contact between a person subject to a 'Preventative Detention Order' and any other person.

### **In what circumstances can a 'Preventative Detention Order' be made?**

Before making a 'Preventative Detention Order' ('the Order'), the senior officer and/or the 'issuing authority' must be satisfied that:

- there are reasonable grounds to suspect that a person will engage in a 'terrorist act', or possesses a thing connected with a 'terrorist act', or has done an act in preparation for or planning of a 'terrorist act'; and
- the Order will substantially assist in preventing an imminent 'terrorist act' that is expected to occur in the next 14 days; or
- the Order will substantially assist in preserving evidence in the aftermath of a 'terrorist act' that has occurred within 28 days ; and
- detaining the person is reasonably necessary for the above purposes.

### **How long can I be detained under a Preventative Detention Order?**

Under a Commonwealth 'Preventative Detention Order', a person may be detained for a maximum of 48 hours. Under a state or territory Preventative Detention Order, a person may be detained up to 14 days.

### **What powers do the Police have under a Preventative Detention Order?**

Under a 'Preventative Detention Order', Police have the powers to:

- enter property using reasonable force to carry out a search or to take a person into custody;
- conduct a 'frisk' (where police quickly run their hands over a person's outer clothing) or 'ordinary' (where a person may be required to remove items like an overcoat or hat for examination) search on a person;
- ask any person for their name and address if the police believe they can help them carry out the order.

### **Do I have to answer questions if I am being preventatively detained by Police?**

A person subject to a 'Preventative Detention Order' has a right not to be questioned. They should **not** answer any questions whilst being detained by police.

### **Can a person under 18 years be preventatively detained?**

A person who is at least 16 years old but less than 18 years can be preventatively detained. However, they must be detained separately from adults. They can also have a parent or guardian visit them while being detained.

Under current law, a person under 16 years of age cannot be preventatively detained.

### **Who can I contact while I am being detained under a Preventative Detention Order?**

Under a 'Preventative Detention Order', a person can contact a lawyer. If the lawyer is not available, the Police must give the person reasonable assistance to contact another lawyer. All contact is, however, monitored.

A person subject to a 'Preventative Detention Order' can also contact one family member or housemate, one employer, and one employee, as applicable, and anyone else the police allows. The contact, however, is only to let the other person know they are safe but not contactable for the time being. They **cannot** tell anyone that they are subject to a 'Preventative Detention Order'.

## **Control Orders**

### **What is a Control Order?**

A 'Control Order' is issued by a Court and can impose a variety of obligations, prohibitions and restrictions on a person. It effectively controls the movements of a person. A person does not need to be charged with a criminal offence to be subject to a Control Order.

The AFP must obtain the consent of the Attorney-General before applying to the Court for a 'Control Order', unless the circumstances are urgent. The Court will make an 'Interim Control Order' if it is satisfied on the balance of probabilities (i.e. more likely than not) that:

- the making of a Control Order will substantially help in preventing a 'terrorist act'; or
- a person has trained with or provided training to a banned 'terrorist organisation'; or
- a person has engaged in a hostile activity in a foreign country; or
- a person has been convicted with a terrorism-related offence in Australia or in a foreign country; or
- the making of a Control Order will prevent the provision of support for a 'terrorist act'; or
- the making of a Control Order will prevent the provision of support for the engagement in a hostile activity in a foreign country.

#### **Can I contest the Control Order?**

The 'Interim Control Order' is made without the knowledge of the person subject to it. They do not have an opportunity to contest the Order at the interim stage.

The 'Interim Control Order' only comes into effect once it is personally served upon the person subject to it. The 'Interim Control Order' will specify when a person is required to attend Court to have the Order confirmed or revoked. This will be at least three days after the making of the Interim Control Order.

A person subject to an 'Interim Control Order' will be given details to allow them to respond to the substance of facts. However, the AFP will not be required to disclose information where it is likely to prejudice 'national security'. A person who is served with an Interim Control Order should seek **urgent legal advice**.

#### **How long does a Control Order last?**

Once an Interim Control Order is 'confirmed' by the Court, it can last for up to 12 months. The AFP may, however, seek a new Order when the old one expires. A person subject to a Control Order may at any time apply to the Court to have the Order varied or revoked.

#### **What conditions can be imposed by a Control Order?**

Under a Control Order, a person can be subject to a range of conditions including:

- requirement to wear a tracking device;
- requirement to remain in certain premises between certain times;
- requirement to report to someone at certain time and place;
- restriction from being at certain places or from leaving Australia;
- restriction from communicating or associating with certain people;
- restriction from owning or using certain articles;
- restriction from carrying out certain activities; and
- restriction from using certain technology, including the internet.

The Court must be satisfied that each of the conditions is reasonably necessary and appropriate for the purpose of protecting the public from a 'terrorist act', or for preventing the provision of support for a 'terrorist act', or for preventing the provision of support for the engagement in a hostile activity in a foreign country.

It is an offence for a person to breach the conditions of a Control Order, punishable by up to 5 years imprisonment.

#### **Can a Control Order be imposed on a person under 18 years?**

A Control Order can be imposed on a person who is 16 or 17 years of age. However, a



Control Order can only apply to a young person for a maximum of three months.

Under current law, a person under 16 years of age cannot be subject to a Control Order.

## **Legal Help in NSW**

If you need legal advice, you may contact:

### **Legal Aid NSW**

Tel: 9219 5000

<http://www.legalaid.nsw.gov.au>

Call or visit the website for details of your closest Legal Aid office

### **Legal Aid Hotline (for under 18s)**

Tel: 1800 101 810

### **Community Legal Centres NSW**

Tel: 9212 7333

[www.clcnsw.org.au](http://www.clcnsw.org.au)

Call or visit the website for details of your closest Community Legal Centre

### **Law Society of NSW**

Tel: 9926 0333

<http://www.lawsociety.com.au>

Call or visit the website to find a private lawyer located near you



Muslim Legal Network NSW

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