

**SUBMISSION OF THE FEDERATION OF COMMUNITY
LEGAL CENTRES (VIC.) INC**

**TO THE PARLIAMENTARY JOINT COMMITTEE ON ASIO,
ASIS AND DSD**

**REVIEW OF ASIO'S SPECIAL POWERS RELATING TO
TERRORISM OFFENCES AS CONTAINED IN DIVISION 3
PART III OF THE AUSTRALIAN SECURITY
INTELLIGENCE ORGANISATION ACT 1979**



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This submission was prepared by Marika Dias, Dan Nicholson and other members of the Anti-Terrorism Laws Task Group, on behalf of the Federation of Community Legal Centres (Vic).

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The Federation of Community Legal Centres

The Federation of Community Legal Centres Vic. Inc ('the Federation') is the peak body for forty-nine Community Legal Centres across Victoria, including both generalist and specialist centres. Community Legal Centres ('CLC's) assist in excess of 60,000 people throughout Victoria each year by providing provide free legal advice, information, assistance, representation, and community legal education.

Overwhelmingly, the people who use Community Legal Centres are on low incomes, with most receiving some form of pension or benefit. Community Legal Centres also see a considerable number of people from culturally and linguistically diverse communities.

Summary

The Federation of Community Legal Centres wishes to express a number of concerns regarding the operation, effectiveness and implications of Division 3 Part III of the Australian Security Intelligence Organisation Act 1979 ('the Act').

In our submission, the Committee should recommend that the powers granted to ASIO under Division 3 of the Act, which expire on 23 July 2006, not be renewed. We submit that these powers threaten free, open democratic society and human rights and are fundamentally flawed. These concerns are examined in detail below.

However, should the Committee opt to recommend that the laws be extended beyond 23 July 2006, we submit that a number of changes are necessary in order to reduce the threat these laws pose. In summary, these recommendations are:

1. That additional information about the operation of such laws be made available for future parliamentary reviews
2. That ASIO's special powers be limited to certain terrorism offences, excluding association and similar offences; that the powers only apply to those suspected of committing terrorism offences, not those with information relating to terrorism offences.
3. That, in relation to the issuing of warrants, ASIO be required to meet all requirements in relation to the issuing authority that it must meet in relation to the Attorney General.
4. That there be no requirement that persons surrender their passports and be prohibited from leaving Australia prior to a warrant being issued.

5. That the right to silence be retained during questioning by ASIO.
6. That no prosecutions be made for failing to provide information or a thing to ASIO without prosecution evidence to prove beyond reasonable doubt that the person had the thing or such information.
7. That those questioned or detained have unfettered access to a legal representative of their choice.
8. That a mechanism be developed for complaints against the prescribed authority.
9. That an exemption be made to the secrecy provisions to allow those detained or questioned to give evidence at the trial of an officer who contravenes the procedural safeguard provisions of the Act.
10. That the secrecy provisions in the Act be removed.

Lack of publicly available information for this review

Those affected by ASIO's powers to detain and question ('ASIO's special powers') have almost no capacity to comment or provide information about the operation of these powers because of the secrecy provisions in the Act.¹ This problem is exacerbated by the fact this review is being conducted within 2 years of the first warrant being issued. The impact of this being that those questioned and detained are still unable to freely speak about their experiences.

As a result, most of the information about the operation of these powers comes from ASIO's reports, and is extremely limited in scope.

The Federation requested additional information from the Attorney-General on 3 March 2005. Certain additional information was provided to the Federation on 18 March 2005, including that:

- No detention has been carried out under the Act
- All those questioned have had access to legal representation, although in one instances the legal representative to did not attend at all times
- No legal representatives have been removed from questioning proceedings
- One oral complaint has been made to the Inspector-General of Intelligence and Security

¹ Section 34VAA(2), *Australian Security Intelligence Organisation Act 1979*. Except where otherwise stated, all provisions referred to in footnotes below are provisions from this Act.

This was not sufficient to address our concerns about a lack of publicly available information in relation to the exercise of ASIO's special powers.

There is an absence of publicly available information from sources independent of the agency exercising powers under the Act. This lack of independent information undermines the capacity of organisations such as ours to comment on the operation, effectiveness and implications of the ASIO powers. It also impedes the Committee's ability to conduct an effective review.

We submit that in future additional material about the operation of these and similar powers should be made available so as to assist in the process of review.

The Committee's capacity to conduct a comprehensive review is also hampered by the relatively brief period in which submissions may be made. This has effectively prevented bodies such as ours from undertaking a process of widespread and thorough community consultation.

A more effective review would be facilitated by either broadening the timeframes involved or by conducting oral hearings (given the limited period in which written submissions may be made).

Breadth of application of ASIO's special powers

The application of ASIO's special powers, in our submission, is unnecessarily broad for two reasons: the breadth of the offences in relation to which ASIO is given special powers; and the indirect nature of the connection between a person detained or questioned and these offences.

ASIO's special powers apply to all terrorism offences under Division 5.3 of the Commonwealth Criminal Code. These offences are built on an inordinately broad definition of terrorist act,² and include rather expansive offences such as being a member of, supporting, giving or receiving training (of any type) from, or associating with a terrorist organisation.

ASIO has powers to detain and question, not just those suspected of the above offences, but almost anyone with important information relating to terrorism offences.³

The combined effect of these two factors is that a significant proportion of the population could be subject to ASIO's special powers. Supporters of present-day equivalents of the ANC or East Timorese independence, or even to supporters of organisations in support of the invasion of Iraq such as the Liberal Party, would fall within the scope of the terrorism offences. Although prosecutions of the

² Criminal Code, section 100.1

³ Section 34C and Section 34D

above are unlikely, anyone with important information about groups such as these could be subject to questioning and detention. Given the coercive nature of these powers, we submit that such wide application is unreasonable.

We recommend that ASIO's special powers be limited to certain terrorism offences, excluding association and similar offences; that the powers only apply to those suspected of committing terrorism offences, not those with information relating to terrorism offences.

Process for issuing of warrants

The process for the issuing of questioning and detention warrants consists of two steps.

Firstly, ASIO must satisfy the Attorney-General that:

- The issuing of the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
- Relying on other methods of collecting that evidence would be ineffectual; and
- (in the case of detention warrants only), if the person is not detained, they would alert someone involved in a terrorism offence about the investigation, not appear for questioning, or destroy evidence.⁴

Secondly, ASIO must satisfy an issuing authority – a Federal Magistrate or Federal Court Judge – only that the issuing of the warrant will substantially assist the collection of intelligence that is important in relation to a terrorist offence.⁵

There is no requirement that ASIO must satisfy the more stringent requirements for the issuing of a warrant in relation to the issuing authority that it is required to meet in relation to the Attorney General. The issuing authority, unlike the Attorney General, is a non-political, independent judicial figure.

We submit that to provide an adequate safeguard, ASIO be required to meet all requirements in relation to the issuing authority that it is required to meet in relation to the Attorney General.

Passports and Leaving Australia

Where a warrant is sought in relation to a person, that person must surrender any passport they hold, both foreign and Australian, to an enforcement officer.⁶ The Act also specifies that a person must not leave Australia after they have

⁴ Section 34C

⁵ Section 34D

⁶ Section 34JBA

become aware that a warrant has been sought.⁷ This applies whether or not a warrant is ultimately issued. Prior to the issuing of a warrant, given that a warrant may never be issued, such significant restrictions on a person's freedom of movement are unreasonable.

Detention without trial

The principle that no one should be arbitrarily arrested or detained is a fundamental principle of both common law and of international human rights law, including the International Covenant on Civil and Political Rights (ICCPR).⁸

The Act gives ASIO the power to detain without charge people who are not suspected of having committed any offence,⁹ without adequate recourse to judicial review of that detention.

These laws arguably breach Australia's international obligations pursuant to the ICCPR. Although these obligations may be derogated from in declared times of national emergency,¹⁰ Australia has made no such declaration to the United Nations.

Right to silence

Those questioned under the ASIO Powers have no right to silence. Failure to produce information or hand over a thing when asked is an offence punishable by up to five years' imprisonment.¹¹ If the person does not have the information or thing that ASIO is seeking, an evidentiary burden falls on them to introduce evidence that suggests a reasonable possibility of this, again requiring them to waive their right to silence.¹²

The right to silence is a fundamental principle of our justice system. It is of great concern to us that it is abrogated in such broad circumstances, in a scheme shrouded in secrecy and lack of public accountability.

Legal Representation

Where a person is being questioned under the Act, there is no requirement that ASIO permit the person to obtain legal advice or to have a lawyer present. In

⁷ Section 34JBB

⁸ *International Covenant on Civil and Political Rights*, Art 9

⁹ Section 34C, 34D

¹⁰ ICCPR, Art 4

¹¹ Section 34G(3), (6)

¹² Section 34G

fact, where a person's chosen lawyer is deemed to be a security risk by the prescribed authority, the Act stipulates that they may be prevented from contacting that lawyer.¹³

Even where a person is permitted to contact a lawyer, the Act provides that the person may be questioned in the absence of a lawyer of their choice.¹⁴ The Act further provides that a person may be detained on the direction of the prescribed authority, even where they are subject to a questioning warrant and there is no detention warrant.¹⁵ As there is no requirement that a person present for questioning be allowed to communicate with a lawyer, effectively a person may be detained without being afforded the chance to contact a lawyer.

Where lawyers are contacted, their involvement is subject to significant restriction. Both the Act and the relevant ASIO Protocol specify that the person's contact with the lawyer must be conducted in a way that can be monitored by the officers responsible for executing the warrant.¹⁶ This is a grave incursion on the right of the person to obtain legal advice in a confidential setting. It would also undoubtedly impede the capacity of the lawyer to obtain full instructions and to provide comprehensive legal advice.

The lawyer contacted is only entitled to receive a copy of the warrant itself and no other documents.¹⁷ This may also limit the lawyer's capacity to fully advise the person being questioned. During questioning, the lawyer involved may not intervene in the questioning except for the purposes of seeking clarification of an ambiguous question.¹⁸ Furthermore, where a person's lawyer is found to be disruptive during questioning, the officer exercising authority under the warrant may direct that the lawyer be removed.¹⁹

The right to legal representation is unduly limited and uncertain under the Act. Given the absence of the right to silence and the seriousness of matters being investigated in such cases, it is critical that people undergoing questioning have unfettered access to legal advice before and during questioning.

Length of Questioning

Where an interpreter is required, a person may be questioned for up to 48 hours. We note that one person questioned under a warrant issued in 2003-2004 was questioned for 42 hours 36 minutes.²⁰ While the use of an interpreter may mean

¹³ Section 34TA

¹⁴ Section 34TB

¹⁵ Sections 34F(1) and 34F(2)

¹⁶ Section 34U(2) and ASIO Protocol to Guide Warrant Process

¹⁷ Section 34U(2A)

¹⁸ Section 34U(4)

¹⁹ Section 34U(5)

²⁰ ASIO Annual Report 2003-2004

that the questioning process takes longer, questioning a person for 48 hours is excessive. This must also cast doubts on the reliability and voluntariness of any information or evidence obtained through such a process. Whether or not an interpreter is used does not alter the unreasonableness of questioning any suspect for longer than 24 hours.

We also note that at the time of making this submission, information regarding the above was only available in relation to the period ending 30 June 2004. We do not know, therefore, whether any questioning warrants have been issued in the intervening period and if so, the length of questioning periods undertaken.

Lack of procedural safeguards

The Act provides for complaints regarding contravention of ASIO's statement of procedures to be made to the Inspector-General of Intelligence and Security or to the Ombudsmen relevant to the Australian Federal Police.²¹ There is no provision for complaints to be made to any other bodies. For example, despite the fact that state police are empowered under the Act, there is no provision for complaints to be made to state police body.²²

There is also no complaints procedure specified where the conduct of the prescribed authority is in question.

The Act creates a series of offences for officers who contravene conditions or requirements contained in a warrant.²³ The Act does not, however, specifically create a class of 'permitted disclosures' for the purpose of reporting, investigating or prosecuting these offences. This is a significant limitation on the effectiveness of these provisions and, consequently, on the capacity to ensure officers' compliance with safeguards.

Secrecy

Before the expiry of a warrant, it is an offence for a person specified in a warrant to disclose any information relating to a content of the warrant, their questioning or detention and even the fact that a warrant has been issued.²⁴ This means that those detained or questioned under a warrant are effectively held in secret for periods of up to a week.²⁵ For two years afterwards it is an offence to discuss 'operational information' with anyone other than one's lawyer and certain other

²¹ Section 34NC

²² Section 34A

²³ Section 34NB

²⁴ Section 34VAA(1)

²⁵ See also Section 34D(3)

authorities.²⁶ Given the exceedingly broad definition of ‘operational information’, it is effectively an offence to tell even one’s friends, family and community what has occurred.²⁷

The coercive nature of ASIO’s special powers is exacerbated by the secrecy that surrounds them. The capacity of individuals and communities to express concern about the exercise of the powers and to keep ASIO accountable for its actions is curtailed.

The impact of the secrecy provisions on the provision requiring the humane treatment of a person specified in a warrant is particularly noteworthy.²⁸ The secrecy provisions do not provide any specific exception for reporting instances of inhumane treatment. The efficacy of the provision relating to humane treatment is diminished by the secrecy provisions, or at the very least, ASIO’s conduct in this regard is unable to be easily monitored.

A system of open and accountable government is a prerequisite for true and meaningful democracy. This system in turn requires that people are at liberty to divulge information regarding their treatment by government agencies to the media and to their community.

These laws also unreasonably restrict the freedom of the press to report on ASIO’s use of the special powers conferred by the Act. Given the significant and coercive nature of these powers it is in the public interest that the media be able to report on such matters.

By silencing people who are questioned and detained and by disabling the media, these laws open the door for abuses of power and, of even greater concern, the concealment of these abuses. The secrecy provisions contained in the Act are unreasonable in an open, democratic society and should be removed.

²⁶ Section 34VAA(2)

²⁷ Section 34VAA(5)

²⁸ Section 34J