UNIVERSITY OF TECHNOLOGY SYDNEY

UTS COMMUNITY LAW CENTRE

SUBMISSION 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

Contact details:
UTS Community Law Centre
PO Box 123
Broadway NSW 2007
02 9514 2914
Lisa.pusey@uts.edu.au

Prepared by Elsa Koleth on behalf of the UTS Community Law Centre

23 March 2005

Attention: Ms Margret Swieringa
Committee Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

Dear Ms Swieringa

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

The UTS CLC welcomes the opportunity to make this submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD under the *Australian Security Intelligence Organisation Act* 1979.

The UTS Community Law Centre

The UTS CLC was established in 1995 to provide a *pro bono* legal advice service to UTS staff and students. The service was extended in 2003 to staff and students at the Sydney Institute. Although serving a community clientele based in these two educational institutions, the Centre also has a social justice focus and has researched legal issues of significance in the state of NSW, nationally, and internationally, across a range of issues. For example, the centre has researched the extent of police powers to use 'sniffer dogs' to detect drugs in NSW, and the legal issues involved in caretaker housing. The Centre published the 'Know Your Rights Guide: Facts and Services for People on Temporary Protection Visas' (www.refugeecouncil.org.au), and 'Be Informed: ASIO and Anti-Terrorism Laws' booklet (www.civilrightsnetwork.org), and publishes community legal information resources on a number of legal issues.

The Review into Division 3 Part III of the *Australian Security Intelligence Organisation Act* 1979

In this submission the UTS Community Law Centre addresses the operation, effectiveness and implications of Division 3 Part III of the *Australian Security Intelligence Organisation Act* 1979.

The scope of the powers

The ASIO powers allow for the detention and questioning of:

- those who are suspected of participating in or assisting in terrorist activities;
- those who are suspected of participating in or assisting terrorist activities at some future time;
- any persons who may have any information suspected of being in some way connected with terrorist activity.

The extension of power to allow for the detention of non-suspects by a government agency is unprecedented in Australia[1]. Furthermore, this detention is valid for a period of seven days rather than 12 hours which was previously the limit.

Our submission is that custody of non-suspects and other members of the public in these circumstances demands the greatest scrutiny before being accorded legislative force.

Recommendations:

- the power to detain non-suspects be repealed.

Powers of Questioning

The legislation removes two fundamental tenets of our criminal justice system:

- Removes the right to silence by decreeing that the failure to answer any questions put to the person held in custody under a warrant is an offence punishable by 5 years of imprisonment[2];

[1] Professor George Williams, 'Why ASIO shouldn't be given more powers', *The Age*, 4th November, 2003

- Removes the privilege against self-incrimination[3].

There is a limited immunity prohibiting the use of information obtained under a warrant against that person under separate criminal proceedings. However, the legislation's failure to extend this immunity implies that information obtained from the person can indeed be used against him or her in the following circumstances[4]:

- Anything said by the person in relation to matters that are not covered by the warrant can be used against them in separate criminal proceedings;
- Anything said by the person can be used in civil proceedings.

There is no requirement to answer a question or surrender objects sought under a warrant in circumstances where the person being questioned does not have the answer or does not have the requested item in their possession. However, in order to dispel the requirement of answering a question, the person being questioned must first satisfy the evidentiary burden of proving that they do not have the information sought[5]. Within the context of this legislation, this provision has the potential to place non-suspects who are being detained and questioned in the position of having to positively prove that they do not know something. It is submitted that such a situation is almost akin to an inversion of the fundamental right to be presumed innocent until proven guilty.

Our submission is that legislative provisions allowing for the extension of the length of questioning hours are another unprecedented inflation of police powers.

- Under the new ASIO legislation a person may be held for a period of 168 hours and questioned for a total period of 24 hours. Previously, suspects of crime could only be held by a government agency for a period of 12 hours;
- The request for an extension of the standard 8 hour questioning period can be made by ASIO to the prescribed authority, in the absence of the person being questioned,

---

[2] s34 G (3)
[3] s 34 G (8)
[4] Stary, R. and Murphy, P. *Practice Note – Australian Security Intelligence Organisation (Terrorism) Act 2002*, Robert Stary and Associates, [online] http://www.civilrightsnetwork.org/resources.htm#ASIO4
[5] Under the *Commonwealth Criminal Code* the evidential burden requires the adducing of evidence that suggests a reasonable possibility that the matter exists or does not exist.

their lawyer or any other person they have been allowed to contact[6]. This is particularly worrying in the situation of young person where such a request could be made in the absence of their parent, guardian or chosen representative;

- There is no provision in the legislation for the person to make an application to the prescribed authority for the questioning to cease, or to in any way oppose a request from ASIO for the questioning period to be extended beyond 8 or 16 hours.

Recommendations:

- Requests for the extension of questioning hours be made in the presence of the person being held and/or their lawyer or other representative;
- That the legislation include an opportunity to appeal the request for an extension;
- Provisions removing the right to silence and privilege against self-incrimination should be repealed.

Powers of Detention

The power to take persons into custody and to conduct ordinary or strip searches upon that person are confined primarily by the limits of what is considered "reasonable and necessary". As usual such a term is largely open to interpretation and it is perhaps worth querying whether in the absence of further definition these provisions confer too wide a discretion upon the police.

A strip search can be conducted purely on the written consent of the person being held, even in the absence of authorisation from the prescribed authority[7]. This is problematic as such consent will at best be obtained in circumstances where the person in custody is under considerable psychological stress and at worst under duress to comply.

[6] S34HB (3)
[7] s34 L (4)

The legislation allows for the prescribed authority to extend the person's detention at any time, however, it makes no provision for that person or their lawyer to appeal against their further detention.

The Inspector General of Intelligence and Security may raise concerns as to the propriety or legality of the treatment of a person being held in custody and in response the prescribed authority may give orders deferring questioning or other activities. However, the legislation suggests that in the event of any such concern being raised by the Inspector General, the prescribed authority is obliged to do nothing more than consider the representation and is allowed the discretion to refuse to do anything about it. This would seem to render the Inspector General's capacity to raise such concerns rather useless.

The person being held can be prevented from contacting anyone while in custody or detention, with the exception of the Inspector General of Intelligence and Security, the Ombudsman or any individual who happens to be specified in the warrant[8]. This is one of the most concerning provisions in the legislation. It is too restrictive, particularly in the case of non-suspects being questioned for information they may or may not possess.

Recommendations:

- Strip searches should not be permitted without the authorisation of the prescribed authority;
- Rights to appeal against extension of detention and the right to contact someone such as a lawyer, should be ensured in the legislation.

Legal Representation

Under the legislation there are significant restrictions placed upon a person's right to access legal advice while appearing under a warrant, and upon communication between lawyers and their clients.

[8] s34F (8)

The legislation makes no requirement that the prescribed authority inform a person of their right to a lawyer, and allow them to contact a lawyer, where the person is appearing under a warrant that does not authorise immediate custody.

There is no right to access a lawyer in the interval between initially being taken into custody under a warrant and being brought before the prescribed authority. Once brought before the prescribed authority the person is allowed the opportunity to identify their lawyer to the prescribed authority in the presence of ASIO. However, at this juncture ASIO may request that the person be prohibited from contacting that lawyer[9].

One of the most disturbing aspects of this legislation is the provision allowing for the questioning of a person without the presence of a lawyer of their choice. This appears to be a grievous restriction on the rights of the person held in custody, be they suspects or non-suspects, as it leaves an as yet uncharged person with no avenue to obtain advice as to their position and the options available to them[10]. This all the more disturbing because the legislation effectively allows for the questioning of children between the ages of 16 and 18, in the absence of a lawyer.

Even in the event that the person is allowed to confer with a lawyer of their choice, there are further restrictions on correspondence between the lawyer and his or her client which render the presence of a lawyer ineffective:

- The person's contact with their lawyer must be made in a way that can be monitored by a person exercising authority under the warrant[11]. In thus removing any element of confidentiality between the lawyer and their client, the utility of having them present is considerably reduced.
- The lawyer can not interrupt questioning or address the prescribed authority at any time for any purpose other than to request the clarification of an ambiguous question, and may be thrown out for disrupting the questioning process.

[9] S34D (4A) (ii) (iii); s34 TA
[10] S34TB
[11] S34U (2)

Recommendations:

- That questioning not be permitted without the presence of a lawyer;
- Allow confidentiality between a lawyer and their client while the person is being held in custody.

Secrecy Requirements

The legislation places strict secrecy restrictions on the persons under a warrant as well as any individual allowed to appear with the person as their legal, familial or other representative, as well as any third parties such as journalists. The provisions prohibit them from disclosing the fact that a warrant was issued, or of anything that occurred under the warrant. This prohibition against disclosure does not apply in very limited circumstances, such as for the purposes of seeking a remedy in a federal court[12]. This secrecy is enforceable while the warrant is on foot and for a period of 2 years after the expiration of the warrant, and any contravention is punishable by 5 years of imprisonment.

These provisions effectively have the frankly farcical consequence of causing a person to disappear from all known society for a period of seven days, then reappear again at the end of that period and resume their lives, without being able to provide so much as a word of explanation as to their whereabouts to their family, friends or employers. It is ludicrous to expect that any individual can behave in such a way in a functioning civil society without raising alarm. Furthermore, it is grossly unjust to impose such a disruption upon an individual's life, regardless of whether or not they are suspected of being associated with terrorist activity, without in any way compensating them for lost earnings or other psychological, or emotional loss caused in that period. If, for example, a person loses his or her job as a consequence of their absence and their inability to provide an honest explanation for that absence, surely that person, once released from custody is justified in expecting some form of compensation for that loss. To take another example, a person who is at liberty on bail is detained for questioning by ASIO, they would appear to be in breach of their bail

[12] S34VAA

conditions. Under the current legislation there is no provision to provide a lawful excuse to the court as to why this person has breached bail by failing to appear at court at a specified time. The Act makes no consideration of such matters beyond the right to seek a judicial remedy, which is in itself a costly and time consuming procedure few could afford and which is in any case only available after the event.

It is submitted that the inability of detained persons to talk about their experiences under ASIO questioning for a period of two years after the expiration of the warrant has a chilling effect on public discourse. The secrecy provisions inhibit journalists and others from addressing matters of national security, thereby inhibiting a culture of critical political discourse. This is especially the case when many journalists appear not to understand the narrow requirements of the law, and therefore avoid all discussion of questions of national importance if they involve ASIO and/or national security matters.

In seriously curbing access to information and statements from individuals involved in the detention and arrest processes, these provisions severely restrict the ability to review the operation of the legislation, and to hold the relevant authorities to account for any abuses of their powers. These secrecy provisions ought to be amended to salvage the credibility of the legislation, and to facilitate the transparency and accountability that is fundamental to the functioning of any democratic society.

Recommendations:

- These secrecy provisions should to be amended to allow people some means of dealing with the consequences of the detention and questioning process on their everyday life.

Submission deadline

Central to the facilitation of a rigorous review process is the provision of a sufficient period of time for individuals and organisations to make a meaningful submission. The UTS CLC would like to express its dissatisfaction at the announcement of the review on the 17th of January this year, with a submission deadline allowing barely two months in which to do the necessary research. The imposition of such a hasty deadline is extremely unhelpful, particularly in light of the fact that the findings of the Commission are only due in early 2006, and serves to derogate from the integrity of the review process by restricting the quality and number of submissions tabled.

Recommendations:

- A further review of this legislation be conducted in another year's time;
- In future such reviews facilitate more time for the preparation of submissions.

We thank the Committee for the opportunity to contribute to this Review and are willing to assist the Committee in furnishing any further information regarding our submission. Please feel welcome to contact the UTS Community Law Centre on (02) 95142914.

Yours sincerely,
Jennifer Burn

Director
UTS COMMUNITY LAW CENTRE

UTS Community Law Centre
PO Box 123
Broadway 2007 NSW
Ph: 9514 2914
Fax: 9514 2918
www.utscommunitylaw.org.au