30th March 2005

Committee Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

Dear Secretary,

**Re: 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.**

We appreciate the opportunity to participate in the above review.

The Civil Rights Network consists of lawyers, activists, academics and representatives from community organisation who are concerned with social justice issues.

As members of the CRN (Melbourne) we seek to raise a number of concerns with the Division 3 Part III of the *Australian Security Intellifence Organisation Act* 1979 (here after, the legislation). We submitt the legislation be repealled due to numerous inherent problems it both contains and causes. These inherent problems will now be discussed.

## Lack of Necessity

The legislation is unnecessary, as pre-existing legislation relating to the detention and questioning of individuals and suspects is sufficient. The legislation may be used in a punitive manner, especially because it allows for the detention of individuals who are not suspected of wrongdoing. Therefore, the legislation may be counterproductive to combatting terrorism because it may, in effect, alienat certain members of the community. It will increases fear and ignorance in our society.

## Breadth of scope of ASIO's special powers with regard to terrorism

The scope of ASIO's special powers relating to terrorism are extremely broad.

To be detained incommunicado for up to seven days and questioned for up to 48 hours, a person must be suspected of committing a terrorism offence (as defined broadly in the *Criminal Code*), and/or possibly possess information which may assist in the collection of intelligence pertaining to a terrorism offence.

The definition of a terrorist offence is wide in scope. A terrorist offence includes activities such as membership of a banned organisation, providing resources to a banned organisation, associating with a terrorist organisation and possession of a 'thing' associated with a terrorist offence. Given this broad definition of a terrorism offence, the net of information individuals may possess is vast. This gives ASIO a broad detention power.

Furthermore, activities which are part of the legitimate democratic process may be designated terrorist offences under the above definition. In result, individuals involved in, or having information regarding, legitimate political activities may be detained and questioned. A terrorism offence requires an 'intension of advancing a political, religious or ideological cause' on the part of the offender. Hocking argues that this criminalises politics because this intent

> *"also lies at the heart of every political protest and every industrial dispute. It is this nexus which remains ... between 'terrorism' thus defined and political dissent which must inevitable, criminalise politics."*[1]

Finally, and perhaps the most concerning issue with regard to the breadth of the legislation, ASIO has the power to detain individuals who are not suspected of committing a terrorism offence. A person may be detained because they may possess information that might pertain to a terrorist offence. Therefore, even without the suspicion of guilt, a person may be detained incommunicado for seven days and questioned for 48 hours.

In result, this detention and questioning power is not designed to targeted the small number of individuals who are suspected of planning a terrorism attack: the scope is much more extensive.

## ASIO's Discretionary Powers

The breadth of the legislation means its implementation will be based on ASIO's discretion. The concern with this is the breadth of the discretionary grounds for issuing a compulsory questioning and detention warrant will require ASIO and the Attorney General, at first instance, to make decision of a political nature. This opens the door for the targeting of particular groups in the community. The legislation therefore allows for detention at the whim of the executive. Secretive, arbitrary decisions about what constitutes legitimate political activites and associations may be made to the detriment of democracy. The legislation has the potential for being used as vehicle for routine intelligence gathering exercises, thereby further undermining democracy.[2]

## Length of questioning

A specified person under a compulsory questioning and detention warrant may be questioned for up to 24 hours. This is unprecedented in Australia. Before the legislation was passed, a person could be questioned and detained by government agencies for a maximum of 12 hours, and only then when suspected of a crime. In the event the specified person requires an interpreter, the maximum length of questioning under the legislation is extended to 48 hours. We understand the use of an interpreter may lengthen

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[1] Jenny Hocking (2004) *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy*, UNSW Press: Sydney, pp 203-4.
[2] ibid, pp 233.

the questioning process. However, questioning someone for 48 hours without reasonable sleep is unnecessary and inhuman. It is noted the legislation requires ASIO to treat a specified person under a warrant humanely. Questioning someone for 48 hours is clearly in conflict with humanitarian aspirations. The length of questioning adds to the oppressiveness of the compulsory questioning and detention regime.

**Evidential burdens on the accused.**

Specified persons under a compulsory questioning and/or detention warrant are required to answer all questions put to them by ASIO. Failure to answer ASIO's questions, and/or providing ASIO with misleading information, is an indictable offence punishable by up to fives years imprisonment. The offence is activated even if the person being questioned by ASIO does not have the information. The onus is on the person under the warrant to show they did not possess the information.

The right to silence is a fundamental principle in our adversarial system of justice. It helps rectify the State versus Individual balance by maintaining the presumption of innocence until proven guilty. This legislation in effect undermines the presumption of innocence, and thus throws a spanner into the State versus Individual balance. The evidentiary burden placed on the person under an ASIO warrant is unjust as it leads to strict liability for an indictable offence. This is unusual in Australia's legal system. These offences force such people to defend themselves, thereby surrendering their right to silence in displacing the evidentiary burden.

These offences should be abandoned. If the offences remain, we strongly suggest, in the interests of justice, the onus of proving all elements beyond a reasonable doubt should be on the Crown.

**Legal representation**

Whilst under a detention warrant, a person is granted access to a lawyer. However, a person is not afforded legal representation if under a questioning warrant. Once a questioning warrant is issued, the prescribed authority has the inherent power under the legislation to further issue a detention warrant. If this occurs, a person may be detained and not granted access to a lawyer.

In addition, lawyers cannot give vital advice during ASIO's questioning. The legislation merely allows for legal advice to be given during breaks in questioning. Furthermore, a lawyer may be removed if the prescribed authority is satisfied they are disrupting questioning. It must be noted that there is no provision regarding the lawyer's admittance once being removed. The legislation allows the person under the warrant to contact another lawyer. However, this lawyer will not be privy to events and communication that has already taken place under the warrant.

This regime of limiting the effect of legal representation undermines principles of due process. Legal advice is essential in any legal matter, and especially so when an

individual is being questioned and detained by ASIO for up to seven days merely because they may have information regarding a possible terrorist offence.

At a bear minimum, we recommended all persons under a compulsory questioning and/or detention warrant be allowed to contact a lawyer. In addition, the lawyer should be present and allowed to give legal advice at all times to ensure due process is satisfied.

**Secrecy provisions**

Persons detained under ASIO's compulsory questioning and detention powers are in effect held in secret. It is an offence for a person who has been detained by ASIO under these laws to meantion the warrant whilst the warrant is in operation. A warrant is in operation for 28 days. In addition, it is an offence for a specified person (or someone under a permitted disclosure) to discuss 'operational' information for up to two years. This means once a warrant has been issued, it is an offence to tell one's family, friends and community what has happened for 2 years and 28 days.

These secrecy provisions violate the rule of law. One aspect of the rule of law is to provide the accountability of all arms of government and government bodies. The secrecy provisions clearly raise accountability issues. It is recognised safeguards are included in the legislation, making it an offence for ASIO to act ultra vires. However, the effectiveness of these safeguards is undermined. A complaint by an individual who has been detained under compulsory questioning and detention warrant is obviously required to set the complaint procedure in motion. However because of the secrecy provisions, this will not occur for at least 2 years. The evidentiary trial will run cold, as will the political and social impact of the complaint. The capacity for individuals to hold ASIO accountable for its actions is therefore seriously eroded.

Transparency of government process and bodies is a necessary element for a true democracy. By curtailing peoples' ability to question and raise a complaint against abuse by ASIO, the legislation cloaks ASIO in secrecy and may open the door for concealment of abuse. These secrecy provisions are an affront to an open and just democratic society and should thus be abandoned.

**Inadequate Safeguards**

The safeguards that accompany these detention and questioning powers are weak. First, as stated above, the secrecy provisions limit a person's ability to set in motion a complaint regarding their treatment. Secondly, an ASIO officer acting ultra vires attracks a lower maximum penalty than a person who has breached a secrecy offence. This adds to the unfairness and inequality of the legislation. Therefore, we recommend the repeal of the secrecy offences.

## Constitutional issues

The legislation may be unconstitutional. Constitutional grounds on which the legislation can be challenged rest upon the implied freedom of political communication and the fundamental doctrine of separation of powers.

### Implied freedom of political communication

The freedom provides for the protection of 'political' communication from suit and parliamentary interference. It is implied into the Constitution because of the representative nature of Australia's democracy.[3] The implied freedom of political communication must therefore be maintained to preserve the practice of our representative democracy, and to create an open and free society.

The secrecy provisions impinge of the implied freedom of political communication. This is despite the legislation expressly providing for the freedom's protection. Section s.34VAA(12) is a mere token: it is hard to imagine any communication regarding ASIO's operations and/or the fact of a warrant as not being political given the media attention on the Federal Governments 'war on terror.'[4] As the vast majority of breaches of the secrecy provisions will be protected by the implied freedom of political communication, a conflict is created between the secrecy provisions and s.34VAA(12) and *The Constitution*.

The breach of the implied freedom of political communication adds to the serious erosions the secrecy provisions make into civil liberties. The secrecy provisions must therefore be abandoned.

### Separation of powers

In summary form, the doctrine of separation of powers prohibits:

1. the vesting of judicial power in bodies other than courts created under Chapter III of *The Constitution* and;
2. the vesting of non-judicial power in members of such Chapter III courts, save for an exception.

The doctrine of separation of powers is essential in a constitutional democracy. It provides independence and accountability of the three arms of government.

Based on the following grounds, the legislation arguably breaches both arms of the separation of powers doctrine:

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[3] See ss 7, 24 and 128 of *The Constitution: Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[4] In *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, the High Court held communication regarding a New Zealand politician amounted to 'political communication' for the purposes of the implied freedom of political communication.

- The power to involuntary detain non-suspects is punitive[5]. Therefore, it must abide by the judicial process of determining criminal guilt. However, under the legislation, a 'prescribed authority' may be a President or Deputy President of the Administrative Appeals Tribunal with 5 years experience in legal practice. When a person is brought before a prescribed authority for questioning, the prescribed authority has the power to detain the person[6], even if the warrant is a questioning warrant and not a detention warrant. This is a clear breach of the first arm of the separation of powers doctrine, as a non-Chapter III[7] court has the power to detain people.

- The issuing of compulsory questioning and detention warrants is not reviewable. In addition, the decision to issue a compulsory questioning and detention warrant is made on the balance of probabilities, without trial. Therefore, the issuing a compulsory questioning and detention warrant is a non-judicial power. According to the legislation, an issuing authority is a Federal Magistrate or Federal Judge. This amounts to a prima facie breach of the second arm of the separation of powers doctrine, as the decision of a judge to involuntary detain a person without trial is made to the civil standard and is not be reviewable. It is noted the legislation states the judge must consent to the appointment of 'prescribed authority', indicating the *persona designata* exception is to apply. In addition to the judge's consent, the *persona designata* exception states the non-judicial power vested in a Chapter III court must be compatible with that court's judicial functions. The issuing a compulsory questioning and detention warrant to the civil standard without a trial, which is not reviewable, will diminish public confidence in the integrity of the judiciary and/or the individual judge issuing the warrant. The issuing of compulsory questioning and detention warrants by members of the judiciary is therefore incompatible with judicial function[8]. The legislation is therefore in breach of the second limb of the separation of powers doctrine.

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[5] Brennan, Deane and Dawson JJ in *Lim v Minister for Immigration* (1992) 176 CLR 1, 27: 'the involuntary detention of a citizen in custody by the State is (generally) penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.'

[6] A prescribed authority may only detain someone who is otherwise under a questioning warrant in following circumstances: the prescribed authority believes on reasonable grounds that if the person is not detained, they will:

- Alert someone involved in a terrorism offence of the investigation (s.34F(3)(a));
- If further questioning is required, they will not appear (s.34F(3)(b)); or
- Destroy relevant evidence (s.34F(3)(c)).

[7] The AAT does not come under s.71 of *The Constitution*, so it cannot be classified as a Chapter III court*: NSW v Commonwealth* (1915) 20 CLR 54.

[8] It is noted the High Court held in *Grollo v Palmer* (1995) 184 CLR 348 that conferring the power to issue telecommunications warrants in secret did not breach the incompatibility condition. However, given individual liberty is at stake, the High Court is likely to view this legislation differently. In *Kable v DPP* (1996) 189 CLR 51, the High Court held the conferrable of the power to issue the preventative detention of the appellant onto the New South Wales Supreme Court was incompatible with the exercise of judicial power.

ASIO's compulsory questioning and detention powers have an air of unconstitutionality. This adds to the oppressiveness of the regime. If the legislation is challenged on constitutional grounds, there will be no actual remedy for an affected person. The legislation will simply be declared unconstitutional and struck down by the courts. It is therefore imperative for the legislation to comply with *The Constitution* so such injustice will not occur. If the legislation is to remain, we recommend, at a bear minimum:

1. only Chapter III courts have the power to issue detention warrants;
2. the decision to issue a compulsory question and detention power must be reviewable; and
3. the specified person must be afforded the right to be heard.

It is recognised raising the standard of proof for issuing a compulsory questioning and/or detention warrant to beyond a reasonable doubt will make the application of the legislation unworkable. This is a further reason to repeal the legislation.

**In conclusion,** we thank the Committee for the opportunity to participate in the above review. We would like to reiterate that it is our submission that the legislation be repealled. However, in the event the Committee decides otherwise, we submitt that the recommended amendments to the legislation, as stated above, be adopted.

Yours Sincerely,

Civil Rights Network (Melbourne)