



The Secretary  
Parliamentary Joint Committee on ASIO, ASIS & DSD  
Parliament House  
CANBERRA ACT 2600

By e-mail to: [Margaret.Swieringa.Reps@aph.gov.au](mailto:Margaret.Swieringa.Reps@aph.gov.au)

11 July 2005

Dear Secretary,

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

We thank you for the opportunity to appear before the Parliamentary Joint Committee on ASIO, ASIS and DSD (the Committee) on 6 June 2005.

We would like to provide supplementary submissions in relation to certain issues raised in the hearing as well as additional information that has come to light subsequent to the public hearings.

Our submissions relate to one aspect of the terms of reference of the review that has been overlooked by most other submitters – that is, the *implications* of Division 3 powers.

As far as we have gauged from the submissions as well as the transcripts of hearings, most of the submitters focused on the fact that the questioning warrant has only been issued 8 times, and the detention warrant none at all. We note that the Committee took comfort in the fact that the powers have been seldom used and that they are powers of last resort. However, we argue that this dismisses the potential detrimental implications of these powers, and that the existence laws in itself is sufficient to warrant a closer examination.

The effect of these detention and questioning powers is that even if they are not used directly, they create the same effect as if they were enforced. We argue that the laws operate as a kind of “Sword of Damocles”, and that the intangible and indirect effect of these laws operates as a form of duress on the mind of the person to co-operate with authorities even in the absence of a warrant.

This “psychological distress” is no doubt subjective and is an elusive term to define, but it has been interpreted liberally by the courts. It has been held by the courts that a simple statement such as "If you co-operate you will have a Merry Christmas," uttered

to a person held at a police station on drug charges before he made an admission rendered that statement inadmissible in the court of law because of oppressive effect of that utterance on the accused<sup>1</sup>. We argue that the existence of Division 3 powers have a similar, if not more potent, effect on those approached by authorities.

From our contacts with the Muslim community we are aware that there have been many instances of ASIO officers approaching people to ask questions "informally" (i.e. without a warrant) and we gave two such examples at the hearing. Further evidence of this was requested from AMCRAN, the Islamic Council of New South Wales as well as the Islamic Council of Victoria. Unfortunately, in Australia there is no qualitative study of the exact impact and effect of the laws on people who are approached by ASIO officers.

However, experience in overseas jurisdictions is telling. Since our appearance before the Committee on 6 June 2005, a new research report from the Council of American Islamic Relations Canada (CAIR-CAN) titled *Presumption of Guilt: A National Survey on Security Visitation of Canadian Muslims* has been released. A copy of the report is enclosed for your perusal.

We wish to draw your attention to a particular section of the report that supports our observations. On page 16, it points to a "preventative arrest" power under Canada's *Anti-Terrorism Act* and it then goes on to state that,

**an individual indicated that security officials referenced the *Anti-Terrorism Act* and informed an individual that "C-36" gives them the right to arrest and detain respondents and force them to speak – and that therefore the individual should speak to them. This tactic had the effect of intimidating the individual and conveying the misleading message that he had to speak to security officials at their request.**

An extract of a case study as cited by the report is as follows:

**Another respondent was visited by both RCMP and local police officers at his home and said he was asked to come to the nearest police station for questioning. The respondent declined the meeting, due to an exam, and the RCMP offered to arrange with his professor for him to skip the exam, but he refused the offer. He said they then began pressuring him to attend the meeting and told him it was in his best interest to speak with them. When he asked for the presence of a lawyer at the meeting, they responded that he could have legal counsel present but it would be better if he didn't. The respondent said the incident worried and confused him, and that he couldn't concentrate on the exam he then went to write. He also said the RCMP called his cell phone three times during his exam. Afterwards, the respondent and his wife went to the designated police station for the questioning, but his wife was not permitted to witness it and was asked to wait outside. *Inside the interrogation room, the respondent said he asked what would happen if he didn't speak with the officers and that their response was Bill C-35 gives them the power to force***

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<sup>1</sup> *R v Rahme* [2001] NSWCCA 414.

*him to speak with them. Then the officers began recording the interrogation ... (emphasis added).*

This affirms our belief that it is indeed a common tactic used by security officials given the wide range of powers they have at their disposal.

The report also shows that the majority of people contacted by security officials did not decline interviews. Alarming, however, it was found that when a person is less cooperative than anticipated, security officials were reported to have become aggressive, exercising intimidating tactics such as the blocking of entrances of the person's premises, and using threatening comments such as "you don't want to play around with us".

We argue that this combination of factors creates a crucible from which the human rights of the certain groups in the community may be denied.

Finally, we wish to provide further information to questions that the Committee posed to other Islamic organisations with which we may be in a good position to assist.

**1. ACTING CHAIR: I would have thought that it is partly the role of governments, agencies and your council to allay the fears of your community about this rarely used instrument.<sup>2</sup>**

Indeed, AMCRAN has so far taken that responsibility seriously. AMCRAN, together with the NSW Council for Civil Liberties and the UTS Community Law Centre have produced a booklet about Australia's anti-terror laws that explain the terrorism offences as well as ASIO and the AFP powers under the new anti-terror legislation. With the generous funding of the Law and Justice Foundation of NSW, we are in the process of preparing a second edition of the booklet, which will also be produced in Arabic, Bahasa Indonesia and Urdu.

Further, with the cooperation of other community organisations and community legal centres, we have conducted a number of community legal education seminars about the anti-terror laws. The aim of these activities is not only to educate the community and explain some of the intricacies of the legislation, but also to empower them with the knowledge that there are also safeguards in the laws, and that some of their rights are also protected. In this way it is our hope that some of the fear and paranoia in the community can be allayed.

As the Acting Chair aptly pointed out, it should also be the responsibility of the government and the agencies to allay these fears. We note with disappointment that it does not appear that governments or the agencies have taken on this role in any meaningful way.

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<sup>2</sup> Question posed to Islamic Council of New South Wales, 6 June 2005, Proof Hansard, p. 44.

2. **Senator ROBERT RAY—At the moment, ASIO can apply to the Department of Foreign Affairs and Trade, and the foreign minister can have a passport suspended without reference to this legislation. Unless the AAT overturns it, it can be suspended for years on end whereas, under this legislation, it is only for 28 days from the time of the warrant, as I understand it. Every day of the week, courts are issuing orders to take in passports, usually through some businessman or others trying to leave town. It is just one point<sup>3</sup>.**

We submit that any suspension of a passport in circumstances as outlined above necessarily involves an “adverse or qualified security assessment” pursuant to s 37 of the ASIO Act, and the subject is to be notified within 14 days of the assessment and their right to appeal to the AAT, pursuant to s 38 of the ASIO Act. Under Division 3, however, a warrant may be issued against a person merely because that person has some information that may assist with intelligence-gathering. Further, a person’s passport may be taken away merely upon the *request* for a warrant for questioning under s 34D of the ASIO Act. We respectfully submit that the powers are not comparable.

Yours sincerely,  
**Australian Muslim Civil Rights Advocacy Network (AMCRAN)**

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<sup>3</sup> Question posed to Islamic Council of New South Wales, 6 June 2005, Proof Hansard, p. 46.