

PW/1689

4 April 2005

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

Dear Secretary,

REVIEW OF ASIO QUESTIONING AND DETENTION POWERS

I refer to your invitation to make a submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD (the "PJCAAD") inquiry into the operation of the ASIO questioning and detention powers which became effective as at 22 July 2003 when the *Australian Secret Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the "amending Act") received assent.

The Law Council welcomes the opportunity to comment upon this important piece of legislation and to assist the PJCAAD in its further consideration of the questioning and detention powers now contained in the *Australian Security Intelligence Organisation Act 1979* (the "ASIO Act")

THE LAW COUNCIL

The Law Council of Australia is the peak national representative body of the Australian legal profession.

It is the federal organisation representing approximately 40,000 Australian lawyers, through their representative Bar Associations and Law Societies (the "constituent bodies" of the Law Council).

It speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

BACKGROUND: THE CURRENT STATUTORY SCHEME

The ASIO Act provides ASIO with the ability to apply for questioning and detention warrants under Division 3 of the ASIO Act. In particular s 34D provides for the approval of questioning and detention warrants where there are reasonable grounds for believing that a warrant will substantially assist the collection of intelligence that is important in relation to a 'terrorism offence'.

A 'terrorism offence' is defined as an offence against Division 72 or Part 5.3 of the *Criminal Code* (Cth), covering a broad range of offences including:

- (a) Offences relating to international terrorist activities using explosive or lethal devices; and
- (b) a range of other terrorism offences, such as terrorist acts and assisting or training with terrorist organizations.

Section 34D gives ASIO the power to apply, with the Ministers consent, for a warrant for certain purposes, namely to:

- (a) require a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant; or
- (b) authorise a specified person to be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning under the warrant and detained under arrangements made by a police officer.

A 'prescribed authority' is a person who has served as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court.

An application for a warrant is made to an 'issuing authority' which may be a current Federal Magistrate or Judge.

The Law Council notes that the nature of the powers conferred by the amending Act, as originally constituted, caused the Chairman of the PJCAAD to observe in 2002 that the Bill was "one of the most controversial pieces of legislation considered by the Parliament in recent times"¹.

PREVIOUS LAW COUNCIL SUBMISSIONS

The Law Council made previous submissions, which may be of use to the PJCAAD in its review of the provisions now contained in s 34D (web links are provided to the submissions where appropriate):

¹ An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, Parliamentary Paper No. 290/2002; Tabled 5 June 2002, at vii.

- Written submissions:
 - Law Council submission to Senate Legal and Constitutional References Committee Inquiry Into the *Australian Security Intelligence Organisation Legislation (Terrorism) Bill 2002* (December 2002), available at: <http://www.lawcouncil.asn.au/get/submissions/2361521011>;
 - Parliamentary Joint Committee on ASIO, ASIS and DSD and to the Senate Legal and Constitutional Legislation Committee (April 2002), available at: <http://www.lawcouncil.asn.au/get/submissions/2112559251>
- Public Hearing appearances:
 - The Senate Legal and Constitutional Reference Committee inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters (December 2002);
 - The PJCAAD inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (June 2002).

Previous Law Council submissions noted its strong concern about the potential infringement of liberties and rights as result of the new questioning and detention power regime. The Law Council observed that under the regime the power to question and in some cases detain people applied, where a warrant was granted, even if a person was not suspected of any criminal behaviour. Instead, the subject of a warrant could be any person who is believed (on reasonable grounds) to have useful information on terrorist activity. In the Law Council's submission, this created a regime where the basic liberties of a person could be infringed, though they are not necessarily suspected of any criminal behaviour or conduct.

Further, the Law Council advocated an alternative to the approach adopted. This alternative was utilization of the existing coercive power regime by the Australian Crime Commission, with appropriate statutory modification as was necessary, to deal with such matters.

LIMITED PERIOD OF THE AMENDING ACTS OPERATION

The Law Council notes that the legislation became effective as at 22 July 2003.

Therefore the period within which Government and non-Government organizations have had to observe their use has been very limited.

On the evidence available, the legislation has only been utilized on three occasions and only in respect of questioning warrants under subs 34D(2)(a). The Law Council is not aware of any usage of the more intrusive detention powers under subs 34D(2)(b).

In this context, the Law Council, while supportive of the review of the legislation, notes that it will be hindered by a lack of practical or operational experience with the new ASIO powers.

Of greatest concern is the fact that the ASIO Act does not give PJCAAD, or any other body for that matter, a specific statutory power to carry out periodic reviews in relation to the ongoing operation and impact of the questioning and detention power regime contained in s 34D. The likely impact is that, despite the limited period within which the current review has coverage, it remains possible that this will be the first and only review of the powers now contained in s 34D.

Given the expansion of terrorism offences under the Criminal Code applicable to the powers in s 34D, the potential impact of a changing global security climate and the extraordinary nature of the powers conferred upon ASIO by s 34D itself, the Law Council would strongly urge the PJCAAD to recommend the amendment of the ASIO Act to ensure that s 34D remains subject to regular and routine review every three years by Parliament or some other public interest body. Such review powers will have even greater importance as the global security climate improves.

THE EFFECTIVE OPERATION OF QUESTIONING AND DETENTION POWERS

Subject to the Law Council's comments about the limited nature of practical experience with the new powers, it does wish to place on record its ongoing concerns about the operation of the questioning and detention power regime.

The Law Council's first concern relates to the breadth of the powers conferred by s 34D, having regard for the recent expansion of commonwealth terrorism offences under the Criminal Code.

In particular, the Law Council wishes to draw to the attention of the PJCAAD the growing suite of offences now covered by Part 5.3 of the Criminal Code. For example, last year the Law Council recorded its strong concerns about new association offences covered in s 102.8 of the Code². By virtue of the fact that the operation of s 34D is linked to offences covered by Part 5.3 of the Code, the questioning and detention provisions now potentially apply to a very broad category of person. The Law Council questions whether this is appropriate.

The Law Council's second concern is (as previously submitted) that the power to detain people applies even if they're not suspected of any criminal behaviour. Rather, they are required to have useful intelligence information on terrorist activity. This creates a regime where the basic liberties of a person, not suspected of criminal behaviour, are seriously infringed. Legislative provisions which restrict liberty on any basis other than conviction by a properly constituted court, demand compelling justification. In the Law Council's submission, such

² See the Law Council's submission to the Senate Legal and Constitutional Legislation Committee inquiry into the provisions of the Anti-Terrorism Bill No.2, available at: http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/anti_terror_2/submissions/sub93.pdf.

justification has not been made out in this case, as other avenues of law enforcement investigation remain open to the executive.

Thirdly, the Law Council questions whether the new powers have proven to be effective and/or necessary.

Unfortunately, the Law Council is not in a position to make any detailed comment on the former, as little advice or information is available on this point. For instance, the Law Council questions whether the warrants issued to date have led to any arrest/s?

In relation to the latter issue, the Law Council notes that to date the powers have been utilized only three times. The specific detention powers in paragraph (b) of s 34D(2) have to date not been utilized at all. In view of these facts, and notwithstanding the limited period of operation, the Law Council questions whether the powers have proven to be necessary. It is not sufficient, in the Law Council's view, to rely on an argument that the powers may be needed at some future point or that it demonstrates the powers are being used by the executive with restraint and responsibility. Such an argument relies on the goodwill of the executive in the future execution of the powers.

The powers conferred by s 34D are unusual and by their nature extraordinary. The Law Council urges the PJCAAD to satisfy itself of the effectiveness and need for the new legislation in combating terrorism related crimes.

RELIANCE ON PROTOCOLS

The questioning and detention powers rely on administrative protocols to guide the conduct of officers exercising warrants under s 34D. In order to ascertain the effectiveness of these protocols, the Law Council urges the PJCAAD to inquire and where appropriate make publicly available information on any complaints received from persons subject to warrants in relation to their treatment.

FURTHER CONTACT

The Law Council would be pleased to respond to the PJCAAD's questions in relation to this submission.

Further information on the submission can be obtained by contacting the Law Council on 02 6246 3788.

The Law Council looks forward to assisting the inquiry as it progresses.

Yours sincerely

Peter Webb
Secretary General