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

24 March 2005

Dear Secretary

Submission in relation to Review of Division 3 Part III of the *ASIO Act 1979*

I would like to thank the Parliamentary Joint Committee on ASIO, ASIS and DSD for the opportunity to make a submission in relation to its review of the operation, effectiveness and implications of Division 3 Part III of the *Australian Security and Intelligence Organisation Act 1979.*

Please find attached a submission which I hope will assist the Committee in its inquiry. I also am willing to appear before the Committee to give evidence, if that would assist the Committee.

Yours sincerely,

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0. INTRODUCTION

It is widely accepted and acknowledged that the powers of compulsory questioning and detention granted by Division 3 of Part III of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* ('the Act') are extraordinary in nature. This Committee, and to a lesser extent the Senate Legal and Constitutional Committee, in arguing for the incorporation in the legislation under review of a sunset clause,[1] stressed that the inclusion of such a clause would require the Government to make the case for such extraordinary laws if they were not to lapse.[2] This submission is therefore written from the perspective that the burden of justifying these laws falls on their proponents.

The first part of this submission argues that there are strong reasons of principle for opposing the legislation. These reasons are not outweighed by arguments about the need for powers to investigate and prevent terrorism.

The second part of the submission identifies particular technical problems with the legislation.

1. CONSIDERATIONS OF PRINCIPLE AGAINST THE LEGISLATION

Although in its detailed text and operation the legislation under review is very complex, in its basics it is quite simple. This legislation enables the Australian Security Intelligence Organisation ('ASIO') to seek warrants authorising the compulsorily questioning, and in some circumstances the detention, of individuals suspected of having information relevant to certain sorts of offences under the *Criminal Code*.[3] In the final analysis, it is the truth of this simple proposition that

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[1] Section 34Y. Unless otherwise indicated, all references are to the Act.

[2] Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) 57, 59; Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) 127-8, 151.

[3] Sections 4 (definition of 'terrorism offence'), 34C(3)(a), 34D(1)(b).

shows this legislation to be untenable: the powers it grants to ASIO have not been shown to be consistent with that organisation's role as a security service in a liberal democracy.

1.1 The proper role of ASIO

A statement of ASIO's functions can be found in section 17 of the Act. The most important of these is 'to obtain, correlate and evaluate intelligence relevant to security.'[4] 'Security' is said to mean 'the protection of, and of the people of, the Commonwealth and the several States and Territories' from spies, saboteurs, politically motivated violence, and the promotion of communal violence.[5] Any discussion of the Act must keep these purposes, and their implications, in mind. It is clear that ASIO's role is to gather and process information relevant to the protection of the people of Australia. More generally, ASIO's activities must answer to the interests of the Australian people, including their interests in being protected from political violence, and in living in a harmonious community.

The pursuit of these purposes necessarily places limits upon the means that can be used to pursue them. It is notorious that, in some countries, security services can themselves become agents of political violence, and can themselves be provokers of, or contributors to, communal violence. It is not simply through good luck that Australia has avoided such states of affairs – it is at least in part through effective institutional design. If ASIO is to continue to serve its important functions care must be taken not to jeopardise these crucial institutional arrangements.

Security services pose particular institutional challenges in a liberal democracy. Openness in government, together with the freedom of political communication and debate that both results from and depends upon such openness, is crucial to liberal democracy. If the people do not know what the government is doing and why, or are not free to discuss it, how can they participate meaningfully in political life? On the other hand, it is the very nature of security services to carry out their work in a

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[4] Section 17(1)(a).

[5] Section 4 (definition of 'security').

clandestine manner, and this is recognised by the Act.[6] But this makes it peculiarly difficult to subject such organisations to democratic control.

One factor contributing to the democratic control of Australia's security agencies is Parliamentary oversight. An important role for this Committee must be to represent the interests of the Australian people in dealing with security and intelligence agencies whose business, of necessity, cannot always be made fully public. However, Parliamentary oversight is not the sole answer. Parliament, and this Committee, cannot supervise ASIO on a day-to-day basis. Nor can other such oversight bodies as the Inspector-General of Intelligence and Security ('Inspector-General').

Another way to help ensure that ASIO remains at the service of Australian democracy and the Australian people is to limit ASIO's operational powers. ASIO is not, and ought not to be, a secret police. Of course, it is as inevitable in a democracy, as in any other society, that the state will have to use violence from time to time, whether to fight wars, to enforce laws or to apprehend criminals. What enables the coercive power of the state to be reconciled with the imperatives of democracy is political openness, and thereby the accountability of the state to the people. But this requirement of openness in the exercise of state coercion precludes a clandestine security agency – even one that is subject to democratic oversight – from exercising the coercive powers of the state.

In a democracy, then, political questions are to be decided through public debate, while the use of coercion to prevent of crime is the job of the police force. The role of the secret service ought to be simply to collect information. To give ASIO coercive powers is to begin to undermine the institutional basis of Australian democracy.

1.2 Does terrorism make a difference?

The Act generally limits ASIO's coercive powers to situations where an individual has information 'important in relation to a terrorism offence'.[7] (An exception to this is

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[6] For example, sections 18, 34VAA, 92.

[7] Sections 34C(3)(a), 34D(1)(b).

section 25(4A)(a),[8] which allows the Attorney-General to issue a warrant allowing ASIO to conduct personal searches in certain cases; however, although this power is objectionable on the same grounds as the other coercive powers conferred by the Act, it has less serious implications for the role of ASIO as a security service in a democracy.)

Does this general limitation of ASIO's coercive powers to the context of terrorism offence make a difference? There are several reasons to answer 'No' to this question.

1.2.1 Democratic responses to political violence

The first answer draws further on considerations of democratic principle. A terrorism offence is defined as an offence against either Division 72, or Part 5.3, of the *Criminal Code*. Offences of the first sort are committed by deploying explosives or other lethal devices in certain sorts of public places, with the intention to cause serious harm, or destruction resulting in major economic loss.[9] The connection to public places means that such offences can most often be expected to be politically or ideologically motivated. Offences of the second sort are all connected more or less loosely to the idea of a 'terrorist act', which can be loosely defined as an act of politically motivated violence.[10] The connection between such offences, and political or ideological conviction, is definitional.

These connections between terrorism offences, and political and ideological conviction, make the investigation of such offences a particular challenge for a democracy. A democracy, while it must protect the lives of its people, is also committed to political openness and political pluralism. If sufficiently many members of a democracy come to hold a particular political view, a democracy must be open to the possibility that that view will become part of its mainstream, even if that view has

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[8] Introduced into the Act by item 23 of Schedule 1 to the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* (Cth).

[9] *Criminal Code* (Cth) section 72.3. It is sufficient to commit the second of these offences that the perpetrator be reckless as to the economic loss that will flow from the destruction: section 72.3(2)(e).

[10] See 1.2.2 below for a more detailed discussion of the definition of 'terrorist act', and of offences under Part 5.3 of the *Criminal Code*.

at one time been associated with political violence (in this regard one can think of the African National Congress in South Africa, for instance, or of the leaders of the American Revolution, or even of the more extreme abolitionists prior to the American Civil War).

On the other hand, if a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy. If that small group is located within a broader community, it is not open to a democratic authority – which is committed to the legitimacy of political, religious and cultural pluralism – simply to exclude that broader community and make it in its entirety an object of coercive investigation and policing.

These constraints on the democratic policing of political violence mean that a security service – which is necessarily clandestine, and therefore is both difficult to hold to account in its day-to-day activities, and cannot be seen by the people to be acting fairly and dispassionately even when it is so acting – is not the appropriate body to carry out such investigations. Indeed, in some circumstances the grant of coercive powers to a security agency could be counter-productive: if a community feels that it is under siege from the security services, this might lead to alienation and a reluctance to communicate the very information that is essential if the authorities are to respond appropriately to threats of political violence.

In the context of the current so-called ‘war on terrorism’, it is impossible not to wonder whether the Muslim community in Australia, or some elements of it, might not feel targeted in this way. So far all the individuals charged under Part 5.3 of the *Criminal Code* have been Muslims, and it therefore seems reasonable to suppose that ASIO’s coercive powers are being used primarily, if not exclusively, against Muslims (because of the secrecy provisions of the legislation, it is of course impossible for me to confirm this hypothesis). This point about the selective application of the law will recur in 1.3 below, as will the issue of secrecy; this latter issue will also be discussed extensively in Part 2 of this submission.

1.2.2 The breadth of the definition of 'terrorism offence'

A second reason why ASIO should not be granted coercive powers even in relation to terrorism offences turns on the details of the legislation. The phrase 'terrorism offence' considered on its own can suggest catastrophic violence – extreme acts of political violence such as bombings and hijackings. But this is not the way in which the Act defines the phrase.

There is no doubt that the offences defined in Division 72 of the *Criminal Code* are serious offences. But this is not true of the offences defined in Part 5.3.

Part 5.3 of the *Criminal Code* creates 21 offences. As was said above, all of these offences have as their starting point the definition of 'terrorist act', as any action or threat of action where the following four criteria are met:

- The action is done, or the threat made, with the intention of advancing a political, religious or ideological cause;
- The action is done, or the threat made, with the intention of coercing, or influencing by intimidation, any government, Australian or foreign, or any section of the public of any country anywhere in the world;
- The action does, or the threatened action would:
    - cause serious physical harm, or death, to a person; or,
    - endanger the life of a person other then the one taking the action; or,
    - create a serious risk to the health and safety of the public, or of a section of the public; or,
    - cause serious damage to property; or,
    - destroy, or seriously interfere with or disrupt, an electronic system;

- The action is, or the threatened action would be:
    - action that is not advocacy, protest, dissent or industrial action; or,
    - intended to cause either serious physical harm, or death, to a person; or,
    - intended to endanger the life of a person other then the one taking the action; or,
    - intended to create a serious risk to the health and safety of the public, or of a section of the public.[11]

This definition covers an extremely broad variety of activity. It includes within its scope such conduct as the attacks upon New York and the Pentagon of September 11, 2001. However, it also includes within its scope much action that many do not wish to condemn, including the following:

- The invasion of Iraq by Australia, the United States and the United Kingdom (which was politically motivated intimidation of the former Iraqi government causing, and intended to cause, the deaths of many persons);
- The American Revolution (which was the politically motivated coercion of the government of Great Britain causing, and intended to cause, the deaths of many persons);
- The activities of the African National Congress (which was the politically motivated intimidation of the government of apartheid South Africa causing, and intended to cause, serious physical harm and death).

[11] *Criminal Code*, sections 100.1(1) (definition of 'terrorist act'), 100.1(2), 100.1(3), 100.1(4).

As well as these events which are fundamental to the political ideals of many of us today, a host of other activity is apt to be caught up in the definition of 'terrorist act', although it does not necessarily seem criminal or worthy of condemnation. Three examples are the following:

- The holding of a student or union demonstration deliberately causing damage to property, and thereby intended to provoke the authorities to retaliate, thus showing their true political colours – a common tactic in trying to bring about political change in authoritarian states (which would be politically motivated intimidation or coercion of the government in question, causing serious property damage and intended to cause a serious risk to the health and safety of the public);

- The exercise, by the citizens of the Federal Republic of Germany, of their constitutional right to resist an attack on the constitutional order of that country[12] (which could quite possibly involve politically motivated intimidation of the unlawful government, causing harm and intended to cause harm to the agents of that government).

The point of these examples is to show that, from the mere fact that certain conduct satisfies the definition of 'terrorist act' under the *Criminal Code*, nothing can be confidently inferred about its moral character: the students in the first example above might be Iranian students, and their opponents Iranian police attempting to enforce the repressive laws of that country. And the same thing is therefore true of offences under Division 101 of the *Criminal Code*. For example, section 101.2 makes it an offence to give training knowing that such training is connected to preparation for a terrorist act.[13] This could make it an offence to train the students, imagined in the example above, about the best way to respond to the use of tear gas by the authorities

[12] *Basic Law of the Federal Republic of Germany*, article 20(4).

[13] *Criminal Code*, section 101.2(1).

in a demonstration. This does not seem immoral, and nor does it seem to be a very serious criminal matter.

This point about the breadth of activity liable to amount to an offence under Part 5.3 of the *Criminal Code* only becomes more pertinent when attention is paid to Division 102. The majority of these 'terrorist organisation' offences can be committed without even having an intention to undertake or support political violence – it is sufficient to have participation, of the relevant sort, with an organisation that is indirectly fostering political violence.[14]

One consequence of the extremely broad definition of a terrorist act is that a very wide range of organisations are liable to be characterised as terrorist organisations. For example, any organisation that offers support to political protestors who clash with police is liable to be so characterised, on the grounds that it is indirectly fostering politically motivated activity which is intended to intimidate a government, and which both is intended to, and does, create a serious risk to the health and safety of a section of the public (by provoking the police to attack them).

Likewise, a charitable organisation, which among its various activities offers succour to the families of those who have been arrested or killed for undertaking acts of political violence, is liable to be characterised as a terrorist organisation, on the grounds that it is indirectly fostering such violence, which in turn constitutes a terrorist act under the legislation.

A final example is provided by the governments of the United States, the United Kingdom and Australia, which are directly engaged in the planning of politically motivated military activity in Iraq, and therefore are similarly liable to be characterised as terrorist organisations. Anyone who participates in such an organisation, whether or not they themselves support the political violence to which the organisation is directly or indirectly linked, is likely to be committing a terrorist offence under Division 102 of the *Criminal Code*.

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[14] *Criminal Code*, sections 102.1(1) (definition of terrorist organisation), 102.1(2), 102.1(7), 102.2, 102.3, 102.4, 102.5, 102.6, 102.8. Section 102.7 may be an exception, but even in this case the drafting

Again, the purpose of such examples is to drive home the point that from the mere fact that an organisation satisfies the statutory definition of terrorist organisations, in virtue of the fact that it directly or indirectly is engaged in, plans, assists in or fosters a terrorist act, very little can be concluded about its moral status, its criminal status, and thus whether or not participation in it is a bad thing. As was pointed out by the Member for Kooyong during the Parliamentary debate on the Anti-Terrorism Bill (No 2) 2004, someone might commit an offence under s 102.8 by meeting with the leaders of a proscribed organisation in the course of encouraging that organisation to extend its non-violent activities.[15] To extend the example, the same offence could be committed by meeting with the leaders of a proscribed organisation in order to encourage it to abandon political violence altogether.

The fact that ASIO's coercive powers are therefore limited primarily to the investigation of terrorism offences does not give any justification for ASIO having such powers. The breadth of conduct covered by the statutory definition of 'terrorism offence' is such that nothing in general can be known about the immorality of, degree of criminality of , or threat (if any) posed to Australia and Australians by, a person's conduct, simply because that conduct constitutes a terrorist offence.

1.2.3 The grounds on which ASIO may seek a Division 3 warrant

Even if one puts to one side the point made in 1.2.2 above, the grounds on which ASIO can seek a warrant are too broad to be justified by reference to the need to prevent terrorism. A Division 3 warrant may be issued if the Attorney-General, and the Issuing Authority, are satisfied that there are reasonable grounds for believing that the warrant will

> substantially assist the collection of intelligence that is important in relation to a terrorism offence.[16]

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leaves it unclear as to whether the nature of the help that is provided by the provision of support must be within the scope of the offender's intention.

[15] *Parliamentary Debates*, House of Representatives, June 24 2004, 30717 (Mr Petro Georgiou).

[16] Sections 34C(3)(a), 34D(1)(b).

Thus, the grounds for the issuing of warrants are quite divorced from the need to prevent catastrophic acts of political violence.

That this is so can be shown by example. Suppose that an organisation *O* has been proscribed under the *Criminal Code*, and that a person *A* has twice associated with a member of that organisation, committing an offence under section 102.8 of the *Criminal Code*. And suppose that person *B* knows certain details of *A*'s meetings. If the Act continues in force, then it will empower ASIO to seek a warrant in relation to person *B* any time in the future, on the grounds that *B* has information important in relation to a terrorism offence committed by *A*. ASIO could do so even if the organisation *O* has since come of the list of prescribed organisations, so that *A*'s behaviour would no longer constitute a terrorist offence. It is hard to see how such a wide-ranging power can be justified by a reference to the need to prevent catastrophic acts of political violence.

The point of the example can be emphasised if we imaging that *O* was an organisation carrying out its activities solely in North Africa, and *A*'s meetings took place in an airport in Europe. How does it contribute to the protection of Australia for ASIO to have the power, years down the track, to compulsorily question and perhaps to detain *B*?

1.2.4 The potential for anti-democratic use of ASIO's coercive powers

A final reason for concluding that the grant of coercive power to ASIO cannot be justified by the appeal to terrorism is this: The breadth of the definition of 'terrorism offence (discussed in 1.2.2 above), together with the wide grounds on which ASIO can seek a warrant (the collection of intelligence relevant to a terrorism offence, wherever and whenever committed, as discussed in 1.2.3 above), have the consequence that the potential reach of ASIO warrants goes far beyond any use which has yet (as far as I know) been contemplated.

For example: Various left-wing groups in Australia contribute money to overseas organisations which are engaged (whether primarily, or peripherally) in acts of political violence which would fall within the definition of 'terrorist act'. These Australian groups are therefore liable to characterisation as terrorist organisations, on

the grounds that they indirectly foster terrorist acts. Membership – even informal membership[17] – of such groups is therefore liable to be construed as an offence under section 102.3 of the *Criminal Code*.[18] ASIO therefore already has the power to seek warrants in relation to those who have intelligence important to these offences that are being committed.

To continue the example: Suppose an Australian government decided to list one or more such left-wing groups under the *Criminal Code*. Associating with members of such groups would then become an offence under section 102.8 of the *Criminal Code*. It is likely that a number of members of such mainstream political parties as the Australian Labor Party and the Australian Greens might commit such an offence. ASIO would then have the power to seek warrants in relation to those who had intelligence important to these further possible offences. This example illustrates a more general point: ASIO's coercive powers are open to use – or abuse – as a political tool by a government that has little regard for democratic values.

1.3 Further thoughts on the proper role of the Executive in a democracy

The point made in 1.2.4 suggest a further consideration of principle against the granting of coercive powers to ASIO: they vest an excessive, and potentially arbitrary, power in the Executive arm of government.

This is not to express any general objection to the possession and exercise of coercive power by the Executive. It almost goes without saying that in a heavily populated urban society like Australia the Executive needs to have wide-ranging and discretionary powers of all sorts, including coercive powers. But the Act, in combination with the *Criminal Code*, has particular features which are at odds with the proper role of the Executive in a democracy.

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[17] *Criminal Code* section 102.1 (paragraph (a) of definition of 'member').

[18] Item 19 of schedule 1 of the *Anti-Terrorist Act 2004* broadened the scope for criminal liability under section 102.3 of the *Criminal Code*, by removing the requirement that the terrorist organisation be a listed organisation.

As was noted above, ASIO's coercive powers relate primarily to 'terrorism offences'. It is thus obvious that, the wider the range of conduct that constitutes a terrorist offence, then the greater the scope for ASIO's exercise of its powers under the Act. Offences against Division 72 of the *Criminal Code* are obviously relatively infrequent, and thus the scope for ASIO to seek warrants in relation to such matters will not be great. However, as was pointed out above, the definition of 'terrorist act' in the *Criminal Code* is sufficiently broad that a wide range of conduct can amount to an offence against Part 5.3 of the *Criminal Code*. Furthermore, the Executive government has the power to mould and widen the scope of conduct that is criminal under Part 5.3 of the *Criminal Code*, by determining which organisations are to be listed as terrorist organisations. In particular, the offence which is perhaps the easiest to commit, and which therefore is likely to result in the greatest number of opportunities for ASIO to seek a compulsory questioning or detention warrant – the offence of associating with members of terrorist organisations with the intention of supporting that organisation's continued existence[19] – can be committed only in relation to a listed organisation.[20]

This Committee's two inquires into decisions to list organisations[21] show that ASIO plays a substantial role in making a decision to list an organisation.[22] ASIO is thus a central participant in a process which results in a substantial widening of the grounds on which it can seek to exercise its coercive powers. There is therefore a possibility of its being the case that, or at least of its appearing to be the case that, ASIO supports the listing of an organisation by the Attorney-General not because it believes that involvement with that organisation ought genuinely to be criminalised, but because it believes that it can further its own operations by increasing the scope of its power to gather intelligence through compulsory questioning and/or detention. Given that questioning and detention warrants are issued following an involved

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[19] *Criminal Code* section 102.8.

[20] *Criminal Code* sections 102.8(1)(b), 102.8(2)(g).

[21] *Review of the listing of the Palestinian Islamic Jihad (PIJ)* (2004) ('First Listings Report'), *Review of the listing of six terrorist organisations* 2005) ('Second Listings Report').

[22] First Listings Report at 2.1, 2.2, 2.9, 3.11, 3.13-3.16; Second Listings Report at 1.11-1.12, 2.4-2.5, 2.23-2.25, 3.8-3.9, 3.15, 3.20, 3.26, 3.31, 3.35, 3.40, 3.48-3.49.

procedure in which both the Director-General of Security ('Director-General') and the Attorney-General are participants,[23] this is a very disturbing possibility.

An appearance of arbitrariness is already evident in the decisions that have been taken to date in listing organisations under the *Criminal Code*. The Attorney-General's Department has suggested that

> It is in Australia's national interest to be proactive and list any organisation which is directly or indirectly engaged in, preparing, planning or assisting in or fostering the doing of a terrorist act.[24]

However, it is obvious that this has not been done. To indicate just two examples, neither the government of the United Kingdom nor that of the United States has been listed. Indeed, no government has been listed, although all governments that maintain armed forces would seem to be liable to be listed, as all are thereby indirectly preparing the doing of terrorist acts (that is, are indirectly preparing for the politically motivated and potentially deadly coercion of other governments). The Committee itself noted that it is hard to discern a basis on which some organisations are listed, and others not.[25]

In fact, to date all the organisations that have been listed under the *Criminal Code* are self-identified Islamic organisations. In the current international environment, and in light of ASIO's remarks that Australia is influenced by the position of the United States, the United Kingdom and Canada in deciding whether or not to list an organisation,[26] it is difficult to avoid the conclusion that at least one principal factor in any decision to list an organisation is not the threat it poses to Australia and Australians, but the consistency of a listing with the foreign policy goals of the Executive – in particular, the goal of targeting militant Islamic organisations as part of the so-called 'war on terrorism'.

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[23] Section 34C.

[24] Submission No 7 to the Committee's Inquiry into the listing of six terrorist organisations, cited in the Second Listings Report at 2.18.

[25] Second Listings Report at 2.19-2.23.

[26] Cited in the Second Listings Report at 3.8.

It is one thing for the Executive in a democracy to have and exercise coercive powers. But the situation brought about by the interaction between the *Criminal Code* and the Act is quite another thing:

- The Executive has coercive power that it is able to exercise through a clandestine security service;
- That coercive power is aimed at a wide range of political activity;
- This breadth of political activity at which the coercive power is aimed is itself, to a significant extent, under the control of the Executive and the security service in question.

This is not a desirable state of affairs in a democracy. It opens the door to the possibility of substantial Executive interference in the political process through the activities of the security service, and threatens to have a chilling effect on political debate. Indeed, to some extent that chilling effect can already be felt: the secrecy provisions of the Act[27] mean that it is very difficult to acquire information – such as about who has been compulsorily questioned by ASIO, and why – that would assist in putting together an effective submission to this review.

It is not the proper function of Australian law to make criminals of those whose opinions on matters of politics and foreign policy happen to differ from those of the government of the day, nor to open the door to their systematic targeting by the security services. In a democracy, political controversies are to be resolved through open political activity, not by way of Executive fiat. This is something more commonly associated with authoritarian regimes. It is certainly hard to see what it has to do with protecting the security of Australia and Australians.

[27] Section 34VAA.

2. OBJECTIONS TO THE DETAILS OF THE LEGISLATION

The first part of this submission has argued that the legislation under review is objectionable for fundamental reasons of principle. This part considers certain aspects of the Act in some detail and identifies particular objections to them.

2.1 The grounds on which, and process whereby, a warrant may be issued

2.1.1 Objections to the basic process of issuing warrants

The process by which a warrant for compulsory questioning is issued is complicated. The first step must be taken by the Director-General:

- The Director-General must present a draft warrant to the Attorney-General, and seek the his or her consent to a request that a warrant be issued;[28]

- The request must be accompanied by a statement of the grounds that make the warrant necessary.[29]

The next step is to be taken by the Attorney-General, who must decide whether or not to allow the Director-General to request the warrant. The Attorney-General may consent only if satisfied of certain matters:

- That there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;[30]

- That relying on other methods of collecting that intelligence would be ineffective.[31]

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[28] Sections 34C(1), 34C(2)(a).

[29] Section 34C(2)(b).

[30] Section 34C(3)(a).

[31] Section 34C(3)(b).

If the warrant sought is a detention warrant, then the Attorney-General has additional obligations. First, he or she must be satisfied that there are reasonable grounds for believing that, if the person is not detained, then he or she may:

- Alert someone involved in a terrorism offence that the offence is being investigated;[32]
- Not appear to be questioned;[33]
- Destroy, damage or alter a record or thing that may be requested pursuant to the warrant.[34]

Second, the Attorney-General must ensure that the warrant will permit the person to contact a lawyer of their choice at any time while they are detained pursuant to the warrant.[35]

If the Attorney-General consents to the Director-General making the request, then the Director-General may present the draft warrant, together with the Attorney-General's written consent, to an issuing authority and request a warrant:[36]

- The issuing authority may issue the warrant only if he or she is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;[37]
- The issued warrant must be in the same terms as the draft warrant.[38]

What is significant about this is that not all the grounds which are necessary for the issuing of a warrant to be lawful need be made out to the issuing authority:

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[32] Section 34C(3)(c)(i).

[33] Section 34C(3)(c)(ii).

[34] Section 34C(3)(c)(iii).

[35] Section 34C(3B)(a).

[36] Section 34C(3), 34C(4).

[37] Section 34D(1)(b).

- There is no requirement that the issuing authority be satisfied that relying on means other than a warrant for collecting the intelligence would be ineffective;

- Although the grounds for the issuing of a detention warrant are reasonably narrow, these grounds do not have to be made out to the issuing authority.

In effect, the existence of these grounds are decided in-house, between the Director-General and the Attorney-General. This makes them significantly less effective constraints on the issuing of warrants, for a number of reasons:

- Decisions taken by the Attorney-General under the Act are not subject to review under the *Administrative Decisions (Judicial Review) Act 1977*,[39] and thus reasons for a decision cannot be sought pursuant to section 13 of that Act;

- The Director-General is, in general, subject to the direction of the Attorney-General, and thus provides no fully independent constraint on the issuing of warrants;[40]

- The publicly available evidence concerning the interaction between ASIO and the Attorney-General's Department in relation to other 'terrorism' matters does not suggest a high level of regard for process.

This last point is an important one, and relates back to the concerns of principle expressed in 1.3 above. The publicly available evidence I am referring to consists of this Committee's two inquires into decisions to list organisations. In relation to the listing of Palestinian Islamic Jihad, no clear rationale was offered by ASIO for that

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[38] Section 34D(2).

[39] *Administrative Decisions (Judicial Review) Act 1977* (Cth), schedule 1, paragraph (d).

[40] Section 8(2).

listing,[41] and consultation procedures do not appear to have been followed.[42] In relation to the subsequent listings of six terrorist organisations, again clear rationales for the listings were not offered,[43] and agreed consultation procedures were not followed.[44] Given this record, it is an objection to the legislation that these crucial grounds for the lawfulness of a warrant do not at least have to be made out to the issuing authority, who is the only participant in the issuing process independent of ASIO and the Attorney-General.

2.1.2 Additional objections to the grounds in relation to the issuing of repeat warrants

There are additional requirements that apply where a warrant has previously been sought in relation to a person. When the Director-General presents the draft request to the Attorney-General:

- He or she must also state the outcomes of any previous requests for warrants in relation to the same person;[45]

- His or her draft request must detail any previous ASIO warrants issued in respect of the same person, including the duration of any questioning, and of any detention under a detention warrant.[46]

(It should be noted that the Director-General does not need to detail any detention that took place pursuant not to a detention warrant, but rather a direction for detention given by the prescribed authority pursuant to section 34F(1)(a) or 34F(1)(b). There seems to be no good reason for this omission.)

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[41] First Listings Report at 3.11, 3.15.

[42] First Listings Report at 3.19.

[43] Second Listings Report at 2.18-2.30, 3.22, 3.26, 3.30, 3.35, 3.40, 3.45, 3.48-3.49.

[44] Second Listings Report at 2.3, 2.6 to 2.12, 3.52.

[45] Section 34C(2)(c).

[46] Section 34C(2)(d)

However, none of these matters need be brought to the attention of the issuing authority. For the reasons given in 2.1.1, this makes them inadequate as safeguards.

These inadequacies of process contrast with the case where the Director-General is seeking a detention warrant, and the person with respect to whom it is sought has already been detained pursuant to an ASIO warrant. In that case, when the Attorney-General decides whether or not to consent to the Director-General making the request, he or she must:

- Take account of the fact that any previous detention pursuant to an ASIO warrant has taken place;[47]

- Be satisfied that the issue of the warrant is justified by information that is additional to or materially different from that known to the Director-General at the time the Director-General sought the Attorney-General's consent to request the issue of the last of the earlier warrants.[48]

Furthermore, when deciding whether or not to issue the warrant, the issuing authority must:

- Take account of the fact that any previous detention pursuant to an ASIO warrant has taken place;[49]

- Be satisfied that the issue of the warrant is justified by information that is additional to or materially different from that known to the Director-General at the time the Director-General sought the Attorney-General's consent to request the issue of the last of the earlier warrants;[50]

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[47] Section 34C(3D)(a).

[48] Section 34C(3D)(b)

[49] Section 34D(1A)(a).

[50] Section 34D(1A)(b)(i).

- Be satisfied that the person is not being detained pursuant to one of those earlier warrants.[51]

At least in this case, there is a minimum attempt to ensure the efficacy of the safeguards, by requiring the Director-General to make them out to the issuing authority.

Even in this case, however, there are objections to be made. Although a repeat warrant is legal only where additional or materially different information comes into the possession of the Director-General, in practice this is likely to be difficult to confirm, given the clandestine manner in which ASIO operates. The issuing authority may indeed have to rely simply on the Director-General's testimony that this is the case. This must inevitably create doubts about the legitimacy of warrants issue, and indeed simply illustrates the general concerns, raised in Part 1 of this submission, of granting this sort of coercive power to a clandestine security service.

2.13 Detention without a detention warrant

When a person is before a prescribed authority for questioning, the prescribed authority may give a direction to detain a person, even if the warrant is solely a questioning warrant and not a detention warrant.[52] The prescribed authority may do this only if he or she is satisfied that there are reasonable grounds for believing that the person may, unless detained:

- Alert someone involved in a terrorism offence that the offence is being investigated;[53]

- Not continue to appear, or appear again, to be questioned;[54]

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[51] Section 34D(1A)(b)(ii). This is not the only point at which the legislation expressly contemplates that there may be multiple warrants in force at a given time in relation to a single person: see sections 34JBA(3)(a), 34JC(3)(a).

[52] Sections 34F(1)(a), 34F(1)(b), 34F(2A).

[53] Section 34F(3)(a).

[54] Section 34F(3)(b).

- Destroy, damage or alter a record thing that has been, or may be, requested pursuant to the warrant.[55]

This allows an official to place someone in detention without any warrant having been issued, nor with any obligation to bring the person before a court to test the lawfulness of their detention. It is a power that is therefore wide open to arbitrary exercise and abuse, and thus is highly objectionable on basic rule of law grounds. It is obviously a power that has no place in a democracy such as Australia.

2.2 What a warrant authorises and requires

Not only is the process for the issuing of compulsory questioning warrants flawed, contrary to democratic principles and thereby an invitation to abuse by the Executive, but the warrants themselves create powers and obligations that are quite inconsistent with basic rule of law values.

The warrant must authorise ASIO to question the person before a prescribed authority by requesting the person to:

- Give information that is or may be relevant to intelligence that is important in relation to a terrorism offence;[56]

- Produce records or things that are or may be relevant to intelligence that is important in relation to a terrorism offence.[57]

The questioning may last for up to 24 hours, in rolling 8 hour periods subject to the approval of the prescribed authority.[58] A request by ASIO for an extension of questioning time can be made in the absence of the person being questioned, and of

[55] Section 34F(3)(c).

[56] Section 34D(5)(a)(i).

[57] Section 34D(5)(a)(ii).

[58] Section 34HB.

his or her lawyer or other representative.[59] When an interpreter is present, the maximum period of questioning becomes 48 hours.[60]

If a person is detained pursuant to a warrant, then he or she must be released once:

- ASIO tells the prescribed authority they have nothing more to ask the person;[61]
- The time for questioning has ended (whether because the 24/48 hour limit has been reached, or the prescribed authority will not extend it, or has revoked an extension);[62]
- A week has passed since the person was first brought before a prescribed authority in accordance with the warrant;[63]
- The person has been detained for a week (168 hours).[64]

These limits on questioning and detention of non-suspects significantly exceed those that apply to suspects under the *Crimes Act 1914* (Cth) (‘*Crimes Act*’), even following their amendment to increase the time for which those suspected of committing terrorism offences may be detained for questioning prior to arrest![65]

Not only does the Act subject non-suspects to periods of questioning and possible detention that exceed those faced by suspects, but it places objectionable burdens on an individual being questioned.

First, a person being questioned under a warrant has no right not to answer a question, or to refuse to produce a record or thing, simply because it might tend to

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[59] Section 34HB(3).

[60] Section 34HB(11).

[61] Section 34D(3)(a).

[62] Sections 34D(3)(b), 34HB(7).

[63] Section 34D(3)(c).

[64] Section 34HC.

[65] *Crimes Act* sections 23CA-23DA.

incriminate them, or make them liable for a penalty,[66] although the Act does provide that anything said, and the production of any thing or record, in response to a request made in accordance with the warrant while before a prescribed authority for questioning, is not admissible in criminal proceedings against the person (other than offences against Section 34G).[67] This sort of compulsory questioning is not necessarily objectionable as such, and does have a long history in Australia. However, it has never before been incorporated into a regime with so much scope for Executive discretion, and so little practical capacity for the oversight of its exercise.

More significantly, the Act makes it an offence for a person before a prescribed authority for questioning to fail to provide information requested, or to produce any record or thing requested, commits an offence.[68] There is no requirement for the prosecution to prove beyond reasonable doubt that the person knew the information or had possession of or control over the record or thing in question. They must only prove that the information or thing was not handed over.

It is a defence to such an offence that the person does not have the information, record or thing.[69] However, if the accused wishes to run such a defence of ignorance, or non-possession of the record or thing, they bear an evidential burden: they must adduce evidence that suggests a reasonable possibility that they did not have the information, record or thing. The most obvious means of discharging this burden – in many cases, perhaps the only means – would be for the defendant to testify, but this would requires the defendant to waive their right not to testify in his or her own defence. The structure of these offences, which give effect to the compulsory questioning regime, therefore pose a very significant threat to the right to silence. Any compulsory questioning regime should place the burden on the prosecution to prove that a person failed to provide information in their possession, without obliging an accused to testify in his or her own defence.

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[66] Section 34G(8).

[67] Section 34G(9).

[68] Sections 34G(3), 34G(6).

[69] Sections 34G(4), 34G(7).

2.3 Secrecy and the freedom to communicate

When one looks in detail at the regime established by Division 3 of Part III of the Act, there is little doubt that one of the most objectionable features is the secrecy in which the process is enshrouded. This secrecy is established in two way:

- The provision for incommunicado detention;
- The general secrecy relating to warrants and questioning;
- The Director-General's general power to destroy records.

2.3.1 Incommunicado detention

A person taken into custody and detained (whether pursuant to a detention warrant, or a direction of the prescribed authority, or because they did not appear before a prescribed authority when they were obliged to) may not contact anyone, and may be prevented from contacting anyone, while in custody or detention.[70]

Exceptions apply. The prescribed authority may permit contact to be made – but is not obliged to unless the warrant to specifies[71]. Provision must be made to enable a person in custody or detention to contact the Inspector-General or the Ombudsman.[72] And, in the case of a detention warrant, the Attorney-General must ensure that the warrant will permit the person to contact a lawyer of their choice at any time while they are detained pursuant to the warrant.[73] However, these exceptions are far from sufficient.

First, a warrant that permits questioning but not detention may be issued even if it does not permit the person to contact a lawyer. A person may then end up under

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[70] Section 34F(8).

[71] Sections 34F(1)(d), 34F(9)(a).

[72] Sections 34F(9)(b), 34F(9)(c) and note thereto. It is an offence for those detaining a person knowingly to fail to provide facilities for making an oral complaint: section 34NB(4).

[73] Section 34C(3B)(a).

detention, pursuant to a direction from the prescribed authority.[74] Under such circumstances, there is no obligation on the prescribed authority to permit the person to contact a lawyer. This is obviously inadequate – no person should be held in detention in Australia without the right to contact a lawyer.

Second, the Act specifically provides for the involvement of State and Territory police in taking individuals named in warrants into custody or detention.[75] However, no provision is made in the Act for the possibility of complaints about the conduct of State and Territory police.

Third, the prescribed authority is obliged to inform a person appearing before them for questioning of their right to seek a remedy in a federal court, when that person first appears, and at least once in every twenty-four hour period.[76] However, no provision is made for a person in detention to contact the registries of the Federal Magistrates Court, Federal Court or High Court. This is particularly significant in the situation in which a person ends up in detention with no right to contact a lawyer, because in that case there would be no one able to contact the registry of the court on the person's behalf.

2.3.2 General secrecy provisions

If a warrant for compulsory questioning has been issued, then while it is in force (ie for a period of up to 28 days[77]), it is an offence (with a penalty of up to 5 years imprisonment) to disclose information:

- That indicates the fact that the warrant has been issued;
- That indicates a fact relating to the content of the warrant;

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[74] Sections 34F(1)(a), 34F(1)(b).

[75] Sections 34A (definition of 'police officer'), 34F(4)(b).

[76] Sections 34E(1)(f), 34E(3).

[77] Section 34D(6)(b).

- That indicates a fact relating to the questioning or detention of a person in connection with the warrant.[78]

Furthermore, if a warrant has been issued, then while it is in force, or for two years following its expiration, it is an offence (with a penalty of up to 5 years imprisonment) to disclose operational information acquired as a direct or indirect result of:

- The issuing of the warrant;
- The doing of anything authorised by the warrant;
- The doing of anything authorised by a direction given by the prescribed authority in connection with the warrant;
- The doing of anything authorised by Division 3 in connection with the warrant.[79]

In this context, 'operational information' means:

- Information that ASIO has or had;
- A source of information (other than the person specified in the warrant) that ASIO has or had;
- An operational capability, method or plan of ASIO's.

This would include any information relating to the warrant or someone's treatment pursuant to it. Depending on exactly what it means to acquire information as an indirect result of the issuing of a warrant, it may also include information relating to ASIO's follow-up activities in relation to a warrant.

Either offence may be committed wherever in the world the disclosure takes place.[80] It is no defence that the information was acquired as a result of someone

[78] Section 34VAA(1)

[79] Sections 34VAA(1), 34VAA(2).

else's disclosure.[81] Strict liability as to the nature of the information applies if the accused is the person in relation to whom the warrant was issued, or their lawyer (who was either present at questioning, or who provided advice and/or representation in relation to the warrant).[82] Otherwise, recklessness is required.[83]

The objections to these offences are many. First, as is implicitly recognised by section 34VAA(12), there must be doubt as to their consistency with the Constitution's protection of free political communication.

Second, they render ASIO's conduct in relation both to the issuing of compulsory questioning warrants, and the exercise of authority under such warrants, virtually immune from public scrutiny. The press cannot report on ASIO's activities. Individuals cannot speak to one another – imagine the situation of a person who has been held in detention pursuant to an ASIO warrant for the maximum period of 7 days[84] who, upon returning home after a week of being held incommunicado is unable even to tell his family where he has been! Nor can the Parliament engage in proper scrutiny. For example, the scope of submissions to this very inquiry is reduced by the fact that their authors are unable to learn what has been going on. The information ASIO is obliged to provide[85] is far from adequate to get a sense of the impact of this warrant regimes on the community.

A potentially more sinister consequence of this impact of secrecy on scrutiny is the way that it allows the Executive to politicise the use information relating to these warrants. The Act establishes wide-ranging exemptions for official disclosure: it is always open to the Attorney-General and the Director-General to permit disclosure without being guilty of the offence,[86] and the Attorney-General may also exercise

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[80] Section 34VAA(4).

[81] Section 34VAA(10).

[82] Section 34VAA(3).

[83] Section 34VAA(3).

[84] Section 34HC.

[85] Pursuant to sections 94(1A) and 94(1B).

[86] Sections 34VAA(1)(f), 34VAA(2)(f), 34VAA(5) (paragraphs (g) and (h) of the definition of 'permitted disclosure'), 34VAA(7), 34VAA(8).

indirect control through the making of regulations permitting certain classes of disclosure.[87] The sorts of political advantage that might be gained by the selective release of information are many; one obvious example that can be given is the selective release of information so as to paint certain individuals or communities as 'terrorists'. This point offers a further illustration of the basic point made at 1.3 above, that vesting these sorts of powers in the Executive and its security agencies is inconsistent with the sort of political openness that is essential to both the workings and the values of a democracy.

A third objection to section 34VAA is that it makes the safeguards offences virtually worthless. Disclosure to a police officer, a public prosecuting authority, a lawyer or anyone else for the purpose of complaining about a contravention of the safeguards, at any time that a warrant is in force and for up to two years afterwards, would almost certainly constitute an offence (as this would almost certainly amount to operational information). There is no provision in the definition of 'permitted disclosure'[88] for such complaints to be made (it would not be covered by paragraph (a)(i) of the definition, referring to the performance of a function or duty under the act, as the victim of a crime is not under a duty to complain, nor would it be covered by paragraph (c) or (d), as complaining of a crime is not the same thing as seeking a remedy). It is very unlikely that a complaint of a breach of the safeguards provisions could be effectively followed up, let alone prosecuted, two years after the offence was allegedly committed.

2.3.3 Destruction of records

The Act gives the Director-General the power to have a record made because of a warrant and in the possession of ASIO destroyed once he or she is satisfied hat it is not required for the performance of functions or exercise of powers under the Act.[89] This power simply increases the difficulty of holding ASIO to account for its exercise of coercive powers under the Act.

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[87] Sections 34VAA(5) (paragraph (i) of the definition of 'permitted disclosure'), 34VAA(9).

[88] At section 34VAA(5).

2.4 Access to lawyers

This submission has already noted objectionable limitations the Act places on the right of those in the custody of the state to have access to lawyers. There are further points of objection to be made on this point, however.

2.4.1 Limited access to lawyers

As has been said, only a detention warrant must guarantee that a person be allowed to contact a lawyer. A warrant that is solely for questioning may be issued even if it does not permit the person to contact a lawyer. Furthermore, although the Attorney-General must ensure that a detention warrant will permit the person to contact a lawyer of their choice at any time while they are detained pursuant to the warrant,[90] it need only permit such contact after the person has:

- Been brought before the prescribed authority for questioning;[91]
- Identified their lawyer;[92]
- Given ASIO the opportunity to request the exclusion of that lawyer.[93]

In the case where a person is not able to identify a lawyer either by name or description (for example, the person may not be familiar with the existence of duty lawyers, and in any event it is not clear that questioning will be taking place in a forum where duty lawyers are available) the Act does not oblige the prescribed authority, or anyone else, to nominate a lawyer on behalf of the person.

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[89] Section 34S.

[90] Section 34C(3B)(a).

[91] Section 34C(3B)(b)(i).

[92] Section 34C(3B)(b)(ii).

[93] Section 34C(3B)(b)(iii).

When a person subject to a detention warrant does seek to contact their lawyer, they may be stopped from doing so by the prescribed authority, but only if the prescribed authority is satisfied that if the person makes contact with their lawyer:

- A person involved in a terrorism offence may be alerted that the offence is being investigated;[94]
- A record or thing that the person may be requested to produce in accordance with the warrant may be destroyed, damaged or altered.[95]

If this happens, the person may contact a different lawyer, but the prescribed authority has the same right to stop that contact.[96] Again, the prescribed authority is not obliged to nominate another lawyer, if the person himself or herself cannot identify one.

2.4.2 Limits on the assistance a lawyer can give to his or her client

If a person contacts a lawyer, whether because the warrant permits them to, or the prescribed authority has permitted them to (pursuant to section 34F(1)(d)), then:

- The contact must be made in such a way that ASIO can monitor it;[97]
- The lawyer may intervene in questioning, or address the prescribed authority, only to seek clarification of an ambiguous question;[98]
- If the prescribed authority considers that the lawyer's conduct is unduly disrupting the questioning, the authority may direct a person exercising authority under the warrant to remove him or her from the place where the questioning is occurring; in this case, the

[94] Sections 34TA(1), 34TA(2)(a).

[95] Sections 34TA(1), 34TA(2)(b)

[96] Section 34TA(4).

[97] Sections 34U(1), 34U(2).

[98] Section 34U(4).

> prescribed authority must allow the person to contact a different lawyer, but again need not nominate one.[99]

Each of these points is a ground of objection to the Act. Although the Act explicitly preserves legal professional privilege,[100] a lawyer's confidence in the protection of his or her relationship with a client must inevitably be undermined by the obligation to permit monitoring.

The idea that a lawyer cannot, during questioning, give advice to a client borders on the absurd. Given the complexity of the Act, and given the obligations it places on a person to answer questions and yield up records and things, it is essential that lawyers be able to advise their clients on the legal consequences of their conduct in the questioning environment.

Finally, the fact that a lawyer can be excluded from the proceedings at the direction of the prescribed authority again must undermine the lawyer's ability to properly represent and advise his or her client. How can a lawyer do these things properly when he or she must also have one eye on the prescribed authority, to ensure that he or she does not do something which the prescribe authority will regard as sufficiently disruptive to merit exclusion.

A further limit on the capacity of lawyers to properly advise and represent their clients is permitted by section 34VA of the Act, which states that regulations made under the Act may prohibit or regulate access to security sensitive information by lawyers acting for a person in connection with proceedings for a remedy relating to a warrant, or treatment in connection with a warrant. Given that most information relating to someone's treatment pursuant to a warrant is likely to be security-classified, this provision has the potential to make a farce of the suggestion that remedies can be sought in the federal courts by a person who is subject to a warrant.

It should be noted that section 3B of the *Australian Security Intelligence Organisation Regulations 1980* (Cth) in effect brings about this result, making the

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[99] Sections 34U(5), 34U(6).

[100] Section 34WA.

access of a lawyer to the relevant evidence dependent upon an exercise of discretion by the Secretary of the Attorney-General's Department. It should be also noted that the National Security Intelligence Legislation Amendment Bill 2005, which is currently before the Senate, threatens to legislatively entrench this result.

Once again, these legislative efforts to ensure that the secrecy of the security services remains protected simultaneously illustrate the basic point that in a democracy these agencies should not be exercising coercive power.

2.4.3 Ambiguities in relation to warrants solely for questioning

The Act does not state unambiguously that a person being questioned is entitled to the presence of a lawyer. However, section 34U, by stating that it applies whenever a warrant permits a person to contact a lawyer,[101] and then going on to discuss the presence and conduct of the lawyer during questioning,[102] does give rise to an implication that, at least when a warrant mentions a right to contact a lawyer, that lawyer is permitted to be present during questioning. However, the Act expressly permits questioning to take place without a lawyer being present.[103]

Furthermore, what about the situation where a warrant is for questioning only, and does not (as it need not in order to be lawful) expressly permit the person named in the warrant to contact a lawyer? Common sense suggests that, given it is a basic principle of our law that a person is free to do whatever is not otherwise prohibited, that there is nothing to stop a person in this situation contacting a lawyer.[104] However, there is nothing to say that a person must be given the facilities to contact a lawyer. Nor is there anything to say that a lawyer must be admitted into the premises, let alone the room, in which questioning is taking place.

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[101] Section 34U(1).

[102] Sections 34U(4), 34U(5).

[103] Section 34TB(1).

[104] Such contact is excluded from the operation of the secrecy offences: section 34VAA(5) (paragraph (c)(i) of the definition of 'permitted disclosure').

It is possible that, in these circumstances, certain provisions of the *Crimes Act* apply:

- A person who is called to appear before a prescribed authority for questioning is obliged to appear at the time indicated by the warrant, and/or by the prescribed authority;[105]

- The *Crimes Act* provides that anyone who has not been arrested, who is in the company of a police officer who would not allow him or her to leaves, and who is being questioned in relation to a Commonwealth offence, is a protected suspect;[106]

- A protected suspect has rights under the *Crimes Act* to contact a friend or a lawyer.[107]

If a police officer is present during questioning, it is therefore likely that a person being compulsorily questioned by ASIO is a protected suspect who (in virtue of this status) has some rights to contact a lawyer.[108]

Nevertheless, this whole issue is extremely unclear. At a bare minimum, the application of the *Crimes Act* should be clarified, and the right of a person subject to a questioning warrant to have a lawyer present be guaranteed.

2.5 Restrictions on travel that flow from seeking, or issuing, a warrant

Once the Director-General seeks the Attorney-General's consent to the making of a request for a warrant in relation to a person, then:

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[105] Sections 34D(2)(a), 34F(1)(e), 34G(1).

[106] *Crimes Act* section 23B(2) together with section 23B(1) (definition of 'investigating official').

[107] *Crimes Act* section 23G.

[108] The exception under section 23B(2)(d)(iv) would typically not apply, as it would be ASIO, not the police officer, who would be exercising authority under the warrant.

- As soon as practicable after that person is notified of the Director-General's action, they must deliver all their passports, Australian and foreign, to a police or customs officer;[109]

- Once the person is notified of the Director-General's action, it becomes an offence for them to leave Australia without the Director-General's written permission.[110]

Passports must be returned, and overseas travel again becomes legal, if the Attorney-General does not consent to the request, if the issuing authority refuses the request, or if, once the warrant is issued, it ceases to be in force.[111] However, the Act does not specify a time limit in which the Attorney-General must refuse or agree to the Director-General's request, so these provisions seem to give ASIO an open-ended power to curtail people's overseas travel rights, by seeking permission to request warrants in respect of them.

When this objection was put during the Senate Legal and Constitutional Committee's inquiry into the Anti-Terrorism Bill (No 2) 2004, which introduced these provisions, ASIO gave the following response:

> The important point that has to be made is that the director-general can only request the minister's consent to the issuing of a warrant if satisfied that the statutory criteria in section 34C of the act have been met—that is, 'that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence'. He must have formed that state of satisfaction to have made the request and 'that relying on other methods of collecting that intelligence would be ineffective'—that is, it is a measure of last resort. He would have to have that state of mind. In no circumstance could the director-general request the minister's consent to the issuing of a warrant and then, based on the fact of the person then surrendering his or her passport, consider that the warrant is no longer required…
>
> The other scenario you raised was the possibility of serial requests being made. It is just not conceivable.[112]

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[109] Section 34JBA.

[110] Section 34JBB.

[111] Sections 34JBA(2), 34JBB(1)(c).

[112] Evidence to Senate Legal and Constitutional Committee, Sydney, July 26 2004, p 39 (Mr Jim Neely, Legal Advisor, ASIO).

Two points can be made in reply to this. First, it seems to display some confusion between the statutory obligations imposed upon the Attorney-General, and those imposed upon the Director-General. Second, it seems in effect to invite one to accept on trust that ASIO will not abuse this power. But the legislation offers no institutional support for such trust; and in any event citizens of a democracy should not be obliged simply to trust their security services to respect their right to freedom of movement. Legislation should be written in such a way as to make such trust unnecessary.

Once a warrant has been issued in relation to a person, then:

- As soon as practicable after that person is notified of the issue of the warrant, they must deliver all their passports, Australian and foreign, to ASIO;[113]

- Once the person is notified of the issue of the warrant, it becomes an offence for them to leave Australia without the Director-General's written permission.[114]

Again, passports must be returned, and overseas travel becomes legal, once the warrant ceases to be in force.[115] As with the previous offences, the penalty for non-compliance is up to 5 years imprisonment.

These offences are marginally less objectionable than the previous two. Nevertheless, they represent a significant incursion on freedom of movement at the whim of the Executive. A basic principle of a liberal democracy should be that those who have committed no crime, and are suspected of no offence, should be free to travel. Once again, the basic contention of this submission is illustrated: the Act is inconsistent with the basic principles of democracy. It should therefore be repealed, or allowed to lapse with its sunset clause.

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[113] Section 34JC.

[114] Section 34JD.

[115] Sections 34JC(2), 34JD(1)(c)(ii).