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Committee Secretary
Parliamentary Joint Committee on ASIO, ASIS and
DSD
Parliament House
Canberra ACT 2600
[mailto:pjcaad@aph.gov.au]

Dear Secretary

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

I appreciate the opportunity to participate in
the above review.

I wish to express the following concerns
regarding the operation, effectiveness and
implications of Division 3 Part III of the
Australian Security Intelligence Organisation
Act 1979 ('the Act'):

Breadth of ASIO Special Powers Relating to
Terrorism Offences

ASIO's powers to detain and question ('ASIO's
special powers') are not limited to those
suspected of involvement in terrorist activities
or links to terrorist organizations. Anyone with
important information relating to terrorism
activities could be the subject of detention and
questioning.

In previous times, the extremely broad definition
of terrorism adopted in the Act may have included
activities associated with the African National
Congress (ANC) and East Timorese independence
movements. This unreasonably broadens the
category of person potentially subjected to
questioning and/or detention under the Act.

Secrecy

Those held under ASIO's special powers for
periods of up to a week are held in secret. For
two years afterwards it is an offence to discuss
what happened with anyone other than one's lawyer
and certain other authorities. This means that it
is an offence tell one's friend, family and
community what occurred.

The serious and coercive nature of ASIO's special
powers is exacerbated by the secrecy that
surrounds them. The capacity of individuals and
communities to express concern about the exercise
of the powers and to keep ASIO accountable for
its actions is curtailed.

A system of open and accountable government and government agencies is a prerequisite for true and meaningful democracy. These laws open the door for abuses of power and, of even greater concern, the concealment of these abuses. The secrecy provisions contained in the act are unreasonable in an open, democratic society and should be amended.

Right to silence

Those questioned under the ASIO Powers have no right to silence. Failure to answer questions is a crime punishable by up to five years' imprisonment. Failure to answer questions is an offence even if the person does not have the information ASIO is seeking, unless the person can show that they did not have the information.

The right to silence is a fundamental principle of our justice system. It is of great concern to us that it is abrogated in such broad circumstances, in a scheme shrouded in secrecy and lack of public accountability.

Legal Representation

Where a person is being questioned under the Act, there is no requirement that ASIO permits the person to obtain legal advice or to have a lawyer present. Where a person is permitted to contact a lawyer, ASIO may still question them prior to the lawyer arriving and before they have a chance to obtain legal advice. Where a person's chosen lawyer is deemed to be a security risk they may be prevented from contacting that lawyer. Where a person's lawyer is found to be disruptive during questioning the lawyer may be removed.

The right to legal representation is unduly limited and uncertain under ASIO's special powers. Given the absence of the right to silence and the seriousness of matters being investigated in such cases, it is critical that people undergoing questioning have unfettered access to legal advice before and during questioning.

Passports and Leaving Australia

Where a warrant is sought in relation to a person, that person must surrender their passport and must not leave Australia. This applies whether or not a warrant is ultimately issued. Prior to the issue of a warrant or where no warrant is issued, there is no justification for such significant restrictions on a person's freedom of movement.

Length of Questioning

Where an interpreter is required, a person may be questioned for up to 48 hours. I note that one person questioned under a warrant issued in 2003-2004 was questioned for 42 hours 36 minutes. While the use of an interpreter may mean that the questioning process takes longer, questioning a person for 48 hours without reasonable sleep is excessive and inhumane. This must also cast doubts on the reliability of any information or evidence obtained through such a process. Whether or not an interpreter is used does not alter the unreasonableness of being questioned for longer than 24 hours.

Lack of publicly available information for this

review

Those affected by the ASIO powers have almost no capacity to comment or provide information about the operation of these powers because of secrecy provisions in the Act.

As a result, the main source of information about the operation of these powers comes from ASIO's reports, and is extremely limited in scope. There is an absence of publicly available information from sources independent of the agency exercising these powers.

This lack of independent information undermines the capacity of organizations such as ours to comment on the operation, effectiveness and implications of the ASIO powers. It also impedes the Committee's ability to conduct an effective review.

I submit that in future additional material about the operation of these and similar powers should be made available so as to assist in the process of review.

I thank the Committee for the opportunity to contribute to the above Review.
Yours faithfully

Julie Lehmann

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