
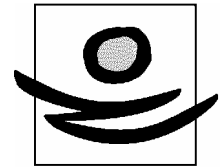


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V I C T O R I A
L E G A L A I D

24 March 2005

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

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By e-mail to: Margaret.Swieringa.Reps@aph.gov.au

Dear Secretary

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

Thank you for the opportunity to comment on the Part III Division 3 of the *Australian Security Intelligence Organisation Act 1979*.

I attach Victoria Legal Aid's comments about the operation of ASIO's questioning and detention powers for your consideration.

If you would like to discuss any of our comments please contact me on (03)9269-0244 or Tonye Lee (Policy Officer) on (03)9269-0246.

Yours faithfully

TONY PARSONS
Managing Director

Encl.

1. Victoria Legal Aid's criminal law clients

Victoria Legal Aid is the state's largest criminal law practice, employing 130 lawyers who practise criminal law from our twelve offices in metropolitan and rural Victoria. In 2003-04 we provided the following services to our criminal law clients:

- Multilingual telephone information services
- Face-to-face legal advice at our offices and at most of Victoria's prisons
- 37,629 duty lawyer services at the Magistrates' Court
- Legal representation in 7,518 cases.

VLA's Youth Legal Service provide advice and representation to children and young people aged 6 - 17 years, primarily in the criminal and family divisions of the Children's Court at Melbourne and around metropolitan region. The service is made up of 13 legal staff and 2 in-house counsel. In 2003-04 the Youth Legal Service provided legal representation in 1,473 cases and gave legal advice in a further 967 matters.

2. Ongoing need for these powers

We note that the powers contained in Part III Division 3 of the *ASIO Act 1979* (the Division) system cease to have effect on 23 July 2006.¹ The Government bears the burden of proof to satisfy Australians that there is an ongoing need for these powers, which are a significant departure from traditional Australian policy on human rights and civil liberties. We do not believe that any such need has been demonstrated. We note that only three people were questioned in 2003-04.² No information has been provided about the value of the information obtained or whether it could have been obtained by traditional investigative procedures.

The European Court of Human Rights has noted the importance of achieving an appropriate balance between the rights of an individual, the rights of the community and the need to implement an adequate response to terrorist threats.³ VLA is opposed to any extension of the powers in the Division. We believe they are a disproportionate response to the threat of terrorism in Australia.

However, if these powers are to be extended, then our other concerns are set out below. Many of these concerns were raised by other stakeholders in 2002 and are noted in the *Senate Legal and Constitutional References Committee Report* tabled 3 December 2002. We urge you to re-examine the submissions to that inquiry.

¹ s.34Y *ASIO Act 1979*

² The Parliamentary Joint Committee on ASIO, ASIS and DSD *Review of ASIO's Questioning and Detention Powers: Discussion Paper*, December 2004.

³ *Report of the European Commission of Human Rights* (14 May 1987) Appls: 11209/84, 11234/84, 11266/84 and 11386/85: Terrence Brogan, Dermot Coyle, William McFadden and Michael Tracey v. United Kingdom, para 106. See also *Brogan & Ors v. The U.K.* [1988] ECHR 24 29/11/88.

3. Children

VLA is concerned that the Division permits the detention, questioning and strip searching of children aged 16-17.⁴ We believe the provisions (which allow 168 hours detention)⁵ are inconsistent with the *Convention on the rights of the child*. The Convention states that '*the detention of child shall be used only as a measure of last resort for the shortest period of time*'.⁶

We acknowledge that the Division contains some safeguards that recognise the special vulnerability of young people (eg: the mandatory presence of a parent or other acceptable adult during questioning or strip searching and the limiting of questioning to 2 hour blocks). However, these safeguards are inadequate to protect children against the package of civil liberties infringements contained in the Division. The Division should not apply to children under 18 (as recommended by the Committee).⁷

4. Non-suspects

VLA is concerned that this Division permits the detention of adults who are not themselves suspected of complicity in terrorist activity. It is sufficient if the person could '*substantially assist the collection of intelligence*' about terrorism.⁸ It is arguable that these provisions contravene the prohibition on arbitrary detention in the *International Covenant on Civil and Political Rights*.⁹ We suggest the provisions should only apply where there are reasonable grounds for suspecting that the subject will commit, is committing or has committed a terrorism offence.

5. The right to silence and privilege against self-incrimination

VLA opposes the abrogation of the right to silence in the Division. We note that information provided cannot be used in evidence against the subject in criminal proceedings (use immunity).¹⁰ However, information provided can still be used to uncover other fresh evidence. The fresh evidence can then be used against the subject (derivative use).

We understand that the primary purpose of the Division is to prevent terrorist attacks by gathering intelligence, rather than criminal prosecution after the event. Therefore, VLA believes that derivative use immunity should also apply to information obtained using these powers.

6. Legal representation

VLA is concerned about the limits on the right to legal representation contained in the Division, including:

⁴ *ASIO Act* s.34NA and s.34M.

⁵ *ibid* s.34HB and s.34HC.

⁶ Article 37 of the *Convention On The Rights Of The Child*, ratified by Australia in 1991.

⁷ *Senate Committee Report, op cit* at paragraph 10.29.

⁸ *ASIO Act* s.34D & s.34F

⁹ Article 9(1), *International Covenant On Civil And Political Rights* 999 UNTS 171 in force 23/3/76.

¹⁰ *ibid* s.34G(9)

6.1 Choice of lawyer

The subject can be prevented from contacting their own lawyer, if the prescribed authority considers there is a security risk.¹¹ However, we understand that no lawyer has been excluded to date.¹² We believe this provision contravenes the *International Covenant on Civil and Political Rights*.¹³ We suggest that this provision should be removed from the legislation.

6.2 Questioning in the absence of the lawyer

The right to legal representation is meaningless if the lawyer is not present. The Division provides that questioning can still occur if there is a delay in lawyer's attendance or the lawyer of choice is excluded.¹⁴ We understand that current practice is to give the subject sufficient notice to arrange acceptable legal representation.¹⁵ We suggest that this good practice should be enshrined in legislation. Further, questioning should be suspended or deferred until the lawyer is present.

6.3 Legal aid

The right to legal representation is meaningless if the subject cannot afford a lawyer. We understand that the Attorney-General released a press statement that '*costs for approved lawyers would be met by the Commonwealth through, potentially, a legal aid style program*'.¹⁶ However, we note that current Commonwealth legal aid guidelines do not appear to cover funding for legal representation during questioning prior to criminal prosecution. We are unaware of any other funding schemes that would enable access to legal representation. We suggest that subjects should have access to legal aid funding (as recommended by the Committee),¹⁷ subject to the national means test.

VLA objects to the National Security Guideline¹⁸ that requires lawyers receiving legal aid funding in matters related to national security to be secured security cleared. We note that the Australian Law Reform Commission has recommended that this guideline should be rescinded.¹⁹

¹¹ ASIO Act s.34TA

¹² *Terrorism- Interrogation Powers*, Phillip Boulten SC, LIV Biennial Criminal Law Conference, Melbourne, 2004 at paragraph 4.

¹³ Article 14(3)(b) *International Covenant on Civil and Political Rights* op cit.

¹⁴ ASIO Act s.34TB

¹⁵ *Terrorism- Interrogation Powers*, op cit at paragraph 4.

¹⁶ *Senate Legal and Constitutional References Committee Report* tabled 3 December 2002 at paragraph 11.46.

¹⁷ *Senate Committee Report*, op cit at paragraph 11.46, recommendation 19.

¹⁸ Commonwealth of Australia, *Legal Aid Guidelines: National Security Matters Guideline*, effective 28 August 2003.

¹⁹ *Keeping Secrets Report On The Protection Of Classified And Security Sensitive Information*, Australian Law Reform Commission Report 98, May 2004, recommendation 6-1.

6.4 Intervention by lawyers

The right to legal representation is meaningless if the lawyer has no immediate power to protect his or her client from demeaning, unfair, or oppressive questioning (as prohibited by protocol).²⁰

The Division provides that lawyers:

- cannot intervene in questioning except to request clarification of ambiguous questions.²¹
- can be removed from the room if the prescribed authority considers them unduly disruptive.²²
- cannot disclose certain information to the Federal Court when seeking a remedy for inappropriate treatment during questioning.²³

VLA suggests that these provisions should be removed.

At present, the only immediate remedy available (when a subject is being inappropriately questioned) is to request the intervention of the Inspector General of ASIO. We understand that the current practice is for the Inspector General or his representative to be present during questioning.²⁴ We suggest that this good practice should be enshrined in the legislation.

6.5 Legal advice

The right to receive legal advice is meaningless if the lawyer does not have access to relevant information. The Division provides that lawyers are not entitled to see any documents referred to during questioning.²⁵ We suggest that the legislation should entitle lawyers to see all documents referred to during questioning.

6.6 Eavesdropping

The right to legal professional privilege is meaningless if the subject cannot communicate privately with his or her lawyer (as recognised in United Nations Principles and the *International Covenant on Civil and Political Rights*).²⁶ The Division provides that the prescribed authority can monitor conversations between a subject and lawyer.²⁷ We suggest that this provision should be removed altogether. Alternatively, it should be limited to visual monitoring only (as recommended by the Committee).²⁸

²⁰ s.34D Warrant Protocol, ASIO, paragraph 4.1.

²¹ ASIO Act s.34U(4)

²² ibid s.34U(5)

²³ ASIO Amendment Regulations 2003 No.1

²⁴ *Terrorism- Interrogation Powers*, op cit at paragraph 4.

²⁵ ASIO Act s.34U(2A)

²⁶ Principle 22 of the *United Nations Basic Principles On The Role Of Lawyers* and Article 14(3)(b) and Article 17 *International Covenant on Civil and Political Rights* op cit.

²⁷ ASIO Act s.34U(2)

²⁸ *Senate Committee Report*, op cit at paragraph 11.26, recommendation 9.

7. Period of questioning

VLA is concerned that the Division permits questioning for a total of 24 hours (ie: an initial 8-hours, plus 2 subsequent 8-hour periods with approval) or for a total of 48 hours if the subject requires the assistance of an interpreter.²⁹ In theory, subsequent questioning periods are only permitted if the prescribed authority is satisfied (on reasonable grounds) that it will '*substantially assist the collection of intelligence*'. However, the application to continue questioning may be made in the absence of the subject and his or her lawyer. Therefore, it is impossible to assess whether current practice complies with even this minimal safeguard. We suggest that lawyers should be permitted to appear and make submissions during these applications.

8. Secrecy

VLA is concerned about the secrecy provisions in the Division. Section 34VAA prohibits the disclosure of information concerning the existence of the warrant (before it expires) or operational information (before the warrant expires and for up to 2 years afterwards). This is a strict liability offence for the subject of the warrant and his / her legal representative.³⁰

VLA considers that these provisions effectively permit ASIO to act with impunity by gagging any public discussion of questionable conduct. The entirety of the provisions arguably contravene the Constitutional doctrine of implied freedom of political communication.³¹ The blanket prohibition on disclosure also arguably breaches the right to freedom of expression in the *International Covenant on Civil and Political Rights*.³² VLA believes these provisions should be repealed.

9. Further information

For further information please contact:

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²⁹ ASIO Act s.34HB

³⁰ s.34VAA(1) – (3) ASIO Act 1979

³¹ despite the attempt to sidestep this issue in s.34VAA(12) by specifying that the '*section does not apply to the extent (if any) that it would infringe any constitutional doctrine*'.

³² Article 19(2) *International Covenant on Civil and Political Rights* op cit.