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

Dear Secretary

Review of Division 3 Part III of the ASIO Act 1979 – Questioning and Detention Powers

Thank you for the opportunity to make a submission to this Review. This submission is divided into five parts. We outline some of the positive features of the legislation in Part I. Part II provides a framework for the evaluation of anti-terrorism laws based on international law and traditional common law principles. In Part III we consider whether the legislation is still needed to confront the terrorist threat to Australia. Finally, we assess provisions of the legislation in detail in Part IV before presenting our conclusions in Part V.

I POSITIVE FEATURES

Following extensive community and parliamentary debate, amendments were made to the original ASIO Bill that produced substantial improvements. These positive changes included: raising the minimum age of detainees to 16 years; allowing detainees access to a lawyer of their choice (except where the lawyer poses a security threat); reducing the maximum questioning period to 24 hours over seven days; requiring judicial authorisation of questioning and detention, and supervision of questioning by a retired Federal? or State judge or AAT tribunal member; and a three-year sunset clause. The process of issuing warrants and supervising questioning provides essential protections. Similarly, the threshold for issuing warrants is set appropriately high (it will 'substantially assist' in the collection of 'important' intelligence about terrorism).

The adoption of a Protocol detailing standards on questioning and detention is also to be welcomed, as is the practice of the Inspector-General in attending almost all questioning sessions. In his Annual Report 2003-04, the Inspector General observed that questioning under section 34D warrants has been conducted professionally and appropriately; that subjects have been accorded dignity, respect, physical comfort and religious needs; and that facilities have been appropriate.

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Despite these positive developments, important concerns remain about both the need for these special powers and the nature of the powers themselves. Three years after their adoption, there is a danger that these exceptional, emergency powers, adopted in response to a specific threat, may become regularised or normalised as a permanent feature of Australia's legal landscape. It is vital to view these powers as temporary, exceptional measures so that they do not serve as a precedent for the adoption of more invasive powers in the future, or make it easier to justify other exceptional powers in less exceptional circumstances.

II EVALUATING ANTI-TERRORISM LAWS

The debate about terrorism is frequently characterised in terms of the need to balance national security against individual rights and liberties. This sets up an unhelpful confrontation between security and liberty as mutually exclusive, and can entrench irreconcilable positions on both sides of the debate. A better way to view the debate is to regard 'national security' as being a vital interest because of its capacity to protect and maintain rights and liberties. Otherwise, 'national security' becomes a vague formula for the protection of unidentified State interests disassociated from the community it is meant to protect. The debate should be one about limiting rights and liberties only for the purpose of safeguarding rights and liberties from terrorist threats.

Such a balance is hard to achieve in Australia due to the absence of a bill of rights (unlike in every other modern liberal democracy such as Canada, New Zealand, the United States, South Africa and the United Kingdom. Australians do not enjoy the same level of protection from unjustifiable governmental interference with their liberty as citizens of other liberal democracies. The absence of binding human rights standards also makes it more difficult to evaluate anti-terrorism measures as such measures are subject only to political judgment and limited constitutional protections. These are not sufficient to provide an adequate policy or legal assessment of such laws.

Although not binding under Australian domestic law, the basic rules governing the restriction of international human rights supply useful principles in evaluating Australia's legal response to terrorism. Under human rights law, rights and freedoms may be restricted in two distinct ways:

1. Some rights may be *limited* by law for such legitimate purposes as promoting general welfare, public security, order, health or public morality in a democratic society, or to secure the rights and freedoms of others (see, eg, *International Covenant on Economic, Social and Cultural Rights*, article 4; *International Covenant on Civil and Political Rights*, articles 12, 17, 18, 22);

2. Some rights may be *derogated from* in times of proclaimed public emergency threatening the life of the nation (*ICCPR*, article 4(1)). Certain rights are, however, non-derogable: life, freedom from torture or slavery, unjust imprisonment, legal personality, the principle of legality and non-retroactivity of penal laws, and freedom of thought, conscience and religion.

In both cases, governments enjoy a margin of appreciation in evaluating the necessity of restricting or suspending rights, although they must precisely specify the nature of the threat and the reasons for any restriction. Restrictions may not be imposed on discriminatory grounds, without rational justifications for treating different groups differently.

Any restriction on rights must also be *proportionate* to the legitimate aim. There must be a balancing of general and individual interests and restrictions or suspensions may only be imposed if alternative or less restrictive measures would fail to achieve the same goal. The requirement of proportionality is relevant to both the existence and duration of a measure of limitation, as well as the manner of its operation. Derogation from rights is temporary and must terminate once the emergency no longer exists.

Key rights affected by the ASIO legislation may be derogated from during emergencies. These include the right liberty and security of person (ICCPR, article 9); freedom from arbitrary or unlawful interference with privacy, family, home or correspondence (ICCPR, article 17); and freedom of movement (ICCPR, article 12). However, any restrictions or suspensions of these rights must satisfy the tests of necessity and proportionality.

In addition, the right to liberty and security of person includes a prohibition on arbitrary or unlawful arrest or detention (ICCPR, article 9). Lawful detention may still be *arbitrary* if it *unreasonable* (including where it is inappropriate, unjust or unpredictable) (see *van Alphen v Netherlands*, UN Human Rights Committee, 1990). Detention is considered unreasonable if it is unnecessary or disproportionate to the legitimate end being sought (*Toonen v Australia*, UN Human Rights Committee, 1994).

Accordingly, as an exceptional legislative measure, the ASIO legislation can only be justified if it satisfies *the principle of proportionality* (see *de Freitas* [1999] 1 AC 69, at 90):

(a) the legislative objective must be sufficiently important to justify limiting fundamental rights;
(b) the measures adopted must be rationally connected to that objective; and
(c) the means used must be no more than that which is necessary (meaning that less invasive or restrictive measures have failed, and the measures must last only as long as the emergency).

III JUSTIFICATION FOR THE LAW

It is well accepted by the judiciary that the existence of a terrorist threat constituting a public emergency threatening the life of the nation is largely within the wide discretion of the executive government. Courts do not usually have access to the security and intelligence information necessary to make such decisions, nor are they political bodies with constitutional responsibilities of that kind.

Although the reliability of intelligence assessments, and government reliance on them, has been called into question ‘since the fiasco over Iraqi weapons of mass destruction’ (*A v Home Secretary* [2004] UKHL 56, Lord Hoffman, at 94), it is accepted that Australia faces terrorist threats of potentially serious magnitude that lawyers cannot second guess.

Even so, it cannot be accepted that the terrorist threat facing Australia constitutes a public emergency threatening the life of the nation. International law requires that an emergency must be actual or imminent, not merely anticipated. It must also involve the whole population and threaten the physical existence of the nation, such as its physical or territorial integrity, or the functioning of State organs. As the European Court of Human Rights stated in the *Lawless* case (1 July 1961, Ser B: Report of the Commission, No 90, 82), a public emergency is a

> situation of exceptional and imminent danger or crisis affecting the general public, as distinct from particular groups, and constituting a threat to the organised life of the community which composes the State in question.

An emergency must, therefore, be of a particular gravity. In the *Greek* case (Report of the European Commission, (1969) YBECHR 12), political instability preceding a coup, and bomb incidents, acts of sabotage and the formation of illegal organizations were not considered to threaten the life of the nation. In *A v Home Secretary*, a decision of the House of Lords in December 2004, two judges questioned the gravity of threat facing the UK. Lord Hoffman stated (paras 95-96):

> Of course the government has a duty to protect the lives and property of its citizens. But that is a duty which it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be some nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom.
>
> This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. I do not underestimate the ability of fanatical groups of terrorists to kill and destroy, but they do not threaten the life of the nation. Whether we would survive Hitler hung in the balance, but there is no doubt that we shall survive Al-Qaeda. The Spanish people have not said that what happened in Madrid, hideous crime as it was, threatened the life of their nation…. Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.

Lord Scott of Foscote also had 'very great doubt whether the "public emergency" is one that justifies the description of "threatening the life of the nation"' (*A v Home Secretary*, para 154). While the majority accepted that the terrorist threat to the UK may amount to a public emergency threatening the life of the nation, the UK's circumstances are materially different from those facing Australia.

Given its geographic location and position in international affairs, the UK is likely to be at greater risk of terrorist attack than Australia. Since 11 September 2001, Australia's National Counter-Terrorism Alert Level has been set at a 'medium' risk of terrorist attack in Australia. The level has never been set at a 'high' risk of attack, nor an 'extreme' risk of imminent attack. As the National Counter-Terrorism Committee stated in its Communique of 7-8 December 2004, a 'medium' alert level means that 'a terrorist attack in Australia *could* occur'.

The possibility of that a terrorist attack could occur is not sufficient to amount to a public emergency threatening the life of the nation. Indeed, it is unlikely that there has ever been a time in the past few decades that? it could be said that there is no risk of a terrorist attack, and yet previously it was not considered necessary to adopt measures as restrictive of rights and liberties as those in the ASIO legislation.

The detention provisions in the ASIO legislation have never been used, while the questioning powers were only used three times in 2003-04 (ASIO Annual Report, 2003-04). While this might be interpreted as a cautious and prudent use of exceptional powers, it equally supports the view that the powers are unnecessary since the terrorist threat is being met through other, less invasive, police and security powers.

In particular, federal and state police now enjoy much enhanced powers to deal with terrorist incidents and threats (see, eg, *Terrorism (Police Powers) Act 2002* (NSW)). At the same time, ASIO's powers in other areas of surveillance and evidence gathering have been increased, while its budget has grown rapidly from $63 million in 2000-01 to $153 million in 2004-05,

with staff increasing from 584 to 1,000 between mid-2001 and mid-2006 (ASIO Annual Report, 2003-04, at 6).

It must also be noted that Australia has not notified the UN Secretary-General that Australia faces a public emergency threatening the life of the nation as a result of the terrorist threat. Notification is normally necessary for Australia to lawfully derogate from certain human rights – particularly the right to liberty and security of person (ICCPR, article 9), which is restricted by the ASIO legislation. In the absence of a lawful derogation, Division 3, Part III does not comply with Australia's international obligations. Either Australia does not believe that the terrorist threat amounts to a public emergency, or Australia is inadvertently or deliberately breaching its international obligations.

IV DIVISION 3 PART III IN DETAIL

Even if there is a public emergency threatening the life of the nation, are the measures in the ASIO legislation strictly necessary, and proportionate to the terrorist threat? As Lord Rodger of Earlsferry stated in *A v Home Secretary* (2004, at para 177): 'There is a very great danger that, by its very nature, a concern for national security may bring forth measures that are not objectively justified.'

It is very difficult for the Australian community to factually evaluate whether the questioning powers are necessary. Little useful information has been made publicly available about the usefulness of information obtained by questioning. The ASIO Annual Report 2003-04 (at 5) states merely that 'the questioning warrants have provided valuable information'.

What is not disclosed is whether, for example, the 'valuable information' has led to any arrests or convictions, or to the prevention of any terrorist acts. At best, ASIO discloses that one person is awaiting trial on 'among other charges, providing and/or misleading information under a questioning warrant'. Information about the 'other charges', and whether questioning assisted the prosecution case, is not revealed.

Duration of Questioning

The duration of questioning under the ASIO legislation is excessive: up to 24 hours (or 48 hours with an interpreter) within a maximum detention period of 168 hours (or 7 full days). This period, applicable to non-suspects, exceeds the already prolonged investigative period for federal and state terrorism offences in relation to terrorism suspects.

Under the federal *Crimes Act 1914* (Cth), a person arrested for a terrorism offence may only be detained for the purpose of investigating the offence (or another terrorism offence of which the person is suspected) for a period of 4 hours (or 2 hours if the person is under 18 years, or is indigenous) (s 23CA(4)(a)-(b)). The investigation period may be extended for up to 20 hours (s 23DA), giving a maximum investigative period of 24 hours. In contrast, the investigation period for serious, non-terrorist federal offences may only be extended for up to 8 hours (a maximum of 12 hours) (s 23D).

The ASIO legislation therefore permits detention for a maximum period of detention that is seven times longer than the period allowed for the investigation of terrorism offences – even though subjects detained under the ASIO legislation need not be suspected of *any* criminal offence.

In NSW, those arrested may be held for no longer than 4 hours (*Crimes Act 1900* (NSW), s 356D), unless a detention warrant extends the investigation period (once only) for up to 8 more hours (s 356G), giving a maximum period of 12 hours.

The simple time limits in the ASIO legislation contrast with the more restrictive language of time limits in federal criminal law. The *Crimes Act 1914* (Cth) requires that the 24 hour maximum investigative period for terrorism offences must end at a 'reasonable' time after arrest, 'having regard to all the circumstances' (s 23CA(4); see also *Crimes Act 1900* (NSW), ss 356D(1) and 356FA). The 24 hour maximum time limit is therefore an outer limit, with a presumption that questioning will end as early as possible before this time. No such presumption is found in the ASIO legislation, thus encouraging officials to pursue the maximum time limits without regard to whether questioning is reasonable in the circumstances.

In federal criminal law, in determining the duration of questioning, investigators must take into account factors such as the number and complexity of matters under investigation, and earlier investigation periods. In NSW criminal law (s 356E), a range of other factors must be considered, such as the person's age, physical and mental capacity and condition, whether the presence of the person is necessary, the willingness of the person to answer questions, and numerous other factors. No such considerations are required of investigators conducting questioning under the ASIO legislation. In both federal and NSW criminal law, in any relevant criminal proceedings, the burden lies on the prosecution to prove the reasonableness of the time period.

In doubling the maximum questioning period where an interpreter is used, the ASIO legislation departs from federal and state criminal law. In criminal law, the use of an interpreter is not counted as a 'time out' period during interrogation (*Crimes Act 1914* (Cth), s 23CB; *Crimes Act 1900* (NSW), s 356F), but is already included within the maximum statutory periods that have been calculated by taking into account the extra time necessitated by the use of an interpreter.

The Inspector-General has also raised the issue of the recording of elapsed time during questioning. The procedure for recording elapsed time is not specified in the legislation and further clarity would be helpful.

Prescribed Authorities

By using retired judges, AAT members, or senior State or Territory judges as prescribed authorities, the legislation avoids conferring functions on federal judges that would be incompatible with judicial office and judicial power (see G*rollo v Palmer* (1995) 184 CLR 348 at 365, Brennan CJ and Deane, Dawson and Toohey JJ). While there is therefore no federal constitutional problem with qualifying State or Territory judges as prescribed authorities, involving serving judges in the prolonged and secretive questioning and detention of citizens can undermine public confidence in the judicial system, and compromises the independence and integrity of those judges.

On the other hand, the appointment of AAT members as prescribed authorities raises different problems. The AAT is a non-judicial body whose officers are members of the executive, and under the ASIO legislation they are sitting in judgment on decisions made by other members of the executive. AAT members (other than Presidential members) are appointed for fixed periods and lack entrenched judicial independence or tenure (*AAT Act 1975* (Cth), s 8). They are dependent on the favour of the executive if they wish to seek reappointment.

Legal Representation

Those held for questioning are entitled to contact a lawyer of their choice (s 34D(4), although the right is located in 'Note 3' to this provision, and not in the subsection itself, raising doubts about the legal enforceability of the right). The prescribed authority must provide a 'reasonable opportunity' for the legal adviser to advise the subject during breaks in questioning (s 34U(3)). Four issues arise. First, the availability of advice *during breaks* in questioning does not necessarily permit advice *prior* to the commencement of questioning. The legislation should expressly recognise a right to advice prior to questioning.

Second, the legislation is silent on whether lawyer-client confidentiality is protected when advice during breaks is sought. The legislation permits monitoring of initial contact with a legal adviser (s 34U(1)), giving rise to an inference that legal advice during breaks may also be monitored. Further, while the legislation expressly preserves legal professional privilege (s 50), there is no express protection of lawyer-client confidentiality. In a context of secret intelligence gathering, it is crucial to protect the right to freely consult a lawyer and to impart and receive information without fear of surveillance.

Third, legal advisers are precluded from intervening in the proceedings, or from addressing the prescribed authority (s 34U(4)), and may be removed for 'unduly disrupting' proceedings (s 34U(5)). Such restrictions unjustifiably restrict the ability of a lawyer to represent and protect his or her client's interests. The concept of 'disrupting' proceedings is unknown to Australian law, and invites arbitrary and subjective exclusions of lawyers, particularly in the absence of any judicial oversight.

Fourth, the legislation should expressly provide for the availability of legal aid.

Offence of Failing to Provide Information

It is accepted that the right to silence is not absolute, but may be justifiably abrogated in limited circumstances where the privilege against self-incrimination is preserved (entailing the conferral of use immunity on subjects in civil or criminal proceedings). Other areas of federal regulation already adopt this approach. The ASIO legislation confers use immunity in criminal proceedings and thus preserves the privilege against self-incrimination (s 34G(9)). However, the legislation does not confer *derivative use immunity* (to prevent disclosures being used to gather other evidence against the person in future criminal proceedings), nor does it confer any immunity at all in civil proceedings (thus allowing incriminating evidence in, for example, deportation proceedings).

Use of Torture Evidence

Section 34J requires persons under warrant to be treated with humanity and with respect for their dignity, and precludes cruel, inhuman or degrading treatment by anyone exercising authority under the warrant, or implementing or enforcing the direction. This provision is a necessary and welcome prohibition on the mistreatment of subjects in custody.

However, it raises three further issues. First, the provision omits any express prohibition of the 'torture' of persons under warrant, and refers only to the lesser forms of maltreatment such as cruel, inhuman or degrading treatment or punishment. To ensure consistency with Australia's international obligations, an explicit prohibition on 'torture' should be inserted into this section.

Second, there is no criminal penalty specified in the legislation for ASIO officers who contravene section 34J. The federal crime of torture only applies to acts committed outside *Australia (Crimes (Torture) Act 1988* (Cth), s 6). Further, the federal crime only punishes torture, and not cruel, inhuman or degrading treatment or punishment. Although such treatment may be covered by ordinary criminal laws (eg assault), the specificity of acknowledging and stigmatising acts as inhuman or degrading is lost, not to mention compliance with Australia's international obligations.

Third, the legislation is silent on whether any information obtained by torture or other mistreatment, in contravention of this provision, may be used by intelligence agencies. Section 84 of the Evidence Act 1995 (Cth) provides that an 'admission' is not admissible in any civil or criminal proceedings where it was 'influenced by 'violent, oppressive, inhuman or degrading conduct, whether towards the person who made the admission or towards another person or a threat of conduct of that kind'. (An admission is defined as 'a previous representation that is: (a) made by a person who is or becomes a party to a proceeding (including a defendant in a criminal proceeding); and (b) adverse to the person's interest in the outcome of the proceeding'.)

Where information obtained by torture is not an 'admission' (since the person tortured is not a party to the proceedings), section 138 of the *Evidence Act 1995* (Cth) provides that evidence 'that was obtained improperly ... is not to be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the way in which the evidence was obtained'. This balancing test gives the courts a discretion to weigh the values at stake. In the United Kingdom, the Special Immigration Appeals Commission has accepted that evidence obtained through the torture overseas of persons not party to UK proceedings may be used against terrorist suspects in deportation (and administrative detention) proceedings under the *Anti-Terrorism Act 2001* (UK). The findings in that case are currently on appeal to the House of Lords.

The policy consequence of permitting the use of evidence (other than admissions) obtained by torture is that there is an incentive for intelligence agencies to routinely torture people to obtain incriminating information against other persons. The law should not serve to encourage fishing expeditions of this kind, nor to encourage intelligence officials to circumvent the absolute international prohibition on torture.

Given that Australian law prohibits Australian officials from torturing subjects, Australian intelligence agencies might be decide to 'contract out' the interrogation and torture of subjects to less scrupulous intelligence services overseas, and then to use the information so obtained. It is therefore recommended that the ASIO legislation expressly prohibit the use of evidence obtained by the torture of one person (whether it takes place in Australia or overseas, and by Australian officials or others) in proceedings against another.

A further and equally troublesome situation not contemplated by the *Evidence Act 1995* (Cth), and not dealt with by the ASIO legislation, is where information obtained by torture is not used in a 'proceeding' of any kind, but is used solely for intelligence or security purposes (such as to prevent a terrorist act). Again, the policy implication of this omission is that officials may be encouraged to torture to gather information for use in preventing terrorist incidents.

It is therefore recommended that the ASIO legislation expressly prohibit the use of evidence obtained by torture (in any domestic or foreign) jurisdiction by intelligence and security services. In such situations, there is no transparent 'proceeding' in which an independent body

can regulate the use of torture evidence, making it difficult to verify compliance. One solution is to criminalise the use of torture evidence for intelligence purposes, and thus to deter officials from engaging in such conduct. An offence of this kind could be added to existing section 34NB (Offences of contravening safeguards). The Inspector General of Intelligence and Security, who has oversight of intelligence operations, would be responsible for ensuring compliance.

Offence of Disclosing Operational Information

The offence of disclosing 'operational information' within two years after the expiry of a warrant prevents public scrutiny of the propriety of the investigative process and accordingly reduces the accountability of ASIO. In particular, it inhibits media scrutiny of the process by criminalising those who give information to journalists (whatever the public value in the content of that information). The penalty for unlawfully disclosing operational information is also unduly severe – 5 years imprisonment – which is a sentence often imposed for serious violent crime.

Lack of Public Disclosure

There has been no public disclosure of the nature or usefulness of information obtained from the questioning of suspects under the legislation. The sensitivity of intelligence gathered and the need to protect operational methods is well accepted. However, it is impossible for Parliament and the community to evaluate the need for, and effectiveness of, the legislation if the general nature of the information obtained through questioning remains off limits.

It would be possible, for example, to disclose whether any information obtained has led to the arrest or prosecution of any terrorist suspects, or contributed to the prevention of terrorist incidents or the disruption of terrorist networks. This would not require disclosing the identities of any persons questioned, arrested, or prosecuted.

Detention Powers

ASIO's power to detain persons suspected of no crime has not been used in three years (although questioning under compulsion itself constitutes detention). Detention is the most invasive restriction on individual liberty and security of person. As such, it must be regarded as a means of last resort to be used after all feasible alternatives have been exhausted. The source of legal protection of liberty is not only international human rights law, but, more importantly in the Australian context, the common law and the underlying rule of law.

As stated recently by Lord Hope of Craighead in the House of Lords decision in *A v Home Secretary*, para 100, in a case overturning the indefinite detention of non-citizens suspected of terrorism: 'It is impossible ever to overstate the importance of the right to liberty in a democracy'. Or as Baroness Hale of Richmond stated at para 222: 'Executive detention is the antithesis of the right to liberty and security of person.' The right to liberty from the libertarian tradition in English common law dates back to the Magna Carta, the 1628 Petition of Right, the 1688 Bill of Rights, and habeas corpus. Liberty applies to all within jurisdiction, not just citizens (*A v Home Secretary*, Lord Rodger of Earlsferry, para 178).

If the stated purposes of the detention provisions are to prevent a subject alerting others that a terrorist offence is being investigated, to prevent absconding, or to prevent the damage or destruction of evidence (*ASIO Act 1979* (Cth), s 34F(3)), then it is arguable that those purposes

can be achieved by less invasive means. As the House of Lords stated in *A v Home Secretary* (2004), less drastic alternatives to detention are capable of preventing the commission of terrorist offences, such as electronic monitoring, home detention, telephone reporting, home surveillance, prohibitions on visitors or contact with others, and banning the use of computers and telephones.

The ASIO legislation is inconsistent with basic democratic and judicial principles. Individuals should not be detained beyond an initial short period except as a result of a finding of guilt by a judge or as part of the judicial process (such as being held in custody pending a bail hearing). Detention is only justifiable as part of a fair and independent judicial process resulting from allegations of criminal conduct.

It is not acceptable in a liberal democracy for a State police force to detain people in secret for some days, nor should it be acceptable for intelligence agencies like ASIO. No other comparable jurisdiction has enacted laws permitting the detention of citizens not suspected of any crime. Anti-terrorism laws in the UK and the US allow detention only where a detainee is suspected of terrorism or of endangering security, and do not permit fishing expeditions to make intelligence gathering more convenient. ASIO's detention powers are unnecessary and unjustifiable and should not be re-enacted.

The detention powers may also be challenged on constitutional grounds. In empowering the executive to detain Australian citizens who have not committed an offence, the legislation breaches the separation of powers. As the High Court stated in *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at 27 (Brennan, Deane and Dawson JJ, with Gaudron J agreeing):

> the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.

There are exceptions to this rule where the detention is non-punitive in character, such as detention due to mental illness and infectious disease, or, in the case of non-citizens, for immigration-related purposes (see *Al-Kateb v Godwin* (2004) 208 ALR 124 and *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49). Although the 'categories of non-punitive, involuntary detention are not closed' (*Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1 at 162, Gummow J), particularly in war time under the defence power (*Lim*, at 28), the present level of terrorist threat is insufficiently serious to warrant the administrative detention of citizens on national security grounds. It may also be significant that detention can occur for a period of seven days while questioning is only permissible for 24 hours of that time.

Consular Access

The ASIO legislation is silent on the right of a non-citizen, who is subject to detention (or compelled questioning), to communicate with a consular official of the country of which the person is a citizen, and to ask the consular official to attend the place of detention to enable the person to consult with their consul. Such a right is recognised in the *Crimes Act 1900* (NSW), s 356O. It stems from a binding international legal obligation on Australia under article 36(1)(b) of the 1963 Vienna Convention on Consular Relations, which covers non-citizens 'arrested or committed to prison or to custody pending trial or… *detained in any other manner*'.

The United States was recently held to this obligation by the International Court of Justice in the *Avena case (Mexico v US)*, and the US has taken active steps to comply with the judgment. International law provides no national security exception to this fundamental right of non-citizens, and security concerns (such as that terrorist information may be passed on to a consular official) may be vitiated by appropriately monitoring contact between a subject and a consular official. Consular access is particularly important given the already tight restrictions on communication with lawyers, friends or family members under the legislation.

V CONCLUSIONS

In December 2004, Lord Hoffman said in the House of Lords of UK terrorism laws:

> The real threat to the life of the nation, in the sense of a people living in accordance with its traditional laws and political values, comes not from terrorism but from laws such as these. That is the true measure of what terrorism may achieve. It is for Parliament to decide whether to give the terrorists such a victory. (*A v Home Secretary*, at para 97).

ASIO is a covert intelligence gathering agency. It is not a law enforcement body. If ASIO is to continue to be granted coercive police powers it should be subject by law to the same political and community scrutiny and controls that apply to any other police force. However, this is not compatible with the current intelligence gathering work of ASIO (including the secrecy applying to the identity of its employees). It would be difficult, if not impossible, for ASIO both to be sufficiently secretive to adequately fulfil its primary mission, as well as to be sufficiently open to scrutiny to exercise the powers set out in the legislation, notwithstanding scrutiny by the Inspector General of Intelligence and Security.

A sufficient policy justification for the ASIO legislation has not been offered. Unfortunately, the original ASIO Bill can now be seen as a hasty over-reaction to the tragedy of September 11 rather than an appropriate response to the issues facing Australia. The Bill as amended and enacted was certainly an improvement, but with the benefit of time Division 3 Part III of the *ASIO Act* can now be seen as needing further substantial amendment. Australians have the right to question whether the legislation has really assisted in addressing the terrorist threat facing Australia. Unlike legislation in the United Kingdom, Canada and the United States, this legislation is not aimed at terrorists, but at non-suspects who may have useful information.

Based upon the information that is available, our view is that, if the legislation is re-enacted, Division 3 Part III should continue to confer a limited questioning power as amended in light of the specific comments we make above. The power should also be subjected to a further three year sunset clause. On the other hand, the detention provisions should not be re-enacted. They cannot now be justified and should be seen as a temporary, exceptional measure enacted in the wake of September 11 and the Bali attack that can no longer be justified.

Yours sincerely

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