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AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION

SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE

ON ASIO, ASIS AND DSD

REVIEW OF DIVISION 3, PART III

OF THE

AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979

22 APRIL 2005

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Australian Security Intelligence Organisation

Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD's

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

1. The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* inserted Division 3 of Part III into the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act). The ASIO Act as amended enables ASIO to obtain a warrant from an issuing authority for the questioning of a person if there are reasonable grounds for believing that doing so will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and there are no other effective means of collecting that information. A person can be questioned for a maximum of 24 hours over a 28-day period, in blocks of no more than 8 hours.
2. In limited and specified circumstances, a warrant may authorise police to detain a person for questioning by ASIO if there are reasonable grounds for believing that person may alert others to the investigation, may not appear for questioning or may destroy evidence. Under any one warrant, a person cannot be detained for more than 168 hours.
3. In response to practical issues identified in planning and executing questioning warrants, the ASIO Act was further amended in December 2003 by the *ASIO Legislation Amendment Act 2003*. These amendments:
 - extend the maximum time available for questioning from 24 hours to 48 hours where interpreters are used;
 - require that, after being notified of the issuing of a warrant, the subject of the warrant must not leave Australia and must hand over all passports issued to him or her and in his or her possession or control;
 - prohibit, while a warrant is in force, disclosure of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant, except if the disclosure is a "permitted disclosure" (as defined);

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- prohibit, while a warrant is in force and for a period of two years after the expiry of the warrant, disclosure of any ASIO operational information acquired as a direct or indirect result of the issue of a warrant, unless the disclosure is a permitted disclosure; and
- clarify the power of the prescribed authority to direct, in limited circumstances and where a warrant authorises questioning only, that the subject of a questioning warrant be detained.

THE NATIONAL COUNTER-TERRORISM PLAN AND ASIO'S ROLE

4. The National Counter-Terrorism Plan approved by the Commonwealth and State and Territory Governments affirms that "Australia relies on a strong intelligence-led prevention and preparedness regime to support Australia's counter-terrorism strategy".

5. ASIO has an important role in that regime, which includes contributing to:

- the prevention of terrorist attacks in Australia and against Australian interests overseas;
- the identification of people in Australia, and elsewhere, involved with terrorism;
- the provision of protective security advice, including for national critical infrastructure; and
- the maintenance of Australia's counter-terrorism response capability.

6. To fulfil this role, ASIO's objectives are to:

- prevent the entry into Australia of people assessed to be connected to terrorism;
- where legally possible, prevent the travel overseas of Australians assessed to be involved in terrorist activities;
- identify and monitor individuals and groups in Australia with links to terrorists overseas, especially individuals who, themselves, have received terrorist training;

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- identify and, where lawful, monitor individuals and groups in Australia committed to the militant ideology espoused by Usama bin Laden and Abu Bakar Bashir;
- assist law enforcement agencies in investigations leading to prosecutions for terrorism offences; and
- assist overseas liaison partners with investigations where there is an Australian connection by:
 - identifying Australians overseas involved in terrorism;
 - resolving threats to Australian interests abroad; and
 - resolving threats to foreign interests in Australia.

QUESTIONING WARRANTS IN CONTEXT

7. Questioning warrants are an essential tool in ASIO's counter-terrorism work. The business of a security intelligence agency is fundamentally one of collecting and analysing information and, very often, making judgements and acting on partial and uncertain information. ASIO does not have unlimited access to information on people's activities. ASIO's information and investigations are rightly confined in their scope by law.

8. ASIO's task is to make the best possible assessment of a threat to security based on the information available at the time that the assessment is needed. In assessing the threat, judgements must be made about the credibility and reliability of that information. ASIO needs to be in the best possible position to judge credibility and reliability, resolve ambiguities, and provide well-founded advice that is as specific as possible.

9. Having to work with partial and uncertain information is not unique to counter-terrorism. It applies just as much to other parts of ASIO's role. What makes counter-terrorism different, however, is the severe physical harm that terrorism can cause to people and their interests.

10. Questioning warrants come to the fore in situations where:

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- (a) the threat of harm is immediate and other methods of intelligence collection will be too slow or too indirect to be effective in the time available; or
- (b) limited insight has been gained into a terrorist activity but the security measures adopted by the individual or group have foiled attempts to identify all those involved or to assess the full extent of the threat; or
- (c) there is reasonable suspicion of terrorist activity but efforts to resolve it have been unsuccessful and those involved have refused to cooperate.

11. ASIO reports annually on the number of questioning and detention warrants sought and issued. We do not, however, normally publicly report those totals outside the annual *Australian Security Intelligence Organisation Report to Parliament*. An exception has been made here for the purpose of the Committee's Review. Eight questioning warrants have been sought and issued since the legislation commenced on 23 July 2003. No detention warrants have been sought or issued since the legislation was enacted.

POWERS NOT YET EXERCISED

Detention Powers

12. Section 34C(3) of the ASIO Act provides that a questioning warrant authorising detention of a person can only be issued where there are reasonable grounds for believing that the person:

- (a) may alert a person involved in a terrorism offence that the offence is being investigated; or
- (b) may not appear before the prescribed authority; or
- (c) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

13. Circumstances have not yet arisen which have required ASIO to seek a detention warrant. The Committee will recall that, in his second reading speech on 20 March 2003, the then Attorney-General, the Hon Daryl Williams AM QC MP, stated: "It must be remembered that these warrants are a measure of last resort. It is anticipated

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that they will be used rarely and only in extreme circumstances.”¹ Were extreme circumstances to arise, the power to exercise a detention warrant could be essential to the prevention of a terrorist attack. ASIO therefore believes that the detention powers remain essential to the legislation.

Questioning of Persons aged 16–18 years

14. Section 34NA of the ASIO Act provides a special regime for questioning and, if a specific test is met, detaining a person aged 16 to 18 years. In addition to the test contained in section 34C(3) of the ASIO Act, the Minister may only consent to a request for issue of a warrant if he or she is satisfied on reasonable grounds that it is likely that the person will commit, is committing, or has committed a terrorism offence and the draft warrant:

- (a) permits the person to contact a parent or guardian or other person acceptable to the person;
- (b) authorises questioning before a prescribed authority in the presence of a parent, guardian or acceptable person; and
- (c) allows questioning for continuous periods of two hours or less.²

15. There has not yet been a need to use this section of the ASIO Act. However, ASIO notes that individuals younger than 20 years of age have come to security attention and considers it important this power should remain in the legislation.

CONCLUSION

16. The power to compel certain people to provide information important to a terrorism offence is an essential tool in ASIO’s intelligence collection capabilities. The existing power has enabled ASIO to collect substantial and valuable intelligence important to progressing a number of investigations.

¹ Williams AM QC MP, the Hon Daryl, Second Reading Speech for the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2], House of Representatives Hansard, 20 March 2003, p13172.

² See subsections 34NA(4), 34NA(5) and 34NA(6) of the ASIO Act.

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17. Experience has shown that many of the concerns raised about how the powers might be used have been unfounded. Leaving aside the obvious matters of legality and propriety, it simply would not be in ASIO's interests to have its counter-terrorism efforts and other work distracted by unnecessary questioning of people peripheral to terrorist activity. Nor is there value in unnecessarily exposing sources and methods of intelligence collection in the course of such hearings unless there is tangible benefit to investigations.

18. ASIO considers that the sunset provision in section 34Y of the ASIO Act should be removed.³ It was inserted at a time when there was considerable uncertainty about the new questioning and detention powers and the way in which they might be used. The legislation has shown itself to be a carefully considered and balanced scheme containing clear and workable provisions.

19. To ensure continued Parliamentary visibility of the operation of the questioning and detention powers, it could, for instance, be amended to include a requirement for a review of its operation every three years by the Parliamentary Joint Committee on ASIO, the Australian Secret Intelligence Service and the Defence Signals Directorate.

³ Section 34Y provides that Division 3 of the ASIO Act (which contains the questioning and detention powers) ceases to have effect three years after it commences. This means that Division 3 ceases to be in force on 23 July 2006.

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