PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD

OPINION

I am asked to advise the Parliamentary Joint Committee on ASIO, ASIS and DSD whether the provisions of sec 34VAA of the *Australian Security Intelligence Organisation Act 1979* affect the capacity of the Committee to seek and receive submissions and evidence, and other persons to provide submissions and evidence, in relation to the Committee's statutory review of the questioning and detention provisions of Part III Division 3 of the *ASIO Act*. I set out and answer the specific questions asked in relation to this topic, by my brief, in the conclusion of this Opinion.

2 The Committee is established in accordance with the requirement of subsec 28(1) of the *Intelligence Services Act 2001*. Among other things, its functions are to review the administration and expenditure of ASIO, ASIS and DSD under para 29(1)(a), to review any matter referred to it in relation to ASIO, ASIS or DSD by the Minister or either House under para 29(1)(b), and to review by 22nd January 2006 the operation, effectiveness and implications of Div 3 of Part III of the *ASIO Act* under para 29(1)(bb). It is also a function of the Committee to report its comments and recommendations to the Minister, and to each House, under para 29(1)(c). The Committee's powers include a power to request the Minister to make a reference under para 29(1)(b). Unusually but tellingly, the provisions of subsec 29(3) of the

Intelligence Services Act specifically exclude certain topics of review from the Committee's functions.

3 The Committee's powers available for the purpose of performing its functions include requesting the Director-General of Security, the Director-General of ASIS, the Director of DSD and the Inspector-General of Intelligence and Security to brief it, under sec 30 of the *Intelligence Services Act*. Further, sec 32 enacts Sched 1 of the Act, which further regulates the activities of the Committee in important respects. For present purposes, the following are worth noting, as they shed light on the purpose and meaning of the enacted provisions concerning the Committee's important work in self-evidently sensitive areas in relation to national security. Under cl 1 of Sched 1, the Committee is forbidden from requiring a person to disclose operationally sensitive information (as defined in cl 1A) or information prejudicial to national security or the conduct of foreign relations. Operationally sensitive information includes the information provided by a foreign government which does not consent to its public disclosure. This is an express prohibition by the Houses acting legislatively addressed to those of their own members selected for the Committee to perform the statutory task of specialized Parliamentary scrutiny of a specialized and sensitive part of the Executive.

4 Other provisions of Sched 1 which also cast light on the place and powers of the Committee discriminate between topics and persons so far as concerns the Committee's rights and powers in relation to evidence and reporting. The power to obtain information and documents under cl 2 specifically excludes persons (as defined) connected with agencies and the Inspector-General, under subcl 2(4). (I note that sec 35 of the *Inspector-General of Intelligence and Security Act 1986* provides

for the Inspector-General to report on his or her operations annually to the Prime Minister and for the Prime Minister to provide that report the to Leader of the Opposition and to table a version of the report in each House. Significantly, the obligations of the Prime Minister and the Leader of the Opposition under subsecs 35(3), (4) and (5) of that Act require the latter to treat as secret any part of the report not tabled, and empower the former to make deletions from a report as he or she considers necessary in order to avoid prejudice to security, the defence of Australia, Australia's relations with other countries or the privacy of individuals.) Under cl 3 of Sched 1, agency heads may be required to give evidence or produce documents to the Committee, personally or by nominated staff members.

5 The protection of operationally sensitive information is further strengthened by the provisions of cl 4 by which a Minister may certify an opinion which has the effect of preventing the Committee from receiving the information in question. Under subcl 4(3), such certificates must be given to the Presiding Officers, and subcl 4(4) prevents the decision of the Minister to certify such an opinion from being questioned in any court or tribunal. That last expression does not describe the Houses themselves.

6 The provisions of cll 6 and 7 of Sched 1 respectively regulate and to a large degree prohibit the publication of evidence or documents given to the Committee. For present purposes, their significance includes the express reference to and partial overriding of sec 2 of the *Parliamentary Papers Act 1908*, under subcl 6(6). But for this last provision, the Committee could have authorized publication of evidence laid before it, pursuant to subsec 2(2) of that Act. Under cl 7, the Committee is expressly prohibited from disclosing in a report to a House the identity of agency staff including information from which it could be inferred, and also operationally sensitive

information or information prejudicial to national security, the conduct of foreign relations or agency performance. Authority is given to an agency head to determine whether information would disclose staff identity directly or by inference, under subcl 7(2). Under subcll (3) and (4), the Committee is obliged to obtain the Minister's advice on possible disclosure of prohibited material and is obliged to follow that advice.

7 The protection of witnesses includes, under subcl 11(3) of Sched 1, the creation of an offence of causing or threatening detriment to a person because the person gave evidence or a document to the Committee. The existence of such an offence highlights the importance of knowing whether giving evidence or producing documents to the Committee is required or prohibited: if the former, threats eg of prosecution would themselves be an offence; if the latter, it is impossible to conceive that an offence would be committed by admonishing (including by threat of prosecution) a person against committing an offence or acting unlawfully.

8 Secrecy provisions of a familiar kind are imposed by cl 12 on members of the Committee and the Committee's staff, including prohibition on production of secret information to a court. Under cl 21, the Committee's staff must have security clearance equivalent to that of ASIS staff. Under cl 22, the Committee is obliged to make arrangements acceptable to the agency heads for the security of information, and is obliged to ensure national security classified documents are retained as briefly as possible.

9 Importantly, although subcl 20(1) leaves to the determination of the Committee the conduct of its proceedings, it must not conduct reviews in public

without the relevant Minister's approval, by reason of subcl 20(2). Under subcl 20(3), in directing which persons may be present at private reviews, the Committee is obliged to have regard to security requirements.

10 In my opinion, the provisions paraphrased in 3 – 9 above are a formidable array of safeguards against the public disclosure of information considered by Parliament to be, first, better kept relatively secret, and, second, appropriate to be disclosed to and considered by the Committee. The importance of these provisions is that they include specific embargos on certain information being provided to the Committee itself, a thoroughgoing scheme for the privacy or even secrecy of other information which may be required to be given to and considered by the Committee, and substantial dispositive weight to the opinions of Ministers, who are themselves of course Members of one or other of the Houses.

11 The provisions of sec 34VAA of the *ASIO Act* are themselves within Div 3 of Part III of that Act. They are thus within the class of enacted law which is the very subject-matter of the Committee's review under subpara 29(1)(bb)(i) of the *Intelligence Services Act*, noted in 2 above. That is, they are among the provisions the operation, effectiveness and implications of which are the mandatory subject of review by the Committee.

12 Important aspects of the offences created by subsecs 34VAA(1) and (2) include the proscription of disclosure of operational information, defined by subsec 34VAA(5) in a way similar but by no means identical to the definition of operationally sensitive information in cl 1A of Sched 1 of the *Intelligence Services*

Act, noted in 3 above. It is probably a broader class of information, especially given the notion of information indicating information that ASIO has or had.

13 Another important aspect is the carve-out by paras 34VAA(1)(f) and 2(f) of permitted disclosures, also defined in subsec 34VAA(5). There are no express provisions in this definition of permitted disclosures which include disclosure to the Committee. However, under subpara (a)(iv) it is envisaged that information could be given to the Inspector-General, and so as noted in 4 above it could be tabled in the Houses eventually. More practically and realistically, paras (g) and (h) of the definition raise the powers to permit disclosures granted in subsecs 34VAA(7) and (8) to the Director-General or the Minister, who would no doubt always act with the same view to the national and public interest which can be seen to inform the elaborate safeguards contained in Sched 1 of the *Intelligence Services Act* itself.

14 The provisions of subsec 34VAA(11) require sec 34VAA to be read as having effect in addition to, and not limiting, other Commonwealth laws prohibiting such disclosure. On the other hand, subsec 34VAA(12) prevents sec 34VAA applying to the extent if any that it would, if applied, infringe any constitutional doctrine of implied freedom of political communication.

15 The somewhat coy legislative reference to "any constitutional doctrine of implied freedom of political communication" in subsec 34VAA(12) obviously means that which is usually understood as the law expounded in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. An important and apposite application of that law is the decision of Finn J in the Federal Court of Australia concerning the prohibition by reg 7(13) of the *Public Service Regulations 1999* of

disclosures by public servants of information about public business or of which he or she has official knowledge: *Bennett v President, Human Rights and Equal Opportunity Commission* (2003) 134 FCR 334. This Opinion does not necessitate anything like a full discussion of that noteworthy judgement. It suffices for present purposes to note that the plain and comprehensive terms of the regulation, even assuming it was otherwise within the power conferred by para 97(1)(k) of the *Public Service Act 1922*, did not strike the learned judge as appropriately accommodating the legitimate end of the effective working of government to the reasonable requirements of the constitutional freedom. Importantly for present purposes, his Honour relied fairly heavily in his reasons on the availability of information relating to government, to members of the public, as in general terms a public good. As will be seen below, in my opinion this judicial approach is likely to be reflected in a perhaps even more weighted view in favour of the availability to the people's elected representatives, comprising the Committee in this case, of relevant information, especially when it has been safeguarded.

16 The broader context required in order to answer the questions in my brief includes, of course, sec 49 of the *Constitution* and the *Parliamentary Privileges Act 1987*. The first provides for Parliament itself to declare the powers, privileges and immunities of the Houses, their members and committees, on the basis of an initial equivalency with those of the House of Commons in 1901. The second may, for present purposes, be regarded as a declaration as to certain of those powers and privileges combined with an attempt otherwise to preserve the position brought about by sec 49 of the *Constitution* and the legislative events thereafter until 1987: see sec 5. The committees referred to in the *Parliamentary Privileges Act* include committees of

both Houses, and thus include this Committee: subsec 3(1). Relevant protections given by the *Parliamentary Privileges Act* include the offence of unauthorized disclosure created by sec 13 and the prohibition against the admission into evidence before a court or tribunal of the fairly broad scope of information for and for the purpose of a committee including evidence taken by a committee including by way of a document: subsec 16(4).

17 In my opinion, it is now beyond argument that a function of each of the Houses, and thus by delegation of this Committee, within its limited remit, is the questioning and criticizing of the executive government on behalf of the people, by way of scrutiny by a House or committee in respect of the conduct of the executive branch of government. These are definitional elements of the responsible government which can be seen, by way of sketch only, in the provisions of secs 1, 6, 7, 13, 24, 28, 61, 62, 64 and 83 of the *Constitution*. The functional description of these aspects of what the Houses are for derives not only from the antecedent political, constitutional and legal history in the United Kingdom and the Australian colonies, but also from the indistinguishable authority of the High Court's decision and reasoning concerning the New South Wales Houses of Parliament in *Egan v Willis* (1998) 195 CLR 424 eg at 451 [42], 453 [45], [46].

18 Given this constitutional and statutory setting, can it be said that the offences created by subsec 34VAA(1) and (2) of the *ASIO Act* in any way prevent – by putting at jeopardy of criminal prosecution, conviction and punishment – persons from giving evidence to or producing documents to the Committee? In my opinion, for the following reasons, that would be an untenable approach. Put simply, the Committee is not only entitled to do its work in the mandatory review delegated to it by

Parliament pursuant to subpara 29(1)(bb)(1) of the *Intelligence Services Act*, but so also are persons generally able – and in appropriate cases, obliged – to provide the Committee with the information which it regards as necessary or potentially useful to discharge that important task. The interacting sets of statutory provisions noted in 2 – 16 above reveal a purpose of Parliament (to use the conventional expression employed in sec 15AA of the *Acts Interpretation Act 1901*, without ascribing any motive to legislators) that there be an interplay between views taken by the Committee, Ministerial opinions and the nature of information in particular circumstances so as to produce, in any given case, answers to the questions whether a person may provide the information to the Committee and the Committee may require a person to do so. Far from these provisions indicating an intention to criminalize the provision of a very general category of information to those conducting a mandatory Parliamentary scrutiny of executive operations under Div 3 of Part III of the *ASIO Act*, they bespeak a discriminating intention that generally relevant information should be available subject to a range of safeguards involving embargos for some classes of information and secrecy or non-publication for others.

19 It is no mere debating point to note that the provisions of sec 34VAA themselves are among those which, as a matter of statutory duty, the Committee must review as to their operation, effectiveness and implications. How could anyone consider the implications of criminally sanctioned secrecy provisions unless the reviewer can have some understanding of that which eg may have been disclosed but for such secrecy?

20 Much more substantively, however, there are the unprecedented incursions on former civil liberties by the main provisions of Div 3 of Part III of the *ASIO Act*

which must be reviewed by the Committee. Were the secrecy provisions of sec 34VAA relating to warrants and questioning to be construed as preventing this Committee as the statutory reviewer of the provisions permitting and regulating those warrants and questioning from receiving information about them, the Parliamentary review scheme would be more or less hollowed out.

21 When construing provisions such as sec 29 of the *Intelligence Services Act* as they explicitly interact with the provisions of Div 3 of Part III of the *ASIO Act* (including sec 34VAA), the fact that the *ASIO Act* provisions represented a politically negotiated statutory scheme for the legal control of incursions on some persons' former civil liberties, for the greater good and national security, looms large. Parliamentary review of such provisions must mean meaningful and effective review, rather than hamstrung review. In my opinion, that approach would be appropriate for any kind of parliamentary review provided in legislation concerning any kind of executive powers. But this approach to the meaning of review provisions is all the more urgent and emphatic when the review in question is of provisions which of themselves, on their face, represent new powers given to the executive of the most fundamental kind, viz to detain persons in custody, etc.

22 This approach to interpretation is allied to but is not the same as the well-established approach, against which there can be no argument, that the privileges and powers of Parliament, including those delegated to committees such as this Committee, are not likely to be abrogated by debatable implications in general provisions which are clearly meant chiefly to operate in relation to persons, dealings and events outside Parliament. This more general approach should not be exaggerated so as to require express words of abrogation, because the meaning of legislative

provisions includes that which is necessarily implied. However, where it is not necessary for the meaningful operation of provisions such as sec 34VAA, read purposively, that they prohibit disclosures to a parliamentary committee as well as to, say, newspapers, there can be no real substance to a suggestion of necessary implication.

23 As noted in 5 and 6 above, Ministers as members of the Executive have been given considerable power, by the legislation, to keep certain kinds of information from the Committee. It would be an impoverished reading of provisions such as those specific embargos to read the provisions of sec 34VAA as operating, in parallel so to speak, as a criminally sanctioned embargo on a much broader range of information than that protected by these focussed Ministerial powers. Where Parliament has indicated specific detractions from the capacity and power of the Committee to seek and receive information and documents, it becomes contradictory and unpersuasive to read the general provisions of sec 34VAA in such a way as, in many cases, to render those specific detractions otiose.

24 It follows that, in my opinion, the provisions of sec 34VAA of the *ASIO Act* have no effect whatsoever on the activities of persons including members of the Committee, the Committee staff, prospective witnesses, witnesses and persons assisting eg agency heads in providing information required by the Committee (within lawful limits as noted above). So long as those activities comprise part of or are being engaged in for the purposes of conducting or complying with the requirements of the mandatory review entrusted to the Committee by Parliament in subpara 29(1)(bb)(i) of the *Intelligence Services Act*, those persons will not be committing any offence of the kind created by those provisions.

25 Accordingly, my answers to the questions asked in my brief are as follows.

1 In relation to its statutory review of the questioning and detention provisions of Part III Division 3 of the ASIO Act, is the Committee entitled to seek submissions and receive evidence (that are not 'permitted disclosures' under s34VAA of the ASIO ACT) touching upon the way in which the questioning or detention system has operated?

Yes, subject only to the restrictions imposed by subsec 29(3) of the *Intelligence Services Act*, and by the operation of cll 2, 3 and 4 of Sched 1 of that Act.

2 If the answer to 1 is yes, does parliamentary privilege attach to such submissions or evidence?

Yes, including by reason of subsecs 12(1) and (2) and 16(3) and (4) of the *Parliamentary Privileges Act*.

3 If parliamentary privilege attaches to such submissions and evidence would it provide a complete defence to:

- *The subject/s of a warrant issued under Division 3 Part III of the ASIO ACT;*
- *The legal representatives of the subject/s;*
- *The family members of the subject/s; and*
- *Third parties and witnesses with relevant knowledge of the warrant;*

if they gave evidence to the Committee and were subsequently prosecuted under the heading "Control of publication of evidence given to the Committee"?

Yes. Furthermore, as noted above there may be offences committed by anybody threatening such a prosecution. In my opinion, there is probably also a separate and serious breach of parliamentary privilege committed by officers of the executive government embarking on any such prosecutions.

4 Is the Committee correct in the propositions set out in the brief under the heading "Control of publication of evidence given to the Committee"?

Yes. For clarity and convenience, I note those correct propositions to be that evidence which would not constitute permitted disclosures within the meaning of sec 34VAA should be received by the Committee in camera; that no submission or evidence to the Committee be authorized for publication except by express decision of the Committee; that the offence created by sec 13 of the *Parliamentary Privileges Act* would be committed by any such unauthorized disclosure; and that there may well be (but presently unnecessary to determine) a separate non-statutory parliamentary privilege breach by such unauthorized disclosure.

5 Based on the answers to these last questions, is there any specific advice the Committee should give to those classes of persons identified in Question 3 who intend to make submissions and give evidence in relation to this review?

If the Committee so wishes, it can and should advise such persons that the provisions of sec 34VAA of the *ASIO Act* do not apply so as to render it an offence for them to provide documents or give evidence to the Committee pursuant to requirements made by the Committee in accordance with law including the provisions of Sched 1 of the *Intelligence Services Act.*

FIFTH FLOOR,

ST JAMES' HALL.

29th April 2005 Bret Walker