



Review of ASIO's Questioning and Detention Powers

Submission to Joint Committee on Intelligence and Security

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Introduction and Summary

The Castan Centre for Human Rights Law ('Castan Centre') thanks the Parliamentary Joint Committee on Intelligence and Security ('Committee') for the opportunity to comment on the 'operation, effectiveness and implications of Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* ['ASIO Act'] and any other provision of that Act as far as it relates to that Division.'¹

The Chair stated at the outset of this inquiry that the 'implications' of Division 3 of Part III of the ASIO Act include 'whether the existing set of safeguards gets the balance right between security and individual liberties'.² The Castan Centre submits that they do not, for reasons given in a wide variety of submissions, reports and peer-reviewed articles by experts since 2002. Consequently, we recommend that the entire Division be allowed to sunset as scheduled in 2018.

At the very least, if the Questioning Warrant regime is maintained, safeguards such as the mandatory recording of questioning, and presence of a truly independent legal representative during questioning, must be put in place. In any case, the Questioning and Detention Warrant regime should be discontinued.

Previous Castan Centre Assessments of the 2002 Amendments

The *ASIO Legislation Amendment Act 2003* and the *ASIO Legislation Amendment (Terrorism) Act 2003* established the detention and questioning regime being examined by this inquiry, and provided that it consisted of extraordinary measures, to sunset in January 2006 unless further required. In April 2002, Castan Centre Director David Kinley and Sarah Joseph made a submission to the Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD regarding the Bill for the latter Act.³ The submission noted that it was 'very likely that [the Bill's] implementation would breach our international obligations under the International Covenant on Civil and Political Rights (ICCPR),' in particular articles 7 (the prohibition on cruel, inhuman and degrading treatment), 9 (the prohibition on arbitrary detention), 10 (the guarantee of humane treatment in detention), 14 (fair trial guarantees) and 17 (privacy protection).⁴

The 2002 submission also noted that Australia had not submitted a notice of derogation under article 4 of the ICCPR, as the UK did in relation to similar measures in the 1990s, but

¹ Current inquiry, *Terms of Reference*:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Terms_of_Reference.

² PJCIS *Media Release*, 22 February 2017:

http://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Intelligence_and_Security/ASIO/Media_Releases.

³ Submission available at: <http://www.monash.edu/law/research/centres/castancentre/policywork/asio2>.

⁴ Ibid.

that in any case 'a derogation would not save the ASIO Amendments from constituting a breach of the ICCPR,' because the measures were harsher despite a demonstrably lower threat level, and because some of the relevant ICCPR provisions breached are non-derogable.⁵

In 2004, then Acting Castan Centre Director Sarah Joseph wrote 'Australia and all states must tread a fine line between overreaction and failure in their duty to protect their populations. International human rights law assists states in defining that line.'⁶

In evaluating the ASIO Act amendments to determine whether they crossed the line, Joseph identified issues including the lack of demonstrated need for rights-limiting measures going beyond those adopted by like-minded countries;⁷ insufficiently independent oversight through the warrant process;⁸ potentially insufficient immunity for those compelled to divulge self-incriminating information⁹ and a heightened potential for arbitrariness if the detention powers were to be applied to 16-18 year old children.¹⁰

Joseph concluded that the ASIO Act amendments were unlikely to be justified by the actual threat facing our society, and therefore breach international human rights standards.¹¹ She also noted, crucially, that they might be so severe as to be counter-productive, particularly if they provoke hostile reactions within our community, or come to be used as propaganda for terrorist recruitment.¹² Joseph's final words remain highly relevant in 2017:

It is inevitable that in the future more lives will be lost to terrorist attacks across the world. It is not hysterical to believe that such an attack could occur in Australia. However, the anguish that will be caused by terrorists in the future should not be supplemented by the impulsive and perhaps pointless sacrifice of fundamental principles and values, such as respect for human rights, pluralism and the rule of law.¹³

Castan Centre Associate Patrick Emerton has done a great deal of work on Australia's anti-terrorism legal regime,¹⁴ including a submission with Marius Smith to the Joint Committee on ASIO, ASIS and the DSD's 2005 inquiry into Division 3 of Part III of the ASIO Act.¹⁵ That submission noted several more serious issues, including the overly broad definition of 'terrorism offence' which would allow people to be detained for a 'vast array'

⁵ Ibid.

⁶ See Joseph, 'Australian Counter-terrorism Legislation and the International Human Rights Framework' (2004) 27(2) *University of NSW Law Review* 428, 429.

⁷ Ibid, 443-444.

⁸ Ibid, 444-445.

⁹ Ibid, 445-446.

¹⁰ Ibid, 446.

¹¹ Ibid, 451.

¹² Ibid, 451-452.

¹³ Ibid, 452.

¹⁴ See *Anti-Terrorism Legislation* submissions:

<http://www.monash.edu/law/research/centres/castancentre/policywork/submissions>.

¹⁵ Submission available at: http://www.monash.edu/_data/assets/pdf_file/0006/138075/asio-05-submission.pdf.

of reasons¹⁶ and the amendments' effective (and unjustified) elevation of intelligence to the status of evidence.¹⁷ Emerton also reinforced Joseph's points about a lack of proportionality in the measures and a lack of rigour in the safeguards.¹⁸

Assessment by Other Experts

In his 2012 Annual Report, the first Independent National Security Legislation Monitor ('INSLM'), Bret Walker QC, reviewed the operation of the Div 3, Part III powers.¹⁹ Walker made several pertinent observations in relation to the Questioning Warrant regime, including that it attracts a far harsher penalty to breach the secrecy of the regime than to breach a safeguard by failing to respect the prohibition on cruel, inhuman or degrading treatment, which demonstrates an inappropriate allocation of priorities.²⁰

In respect of the Questioning and Detention Warrant regime, Walker noted that it 'is certainly a drastic interference with personal liberty and freedom,'²¹ and that some of the safeguards accompanying it were therefore 'inappropriately slight,'²² putting Australia at risk of breaching not only article 9(1) of the ICCPR, but also fundamental constitutional rule of law principles.²³ He concluded that '[Questioning and Detention Warrants] are not at all necessary as less restrictive alternatives exist to achieve the same purpose.'²⁴ In this conclusion, Walker was in accord with the submission to his review of Lisa Burton, Nicola McGarrity and George Williams of the Gilbert + Tobin Centre of Public Law.²⁵ Like Sarah Joseph, these academics have published detailed, peer-reviewed analyses of the questioning regime and found it to have struck the wrong balance between the preservation of security and the protection of individuals' rights.

In October 2016, the second INSLM Roger Gyles AO QC published a report on anti-terrorism questioning and detention powers, including those under Division 3 of Part III of the ASIO Act.²⁶ Gyles went further than his predecessor, finding that Division 3 in its entirety (rather

¹⁶ Ibid, 1. See further McCasland-Pexton, A., Joseph, S. and Kinley, D. Submission to the Senate Legal and Constitutional Affairs Committee Regarding the Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]: http://www.monash.edu/law/research/centres/castancentre/policywork/anti_t2.

¹⁷ Ibid.

¹⁸ Ibid, 1-2.

¹⁹ See INSLM, *Annual Report 2012*, available at:

<https://www.inslm.gov.au/sites/default/files/publications/inslm-annual-report-2012.pdf>, Chapters IV and V.

²⁰ Ibid, 80-83.

²¹ Ibid, 99.

²² Ibid, 101.

²³ Ibid, 105-106.

²⁴ Ibid.

²⁵ G+T Centre, *Submission on ASIO Powers*, 3 September 2012:

http://www.gtcentre.unsw.edu.au/sites/gtcentre.unsw.edu.au/files/centre_submission_asio_powers_2.pdf

²⁶ INSLM, *Certain Questioning and Detention Powers in Relation to Terrorism*, October 2016, available at: <https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf>.

than just the Questioning and Detention Warrant powers) is no longer 'fit for purpose' and should be repealed or cease on its sunset date in 2018.²⁷ He also recommended tightening the definition of 'terrorism offence', a recommendation made by the Castan Centre more than a decade earlier.²⁸ It should be noted that the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* actually broadened the definition in 2014.²⁹

Gyles observed that a coercive questioning model with more rigorous safeguards exists in the *Australian Crime Commission Act 2002*, and recommended it be adopted as a model for a replacement regime for ASIO.³⁰ The Castan Centre supports this recommendation in principle, but would require further study of the Crime Commission questioning regime to determine whether it is compatible with human rights law.

ASIO's Position

ASIO's position, as stated in the attachment to the Attorney-General's Department's submission to the 2016 INSLM review, is that the Questioning Warrant process in Part III should be 'streamlined' to provide that only the Attorney-General need be involved in the authorisation. Under ASIO's proposal an Issuing Authority would still be required for a Questioning and Detention Warrant, but actual oversight of questioning in either case would no longer involve a 'prescribed authority.'³¹ This would presumably also remove the prescribed authority's ability to invite lawyers and/or parents to be present during interrogations under ss 34K, 34ZQ and 34ZR.³² Such a diminution in oversight – which is already of questionable strength³³ – would be unacceptable from a human rights perspective.

The only oversight proposed to be retained is by the Inspector-General of Intelligence and Security ('IGIS') and an 'authorised officer' from the Attorney-General's Department.³⁴ With all due respect to the functional independence of the IGIS, that office is still a creature of the executive, reporting to the Attorney-General and other members of Cabinet.³⁵ As such, there remains a need for a truly independent person, such as a legal representative, to be present during questioning of terrorism suspects and others detained under this warrant regime.

²⁷ Ibid, 1 and 51.

²⁸ Ibid, 2.

²⁹ See *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*, Schedule 1, Item 37.

³⁰ Ibid, 1.

³¹ See *Attachment to AGD submission: ASIO views on streamlining options*, 2016:

https://www.inslm.gov.au/sites/default/files/submissions/agd_submission-qw_qdw_regime_0.pdf.

³² Inserted by the *ASIO Legislation Amendment Act 2006*.

³³ See eg Burton, McGarrity and Williams, above n 25, 4-11.

³⁴ Ibid, 2.

³⁵ See Division 4, Inspector-General of Intelligence and Security Act 1986

The vast experience of the European Committee for the Prevention of Torture has shown that safeguards such as the presence of a lawyer go a long way towards fulfilling States' obligations under articles 2 and 16 of the *UN Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* to take effective measures to prevent torture and other cruel, inhuman or degrading treatment or punishment.³⁶ The UN Human Rights Committee and Committee against Torture concur in this recommendation.³⁷

A purely executive power to detain people *incommunicado* for questioning, which appears to be what ASIO seeks,³⁸ poses significant risks. In his 2002 report to the former Commission on Human Rights, the UN Special Rapporteur on Torture observed:

Torture is most frequently practised during incommunicado detention. Incommunicado detention should be made illegal, and persons held incommunicado should be released without delay. [All relevant] information... should be scrupulously recorded... In accordance with the Basic Principles on the Role of Lawyers, all persons arrested or detained should be informed of their right to be assisted by a lawyer of their choice or a State-appointed lawyer able to provide effective legal assistance... Security personnel who do not honour such provisions should be disciplined.³⁹

According to the INSLM's 2016 report, only 16 Questioning Warrants (11 of which were in 2004-05, and none of which was issued after 2010) and not a single Questioning and Detention Warrant has been issued to date.⁴⁰ The report concludes that the present regime is inappropriate, and, regarding ASIO's proposals to strengthen it:

The task of amending the present provisions to give ASIO a more streamlined procedure but satisfy legitimate concerns about the scope for executive over-reach and oppression would be formidable and the result would be unlikely to satisfy all, or even most. The obvious solution is to adopt the ACC Act model as closely as possible.⁴¹

³⁶ See *CPT Standards* (CPT/Inf/E (2002) 1 - Rev. 2010), at para 15: 'The CPT wishes to stress that, in its experience, the period immediately following deprivation of liberty is when the risk of intimidation and physical ill-treatment is greatest. Consequently, the possibility for persons taken into police custody to have access to a lawyer during that period is a fundamental safeguard against ill-treatment. The existence of that possibility will have a dissuasive effect upon those minded to ill-treat detained persons; further, a lawyer is well placed to take appropriate action if ill-treatment actually occurs.' See further *EU Directive 2013/48/EU* on the right of access to a lawyer: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0048>.

³⁷ See Human Rights Committee *General Comment 20* of 10 March 1992, at para 11 and Committee Against Torture, *General Comment 2* of 24 January 2008, at para 13.

³⁸ It is arguable that, under ss 34K and 34ZS of the ASIO Act, the questioning and detention warrant regime already represents a form of incommunicado detention.

³⁹ See *Report of the Special Rapporteur on the question of torture*, UN Doc E/CN.4/2003/68, available at: http://ap.ohchr.org/documents/alldocs.aspx?doc_id=3360, at para 26(g).

⁴⁰ INSLM, *Certain Questioning and Detention Powers in Relation to Terrorism*, above n 26, 25.

⁴¹ *Ibid*, 51.

Conclusion and Recommendation

ASIO appears to be calling for significantly broader powers under a controversial interrogation regime it barely uses, which already fails to meet Australia's international human rights obligations, and which has not assisted materially in bringing suspects to justice.⁴² Even if it has assisted in intelligence gathering operations, ASIO already had surveillance powers before 2002 which were time-tested and adequate for this purpose. ASIO is not a law enforcement agency. The invasive warrant regime does not even need to be a measure of last resort since s 34D(4)(b) of the ASIO Act was amended by the *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014*,⁴³ which is unacceptable.

The Castan Centre supports the INSLM's 2016 recommendation to repeal Division 3, Part III in its entirety, or let it lapse at its sunset date.

Alternatively, if this submission is not accepted by the Committee, the Castan Centre recommends that the Questioning and Detention Warrant regime under Subdivision C be repealed/allowed to lapse, and the safeguards for the Questioning Warrant regime under Subdivision B be bolstered (for example by removing the discretionary aspects of access to a lawyer and video recording under Subdivision E) rather than 'streamlined' as requested by ASIO.

⁴² This conclusion was also reached by Burton, McGarrity and Williams – see above n 25, 2.

⁴³ See Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014, Schedule 1, Item 28.