Lawyers for the People
AUSTRALIAN LAWYERS ALLIANCE

Review of ASIO's questioning and detention powers

Submission to the Parliamentary Joint Committee on Intelligence and Security

26 April 2017

Suite 5 Level 7, 189 Kent Street, Sydney NSW 2000 | GPO Box 7052, Sydney NSW 2001 | ABN 96 086 880 499
T - +61 2 9258 7700 | **F** - +61 2 9258 7777 | **E** - enquiries@lawyersalliance.com.au | **W** - www.lawyersalliance.com.au

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Who we are

The Australian Lawyers Alliance (ALA) is a national association of lawyers, academics and other professionals dedicated to protecting and promoting justice, freedom and the rights of the individual.

We estimate that our 1,500 members represent up to 200,000 people each year in Australia. We promote access to justice and equality before the law for all individuals regardless of their wealth, position, gender, age, race or religious belief.

The ALA started in 1994 as the Australian Plaintiff Lawyers Association, when a small group of personal injury lawyers decided to pool their knowledge and resources to secure better outcomes for their clients – victims of negligence. While maintaining our plaintiff common law focus, our advocacy has since expanded to criminal and administrative law, in line with our dedication to justice, freedom and rights.

The ALA is represented in every state and territory in Australia. More information about us is available on our website.[1]

[1] www.lawyersalliance.com.au.

Introduction

1. The Australian Lawyers Alliance (ALA) welcomes the opportunity to have input into the issues raised by the terms of reference of Parliamentary Joint Committee on Intelligence and Security's Review of ASIO's questioning and detention powers.

2. The ALA accepts that law reform for national security purposes is an important function of the legislature, where it is necessary and proportionate to the risks faced. However, in the opinion of the ALA, Division 3 Part III is neither necessary nor proportionate to the risks, and does not offer any genuine protection from the terrorist threat faced.

3. The ALA supports the findings of the Independent National Security Legislation Monitor (INSLM), which has argued that Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) 'should either be repealed, or not extended beyond the present sunset date'.[2] As noted by the current INSLM, the Hon Roger Gyles AO QC, '[i]t is time to accept that the capacity to secretly and immediately detain persons whether or not they are implicated in terrorism is a step too far.'[3]

4. This submission sets out the reasons for this support.

[2] The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Certain question and detention powers in relation to terrorism*, (October 2016), https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf, recommendations 7 and 8.
[3] The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Certain question and detention powers in relation to terrorism*, (October 2016), https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf, [9.10].

Powers under Division 3 Part III

5. Division 3 Part III of the ASIO Act was introduced in 2003 at a time of heightened concern regarding the risk of terrorism, following attacks in the USA in 2001 and Indonesia in 2002. It contains unique and invasive powers of questioning and detention that are unseen in other countries[4] and of questionable legality under the Australian Constitution. They also appear to conflict with a number of Australia's obligations under international human rights law. The detention powers have never been used, and the questioning powers have not been used since 2010.[5]

6. This Division of the ASIO Act allows for the issuance of Questioning and Detention Warrants (QDW) and Questioning Warrants (QW) concerning persons 16 years and older. These warrants can be granted if the relevant Minister believes that "there are reasonable grounds for believing that issuing the warrant … will substantially assist the collection of intelligence that is important in relation to a terrorism offence".[6] It is recalled that terrorism offences under the *Criminal Code Act 1995* (Cth) are much broader than terrorist acts, including many offences that would not give rise to violence or a risk to life or property.[7] To this end, the INSLM has noted

[4] The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Certain question and detention powers in relation to terrorism*, (October 2016), https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf, [9.2].

[5] See ASIO Annual Reports 2004-5 to 2015-16, available here: https://www.asio.gov.au/asio-report-parliament-2015-16.html.

[6] S34D(4)(a).

[7] See Australian Lawyers Alliance, *Criminal Code Amendment (High Risk Terrorist Offenders) Bill 2016: Submission to the Parliamentary Joint Committee on Intelligence and Security* (October 2016), https://www.lawyersalliance.com.au/documents/item/695, for an exploration of some of ALA's concerns regarding the broad nature of terrorist offences under the *Criminal Code Act 1995* (Cth), Part 5.3. Note in particular that terrorist offences under Division 101 of that Act include many preparatory offences, including possessing a thing or collecting or making a document that is connected with preparation for, the engagement of a person in, or assistance in a terrorist act, and being reckless as to that connection: ss 101.4, 101.5. As such, being suspected of committing a terrorist offence does not indicate that someone is suspected of being involved in terrorist-related violence.

that linking the powers to terrorism offences, rather than potential terrorist acts, 'elides the fundamental distinction between the collection of intelligence and law enforcement'.[8]

7. Pursuant to these warrants, the Australian Security Intelligence Organisation (ASIO) has the power to compel the subject of the warrant to answer questions, even where they are not accused of or suspected of being involved in any crime, including a terrorist offence or potential terrorist act. If the person fails to answer questions posed pursuant to one of these warrants they can be liable for prison sentences of five years.[9] They can be detained for up to a week for the purposes of the warrant under a QDW, with no court oversight, although they must be brought before a prescribed authority (being a judge or President or Vice President of the Australian Administrative Tribunal)[10] in such cases.[11] There is no protection against self-incrimination, although answers provided under these warrants cannot be used to prosecute the subject of the warrant.[12] Access to translators and lawyers is limited.[13]

8. If a warrant has been sought in relation to an individual, even if the warrant has not yet been granted, that individual must provide all travel documents to an enforcement officer and must not leave the country without permission.[14] The same penalty applies after a warrant has been issued.[15]

[8] The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Certain question and detention powers in relation to terrorism*, (October 2016), https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf, [9.6].
[9] S34L.
[10] S34B.
[11] Ss34F-34H, 34S.
[12] S34L(8).
[13] Ss34N(2), 34ZO.
[14] Ss34W, 34X.
[15] Ss34Y, 34Z.

9. Five year prison sentences also apply if any person discloses the existence of the warrant, or its contents, while it is in force. If the subject of the warrant or their lawyer discloses this information, it is a strict liability offence, meaning that no defence is available if the fact of disclosure is proven, unless the individual can show that they had an honest and belief that the facts were otherwise. If anyone else discloses this information, the fault element is recklessness.[16]

10. In either case, there need be no intention to disclose the information, no risk to national security, or to the safety of any person or property, before severe penalties can ensue as a result of disclosing information about a QW or QDW. As such, under this legislation, people who are not suspected or accused of any crime could be liable to five years in prison, for simply telling their boss why they were not able to come to work, or a family member why they could not come home, as noted by the INSLM.[17]

Unacceptable infringement of civil liberties: Australian Constitution

11. Australia is a liberal democracy, with individual freedom being a fundamental premise. While we do not currently enjoy clear legislated human rights in the form of a Federal Human Rights Act, freedom of speech and freedom of movement are foundational rights that we all enjoy, as recognised by the Constitution.[18]

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[16] Ss34ZS,

[17] The Hon Roger Gyles AO QC, Independent National Security Legislation Monitor, *Certain question and detention powers in relation to terrorism*, (October 2016), https://www.inslm.gov.au/sites/default/files/files/Certain-Questioning-and-Detention-Powers.pdf, [9.28].

[18] The freedom of political communication prevents any laws that inhibit communication that might be relevant to political discourse. It is possible that this freedom could be relevant to the secrecy requirements under Division 3 of Part III of the ASIO Act, if it were considered that these requirements did not serve a legitimate purpose. See *Lange v ABC* (1997) 189 CLR 520. Freedom of

12. There are serious questions about the Constitutional validity of powers that exist under Division 3 Part III, especially in relation to the secrecy and detention provisions. Given that these powers relate to individuals who are not suspected of committing any offences, they are extraordinary.

13. They are also unnecessary. The infrequent use of these warrants means that there has not been an opportunity to test their validity in the High Court, and Constitutional questions remain unresolved.

Freedom of political communication

14. In Australia, the High Court has recognised that freedom of political communication is an essential right that underpins our system of representative democracy. Legislative restrictions on this freedom are only permissible to the extent that they are reasonably appropriate and adapted to a legitimate purpose.[19] However, as noted by the INSLM, '[t]he power [to issue a QW under the ASIO Act] as it stands lacks utility and cannot be regarded as effective.'[20]

15. The activities of ASIO forcibly questioning individuals who are not suspected of committing any crime could easily be seen as relevant political dialogue. The activities of any government agency should be subjected to scrutiny to ensure that they are operating in line with their mandates and not misusing or exploiting there

movement can usually only be restricted as a punishment imposed by a court, pursuant to a finding of guilt in relation to a criminal charge. Other limited restrictions can be imposed, for example, to assess migration status or to affect a legitimate Executive function such as deportation or to guarantee an accused person will be available to be tried for a crime: *Chu Kheng Lim & Ors v The Minister for Immigration, Local Government and Ethnic Affairs*, (1992) 176 CLR 1; *Kable v DPP (NSW)* (1996) 189 CLR 51; *Al Kateb v Godwin*, (2004) 219 CLR 562.

[19] *Lange v ABC* (1997) 189 CLR 520.

[20] Ibid, [9.14].

power. They are also entrusted with spending public funds, for which they should be publicly accountable.

16. Oversight of law enforcement and security agencies is particularly important, given the considerable power that they wield. While there are certainly times that oversight will not be possible for national security reasons, in all other activities oversight, including communication about them, is essential. Any secrecy based on national security must be tightly constrained and genuinely founded in a concern for public safety. Any extension beyond this risks undermining human rights, trust in the government and, ultimately, genuine national security efforts, as well as infringing the freedom of political communication.[21]

17. Given the breadth of the ban on disclosure of activities under Division 3 Part III, which does not require any link with a risk to national security before these significant penalties become available, it is difficult to see how this secrecy provision could be considered reasonably appropriate or adapted to a legitimate purpose. It is thus likely to conflict with the Constitutional freedom of political communication.

Separation of powers and detention as punishment

18. If the powers contained in these warrants were considered to amount to punishment, it is possible that they would be found to infringe the separation of powers entrenched in the Constitution, due to the lack of involvement of a court in their issuance.[22] This is particularly likely where detention occurs. The characterisation of the detention permitted under QDWs is untested and unclear:

[21] The default position must be in favour of public oversight. If the government imposes restrictions under the guise of national security, with no genuine grounding in a threat to public safety or the life of the nation, over time the population will lose respect for the serious risk that national security challenges can pose.

[22] *Chu Kheng Lim & Ors v The Minister for Immigration, Local Government and Ethnic Affairs*, (1992) 176 CLR 1; *Kable v DPP (NSW)* (1996) 189 CLR 51.

> 'whether the questioning and detention powers under Division 3 Part III may be characterised as punitive or not is a novel question in Australian law. Evidence before the Committee suggests that the issue is one on which respectable legal opinion differs and the matter will remain an open question until it is the subject of judgment by the High Court of Australia.'[23]

19. However, there is a presumption that detention is punishment, unless there is an alternative legitimate executive function that underpins the power to detain:

> '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'.[24]

20. There are exceptions to this presumption.[25] Fitting this detention within these exceptions appears difficult, however, given that the subject of the warrant is not suspected of any crime or alleged to pose any risk to the community. As noted by the former Parliamentary Joint Committee on ASIO, ASIS and DSD, clarity on whether the detention allowed under QDWs remains elusive.

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[23] Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO's Questioning and Detention Powers – Review of the operation, effectiveness and implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act*, (2005), http://www.aph.gov.au/Parliamentary_Business/Committees/House_of_Representatives_Committees?url=pjcaad/asio_ques_detention/report.htm, [2.4].

[24] *Chu Kheng Lim & Ors v The Minister for Immigration, Local Government and Ethnic Affairs*, (1992) 176 CLR 1, at 27, per Brennan, Deane and Dawson JJ.

[25] Other instances where administrative or executive detention was found not to infringe on the separation of powers have related to individuals who themselves were considered to be a risk to the general population (*Fardon v Attorney General (Qld)* (2004) 223 CLR 575), or in the case of individuals in Australia who are not citizens and do not have valid visa, to assess a claim for asylum or effect a deportation order (*Al Kateb v Godwin* (2004) 219 CLR 562).

Obligations under international law

21. Australia has agreed to be bound by a wide range of international human rights which protect the rights to be free from arbitrary detention, privacy, freedom of speech, to be free from torture and cruel, inhuman and degrading treatment or punishment. We have also agreed to protect the rights of children and eliminate racial discrimination.[26]

22. Many of these rights can be curtailed for reasons of national security to the extent that it is considered necessary and proportionate to do so, although the least intrusive means of curtailing the right must be employed.[27] However, as with the Constitutional protections, it is difficult to argue that the provisions in Division 3 Part III of the ASIO Act meet the threshold of necessity and proportionality, not least because of their lack of use. If they were necessary, they would surely be used.

23. Further, given the breadth of potential crimes that these warrants can be issued to assist in investigating, it is hard to argue that they are proportionate. A QW could plausibly be requested and granted to assist in the investigation of possession of a thing connected with the 'preparation for, the engagement of a person in, or assistance in a terrorist act' recklessly.[28] If the national security risk posed by this offence is compared to the risk posed by non-national security related crimes for

[26] See especially *International Covenant on Civil and Political Rights* (1966), articles 9, 12, 17, 19; the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, articles 1, 2, 16; the *Convention on the Rights of the Child*, article 37 and the *International Convention on the Elimination of All Forms of Racial Discrimination*, (1965) generally.
[27] See, for example, Human Rights Committee, *General Comment 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, [12], [66]; Human Rights Committee, *General Comment 34: Article 19 (Freedoms of opinion and expression*, CCPR/C/GC/34, [22], [34].
[28] *Criminal Code Act 1995* (Cth), s101.4(2); ASIO Act, ss34D, 34E.

which QWs are not available, applying more invasive laws to the former but not the latter is illogical.[29] Thus the proportionality test also appears not to be met.

24. Specific obligations under international law will be briefly examined to demonstrate how these laws appear to infringe these obligations.

Right to be free from arbitrary detention

25. Detention pursuant to a QDW, particularly "without access to a lawyer and in conditions of secrecy" as the ASIO Act provides, would appear to give rise to a risk of arbitrary detention, as recognised by the Human Rights Committee in its most recent review of Australian laws.[30]

26. Similarly to protections under Australian Constitutional law, under international law detention is usually only permissible after a finding of guilt by a court, following a trial meeting international fair trial standards.[31] There are some limited exceptions to this requirement.[32] It is unlikely, however, that detention to allow questioning of an individual not believed to be connected with any crime, for the simple reason that they might inform the individual suspected of committing a crime that they had been asked about it, would fit within those exceptions, without further national security factors being in play.

[29] Note that the Australian Criminal Intelligence Commission also has powers to compulsorily question people. This power has been used for counter-terrorism investigations as well as other types of investigations. As these powers are not currently under review, the ALA makes not comment on them at that time, other than supporting the concerns of the Law Council of Australia in its submissions to the INSLM in advance of its most review of questioning and detention powers: Law Council of Australia, *Questioning and detention powers* (June 2016), https://www.inslm.gov.au/sites/default/files/submissions/01_-_law_council_of_australia_0.pdf.
[30] Human Rights Committee, *Concluding observations, Australia*, CCPR/C/AUS/CO/5, [11].
[31] See, for example, Human Rights Committee, *General Comment 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, [12], [14], [15]
[32] See Human Rights Committee, *General Comment 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35 generally for an exploration of this right and the exceptions to it.

Right to privacy

27. Mandatorily questioning individuals appears to contravene the right to privacy found under article 17 of the *International Covenant on Civil and Political Rights* (ICCPR). Under that article, everyone has the right to protection under the law of the right to be free from arbitrary interferences with privacy, and to be free from arbitrary attacks on ones honour.

28. Questioning someone regarding matters which do not relate to them being a suspect in a crime and have at best tenuous national security links, if such links exist at all, appears to clearly infringe the right to privacy. Detaining someone to engage in such questioning appears to be a particularly clear infringement of this right; see above.

Freedom of expression

29. It is an offence to disclose information about warrants granted under Division 3 Part III, including a fact related to the content of a warrant or the questioning or detention of a person in connection with the warrant, punishable by up to five years imprisonment.[33] This restriction applies to everyone, not just the subject of the warrant. Strict liability applies if it is the subject of the warrant or their lawyer that discloses the information, otherwise the fault element is recklessness. This appears to be a clear impediment on the right to freedom of expression under international law,[34] as well as under the domestic right to freedom of political communication.

30. This provision appears to directly contravene the ICCPR, as it imposes detention for exercising the right of freedom of expression: 'detention may be arbitrary by virtue

[33] S34ZS.
[34] ICCPR, article 19.

of the fact that it represents punishment for freedom of expression'.[35] Given there is no requirement that the disclosure give rise to a risk to national security, the exception found in article 19.3 of the ICCPR would not apply.

31. The heavy penalties that exist for disclosing the existence of a QW or QDW, would no doubt have a chilling effect on the reporting of any matters to do with a QW or QDW in the media, or even sharing information with a family member. Given this secrecy applies so broadly, with no requirement that the disclosure would give rise to a risk to national security, it appears to contravene s19 of the ICCPR.

Cruel, inhuman or degrading treatment or punishment

32. The provisions that exist in Division 3 Part III could give rise to cruel, inhuman or degrading treatment or punishment (CIDTP), in conflict with Australia's obligation under article 16 of the *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment* (1984) (CAT). Interrogation and detention are identified in the CAT as government actions in which the risk of CIDTP is particularly high: article 11. Detaining someone for a week when they are not suspected of any crime could contravene this prohibition.

33. Other provisions in the Division could allow for CIDTP. Under a warrant, an individual may be questioned for a total of 24 hours, or 48 hours if an interpreter is being used.[36] While it is expected that there be breaks so that the questioning does not occur continuously, it is possible that such intensive questioning could be seen to amount to CIDTP.

[35] Human Rights Committee, *General Comment 35: Article 9 (Liberty and security of person)*, CCPR/C/GC/35, [53].
[36] S34R(6).

34. Individuals can also be searched, including strip searched. Strip searches may be conducted on people 16 years and older and must comply with provisions in the legislation.[37]

35. While there is a requirement that subjects of warrants be treated with humanity, and not be subjected to CIDTP,[38] those phrases are not defined in the legislation. As such, the risk that it might arise as a result of detention, questioning for long periods or strip searches, cannot be said to be avoided by that prohibition.

Detention of children

36. A further concern relates to the possible questioning and detention of children under this Division.[39] The *Convention on the Rights of the Child* (1989) requires that detention of children only be a measure of last resort, and for the shortest possible period.[40] However, both QWs and QDWs can be issued in relation to 16- and 17-year-olds. Detaining children who are not suspected of any crime to answer questions in relation to terrorist offences is unlikely to ever be seen as necessary.

Potential discriminatory impact

37. National security laws have the potential to have a discriminatory impact on the grounds of race, national origin or religion. Even though they may be drafted in a neutral manner, anecdotal information suggests that the impact of counter-terrorism laws generally have a discriminatory impact, focusing particularly on individuals from a particular region of the world or of a particular ethnicity. This risk has been recognised by the Committee on the Elimination of Racial Discrimination,

[37] Ss34ZB, 34ZC.
[38] S34T.
[39] S34ZE.
[40] Article 37.

in its latest review of Australia's implementation of Australia's implementation of its obligations under the *International Convention on the Elimination of All Forms of Racial Discrimination*.[41]

38. There is no reason to believe that this general concern would be mitigated in relation to Division 3 Part III. It is perfectly foreseeable that, just as national security laws themselves might have a discriminatory impact, powers to question and detain people to assist with investigating terrorism offences could unfairly target the same groups.

Recommendations

The ALA makes the following recommendations:

- Repeal Division 3 Part III immediately and in its entirety. Do not replace it with any other provisions, as the lack of use of the warrants provided for under this Division indicates there is no need for such powers, which appear to conflict with Constitutional protections and obligations under international human rights law;
- Conduct a review of all legislation passed since September 2001 regarding national security to ensure that it complies with the Australian Constitution and international human rights obligations. Repeal or reform all provisions that do not so comply.

[41] Committee on the Elimination of Racial Discrimination, *Concluding observations, Australia*, CERD/C/AUS/CO/15-17, [12].