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Review on Relevant ASIO Provisions and Why Provision like Section 34G (3) Should Be Deleted

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The detention and questioning power provisions within the Australian Security Intelligence Organisation Act 1979 (ASIO) was extended in 2006, and due for a review in 2016 as its Section 32 articulates. It is questionable if there is any genuine political motivation behind the current review and so to implement reforms accordingly, since the occurrence of a series of terrorist attacks which may only strengthen the will of the government to tighten anti-terrorist laws. By the time this submission is initially drafted, only one week has passed after the 2017 Westminster Attack in London. Experience shows that even with effective reviews of various Anti-Terrorism Acts being conducted, there has been a very low level of political commitment to implementing recommendations provided for various reasons (Williams, 2011). A slight hope here is that after a few years, all the recommendations submitted for the current Act, including this one, could be implemented, and proper discussions regarding anti-terrorist laws initiated.

Australia's anti-terror laws were introduced mainly as a response to 9-11 in 2001, and certainly Australia was not the only country engaged in such legal reactions (Roach, 2007). For Australia, without a national human rights charter or bill of rights, unlike most other Western countries there seems to be a major challenge in ensuring a delicate balance between state power and the protection of civil rights of individuals, when compared with other anti-terrorist acts such as the ones drafted in Canada (Williams, 2011).

There has been a strong push from the UN on its member states to fight against terrorists after 9-11 via UN Resolutions. However, it is rather the American anti-terrorist law (USA PATRIOT Act) and the UK terrorism legislation (the Terrorism Act 2000), that have heavily influenced the Australian ASIO provisions; politically, all the similarities of the relevant provisions simply shows the strong support from both Britain and Australia to the stand of the American government against Terrorists (McCallum, 2012). The generous supports offered by the UK government towards the American government via the terrorism legislation tends

to be a direct violation of the Section 5 (1) of the European Council's Convention for the Protection of Human rights; to rectify the situation the UK government declared a state of emergency thereby allowing it to opt out of the European Councils Convention on Human Rights (Henning, 2002; McCallum, 2012).

If state power and human rights are properly balanced, there seems to be fewer problems, even though what constitutes a terrorist's (suspect's) procedural rights may not be exactly the same as that for other ordinary suspects. Arguably, we may accept some of the current ASIO provisions, such as: authorities holding suspects who have information on terrorism related activities for up to seven days, or have these individuals who are detained to be subjected to up to 24 hours of interrogation over that seven-day period; and not even having these persons being charged during such detention period. In contrast, however, what may not be so acceptable would be the use of torture during interrogation and so on, and that is to say a line needs to be drawn regarding how differently a terrorist might be treated compared with an ordinary suspect. This submission challenges the total deprivation of the privilege against self-incrimination by Section 34H.

The privilege against self-incrimination is a significant common law principle, even though it is not regarded as flawless. An absolute legal right of silence right may create so much confusion and practical challenges. If suspects do not have any moral/legal duty to answer questions imposed by police, then there should be no power granted to police to question suspects at the first stance. So in reality the legal privilege exempts suspects from compulsions, a situation of being coerced to answer questions. The key question focuses on-what constitutes "coercion" within the context of an interrogation? I had a long discussion regarding interrogative coercion in my thesis completed in 2015. The main point is that, at the minimum, respect of individuals regarding their individual autonomy, and free will of a person should be maintained, and this is how reliable information can be obtained. During this process, police might be allowed to be persuasive or manipulative to a certain degree, so far as reliable evidence could be obtained (Qu, 2015).

Nothing seems justifies Section 34H (3), which imposes 5 years' imprisonment for those who do not answer police questions. During the process of an interrogation, a simple announcement of a 5 years' imprisonment with no evidence of guilt may not have any real impact on a suspect. As for guilty terrorists whose aim is to donate their lives to promote their religious calls, a 5 years' punishments may not be enough to get them to betray their religion or their organizations. For innocent suspects, this 5 years' imprisonment may only lead them to feel unfairly treated within the criminal justice system. Different from the time of 9-11, we are facing more and more lone wolf type of terrorists, and Section 34H (3) simple does not help to achieve anything or any reliable information. Having Section 34H (3) only leads to the society to be more divided and make suspects, and especially suspected terrorists from different ethnic groups, to feel how unfair this legal system is against them during preliminary investigations, in contrast with to the common law principles such as innocent until proven guilty, and the ever shrinking privilege against self-incrimination.

This relevant provision under Division 3 of ASIO seems to be drafted in a hasty way, without no thorough consideration and driven by a punitive purpose only. Unless empirical evidence clearly shows that this single provision - 34H (3) is efficient in eliciting evidence from relevant suspects, this provision should be eliminated. Similar provisions, with a purely punitive purpose and without contribution to truth elicitation, should be eliminated as well.

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