NOWAR SA

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SUBMISSION TO PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD.

RE: REVIEW OF DIVISION 3 OF PART III OF THE AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT 1979

FROM: NOWAR (SA)

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This submission was endorsed by the committee of NOWAR SA on 17th March 05

This submission addresses:
"broader issues relating to the use of questioning and detention powers"
"legislative changes which NOWAR SA believes should be made to the legislation"

Summary: Nowar believes that:

- **The potential for future abuse of these powers of ASIO for political purposes outweighs any positive aspects (if these exist).** There is strong evidence already that the government is using other anti-terrorist legislation for party political purposes which do not further the 'war on terror' or prevent terrorist acts. In doing so civil liberties and democratic rights are being violated and this has a negative effect on our society. This does not augur well for future application of the powers of ASIO to detain and question individuals.

- **ASIO does not need these powers to efficiently perform its function.** Questioning and gathering of information can be undertaken without detention.

- **A secret organisation that is not publicly accountable should not be given powers which should only be exercised by open, publicly accountable bodies.**

- **RECCOMENDATIONS:**

- **The power of ASIO to detain individuals for questioning be revoked.**

- **The power of ASIO to compulsorily question individuals be revoked.**

- **Failing this that the legislative changes listed at the end of the submission be put in place as safeguards against abuse of these powers.**

Use of anti-terrorist legislation for political purposes: the use of anti-terrorist legislation for political purposes by the government demonstrates that the new ASIO powers could be similarly abused.

It appears that at least 3 individuals who represent no threat to society have been victimised by use of Australian anti-terrorist legislation: Bilal Khazal, Izhar Ul-Haque and currently Jack Thomas.

Bilal Khazal published documents on the internet espousing a radical political viewpoint and was charged with collecting or making documents to facilitate terrorist acts. It is now apparent there were no terrorist acts planned or facilitated and his arrest and charging under anti-terrorist laws could be seen as an attack on free speech and freedom of political communication.

Izhar Ul-Haque was a 21-year-old fourth year medical student at the University of NSW when he was arrested and charged with training with Lashkar-e-Taiba. There was no suggestion that he was involved in or was planning any kind of terrorist activity. He undertook only basic level training before deciding he did not want to fight the Indian army in Kashmir. Terrorism expert Clive Williams says that Lashka-e-Taiba is unlikely to be interested itself in terrorist activities in Australia. Yet Ul-Haque was held in solitary confinement at a maximum security prison for 6 weeks until a judge ordered his release on bail, declaring that he posed no danger to society. Justice Hidden said "It is no part of the Crown case that this young man is a threat to Australian society. His family is in this country, he is undertaking study in this country. He appears to enjoy the support of a wide variety of people in this country." Alexander Downer had praised his arrest on April 15th 2004 by the Federal Police, saying that by their actions the police were protecting the people of Australia.

Jack Thomas converted to Islam at age 23 and travelled to Pakistan and Afghanistan to become a cleric. While he was there the attacks on Sept 11th 2001 occurred. He was arrested while trying to return to Australia from Pakistan in 2003 and was jailed there for 5 months where he was interrogated by the Pakistan Secret Service (ISI). He was released without charge after no evidence linking him to terrorism could be found and returned to Australia where he lived a completely quiet life with his family for one and a half years. During that time he was monitored by ASIO and no new evidence was uncovered. Yet he was suddenly arrested and charged on the basis of a single interview which had been conducted years previously by the Australian Federal Police in Pakistan without a lawyer present and after 5 months of psychological and physical torture in the Pakistan prison. Previously the DPP had advised that evidence obtained from this interview would not be admissible in an Australian court. He was charged with receiving

funds from a terrorist organisation – specifically an airline ticket to Australia. Jack was held for 3 months in the maximum security prison at Barwon, near Geelong, in solitary confinement for up to 23 hours a day, damaging him psychologically. He has now been granted bail by Victoria's Chief Magistrate, Ian Gray, who said that circumstances warranted his release. Magistrate Gray said that Thomas had not made any efforts to contact terrorist organisations since his arrival back in Australia and did not pose a significant flight risk, also mentioning that he had been psychologically damaged by his incarceration. The DPP has appealed against the decision to grant Thomas bail.

The nature of the charges against these 3 individuals, and the fact that the individuals appear to represent no threat to Australian society and to not be involved in terrorism, gives cause for great concern over the manner in which anti-terrorist legislation is being applied.
The government gains a political advantage from appearing to be protecting Australia from a terrorist threat.
The individuals that are targeted have their civil liberties violated, and are branded in the media and by the government as terrorists, but no actual terrorist acts are being prevented.

This in turn gives us great concern over the way in which the new ASIO powers could be applied in the future for political purposes. The ASIO powers in addition have the potential to be used for suppression of dissent with government policy by intimidating and detaining political activists.

NOWAR SA submits that the current anti-terrorist legislation including the new ASIO powers places far too much power in the hands of the executive. In addition we submit that this power has already been abused for political ends. The government and the relevant agencies including ASIO and the Federal police have shown that they cannot be trusted with the exercise of this power. Indeed any government or agency would be tempted to abuse these powers for its own ends.

Wide net cast by anti-terrorist laws: The raft of anti-terrorist legislation introduced over the last few years has cast a progressively wider net in which the new ASIO powers could be applied. This net includes laws which criminalise association with members of proscribed organisations, financing proscribed organisations and the unilateral power of the executive via the Attorney-General to proscribe any organisation. These powers go beyond any existing in other western democracies. They set the stage for gross abuse of the new ASIO powers in the future.

For example, this widespread abuse could be triggered by a terrorist attack on Australian soil. The government could use such an event to proscribe activist organisations supporting overseas movements for self-determination (such as the Acheh independence movement and the West Papua independence movement). ASIO could then be used to

suppress activists involved in such movements and by such means dampen dissent generally in Australia across a wide range of government policies.

The wide net cast by the new 'terrorism-related' offences dramatically increases the ability of ASIO to question people under warrant, but does not in itself mean that terrorist acts will be prevented or prosecuted in court. This raises questions as to how ASIO's powers will be used. They may be used to monitor a wide range of citizens for purposes way beyond the prevention of terrorism.

The power of the executive to proscribe organisations at will was widely criticised when it was first proposed by the government. Senator Faulkner of the Labor party said in debate that "Proposals to erode our freedoms and our rights will ultimately erode our security as well. For this reason, we do not accept and will not accept the government's executive proscription bill. We will not accept a regime of secret proscriptions, of decisions in closed rooms, of such significant and potentially destructive power in the hands of one person and one person alone. To have that kind of power exercised by one person in secret, particularly a member of the government executive…..is not acceptable in a democratic society and it should never be allowed on the statute books." (*Commonwealth Parliamentary Debates,*Senate, 16th June 2003, 11432-3).
Shortly thereafter, when the power was again proposed by the government, the Labor party allowed the legislation.

The excessively wide definition of a terrorist organisation allows the proscription of any organisation which indirectly fosters or encourages a terrorist act. It is now in the hands of the executive alone to make the decision as to whether an organisation falls under this definition. The danger of this sort of power was recognised in the past history of Australia when moves were made to ban the Communist Party. That kind of power was rejected by the Australian people in the past, but that is the kind of power that is now in place. It has no place in a democracy and greatly broadens the scope for abuse of power by a secret intelligence organisation such as ASIO.

NOWAR submits that the ASIO powers are too dangerous to be maintained in the context of anti-terrorist legislation which casts a net this wide beyond the criminalising of terrorist acts in themselves.

No need for ASIO powers: It has not been demonstrated that ASIO needs the new powers to perform its function of gathering information and to be effective against terrorism. Widespread powers already existed in the Criminal Act which criminalise terrorist acts and terrorist conspiracy, and which allow effective operations against terrorism. ASIO already has effective covert means of acquiring information. It is more likely that the new powers of detention and compulsory questioning will be used for a purpose for which they were not intended – to intimidate activists and control the free expression of political opinion. The effect of a secret agency being given police powers

of detention is more likely to dampen the open expression of political opinion than to be effective in fighting terrorism.

We are sceptical of Professor George William's claim that new laws are needed to increase community confidence. This is not a good or sufficient reason for the introduction of new laws because the function of the law is not to satisfy community perception of a need, but to satisfy a real need. If the new laws are not needed to protect the community and at the same time endanger the democratic freedoms of that community, then they are not justified by any feeling of false security they engender in the public. We have not seen or had demonstrated to us any specific area of law which was inadequate to deal with terrorism before the introduction of anti-terrorist legislation.

Secrecy: The danger of abuse of the new ASIO powers is magnified greatly by the cloak of secrecy which has been thrown around the exercise of these powers by new secrecy laws. These laws make it a criminal offence to reveal any details of the operation of ASIO's powers of detention and questioning for 2 years from their exercise. This is of very great concern as it prevents public knowledge of the manner in which ASIO is exercising its powers. Public knowledge via the media is a vital safeguard to the preservation of a democracy. This increase in the secrecy surrounding ASIO's operations is grossly over-extended and in the context of this secrecy the new powers of ASIO are made much more dangerous.

NOWAR **recommends that there be no secrecy provisions surrounding the operation of ASIO's questioning and detention powers and that ASIO be required to itself provide immediate details of the exercise of its questioning and detention powers to a public committee openly accessible by the media. This committee should itself immediately notify the media of these details. The details should include the identity of the detainee.**

Previously powers of arrest and detention could only be exercised by open, publicly accountable bodies. The very nature of ASIO therefore is unsuitable for the exercise of these powers. NOWAR agrees with Professor George Williams when he says "If ASIO is to be granted new police powers it must be subject to the political and community scrutiny and controls that would apply to any other police force. However this is not compatible with the current intelligence gathering work of ASIO and its organisational structure (such as in regard to the secrecy applying to the identity of its employees). It would be difficult, if not impossible, for ASIO both to be sufficiently secretive to fulfil its primary mission, as well as sufficiently open to scrutiny as would be necessary for it to exercise the powers set out in the ASIO Bill." (*Australia's Legal Response to September 11: the need to safeguard democracy while fighting terrorism*, paper delivered at Victorian Trades Hall Council, 9th Aug 2002)

Therefore the over-riding recommendation of NOWAR is that **the power of ASIO to detain individuals for questioning be revoked.**

Safeguards: A protocol has been established under which ASIO is to undertake questioning. However a deficiency of the protocol is that it is not legally enforceable. The protocol is not a legislative instrument. The Inspector-General of Intelligence and Security has no power to stop the questioning process. The Inspector-General has statutory powers to take concerns to the Attorney-General but the final decision is an executive decision.

NOWAR **recommends that the Inspector-General of Intelligence and Security have the legal power to stop the questioning of a subject and order their release if the protocol is violated.**

Under the protocol "A subject must not be questioned continuously for more than 4 hours without being offered a break." NOWAR considers that 4 hours of continuous questioning constitutes psychological torture which would place unreasonable stress on a subject. Apart from the psychological harm to the subject this length of continuous questioning could result in inaccurate information being given.

NOWAR **recommends that the maximum period of continuous questioning without a break be one hour. A break should be at least 30 mins.**

The operation of the protocol safeguards crucially depends on the 'prescribed authority'. But the prescribed authority is exclusively appointed by the Attorney-General. This places too much power in the hands of the executive and may compromise the independence of the 'prescribed authority'.
NOWAR **recommends that the prescribed authority be appointed by an independent committee which includes lawyers, human rights representatives and the Inspector-General of Intelligence and Security. It could also include representatives of the major political parties, including the Greens and Democrats. This committee could be the PJCAAD with additions.**

The protocol intends to rule out the use of sleep-deprivation but allows the 'prescribed authority' to overrule this provision: "Except where otherwise directed by the prescribed authority, a subject must be accorded the opportunity for a minimum continuous, undisturbed period of 8 hours sleep during any 24 hour period of detention."
This allows the possibility that the prescribed authority may, at the request of ASIO or the Federal Police, deny a subject uninterrupted sleep and institute a sleep-deprivation regime.

To guard against this possibility NOWAR recommends that the prescribed authority be appointed by an independent committee as above, not be an executive appointment, and **the prescribed authority should not have the authority to be able to direct the interruption of an opportunity for continuous sleep of 8 hours ie the words "Except**

where otherwise directed by the prescribed authority…" should be removed from the above protocol.

NOWAR also recommends that **an independent human rights observer/s and an independent psychiatrist/s should have access to a detainee. The observer/s and the psychiatrist/s should have access to an independent committee which has the power to order a detainee's release if they consider the detainee's human rights are being abused or their mental state requires treatment. If there is no committee they should report to the Inspector-General of Intelligence and Security who should also have the power to order a detainee's release.**

Lawyers:
NOWAR recommends that
a person subject to a warrant for questioning without detention should have the same right to contact and consult with a lawyer of choice as a detainee. (at present this is a right only for a person detained for questioning).

A requirement that in all cases a person subject to questioning must be allowed to contact and consult with a lawyer. (At present the Act allows detention to take place without a warrant if ordered by the prescribed authority and in this case there is no requirement that the detainee be permitted to consult a lawyer).

A person being questioned should be able to consult privately with a lawyer without monitoring by ASIO.

A person being questioned should be able to consult with a lawyer of his or her own choice. The prescribed authority must not have the power to stop contact with a particular lawyer (on request by ASIO).

SCRUTINY OF EVIDENCE JUSTIFYING THE ISSUE OF A WARRANT:

The present process by which a warrant is issued under the ASIO legislation leaves all scrutiny of evidence justifying the issue of a warrant in the hands of ASIO and the executive via 2 people: the Director-General of Security and the Attorney-General. This leaves the issuing of a warrant open to abuse.

NOWAR proposes that **a publicly accountable independent committee (a 'Review Committee') be established for the review of evidence justifying the issue of a warrant by ASIO. This review should take place immediately a warrant is issued. The committee must have the power to order the immediate release of a detainee and revoke the warrant. The committee should include lawyers, human rights representatives, the Inspector-General of Intelligence and Security and**

parliamentarians from the major political parties including Greens and Democrats. The committee could be the PJCAAD with additions.

If there is no Review Committee established the Issuing Authority for a warrant should be required to be satisfied that detention and questioning is necessary because the information could not be collected by ASIO by other means.
(At present only the Attorney-General and the Director-General of Security are required to consider this question, putting too much power in the hands of the executive).
The Issuing Authority should have the power to refuse the issuing of a warrant if not satisfied on this point and refer the matter to an independent authority which should include the Inspector-General of Intelligence and Security and lawyers.

ONUS OF PROOF:

It is unreasonable that there should be a reversal of the onus of proof under questioning by ASIO and this is a reversal of basic principles of justice and law, violating the principle of "innocent until proven guilty." In addition the extra pressure exerted on a subject by this reverse onus of proof could result in false information being given.

NOWAR recommends that **the onus of proof should be on ASIO or the police to prove that a subject possesses information or a thing in connection with a terrorist act, not the subject to prove that they did not.**

The violation of basic principles of justice is exactly what we are trying to avoid in combating terrorism.

Sunset Clause: NOWAR considers it essential that a decision on whether the new ASIO powers be continued or discontinued next year be made by both houses of parliament after a full and thorough debate and another inquiry into whether the powers are desirable. The decision should not be an executive decision.

NOWAR recommends that **it be a requirement that a decision on whether the ASIO powers be revoked or continued (with modifications if proposed) be made by both houses of parliament after a full and thorough debate, not by executive decision. We also recommend that another inquiry into the ASIO powers take place at this time before the decision is made.**

RECOMMENDATIONS:

- **The power of ASIO to detain individuals for questioning be revoked.**

- **The power of ASIO to compulsorily question individuals be revoked.**

Failing this NOWAR SA recommends that the following legislative changes be put in place:

- No secrecy provisions regarding the operation of the detention and questioning powers so that full details of these can be provided immediately to the public, plus an explicit requirement that ASIO itself provide these details immediately to an open public body accessible by the media.

- Another comprehensive public inquiry into the ASIO powers when the Sunset clause takes effect in 2006 (including a Senate inquiry), with the focus on whether these powers should be discontinued. A requirement that a decision on whether the ASIO powers should be discontinued or continued (with modifications if proposed) be made by both houses of parliament and must not be an executive decision.

- Increased scrutiny of the evidence provided by ASIO to justify the issuing of a warrant for detention for questioning. This should be undertaken by a publicly accountable committee of parliamentarians from all sides of politics (including a representative/s from the Greens and Democrats) plus lawyers including human rights lawyers or representatives and the Inspector-General of Intelligence and Security. The committee could be the PJCAAD with additions ('Review Committee'). This committee must have the power to revoke a warrant which they consider to be unjustified and to order the immediate release of a detainee.

- Access by a human-rights observer/s and an independent psychiatrist/s to a detainee. The human rights observer/s and psychiatrist/s should have access to the 'Review Committee' which should have the power to order a detainee's release if they consider that the detainee's human rights are being abused or their mental state requires treatment. If there is no 'Review Committee' the human rights observer/s and psychiatrist/s should be able to make representations to the

Inspector-General of Intelligence and Security who must have the power to order a detainee's release if he or she considers that the detainee's human rights are being abused or their mental state requires treatment.

- The appointment of the 'prescribed authority' should not be the sole choice of the Attorney-General. Because of the crucial role of the 'prescribed authority' in providing safeguards against abuse of the ASIO powers the appointment should not be an executive appointment. Instead a committee such as the 'Review Committee' should make this appointment.

- If there is no 'Review Committee' established as suggested above, the Issuing Authority for a warrant should be required to be satisfied that detention and questioning is necessary because the information could not be collected by ASIO by other means. At present only the Attorney-General and the Director-General of Security are required to consider this question, putting too much power in the hands of the executive. The Issuing Authority should have the power to refuse the issuing of a warrant if not satisfied on this point and refer the matter to an independent authority which should include the Inspector-General of Intelligence and Security and lawyers.

- A requirement that a person subject to a warrant for questioning without detention be allowed to contact and consult with a lawyer of choice. At present this is a requirement only for a person detained for questioning.

- A requirement that the Attorney-General or 'Review Committee' make a decision on a request for a warrant by ASIO within a reasonable time so that passports cannot be impounded arbitrarily and indefinitely.

- The onus of proof should be on ASIO or the police to prove that a defendant possessed information or a thing in connection with a terrorist act, not the defendant to prove that they did not.

- A requirement that in all cases a person subject to questioning must be allowed to contact and consult with a lawyer. At present the Act allows detention to take place without a warrant if ordered by the 'prescribed authority' and in this case there is no requirement that the detainee be permitted to consult a lawyer.

- A person being questioned should be able to consult privately with a lawyer without monitoring by ASIO.

- ASIO should not be permitted to destroy any information regarding the exercise or operation of its detention or questioning powers, although information gathered during these operations may be destroyed if no longer relevant.