Your reference
Our reference TP:TL
Enquiries (03)9269-0246

Melbourne Office
350 Queen St
Melbourne VIC 3000

GPO Box 4380
Melbourne VIC 3001

DX 210646 Melbourne VIC

t: 03 9269 0234
1800 677 402

www.legalaid.vic.gov.au

ABN 42 335 622 126

18 August 2005

The Hon. David Jull, MP
Chair
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
CANBERRA ACT 2600

By e-mail to: Margaret.Swieringa.Reps@aph.gov.au

Dear Mr Jull

Review of the Australian Security Intelligence Organisation Act 1979

I refer to the evidence given by VLA's representative (Mr Simon Moglia) to the Committee on Tuesday 7 June 2005.

Thank you for inviting Victoria Legal Aid to provide additional comments about issues raised during the hearing. I attach our comments for your consideration.

If you would like to discuss any of our comments please contact me on (03)9269-0244 or Tonye Lee (Policy Officer) on (03)9269-0246.

Yours faithfully

TONY PARSONS
Managing Director

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1. Limiting ASIO's detention powers by reference to seriousness of the offences

Mr Duncan Kerr raised the issue of limiting ASIO's detention powers to serious terrorism offences:

> ***Mr Kerr***— *Can I put a proposition to you here about the threshold for detention? If you included a provision that detention could be authorised only where there was a reasonable belief—or whatever formula you wish to use to express it—that there was an imminent threat or actual prospect of harm to person or property, would that in a sense satisfy your concern? It would leave open the questioning regime, for which parallels exist in the ACC and a whole range of things….but not detention….detention would be available only when the existing three tests were satisfied and there was some link to the sorts of circumstances that the parliament really did intend—the matter of last resort. I was wondering, if we do keep these powers, whether that would be the kind of framework that you would urge upon us?*
>
> ***Mr Moglia***—*I think I have come to the spot where I will have to take that on notice….*[1]

Currently, a warrant for questioning may be requested if the Minister is satisfied that:

1. there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence
2. the intelligence is important intelligence
3. the intelligence is in relation to **a terrorism offence**
4. relying on other methods of collecting the intelligence would be ineffective.[2]

There is no requirement that the person being questioned is suspected of involvement in the terrorism offence. There are some additional requirements for warrants for detention. These are discussed in more detail at paragraph 4 of this supplementary submission.

'Terrorism offences' are listed in Part 5.3 of the *Commonwealth Criminal Code Act* 1995. The offences include a large range of conduct, including less serious conduct that is not traditionally considered sufficient to justify criminal sanctions, such as:

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[1] Page 42 proof copy transcript for Tuesday 7 June 2005

[2] Sections 34C(3)(a) and (b) *ASIO Act* 1979

- acts of preparation (eg: receiving training from a terrorist organisation)[3]
- acts of association (eg: associating on 2 or more occasions with a member of a terrorist organisation).[4]

As set out in VLA's written submission dated 24 March 2005, we believe that both the questioning and detention powers in Part III Division 3 of the *ASIO Act* 1979 (the Act) are a disproportionate response to the threat of terrorism in Australia. We oppose the continuation of these powers and in particular, the power to detain non-suspects.

If these powers are to be renewed, then the legislation should properly reflect ASIO's intention that they would only be used as 'a last resort'.[5] VLA supports limiting the detention powers to cases involving 'serious terrorism offences'.

We support the definition of serious terrorism offences apparently suggested by Mr John Von Doussa QC (and favourably considered by Mr Duncan Kerr), ie:

> **Serious terrorism offences** are offences that involve a real and imminent prospect of harm to people or property.[6]

However, as a minimum, we consider that acts of preparation and association should be excluded from the 'serious terrorism' category. ASIO would retain the power to question (but not detain) a person who has intelligence about less serious terrorism offences. The Australian Federal Police would also retain their traditional criminal investigative powers in relation to a person suspected of direct involvement in less serious terrorism offences. We suggest further consultation with stakeholders about which offences should be included in the category of serious terrorism offences.

Alternatively, we suggest limiting the detention powers to cases where there is an 'imminent risk of a terrorist act.' We suggest the following definition of terrorist act:

> A **terrorist act** is an act that involves a real prospect of harm to people or property.

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[3] Section 102.5 *Criminal Code*

[4] Section 102.8 *Criminal Code*

[5] See evidence by Mr Dennis James Richardson, Director-General, ASIO at page 21 proof copy transcript for Thursday 19 May 2005.

[6] See discussion at pages 22 -24 proof copy transcript for Friday 20 May 2005

This proposed criteria does not categorise the nature of the intelligence according to the possibility of future criminal charges. This avoids blurring the line between ASIO's role as an intelligence organisation and the independent role of the Australian Federal Police in criminal investigation and prosecution.

2. Presence of the Inspector-General during questioning

Senator Alan Ferguson (the Acting Chair) raised the issue of the presence of the Inspector-General during questioning:

> ***Senator Ferguson***—*I think [the Inspector-General] does send staff when he is not there himself. He does send staff. But you are making the request that he himself be there all the time?*
>
> ***Mr Moglia***—*Perhaps that is something for me to take on notice.*[7]

VLA is not suggesting that the Inspector-General should personally attend during the entire questioning period. The current practice is sufficient and should be enshrined in the legislation – ie: the Inspector-General or an appropriate member of the Inspector-General's staff should be present during the entire questioning period.

3. Legal aid funding

Senator Robert Ray raised the issue of legal aid funding:

> **Senator Ray**—I think you mentioned that, if they were under charge, they would get almost automatic right to legal aid but here, because there is no charge, they do not. Yet we have the extraordinary position that we have imposed the right to detain or compulsorily question. It has fallen between two stools, I take it. What can we do about it?…
>
> ***Mr Moglia***—*...we suggest that there should be a guideline—a priority—set on its own, which indicates that money has to be there.*[8]

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[7] Page 37 proof copy transcript for Tuesday 7 June 2005

[8] Pages 38-39 proof copy transcript for Tuesday 7 June 2005

VLA suggests the following amendments to the Commonwealth funding agreement with Legal Aid Commissions:

(a) Amend the criminal law priorities to:

A criminal law matter that is a Commonwealth law matter is a Commonwealth legal aid priority if it relates to:

- *the legal representation of a person charged with a criminal offence, or*
- *the questioning or detention of a person under Part III Division 3 of the ASIO Act 1979.*

(b) Add a new criminal law guideline:

Questioning or detention under the ASIO Act 1979.

The commission should make a grant of legal assistance for legal advice and representation during the questioning or detention of an applicant under Part III Division 3 of the ASIO Act 1979. An application for assistance under this guideline is not subject to the merits test.

4. Limiting ASIO's detention powers by reference to the potential conduct of the person being questioned

This issue was raised by Senator Robert Ray:

> ***Mr Moglia***—*…the specific power about detention still goes too far. It can be restricted in a reasonable and proportionate way – proportionate to the kinds of risks we are facing.*
>
> ***Senator Ray***—*If we change the word from 'may' to 'probable' would that help – that there is a probability of the destruction of evidence, the probability of absconding or a probability of default, rather than that there 'may' be?*[9]

As discussed above at paragraph 2, the detention powers are limited by reference to the nature of the offences that ASIO is collecting intelligence about. However, the detention powers are also limited by reference to the potential conduct of the person being questioned.

[9] Page 41 proof copy transcript for Tuesday 7 June 2005

Currently a warrant for questioning may also authorise the person to be taken into custody and detained, if the Minister has reasonable grounds for believing that the person **may**:

- alert a person involved in a terrorism offence that the offence is being investigated
- not appear before the prescribed authority
- destroy, damage or alter a record or thing the person may be requested to produce.[10]

The prescribed authority may also give a direction to detain a person being questioned (even if the warrant was for questioning only), based on the same criteria.[11]

The test for detention requires only the possibility that the person would alert others to the investigation, fail to appear or destroy evidence. Arguably, this test could always be met. In any event, the test is much lower than the traditional threshold. For example, the Victorian test for bail is:

> *A court shall refuse bail…if the court is satisfied that there is an **unacceptable risk** that the accused person if released on bail would—*
>
> - *fail to surrender himself into custody in answer to his bail*
> - *commit an offence whilst on bail*
> - *endanger the safety or welfare of members of the public*
> - *interfere with witnesses or otherwise obstruct the course of justice.'*[12]

As discussed above, we consider that the Act should properly reflect the intention that these powers should only be used as a 'last resort'. Earlier, we submitted that the detention powers should be limited to cases where ASIO is collecting intelligence about 'serious terrorism offences' or where there is an 'imminent risk of a terrorist act'. In addition, VLA submits that the Act be amended so that the criteria for detention is that there is an '**unacceptable risk'** that the person being questioned would alert others to the investigation, fail to appear or destroy evidence.

4. Independent counsel

This issue was raised by Mr Duncan Kerr:

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[10] Section 34C(3)(c) *ASIO Act* 1979

[11] Sections 34F(2A) and 34F(3) *ASIO Act* 1979.

[12] Section 4(2)(d) *Bail Act* 1977 (Vic)

> **Mr Duncan Kerr**—Another thing that struck me as you were speaking—and I have not tested this as an idea, so it may in the end sound silly—related to the situation that exists in, I think Queensland. They have a statutory role for the challenge of decisions that have been made by their equivalent of ICAC. That gives the opportunity for any application for a warrant to be tested by an independent counsel in those circumstances—not briefed by anybody; in fact, the people in relation to whom the warrant is sought would not know the counsel. There is at least an opportunity for the alternative case to be put in the public interest. That is the sort of role, presumably, that legal aid could fund if there were provision for that…*I suppose that is the role, in some ways, that the Inspector-General of Intelligence and Security plays at a later stage but not at those earlier stages?…*
>
> *It becomes very complex, because you obviously need to security clear the amicus to a very high degree if you are going to give a practical value to the intervention. Again, how much the community would be reassured by the fact that you say that you are providing this additional safeguard, I do not know. But, if it does commend itself to you on reflection, drop us a note. Otherwise let it just slip.*[13]
>
> ***Mr Moglia**—...I will take that further and raise that, with possible submissions.*

VLA strongly supports the concept of an independent counsel to monitor or challenge questioning and detention warrants issued under the Act. We note that in Queensland, the Public Interest Monitor (PIM) has a similar role in relation to the covert evidence gathering powers set out in chapter 4 of the *Police Powers and Responsibilities Act* 2000 (Qld). Under the Queensland model:

- The PIM is appointed by the Governor-in-Council and must not be employed by any other agency that may have an interest in the proceedings (such as the Police Service, Office of Public Prosecutions or Crimes and Misconduct Commission).[14]
- The functions of the PIM are:
  - to monitor compliance by police officers in relation to applications for covert evidence warrants.
  - to appear at the hearing of warrant applications to test the validity of the applications (by questioning the applicant or any witnesses and making submissions on the appropriateness of granting the warrant).
  - to gather statistical information about the use and effectiveness of warrants.
  - to give the Police Commissioner a report on non-compliance by police officers.[15]

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[13] Page 43 proof copy transcript for Tuesday 7 June 2005

[14] Section 157 *Police Powers and Responsibilities Act* 2000 (Qld)

- The PIM provides an annual report to the Minister about the use of covert warrants, which is tabled in Parliament.[16]

The role of the PIM is safeguarded by statutory provisions that:

- require the applicant to advise the PIM of the application for warrant.[17]
- permit the PIM to appear at the hearing.[18]
- require the court to consider any submissions made by the PIM.[19]
- give the PIM the same powers in relation to applications to extend warrants.[20]
- require the officer executing a search warrant to provide the PIM with a report about the exercise of the powers under the warrant.[21]
- protect the PIM from civil liability for his or her actions.[22]

VLA suggests that the Queensland model could be adapted to create an independent counsel to monitor or challenge questioning and detention warrants issued under the Act. However, we do not believe it would be appropriate for the Inspector-General of Intelligence and Security to perform that role—due to conflict of interest. Given that so few warrants have been issued to date, the creation of a permanent position may not be justified. Instead, it may be more practical for the Commonwealth to fund Legal Aid Commissions to appoint independent counsel on a case-by-case basis. The Commonwealth guidelines already provide that legally aided practitioners in national security matters must hold security clearances at the appropriate level.[23]

5. Further information

For further information, please contact Tonye Lee (Policy Officer):

Phone: (03) 9269-0246
E-mail: tonyel@vla.vic.gov.au

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[15] Section 159 ibid

[16] Section 160 ibid

[17] eg: sections 124, 138, 148ibid

[18] eg: sections 125, 139, 149 ibid

[19] eg: sections 126, 140, 150 ibid

[20] eg: sections 130, 143, 153 ibid

[21] Section 156 ibid

[22] Section 162 ibid

[23] eg: Commonwealth criminal law guideline 9 at chapter 2 *VLA Handbook*, available at www.legalaid.vic.gov.au