amnesty international australia

Submission to the

Parliamentary Joint Committee on ASIO, ASIS and DSD

regarding the

INQUIRY INTO THE OPERATION, EFFECTIVENESS AND IMPLICATIONS OF DIVISION 3 OF PART III OF THE *AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION ACT* 1979

March 2005

Submitted by

Amnesty International Australia

Locked Bag 23
Broadway NSW 2007

Phone: Rebecca Smith (02) 6248 0730
Fax: (02) 6257 7588

The global defender of human rights

1. Executive Summary

Amnesty International Australia appreciates this opportunity to comment on the operation and effectiveness of Division 3, Part III of the *Australian Security Intelligence Organisation Act* 1979 as amended on 23 July 2003[1] and on 18 December 2003[2] (the ***Act***).

Amnesty International is concerned that Part III Division 3 of the Act undermines human rights. In particular the creation of a system of detention without charge is inconsistent with the protection of human rights in Australia. Similarly, Amnesty International is concerned that the procedures provided for under the Act for detaining and questioning individuals without full access to legal counsel and with limited protections does not protect freedom, but rather, undermines it.

It is recognised that the need to balance individual freedoms against anticipated threats in the general community is a difficult process. Amnesty International continues to recommend that extreme caution be taken before the rights of individuals protected under Australian law are diminished. Amnesty International is concerned that the Act breaches the equal obligation to ensure that any measures taken in the interest of national security include safeguards for the protection of fundamental human rights.

Amnesty International's main concerns with the Act are:

- The Act provides for detention of people who have not been charged for up to seven days which may amount to arbitrary detention and will then be in breach of Article 9 of the *International Covenant on Civil and Political Rights* (the *ICCPR*). Amnesty International is opposed to any government detaining a person unless that person is charged with and prosecuted for a recognisable criminal offence without delay;

- The Act removes or undermines protections required under international law when people are detained including the right of prompt assistance to a lawyer, the right to communicate and receive visits and the right of foreign nationals to contact their embassy. The Act creates the possibility of

[1] *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act* 2003

[2] *ASIO Legislation Amendment Act* 2003

incommunicado detention of persons if they are unable to access a lawyer or their family. Amnesty International Australia has grave concerns about such a possibility as in other places systems of incommunicado arrest and detention have facilitated the mistreatment of detainees;

- The detention and strip search provisions of the Act apply equally to minors and may be in breach of the *Convention on the Rights of the Child* (the *CRC*);
- The Act limits the ability to access legal representation and the role of lawyers in breach of international standards including the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*[3] (the *Body of Principles*) and the *Basic Principles on the Role of Lawyers*[4] (the *Basic Principles*) ;
- The Act shifts the evidentiary burden and has the effect of reversing the presumption of innocence. This may be in breach of the right to a fair trial in the *International Covenant on Civil and Political Rights*; and
- The secrecy provisions and in particular the limits on outside scrutiny because of the operation of these provisions. This particularly impacts on the ability of organisations other than ASIO to comment on the operation and effectiveness of Part 3, Division III.

In light of these concerns, Amnesty International Australia would therefore encourage the Australian Government not to renew the amendments to the ASIO Act once they cease to be in force on 23 July 2006.

2. Introduction

Amnesty International is a worldwide movement of more than 1.8 million people across 150 countries working to promote the observance of all human rights enshrined in the *Universal Declaration of Human Rights* and other international standards. In pursuit of these goals, Amnesty International undertakes research and action focused on preventing grave abuses of human rights including rights to

[3] Adopted by UN General Assembly resolution 43/173 of 9 December 1988

[4] UN Doc A/CONF.144/28/Rev.1 at 118 (1990)

physical and mental integrity, freedom of conscience and expression, and freedom from discrimination.

Amnesty International is independent of any government, political ideology, economic interest or religion. It does not support or oppose any government or political system, nor does it support or oppose the views of the victims whose rights it seeks to protect. It is concerned solely with the impartial protection of human rights.

Amnesty International has monitored the use of security legislation and security measures in all regions of the world for 40 years. Many states have enacted measures and amended legislation regarding national security in recent years to counter terrorism. As an independent and impartial global human rights organisation, Amnesty International is monitoring the enactment of such legislation and its impact on human rights. The organisation maintains that the introduction of national security measures should not be at the cost of human rights.

Amnesty International Australia continues to closely monitor legislation introduced in Australia since September 2001 to counter "terrorism". Amnesty International Australia made a submission to and appeared before this Committee on 2 May 2002 during its review of the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002. Submissions have also been made to the Senate Legal and Constitutional Legislation Committee and to the Senate Legal and Constitutional References Committee. Amnesty International Australia also recently made submissions to the Senate Legal and Constitutional Legislation Committee for the inquiries into the *Anti-Terrorism Bill* 2004 and the *National Security Information (Criminal Proceedings) Bill* 2004 and the *National Security Information (Criminal Proceedings) (Consequential Amendments) Bill* 2004.

Amnesty International acknowledges that governments have a duty to protect the rights and safety of people within their territory. Amnesty International shares concerns with states and other international organisations about abuses of human rights by non-state actors and has repeatedly called on armed groups to abide by international humanitarian law. Amnesty International recognises that there must be an appropriate Government response to increased national security concerns. However the organisation emphasises that the overall response must take place within a human rights framework. Human rights standards constitute the bare minimum necessary to protect the safety and integrity of individuals from abuse of

power. Amnesty International emphasises that all measures to counter terrorism must be in strict conformity with international law, including international human rights standards.

Australia has a variety of obligations with regard to the protection of human rights in international law, through both customary law and treaties. Many of these obligations have been adopted and enacted in Australian domestic legislation. Some human rights treaties accept that on certain occasions, emergencies that 'threaten the life of the nation'[5] may justify limiting or suspending the enjoyment of human rights in order to address the difficulties caused by the emergency, but only for the duration of the emergency.

Not all rights under treaties are subject to derogation – a core group of rights are mentioned specifically in some treaties as being non-derogable, and must apply fully at all times. For example, the International Covenant on Civil and Political Rights (*ICCPR)* states explicitly that the right to life, the right not to be tortured, the right not to be enslaved, the prohibition against retroactive criminal legislation, the right to recognition under the law and the right to freedom of thought, conscience and religion cannot be limited under a state of emergency. Other rights are considered to be non-derogable by virtue of being customary rules of international law or even peremptory rules of international law. For example, the obligation to treat detained persons with humanity, and certain elements of the right to a fair trial, particularly 'arbitrary deprivations of liberty...or the presumption of innocence' are all non-derogable.[6]

3. General Concerns

3.1 *Detention without Charge*

Amnesty International Australia is concerned that the Act operates to allow detention that would otherwise be unlawful in Australia. Freedom from arbitrary arrest and detention is a fundamental right contained in Article 9 of the *ICCPR* and is a requirement of a system founded on the rule of law. The rules of evidence and standard of proof in the criminal justice system have been prescribed in order to reduce the risk of innocent individuals being convicted and punished. The abolition of

[5] *ICCPR* Article 4(1)

[6] UN Doc CCPR/C/21Rev.1Add. 11 General Comment No. 29 (24 July 2001), paragraph 11.

the rules of evidence and standards of proof under the Act removes these protections and creates a situation whereby innocent people may be subject to detention.

The Act allows for the detention of persons for up to 168 hours. Persons may not be suspected of committing any criminal offence, but may merely be suspected of having information about a possible criminal offence. Amnesty International Australia is opposed to any government detaining a person unless that person is charged with and prosecuted for a recognisable criminal offence without delay. Amnesty International Australia recognises the need to question people who have information about criminal activity. However, the organisation maintains that it is a human rights violation to detain a person without an intention to prosecute.

Amnesty International Australia submits that the system of detention outlined in the Act may be contrary to Article 9 of the ICCPR which recognises the right not to be arbitrarily detained. Amnesty International Australia notes that in the case of *Van Alphen v The Netherlands*, the Human Rights Committee noted that 'remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remand in custody must be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime'.[7] In this case, it was found that failure to cooperate with a criminal investigation was not sufficient reason to justify detention.

Amnesty International also draws attention to Article 5(1) of the European Convention on Human Rights which prohibits detention without charge or trial. This demonstrates the consensus in international standards opposing arbitrary detention.

3.2 *Rights While Detained*

International standards provide that all persons who are arrested or detained (with or without charge) should be informed immediately of the reasons for the detention and notified of their rights, including:

- the right of prompt assistance of a lawyer;
- the right to communicate and receive visits;
- the right to inform family members of the detention and place of confinement; and

[7] Communication Number 305/1988: Netherlands 15/08/90 CCPR/C/39/D/305/1988 para 5.8

- the right of foreign nationals to contact their embassy or an international organisation.

Anyone arrested or detained who does not adequately understand or speak the language used by the authorities, has the right to be notified in a language they understand of their rights and how to exercise them and to be provided with an interpreter if necessary. These rights are important safeguards against arbitrary deprivation of liberty and incommunicado detention. Amnesty International notes that all of these rights are removed or undermined by this legislation.

3.3 *Reverse Onus of Proof*

The right to be presumed innocent is present in both the Australian justice system, and in international human rights law.[8] The right of an individual charged with a criminal offence to the presumption of innocence is a non-derogable right.[9] Amnesty International Australia is concerned that the Act in its current form has the effect of shifting the evidentiary burden of proof onto the person held in detention (see 4.5.1 below). Sections 34G(3) and (6) respectively create an offence of failing to give information to a prescribed authority under questioning, when requested in accordance with a warrant and an offence to failing to produce any record or thing under questioning, when requested in accordance with a warrant. The 'reverse onus' created by these offences effectively violates the principle of the right to be presumed innocent until proven guilty, and therefore, the right to a fair trial. This effective shift in the burden of proof is of particular concern in light of the fact that the individual detained under the warrant is not charged with a criminal offence, but is being held on the basis of some information that they are 'reasonably believed' to possess.

3.4 *Treatment of Minors*

Amnesty International Australia has concerns regarding the current application of the Act to children16 years of age and above. Other Commonwealth legislation provides limited detention periods for certain classes of people, including minors and Aboriginals and Torres Strait Islander adults.[10] Such people may only be detained for half the time of non- Aboriginal and Torres Strait Islander adults. The Act

---

[8] Article 14(2) of the *ICCPR*, and Article 11 of the *Universal Declaration of Human Rights*.

[9] UN Doc CCPR/C/21Rev.1Add. 11 General Comment No. 29 (24 July 2001), paragraph 11.

[10] *Crimes Act* 1914 (Cth) section 23C(4) for a non-terrorism offence and section 23CA(4) for a terrorism offence. Note that this only applies to the initial period of detention of terrorism offences.

however fails to provide for an overall shorter detention period for minors, although it does provide for shorter blocks of questioning.

In addition, there is no guidance given to the Minister, the issuing authority or the prescribed authority as to the relevance, if any, of a person's age for the purpose of detention. Amnesty International Australia is concerned that this may breach Article 37 of the *Convention on the Rights of the Child* (*CRC*). Article 37 provides that no child should be deprived of his or her liberty arbitrarily. Any detention should only be used as a measure of last resort and for the shortest appropriate period of time.

Amnesty International Australia is also concerned that the application of sections 34G(3) and (6) to children may breach Article 40 of the *CRC*. Article 40 provides that a child is to be presumed innocent until proven guilty. However, the offences provided by section 34G(3) and (6) (as discussed at 3.3 above and 4.5.1 below) effectively place the burden of proof on the individual detained.

Amnesty International Australia is also concerned about the provisions in the Act that allow for strip-searching of children. The impact of a full strip-search on the child should be considered before these provisions are applied equally to adults and children. Under Commonwealth law previously in place in Australia, an order to strip search a minor could only be made by a Magistrate and the legislation required the Magistrate to specifically consider a person's age before making an order.[11] The obligation under Article 3 of *CRC* to put the best interests of the child first should always be maintained.

3.5 *Provision for Compensation*

Amnesty International recommends the inclusion of compensation provisions into the Act. There should be compensation provisions that allow for remedies for those who can establish that they were detained without sufficient cause or that they were not treated humanely while in detention. These are required in addition to the penalty provisions in the legislation.

[11] *Crimes Act* 1914 (Cth) section 3ZI(2)

4. CLAUSE-BY-CLAUSE ANALYSIS

4.1 *Section 34C Requesting Warrants*

This section details the process for requesting a warrant.

4.1.1 Standard of Proof for Warrant

Amnesty International Australia is concerned with the low standard of proof required to obtain warrants to question and/ or detain a person under this section. The section establishes that, to consent to the making of a request for a warrant, the Minister must be 'satisfied' 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'.[12] Further, to obtain a warrant that will authorise detention, the Minister must be 'satisfied' that 'if the person is not immediately taken into custody and detailed, the person (i) *may* alert a person involved in a terrorism offence that the offence is being investigated; or (ii) *may* not appear before the prescribed authority; or (iii) *may* destroy, damage or alter a record or thing...[13]' (emphasis added). Amnesty International Australia believes that this standard is too low, and is also concerned at the use of a subjective standard. The need for the Minister to be merely 'satisfied' in section 34C(3) undermines the objective elements of 'reasonable grounds for believing that issuing the warrant... will substantially assist the collection of intelligence' in section 34C(3)(a).

4.1.2 Access to lawyers limited to warrants authorising detention

Section 34C(3B) requires the Minister to ensure that, if the warrant to be issued will provide for the person to be taken into custody and detained, then the warrant must permit the person to contact a single lawyer of the person's choice while the person is in detention. This is subject to the proviso that 'a person exercising authority under the warrant' must first have the opportunity to request the prescribed authority to direct that the person be prevented from contacting the lawyer.[14]

---

[12] Sections 34C(3) and 34C(3)(a)

[13] Section 34C(3)(c)

[14] Section 34C(3B)(b)

There is no similar provision ensuring that the person has access to a lawyer if they are the subject of a questioning warrant that does not involve a detention period. The Act is essentially silent on the conditions imposed on a person who is the subject of a questioning warrant. It is unclear whether the person is required to stay, which would effectively amount to detention, or if they are free to leave. It is unclear whether there are restrictions on who they are permitted to contact.

The *Crimes Act* 1914 (Cth) establishes a regime that differentiates between people under arrest and persons who may be under some form of detention or control but not actually under arrest.[15] The *Crimes Act* 1914 (Cth) clearly details the protections afforded to both categories of people. It is unclear whether these protections apply to people subject to a questioning warrant under the Act, given that there are no specific protections provided in the Act. Presumably while a person is subject to a questioning warrant, they are still at liberty to contact any other person including a lawyer while they are being questioned. Amnesty International Australia maintains that the right to contact a lawyer and the right to have the lawyer attend the questioning must be respected at all times in compliance with international law. Amnesty International Australia notes that Principle 1 of the *Basic Principles* states that '[a]ll persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights...'.[16]. Further, principle 17(1) of the *Body of Principles* provides that '[a] detained person shall be entitled to have the assistance of legal counsel'.[17] If the right to contact a lawyer is not specified there is a greater danger that this right is denied and the outcome may be that the person is held in de facto incommunicado detention.

Further, the Act provides in section 34F that the prescribed authority may give a direction that a person be detained.[18] Thus, a questioning warrant may be converted into a detention warrant. If this occurred, there would be no protection of the detained person's right to contact a lawyer because, as discussed above, a questioning warrant does not necessarily explicitly provide for the right to contact a lawyer. Hence the person could be detained incommunicado.

---

[15] These are known as "protected suspects" under s.23B(2)

[16] *Basic Principles on the Role of Lawyers* UN Doc A/CONF.144/28/Rev.1 at 118 (1990) Principle 1

[17] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* Adopted by UN General Assembly resolution 43/173 of 9 December 1988

[18] Discussed below at 4.4.1

4.2 *Section 34D Warrants for Questioning Etc*

This section details the issuing of the warrant and the conditions that can be placed on the warrant.

4.2.1 Limits on Issuing Authority

Amnesty International Australia is concerned that the power of the issuing authority under the Act is limited to issuing a warrant that is 'in the same terms as the draft warrant[19]. This forecloses any possibility of amendment and leaves the issuing authority only with the choice of either issuing or refusing to issue the warrant. This limits the independence of the issuing authority and ensures that they are simply an extension of the executive arm of government. Further, in the process of deciding whether to issue the warrant, the issuing authority is limited to being 'satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence'.[20] The issuing authority does not have the ability to consider the additional issues that the Minister is required to consider under section 34C(3). This is the case even if the warrant is to provide for the person to be taken into custody and detention. While the Minister is required to consider whether there are reasonable grounds for believing that if the person is not taken into custody and detained the person may, among other things, alert a person involved in a terrorism offence, the issuing authority does not have the ability to consider these additional issues.

These further restrictions on what the issuing authority can consider ensure that the independence of the issuing authority is limited. Essentially, the Minister makes a decision about the warrant that the issuing authority is required to accept or reject in its entirety without further consideration. In this way, the issuing authority is simply an extension of the executive arm of government and does not provide for any independent review of whether the warrant should be granted.

4.2.2 Questioning before Prescribed Authority

The explanatory memorandum and second reading speech explain that this provision is to be interpreted in such a way that ensures a person must only be questioned before a prescribed authority. However it is of concern to Amnesty International

---

[19] Section 34D(2) and (5).

[20] Section 34D(1)(b)

Australia that this requirement is not explicitly stated in the Act. The Act does state that the warrant must 'authorise the Organisation, subject to any restrictions or conditions, to question the person before a prescribed authority'.[21] Other sections similarly refer to questioning occurring before the prescribed authority. However the Act does not explicitly state that questioning may only occur before a prescribed authority. .

4.2.3 Time Periods

Amnesty International Australia is concerned that the Act allows for detention of persons for 168 hours.[22] This concern is amplified by the fact that the Act provides for 168 hours of detention, with only 24 hours of questioning (or 48 hours if an interpreter is required). The length of detention is not consistent with the amount of time allowed for questioning in the criminal justice system.[23]

Accordingly, Amnesty International Australia considers that the time for detention under the Act is excessive. This is of particular concern in light of the fact that detainees under the Act need not be suspected of having any part in any criminal activity, merely of having information or a thing that may be relevant to an investigation. Amnesty International Australia is unclear as to why it is necessary to detain a person for 168 hours when they can only be questioned for 24 hours over that period (or 48 if they require an interpreter).

Amnesty International Australia is concerned about what may be taking place while the person is detained. Although there is a protocol in place that guides the execution of detention and questioning warrants, this protocol does not have legislative force. Thus, breaches of the protocol do not carry any criminal sanctions.

In addition the organisation is concerned that the detainee may be held incommunicado during the extended period of detention. This is due to the possible situation that the warrant may not provide for them to access their family and as discussed at 4.1.2, the person may also be unable to access a lawyer.

---

[21] Section 34D(5)(a)

[22] Section 34D(3)(c)

[23] Note that Amnesty International Australia also expressed concern regarding the extension of the questioning time for 'terrorism offences' under the *Crimes Act* 1914 in a submission to the Senate Legal and Constitutional Legislation Committee in April 2004

4.2.4 Access to a lawyer

The Act provides that if the warrant is a detention warrant, the warrant 'must permit the person to contact a single lawyer of the person's choice, so the warrant must identify such a lawyer'.[24] Further the Act provides that the warrant may specify the times that the detained person is permitted to contact the lawyer. However, this can only occur after the person has been brought before the prescribed authority for questioning and has informed the prescribed authority 'of the identity of the lawyer whom the person proposes to contact'.[25] A person exercising authority under the warrant must then have the opportunity to object to the lawyer identified.

The Act is ambiguous as to the exact meaning of section 34D(4). It is unclear whether the person has to be able to name a specific lawyer or if it is sufficient for the detained person to name a lawyer by reference to their position i.e. the local duty lawyer; or by their employment i.e. a legal aid lawyer. This ambiguity is dangerous. At worst, it could mean that a person would be effectively prevented from contacting a lawyer as they may not be able to specifically identify one. At best, it still requires a detained person to have some level of legal knowledge so that they can at least identity a person by reference to their position or their employer. Amnesty International Australia is concerned that this ambiguity could have the effect of preventing the detained person from accessing a lawyer altogether. As stated above, this would be in breach of international standards as all people under detention are entitled to have the assistance of legal counsel.[26] This is of further concern because Amnesty International has found that systems which provide for arrest and detention of persons without the presence of lawyers have facilitated the mistreatment and torture of detainees.[27] The Human Rights Committee has found that the practice of incommunicado detention may violate Article 7 of the *ICCPR* (prohibiting torture and ill-treatment)[28] or Article 10 (providing safeguards for people deprived of their

---

[24] Section 34D(4) Note 3

[25] Section 34D(4)(b)(ii)

[26] *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* Principle 17(1); *Basic Principles on the Role of Lawyers* Principle 1

[27] See for example Amnesty International *Rights at Risk* ACT 30/001/2002 pp. 21- 24

[28] *Albert Womah Mukong v Cameroon* (458/1991) 21 July 1994 UN Doc CCPR/C/51/D/458/1991

liberty).[29] The Committee has also stated that '[p]rovisions should also be made against incommunicado detention' as a safeguard against torture and ill-treatment'.[30]

It is a fundamental principle under international standards that governments must ensure that all arrested, detained or imprisoned people have a right to communicate with a lawyer in full confidentiality.[31] Any failure to provide access to legal representation will also have an effect upon the person's ability and right to challenge their detention and limit access to existing legal rights, such as those provided in the Act for seeking a remedy in the Federal Court. This limitation upon the ability to challenge one's detention may violate a person's freedom from arbitrary detention. It also has the potential to severely compromise the right of a detained person to have adequate facilities to prepare a defence, as required under Article 14(3)(b) of the *ICCPR*. Thus it is important that any legislation clearly provide for a person to have a real opportunity to access and consult with a lawyer.

4.3 *Section 34E Prescribed Authority must explain warrant*

This clause requires a prescribed authority to inform the person of particular details regarding the warrant when a person first appears before a prescribed authority.

4.3.1 Explanation of Warrant

In section 34E(2) the obligation to inform and explain the warrant is limited only to a person's first appearance before the prescribed authority.[32] Amnesty International Australia is concerned that this provision may be inadequate to ensure persons who are held for extended periods of detention are clear about the details of their future detention, especially how long they are to be held for and what restrictions in place. The person may not be able to fully comprehend all the information that the prescribed authority is giving them at their initial appearance. It is important to ensure that the detained person is fully informed of their situation at all times and thus the explanation should be given more than once.

---

[29] *Megreisi v Libyan Arab Jamahiriya* (440/1990) 23 March 1994 UN Doc CCPR/C/50/D/440/1990

[30] Human Rights Committee *General Comment 20 Article 7* UN Doc HRI\GEN\1\Rev.1 at 30 para 11

[31] Principles 22 and 8 of the *Basic Principles on the Role of Lawyers*; Principle 18 of the *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*

[32] However section 34E(3) does require that the prescribed authority tell a detained person of their right to seek a remedy from the Federal Court at least once in every 24 hour period.

4.3.2 Conduct of State and Territory Police

The Act provides that the person must be informed that they have the right to complain to the Inspector General of Intelligence and Security or the Australian Federal Police Ombudsman in relation to the conduct of any officials. Amnesty International Australia notes that section 34A defines 'police officer' to include a member of the State or Territory police force. Accordingly it is necessary to insert a provision to ensure the detained person is informed of their right to make a complaint in relation to the State or Territory policy to the relevant authority.

4.3.3 Access to Information

There is no requirement under the Act that persons be given access to information regarding the basis upon which they were detained or required for questioning. This removes the ability to seek judicial review of this information. While the Act is not able to be reviewed under the *Administrative Decisions (Judicial Review) Act* 1977, provision is made for review by the Federal Court in section 34E(1)(f). To fully review the process under which the person is detained, it would be necessary to have access to the information forming the basis for the decisions to seek and issue the warrant. It may also be in contravention of Article 9(2) of the *ICCPR* which states that:

> '[a]nyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charge against him'.

Amnesty International notes that this requirement applies to someone who is arrested on a charge. However, it is important that when challenging the legality of detention, a detainee and their legal representative has access to the basis upon which the State justifies detention. It would be unacceptable for a state to be able to avoid their international obligations simply by virtue of carefully chosen terminology. Amnesty International Australia is concerned that people will be detained on the basis of secret and therefore possibly inaccurate or misinterpreted information. They should be afforded the opportunity to address and correct this information.

4.4 *Section 34F Detention of persons*

Amnesty International Australia notes that this section again limits the power of the prescribed authority. The prescribed authority is permitted only to give a direction that is consistent with the warrant or has been approved in writing by the Attorney General (section 34F(2)). This again limits the independence of the prescribed authority and ensures that they are simply an extension of the executive arm of government.

4.4.1 Incommunicado Detention: Access to a Lawyer and Family

Section 34F(1) provides that the prescribed authority may make a direction that the person appearing before them under a warrant be detained. This effectively allows a questioning warrant to be transformed into a detention warrant. However, only a warrant initially agreed to by the Minister under section 34C(3B) requires that the Minister ensure that the person be permitted to contact a lawyer of their choice. This is further clarified in section 34D(4) Note 3 which states that 'A warrant authorising the person to be taken into custody and detained must permit the person to contact a single lawyer of the person's choice, so the warrant must identify such a lawyer'. As discussed at 4.1.2, a questioning warrant does not have to explicitly provide that a person be permitted to contact a lawyer of their choice. Thus, if the warrant initially issued is a questioning warrant and is then converted to a detention warrant, this may mean that a person is detained without the ability to access a lawyer.

As discussed above under headings 4.2.3 and 4.2.4, detention without the ability to access a lawyer is contrary to international law as it may create a situation of incommunicado detention. Amnesty International Australia has grave concerns regarding the way in which the Act allows for the detention of persons possibly without access to legal representation. In the past similar systems of arrest and detention without the presence of lawyers has facilitated the mistreatment and torture of detainees.,[33]

[33] See for example Amnesty International *Rights at Risk* ACT 30/001/2002 pp. 21- 24

International human rights bodies such as the Human Rights Committee[34] and the Special Rapporteur on Torture[35] have specified that provision should be made against incommunicado detention. Incommunicado detention has been condemned by many governments, and non-governmental and inter-governmental organisation as a serious human rights violation that often leads to other abuses.

Amnesty International submits that all persons detained must be treated in compliance with all human rights standards, including the ICCPR, the Body of Principles, and the *UN Standard Minimum Rules for the Treatment of Prisoners.* Amnesty International also draws attention to similar standards for detention in the provisions and decisions of the European Court of Human Rights, and the *European Prison Rules.*

Amnesty International Australia is concerned that the Act reverses the usual provisions under Australian law regarding access to legal representation and the right to communicate with friends and relatives. The Act is contrary to the relevant provisions of the criminal law regime in Australia providing for access to legal representation and ensuring the ability to communicate with friends and relatives.[36]

The Attorney-General initially argued that incommunicado detention is necessary to prevent the person form contacting others suspected of being involved in 'terrorism' offences. Amnesty International Australia finds it difficult to believe that a person's detention for seven days without contact with their family or friends would not draw similar attention to an investigation.

It has been stated that the requirement that the detained person be questioned before a prescribed authority is an additional safeguard for their protection. Amnesty International Australia points out that there is no guarantee under the Act that a prescribed authority be present throughout the entire 168 hours of detention (nor is such a course likely to be practicable), although this is what would effectively be required to comprehensively safeguard against the abuse of incommunicado detention.

---

[34] Human Rights Committee *General Comment 20 Article 7* UN Doc HRI\GEN\1\Rev.1 at 30 para 11.

[35] Recommendation (j), General Assembly Report 2001 (A/56/156)

[36] See for example section 464C of the Crimes Act 1958 (Vic) and section 23G of the Crimes Act 1914 (Cth).

4.4.2 Incommunicado Detention: Access to Consular Officials

The Act fails to specifically include provisions guaranteeing the right of foreign nationals to be given an opportunity in all cases to seek the assistance of their embassy or a country representative, as provided for under the Vienna Convention on Consular Relations (the *Vienna Convention*).[37] When issuing the warrant, the prescribed authority may specify any persons that the detainee is permitted to contact and the warrant must make express provision for this contact. However under the *Vienna Convention* it is the responsibility of the Government to ensure that the right to contact consular officials is protected and, where requested, to arrange without delay for persons detained to contact their embassy or consulate. Amnesty International Australia therefore proposes that the Act include an automatic right for a foreign national who has been detained for questioning to contact a consular official and that the detained person be informed of that right.

4.4.3 Provision of facilities for contact

Amnesty International Australia also notes that section 34F(9)(c) requires a detained person to be given facilities to contact the Inspector General and the Ombudsman. However, there is no similar requirement to provide facilities to contact other persons permitted under the warrant (section 34F(9)(a)). Also, as noted above, the person should have a right to make a complaint in relation to the State or Territory police and similar provision of facilities to contact the relevant authority.

Further, the Act explicitly provides for a person to 'seek from a Federal Court a remedy relating to the warrant or the treatment of the person in connection with the warrant'.[38] However, the Act does not make any provision for the person to be given facilities for contacting the Federal Court or grant explicit permission for a person to contact the Registrar of the Federal Court to initiate a complaint. This omission makes the ability to seek a remedy from the Federal Court somewhat meaningless. This deficiency, when coupled with the possible limits on access to a lawyer and the

---

[37] The *Vienna Convention on Consular Relations* was signed by Australia on 31 March 1964, ratified on 12 February 1973 and entered into force in Australia on 14 March 1973. Article 38(c) provides "...consular officers shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation".

[38] Section 34E(1)(f)

obvious consequences such limitations pose to preparing a Federal Court action, renders any provision within the legislation of the ability to seek a remedy from the Federal Court is illusory.

4.5 *Section 34G Giving Information and producing things etc*

4.5.1 Effective Reversal of Onus of Proof

Section 34G(3) and 34G(6) create similar offences and may be dealt with together. Subsection (3) creates an offence of failing to give information to a prescribed authority under questioning, when requested in accordance with a warrant. Subsection (6) creates an offence of failing to produce any record or thing under questioning, also when requested in accordance with a warrant. Subsection (4) and (7), respectively provide a defence of not having the information or not have possession or control of the record or thing, however, the evidentiary burden is explicitly placed upon the defendant.

Amnesty International Australia considers that this reversal of the usual evidentiary onus of proof effectively violates the detainee's right to be presumed innocent, as required by Article 14 of the *ICCPR*, and as outlined above. If the prosecution alleges that the person has failed to give information or to produce a record or thing, then presuming that the defendant has failed to answer a question or produce a record or thing, the offence is established unless the defendant can prove that he or she did not have the information or thing. In this case, it is not for the prosecution to prove that the defendant did have the information or thing but rather for the defendant to prove that they did not. It is the position of Amnesty International Australia that the burden of proof be placed on the prosecution, as is usual in the criminal justice system.

Amnesty International Australia is also concerned about the application of the 'reasonable possibility' standard of the criminal law in this Act, as detailed in the Explanatory Memorandum. Under this standard, it is the task of the defendant to suggest a reasonable possibility that he or she does not have the information requested. The standard is unreasonably high in the circumstances, given that there is already effectively a general presumption of guilt, rather than a specific set of possibly incriminating facts or circumstances that the defendant is seeking to disprove.

4.5.2 Right to Silence

Section 34G(3) also obliges a person to give information requested and does not permit them to refuse to answer. This section may have the effect of abrogating the right to silence. If the defendant does not answer because he does not know and if he is then charged with failing to answer, then to discharge the evidential burden discussed above the defendant will have to testify. This will thereby effectively remove the right to silence. The 'right to silence' is a central aspect of criminal procedure under the common law. It is closely linked to the principle that the prosecution must prove guilt beyond reasonable doubt, and the preceding principle of the right of the defendant to be presumed innocent until proven guilty. As such, Amnesty International Australia considers that it is an indispensable aspect of the right to a fair trial that should not be removed in any way.

Amnesty International Australia is also concerned that while legal professional privilege is explicitly maintained[39], the requirement to give information appears to extend to privileged relationships such as to doctor and patient or spousal communications. Amnesty International Australia recommends that the Act be amended to acknowledge the special position of such professionals and that any requirement that they provide information be read alongside and consistently with their codes of ethics or conduct.

4.6 *Section 34H Interpreter provided at request of prescribed authority*

Section 34HAA Interpreter provided at request of person being questioned

Section 34H provides for an interpreter to be provided for a person appearing for questioning if the prescribed authority before which that person first appears believes that person is unable to communicate in English. Section 34HAA further provides for the person appearing before the prescribed authority to request the presence of an interpreter. However, section 34HAA(2) leaves the ultimate decision to the prescribed authority to deny the person an interpreter if the prescribed authority 'believes on reasonable grounds that the person who made the request has an adequate knowledge of the English language, or is physically able, to communicate with reasonable fluency in that language'

[39] Section 34WA.

Amnesty International Australia is concerned that the prescribed authority has the ultimate power to limit access to an interpreter under the Act. Under international standards, anyone arrested or detained who does not adequately understand or speak the language used by the authorities, has the right to be notified in a language they understand of their rights and how to exercise them and to be provided with an interpreter if necessary.[40] Amnesty International Australia maintains that it must be left to the person to determine whether they require an interpreter to assist them and the prescribed authority should not have the ability to overrule this determination.

4.7 *Section 34JBA Surrender of passport by person in relation to whom warrant is sought*

The Act requires a person to surrender their passport as soon as practicable after being notified that the Director-General has sought the Minister's consent to request the issue of a warrant. The penalty for a failure to surrender the passport is imprisonment for five years. The person is required to surrender their passport even though a warrant has not actually been issued. The Director-General has only sought the Minister's consent. Amnesty International Australia is concerned that there is no time limit set by the legislation to determine the time within which the Minister must make a decision as to whether the permit the Director-General to request a warrant. Amnesty International Australia is also concerned that there is no specific provision allowing a person to apply to the Director-General for return of their passport in extenuating circumstances. Section 34JBB does provide that the Director-General may give written permission for a person to leave Australia at a specified time. However, the Act does not establish a process for a person to make such an application, nor does it specifically require that the Director-General must return any surrendered passports to enable the person to travel. Amnesty International Australia is concerned that these failures in the legislation impose an unfair burden on the person.

4.8 *Section 34NB Offences of contravening safeguards*

[40] Article 14(3) *ICCPR*

Section 34NB creates offences for contravening safeguards. The offences include the exercise of authority in contravention of a condition or restriction in the warrant;[41] conduct in contravention of a direction by a prescribed authority;[42] and a police officer conducts an unauthorised strip-search.[43] While these sections are commendable, section 34VAA limits the likelihood of a prosecution under this section. This is discussed at 4.10 below.

4.9 *Section 34U Involvement of lawyers*

Section 34U provides for limits on the role of lawyers. The section provides that:

- any conduct between the client and the lawyer must be able to be monitored;[44]
- the legal adviser may not intervene in questioning except to request clarification of an ambiguous question;[45] and
- if the prescribed authority considers that the lawyer is disruptive during questioning, then the lawyer may be removed.[46] In such a situation, the person has the right to contact someone else as a lawyer although section 34TB does state that questioning may occur in the absence of a lawyer of the person's choice.

Amnesty International Australia considers that the Act erodes a fundamental principle under international standards that require governments to ensure that all arrested, detained or imprisoned people have a right to communicate confidentially with their lawyer[47]. Although the Act does provide for the right to a lawyer, the right to access a lawyer is limited as discussed above. Further, even once the person is actually able to access their lawyer, the ability of the lawyer to represent their client is extremely limited. There is no right to confidential communication and the lawyer is unable to intervene in questioning. Amnesty International Australia believes that this is an

---

[41] Section 34NB(1)

[42] Section 34NB(3)

[43] Section 34NB(5)

[44] Section 34U(2)

[45] Section 34U(4)

[46] Section 34U(5)

[47] Principle 8 of the *Basic Principles on the Role of Lawyers* states:

> 'All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality.'

unjustified limitation on the role of lawyers and again that these provisions contravene standards under international law.

4.10 *Section 34VAA Secrecy relating to warrants and questioning*

The Act provides that it is an offence to disclose information while the warrant is in force indicating the fact that the warrant has been issued, or a fact relating to the content of a warrant, or to the questioning or detention of a person in connection with the warrant or to generally disclose operational information. The penalty is imprisonment for five years.

Similarly it is an offence to disclose information for two years after the expiry of the warrant if the information is operational information obtained as a direct or indirect result of the issue of the warrant or of the doing of anything authorised by the warrant. The penalty is also imprisonment for five years.

Amnesty International Australia has many concerns about this section as outlined below.

4.10.1 Restricting the right to disclosure

The legislation restricts the communication of certain information. Amnesty International Australia is concerned that the concept of "operational information" is broadly and imprecisely defined. 'Operational information' may include any information or source of information available to ASIO, as well as any information regarding ASIO's operational capability, method or plan. The Act prohibits disclosure of that information if it directly or indirectly resulted from the issuing of, or the conduct pursuant to, the warrant. Effectively this will prohibit the disclosure of most information relating to ASIO where a warrant under the Act has been issued. This is particularly onerous given that the offences are termed as strict liability offences if the discloser is the subject of the warrant or their lawyer. The subject of the warrant or their lawyer can be found guilty even when there was no intention to disclose information and the discloser was not reckless. Amnesty International Australia is again concerned at this inclusion of a reversal of the onus of proof and the lack of any requirement of a fault element in the offence.

These provisions also create problems for family and friends who have received information through the "permitted disclosure" exception or those who the person has been permitted to contact under the warrant or any other persons who gain

knowledge of the warrant. Such people may be at undue risk of imprisonment for reckless disclosure. After any permitted contact with the subject of the warrant or after any "permitted disclosure", these third parties will be immediately placed in a difficult position: they will not be able to seek legal advice on their rights and they may not properly understand the secrecy provisions or exactly what information falls under the category of "permitted disclosure". This places these otherwise innocent parties at risk of imprisonment for five years.

4.10.2 Removing public accountability

The impact of these offences is that there is no ability for outside scrutiny of the operation of the warrant system under this Act. Thus, while the terms of reference of this inquiry include "...the operation, effectiveness and implications" of Division III Part 3, in reality it is not possible for any organisation except ASIO to comment on the operation and effectiveness of the relevant part of the Act. These provisions are directly contrary to the existence of transparency in government. It is impossible to monitor the application and use of the Act and hence there is essentially a secret system operating without the scrutiny of civil society. Amnesty International Australia recognises and respects the need to retain a certain level of confidentiality regarding ongoing investigations. However, the organisation maintains that the public has a right to know in general terms the degree to which and how Australian security agencies are applying their broad ranging and unprecedented powers. The level of secrecy and lack of public scrutiny provided in the Act has the potential to allow human rights violations to go unnoticed and to occur in a climate of impunity.

Human rights, media and other independent organisations are prevented from gaining information about or making public any concerns about the welfare of a detained person without government approval. The Director-General of ASIO or the Attorney-General may not be prepared to enable the disclosure of information that suggests irregularities or mistreatment on the part of ASIO, thus preventing any independent monitoring or investigating of that alleged irregularity or mistreatment. Organisations such as Amnesty International should not be prevented from monitoring the application of ASIO's powers in relation to the protection of human rights.

The Act prevents a third party who knows of the issuance of the warrant and the subsequent detention from complaining on behalf of the detained person about

government actions during the period that the person is being detained. While the detainee is allowed access to the Inspector General of Intelligence and Security and the Ombudsman during detention, there is no ability for third parties to act on their knowledge of detention to assist a detainee. As evidenced in most cases requesting *habeas corpus*, the ability of third parties to act for and on behalf of a person who may be unable to adequately utilise their right to complain, is a vital element of the protection of human rights.

4.10.2 Limits the likelihood of prosecutions for contravention of the safeguards

Further as mentioned above at 4.8, this section means that a prosecution for contravening the safeguards as detailed in section 34NB is unlikely. Section 34VAA does create a category of "permitted disclosures". The definition of "permitted disclosures" lists instances in which disclosure may be permitted. However the definition does not allow for the person who was the subject of the warrant to provide information or make a complaint to the Director of Public Prosecutions unless the disclosure is specifically and additionally permitted by the Director-General, the Minister or a prescribed authority. This means that the Director of Public Prosecutions may not be able to initiate a prosecution under section 34NB as he may not be aware of the contravention. It also means that it will be difficult for the Director of Public Prosecutions to mount a successful prosecution as the person who has directly witnessed or experienced the breach will not be able to testify. This effectively prevents the operation of section 34NB and means that the threat of prosecution for failing to comply with the safeguards in the legislation is not a real threat. As stated above, Amnesty International Australia believes that the offences in section 34NB are commendable and hence it is important to ensure that the offences are enforceable and able to be prosecuted.