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## ASIO Legislation Amendment Bill 2003

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No. 68 2003–04

ASIO Legislation Amendment Bill 2003

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1 December 2003

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# ASIO Legislation Amendment Bill 2003

**Date Introduced:** 27 November 2003

**House:** House of Representatives

**Portfolio:** Attorney-General

**Commencement:** The day after Royal Assent

## Purpose

To amend Division 3, Part III of the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) to:

- extend the maximum period during which a person using an interpreter can be held for questioning under an ASIO warrant
- require the subject of an ASIO warrant to surrender their passport/s and make them criminally liable if they leave Australia without permission from the Director-General of Security while a warrant is in force
- create new offences relating to the primary or secondary disclosure of information about ASIO warrants or operational information.

## Background

### General

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, giving ASIO new and unprecedented powers to question and detain, was introduced into the Australian Parliament in March 2002. It was the subject of two parliamentary committee reports and amendment in both Chambers. However, it was laid aside by the House of Representatives after the Senate insisted on amendments with which the House would not agree.

The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2] was introduced into the House of Representatives in March 2003. After

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considerable debate and some amendment it finally passed both Houses in June 2003 and commenced operation on 23 July 2003.

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* inserted Division 3, Part III into the ASIO Act. In early November 2003, the Attorney-General said he had asked for a report on ‘shortcomings’ of the ASIO legislation.<sup>1</sup> The ASIO Legislation Amendment Bill 2003 (the Bill) proposes to amend Division 3.

Background information on the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*, can be found in:

- [Bills Digest](#)<sup>2</sup>—Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002
- [Bills Digest](#)<sup>3</sup>—Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2]
- Parliamentary Joint Committee on ASIO, ASIS and DSD—[An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment \(Terrorism\) Bill 2002](#), June 2002
- Senate Legal and Constitutional Legislation Committee—[Provisions of the Australian Security Intelligence Organisation Legislation Amendment \(Terrorism\) Bill 2002](#), June 2002
- Senate Legal and Constitutional References Committee—[Australian Security Intelligence Organisation Legislation Amendment \(Terrorism\) Bill 2002 and related matters](#), December 2002

## Questioning and detention under an ASIO warrant

For convenience, warrants issued under Division 3 (section 34D) of the ASIO Act are referred to as ‘ASIO warrants’ in this Digest.

The Bill proposes to increase the amount of time during which a person can be questioned (with or without detention) under an ASIO warrant if that person uses an interpreter because they are not fluent in English or have a physical disability. A brief description of the current questioning and detention provisions and the interpreter provisions in the ASIO Act is set out below.

The ASIO Act enables ASIO to obtain a warrant from an ‘issuing authority’<sup>4</sup> for the questioning of an adult when 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.<sup>5</sup> In other words, ASIO warrants for adults can involve both suspects

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and non-suspects. The warrant may also enable the person to be detained—if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority or may destroy or damage evidence.

ASIO warrants for questioning and detention may also be issued in relation to children aged between 16 and 18 years but only if it is likely that the child will commit or has committed a terrorism offence.<sup>6</sup>

The subject of an ASIO warrant cannot be detained for more than 168 hours.<sup>7</sup> They can be questioned under a warrant for no more than a total of 24 hours<sup>8</sup> and once they have been questioned for this period of time they must be released.<sup>9</sup> Questioning is conducted in the presence of a ‘prescribed authority’.<sup>10</sup>

Within the 24 hour period, adults can be questioned for up to eight hours. Just before the end of the eighth hour, the prescribed authority must decide whether questioning can continue.<sup>11</sup> A person exercising authority under the warrant can ask that questioning continue. This request can be made in the absence of the person being questioned, their lawyer, parent or guardian.<sup>12</sup>

The prescribed authority can permit questioning to continue only if satisfied that:

- there are reasonable grounds for believing that continuing the questioning will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and
- those exercising authority under the warrant conducted the questioning properly and without delay.<sup>13</sup>

There are special rules for young people aged between 16 years and 18 years.<sup>14</sup> For instance, they can only be questioned for continuous periods of 2 hours or less, separated by breaks ordered by the prescribed authority.<sup>15</sup> Apart from this young people, like adults, can be questioned for a maximum period of 24 hours with the prescribed authority deciding just before the end of each eight hour period, whether the questioning can continue.<sup>16</sup> Additionally, like adults, young people can be detained for up to 168 hours but must be released once they have been questioned for 24 hours.

The ASIO Act does not prevent a person being subject to more than one warrant. Conditions under which new warrants can be requested and issued are set out in the ASIO Act.<sup>17</sup>

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## Interpreters

Section 34H of the ASIO Act provides that when a person first appears before a prescribed authority for questioning and the prescribed authority believes ‘on reasonable grounds’ that the person cannot ‘communicate with reasonable fluency’ in English because of ‘inadequate knowledge of the English language or a physical disability’, then the person exercising authority under the warrant must arrange for an interpreter to be present.

The ASIO Act additionally allows the person who is the subject of a warrant to request an interpreter (section 34HAA). In such a case, an interpreter must be arranged:

... unless the prescribed authority believes on reasonable grounds that the person who made the request has an adequate knowledge of English, or is physically able, to communicate with reasonable fluency in that language.<sup>18</sup>

Section 34E requires the prescribed authority to inform a person who is before them for questioning about a number of things including whether the warrant authorises their detention, what the warrant authorises ASIO to do, offences that may apply if the person does not answer questions or provide information, the complaint mechanisms that exist and whether any limits have been placed on the person contacting others.

If the prescribed authority believes that a person needs the services of an interpreter, then the explanation that must be given under section 34E cannot occur until an interpreter is present.<sup>19</sup> Further, a person exercising authority under the warrant cannot commence questioning the person until the interpreter is present.<sup>20</sup>

If a request for an interpreter by the subject of warrant has been granted, then if questioning has not commenced, the prescribed authority must delay informing the person of the matters set out in section 34E and the person exercising authority under the warrant must delay questioning the person until the interpreter is present.<sup>21</sup> If the questioning has commenced before the person asks for an interpreter, then the person exercising authority under the warrant must defer further questioning until the interpreter arrives and the prescribed authority must inform the person again of the matters set out in section 34E.<sup>22</sup>

## Passports

The Bill provides for the confiscation of a person’s passport or passports while they are the subject of an ASIO warrant. It will be an offence for a person who is the subject of an ASIO warrant to leave or attempt to leave Australia without the permission of the Director-General of Security.

At present there is no power in the ASIO Act for the confiscation of a person’s passport. However, the *Passports Act 1938* enables:

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- an Australian passport to be cancelled<sup>23</sup>—for instance, if the Minister considers that the person is likely to engage in conduct prejudicial to the security of Australia or a foreign country
- an officer<sup>24</sup> to demand that any passport that has been obtained by means of a false or misleading statement or has been used in connection with an offence against the Passports Act or regulations be delivered up<sup>25</sup>
- an officer to demand that any person who needs a passport to enter Australia deliver up that passport.<sup>26</sup>

Offences relating to these provisions—such as failure to deliver up a passport when required—attract a maximum penalty of \$2,000 or imprisonment for 1 year, or both.

### Secrecy provisions

The Bill proposes to repeal existing secrecy provisions in Division 3, Part III of the ASIO Act and insert new provisions. The existing secrecy provisions relate to lawyers and to children's 'representatives'. The Bill proposes to insert general requirements and general offences which criminalise primary and secondary disclosures of information about an ASIO warrant or about operational information.

At present, it is an offence for a detained person's lawyer to communicate information about their questioning or detention to a third person while the detainee is being detained under the ASIO warrant. There are exceptions to this general rule. For instance:

- a lawyer's communication with a third person will not be an offence if the third person is the prescribed authority, a person exercising authority under the warrant, the Inspector-General of Intelligence and Security (who has supervisory and complaints functions) or the Ombudsman (who has complaints functions)<sup>27</sup>
- a lawyer will be able to communicate with a third person if authorised to do so by the prescribed authority, in accordance with any relevant regulations that are made,<sup>28</sup> and
- a lawyer must not be prevented by the prescribed authority or by regulation from communicating with a federal court in order to seek a remedy relating to the warrant or treatment of the detained person.<sup>29</sup>

Division 3 enables a young person who is the subject of an ASIO warrant to have a 'representative' present at their questioning—ie a parent, guardian, or someone able to represent their interests. The prescribed authority may permit a 'representative' to communicate information about the questioning or detention to a third person. However, the representative commits an offence if, while the child is being detained, they communicate with a third person without permission and the third person is not a parent,

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guardian or sibling of the subject, a prescribed authority, a person exercising authority under the warrant, the IGIS or the Ombudsman.<sup>30</sup> Certain secondary disclosures committed by parents, guardians or siblings while a child is being detained are also offences.<sup>31</sup>

## Main Provisions

### Questioning and interpreters

**Item 1 of Schedule 1** enables a person to be questioned under an ASIO warrant for a maximum period of 48 hours (subject to the prescribed authority permitting questioning to continue every eight hours) if ‘an interpreter is present at any time’<sup>32</sup> while they are being questioned under the warrant.

These amendments apply to warrants issued on or after the Bill commences (**item 2**).

### Passports and overseas travel

**Item 3**, inserting **proposed section 34JC**, requires a person who has been issued with an ASIO warrant to surrender their passport or passports (Australian and/or foreign) to someone exercising authority under the warrant. Failure to do so is an offence punishable by a maximum period of 5 years imprisonment.

Under the ASIO Act, an ASIO warrant cannot be in force for more than 28 days.<sup>33</sup> A confiscated passport must be returned ‘as soon as practicable’ after the warrant has expired but can be returned earlier. The passport/s must be surrendered again if the person is subject to another warrant. A passport that has been cancelled need not be returned. During the period it is surrendered a passport may be inspected or copied.

**Proposed section 34JC** applies to all passports irrespective of when they were issued where the person is notified on or after the commencement of the Bill that an ASIO warrant has been issued (**item 4**).

Once a person who is the subject of an ASIO warrant has been told that a warrant has been issued and of the prohibition on their leaving Australia, they commit offence if they leave or attempt to leave Australia while the warrant is in force, unless they obtain the written permission of the Director-General of Security. The maximum penalty on conviction is 5 years imprisonment. The offence provision applies to a person who leaves Australia on or after **proposed section 34JD** commences, irrespective of when notice of the issue of the warrant was given to them.

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## Power of the prescribed authority to detain

**Proposed subsection 34F(2A)**, inserted by **item 5**, is intended to clarify that a prescribed authority can order the detention of a person who is before them for questioning even though the warrant itself is for questioning rather than detention. It applies to warrants issued on or after the Bill commences (**item 6**).

## Secrecy provisions

**Items 8 and 9** repeal existing provisions in the ASIO Act that deal with disclosures by lawyers [subsections 34U(7)-(11)] and children's representatives [subsections 34V(4)-(6)]. New secrecy provisions are contained in **proposed section 34VAA** (discussed below). They encompass both primary and secondary disclosures [**proposed subsection 34VAA(10)**]. Additionally, they introduce offences relating to disclosures that occur after an ASIO warrant has expired.

### Disclosures before an ASIO warrant has expired

**Proposed subsection 34VAA(1)** provides that person commits an offence if, while an ASIO warrant is current, they disclose information:

- about the content of a warrant or the fact that it has been issued, or
- about the questioning or detention of a person under the warrant.

It will also be an offence, while a warrant is current, to disclose 'operational information'—if the person has the information as a direct or indirect result of the warrant being issued, because of anything done in connection with the warrant or because of directions issued by the prescribed authority under subsection 34F(1)<sup>34</sup> of the ASIO Act.

The penalty is a maximum period of 5 years imprisonment.

No offence is committed if the disclosure is a 'permitted disclosure'.

### Disclosures in the two years after the expiration of an ASIO warrant

**Proposed subsection 34VAA(2)** provides that a person commits an offence if, during the period of 2 years after a warrant has expired, they disclose operational information which is in their possession as a direct or indirect result of a warrant being issued or because of anything done in connection with the warrant or because of a direction issued by a prescribed authority under subsection 34F(1) of the ASIO Act.

The penalty is a maximum period of 5 years imprisonment.

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No offence is committed if the disclosure is a ‘permitted disclosure’.

### Defining ‘operational information’

The expression, ‘operational information’, is defined to mean information that ASIO has or had; a source of information that ASIO has or had; or an operational capability, method or plan of ASIO [**proposed subsection 34VAA(5)**].

### Permitted disclosures

As stated above, disclosure will not be an offence if it is a ‘permitted disclosure’, a term defined in **proposed subsection 34VAA(5)**.

Permitted disclosures include disclosures made by a person:

- exercising powers or functions under the ASIO Act
- doing something they are authorised to do under an ASIO warrant
- doing something pursuant to a prescribed authority’s directions about the detention or further appearance of a person, and
- exercising a power or function under the *Complaints (Australian Federal Police) Act 1981* or the *Inspector-General of Intelligence and Security Act 1986*.

Permitted disclosures also include:

- disclosures made in the course of questioning under a warrant
- disclosures made to a lawyer for the purpose of obtaining legal advice about a warrant or for the purpose of getting representation in proceedings relating to a warrant
- disclosures made for the purpose of initiating or conducting legal proceedings for a remedy relating to a warrant
- disclosures allowed by a prescribed authority
- certain disclosures made by a child’s representative, or the child’s parent, guardian or sibling—for example to the child’s parents, guardian or siblings, the child’s representative, a prescribed authority or a person acting under the authority of an ASIO warrant, and
- disclosures permitted in writing by the Director-General of Security, the Minister or prescribed by regulation. Permissions may be made subject to conditions. The

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Minister's permission can only be given after he or she has consulted with the Director-General of Security.

### **Strict liability**

In general, Commonwealth offences consist of physical elements and fault elements. This is because it is a general principle of criminal law that fault be proved in relation to each physical element of an offence. There are some exceptions to this rule. For example, an offence may be a strict liability offence or contain physical elements where no 'fault' needs to be proved by the prosecution. In such cases, the Commonwealth Criminal Code provides a defence of mistake of fact to an accused person.

The Bill imports strict liability into one vital element of each of the disclosure offences if the discloser is the subject of the warrant or a lawyer who has been connected with the warrant.<sup>35</sup> In these cases, the prosecution need not prove that the accused put their mind to whether the information they disclosed was about the warrant or was 'operational information'. In the case of any other accused person, the standard fault element of 'recklessness' will apply to this element of the offences.

### **Geographical jurisdiction**

The disclosure offences will attract extended geographical jurisdiction—category D<sup>36</sup> [**proposed subsection 34VAA(4)**]. This means that an offence may occur irrespective of whether a person makes a prohibited disclosure in Australia or overseas.

### **Implied freedom of political communication**

**Proposed subsection 334VAA(12)** is designed to create a constitutional safety net by providing that the secrecy provisions do not apply to the extent that they infringe the implied constitutional freedom of political communication.

### **Application of the secrecy provisions**

The amended secrecy provisions apply to warrants issued on or after the commencement of the legislation [**item 11**].

### **Review of Division 3, Part III of the ASIO Act**

**Item 1 of Schedule 2** inserts a date by which Division 3 of Part III of ASIO Act (as amended) must be reviewed by the Parliamentary Joint Committee on ASIO, ASIS and DSD—22 January 2006. This does not change the timetable first inserted by the *ASIO Legislation Amendment (Terrorism) Act 2003*.

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## Concluding Comments

### General

The Government has said:

... in the context of implementing the new regime [under the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003*] ASIO has identified a number of significant practical limitations in the existing provisions. The ... Bill has been drafted to address these limitations and to provide ASIO with a better legal basis upon which it can collect intelligence for the purpose of combating terrorism.<sup>37</sup>

Newspaper reports say that the ALP is expected to support the Bill.<sup>38</sup>

### Interpreters

#### International human rights instruments

##### Article 26, International Covenant on Civil and Political Rights

On 27 November 2003, it was reported that the University of Sydney's Associate Professor Don Rothwell had said that doubling the maximum ASIO questioning period for those whose first language is not English will breach article 26 of the International Covenant on Civil and Political Rights (ICCPR).<sup>39</sup> Article 26 reads:

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The Government's view is that its proposals do not violate article 26 because differential treatment is not discriminatory 'so long as the distinction is based on objective and reasonable criteria'.<sup>40</sup>

The United Nations Human Rights Committee has commented that different treatment will not amount to discrimination 'if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant'.<sup>41</sup>

International case law to date indicates that the range of permissible distinctions on the basis of race (and sex) is limited. In other words, distinctions on the basis of race (and sex) are likely to constitute a breach of article 26 as they are unlikely to be considered reasonable, objective and have a legitimate aim. In contrast, there is a greater range of permissible distinctions on other grounds. That said, acceptable differences of treatment in

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the area of core civil and political rights, such as the right to liberty of the person, would be narrowly construed. Relevant factors would include whether the treatment can be considered a penalty.

In assessing the amendments proposed to Division 3, a point of comparison may be the *Crimes Act 1914* (Cwlth). The Crimes Act provides for the use of interpreters if an arrested person is being questioned by the police. Under the Crimes Act, the investigation period is four hours, except in the case of an Indigenous person or a child, in which case the period is two hours.<sup>42</sup> In determining whether the investigation period has expired, various times are disregarded ('time out'). These include times:

- for bringing the person to the investigating premises
- involved in suspending or delaying questioning so that the person can communicate with their lawyer, interview friend, parent or interpreter
- involved in suspending or delaying questioning while the person's lawyer, interview friend, parent or interpreter arrives
- involved in suspending or delaying questioning while the person receives medical treatment etc.

The Crimes Act also provides that in any proceedings, the burden lies on the prosecution to show that any particular period of time was 'time out'.<sup>43</sup>

In other words, there is no automatic doubling of the maximum questioning period available to police simply because a person has an interpreter. And the Crimes Act speaks of 'time out' in terms of 'delays' and 'suspension' of questioning that occurs.

#### Article 9, ICCPR

A further question that might be asked relates to Article 9(1) of the ICCPR which reads:

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

Does the doubling of the maximum amount of time that a person may be questioned (and possibly, detained) under an ASIO warrant, simply because an interpreter is present 'at any time while a person is questioned under ... [an ASIO] warrant' make it more likely that a person's detention is arbitrary under the ICCPR? Or is the Government correct when it says that the doubling of time is necessary:

... because questioning time is effectively halved where questions and answers need to pass through the interpreter to the recipient of the communication.<sup>44</sup>

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### Other questions relating to the interpreter amendments

Some other questions that are relevant to the reasonableness of the interpreter amendments relate to:

- children aged between 16 and 18 years who need an interpreter. Should ASIO be able to question them for up to 48 hours?
- presence of the interpreter. Increases in the maximum questioning times operate once ‘an interpreter is present at any time while a person is being questioned under a warrant issued under section 34D’. Does the presence of an interpreter facilitate or impede questioning? Should the bare fact that an interpreter has been present at some stage during the questioning process trigger a potential doubling of a person’s questioning time—irrespective of how long they have been present, whether questioning has been conducted through them and whether their presence has in fact facilitated or impeded the questioning process?
- the wording of **proposed subsection 34HB(8)**. **Proposed subsection 34HB(8)** includes the following words: ‘an interpreter is present at any time while a person is questioned under a warrant issued under section 34D.’ For clarity, should the provision read instead, ‘an interpreter is present at any time while a person is questioned through an interpreter under a warrant issued under section 34D’?
- decisions about extending questioning periods. At present, the prescribed authority can only decide to extend questioning at the end of each eight hour period if satisfied that questioning will substantially assist the collection of intelligence about terrorism and that the person exercising authority under the warrant has conducted the questioning properly and without delay. Should there be additional matters about which the prescribed authority must be satisfied if questioning is to be extended because an interpreter has been present—for example, that the presence of the interpreter has contributed or substantially contributed to delays to or suspension of questioning?
- existing offence provisions. It is an offence under the ASIO Act to fail to provide information or documents when being questioned under an ASIO warrant.<sup>45</sup> The maximum penalty for these offences is 5 years imprisonment. Is the potential leverage provided by these offences such that it is not necessary to provide for extended questioning periods when interpreters are used?<sup>46</sup>
- people with physical disabilities. Concerns have been expressed about the impact of the proposed amendments on non-English speakers. The amendments will also double the maximum questioning period for those who have an interpreter because they are unable to communicate with reasonable fluency in English because of a ‘physical disability’. Does the maximum questioning time for people with physical disabilities need to be doubled?

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- impact on the use of interpreters. Will the amendments mean that people will be less likely to ask for an interpreter even if they might need one? On the other hand, will the amendments mean that interpreters will be provided more frequently, especially given the fact that the doubling of maximum questioning times will be triggered if an interpreter is present 'at any time' during questioning under a warrant.
- constitutional issues. Does the doubling of the maximum time for questioning when an interpreter has been used, if combined with detention under the warrant, amount to punitive detention of the sort that requires judicial sanction under the Commonwealth Constitution?
- reporting. Section 94 of the ASIO Act provides that the annual report of the Director-General of Security must contain specified information. This includes the total number of ASIO warrants issued under section 34D, the number of hours each person was questioned under a warrant, and the number of hours they were detained. Should there be additional reporting requirements inserted into the ASIO Act relating to the use of interpreters and the use of the extended questioning periods?
- other enhancements relating to interpreters? Should the ASIO Act be amended to require that a person brought before a prescribed authority be given a copy of the ASIO Protocol in English or in a community language in which they are fluent? Should there be a statutory requirement that an interpreter be competent and/or accredited?<sup>47</sup>

## Secrecy provisions

### Strict liability provisions

There are two disclosure offences in the Bill. The first relates to disclosures that occur before the expiration of the warrant. An important element in this offence is that:

- the information disclosed indicates that the warrant has been issued or is about the content of the warrant or the questioning or detention, and/or
- the information is operational information.

The second offence relates to disclosures that occur within 2 years of the warrant's expiration. An important element in this offence is that the information is operational information.

The Bill provides that where the subject of a warrant or a lawyer who has been connected with the warrant is accused of one of these offences, the prosecution need not prove that the accused put their mind to matters which, arguably, form the crux of the offence. The standard fault element that would otherwise be applied by the Commonwealth Criminal

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Code is ‘recklessness’.<sup>48</sup> Parliament may wish to consider whether the fault element of recklessness should be dispensed with, given the importance of the physical element in the offence and the maximum penalty that applies (5 years’ imprisonment).

### Disclosures about ASIO warrants

On 8 November 2003, the *Weekend Australian* reported:

At least one of the seven men raided by armed police and ASIO on suspicion of being linked to al-Qa’ida suspect Willie Brigitte was detained and questioned this week under new national anti-terrorism laws.

The questioning of the suspect marks the first time ASIO has used its contentious anti-terror powers, which were introduced in July this year in the wake of the Bali bombing.

The man was taken to the Australian Crime Commission offices in Sydney’s CBD for questioning in two eight-hour sessions about his connections to Brigitte, who was deported to France last month.

The man was later released and no charges have been laid.<sup>49</sup>

Parliament may wish to consider whether this sort of reporting would and should be caught by the new disclosure offences. Additionally, while the Bill attempts to provide a constitutional safety net, it is unclear what sort of reporting or disclosures, this will permit.

## Endnotes

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- 1 See, for instance, ‘Sunday’, 2 November 2003; ‘Immigration net is not so shark proof’, *The Sun-Herald*, 2 November 2003.
- 2 Nathan Hancock, Bills Digest No. 128, 2001–02.
- 3 Nathan Hancock, Bills Digest No. 133, 2002–03.
- 4 Issuing authorities are Judges, Federal Magistrates or others in a prescribed class who have consented to being appointed—section 34AB.
- 5 See subsections 34C(3) & (3B) which set out the matters about which the Minister must be satisfied before he or she consents to the Director-General of Security applying to an issuing authority for a warrant.
- 6 See subsections 34NA(4)-(6).
- 7 Section 34HC.
- 8 Subsection 34HB(6).

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- 9 Paragraph 34HB(7)(c).
- 10 A ‘prescribed authority’ is a person appointed by the Attorney-General. The ASIO Act provides that the Attorney-General can appoint, as a prescribed authority, a former superior court judge with at least 5 years experience in that role. If there is an insufficient number of former judges available, then serving State or Territory superior court judges can be appointed, so long as they have at least 5 years experience. If there are insufficient numbers of serving superior court judges, the Attorney can appoint legal practitioners of at least 5 years standing who hold appointments as President or Deputy President of the AAT.
- 11 Subsections 34HB(1)-(2).
- 12 Subsection 34HB(3).
- 13 Subsection 34HB(4).
- 14 ASIO warrants cannot be issued in relation to children under 16 years—section 34NA.
- 15 Subparagraph 34NA(6)(b)(ii) & paragraph 34F(1)(e).
- 16 Subsection 34NA(10).
- 17 See sections 34C and 34D.
- 18 Subsection 34HAA(2).
- 19 Subsection 34H(3).
- 20 Subsection 34H(4).
- 21 Subsection 34HAA(3).
- 22 Subsection 34HAA(4).
- 23 Section 8.
- 24 ‘An officer’ is defined in section 5 of the Passports Act as ‘any officer of the Department [of Foreign Affairs and Trade], and includes any officer of Customs, any member or special member of the Australian Federal Police, any member of the Police Force of a State or Territory of the Commonwealth, and any person authorized by the Minister to exercise the powers conferred on officers by this Act.’
- 25 Subsections 9(1) & (1A)
- 26 Subsections 9(2)-(4).
- 27 Subsection 34U(7).
- 28 Subsection 34U(8).
- 29 Subsections 34U(9) & (11).
- 30 Subsections 34V(4)-(5).
- 31 Subsection 34V(6).
- 32 Emphasis added.
- 33 Paragraph 34D(6)(b).

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- 34 Subsection 34F(1) enables the prescribed authority to make directions about the detention or further detention of the subject of an ASIO warrant when that person appears before the prescribed authority for questioning.
- 35 Lawyers caught by the provision are lawyers that have been present at questioning as the person's legal adviser, have been contacted for the purpose of the subject of the warrant obtaining legal advice about the warrant, or have been contacted for the purpose of the subject of the warrant obtaining legal representation in proceedings about the warrant—**proposed subsection 34VAA(3)**. The Bill does not indicate whether 'the purpose' is the sole purpose or any purpose.
- 36 See section 15.4, Criminal Code.
- 37 Attorney-General, Second Reading Speech, ASIO Legislation Amendment Bill 2003, House of Representatives, *Hansard*, 27 November 2003, p. 22885.
- 38 See, for example, 'Labor to back tougher ASIO laws', *The Australian*, 27 November 2003; 'Liberals block Ruddock on security blitz', *Sydney Morning Herald*, 26 November 2003.
- 39 'ASIO grillings will breach civil rights, warns expert', *Sydney Morning Herald*, 27 November 2003.
- 40 *ibid.*
- 41 Human Rights Committee, General Comment 18, pr 13; See also *Broeks and Zwaan-de Vries* communications no. 172 and 182/1984.
- 42 Section 23C. The investigation period can be extended by order of a judicial officer but cannot be extended for more than eight hours and only one extension can be granted—section 23D.
- 43 Paragraph 23C(8)(b).
- 44 Explanatory Memorandum, ASIO Legislation Amendment Bill 2003, p. 2.
- 45 Section 34G.
- 46 See, for example, George Williams, 'Terrorist laws tough enough now, if used', *Sydney Morning Herald*, 4 November 2003.
- 47 Some Australian crimes statutes recognise the importance of competent interpreters. For instance, the *Crimes Act 1958* (Vic) provides that:
- If a person in custody does not have a knowledge of the English language that is sufficient to enable the person to understand the questioning, an investigating official must, before any questioning or investigation under section 464A(2) commences, arrange for the presence of a competent interpreter and defer the questioning or investigation until the interpreter is present— section 464D, *Crimes Act 1958* (Vic).
- 48 Section 5.4.
- 49 'ASIO flexes fresh muscle', *Weekend Australian*, 8 November 2003.

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