

Submission to Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers

The Castan Centre for Human Rights Law is concerned about the following human rights implications of Division 3 Part III of the ASIO Act 1979. The law breaches several of Australia's human rights obligations under the ICCPR. We believe therefore that the law should be amended so as to comply with those obligations. At the least, the sunset clause should be reinstated, so that the law can be reviewed again within a period of time.

Freedom From Arbitrary Detention

Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) states, in part, that "no one shall be subjected to arbitrary arrest or detention". It is submitted that Division 3 Part III breaches article 9(1) ICCPR for the following reasons:

1. The fact that a warrant can be issued in relation to any "terrorism offence" allows people to be detained for a vast array of reasons, due to the fact that the definition of "terrorism offence" is so wide.

The Human Rights Commission in *Van Alphen v Netherlands* stated that remand in custody (and presumably also detention) must be "necessary in all of the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime".¹ While it is accepted that detention may be necessary to investigate the commission of a major terrorist act, it is submitted that it is not necessary for the investigation of the vast majority of crimes and potential crimes which are caught by the definition of "terrorism offence".

2. As noted by Hocking, the Act has effectively placed "intelligence on the same legal plane as evidence".² Intelligence is often "speculative and unverified",³ a fact which is supported by the failure of intelligence services to predict the absence of weapons of mass destruction in Iraq and the post-referendum violence in East Timor. Relying on such intelligence is likely to lead to the detention of people who are not only innocent but who do not have any relevant information about terrorism offences.
3. The detention measures of the ASIO Act are not in proportion to what an intelligence agency such as ASIO requires. Prior to the enactment of Division 3 Part III, ASIO already had the power to "bug phones, install listening devices in offices and homes, intercept telecommunications, open people's mail, monitor online discussion, break into computer files and databases and use personal tracking devices"⁴. This vast arsenal of intelligence-gathering methods makes it more likely that detention under the ASIO Act will be unnecessary and therefore arbitrary.

¹ *Hugo van Alphen v The Netherlands*, [5.8], UN Doc CCPR/C/305/1988 (1990)

² Hocking, Jenny "Counter-Terrorism and the Criminalisation of Politics: Australia's New Security Powers of Detention, Proscription and Control: (2003) 49 *Australian Journal of Politics and History* 355 at 365

³ *Id*

⁴ Head, Michael "Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights" (2002) 26 *Melbourne University Law Review* 666, 671

It should be noted that the long-term detention of non-suspects has not been employed by the United States or the United Kingdom.⁵ It is probable that these two close allies are at greater risk from terrorism than Australia.

4. The detention of a person under the *ASIO Act* is not authorized by a judicial body. A detainee must only be brought before a “prescribed authority”, who will normally be a former judge with at least 5 years’ experience.⁶ It is possible that the presence of the former judge will reduce the chances of a detention under the *ASIO Act* being arbitrary, however it is also possible that a former judge, lacking any security of tenure, may be unwilling to do anything which would jeopardize his or her chances of reappointment.

It should be noted that, because detainees are not arrested in relation to a criminal charge, detention under the *ASIO Act* probably does not breach article 9(3) ICCPR, which states, in part, that: “anyone arrested or detained on a *criminal charge* shall be brought promptly before a judge or other officer authorized by law to exercise judicial power” (emphasis added). Detainees under this Part are not detained on ‘a criminal charge’.⁷ Nevertheless, article 9(3) is probably indicative of the treatment which is expected to be given to those detained for other reasons and lends weight to the suggestion that such detention breaches article 9(1).

Freedom From Self-Incrimination

Section 34G of the *ASIO Act* requires a person to provide any information, record or thing requested in accordance with a warrant issued under Part III Division 3.⁸

It is possible that information divulged by a person could lead to self-incrimination in breach of article 14(3)(g) ICCPR. Section 34G(8) of the *ASIO Act* explicitly requires a person to give evidence which may be self-incriminating. Section 34G(9), however, states that any evidence so given cannot be used in proceedings against that person (except for proceedings arising out of a breach of section 34G).

Nothing in the *ASIO Act*, however, prevents information being used to uncover further evidence against a person.⁹ It is acknowledged that the issue of derivative use of information is complex,¹⁰ however there is no guarantee that derivative information would be prohibited by the courts in Australia.

⁵ Michaelsen, Christopher “International Human Rights on Trial” – The United Kingdom’s and Australia’s Legal Response to 9/11” (2003) 25 *Sydney Law Review* 275, 283

⁶ *Australian Security Intelligence Organisation Act 1979* (Cth) s34B. If there is an insufficient number of such judges, the Minister may appoint a current State or Territory judge with at least 5 years’ experience. Failing that, the President or Deputy President of the Administrative Appeals Tribunal may be appointed.

⁷ See also Michaelson, above, note 5, 284.

⁸ *Australian Security Intelligence Organisation Act 1979* (Cth) s34G(3) and (6).

⁹ Michaelsen, above note 5, 285

¹⁰ See, eg, *R v S (R.J.)* [1995] 1 SCR 451; *British Columbia (Securities Commission) v Branch* [1995] 2 SCR 3, regarding the law in Canada. In Canada, evidence may not be used against a person if that evidence would not have been discovered ‘but for’ that person’s compelled testimony: See Peter W Hogg, *Constitutional Law of Canada* (3rd ed, 1997) [51]–[58]. The same principles would probably

Rights of the Child

A child aged 16 or over may be detained pursuant to section 34NA(2)(a), however the child can only be detained if it is suspected that he or she “is committing or has committed a terrorism offence.”¹¹ The child must also be questioned in the presence of a parent, guardian or another person able to represent his or her interests.¹²

Regarding possible breaches of the *ASIO Act*:

1. Any breach of human rights standards (eg those cited above with regard to article 9(1)) will also be a breach of the rights of children in accordance with article 24 ICCPR (which guarantees the rights of children in general terms) if the detainee happens to be a child (a person under 18).
2. The detention of children is circumscribed by article 37(b) of the Convention on the Rights of the Child, which states that children must not be unlawfully or arbitrarily detained, and that detention of a child “shall be used only as a measure of last resort and for the shortest appropriate period of time”.

We refer to our earlier statement that the definition of “terrorism offence” is extremely broad. Considering this, it is possible that children will be detained in relation to offences which do not pose a real or immediate threat to the community. It is submitted that this would be a breach of Australia’s obligations under article 37(b).

Derogation

Under article 4 ICCPR, Australia has the right to derogate from certain provisions – including articles 9, 14 and 24 – where there is a “public emergency which threatens the life of the nation” and where the measures taken are “strictly required by the exigencies of the situation”. Australia has not chosen to derogate from any of its obligations under ICCPR.

If the Australian Government were to justify the above provisions by derogating from the relevant articles of ICCPR on the grounds that there was a public emergency which threatens the life of the nation, it is likely that it would be given wide latitude by the courts to decide what constitutes such an emergency. This was the case in *A & Ors v Secretary of State for the Home Department*, where the House of Lords accepted the Government’s assertion that such a emergency existed.¹³ Ultimately, however the House of Lords held that the measures adopted by the Government – the indefinite detention of aliens suspected of international terrorism – were not a proportional response to the threat.¹⁴ The law was therefore quashed.

exclude evidence introduced against a person if it would not have been uncovered apart from that person’s compelled statement under the *ASIO Act*. See also *US v Hubbell*, 530 US 27 (2000), on the status of the law in the USA, where the protection against derivative use immunity under the Constitution is very strong.

¹¹ *Australian Security Intelligence Organisation Act 1979* (Cth) s34NA(4)(a)

¹² *Australian Security Intelligence Organisation Act 1979* (Cth) s34NA(6)(b)

¹³ [2004] UKHL 56, paragraph 29

¹⁴ [2004] UKHL 56, paragraph 44

Section 34HC does not permit a person to be held for more than 7 days, however there is no limit to the number of such warrants that can be issued.¹⁵ When this is combined with the fact that Australia's intelligence organizations have not identified any specific threats to the life of the nation (although nonspecific threats have been made by terrorist organizations¹⁶), it is submitted that the broad powers of detention contained in the *ASIO Act* are not proportional for dealing with the public emergency (if any) existing at this time.

Further, the UN Human Rights Committee has stated that, despite the implication to the contrary, nations cannot derogate from article 9(1) ICCPR because it is essential to protect non-derogable rights (eg right to life, torture).¹⁷

It is therefore submitted that derogating from any of Australia's obligations under the ICCPR would not save the detention provisions under Part 3 Division III of the *ASIO Act* from breaching Australia's obligations under the ICCPR.

¹⁵ *Australian Security Intelligence Organisation Act 1979* (Cth) s34D(1)(a)

¹⁶ Peake, Ross "We Won't Bow to Terrorism: 'Pools of Blood' Threat to Australia" *Canberra Times* 26 July 2004, 1

¹⁷ General Comment 29, paragraph 16