

**Submission to the Parliamentary Joint Committee: Review of Division 3 Part III of
the *Australian Security Intelligence Organisation Act 1979* (Cth) – Questioning and
Detention Powers**

Liberty Victoria

This submission concerns the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) (‘the amending Act’), which supplemented the *Australian Security Intelligence Organisation Act 1979* (Cth) (‘*ASIO Act*’) with ‘Division 3–Special powers relating to terrorism offences’ (‘Division 3’).

As Division 3 has already been the subject of much analysis,¹ this submission will only address provisions of particular concern.

SUMMARY

Liberty Victoria contends that the Division 3 powers are unnecessary, that they violate fundamental civil liberties, and lack a firm constitutional basis. Liberty also considers that such invasive policing powers, if improperly exercised, could alienate the very groups thought most susceptible to terrorist infiltration.

For these reasons, Liberty recommends the **total repeal** of the Division 3 powers.

However, in the event that the legislation is renewed, Liberty strongly

recommends amendments with respect to the following:

¹ See, eg, Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004); and Volume 27(2) of the *University of New South Wales Law Journal* (2004), a special edition containing a wide range of academic commentary on the legislation.

Warrants:

- amendment of sections 34C and 34D to provide clear and consistent criteria for the issue of warrants; and
- clear provision for detainees, lawyers and other parties to access reasons for which a particular warrant was issued.

Secrecy provisions:

- exclusion of liability for reckless disclosure, i.e. where a person discloses information not knowing it to be ‘operational’ information;
- exceptions to facilitate bona fide journalistic and academic commentary; and
- specific exceptions regarding communications between detainees and lawyers, to facilitate access to effective legal advice.

Access to legal advice:

- clear statement of detainees’ right of access to a lawyer at all times during detention;
- clear statement of lawyers’ rights to interrupt questioning at any point in order to provide advice to detainees, or to clarify a question;
- deletion of provisions permitting exclusion of lawyers from questioning on grounds of ‘disruptive’ behaviour; and
- deletion of provisions that prevent detainees from contacting a lawyer of their choice.

Safeguards:

- imposition of strict liability for ASIO officers breaching any safeguard or limitation on a Division 3 power;
- increase in the maximum penalty for such offences, at least so as to match the penalties imposed on detainees for non-disclosure of information, or violation of secrecy provisions; and
- provision that any information obtained through breach of a safeguard or limitation should be automatically excluded from admission into evidence, in any subsequent court case.

Evidential burden relating to non-disclosure:

- removal of the evidential burden on defendants charged with withholding information requested under a warrant.

Constitutional issues:

- a thorough analysis of the constitutional head(s) of power supporting the Division 3 provisions, and of possible threats to the separation of powers posed by their exercise.

Effects of the powers to date:

- publication of a report on the effects of the Division 3 powers to date, giving particular attention to their effects on minority groups.

1 THE POWERS ARE UNNECESSARY

a. ASIO's preexisting powers are adequate

Prior to their amendment ASIO's questioning and detention powers were already extensive. Under the *ASIO Act*, ASIO may seek warrants for investigations concerning 'security' generally, or more specifically for those concerning 'foreign intelligence'.²

To obtain a warrant for 'security' purposes, it is only necessary to satisfy the Minister that the issuing of such a warrant will substantially assist in the collection of intelligence in respect of a matter that is important to security.³ To obtain a 'foreign intelligence' warrant, it must be shown that the warrant would enable ASIO to collect information important to the defence of the Commonwealth, or the conduct of its international affairs.⁴

These warrants empower ASIO to perform a wide range of investigative operations, including searches and access to computer data,⁵ the installation of listening and tracking devices,⁶ interception of telecommunications, postal and other delivery services.⁷

It has not been established these powers are in themselves an inadequate basis for effective counter-terrorism measures.

b. The powers are unnecessarily broad

The new powers hinge on the very broad definition of 'terrorist act' found in section 100.1 of the *Criminal Code*. Under the *Code* an act is a 'terrorist act' if, among

² *Australian Security Intelligence Organisation Act 1979* (Cth) ('*ASIO Act*') s 4.

³ *ASIO Act* sub-s 25(2).

⁴ *ASIO Act* sub-s 27A(1).

⁵ *ASIO Act* s 25A.

⁶ *ASIO Act* ss 26, 26A, 26B, 26C.

⁷ *ASIO Act* ss 27, 27A; *Telecommunications (Interception) Act 1979* (Cth) Part III.

other things, it ‘causes serious harm that is physical harm to a person,’ ‘causes serious damage to property’ or ‘seriously interferes with, seriously disrupts, or destroys, an electronic system.’⁸

These definitions invite application in a very wide range of circumstances. It is arguable that many forms of protest could fall within their ambit, including some forms of industrial action⁹ and campaigns against Medicare-funded abortion.

Liberty notes that a group’s allegedly ‘terrorist’ acts need not be its dominant purpose. Rather, a ‘terrorist organisation’ includes ‘an organisation that is directly or indirectly engaged in...assisting in or fostering the doing of a terrorist act.’¹⁰ This means that the activities of a group may be predominantly charitable, yet still be designated as ‘terrorist’. For example, aid workers in tsunami-affected parts of Asia could be imputed with terrorist aims, simply by providing aid to members of separatist groups, such as the Tamil Tigers in Sri Lanka or Gerakan Aceh Merdeka in Indonesia.

Moreover, the provisions are not limited to questioning or detention for preventative purposes. It is enough if ASIO’s questioning is ‘in relation to’ a terrorism offence, including past offences.¹¹ While the extent of the necessary ‘relation’ is unclear, it greatly expands the potential scope of the power.

⁸ *Criminal Code* sub-ss 100.1(2)(a), (b), (f). See Ben Goulder and George Williams, ‘What is “Terrorism”?: Problems of Legal Definition’ (2004) 27 *University of New South Wales Law Journal* 270.

⁹ The *Code* explicitly excludes industrial action from its definition of ‘terrorist act’, but this exemption does not apply where the said industrial action is intended ‘to cause serious harm that is physical harm to a person’ or ‘to create a serious risk to the health or safety of the public or a section of the public’: sub-s 100.1(3)(b). It is arguable that based on this definition, many forms of industrial action could still fall within the ambit of a ‘terrorist act.’

¹⁰ *Criminal Code* sub-s 102.1(1).

¹¹ *ASIO Act* sub-s 34D(1).

2. THE POWERS UNDERMINE FUNDAMENTAL CIVIL LIBERTIES AND THE RULE OF LAW

a. Detention without trial or charge

The deprivation of liberty by the state is extremely serious. In Liberty's view, the detention of non-suspects for periods of up to seven days can only be tolerated where absolutely necessary. As outlined above and elsewhere in this submission, Liberty considers that the powers go well beyond this.

Where absolutely necessary, detention without charge should be carried out with minimal incursions on the comfort and privacy of the detainee. The detention facilitated by Division 3 is highly intrusive and severe in character, including provision for strip searches¹² and periods of questioning exceeding sixteen hours in some circumstances.¹³ The legislation's secrecy provisions, discussed below, exacerbate the potentially traumatic nature of such detention, by prohibiting former detainees from revealing any details of their experiences for two years after their detention.

Liberty is particularly concerned that these detention powers extend to children, that is people aged sixteen and seventeen. While Division 3 makes some concessions for these detainees,¹⁴ such as allowing the presence of a parent or guardian, these are wholly inadequate. A questioner may request that a parent or guardian be removed if his or her conduct is 'unduly disrupting questioning of the subject.'¹⁵ The presence of a parent who is powerless to intervene is unlikely to mitigate, and may even increase the trauma suffered by child detainees, both during and after detention of this kind.

¹² *ASIO Act* s 34L.

¹³ *ASIO Act* sub-s 34HB(2).

¹⁴ *ASIO Act* s 34NA.

¹⁵ *ASIO Act* sub-s 34V(2).

Recommendation:

In light of the concerns set out above, Liberty favours the **total repeal** of the Division 3 powers.

b. Risk of arbitrary or partisan exercise

The ambiguity surrounding the issue of warrants under Division 3 provides scope for the powers to be exercised inappropriately.

The provisions governing the issue of warrants operate inconsistently at various stages of the approval process. Section 34C provides that before the Minister can approve a request for a warrant, he or she must be satisfied that alternative means of collecting the intelligence would be ineffective, and that ‘issuing the warrant...will substantially assist the collection of intelligence that is important in relation to a terrorism offence.’ However, under section 34D, the ‘issuing authority’ need only be satisfied that there are ‘reasonable grounds’ for believing the warrant will procure information ‘that is important in relation to a terrorism offence.’ It seems anomalous that the conditions for issuing warrants should vary in this way.

It is also arguable that the few safeguards contained in sections 34C and 34D provide little more than a ‘veneer of accountability’,¹⁶ particularly when viewed in conjunction with the secrecy requirements affecting Division 3. In requesting a warrant, the Director-General must set out the ‘facts and other grounds’ upon which he or she considers the warrant necessary.¹⁷ The issuing authority must ‘take account of those facts

¹⁶ Michael Head, ‘ASIO, Secrecy and Lack of Accountability’, (2004) 11(4) *Murdoch University Electronic Journal of Law*.

¹⁷ *ASIO Act* sub-s 34C(2)(b).

in deciding whether to issue the warrant requested,¹⁸ and must personally sign the warrant issued.¹⁹ However it is doubtful that such documents would be accessible to detainees or their lawyers under the *Freedom of Information Act 1982* (Cth), given that Act's exemptions for documents affecting national security and defence,²⁰ law enforcement and public safety.²¹ The secrecy provisions found elsewhere in Division 3 would also very likely deem it an offence to disclose such information.

Taken together, this inconsistency and lack of accountability provide scope for issuing authorities to make partisan distinctions between legitimate and illegitimate forms of political activity. There is equally a risk that the powers will be used arbitrarily or to target particular ethnic groups.²² There is some feeling within the Australian Islamic community that Muslims risk being unfairly targeted by these powers. This is not without justification, given that every 'terrorist organisation' currently banned under the *Criminal Code* is an Islamic organisation.

Liberty is aware that several commentators have written to Attorney General Philip Ruddock requesting details of the warrants issued so far under Division 3. To date, their requests have elicited no response.

Recommendations:

In the event that Division 3 is not repealed, Liberty recommends:

¹⁸ *ASIO Act* sub-s 34D(1A)(a).

¹⁹ *ASIO Act* sub-s 34(6)(a).

²⁰ *Freedom of Information Act 1982* (Cth) s 33.

²¹ *Freedom of Information Act 1982* (Cth) s 37.

²² Liberty also notes the comment by Justice Hope in his report on ASIO, commissioned by the Whitlam Government in 1972, that at the time, many ASIO operatives automatically regarded those with 'leftist' politics as potentially 'subversive'. R. Hope, Royal Commission on Australia's Security and Intelligence Agencies, Report on the Australian Security Intelligence Organization, December 1984, AGPS, Canberra, 1985. See also Head, 'ASIO, Secrecy and Lack of Accountability,' above n 16.

- amendment of sections 34C and 34D to provide consistent criteria for the issue of warrants; and
- clear provision for detainees, lawyers and other parties to access reasons for which a particular warrant was issued.

c. Secrecy provisions inhibit freedom of the press and freedom of political communication

The secrecy provisions contained in section 34VAA are extraordinarily far-reaching, both in their application to non-detainees and their operation for two years after the issue of a warrant.²³ They apply to all ‘operational information’, defined very broadly to encompass ‘information that [ASIO] has or had’, ‘a source of information’ it has or had, or ‘an operational capability, method or plan.’²⁴

The provisions make no concessions for reckless disclosure of information deemed ‘operational’ in nature. Indeed, strict liability applies to detainees, lawyers present during questioning and those contacted by former detainees seeking legal advice.²⁵

While sub-section 34VAA(5) sets out certain exceptions in the form of ‘permitted’ disclosures, including disclosures made to lawyers, these are of limited usefulness. Such ‘permitted’ disclosures are contingent upon written authorisation from a prescribed authority, the Director-General or the Minister, and in all cases may be ‘subject to special conditions’.²⁶

²³ *ASIO Act* sub-s 34VAA(2).

²⁴ *ASIO Act* sub-s 34VAA(5).

²⁵ *ASIO Act* sub-s 34VAA(3)

²⁶ *ASIO Act* sub-ss 34VAA(6), (7), (8) and (9).

These provisions potentially affect all forms of journalistic and academic commentary, and contravene freedom of the press and freedom of political communication, both vital elements of a liberal democracy.

They also seriously compromise detainees' access to effective legal advice, as discussed below.

Recommendations:

- exclusion of liability for reckless disclosure, i.e. where a person discloses information not knowing it to be 'operational' information;
- exceptions to facilitate bona fide journalistic and academic commentary; and
- specific exceptions regarding communications between detainees and lawyers, to facilitate access to effective legal advice.

d. Restrictions on access to legal advice undermine due process

Liberty is particularly concerned by the restrictions on detainees' access to legal advice, both during and after their detention.

While anyone detained under a detention warrant may seek legal advice,²⁷ there is no such protection for detainees held under questioning warrants and subsequently detained by direction of a prescribed authority.²⁸

Even where a lawyer is present, section 34U imposes significant restrictions on the lawyer's ability to provide effective advice. The section provides that lawyers may only intervene to 'request clarification of an ambiguous question,' and may be removed if

²⁷ *ASIO Act* sub-ss 34F(1)(d) and 9(a), and sub-s 34U(1).

²⁸ *ASIO Act* sub-s 34F(1)(a).

the prescribed authority considers their presence ‘unduly’ disruptive. Liberty considers that these provisions preclude detainees from accessing effective legal advice, and so undermine due process.

Liberty also objects to section 34TA, which prevents detainees from accessing a lawyer of their choice. While certain conditions must be met before a detainee’s choice can be overruled,²⁹ the section presents a further impermissible limitation on access to legal advice.

Recommendations:

- clear statement of detainees’ right of access to a lawyer at all times during detention;
- clear statement of lawyers’ rights to interrupt questioning at any point in order to provide advice to detainees, or to clarify a question;
- deletion of provisions permitting exclusion of lawyers from questioning on grounds of ‘disruptive’ behaviour; and
- deletion of provisions that prevent detainees from contacting a lawyer of their choice.

e. Inadequate safeguards

Division 3 contains insufficient checks on ASIO’s exercise of its new powers. Section 34NB sets out a range of offences applicable to ASIO officers and issuing authorities. However, given the restrictions on access to legal advice, detainees are

²⁹ *ASIO Act* sub-s 34T(2).

unlikely to be aware of these safeguards at the time of their detention or afterwards. As such, they are unlikely to enforce their rights, either by complaining to the Ombudsman or by applying to a federal court.³⁰

Moreover, given the Division's far-reaching secrecy provisions, it is unclear how a former detainee could establish a case that he or she had been mistreated, so as to establish a contravention under section 34NB. This remains true despite limited exceptions for 'permitted disclosures' relating to legal advice, as described above.

Liberty notes that the offences only apply where an officer 'knows of the contravention',³¹ that is, they do not include reckless contravention. Liberty considers that a strict liability approach is necessary, particularly given the stringency of the secrecy provisions as they apply to former detainees. The current approach provides considerable scope for willful blindness. Moreover it is impractical and unfair, in demanding far higher standards of knowledge and vigilance of detainees, than of trained ASIO operatives.

Lastly, in view of the extraordinary nature of these powers, Liberty recommends that where any safeguard or limitation is breached in acquiring information, that information should be automatically excluded from admission into evidence in any subsequent court case.

Recommendations:

- imposition of strict liability for ASIO officers breaching any safeguard or limitation on a Division 3 power;

³⁰ *ASIO Act* sub-s 34E(e) and (f).

³¹ *ASIO Act* s 34NB.

- increase in the maximum penalty for such offences, at least so as to match the penalties imposed on detainees for non-disclosure of information, or violation of secrecy provisions; and
- provision that any information obtained through breach of a safeguard or limitation should be automatically excluded from admission into evidence, in any subsequent court case.

f. Detainees bear an evidentiary burden regarding their lack of knowledge

Liberty considers it inappropriate and illogical that detainees should bear an evidential burden to show that they don't have the information required of them.³² This is particularly severe given the penalty of five years for non-disclosure under section 34G.

Recommendation:

- removal of the evidential burden on defendants charged with withholding information requested under a warrant.

3. THE POWERS LACK A CLEAR CONSTITUTIONAL BASIS

a. Tenuous links to constitutional heads of power

While this submission will not attempt a detailed analysis of constitutional issues, Liberty notes academic commentary suggesting that the Division 3 powers are not supported by any constitutional head of power.³³

³² *ASIO Act* sub-ss 34G(3) and (4).

³³ See, eg, Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27(2) *UNSW Law Journal* 524.

b. Conflation of executive and judicial power

Liberty considers that the detention powers accorded to ASIO under Division 3 are inappropriate to an executive body, and potentially violate the separation of powers.

We draw the Committee's attention to the comments made by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs*:

[It is] beyond the legislative power of the Parliament to invest the Executive with an arbitrary power to detain citizens in custody notwithstanding that the power was conferred in terms which sought to divorce such detention in custody from both punishment and criminal guilt. The reason why is that...the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.³⁴

We also note concerns with the appointment of judges as *personae designatae* for the purpose of issuing warrants, and of State judges as prescribed authorities. In light of the High Court's decision in *Grollo v Palmer*,³⁵ it is possible that such appointments may exceed the scope of the 'personal capacity' exception to the limits on Chapter III judicial power.³⁶

³⁴ *Chu Kheng Lim v Minister for Immigration Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27-28. See the detailed analysis of this decision in Carne, *Ibid*, 553-62.

³⁵ *Grollo v Palmer* (1995) 184 CLR 348.

³⁶ Carne, above n 33, 530.

Recommendation:

- a thorough analysis of the constitutional head(s) of power supporting the Division 3 provisions, and of possible threats to the separation of powers posed by their exercise.

In the absence of such clarification, the provisions should not be renewed.

4. UNDULY INVASIVE POLICING IS COUNTER-PRODUCTIVE

It is arguable that intrusive powers of this nature may be counter-productive, in contributing to a feeling of victimisation in certain sections of the population thought susceptible to the influence of terrorist groups.

It is particularly difficult to assess this possibility given the lack of published information about ASIO's exercise of the Division 3 powers to date.

Liberty considers that if the powers are to be renewed, it is incumbent on the Australian Government to conduct a thorough investigation into their effectiveness, and their impact on minority groups.

Recommendation:

- publication of a report on the effects of the Division 3 powers to date, giving particular attention to their effects on minority groups.