

Submission by the
Media, Entertainment and Arts Alliance



the Joint Parliamentary Committee on ASIO, ASIS & DSD

Review of ASIO's Detention and Questioning Powers

Terms of reference:

The Committee is required to review, by 22 January 2006, the operation, effectiveness and implications of:

(i) Division 3 Part III of the Australian Security and Intelligence Organisation Act 1979; and

(ii) the amendments made by the Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003, except item 24 of Schedule 1 to that Act (which included Division 3 Part III in the Australian Security Intelligence Organisation Act 1979); and

(c) To report the Committee's comments and recommendations to each House of Parliament and to the responsible Minister.

March 2005

Introduction

The Media, Entertainment and Arts Alliance ('the Alliance') is the professional and industrial association for those working in the media, entertainment and arts industries in Australia. It has 36,000 members Australia-wide, with approximately 10,000 of these members working journalists.

The Alliance is a member of the International Federation of Journalists ('the IFJ'), the global federation of journalists' organisations. It represents over 500,000 journalists in over 110 countries around the world.

Christopher Warren, author of this submission, is the Federal Secretary of the Alliance and President of the IFJ.

The Alliance is deeply concerned that Division III of the *Australian Security and Intelligence Organisation Act 1979*, as amended by the *ASIO Amendment (Terrorism) Act 2003* contains provisions that seriously threaten journalists' freedom of speech and in turn, the public's right to know. The Alliance is principally concerned with provisions that allow for the imprisonment of journalists for five years who disclose any information relating to an ASIO warrant.

ASIO amendments part of a broader framework

The 11 September 2001 terrorist attacks in the United States, the war in Iraq and the war on terror have had a dramatic impact on Australian society. The attacks on New York and Washington in 2001 claimed ten Australian lives. They occurred against a pre-existing background of racial tension within Australia generated by the debate over asylum seekers, particularly asylum seekers from Iraq and Afghanistan.

Concerns about terrorism were exacerbated by the attacks in Bali on 12 October 2002 and more recently, the bombing outside the Australian embassy in Jakarta on 9 September 2004. In the Bali attack, 88 Australians died, along with numerous others, primarily Indonesians. In the Australian embassy bombing in Jakarta, no Australians were killed, but Australian interests were the clear target.

The Howard Government has used this heightened fear of terrorism and concern over asylum seekers to introduce a raft of 'anti-terrorism' laws in Australia, some of which effectively limit free speech and civil liberties. In this climate, journalists have faced renewed pressure to reveal the identities of their sources. They have also confronted increased restrictions relating to matters of national security.

The ASIO amendments are part of a raft of security and anti-terror legislation, that, taken as a package, reveal a concerning trend toward the erosion of press freedom in Australia. The most prominent issues in this regard are those raised by the *ASIO Amendment (Terrorism) Act 2003*.

Erosion of civil liberties

There are many aspects of the Act which erode civil liberties and grant a disturbing level of discretion to the Attorney General, ASIO Director General and the 'prescribed authority' which issues the warrants. The Attorney General need only be satisfied that

there are reasonable grounds for believing that the issuing of a warrant will substantially assist an investigation before authorising a warrant.

A warrant permits ASIO officials to hold the subject (the detainee) for up to 186 hours (7 days). Worse still is the provision which allows the 'prescribed authority' to issue a series of back-to-back warrants if the subject is thought to be of ongoing assistance to the investigation. Further, the Act makes clear that there is no limit on the number of warrants that can be issued, effectively allowing ASIO to prolong the detention and interrogation indefinitely.

Such intrusive powers raise issues that should be of concern to the whole community. Considering that ASIO has been afforded huge discretionary power in issuing and enforcing warrants under this Act, the Alliance insists that such powers be monitored through at least some level of public scrutiny.

Section 34VAA: ASIO secrecy provisions severely limit press freedom

There are two offences which raise the greatest alarm among journalists. These provisions fall within section 34VAA "Secrecy relating to warrants and questioning".

The first offence prohibits the disclosure of any information relating to an ASIO warrant for a period of 28 days after it has been issued (section 34VAA (1)). In practice, this restriction stops those who have been questioned by ASIO and/or their lawyers from talking to the media. Despite the possibility that the subject of the warrant might have been arbitrarily arrested and despite any maltreatment he/she may have received at the hands of ASIO officials, there can be no disclosure to anyone for 28 days.

The 'permitted disclosure' provisions (34VAA (5)) are little more than an internal authorisation mechanism for ASIO and the subject's lawyers who may need to disclose certain details to arrange the subject's defense. Public interest never comes into consideration where permitted disclosures are concerned.

The strict liability provision (34VAA (3)) makes clear that it is the subject and his/her legal representatives which are present during the questioning who are the most vulnerable to a five-year jail term for unauthorised disclosures of ASIO information. But the final sentence of section 34VAA (3) opens the liability up to anybody who fulfils the *Criminal Code*'s definition of 'recklessness' in disclosing the information.

The fault element of recklessness, may at least, offer a defence for journalists who unwittingly discloses information which relates to a warrant or is 'operational information'. Recklessness requires both an awareness of the results that an act will bring about and the disregarding of those results.

It is unclear however, whether the Act allows for journalists to make their own judgement that disclosing 'operational information' is in the public interest, and therefore, that it is justified and not reckless. A journalist disclosing information about an ASIO warrant which, for example, he/she believes to have been illegally issued and enforced in contravention of international human rights conventions, is a disclosure which, technically, is designed to disrupt ASIO operations and therefore could be regarded as 'reckless'.

The Alliance is concerned that knowingly disclosing this information for the purpose of informing the public and stimulating debate about ASIO's activities is not overtly supported by a public interest test under the Act. Accordingly, the journalist in question is left highly vulnerable to a five-year prison term for doing his/her job. This is an unacceptable legal framework for Australian journalists to work in.

The second offence is essentially a broader extension of the first. Section 34VAA (2) allows that for a period of two years after the expiry of the warrant, it remains an offence for anyone to disclose any 'operational information' that ASIO has or had relating to this warrant. The Act is protects ongoing investigations that are linked to an initial warrant for a period of two years. But considering that there is no limit on the number of warrants that shall be issued, a long series of back to back warrants could mean that this two-year banning period does not actually begin until the final warrant has expired.

The Act implies that any journalistic disclosure of ASIO 'operational information' will be punishable by five years imprisonment. The Alliance is especially concerned about this provision which targets journalists who are fulfilling their ethical obligation to disseminate information that is in the public interest. The definition of 'operational information' in section 34VAA (5) is reprinted below:

- (5) ***Operational information*** means information indicating one or more of the following:
- (a) information that the Organisation had or had;
 - (b) a source of information (other than the person specified in the warrant mentioned in subsection (1) or (2)) that the Organisation has or had;
 - (c) an operational capability, method or plan of the Organisation.

The Alliance contends this definition is unreasonably broad so as to include almost anything that ASIO has done or is doing, or has known or knows. It is hard to see what information or plans that ASIO has that would not fall under this definition of 'operational information'. Thus this section effectively gags any debate about ASIO's activities, which the Alliance finds an untenable situation.

Section 34NB: inadequate and disproportionate safeguards

The Alliance acknowledges the safeguard provisions in the Act (Section 34NB) which are ostensibly designed to keep a check on ASIO staff acting under the authority of a warrant. The safeguards stipulate that an ASIO official who *knowingly* contravenes a condition or restriction that the warrant places upon him/her faces a two-year jail term. It hardly seems appropriate however, that journalists who tell the story of this abuse of ASIO power in an effort to foster healthy public debate into counter-terrorism, risk five years in jail.

The Alliance condemns this disproportionate sentencing regime as an absurd instance of blaming the messenger in order to insulate ASIO investigations from adequate public scrutiny. We reject that any journalist should ever be imprisoned for doing his or her job and least of all in Australia where freedom of the press to monitor government agencies is such a firmly entrenched feature of our democracy.

ASIO operations not accountable

The Alliance recognises ASIO's intricate connections with many aspects of the domestic 'war on terror' and we are fearful that such a broad involvement may, potentially, be invoked to silence all public discussion of the Government's tactics in combating domestic terror threats.

The Alliance calls on the Parliamentary Joint Committee on ASIO, ASIS and DSD to renew Australia's long-standing commitment to a free press. We insist that matters relating to the issuing and enforcement of ASIO warrants under the *ASIO Legislation Amendment (Terrorism) Act 2003* are most definitely in the public interest and therefore, deserving of public scrutiny. The Alliance can appreciate that there are times when secrecy is necessary so as not to jeopardise an investigation but the existing Act affords far too much discretion to ASIO officials.

To inoculate ASIO from any public scrutiny about their activities – and to have the potential to jail journalists who attempt to shed light on ASIO's activities – is fundamentally undemocratic. Journalists and the media fulfill an important monitoring role and they should be granted access to at least some of the information which relates to an investigation by ASIO.

Indeed, it may even serve ASIO to be more transparent in their activities. Openness may help engender public support for the 'war on terror' instead of establishing an opaque system whose internal operations are withheld from public view and criticism.

No journalists arrested for breaching the Act – so far

It is important to note that, as far as we are aware, no journalists have been jailed or arrested for reporting ASIO activities. However, while this is good news in one sense, it does not mean that the legislation is benign. There are three areas of concern:

Firstly, suspects that have had warrants issued would be made fully aware that they face a five-year jail term for speaking to others about their arrest, including the media. This is clearly designed to stop any leaks about ASIO activities, even if the activities or methods used are suspect.

Secondly, if a suspect or their lawyer does speak to a journalist, journalists would be aware that they could be liable to prosecution for publishing the information.

Finally, the Alliance is concerned that a journalist him/herself may have a warrant issued for their arrest, in connection with a suspect's disclosure. In such case, the journalist would not be able to disclose that they themselves had been arrested – and the reason – for two years under the Act.

Other 'anti-terrorism' legislation erodes press freedom

There have been other counter-terrorism legislative changes which also threaten journalistic independence. The *Criminal Code Amendment (Terrorist Organisations) Bill*, passed by the Senate on 4 March 2003, allows for an organisation to be deemed 'terrorist' without requiring a United Nations mandate. This, in conjunction with other bans on associating with a 'terrorist' organisation, may deny journalists access to these groups, which, in turn denies the public an adequate understanding.

The *Anti-Terrorism Bill (No. 2) 2004*, which prohibits association with a terrorist organisation, may, potentially, be used to impede journalists infiltrating terror groups. A great deal of discretion is afforded the authorities to both proscribe organisations as ‘terrorist’ and secondly, to judge what ‘association’ is deemed ‘support.’ Does reporting on a terrorist organisation’s political objectives, for example, qualify as ‘support’?

Equally concerning is the *Telecommunications (Interception) Amendment (Stored Communications) Bill 2004*. This Bill, passed on 27 May 2004, allows for the Government to obtain a warrant to access stored communications, including sms, mms (multimedia messages), email, and voicemail messages. This poses a serious threat to the anonymity of journalists’ sources – a fundamental ethical ideal which safeguards journalistic integrity in the eyes of the public.

Conclusion

The ramifications on press freedom if the amendments to the *ASIO Act 1979* are allowed to continue are enormous. Australia’s reputation for a free and independent press is severely compromised when the only information that the public can receive about our security organisation’s activities is sanctioned by the Government. It is entirely inappropriate for journalists to face the prospect of jail for reporting matters in the public interest. The safeguards provided in the *ASIO Act 1979* are inadequate, and disproportionate. The Act is part of a broader set of counter-terrorism measures which, taken as a package, effectively limit freedom of the press in Australia.

Recommendation:

The Alliance has deep concerns about the civil rights and press freedom implications of Division III of the Act. Accordingly, we call on the Committee to recommend to the Government to maintain the sunset clause in Act (34Y) which would mean the Division will cease to have effect on 23 July 2006.

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