AMCRAN
Australian Muslim Civil Rights Advocacy Network

Submission to the

Parliamentary Joint Committee on ASIO, ASIS and DSD

Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers

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About AMCRAN

The Australian Muslim Civil Rights Advocacy Network (AMCRAN) is dedicated to preventing the erosion of the civil rights of all Australians, and, by drawing on the rich civil rights heritage of the Islamic faith, provides a Muslim perspective in the civil rights arena. It does this through political lobbying, contributions to legislative reform through submissions to government bodies, grassroots community education, and communication with and through the media. It actively collaborates with both Muslim and non-Muslim organisations to achieve its goals.

Since it was established in April 2004, AMCRAN has worked to raise community awareness about the anti-terrorism laws in a number of ways, including the production of a booklet *Terrorism Laws: ASIO, the Police and You*, which explains people's rights and responsibilities under these laws; the delivery of community education sessions; and active encouragement of public participation in the law making and review process.

AMCRAN and its members have participated in a number of parliamentary inquiries with respect to anti-terrorism laws in Australia, including:

- Senate Legal and Constitutional Committee Inquiry into the Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (including appearance before the Committee);
- Senate Legal and Constitutional Committee Inquiry into the Anti-Terrorism Bill (No.2) 2004 (including appearance before the Committee);
- Senate Legal and Constitutional Committee Inquiry into the Provisions of the National Security Information (Criminal Proceedings) Bill 2004 and the National Security Information (Criminal Proceedings) (Consequential Amendments) Bill 2004;
- Parliamentary Joint Committee on ASIO, ASIS and DSD Review of Al Qa'ida, Jemaah Islamiyah, the Abu Sayyaf group, the Armed Islamic Group, the Jamiat ul-Ansar, the Salafist Group for Call and Combat as terrorist organizations under section 102.1A of the Criminal Code; and
- Senate Legal and Constitutional Committee Inquiry into the provisions of the National Security Information Legislation Amendment Bill 2005.

Introduction

We would like to thank the Parliamentary Joint Committee on ASIO, ASIS and DSD (PJCAAD) for the opportunity to make submissions to the review the operation, effectiveness and implications of Division 3, Part III of the *Australian Security Intelligence Organisation Act* 1979 ('the Act'), which empower ASIO to obtain questioning and detention warrants in relation to persons believed to have information about terrorist offences. We are prepared to appear before the Committee should further elaboration on our submissions is required.

It is AMCRAN's view that there are serious concerns in relation to the operation, effectiveness and implications of ASIO's detention and questioning powers under the Act, and that they have an adverse impact on the civil rights of all Australians. AMCRAN submits that ASIO's powers under Division 3 should be allowed to lapse on 23 July 2006.

However AMCRAN understands that the Committee may not be in a position to recommend the excision of Division 3 altogether, and for that reason, we make recommendations throughout the submission in the hope that it would lessen the impact of the laws. However, this should not be taken as our acceptance of the effectiveness or legitimacy of Division 3.

We have had the benefit of reading the draft submissions of Mr Stephen Sempill and Mr Joo-Cheong Tham, the UTS Community Law Centre, the Public Interest Advocacy Centre, Illawarra Legal Centre, the National Association of Community Legal Centres, and the Islamic Council of NSW. We endorse these submissions and support their recommendations to the PJCAAD.

Constitutional issues

AMCRAN is concerned about the uncertain constitutional basis upon which the detention and questioning powers are founded. This is comprehensively argued by Dr Greg Carne in his recent journal article "Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act* 2003 (Cth)[1]".

AMCRAN specifically recommends the submissions of Mr Stephen Sempill and Mr Joo-Cheong Tham which argue that the provisions conferring the power to detain without trial are arguably unconstitutional.

Flawed foundation: Overly broad definition of terrorism

[1] Carne, G, 2004. "Detaining Questions or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act* 2003 (Cth)" 27(2) UNSW Law Journal 524.

It is submitted that the basis upon which questioning or detention warrants can be obtained is substantially flawed. The Act allows for the issuing of a questioning or detention warrant where the Attorney-General and the issuing authority are satisfied, amongst other matters, that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence[2]. A "terrorism offence" is defined in s 4 of the Act as an offence against Division 72 or Part 5.3 of the *Criminal Code*, even if no terrorist act occurs.

The definition of "terrorist act" in s100.1 of the *Criminal Code* is overly broad, and it is arguable that many legitimate activities could be covered by this definition. The breadth and range of the terrorism offences in the *Criminal Code* substantially widen the scope of matters in relation to which ASIO may collect intelligence.

For example, some of the activities that may be classed as terrorist acts under this definition include activities associated with legitimate freedom movements that oppose tyranny (previously including organisations like the African National Congress in South Africa). Further, there are a number of ill-defined offences under this Division, for example, recklessly possessing a "thing" in connection with the preparation of a terrorist act[3], or recklessly collecting or making documents likely to facilitate terrorist acts[4]. Similarly, the definition of "terrorist organisation" in s 102.1 as well as the wide range of offences connected with a "terrorist organisation", such as being a member[5], or an informal member[6], or associating with a member of a "terrorist organisation"[7] further broaden the type and range of matters that an intelligence-gathering exercise may involve. Consequently, the detention and questioning powers under the Act which are predicated on these broad definitions are also expansive.

Furthermore, this legislation gives ASIO, other government agencies, and the executive arm of government broad discretionary scope, enabling them to target specific communities or groups under very general criteria, for example, by religion or race, thus making the laws potentially divisive and extremely discriminatory in its application.

Particularly when it comes to terrorism, ASIO and the Australian Federal Police ('the AFP') are also not immune to the possibility of overreaction and overestimation of a threat far beyond its real significance. One recent example of this was the case of Bilal Tayba, where the AFP accused him of "stalking" a police officer when all that he was doing was assisting a friend to sign some bail papers. His home was then raided one night after midnight by eight police officers. When the matter finally came before court, all charges were dropped. Further details of the incident, as described by Hall Greenland of *The Bulletin*, are extracted in Attachment A.

[2] The Act, s 34C(3)(a).
[3] *Criminal Code*, s 101.4(2)
[4] *Criminal Code*, s 105.1(2)
[5] *Criminal Code*, s 102.1
[6] *Criminal Code*, s 102.1
[7] *Criminal Code*, s 102.8

What the article illustrates is a tendency for organisations such as ASIO and AFP to overreact. AMCRAN submits that it is necessary to remove the discretionary nature of the legislation to ensure that such miscarriages of justice do not occur.

Recommendation 1

In view of the uncertain constitutionality as well as the broad basis for these provisions, the detention and questioning powers under Division 3 should be allowed to lapse on 23 July 2006.

In the alternative, that substantial changes to the *Criminal Code* are made to limit the potential reach of the powers.

Detention

It is a universal principle that no person should be subject to arbitrary detention without charge or trial. This is also a principle guaranteed by international covenants to which Australia is a signatory. Specifically, Article 9(1) of the *International Covenant on Civil and Political Rights* states that "Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention."

Should an intelligence organisation have the power to detain?

The Act clearly specifies that the function of ASIO is as an intelligence-gathering organisation. It is of interest that the Act specifically excludes "the carrying out or enforcing measures for security within an authority of the Commonwealth."[8]

Clearly, it is inappropriate that ASIO has the power to detain people beyond the need for questioning, as it would seem that the detention of individual crosses the boundary into measures for enforcing security. This is especially the case, given that the powers granted to ASIO are applicable only in accordance with definitions in the *Criminal Code*; clearly if the powers are defined in the *Criminal Code* then that is *prima facie* evidence that it is a criminal or law-enforcement, and not a security, matter.

Detention beyond the need for questioning

In relation to detention warrants, s 34C(3)(c) of the Act specifies three additional requirements for the issue of a warrant for a person to be detained: (i) that the person may inform others related to the investigation; (ii) that the person may not appear before a prescribed authority; or (iii) the person may destroy, damage or alter a record or thing s/he may be requested in accordance with the warrant to produce.

[8] The Act, s17(2).

AMCRAN submits that none of these requirements are sufficient for the detention of a person who is not suspected of having committed any terrorism offence. The power to detain people based on these criteria is unprecedented, in that a person is being detained, not because they are even suspected of having committed a crime, or even involvement in terrorist activity. While the conduct described in s34C(3)(i) and (iii) may be loosely seen as breaches of criminal offences (secrecy offences[9] and failure to provide record or thing[10] respectively), detaining a person merely on the suspicion that they may tell someone else something or destroy something in the future is not sufficient reason for deviation from the principle that no person should be detained without charge or judicial trial. In no other case at law do we allow the detention of an individual who has not been charged or convicted of an offence on the basis that he or she may commit an offence in future.

This is further exacerbated by the use of the word "may", which means that there is no need to consider whether it is "likely" or "probable" that the person will do such a thing.

Again, we submit that the ASIO's power to detain persons should be removed. In the alternative, we would suggest that the following changes be made to S34F(2A): firstly, that the language be tightened, and rather than the word "may" which is vague and simply implies possibility but does not allow scope for the probability to be judged, more specific language be used. Secondly, we recommend that due to the right that people have not to be detained in general as covered by Australia's various international treaties, that a condition of further detention beyond questioning be that the person be suspected of involvement in an offence.

Recommendation 2

ASIO's detention and questioning power should be allowed to lapse on 23 July 2006, as this appears to be outside of ASIO's charter. Once a person is questioned and has provided the information requested by ASIO, he or she should be released, and should not be held.

In the alternative, only people who are suspected of having committed an offence should be detained. Further, it should not be sufficient grounds that a person "may" do something in violation of S34F(2A), but that they are "reasonably likely" to do so.

Length of detention

Pursuant to a warrant under the Act, a person can be detained for up to 168 hours[11] and questioned for up to a maximum of 24 hours in three 8-hour blocks[12] (for persons requiring an interpreter, the maximum number of hours that a person can be

[9] The Act, s 34VAA(2)
[10] *Criminal Code*, s104.1
[11] The Act, s 34HC.
[12] The Act, s 34D(3)(c).

questioned is 48[13]). In the reporting period between 2003 and 2004, one person was questioned for more than 42 hours[14].

On the other hand, when the AFP reasonably suspects someone of having committed a crime under federal law, they may detain the person for a maximum of 12 hours without charge[15], or for 24 hours in terrorism-related cases[16]. It is excessive and defies logic that the period of detention under the Act for persons who are being questioned merely for intelligence-gathering purposes is longer than for those who are detained under the *Crimes Act* on suspicion of having actually committed a terrorism offence.

For this reason AMCRAN makes the following recommendation:

Recommendation 3 (where Recommendation 3 above fails)

Should ASIO's detention and question powers be not removed, ASIO must only be able to detain people for a period of less than, or at least equal to, the maximum period of time that the AFP can detain a person under suspicion of having committed a crime, i.e. 12 hours for normal offences and 24 hours if they are suspected of involvement in a terrorist offence.

Strip Searches

Under the Act, a person may be strip-searched while they are being detained[17]. Section 34L(2) provides that a strip-search may be conducted if a police officer reasonably suspects that the person has a seizable item[18] and that it is necessary in order to remove the item. Although the Act goes on to specify that any strip-searching must be approved by the prescribed authority[19], it does not specify the criteria that the prescribing authority should consider as part of that process. Indeed, the law appears to contemplate that the prescribed authority need not even be present at the time of the strip search as his or her approval may be obtained by telephone, fax or other electronic means[20]. Furthermore, the Act only specifies that a prescribed authority is to make a record of the decision and the reasons if he or she refuses to give his or her approval[21].

Strip searches are a demoralising and difficult process for all, but particularly for members of the Islamic faith. Islam places great emphasis on modesty and on not revealing one's body to anyone other than one's close family. For many Muslims,

[13] See the Act, s 34HB(8) – (12).
[14] Australian Security Intelligence Organisation Annual Report 2003 - 2004, p. 50.
[15] See *Crimes Act* 1914 (Cth) ss 23C and 23D(5).
[16] See *Crimes Act* 1914 (Cth) ss 23CA and 23DA.
[17] The Act, s34L(1)(b).
[18] 'Seizable item" is defined in s 4 as "anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody".
[19] The Act, s34L2(c).
[20] The Act, s34L(3).
[21] The Act, s34L(6).

being forced to strip is a form of personal violation, the severity of which is difficult to convey through analogy or words. It is likely to cause severe psychological stress and feelings of "dirtiness" and disgust.

If strip searches are to be conducted, they should be done with good reason and justification and not merely as a matter of undocumented and untested "reasonable suspicion" on the part of a police officer.

In addition, s 34L(8)(b) allows for any found item that is "relevant to collection of intelligence that is important in relation to a terrorism offence"[22] to be seized. This may have the effect of swaying the mind of a police officer in considering whether or not there are reasonable grounds to conduct a strip search. The temptation to inflate the "reasonable grounds" may affect the impartiality of the officer.

AMCRAN submits that the process for approving strip searches must be toughened, and the police officer must substantiate the reasons to the prescribed authority. We also submit that the prescribed authority must also be required to be satisfied that there are reasonable grounds that the person has a seizable item and that it is necessary to conduct a strip search in order to remove the item.

Recommendation 4

That the provisions for strip searching be tightened, and the police officer must provide evidence to the prescribed authority as to why he or she believes the detained person may be in possession of a seizable item that could not be detected by an ordinary search or the use of widely available equipment such as metal detectors or infrared cameras.

Secrecy provisions

AMCRAN submits that there are a number of concerns in relation to the secrecy provisions in the Division. When a warrant is in force, s 34VAA makes it an offence to disclose information that indicates the fact that the warrant has been issued, or a fact relating to the content of the warrant or to the questioning or detention of a person in connection with the warrant[23]. Another offence created by the Act is the disclosure of operational information, both during the period of the warrant and also within two years of its expiration[24]. "Operational information" is further defined in s34VAA(5), and it has been suggested that it includes any information relating to the warrant or someone's treatment pursuant to the warrant. Strict liability as to the nature of the information applies to the person who has been questioned or detained pursuant to a warrant under the Act as well as his or her legal advisor or representative.

[22] The Act, s34L 8(b).
[23] The Act, s 34VAA(1)(c)(i).
[24] The Act, s 34VAA(1)(c)(ii); s34VAA(2).

AMCRAN submits that these secrecy provisions pose a grave threat to civil society. We submit that the wide coverage of these provisions as well as the vagueness of some of the terms such as "operational information" are also likely to lead to over-estimation of the reach of the laws. This in turn has a significant impact on the public discussion of these powers thus clouding issues of accountability and transparency, in that it is likely to "threaten to curtail that freedom by making journalists think twice before reporting on terrorism"[25].

There is already a great deal of secrecy surrounding the operation of ASIO's activities, and given the concerns about the breadth of these powers, it is important that their exercise are open to public scrutiny.

Further, we are concerned that the secrecy provisions are likely to have an impact on the services that welfare organizations are able to provide to those who have been affected by these laws. The destabilizing effect of arbitrary detention on the person as well as the person's family cannot be underestimated, but the secrecy provisions will effectively prohibit the people from approaching organisations or even religious leaders who are usually in a position to provide counseling or other support and assistance.

Recommendation 5

That the secrecy provisions be removed from the Act.

Secrecy laws severely limit scope of PJCAAD enquiry

The Act effectively places a two-year embargo period on persons detained or questioned pursuant to a warrant under the Act. Since the Act only received royal assent on 22 July 2003[26], less than two years ago, there is in fact no opportunity for anyone who has been questioned or detained pursuant to an ASIO Act warrant to discuss the impact of any questioning or detention. In other words, because the period of secrecy has not elapsed since the introduction of the laws, no-one who has been detained by ASIO could possibly speak openly about the effect of the laws.

This has a dramatic impact on the scope of this present Inquiry. It means that those most immediately and directly affected by the Act are unable, under threat of law, to make a submission to the Inquiry.

It is uncertain whether or not parliamentary privilege, or whether or not s 34VAA(12) that, to some extent, guarantees the implied freedom of political communication, would cover such disclosure.

AMCRAN has lodged verbal and written requests for clarification from both independent legal experts and the PJCAAD as to whether parliamentary privilege

[25] Simeon Beckett, "New law on terrorism raises spectre of agency abuse," *The Age*, 26 June 2003.
[26] Note 1 to the Act.

would extend to the secrecy provisions. At the time of writing, the PJCAAD is yet to receive legal advice on this issue.

Even if disclosure to the PJCAAD were allowed, there would also be practical barriers to making a submission. Many in the community would not necessarily know or understand the submission process and would normally rely on community or civil rights organisations or lawyers to assist with the preparation of submissions. Further, statistics show that some of the people detained by ASIO required interpreters[27], and thus in making submissions they may also require assistance with translations as PJCAAD has advised that submissions should be in English. However, any parliamentary privilege or implied freedom of political communication is unlikely to extend to the communication between the person detained and the interpreter or person assisting with the submission. We submit that the scope of the secrecy provisions is such that those people detained or questioned would encounter insurmountable difficulties should they wish to make submissions in relation to their detention or questioning under the Act.

One must, while appreciating the good work of PJCAAD, wonder what the use of an Inquiry into ASIO's detention powers is that denies detainees themselves the ability to make a submission that discusses their detention. Would a report issued on, for example, the impact of detention on refugees be complete if it did not allow the refugees themselves to make a submission?

Thus, it is AMCRAN's considered opinion that any Report issued by PJCAAD will be limited in scope because it is unable to examine the impact of the legislation on detainees. We therefore make the following recommendation:

Recommendation 6

That another review of ASIO's detention powers be conducted three years hence with specific allowance for those people who have been detained and questioned to make submissions with the assistance of legal practitioners and community groups.

Power imbalance as to disclosure of secrets

While the person detained or questioned is subject to these secrecy provisions, the same rules do not cover the actions of the Minister. Indeed, the Minister may permit himself to make disclosures[28]. This creates a power imbalance; as it means that the Minister may disclose information that the detainee may not. This power may be abused for political purposes; and may be used to attack an individual who has been detained in a way that a detainee can not defend themselves. Hypothetically, should the Minister make allegations about certain things said during questioning, which is legal for him to do, the detainee would not be in a position to respond in any way for it would breach the secrecy provisions.

[27] ASIO Annual Report 2003-2004, p. 40.
[28] The Act, s34VAA 5(h).

Obviously, in practice there is a need for a Minister to speak to ASIO officers about questioning and detention matters. However, this should not extend to disclosing such matters publicly in such a manner that is unlikely to allow the detainee a right of reply.

Therefore AMCRAN makes the following recommendation:

Recommendation 7

That the Minister not be allowed to disclose matters relating to the questioning or detention of a person publicly; that if the Minister, or any member of the executive government do make disclosures relating to the questioning or detention of an individual, then the limits on disclosure are taken to be null and void.

Social and employment difficulties

AMCRAN submits that detention and questioning under the Act could have an extremely debilitating and destabilising effect, especially for someone who was not even involved in terrorism. This comes from a combination of two factors: firstly, the long detention period (of up to 7 days), and secondly, the secrecy provisions that make it an offence punishable for up to 5 years to mention the detention.

In particular, it is difficult to see how one can maintain a normal family or other social relationship if one is detained for a week, yet cannot disclose the fact of his detention. This may damage relationships, for example, between a husband and a wife; normally disappearing for seven days would be considered unreasonable.

Similar issues arise in relation to employment. If someone disappears from the workplace for seven days, this is not likely to enamour him to his employer. Even if a detainee could tell his employer that he had been detained by ASIO, this is not likely to be to the liking of the employer. This is especially the case given that even people not suspected of terrorism may be detained for 7 days.

Evidential Burden

The Act imposes a penalty for not providing information[29] and not producing an item[30] when a person is being questioned under an ASIO Act warrant. Further, the Act specifies that the evidential burden is upon the defendant to prove that he or she did not have the information[31] or did not have possession or control of the record or thing[32]. It is very difficult – if not impossible – to prove that one does not know something, and even harder to prove that one did not know something at the time of questioning. The detainee, for example, might have had no knowledge of an issue

[29] The Act, s 34G(3).
[30] The Act, s 34G(6).
[31] The Act, s34G(4).
[32] The Act, s 34G(7).

until ASIO raised the matter or alternately may have had a fleeting or superficial knowledge of the matter or may have genuinely forgotten some details. It is also possible that a person may have unintentionally forgotten a fact due to poor memory; or due to the stress and concerns of the questioning process (for example, that the person may now be in the 46th hour of questioning, concerned about his family, worried about his future employment prospects, and wondering whether he will be detained for another five days) was unable at the time of questioning to recall certain facts; or forgot where he or she had placed something.

In addition, it is difficult to imagine how someone could, before a court of law, prove that he did not know something and had not forgotten it or was unable to provide a particular item.

One particularly difficult issue that may occur is the interaction of this with the *National Security Information (Criminal Proceedings) Act* 2004 ('the National Security Information Act'). Under the provisions of the National Security Information Act, the Attorney-General may request that evidence or witnesses be only be allowed in a closed court, or not be presented at all. Even if the defendant were able to produce evidence that might show that he did not know something, it is possible, if not likely, that there would be "national security" issues surrounding it.

This leads to an unfortunate situation where the means to prove someone's innocence are effectively in the hands of people closely tied with the prosecution (presumably, the AFP would carry out charges under section 34G in cooperation with ASIO, while the Attorney-General would work very closely with ASIO to decide on national security issues and also to grant security clearances to lawyers of the defendant).

For the reasons of the difficulty of proving that one does not know or possess anything, and also because the National Security Information legislation introduced with such legislation, we recommend the following:

Recommendation 8

That the evidentiary burden on the defendant in ss 34G(4) and 34G(7) be removed.

Legal advice

The Act specifies that a person detained pursuant to a detention warrant or at the direction of the prescribed authority is prevented from contacting another person, except under very limited circumstances. The Act permits a person under the warrant to contact a lawyer of the person's choice or someone with a legal or familial relationship with the person[33]. During the detention period, the prescribed authority may give a direction permitting the person to contact an identified person, including someone identified by reference to the fact that he or she has a particular legal or

[33] The Act, s 34D(4).

familial relationship with the person[34]. However, the prescribed authority may specify that certain information is not to be disclosed[35].

AMCRAN submits that there are insufficient safeguards in place to protect a person's fundamental right to have access to legal advice and assistance under circumstances where they have been detained, which in itself presents complex legal issues and will likely have severe personal repercussions. The terrorism and ASIO related laws are very complex. A lay detainee clearly needs a lawyer to assist him or her in this situation, to act as an advocate and to provide clear legal advice and information. However, under the Act, the detainee can be questioned in the absence of a lawyer; and even if a lawyer is present, he or she may be replaced if the lawyer is "unduly disruptive"[36].

We further submit that any contact between the person and his or her lawyer must not be able to be monitored (as allowed by s 34U(2)). During questioning, the lawyer must be able to intervene in order to advise the person, and must not be able to be removed.

With regard to questioning warrants, while it is arguable that it would not prevent a person from seeking legal advice as there is no requirement of immediate custody and hence the person is free to seek such advice, we submit that this right must be specifically stated in the warrant.

Recommendation 9

That a person detained or questioned pursuant to either a detention or questioning warrant must have access to a lawyer of their choice, who must be present during questioning. Any contact with the lawyer must not be monitored, and the lawyer must be free to advise his or her client during questioning without fear of removal.

Threat of use of ASIO powers as a means of coercion

AMCRAN is, on occasion, contacted by members of the Muslim community for advice as to what to do in circumstances involving ASIO officers. There seems to be a clear pattern of behaviour from ASIO's officers. While we are cautious in warning that they should not disclose anything pursuant to an ASIO warrant, more often than not we are advised that ASIO officers regularly meet with members of the community to obtain information.

With the fear and paranoia that has been generated in the community about the scope and extent of the anti-terrorism laws, members of the community are often alarmed when contacted by ASIO. In such circumstances, they are often reluctant to talk to ASIO officers. Anecdotally, the officers explain that they can force cooperation by

[34] The Act, s 34F(1)(d).
[35] The Act, s 34F(1)(d).
[36] The Act, s34U(5).

obtaining a questioning or detention warrant, which, combined with the operation of s 34JBA which allows a person's passport to be seized during the period of the warrant, is a potent method of coercing persons to cooperate. Hypothetically, ASIO may wish to question a person who is an expatriate returning to Australia for a short period of time. Officers approach the person requesting an informal meeting. The person may not wish to discuss anything with the officers, and refuses. However, the ASIO officers go on to explain that they could obtain a warrant to compel the person to cooperate, and that their travel plans could be disrupted because the person's passport would have to be surrendered under the warrant[37].

Alarmingly, it has in fact been reported that ASIO officers threatened a person with detention for three days under the Act if the person did not cooperate with a raid[38].

While this may deliver short-term results, it is likely to create animosity in the very people whose cooperation may be most important for the gathering of intelligence. We submit that a person's cooperation under these circumstances could more closely be identified as cooperation under duress, and that the use of the laws in such a manner should not be allowed. We submit that to use the Division in this way by threatening the issuing of a warrant under which a passport can be taken away is an abuse of the power.

Passports Issues

Under the Act, upon the Director-General applying for a warrant (and before approval is even granted), the passport of the person under the warrant can be taken away immediately[39]. This is an extremely broad power that may be invoked by ASIO to prevent travel and may be based on very thin evidence. Furthermore, procedural rights and grounds of appeal against the withdrawal of a passport is unclear in the legislation.

Since the stated object of the detention and questioning powers are for the collection of intelligence, it is not clear why passports are to be confiscated from people with whom ASIO wished to obtain information. There must be safeguards in place to guard against the potential for the vexatious use of this power.

Recommendation 10

That the power to confiscate a person's passport under s 34JBA should be removed from the Act.

In the alternative, that the passport of a person against whom a warrant is sought should not be surrendered immediately on application for a warrant.

[37] The Act, s 34JBA.

[38] In a media interview on the ABC on 1 November 2003, Mr Stephen Hopper, a Sydney lawyer representing a person whose home was raided by ASIO, stated that officers threatened his client with detention for three days under the ASIO Act if he did not cooperate with the raid. Transcript available online: http://www.abc.net.au/am/content/2003/s980064.htm

[39] The Act, s 34JBA(1).

Attachment A

Excerpt from:

Hall **Greenland**, *Operation terror*, 15 March 2005, The Bulletin

Volume 123; Number 11.

Bilal Tayba must wish he'd used a parking station. On June 3 last year, he picked up his friend, terrorist suspect Bilal Khazaal (pictured left), and drove him to the Downing Centre - Sydney's main courts building - for Khazaal to sign a variation in his bail papers. They parked in a laneway behind Khazaal's solicitor's offices which are opposite the centre. They went through the offices, crossed the road, did the business, returned to the van and drove home.

All uneventful except for the television crew dogging their every step.

But to hear the Australian Federal Police tell it, Tayba had been hatching a plot to turn downtown Sydney into Baghdad on a bad day. They came for Tayba after midnight, eight AFP policemen, pounding at his front door, waking his wife and two young children. Tayba was arrested and charged with intimidating and stalking police and accused of preparing a bomb attack on AFP headquarters.

That headquarters also backs onto the laneway behind the solicitor's. It's unmarked except for discreet surveillance cameras. The police fact sheet claimed Tayba had been scoping the building for a bomb attack.

Shades of Baghdad, except three weeks later when the matter came to court, the AFP dropped all charges and paid the costs of Tayba's lawyers. (The AFP got one thing right: there were men with video cameras in the laneway; they worked for a TV channel. They had been mistaken for "terrorist" associates of Tayba.)

"Crazy nonsense," Tayba's solicitor Chris Murphy called the whole AFP operation. His firm says it is preparing to sue for damages.

The AFP did not want to talk about this case. Their critics do - two defence lawyers working on separate "terrorism" cases mentioned it to The Bulletin. For them it is typical of the AFP's tendency to overreact. Another Melbourne-based lawyer has accused the AFP of having a "trophy syndrome".