

PAX CHRISTI AUSTRALIA

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

This submission is tendered by Pax Christi Australia (Pax Christi) to the Parliamentary Joint Committee on ASIO, ASIS and DSD in respect of its review of Division 3 of Part III of the ASIO Act 1979 (ASIO Act).

Pax Christi is a Christian peace movement with branches in Victoria, New South Wales and Queensland and individual members throughout Australia. Members are involved in peace efforts in the fields of demilitarisation and security, human rights, ecology, development, economic justice and reconciliation.

Pax Christi has examined the implications of the ASIO Act and considers that human rights are unreasonably compromised by the Act. Pax Christi considers that the Act should be amended by Parliament to ensure that our anti-terror laws do not do more damage to our rights than terrorism itself.

Pax Christi notes with concern that Australia, alone amongst Western democracies, has no Charter or Bill of Rights against which legislation such as the ASIO Act should be tested to ensure that fundamental human rights are protected. It also notes with concern that Australia has not ratified the Optional Protocol to the Convention against Torture that would permit an expert international committee to visit Australia, if appropriate, to review and advise on arrangements for the treatment of persons held in detention.

Pax Christi believes that the anti-terrorism legislation enacted by the Commonwealth Parliament in the past few years is an overreaction to the threat of terrorism in our region and that the policy of 'anything goes' is not in the interest of the citizens of Australia. The anti-terrorism legislation should be subjected to a comprehensive review in the light of fundamental human rights. Nonetheless, in view of the limited scope of this review, this submission is limited to a few issues arising under the ASIO Act.

Introduction

Pax Christi acknowledges that the Government must take action to protect our society against terrorist activity, but the action must be commensurate with the risk.

Article 29.2 of the Universal Declaration states that rights and freedoms must be protected:

In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.

On 10 March 2005 Secretary-General Kofi Annan delivered a keynote address to the closing plenary of the International Summit on Democracy, Terrorism and Security in Madrid. In his address, the Secretary-General set out the main elements of a principled strategy to fight terrorism, one of which is the defence of human rights. He said:

Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective – by ceding to him the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits.

The invasions of human rights by the ASIO Act are not justified by the threat of terrorism in Australia. The ASIO Act should be reviewed and amended to protect human rights in order better 'to serve the struggle against terrorism'.

Questioning and detention

The ASIO Act provides that the Director-General of Security must obtain the consent of the Attorney-General (the Minister) to request the issue of a warrant for questioning and detention of a person: s34C(1).

The Minister may consent to the issue of a warrant only if he or she is satisfied "that 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"¹ and "that relying on other methods of collecting that intelligence would be ineffective": s 34C(3)(a) and (b).

If the proposed warrant authorises that a person be taken into custody immediately and detained for questioning, the Minister may consent if he or she is satisfied that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear for questioning or may destroy, damage or alter a record or thing that the person may be required to produce: s 34C(3)(c).

After obtaining the Minister's consent, ASIO may then obtain a warrant for detaining and questioning a person where the "issuing authority", that is, a Federal Magistrate or Federal Judge appointed by the Minister: s 34AB, is satisfied "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": s 34D(1).

The warrant may require the person to appear for questioning either immediately or at a specified time or require the person to be taken into custody immediately and

¹ "Terrorism offence" is defined widely in the Criminal Code and includes the *threat* of certain action where 'threat' is undefined and may mean no more than an "indication of something undesirable coming": *The Australian Concise Oxford Dictionary*. Accordingly, under the ASIO Act, the power to detain and question a person can be exercised even if no terrorist act has occurred but there is an "indication" or a suspicion that such an act may occur.

detained for questioning: s 34D(2). The questioning ends when ASIO has no more questions or when 168 hours have elapsed: s 34D(3).

There is no requirement that the issuing authority be satisfied as to the need for the person named in the warrant to be taken into custody immediately and detained before it issues a warrant for immediate detention. The issuing authority can rely on the assertion of the Minister. Thus, on the important matter of detention of a person who is not suspected of any crime, the issuing authority has no power to review the reasons for the Minister's satisfaction that the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear for questioning or may destroy, damage or alter a record or thing that the person may be required to produce.

Pax Christi proposes that the ASIO Act be amended to provide that the issuing authority may issue a warrant for the immediate taking into custody and detention of a person only if it is satisfied as to the matters set out in s 34C(3)(c), namely that the person may alert a person involved in a terrorism offence that the offence is being investigated, may not appear for questioning or may destroy, damage or alter a record or thing that the person may be required to produce

Even if the ASIO Act is amended to give the issuing authority the power to review the reasons for the Minister's satisfaction on these matters, the provisions relating to detention for up to 168 hours of persons who are not suspected of any offence are draconian. The ASIO Act – if it is to show due regard for human rights - should provide that such persons should not be liable to questioning and detention for a period up to 168 hours unless exceptional circumstances exist, eg where the Minister and the issuing authority are satisfied on reasonable grounds that the person has information on a proposed terrorism offence and the information may enable ASIO to prevent the proposed terrorism offence. In this case, it is arguable that the interference with human rights may be justified.

Pax Christi proposes that the ASIO Act be amended to provide that the issuing authority may issue a warrant for immediate taking into custody and detention of a person only in exceptional circumstances, eg that the Minister and the issuing authority are satisfied on reasonable grounds that the person has information on a proposed terrorism offence and the information may enable ASIO to prevent the proposed terrorism offence.

The ASIO Act does not specify where a person may be detained and questioned. It is possible that a person may be detained and questioned in a State other than the State in which he or she was taken into custody and consequently it may be practically impossible for the person's family or preferred lawyer to visit him or her.

Pax Christi proposes that the ASIO Act be amended to provide that a person must not be detained in a place other than in the State of Australia where he or she was taken into custody.

Questioning and detention of young people

A warrant may not be issued against a child aged under 16: s 34NA(1). Warrants for questioning and detaining a young person aged between 16 and 18 may be requested only if the Minister is satisfied on reasonable grounds that it is likely that the young person has committed, is committing or will commit a terrorism offence: s 34NA(4)(a). Moreover, there are some safeguards for young persons.

Like adults, a young person may be subject to a strip search, however the strip search must be authorised by the prescribed authority and conducted in the presence of a parent, guardian or other person who can represent the child's interests: s 34M(1)(f).

Another concession is that there must be a break in questioning after each two hours: s34N(6)(b) and the prescribed authority may direct that no questioning take place in the absence of a parent or guardian requested by the young person: s34V(3)(b).

The concessions for young people are inadequate. It is unacceptable that young people should be subject to a questioning and detention regime that resembles that for adults in a number of respects. Ideally, young people should not be subject to the questioning and detention regime at all on the basis that the general law provides the Australian Federal Police with sufficient powers. If however the ASIO Act is to retain ASIO's right to seek to have young people questioned and detained, then the special rules should be amended to provide additional protection for them.

Pax Christi proposes that the ASIO Act be amended to provide that young people may not be detained for more than a total of 24 hours in a twelve month period; they must be accompanied by a parent, guardian or other person acceptable to the young person throughout their detention, if they request this company, and by a lawyer chosen by the young person or their parent, guardian or other person at all times they are being questioned; and they must not be subject to a strip search.

Penalties

The ASIO Act fails to provide commensurate penalties for different offences. For example, if a detainee fails to give information when asked to give it, he or she is liable to imprisonment for five years: s 35G(3). However, if an official contravenes the ASIO Act, eg by treating a detainee inhumanely in contravention of s 34J or, in the course of a strip search, by searching the body cavities of a person aged 16 of the opposite sex in contravention of s 34M(1), then the official is liable to imprisonment for two years: s 34NB, in the unlikely event that evidence can be produced to support a charge.

Pax Christi proposes that the ASIO Act be amended to provide less severe penalties for contraventions by persons who are questioned and detained and more severe penalties for contraventions by Australian Federal Police and ASIO officials.

Removal of the right to silence

A person who is before a prescribed authority for questioning under a warrant has no right to silence and failure to give information as required is a strict liability offence punishable by imprisonment for five years. It is no defence that the information required may be irrelevant to ASIO's intelligence needs and that the information is highly sensitive and disclosure could be dangerous to innocent persons. The only defence permitted is that a person charged with this offence did not have the information required – and the defendant has the difficult evidential burden of establishing that he or she did not have the information: s 34G(4) and s13.3(3) of the Criminal Code.

In some cases it will be virtually impossible for a person to discharge the evidential burden that he or she does not have the information sought by a question.

Pax Christi proposes that the ASIO Act be amended to provide that a person who has been questioned pursuant to the Act and fails to provide the information which was sought commits an offence only if the prosecution – not the person - bears the evidential burden and proves that a detained person failed to disclose information in his or her possession and the information was relevant to a terrorism offence.

Transparency

Another weakness in the ASIO Act is its lack of transparency.

The Act has the effect that a person, who is not suspected of any offence, may be taken into immediate custody and detained for 168 hours in accordance with a warrant without prior warning, where no opportunity is provided to notify family or employer. It is also possible that the place of detention and questioning is outside the State in which he or she was taken into custody. The ASIO Act does not prohibit action to take the person outside Australia. If the person detained discloses information relating to the warrant and questioning, eg discloses to his or her political representative that he or she was mistreated during the period of detention, the disclosure is likely to contravene s 34VAA of the ASIO Act and exposes the person to five years imprisonment.

The arrangements for oversight of persons in detention are manifestly inadequate. The abuses of prisoners during interrogation in Iraq by US and British military were treated as credible only when photographs of the abuse were published. It is likely that the publication of a photograph of inhumane treatment of a person detained under the ASIO Act would contravene s 34VAA of the Act, even though the inhumane treatment itself would contravene the Act.

Pax Christi proposes that the ASIO Act be amended to permit disclosure of treatment during questioning and detention within a short period of the issue of a warrant, say after three months have elapsed.

Conclusion

As stated in the Universal Declaration, certain human rights and freedoms are fundamental to the continuance of a free society and may be limited only in exceptional circumstances and then only so far as is strictly necessary. Pax Christi agrees with Secretary-General Kofi Annan in his address referred to earlier that 'upholding human rights ... is an essential element' of any successful counter-terrorism strategy. The ASIO Act fails to do this.

Pax Christi urges the Parliamentary Joint Committee on ASIO, ASIS and DSD to recommend that the ASIO Act be amended to ensure due protection for fundamental human rights.

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