

**Parliamentary Joint Committee**

**on ASIO, ASIS and DSD**

**An Advisory Report on the Australian Security Intelligence Organisation  
Legislation Amendment (Terrorism) Bill 2002**

Submission: 114

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**Subject:** submission re security laws amendments

SUBMISSION TO THE JOINT PARLIAMENTARY COMMITTEE CONCERNING PROPOSED AMENDMENTS TO THE FEDERAL SECURITY ACTS  
April 12, 2002, from Barbara Hocking, retired barrister, first barrister briefed in the Mabo cases.

This submission is directed in particular to those provisions of the ASIO Amendment Bill 2002 concerning proposed increases in the powers of ASIO agents:

1. The proposal is that an ASIO operative is to be able to hold and/or have held for questioning any person - including any child - who allegedly may have some knowledge of or connection with 'terrorism' or 'terrorists'.
2. This new power is to operate initially for a period of 48 hours, without the laying of any charge(s) and without any legal representation and without anyone being able to know where that person is or has been taken or why. Moreover, the so-called 'right to silence' principle of our law is to be removed and there would be severe penalties for not answering questions. Does a failure to answer include answering only with name, rank and address, comparable to the name, rank and number, with which prisoners of war were always instructed to answer? What status has an 'I don't know' answer? This extraordinary removal of the normal safeguards of our legal system is a power to be initiated and exercised, not by the criminal law in its role as part of the judicial arm of government, but by the security system in its role as part of the executive arm of government.
3. The proposal is an oppressive extension of the powers of detention of both children and adults by the federal government. No State criminal law has comparable provisions, and, consequently, State procedures cannot apply; although normally State law would be the procedural law in operation. Therefore, State criminal law procedures have to be excluded from this area. This is because the present rule is that in criminal (as in other) matters the procedures of the relevant State are those that apply to any Federal matters being handled in a particular State's court system. A new inter-se law is being established here - it would seem that the method is by consent of the States - and this alone makes it open to question as to its constitutional validity.

Further, so extreme a power in the hands of the executive arm of government has no place in the law of a democratic society that is supposedly safeguarded by the separation of powers and the rule of law. Under the federal Constitution, Australian laws have to be drafted within the operation of the doctrine of the separation of powers. As a result, the law - the legal arm of the three branches of a democratic government - must be a separate and independent arm of our tripartite system. It is well-known for example that courts cannot exercise the executive or the legislative powers. Similarly, the executive decision-making function has to be separate from the other two powers. Consequently, the legal arm, which includes the criminal law, cannot function as a mere extension of the powers of the executive arm of government; just as the executive cannot take into its powers the criminal law. That is to deny and be in breach of the doctrinal requirement that there be a separation of the three powers of democratic government. This is the crux of the difference between a tyranny and a democracy. Due process of law means more than the mere passage of an Act - legislation in a democracy cannot be in conflict with the doctrine of the separation of powers. For this reason, in my opinion, the proposed amendments are in all probability unconstitutional, as well as being a violation of the historical development of our free democratic society. They are both legally and morally at fault. They represent the sort of tyranny of the executive practised five centuries ago by the Star Chamber in the time of the Tudors, as well as the methods of the German Gestapo and SS, and the Russian Tsarist secret police and Soviet KGB. We have here the spectre of the knock on the door during the

night and the disappearance of people at the behest of an arm of the executive government.

5. I therefore submit further that these proposals will destroy the ethical basis of the values for which we stand and fight, thereby giving to terrorists the very victory over us that they are seeking. Sacrifices have to be made, but in my opinion, the legal safeguards and foundations of our democratic way of life should not be among them. This is to destroy us, not to save us.

I write here as a lawyer conscious of the frailty of democracy - old enough even to remember Hitler's gradual destruction of German democracy. Historical lessons can provide warnings of dangers we need to avoid. There are always reasons to be found for destroying democracy bit by little bit.

My submission to the Joint Parliamentary Committee is that it has a responsibility to ensure that the security services of our democracy operate so as to preserve our way of life by retaining the democratic balance in Australian society. Our society functions as a democracy because it follows the doctrine of the separation of powers between the executive and the legislative and the judicial arms of government.

My submission is that the adoption of these amendments would so change that balance that the doctrine of the separation of powers would be destroyed, and Australia, by their adoption, will take the path from a democratic to a tyrannical society, since the executive power would improperly include a criminal law power.

Criminal law is necessarily part of the judicial power - never part of the executive power. Only in a tyranny does the executive take over from the judiciary in an area that has always been and indeed in a democracy must always remain part of the judicial power.

Finally, Australians will no longer be protected by the rule of law from any abuse of this new executive criminal law power.

6. It seems that this power to detain an alleged suspect incommunicado for questioning is able to be renewed by ASIO for further periods of time. At least three times, ie 144 hours, and the actual limit (if any) is unclear. Moreover, it applies to both children and adults! My submission is to ask the Joint Parliamentary Committee to oppose such extraordinary departures from the practices of the common law and from our democratic history.

7. Finally, is the implementation of this procedure to be open to supervision by the courts, as is the case in other criminal procedures? Or is this extension of executive powers outside the jurisdiction of the legal system? To operate in that way, would be yet another denial of both the rule of law and the principles of democracy as we know them in Australia.

I would be available to speak to this submission at the public hearings of the Committee in Melbourne. Thank you.

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