

Academics fire shot heard in detention

Review, by Bill Rowlings, CEO, Civil Liberties Australia

In a pre-emptive bid to restore sanity to Australia's terror laws regime, Lisa Burton, Nicola McGarrity and Prof George Williams have fired the first sensible shot.

The three UNSW academics have produced a detailed paper analysing how the "extraordinary" questioning and detention powers of ASIO have been used – or not used – since being enacted in 2003.

The *Australian Security Intelligence Organisation Legislation (Terrorism) Amendment Act 2003 (Cth)* is the most controversial piece of anti-terrorism legislation passed by the Commonwealth Parliament, they say. It created a system of warrants that permit the Australian Security Intelligence Organisation (ASIO) to question and detain non-suspects to gather intelligence about possible terrorism offences.

They point out that the use, misuse or non-use of such laws will come under scrutiny over the next few years, preparing for parliament to decide whether to keep them before July 2016, when they expire automatically under a 'sunset clause' proviso.

In conclusion, they say the "Special Powers Regime (is) extraordinary. There is no precedent for such powers either in Australia or in other like nations."

"The Regime was accepted as an exceptional measure, and the inclusion of a sunset clause demonstrates that parliamentarians believed that it would be temporary. Ten years on, the Special Powers Regime can no longer fall back on these justifications. Today, a different question must be asked — whether there is a basis for the Special Powers Regime becoming a *permanent* feature of Australia's legal landscape."

Burton, McGarrity and Williams say the most extraordinary power is for 'authorities' (basically, public servants such as police) to detain someone without charge or trial.

"This power challenges the general rule that Australians should only be detained as a result of a finding of criminal guilt by a judicial officer. For this reason, the power should not be accepted unless there is clear evidence that it is necessary to protect the community from terrorism. It is not enough to say that ASIO will exercise restraint and only request a Detention Warrant if it believes that the circumstances necessitate it. The rule of law requires that legislation tightly constrain executive discretion."

They point out there's no evidence that questioning warrants have produced terrorism convictions, or even trials. As well, the regime can restrict the access of an uncharged person to legal help, ASIO can monitor lawyer-client conversations...and someone detained on suspicion, without charge, can't tell people where they are and what's happened.

"The question of whether — and to what extent — individual rights and freedoms can be restricted in times of emergency is one of the most challenging to have faced Western democracies. An even more difficult question faces us today. A decade on from the September 11 terrorist attacks, this state of emergency has become the norm; there is no end in sight for the 'war on terror'. Therefore, Australia must start considering and answering the question of what its anti-terrorism laws should look like for the long term. Is it prepared to accept the ASIO Special Powers Regime as an 'ordinary' part of the legal framework? The Regime makes substantial inroads into fundamental human rights. Intelligence agencies are given unprecedented powers to detain non-suspects. These powers might be acceptable

if they were required to protect Australia from a terrorist act. However...they have rarely been used and the need for them over the longer term has not been made out.”

The article http://www.mulr.com.au/issues/36_2/36_2_3.pdf, in the Melbourne University Law Review Edition (2012) Volume 36(1), includes this table relevant to warrants to date:

Table 1

Year ending 30 June	Warrants sought	Warrants issued	Number of persons	Length of questioning (by person)	Total hours of questioning
2004	3	3	3	15:57	69.05
				10:32	
				42:36	
2005	11	11	10	15:50	69.04
				5:17	
				7:37	
				12:49	
				2:38	
				5:24	
				4:05	
				4:05	
5:17					
2006	1	1	1	4:20	4.20
2007	0	0	0	0	0
2008	0	0	0	0	0
2009	0	0	0	0	0
2010	1	1	1	5:48	5.48
2011	0	0	0	0	0
2012	0	0	0	0	0
Totals	16	16	15	148 hours and 17 minutes	148 hours and 17 minutes

²⁹¹ ASIO, *Report to Parliament 2003–2004*, above n 164, 39–40; ASIO, *Report to Parliament 2004–2005*, above n 164, 41; ASIO, *Report to Parliament 2005–2006* (2006) 45; ASIO, *Report to Parliament 2006–2007* (2007) 122; ASIO, *Report to Parliament 2007–08* (2008) 122; ASIO, *Report to Parliament 2008–09* (2009) 112; ASIO, *Report to Parliament 2009–10* (2010) 136; ASIO, *Report to Parliament 2010–11* (2011) 158; ASIO, *Report to Parliament 2011–12* (2012) 129.

SMH story: <http://www.smh.com.au/opinion/political-news/repeal-urged-of-asio-detention-powers-act-20130131-2dnhf.html>