



COPY

Our Ref: JC:ssh:1292012

6 May 2009

The Hon. Robert McClelland MP
Attorney-General
Parliament House
CANBERRA ACT 2600

Dear Attorney,

Re: ASIO's questioning and detention powers

I refer to your letter dated 9 April 2009 which responded to my letter to you dated 4 February 2009 sent on behalf of the Law Society's Human Rights Committee in regard to ASIO's powers.

I thank you for your time taken to consider our concerns and to reply.

The Committee has considered your reply and has asked me to respond, as follows.

Two matters raised in the initial letter were the possible constitutional difficulty surrounding these powers and secondly their possible breach of Australia's international human rights obligations.

It may be difficult for you to comment on any constitutional difficulty and we are content to have raised the issue with you.

However, so far as the human rights issue is concerned, your letter did not address that question, perhaps because the Committee's concerns in that respect were not specified.

Two human rights issues the Committee identifies are that the powers apply to non-suspects who may possess information about the commission of terrorist offences by others, and second that the offences may be relatively minor, for example a small donation to a recognised terrorist organisation like Hamas may be a "terrorist offence" under Part 5.3 of the Criminal Code 1995 (Commonwealth).

It is submitted that the right to personal liberty in Article 9(1) of the International Covenant on Civil and Political Rights ('ICCPR') is infringed by the detention power because to detain a non-suspect incommunicado relating to a relatively minor offence *by another*, for up to a week is grossly disproportionate to the end hoped to be achieved.



Further, persons questioned under the powers are required to answer, even when that may involve self-incrimination. Although the answers cannot be used as evidence in criminal proceedings, a confession could be used to compile other evidence of guilt and in those circumstances, the legislation appears to breach Article 14 (3) (g) of the ICCPR which requires parties to that treaty to avoid requiring confessions by charged persons.

There are a number of safeguards built into the legislation to prevent abuse of the detention and/or questioning procedure itself which are valuable. However, those safeguards do not prevent the breaches above. In addition a non-suspect who refuses to answer questions is exposed to a maximum criminal penalty for that refusal of 5 years gaol. This penalty appears excessive for someone who merely fails to give information about the activities of others.

The Committee is also concerned that the possession of interrogation powers of non-suspects by an intelligence organisation is unprecedented in the Western world.

These powers are essentially police powers exercised by a secret intelligence organisation. It is submitted that because ASIO's agents cannot be identified, there are dangers involved in giving any police powers at all to such an organisation. ASIO existed for more than 50 years before it was given police powers. Why is there a need for such powers, particularly when balanced against what appear to be breaches of fundamental rights by the legislation.

Finally, the use by ASIO of such powers is likely to involve the organisation in controversy which could be injurious to its reputation and affect the level of cooperation which citizens should feel obliged to provide to it.

I thank you in anticipation of your further consideration of these issues.

Yours sincerely



Joseph Catanzariti
President