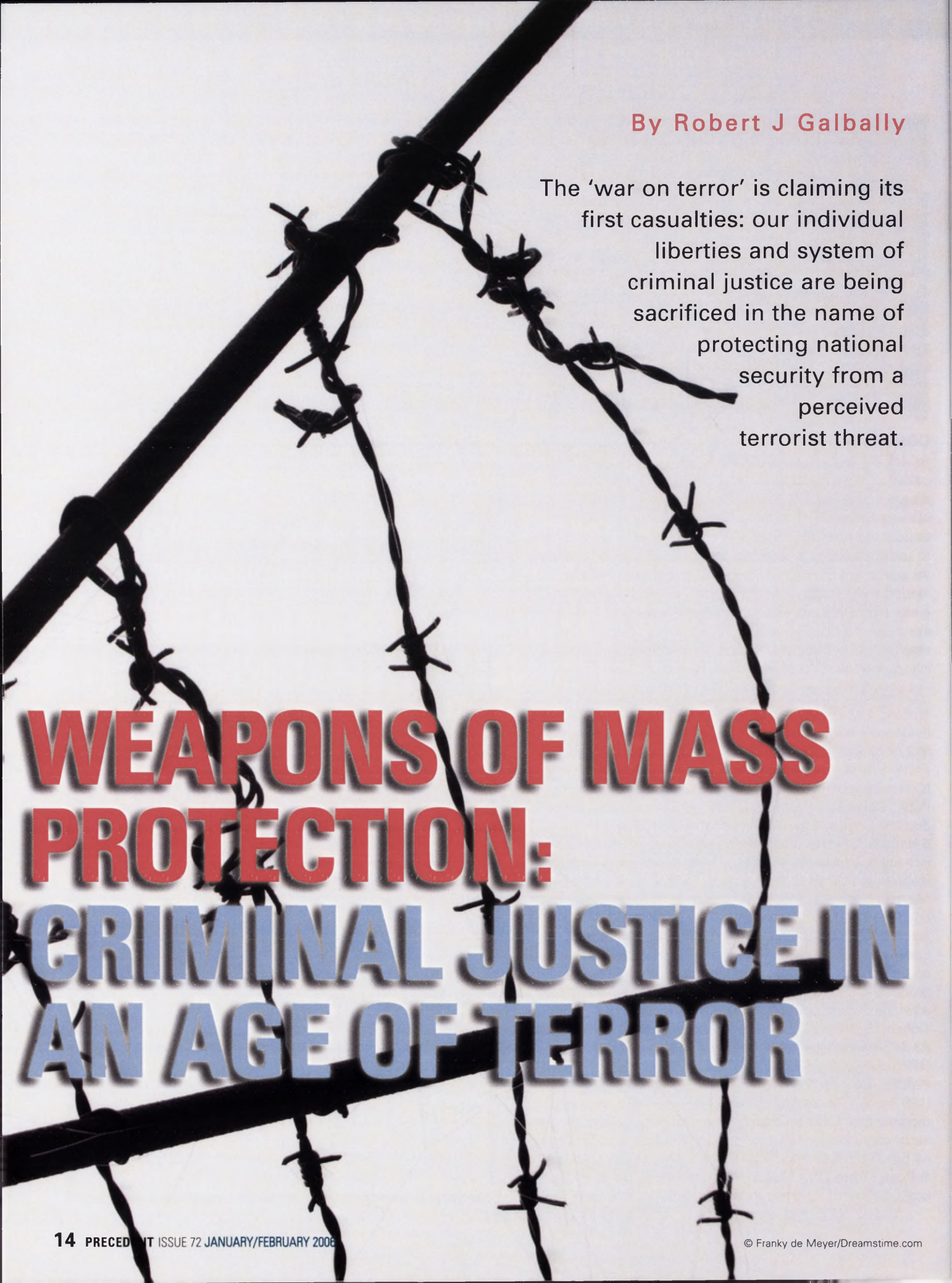

By Robert J Galbally

The 'war on terror' is claiming its first casualties: our individual liberties and system of criminal justice are being sacrificed in the name of protecting national security from a perceived terrorist threat.

WEAPONS OF MASS PROTECTION: CRIMINAL JUSTICE IN AN AGE OF TERROR

The current legislative framework provides for detention without charge, severe limitations to a fair trial, and the removal of the free choice to appoint one's own lawyer. The role of an advocate as well as the rights of an accused have been severely eroded by the recent legislation, all enacted in the name of national security.

The draconian 'anti-terror' laws, which were passed late last year, garnering mass media coverage and prompting public demonstrations, have somewhat overshadowed earlier changes made in the wake of 9/11. These earlier changes, which also departed radically from our criminal law heritage, warrant close examination if the full scope of counter-terrorism measures is to be properly understood. This article assesses the implications of those earlier reforms.

PRETEXT: LEADING THE WAY

After the tragic events of 11 September 2001, the Howard government hurried to stand together with the Bush and Blair administrations in declaring that the attacks necessitated an unmitigated 'war on terror.' In the face of criticism from domestic and international civil liberties groups, the Howard government followed the example set by our American and British allies and began introducing new, draconian anti-terror laws. Despite the fact that Australia has had little or no experience of terrorism we are, in the words of Attorney-General Philip Ruddock, 'leading the world in implementing counter-terrorism legislation'.[1]

The first raft of anti-terrorism legislation was introduced into the federal parliament on 12 March 2002. The legislative framework comprised five Bills, including:

1. Security Legislation Amendment (Terrorism) Bill 2002 [No 2] (Cth);
2. Suppression of the Financing of Terrorism Bill 2002 (Cth);
3. Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (Cth);
4. Border Security Legislation Amendment Bill 2002; and
5. Telecommunications Interception Legislation Amendment Bill 2002 (Cth).

These Bills were passed relatively swiftly in 2002. The *Anti-Terrorism Act* 2004 (Cth)('Anti-Terrorism Act') was introduced only last year and passed in June 2004. The Anti-Terrorism Act, according to Mr Ruddock, "put Australia's counter-terrorism legislative framework at the forefront of international efforts to combat terrorism".[2] Perhaps Mr Ruddock is referring to the fact that our Anti-Terrorism Act contains a definition of terrorism that goes above and beyond Bush's *USA Patriot Act* (2001).[3]

Another major player in Australia's new anti-terrorism laws was supposed to be the Australian Security Intelligence Organisation Legislations Amendment (Terrorism) Bill 2002 (Cth). The Bill was rejected by the Senate in December 2002, reintroduced in March 2003 with some minor amendments and then finally enacted in June 2003. It now forms part of the *Australian Security Intelligence Organization Act* 1979 (Cth) ['ASIO Act']. The *National Security Information (Criminal and Civil Proceedings) Act* 2004 (Cth)['National Security Act'], which aims to prevent the disclosure of security sensitive information in federal civil and criminal proceedings, was enacted in 2005. This article addresses these three Acts.

THE RIGHT WAY

When examining these new legislative regimes, we must ask whether or not they comply with fundamental, normative legal principles established under international treaties to which Australia is a party. One such treaty is the *UN International Covenant on Civil and Political Rights* ['ICCPR'][4] which proscribes arbitrary arrest and detention. The onus on ratifying nations in relation to the enactment of new domestic anti-terror laws was established by the UN General Assembly in Resolution 54/164, which confirmed that all measures to counter terrorism must be in 'strict conformity with the relevant provisions of international law, including international human rights standards'.[5] In relation to these standards, the ICCPR is most instructive:

Article 9.1 states that: 'Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.'

Article 14 of Section 1: 'All persons shall be equal before the courts and tribunals. In a determination of any criminal charge against him ... everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law ...'

Article 14.3: 'In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality';

Sub-Section (b): 'To have adequate time and facilities for the preparation of his defence and to communicate with Counsel of his own choosing.

Sub-Section (d): 'To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing...'

Democratic nations, which have pioneered the development and implementation of these standards, must uphold these basic freedoms, especially when faced with challenges such as terrorism. Australia, it appears, is failing in this regard.

THE WRONG WAY: ARBITRARY DETENTION WITHOUT CHARGE

Under the new ASIO Act, any person, whether or not they are suspected of an offence, may be detained and questioned for an indefinite period of time. The amendments enable ASIO to obtain a warrant permitting the compulsory detention and/or interrogation of a non-suspect or suspect as long as the authority issuing[6] the warrant has 'reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.'[7] A single warrant for detention issued in this way must not exceed 168 hours, or seven days. However, there is no limitation on the total period of detention for any person. That is, >>

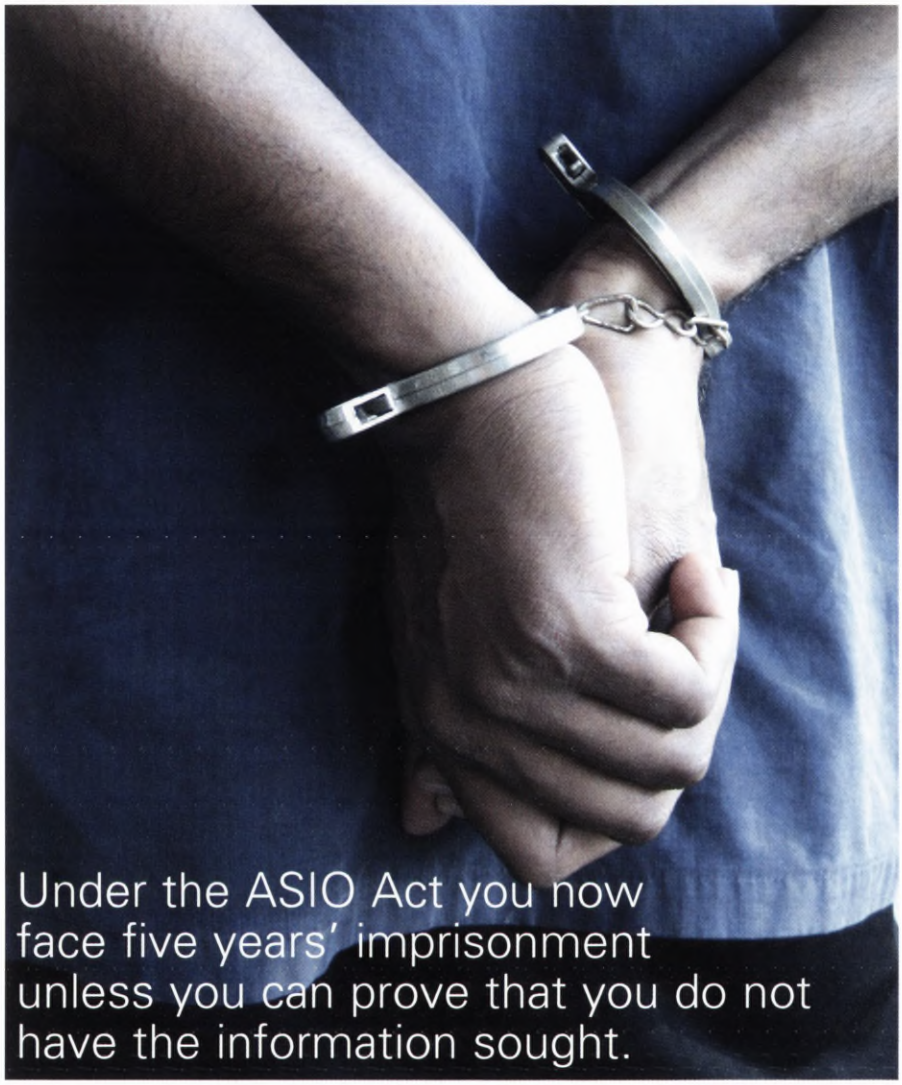

Photo: Jeremy Scheerlinck

where new material establishing reasonable grounds is produced, successive warrants for seven-day detention may be obtained from the issuing authority. The evident danger inherent in this regime is the potential for an uncharged person to be detained indefinitely under successive warrants.

These new amendments to the ASIO Act enable the detention of non-suspects to be authorised by a non-court body. As such, the amendments directly contradict Article 9.1 of the ICCPR. Surely there is a need for consistency between laws enacted in Australia and the laws of the international community to which we are a party?

Imagine that you have been arrested and detained without charge. Perhaps you appear suspicious, or perhaps you have a satellite connection that allows you to watch the Al Jazeera television network. You are detained with no inkling as to when you will be released. An ASIO official requests some information or some item from you. You do not possess the information sought or the item requested from you. Under the ASIO Act you now face five years imprisonment (strict liability) unless you can prove that you do not have the information sought.[8] Your right to silence is stripped from you and the onus of proof is reversed. At this time, you begin to think you need some legal advice.

RESTRICTING ACCESS TO LAWYERS

Think again. The ASIO Act also contains all sorts of provisions pertaining to the 'involvement of lawyers' in ss34U and 34TA. The token right to legal counsel contained in s34C(3B) of the legislation is watered down later in the ASIO Act. While 34C(3B) prescribes that:

> 'In consenting to the making of a request to issue a warrant authorising the person to be taken into custody immediately, brought before a prescribed authority immediately for questioning and detained, the Minister must ensure that the warrant to be requested is to permit the person to contact a single lawyer of the person's choice (subject to section 34TA)...'

Section 34TA – appropriately titled 'limit on contact of lawyer of choice' – renders this notion of choice a fallacy. 'Choice,' it would seem, is a misleading notion anywhere in the ASIO Act. In reference to lawyer contact, the 'prescribed authority'[9] has the power to prohibit access to a lawyer entirely if the authority deems that access likely to alert a person involved in a terrorism offence that the offence is being investigated.[10]

The ASIO Act also contains provisions that directly contradict the principle of lawyer-client privilege. That is, pursuant to s34U(2), contact between a detainee and their lawyer is 'able to be monitored'.[11] In addition, the lawyer can intervene in the questioning of the detainee only in order to request clarification of a confusing question.[12] If the lawyer disrupts the interrogation, ASIO is authorised to remove that lawyer[13] and questioning may occur in the absence of a lawyer.[14]

The effect of these provisions upon lawyers is profound and disturbing. These provisions fly in the face of the very spirit and tenor of Articles 14.3 (b) and (d) of the ICCPR.

HINDERING THE DEFENCE

Let us revisit our hypothetical arrest-and-detention scenario. Your interrogation by ASIO has now led to the issuing of criminal charges against you. You are now facing a federal criminal prosecution. You and your lawyer find yourselves falling within

the ambit of National Security Act. This Act, once invoked by the prosecution, makes it compulsory for your lawyer to obtain security clearance before you can openly communicate with them.

Pursuant to s39 of the National Security Act, once the prosecutor elects to invoke the operation of the legislation, any legal representative of a defendant in a federal criminal proceeding must obtain security clearance.[15] This requirement severely inhibits the defendant's choice of representation, especially when you consider who will be authorising the security clearances – ASIO. Moreover, only those lawyers who are given notice by the Secretary of the Attorney-General's department are entitled to apply for security clearance. There is no obligation under the Act to give notice or grant clearance to a lawyer engaged by the defendant. If your lawyer does not obtain security clearance, s46 of the Act makes it an offence, punishable by up to two years imprisonment, for you to disclose to that lawyer certain information which is likely to prejudice national security in any way.[16]

Alarmingly, the issuing of notice by the Secretary of the Attorney-General's department is not a necessary condition for an offence under s46 to be made out. But what is disclosure of information 'likely to prejudice national security'? Section 17 tells us that:

> 'A disclosure of national security information is likely to prejudice national security if there is a real, and not merely a remote possibility that the disclosure will prejudice national security.'[17]

The rest of the National Security Act is equally cryptic: so much so that you might offend s46 without even being aware of it. Not only must your lawyer posses security clearance, but that clearance must be 'at the level considered appropriate by the Secretary…'[18] Even then, if you want to be sure to avoid a possible two-year term of imprisonment, you shouldn't speak to your lawyer unless 'the disclosure has been approved by the Secretary'[19] and 'the disclosure takes place in compliance with conditions approved by the Secretary'.[20] Ultimately, the decision as to what a prohibited disclosure may or may not be and the determination as to what constitutes an offence under s46 rests entirely in the hands of the Secretary of the Attorney-General's department. So much for the separation of powers.

The overriding effect of these provisions is to hinder the ability of the defendant's lawyers to receive proper instructions from their client and to thoroughly prepare their defence. Without the tick of approval from the Attorney-General's department and from ASIO, the defendant's lawyer will not be educated as to what the prosecution case is, will not be able to advise his/her client as to how to meet it, and may in any event be excluded from parts of the hearing.[21] Once again, Articles 14.3 (b) and (d) of the ICCPR are affronted by Australia's anti-terror legislation.

The ICCPR represents the international community embracing the existence of universal human rights. Until recent times, justice – in the true meaning of the expression – meant the right to freedom from arbitrary detention, to have a fair trial and that an accused could choose his or her own lawyer. The legislation analysed in this article not only offends the international standards of justice expressed in ICCPR, but it also dismantles the very cornerstones of our own system of criminal justice. How is a non-suspect detainee held without charge being treated as if they were innocent until proven guilty? Where is the sanctity of attorney-client privilege in a system that denies people access to their own lawyers? The legislation analysed in this article ought to raise serious doubts as to whether the fight against international terrorism can be won by introducing new repressive laws. What is the point of protecting our security if we are not free to enjoy it? ■

Notes: **1** Phillip Ruddock, 'Deakin Law School Oration 2004: National Security and Human Rights', (2004) 14 *Deakin Law Review* 9. **2** Phillip Ruddock, *Ibid.* **3** *Uniting and Strengthening America by Providing Tools Required to Intercept and Obstruct Terrorism Act of 2001*, Pub L No 107-56, 115 Stat 272 (2001). For the Australian definition of 'terrorism' or 'terrorist act' see generally *Criminal Code Act (1995)* (cth) Part 5.3—Terrorism. **4** *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966, UNTS 3 (entered into force 23 March 1976). **5** UN Doc A/Res/54/164 (1999). **6** The 'issuing authority' is not a court but rather a person appointed by the Minister, who is a federal magistrate or judge. See ASIO Act s34AB for definition of 'issuing authority'. **7** ASIO Act s34D(1). **8** ASIO Act s34G. **9** The ASIO Act contains a system for the appointment of 'prescribed authorities'. The Attorney-General makes appointments from the ranks of retired judges of superior federal and state courts who have served on these courts for at least five years. If the Minister is of the view that there is an insufficient number of people to act as prescribed authorities, he may then appoint state judges of certain courts who have served for at least five years or persons who hold an appointment to the Administrative Appeals Tribunal and who have been enrolled as a legal practitioner for at least five years: ASIO Act s34B. **10** ASIO Act s34TA. **11** ASIO Act s34U (2). **12** ASIO Act s34U(4). **13** ASIO Act s34U (5). **14** ASIO Act s34TB. **15** See generally National Security Act s39. **16** See generally, National Security Act s46. **17** National Security Act s17. **18** National Security Act s46 (c) (i). **19** National Security Act s46 (c) (ii). **20** National Security Act s46 (c) (iii). **21** See, generally, National Security Act s29 – closed hearings and non-disclosure or witness exclusion orders in federal criminal proceedings.

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