Law School, University of Melbourne

VIC 3010

Tel: (03) 8344 7030

Secretary

Parliamentary Joint Committee on ASIO, ASIS and DSD

Parliament House
Canberra ACT 2600

23 March 2005

Dear Secretary,

Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD's review of ASIO's special powers relating to terrorism offences as contained in Division 3 Part III of the Australian Security Intelligence Organisation Act 1979 (Cth)

We would like to thank the Parliamentary Joint Committee on ASIO, ASIS and DSD ('the Committee') for the opportunity to make a submission to the Committee's review of ASIO's special powers relating to terrorism offences as contained in Division 3 of Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('special powers provisions'). If it assists the Committee, we would be prepared to appear before the Committee to elaborate upon our submission.

Should you have any queries, please do not hesitate to contact us.

Yours sincerely,

(Stephen Sempill) (Joo-Cheong Tham)

SUBMISSION TO THE PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD'S REVIEW OF ASIO'S SPECIAL POWERS

By Stephen Sempill[*] and Joo-Cheong Tham[+]

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[*] LLB student, Law Faculty, University of Melbourne.
[+] Lecturer, Law Faculty, University of Melbourne.

RECOMMENDATIONS

PAUCITY OF INFORMATION

- We **recommend** that the Committee request the Attorney-General authorize the disclosure of information relating to the exercise by ASIO of its powers to compulsorily question and detain without trial and, upon release of such information, provide additional time for public submissions and hearings.

REASONS FOR THE COMPLETE REPEAL OF THE SPECIAL POWERS PROVISION

- We **recommend** that the special powers provisions should be completely repealed. We do so on the grounds that:
  - the need to confer upon ASIO the power to compulsorily question and detain without trial in order to prevent politically/ideologically motivated violence has yet to be demonstrated;
  - these powers violate the principle that persons not charged with or convicted of any criminal wrongdoing should not be detained or placed in coercive circumstances; and
  - the provisions conferring the power to detain without trial are, arguably, unconstitutional.

THE POWERS SHOULD ONLY BE EXERCISED IN THE MOST EXCEPTIONAL SITUATIONS

- We **recommend** that the criteria for the exercise of these powers, in addition to present criteria, should include the requirement of reasonable suspicion of an *imminent* ‘terrorism’ offence involving *material risk* of *serious physical injury* or *serious property damage.*
  - We **recommend** that all criteria, including those recommended above, should bind both the Attorney-General and the ‘issuing authority’.

THE EXERCISE OF THESE POWERS SHOULD BE MADE AS TRANSPARENT AND PUBLIC AS IS PRACTICABLE

- We **recommend** that section 34VAA of the Act be completely repealed.
  - In its place, we **recommend** that the option of conferring upon ‘issuing’ and ‘prescribed’ authorities the power to issue orders for non-disclosure be investigated. Such power could, for instance, be modelled upon section 29B of the *Australian Crime Commission 2002* (Cth).

PERSONS SUBJECT TO THESE POWERS OF ASIO TO COMPULSORILY QUESTION AND DETAIN WITHOUT TRIAL SHOULD AT ALL TIMES HAVE ACCESS TO A LAWYER OF CHOICE AND TO EFFECTIVE LEGAL REPRESENTATION

- We **recommend** that:
    - questioning always occur with legal representation;
    - lawyers have the ability to intervene during questioning not only to clarify an ambiguous question but also to object to the questioning on legal grounds;
    - there be provision for breaks of 30 minutes after every two hours of questioning to enable lawyers to advise their clients**;** and
    - copies of video-recordings made pursuant to section 34K of the Act be supplied to the subjects of the questioning and detention warrants as well as their lawyers.

THE EFFECTS OF THESE POWERS, WHETHER DIRECT OR OTHERWISE, SHOULD BE REGULARLY MONITORED ESPECIALLY FOR THEIR DISCRIMINATORY IMPACT AND EFFECT UPON POLITICAL FREEDOMS

- We **recommend** that ASIO practices in relation to the ‘special powers’ be reviewed on an annual basis by the Human Rights and Equal Opportunity Commission and the results of such a review be made public.

I INTRODUCTION

This submission is divided into three main parts. Part A highlights the paucity of information regarding the exercise the Australian Security Intelligence Organisation's ('ASIO') power to compulsorily question and detain without trial. The second part, Part B, outlines reasons for the complete repeal of the special powers provisions. In the event that these provisions are not completely repealed, Part C submits that various principles should govern the exercise of these powers.

II PAUCITY OF INFORMATION

There is presently a paucity of information regarding the exercise by ASIO of its powers to compulsorily question and detain without trial. The main source of information relating to the exercise of these powers is found in ASIO's 2003-04 Annual Report.[1] Such information is, however, limited to detailing the number of requests made and warrants issued for either compulsory questioning or detention and the number of hours of compulsory questioning for the financial year 2003-04.

Significantly, disclosure of information relating to other aspects of these powers is prohibited by the broad-ranging secrecy offences found in section 34VAA(1)-(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth) ('the Act').

It was because of this paucity of information that a number of academics wrote a letter dated 17 February 2005 to the Attorney-General requesting that he authorize the disclosure of certain information. Such disclosure was requested so that this Committee could conduct a proper and effective review of the special powers provisions (a copy of the letter is attached as an appendix to this submission). At the time this submission was sent to the Committee, a response has yet to be received from the Attorney-General.

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[1] See http://www.asio.gov.au. Another source of information is the Inspector-General of Intelligence and Security's 2003-2004 Annual Report (available at http://www.igis.gov.au)

We **recommend** that the Committee also request the Attorney-General authorize the disclosure of information relating to the exercise by ASIO of its powers to compulsorily question and detain without trial and, upon release of such information, provide additional time for public submissions and hearings.

III THE REASONS FOR COMPLETE REPEAL OF THE SPECIAL POWERS PROVISION

We **recommend** that the special powers provisions should be completely repealed. We do so on the grounds that:

- the need to confer upon ASIO the power to compulsorily question and detain without trial in order to prevent politically/ideologically motivated violence has yet to be demonstrated;
- these powers violate the principle that persons not charged with or convicted of any criminal wrongdoing should not be detained or placed in coercive circumstances; and
- the provisions conferring the power to detain without trial are, arguably, unconstitutional.

A *Necessity for Powers yet to be Demonstrated*

In a speech made shortly after the September 11 attacks, High Court Justice Michael Kirby cautioned:

> Keeping proportion. Adhering to the ways of democracy. Upholding constitutionalism and the rule of law. Defending, even under assault, and even for the feared and hated, the legal rights of suspects. These are the ways to maintain the support and confidence of the people over the long haul … every erosion of liberty must be thoroughly justified. Sometimes it is wise to pause before acting precipitately…Always is it wise to keep our sense of reality and to remember our civic traditions. [2]

[2] Justice Michael Kirby, 'Australian Law — After 11 September 2001' (2001) 21 *Australian Bar Review* 253, 263.

It is clear from this statement that any legislation that restricts civil liberties and departs from long-standing democratic norms requires a particularly heavy burden of justification – the onus of justification falling on those seeking to change the law.

More than three years after the special powers provisions were proposed,[3] such justification is still not made out. The consequence is that they should be completely repealed. As cogently argued by Duncan Kerr:

> The ASIO legislation ought to be seen as so exceptional that, when parliament reconsiders these laws in three years (under the sunset clause), it should remove them from the statute book unless a proper case for their continuation can still be made out. This is not the sort of legislation which, once introduced, should be allowed to become just another part of our political and legal landscape.[4]

That a proper case has not been made for the continuation of the 'special powers' provisions can be seen by examining the key reason given for these provisions, that is, the powers they confer upon ASIO are necessary in order to prevent political/ideological violence. This reason is far from persuasive simply because the powers that ASIO possessed prior to the enactment of the special powers provisions (and continue to possess) would seem more than adequate to prevent political/ideological violence.

A brief survey of the extensive powers ASIO presently has in relation to intelligence gathering proves this point. In this, ASIO's powers stem from warrants it can seek from the Attorney-General. These warrants fall into two categories:

- those relating to 'security'[5] generally; and
- those relating to the gathering of 'foreign intelligence'.[6]

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[3] The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 (Cth) was tabled in the federal Parliament in March 2002. For an analysis of the initial proposal, see George Williams, 'Australian Values and the War against Terrorism' (2003) 26 *University of New South Wales Law Journal* 191. For an account of the enacted provisions, see Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) 212-30; Brian Walters, 'The War on Terror: Labor's Capitulation to the ASIO Legislation' (2003) 12 *Dissent* 48.

[4] Duncan Kerr, 'Australia's Legislative Response to Terrorism: Strengthening arbitrary executive power at the expense of the rule of law' (2004) 29 *Alternative Law Journal* 131, 133.

With respect to the first category, ASIO, upon satisfying the Attorney-General that there are reasonable grounds for believing that the issuing of the requested warrant will substantially assist the collection of intelligence in respect of a matter that is important to security, may be issued search[7] and computer access warrants.[8]

Probably because of their more invasive character, stricter conditions apply to the issuing of warrants relating to listening devices,[9] tracking devices,[10] the inspection of postal[11] and delivery service articles[12] and telecommunication interceptions.[13] Generally, such warrants can be issued by the Attorney-General only if s/he is satisfied that:

- the person/s affected by the warrant is engaged in or reasonably suspected of being or likely to being engaged in activities prejudicial to security;
- the action/s authorised by the warrant will assist ASIO in obtaining intelligence relevant to security.

ASIO's capacity to seek warrants is greater in relation to 'foreign intelligence'. This concept is statutorily defined to mean 'intelligence relating to the capabilities, intentions or activities of a foreign power'.[14] 'Foreign power' in turn means foreign governments, entities directed or controlled by such governments *and* foreign political organisations.[15] An organisation like al-Qaeda, for instance, would qualify as a 'foreign power' because it is a foreign political organisation.

Generally, ASIO can be issued any of the above warrants if it satisfies the relevant Minister that the collection of foreign intelligence relating to a specified matter is

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[5] For the statutory definition of 'security, see section 4 of *Australian Security Intelligence Organisation Act 1979* (Cth) ('the Act').
[6] Ibid.
[7] Ibid s 25.
[8] Ibid s 25A.
[9] Ibid s 26.
[10] Ibid ss 26A-C.
[11] Ibid s 27.
[12] Ibid s 27AA.
[13] *Telecommunications (Interception) Act 1979* (Cth) s 9.
[14] The Act s 4.

important in relation to the defence of the Commonwealth or to the conduct of the Commonwealth's international affairs.[16]

While the conditions applying to these 'foreign intelligence' warrants is stricter in one respect in that they are restricted to the defence of the Commonwealth and the conduct of the Commonwealth's international affairs, they are much more relaxed in other respects. First, the Attorney-General does not have to be satisfied that the conduct authorised by the warrant will assist, let alone substantially assist, in the collection of 'foreign intelligence'. Further, the issuing of more invasive warrants, for instance, listening devices, are not conditioned on the affected person being engaged in or reasonably suspected of being engaged or likely to be engaged in activities prejudicial to security.

The breadth of these extensive intelligence-gathering powers can be illustrated by an example involving a person reasonably suspected of having information pertaining to a terrorist act. Take, for instance, a person who is reasonably suspected of having information pertaining to an al-Qaeda plot to bomb the American embassy. Such a person need not be a member of al-Qaeda or be directly involved in the bomb plot. Indeed, such a person need not even be in actual possession of relevant information. For example, such persons could include relatives or lawyers of suspected al-Qaeda members. If ASIO were to request any warrant in relation to such a person, the Attorney-General could legally issue it because collecting intelligence in relation to a plot to bomb the American embassy would be important to the Commonwealth's conduct of international affairs. Warrants then could be legally issued to tap the telephone or bug the house of such a person.

The lack of necessity for the powers to compulsorily question and detain without trial not only stem from the scope of ASIO's other intelligence-gathering powers. It also arises from the fact that these powers can be used against an extremely wide range of conduct.

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[15] Ibid.
[16] Ibid s 27A and *Telecommunications (Interception) Act 1979* (Cth) s 11A.

Specifically, these powers can be used against conduct that might constitute a 'terrorism' offence under the *Criminal Code*.[17]

Such offences catch a very broad range of conduct; some of which are clearly considered legitimate political activity. For instance, it could be seriously argued that persons who are members of the Liberal Party are, by virtue of their membership, now committing a 'terrorism' offence. This results from section 102.3 of the *Criminal Code* which presently makes punishable by a maximum of 10 years' imprisonment to knowingly be a member of a 'terrorist organisation'.

This conclusion stems from the fact that it is strongly arguable that the Liberal Party is a 'terrorist organisation' because of its support for the use of military force in Iraq. Such military force clearly meets the statutory definition of a 'terrorist act'. Among others, it caused deaths and was done 'with the intention of advancing a political . . . cause', whether it be democracy, freedom or otherwise and 'with the intention of coercing . . . the government of . . . a . . . foreign country', namely, coercing the then existing Iraqi government.[18]

If the use of military force in Iraq is a 'terrorist act' under the *Criminal Code* then an organisation that is 'directly or indirectly . . . fostering' the use of such force, for instance, through political support would, like the Liberal Party, be a 'terrorist organisation' under the *Criminal Code.* In such circumstances, persons who are members of the Liberal Party and know of its support for the use of military force in Iraq would be breaching section 102.3 of the *Criminal Code.* If this is the case then ASIO can employ its power to compulsorily question and detain without trial not only members of the Liberal Party but also, in some circumstances, persons suspected of having information

[17] See ss 4, 34C(3), 34D(1)(b) of the Act. For discussion of the 'terrorism' offences, see Jenny Hocking, above n 3, Chapter 11; Bernadette McSherry, 'Terrorism Offences in the *Criminal Code:* Broadening the Boundaries of Australian Criminal Laws' (2004) 27 *University of New South Wales Law Journal* 354 and Nick O'Neill, Simon Rice and Roger Douglas, *Retreat from Injustice: Human Rights Law in Australia* (2004) Chapter 11.

[18] Ibid s 100.1. See generally Ben Goulder and George Williams, 'What is 'Terrorism'?: Problems of Legal Definition' (2004) 27 *University of New South Wales Law Journal* 270.

relating to such membership. It borders upon absurdity to suggest that such broad powers are necessary to prevent political/ideological violence.

The argument that the powers of ASIO to compulsorily question and detain without trial are unnecessary in order to prevent political/ideological violence because of the breadth of the 'terrorism' offences has acquired even greater force since the enactment of the special powers provisions. Since then, the scope of the 'terrorism' offences has expanded in key respects. The breadth of offences relating to 'terrorist organisations' has been considerably amplified since the passage of the *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth); an Act which empowers the Attorney-General to proscribe organisations he considers to be 'terrorist organisations'.[19] Moreover, it is now an offence, in some circumstances, to associate with members and other persons involved in a 'terrorist organisation'.[20]

B *Violation of the Principle that Persons not Charged with or Convicted of any Criminal Wrongdoing Should not be Detained or Placed in Coercive Circumstances*

A fundamental precept of liberal democracy is the adherence to the rule of law. It is, in turn, a cornerstone of the rule of law that 'a man may with us be punished for a breach of law, but he can be punished for nothing else (sic).'[21] As stated by Brennan, Deane and Dawson JJ in *Lim v Minister for Immigration*, 'the involuntary detention of a citizen in custody by the State is (generally) penal or punitive in character.'[22] So it is that it can be reasonably said that detention of persons through the special powers provisions is a form of punishment. By analogy, being subject to the compulsory questioning powers can also be said to be a form of punishment: it places individuals in coercive circumstances where they have no right to silence.

[19] For discussion, see Joo-Cheong Tham, 'Casualties of the Domestic 'War on Terror': A Review of Recent Counter-Terrorism Laws' (2004) 28 *Melbourne University Law Review* 512, 518-520.
[20] *Criminal Code* s 102.8; inserted by *Anti-Terrorism Act (No 2) 2004* (Cth). See generally Senate Legal and Constitutional Legislation Committee, *Report on Provisions of the Anti-terrorism Bill (No 2) 2004* (2004).
[21] A V Dicey, *Introduction to the Study of the Law of the Constitution,* (10th ed, 1959) 202.

Both forms of punishment are being imposed on persons who are not suspected of, charged with or convicted of any criminal wrongdoing. In permitting such punishment, the special powers provisions are contrary to the rule of law and violate the most fundamental aspects of our criminal justice system. Indeed, these powers turn on its head Blackstone's maxim, "better that ten guilty persons escape than that one innocent suffer.'[23]

The violation of these key precepts of the rule of law is even more egregious given the wide range of conduct captured under the 'terrorism' offences. In the preceding section, it was argued that membership of the Liberal Party is likely to be a 'terrorism' offence. The 'terrorist organisation' training offence provides another good illustration of the breadth of these offences.[24] A 'terrorist' organisation can, for example, be an organisation which is predominantly involved in charitable work but is also indirectly involved in a 'terrorist' act. Moreover, the training element of these offences does not have to be related to a 'terrorist act': it suffices that any training is received or provided to a 'terrorist' organisation.[25] For example, an aid worker providing 'first aid' training in to a predominantly charitable organisation s/he knows has, on a few past occasions, engaged in an extreme act of ideological/political violence would clearly be committing a training offence. Even more vividly in light of the tsunami-disaster, an aid worker providing such training to movements such as Gerakan Aceh Merdeka or the Tamil Liberation Tigers, groups that are known to have resorted to acts of ideological/political violence, would definitely be culpable under this offence despite having no direct involvement with such violence. Given that there is knowledge that the organisation is a 'terrorist' organisation, the aid worker in both scenarios presently faces the prospect of 25 years in jail.

C *Provisions Conferring the Power to Detain Without Trial are Arguably, Unconstitutional*

[22] (1992) 176 CLR 1, 27.
[23] William Blackstone, *Commentaries on the Laws of England* (1769) quoted in David Shrager and Elizabeth Frost (eds) *The Quotable Lawyer* (1986).
[24] *Criminal Code* s 102.5.

Provisions permitting detention without trial or charge are, arguably, unconstitutional because they breach the constitutional separation of judicial power. In *Lim v Minister for Immigration,* Brennan, Deane and Dawson JJ stated that there is 'a constitutional immunity from being imprisoned . . . except pursuant to an order by a court.'[26] According to their Honours, this was because, save some exceptions:

> the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[27]

Gummow J in the *Stolen Generations' Case* paraphrased the above proposition in following terms:

> A power of detention which is punitive in character and not consequent upon adjudgment of criminal guilt by a court cannot be conferred upon the Executive by a law of the Commonwealth.[28]

The key question in relation to the power to detain persons under the Act is whether it is punitive. If so, it is clearly not pursuant to the adjudgment and punishment of criminal guilt and hence, its conferral will be unconstitutional.[29]

This question does not admit of a precise answer because the law in this area is still developing with the High Court yet to provide a clear test as to what constitutes criminal punishment. Indeed, the recent High Court decision in *Al-Kateb v Godwin*[30] reveal various approaches to issue of punitive detention.

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[25] Ibid s 102.5.
[26] (1992) 176 CLR 1, 28-9.
[27] Ibid 27. This statement by their Honours was subsequently accepted in *Kable v Director of Public Prosecutions (NSW)* (1995) 189 CLR 51, 97, 131 and *Kruger v Commonwealth (Stolen Generations Case*) (1997) 190 CLR 1, 84, 109, 161.
[28] *Kruger v Commonwealth (Stolen Generations Case*) (1997) 190 CLR 1, 161.
[29] For discussion of this issue, see the Senate Legal and Constitutional References Committee, *Report on Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) 74-8 and Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003'* (2004) 27 *UNSW Law Journal* 524, 553-576.

Despite these different approaches, there are strong arguments with each of these approaches that the provisions conferring the power to detain without trial are unconstitutional. Gummow J appears to adopt the strictest approach by treating paradigmatic instances of criminal punishment like detention and fines as typically punitive and hence, can only be imposed by a Chapter III court unless an exception applies.[31] Gummow J's treatment of paradigmatic instances of criminal punishment appears to closely conform to the statement by Brennan, Deane and Dawson JJ's in *Lim* that was quoted above. Given that the exceptions identified in *Lim,* for instance, quarantine and detention of the mentally ill, cannot be plausibly applied to the power to detain without trial under the *Act,* it is strongly arguable that under Gummow J's approach, the exercise of such power results in punitive detention and the provisions conferring such power are, therefore, unconstitutional.

Other judges, namely, McHugh, Hayne, Callinan and Heydon JJ do not seem to consider detention as prima facie punitive.[32] At the same time, all seem to agree that detention will be considered a form of criminal punishment if it were imposed for a punitive purpose.[33] For Hayne J, with whom Heydon J agreed, such a purpose is present when there is a burden imposed for 'identified and articulated wrongdoing'.[34] McHugh and Callinan JJ seemed to approach the question in a negative manner, that is, by identifying non-

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[30] [2004] HCA 37 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 6 August 2004).

[31] *Al-Kateb v Godwin* [2004] HCA 37 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 6 August 2004) paras 137-140.

[32] Such a position is clearest in Hayne J's judgment when his Honour stated that '[o]nly if it is said that there is an immunity from detention does it become right to equate detention with punishment that can validly be exacted only in the exercise of judicial power': *Al-Kateb v Godwin* [2004] HCA 37 (Unreported, Gleeson CJ, McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, 6 August 2004) para 267 (with whom Heydon J agreed at para 303). See also ibid paras 44-5 (McHugh J); para 258 (Hayne J) (with whom Heydon J agreed at para 303) and paras 287, 289, 291 (Callinan J).

[33] See ibid para 44 (McHugh J); paras 135-40 (Gummow J); paras 265 (Hayne J) (with whom Heydon J agreed at para 303) and paras 287, 289, 291 (Callinan J). Gleeson CJ and Kirby J did not expressly address this issue.

[34] Ibid para 265 (emphasis original). In that same paragraph, Hayne J quoted H L A Hart's definition of the 'central case of punishment' which consisted of the following elements: it was pain or other unpleasant consequences imposed for an offence against the law on the actual or supposed offender and was administered by persons other than the actual or supposed offender who are acting pursuant to authority conferred by the law.

See also ibid para 261 where Hayne J observed that the detention of the unlawful non-citizen was 'not inflicted on that person as punishment for any actual or assumed wrongdoing'.

punitive purposes.[35] On these approaches, the questions then are: first, can it be said that the power to detain under the Act is aimed at punishing wrongdoing? secondly, is there a non-punitive purpose animating the provisions that confer this power?

The criteria for approving a detention warrant strongly suggest an affirmative answer to the first question. Before approving a detention warrant, the Attorney-General must be satisfied that if the warrant were not issued, the subject of the warrant may:

- alert a person involved in a terrorism offence that it was being investigated; or
- fail to appear before the prescribed authority; or
- destroy or otherwise change a record or thing that the person may be required to produce under the warrant.[36]

The last two circumstances are offences under the Act.[37] The first circumstance is clearly a form of culpable behaviour that may, in some situations, be an offence under the *Criminal Code.*[38] All three circumstances then are, in the words of Hayne J, 'identified and articulated wrongdoing'. In this context, it is reasonable to presume that the power to detain is being exercised to punish such wrongdoing.

In relation to the question of a non-punitive purpose, there is much to be said that if a punitive purpose can be affirmatively demonstrated with respect to the power to detain under the Act, the presence of non-punitive purposes will not redeem the power from a constitutional perspective. In such circumstances, the power is still being exercised for the purpose of punishment even though its exercise is also prompted by other motivations, for instance, intelligence-gathering with the aim of preventing criminal acts.[39]

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[35] Ibid paras 44-5 (McHugh J) and paras 287, 289, 291 (Callinan J).
[36] Section 34C(3)(c) of the Act.
[37] Section 34G of the Act.
[38] For instance, such conduct may be an offence under sections 101.6 or 102.7 of the *Criminal Code.* These sections respectively make illegal acts in preparation of a 'terrorist act' and the provision of support to a 'terrorist organisation' for the purpose of assisting the organisation engage in a 'terrorist act'.
[39] See, for instance, comments by McHugh J in *Re Woolley; Ex parte Applicants M276/2003 by their next friend GS* [2004] HCA 49 (7 October 2004) [78]. For discussion of the aims of the detention powers, see

What should be clear from the preceding discussion is that there are cogent grounds for believing that the provisions conferring the power to detain under the Act are unconstitutional. These constitutional risks should be taken very seriously in the context of a power to detain simply because the deprivation of liberty is among the ultimate powers available to the state. It is our strong view that the power to detain should not be conferred when there are serious doubts as to its constitutionality as is the case.

IV In The Event That the Special Powers Provision are not Completely Repealed, the Exercise of Powers Under These Provision Should be Governed by Certain Principles

We believe that the exercise by ASIO of its powers to compulsorily question and detain without trial should be governed by certain principles, namely:

- these powers should only be exercised in the most exceptional situations;
- the exercise of these powers should be made as transparent and public as is practicable;
- persons subject to these powers should at all times have access to a lawyer of choice and to effective legal representation; and
- the effects of these powers, whether direct or otherwise, should be regularly monitored especially for their discriminatory impact and effect upon political freedoms.

A *These Powers Should Only be Exercised in the Most Exceptional Situations.*

This principle arises from several grounds. As mentioned earlier, the deprivation of liberty is among the ultimate powers available to the state. It is a power usually reserved for those who have committed, or are suspected of criminal wrongdoing. Over the centuries both common law and statute have developed safeguards to protect the innocent from unjust and unlawful state detention. One of the fundamental features of the special

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Senate Legal and Constitutional References Committee, *Report on Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* (2002) 72-3.

powers provisions, the detention of persons suspected of having information relating to a ‘terrorism’ offence, clearly alters the pre-existing legal framework.

How such persons are detained under the special powers provisions also marks a departure from established principles. Prior to the enactment of these provisions, ASIO did not have powers of arrest or interrogation. These powers resided in state and federal police agencies. These agencies are able to detain persons suspected of committing criminal offences. Those detained must be charged or released within a reasonable amount of time. Detainees usually have the right to legal counsel and the right to silence.

These rights and restrictions have been substantially altered by the *Act*. Pursuant to warrants, ASIO, in conjunction with the Australian Federal Police (AFP), can compulsorily question and/or detain persons suspected of having relevant information for consecutive periods of seven-days. Detainees can be detained for up to seven days and can be questioned for up to 24 hours, or 48 hours if an interpreter is used. In contrast, police can only detain and question suspects of ‘terrorism offences’ a maximum of 24 hours.[40] During questioning, detainees have no right to silence and have only a highly circumscribed right to legal representation. Moreover, detainees can be subject to body and strip searches. Children aged between 16 and 18 are also subject to detention, although only if they are suspected of involvement in a ‘terrorism’ offence.

The invasive and severe character of these ‘special powers’ means that they must be reserved for truly ‘special circumstances.’ They should only be exercised to *prevent* future conduct; past conduct should be dealt with by ordinary police powers. Further, they should only be exercised where the risk of harm or damage is sufficiently serious to justify the coercion attendant with the exercise of these powers. We, therefore, **recommend** that the criteria for the exercise of these powers, in addition to present criteria, should include the requirement of reasonable suspicion of an *imminent* ‘terrorism’ offence involving *material risk* of *serious physical injury* or *serious property damage.*

[40] *Crimes Act 1914* (Cth) ss 23CA & 23DA.

Such criteria should bind both the Attorney-General who has to request a 'special powers' warrant as well as the 'issuing authority' who ultimately issues the warrant.[41] A serious anomaly in the Act is that key criteria that bind the Attorney-General do not similarly apply the 'issuing authority'. The Attorney-General is required to be satisfied with both questioning and detention warrants that relying upon other methods of collecting the intelligence that is important to a 'terrorism' offence would be ineffective.[42] The Attorney-General must be further satisfied in relation to a detention warrant that the person who is to be detained may alert a person involved in a 'terrorism' offence or fail to appear before the 'prescribed authority' or destroy or otherwise damage a record or thing that s/he may be required to produce under the warrant.[43]

None of these criteria bind the 'issuing authority'. Such an authority is only required to be satisfied that the Director-General of ASIO has requested a warrant in the same terms as that approved by the Attorney-General and that there are reasonable grounds for believing that the issuing of the warrant will substantially assist in collecting intelligence that is important to a 'terrorism' offence.[44]

We, therefore, **recommend** that all criteria, including those recommended above, should bind both the Attorney-General and the 'issuing authority'.

B The Exercise of these Powers Should be made as Transparent and Public as is Practicable

It is true that some degree of secrecy is required for the effective investigation of acts of political/ideological violence. The present provisions relating to secrecy, specifically section 34VAA of the Act, go far beyond what can be justified.

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[41] Section 34D of the Act.
[42] Section 34C(3)(b) of the Act.
[43] Section 34C(3)(c) of the Act.
[44] Section 34D(1) of the Act.

Section 34VAA of the Act, which was enacted by *ASIO Legislation Amendment Act 2003* (Cth), provides for broad-ranging secrecy offences punishable by a maximum of five years' imprisonment.[45] It is now an offence for any person to disclose information that reveals that a detention or questioning warrant has been issued, the content of that warrant, or the facts relating to its execution while the warrant is in force.[46] Given that a warrant can be in force for a maximum of 28 days,[47] this ban on disclosure can operate for a 28-day period for each warrant. As there is no limit on the number of warrants that can be issued for each person, this ban can operate indefinitely as a result of a series of warrants.[48]

Section 34VAA also prohibits any person from disclosing 'operational information' if such information directly or indirectly resulted from the issuing of a warrant or from conduct pursuant to such a warrant where the disclosure takes place while the warrant is in force, or within two years after the expiry of the warrant.[49]

The breadth of this offence stems from two sources. First, there is an expansive definition of 'operational information', namely any information relating to information or a source of information that ASIO has or had or information relating to an operational capability, method or plan of ASIO.[50] In effect, 'operational information' encompasses information relating to ASIO's knowledge and most of its activities. Second, to be convicted of this offence, the accused does not need to know that the information is 'operational information', as recklessness will suffice.[51] The Act goes even further by applying strict liability in this regard to the following groups: persons being detained or questioned;

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[45] Sections 34VAA(1)–(2) of the Act. See generally Tham, above n 19, 514-8, 523-8 and Michael Head, 'Another Threat to Democratic Rights: ASIO detentions cloaked in secrecy' (2004) 29 *Alternative Law Journal* 127.
[46] Section 34VAA(1)(a)–(c), (e)–(f) of the Act.
[47] Ibid 34D(6)(b).
[48] Although it should be noted that a new warrant can only be issued on the basis of information 'additional to or materially different from that known' at the time of the original warrant: ibid s 34D(1A).
[49] Ibid s 34VAA(1)–(2).
[50] Ibid s 34VAA(5).
[51] Ibid s 34VAA(3).

lawyers present during these persons' detention or questioning; and lawyers contacted by such persons for the purpose of seeking legal advice.[52]

It should be noted, however, that the secrecy offences are not committed if a disclosure is a 'permitted disclosure'.[53] A 'permitted disclosure' is narrowly defined to include disclosures made by a person exercising powers under the Act and those made for the purpose of conducting legal proceedings or obtaining legal advice and representation in relation to a warrant or its execution. A disclosure is also a 'permitted disclosure' if it has been authorised by a prescribed authority, the Director-General of ASIO or the Attorney-General.[54]

Various illustrations can be given on the effect of these secrecy offences.[55] The prohibition on disclosing information relating to the issuing of the warrant, the details of the warrant, and detention and questioning under the warrant mean that journalists reporting on the fact that a person is presently subject to detention or compulsory questioning face up to five years in jail.[56] The same also applies to a parliamentarian highlighting the conditions under which persons are presently detained under the *ASIO Act* outside of Parliament.[57] The 'operational knowledge' offence will have an even more profound effect. It will prohibit journalists reporting on the detention of a person for two years after the expiry of the detention warrant. More than this, it will render illegal coverage of ASIO's subsequent investigation into the detainee for two years after the

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[52] Ibid s 34VAA(3).
[53] Ibid s 34VAA(1)(f), (2)(f).
[54] Ibid s 34VAA(5).
[55] See generally Jude McCulloch and Joo-Cheong Tham, 'Secret state, transparent subject: The Australian Security Intelligence Organisation in the age of terror' (2005) *Australian and New Zealand Journal of Criminology* (forthcoming).
[56] For example, recent reporting by *The Australian* and *The Weekend Australian* journalists that acquaintances of Willie Brigitte had been subject to compulsory questioning by ASIO would be illegal under this Act: see Martin Chulov, 'Brigitte's N-reactor Bomb Plot', *The Australian* (Sydney), 10 November 2003, 1 and Martin Chulov and Trudy Harris, 'Terror Power Used on Brigitte Mate', *The Weekend Australian* (Sydney), 8-9 November 2003, 1.
[57] Joo-Cheong Tham, 'The Danger to Our Freedoms Posed by the ASIO Bill', *The Age* (Melbourne), 1 December 2003, 15, quoted in Parliament by Bob Brown and Michael Organ: see Commonwealth, *Parliamentary Debates*, Senate, 2 December 2003, 18 668–9 (Bob Brown); Commonwealth, *Parliamentary Debates*, House of Representatives, 2 December 2003, 23 473 (Michael Organ). For a discussion of the effect on parliamentary privilege and submissions to parliamentary committees, see Commonwealth, *Parliamentary Debates*, Senate, 4 December 2003, 19 442–5 (Bob Brown).

expiry of the warrant, whether or not such investigation involves conduct pursuant to a warrant.[58] These illustrations demonstrate the profound effect of these secrecy offences upon freedom of the press and freedom of political expression.

More than this, the secrecy offences, by imposing a pall of silence, implicitly sanctions lawless behaviour by ASIO. ASIO, as a domestic intelligence agency, has always operated with a degree of secrecy over and above that afforded to police agencies. The secrecy that has traditionally cloaked ASIO's operations means that to some extent it has always operated in a legal grey zone outside the rule of law.[59] The newly-enacted secrecy offences compound the problems related to lack of transparency by further immunizing ASIO from legal checks and, hence, implicitly sanctioning lawless behavior.

The secrecy offences encourage lawlessness because they severely diminish the public discussion and scrutiny which act as a primary antidote against illegality. Starved of relevant information, it is unlikely that any political campaign against arbitrary and illegal detention by ASIO will get off the ground.[60]

The secrecy offences also directly impede legal challenges to some of ASIO's investigatory activities. While it is true that disclosure for the purpose of initiating legal proceedings in relation to a detention/questioning warrant is permitted,[61] this exception is quite limited. 'Permitted disclosure' exceptions do not extend to the disclosure of information for the purpose of legal proceedings relating to ASIO's *investigatory activities* which are connected to the questioning/detention warrant. Such investigatory activities can involve the use of listening and tracking devices as well as search warrants.[62] If such intrusive means were used in connection to a questioning/detention warrant, disclosure of information relating to such use will be an 'operational information' offence with the effect that individuals cannot challenge the legality of such

[58] For a more detailed discussion of the effects of these offences, see Tham, 'The Danger to Our Freedoms Posed by the ASIO Bill', above n 57, 15.
[59] See Joo-Cheong Tham, 'ASIO and the rule of law' (2002) 27 *Alternative Law Journal* 216.
[60] Michael Head, '*New laws cloak ASIO detentions in secrecy'* posted on World Socialist Web Site <http://www.wsws.org/articles/2003/dec2003/asio-d10.shtml>; accessed on 2 March 2004.
[61] Section 34VAA(5) of the Act.

intrusive investigatory activities. For example, if ASIO, after compulsorily questioning someone taps their phone in breach of the ASIO Act, this illegality could not be tested in the courts as it would be an 'operational knowledge' offence to disclose the fact that the phone has been tapped.

The dilution of these checks against illegality does not, of course, necessarily mean that ASIO will act illegally. At the same time, however, it clearly increases the risk of such conduct; a risk that is far from fanciful. In 1978, Justice Hope in a report on security and intelligence, for example, found that the legality of ASIO's practices with respect to listening devices, mail interception and entering and searching premises was not beyond doubt, and probably tainted with illegality.[63]

The secrecy offences also work to inoculate ASIO from constitutional challenges to its detention powers. This acquires particular importance given the serious doubts surrounding the constitutionality of the detention powers. These secrecy offences will mean that it will be exceedingly hard to test these live constitutional questions primarily because the task of identifying persons detained/questioned is made very difficult. These hurdles mean that possibly unconstitutional coercive powers can be exercised largely immune from challenge.

Besides impacting upon freedom of the press and that of political expression and implicitly sanctioning lawless behaviour by ASIO, the secrecy offences have a particularly potent impact on persons detained by ASIO. They will exacerbate the punitiveness of such detention by denying detainees the opportunity to communicate with others about the circumstances of their detention for two years after their release.

Imposing such prolonged silence on detainees regarding their experience of detention will almost certainly add considerably to any ongoing negative psychological impacts of detention. In addition, the prohibition on disclosure is likely to cause many practical and

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[62] See Division 2, Part III of the Act.
[63] Royal Commission on Intelligence and Security, *Fourth Report: Volume 1* (1978) 82-6, 92-3.

personal problems for detainees. Employees, loved ones, family and others are likely to demand an explanation for sudden and inexplicable disappearance for up to a week. Yet, even stating that one was in the custody of ASIO could expose the teller to serious criminal penalty. The enforced and protracted silence around the conditions and even the fact of detention is likely to add considerably to the isolation and alienation of detainees from the broader community and even family and friends.

These effects of the secrecy offences found in section 34VAA of the Act, namely, the way in which these offences curb freedom of the press and of political expression; implicitly sanction lawlessness by ASIO and exacerbate the punitiveness of detention under the special powers provisions lead us to **recommend** that section 34VAA of the Act be completely repealed.

In its place, we **recommend** that the option of conferring upon 'issuing' and 'prescribed' authorities the power to issue orders for non-disclosure be investigated. Such power could, for instance, be modelled upon section 29B of the *Australian Crime Commission 2002* (Cth).

C *Persons Subject to these Powers of ASIO to Compulsorily Question and Detain Without Trial Should at All Times Have Access to a Lawyer of Choice and to Effective Legal Representation*

The right to effective legal representation is central to the fair and just operation of the criminal justice system. This right has assumed even greater importance in light of the broad new powers conferred upon ASIO to detain and compulsorily question people without the right to silence. Access to effective legal representation is crucial to help individuals understand their rights and to make informed judgements relating to their best interests.

Currently, the Act provides a limited right to legal representation. Section 34D requires the Attorney-General to ensure that a requested detention warrant permits the person to

contact a 'single lawyer of the person's choice'.[64] However, this obligation does *not* extend to warrants solely authorising compulsory questioning. It should, on the other hand, be noted that a person subject to a compulsory questioning warrant is not prevented by virtue of the secrecy offences from contacting a lawyer of choice.[65]

Where the right to contact a lawyer exists, it is heavily circumscribed. It is dependent upon the detainee choosing a single lawyer. There is some argument that the wording of the Act means that the detainee is required to identify by name his or her lawyer of choice. If there were such a requirement, it would obviously mean that detainees who did not personally know a lawyer would be denied access to legal representation.

Moreover, under section 34TA the prescribed authority can prevent such contact if s/he formed the view that such contact will alert a person involved in a 'terrorism' offence or may result in the destruction of a document or record that may be requested by ASIO. This provision severely impacts the right to legal representation, allowing the proscribed authority to effectively veto a person's lawyer of choice.

In addition to the above restrictions, the ability of a lawyer to represent his or her client during compulsory questioning has been curbed in various ways. For example, under section 34TB the questioning of a person may occur in the absence of a lawyer. Section 34U provides that the proscribed authority must ensure breaks in questioning in order to allow a lawyer to advise the detainee. However, the detainee's contact with his or her lawyer is monitored by ASIO and the Australian Federal Police. These provisions offend the basic principle of lawyer-client confidentiality and will unreasonably limit the ability of a lawyer to assist his or her client.

Section 34U provides that a lawyer may only intervene in the questioning of his or her client to request that an ambiguous question be clarified and a lawyer can be removed if the prescribed authority forms the view that s/he is unduly disrupting the questioning.

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[64] Section 34C (3B) of the Act

[65] Section 34VAA of the Act.

This reduces the role of a lawyer to a mere interpreter, ensuring that a lawyer is largely ineffectual and unable to properly represents his or her client's interests during questioning.

Finally, by hampering access to effective legal assistance and representation, this Act strikes at the heart of the rule of law. The rights and safeguards provided by the law are only meaningful if they can be effectively enforced. The lack of access to effective legal assistance and representation, together with Act's secrecy provisions, severely limit the ability of people to enforce their rights and gain access to avenues of review.

These provisions unduly restrict the right to effective legal representation. We therefore **recommend** that:

- questioning always occur with legal representation;
- lawyers have the ability to intervene during questioning not only to clarify an ambiguous question but also to object to the questioning on legal grounds;
- there be provision for breaks of 30 minutes after every two hours of questioning to enable lawyers to advise their clients**;** and
- copies of video-recordings made pursuant to section 34K of the Act be supplied to the subjects of the questioning and detention warrants as well as their lawyers.

D *The Effects of these Powers, Whether Direct or Otherwise, Should be Regularly Monitored Especially for their Discriminatory Impact and Effect upon Political Freedoms*

It should be clear by now that the powers conferred upon ASIO by the special powers provisions to compulsorily question and detain without trial are very wide not least because of the broad-ranging 'terrorism' offences. The breadth of these powers give rise to the risk of arbitrary exercise; a risk that is particularly acute in light of the secrecy that presently shrouds the exercise of these powers.

There are two risks, in particular, that is, the risk that these powers are being disproportionately applied to the Muslim members of the Australian community and the risk that these powers will adversely affect political freedoms.

The first risk arises from the fact that all persons charged so far under a 'terrorism' offence are Muslim[66] and that all groups that have been proscribed as 'terrorist organisations' under the *Criminal Code* are Muslim organisations.[67] Given that, the powers ASIO has to compulsorily question and detain without trial hinge upon the 'terrorism' offences, a significant portion of which are offences relating to 'terrorist organisations', these facts give rise to a reasonable apprehension that these powers are being disproportionately applied to Muslims.

The other risk stems from the fact that these powers are being used against conduct that is politically or ideologically motivated. So much is obvious from the definition of a 'terrorist act'[68] which underpins all 'terrorism' offences. At the same time, these offences capture a very broad range of conduct including membership of the Liberal Party. It is reasonable, however, to presume that ASIO will not be attempting to prevent all conduct caught by the 'terrorism' offences. It will not, for instance, be using its powers to compulsorily question and detain without trial against members of the Liberal Party.

The upshot is that ASIO will exercise its discretion as to the type of politically or ideologically motivated conduct coming within the rubric of the 'terrorism' offences, it will direct its energies to. This discretion, it is reasonable to assume, will be determined by ASIO's understandings of what is legitimate as distinct from illegitimate political activity. It is the existence of such discretion that makes it intelligible to say that ASIO is *policing politics.* This risk accompanying such a function is that what the Australian public considers to be legitimate political activity will be considered illegitimate from

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[66] For details of those charged, see Brendan Nicholson, 'A man of terror, or a terrorised man?', *The Age: Insight* (Melbourne), 19 February 2005, 5.
[67] *Criminal Code Regulations 2002* (Cth) regs 4-4F, Schedules 1-1A.
[68] *Criminal Code* s 100.1.

ASIO's perspective. For some, this risk is heightened by ASIO's history[69] and, specifically, by Justice Hope's finding that 'in the past, ASIO officers have shown a tendency to think of anyone they chose to call "left wing" as subversive'.[70]

It is crucial to guard against these two dangers, namely, discriminatory exercise of the 'special powers' and adverse effect upon political activity. To this end, we **recommend** that ASIO practices in relation to the 'special powers' be reviewed on an annual basis by the Human Rights and Equal Opportunity Commission with the results of such a review be made public.

END OF SUBMISSION

[69] See generally Frank Cain, *The Australian Security Intelligence Organisation: An Unofficial History* (1994) and Frank Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27 *University of New South Wales Law Journal* 296.
[70] Royal Commission on Intelligence and Security, above n 63, 130.

APPENDIX

LETTER TO ATTORNEY-GENERAL REQUESTING DISCLOSURE OF INFORMATION REGARDING EXERCISE BY ASIO OF POWERS TO COMPULSORILY QUESTION AND DETAIN WITHOUT TRIAL

Hon. Phillip Ruddock
Attorney-General

House of Representatives

Parliament House

Canberra ACT 2600

17 February 2005

Dear Attorney-General,

Request for information relating to the exercise of ASIO's special powers relating to 'terrorism' offences

As you would be aware, the Parliamentary Joint Committee on ASIO, ASIS and DSD is presently conducting an inquiry into the powers conferred upon ASIO to compulsorily question and detain persons suspected of having information relating to a 'terrorism' offence under the Criminal Code.

We are writing to request that you authorise the disclosure of certain information relating to the exercise of these powers.

Presently, the main source of information relating to the exercise of these powers is found in ASIO's 2003-04 Annual Report. Such information is, however, limited to detailing the number of requests made and warrants issued for either compulsory questioning or detention and the number of hours of compulsory questioning for the financial year 2003-

04. Further, disclosure of information relating to other aspects of these powers is prohibited by section 34VAA(1)-(2) of the *Australian Security Intelligence Organisation Act 1979* (Cth).

As Attorney General, you are, however, able to authorise the disclosure of certain information pursuant to section 34VAA(5) of the *Australian Security Intelligence Organisation Act 1979* (Cth) (‘the Act’). In the interest of an effective and proper parliamentary review of these powers to compulsorily question and detain, we request that you authorise and require the disclosure of the following information whether by ASIO or other relevant bodies:

1) the number of requests made under section 34C of the Act since the end of the 2003/2004 financial year;
2) the number of warrants issued during the same period under section 34D of the Act;
3) the number of warrants issued during the same period under section 34D(2)(b) of the Act;
4) the number of times that a prescribed authority has ordered the detention of a person brought before them for questioning pursuant to section 34F;
5) the number of hours each person against whom a warrant was issued during this same period appeared before a prescribed authority for questioning under a warrant issued that meets the requirement of section 34D(2)(a) and the total of all those hours for all those persons;
6) the number of persons compulsorily questioned and/or detained pursuant to Division 3, Part III of the Act who were subsequently charged with a criminal offence;
7) if persons compulsorily questioned and/or detained pursuant to Division 3, Part III of the Act were subsequently charged with a criminal offence, the nature of the charges;
8) the number and nature of criminal charges laid as a result of information obtained through the use of powers found in Division 3, Part III of the Act;
9) the policies (apart from the statutory criteria) governing the making of requests by the Director-General of ASIO pursuant to section 34C(1) of the Act;
10) the policies (apart from the statutory criteria) governing the Attorney General’s decision whether or not to consent to such request under section 34C(3) of the Act;

11) the number of individuals who were compulsorily questioned pursuant to Division 3, Part III of the Act who had legal representation while being questioned;
12) the number of questioning hours during which the questionee had a legal representative present;
13) the number of times a prescribed authority prevented contact with a lawyer pursuant to section 34TA of the Act;
14) the number of times that a prescribed authority has directed that a legal advisor be removed from the place where questioning is taking place pursuant to section 34U(5) and in each case the number of questioning hours for which such removal occurred;
15) the number of individuals that have been notified pursuant to section 34JBB(1) of the Act that the Director-General has sought the consent of the Attorney General to a request for the issuing of a warrant under section 34D of the Act;
16) the number of times a person has been searched pursuant to section 34L of the Act and nature of such searches, i.e. ordinary or strip search;
17) the number of persons aged between 16 and 18 questioned and/or detained through the use of powers found in Division 3, Part III of the Act;
18) reports provided to the Attorney General under section 34P of the Act;
19) the number of complaints made to the Inspector-General of Intelligence pursuant to section 34 F(9)(b) and 34NC and sections 10 and 13 of the *Inspector-General of Intelligence Act 1986* (Cth).

We note that some of the requested information is merely an updating of information found in ASIO's 2003-2004 Annual Report. With all questions, we have taken especial care to only request information that will not prejudice any ongoing investigation.

Finally, we note that the submissions need to be made to the Parliamentary Joint Committee on ASIO, ASIS and DSD's inquiry by 24 March 2005. In these circumstances, we would appreciate that the above information be disclosed as soon as practicable.

Thank you for your attention.

Yours sincerely,

(Patrick Emerton, Assistant Lecturer, Law Faculty, Monash University)

(Dr Jude McCulloch, Senior Lecturer, Department of Criminal Justice and Criminology, Monash University)

(Dr Sharon Pickering, Senior Lecturer, Department of Criminal Justice and Criminology, Monash University)

(Joo-Cheong Tham, Lecturer, Law Faculty, University of Melbourne)