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The Secretary
Parliamentary Joint Committee On
ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

23 March 2005

Dear Secretary,

Submission for Review of the Australian Security Intelligence Organisation (ASIO) Questioning and Detention Powers by the Parliamentary Joint Committee on ASIO, ASIS and DSD

I am a Senior Lecturer in Law at the Faculty of Law, University of Tasmania in Constitutional Law, International Law and Human Rights.

I gave invited witness submissions (based on written submissions) into the separate inquiries into the ASIO questioning and detention powers legislation conducted by the Parliamentary Joint Committee in May 2002 and by the Senate Legal and Constitutional References Committee in November 2002.

My written and witness submissions on the legislation are extensively cited in the reports of both committees: *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* and *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters* and in the report of the Senate Legal and Constitutional Legislation Committee: *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*

I make the following submission to the present review of the ASIO Questioning and Detention Powers. I have included as attachments two recent and relevant articles of mine on the topic of the ASIO questioning and detention powers from the *University of New South Wales Law Journal* and the *Deakin Law Review* and reference is made to these in this submission.

. The need for a continuing role for the Parliamentary Joint Committee in reviewing and monitoring the operation of ASIO Questioning and Detention powers

The Committee Chairman, Hon David Jull has observed that the PJCAAD does not have any specific statutory power to carry out periodic reviews of the questioning and detention regime and that "As a consequence this review by the Committee may represent the only opportunity for detailed parliamentary scrutiny of these powers". This observation accords with the nature of the powers under sections 29 (1)(a) and (b) and (bb) of the *Intelligence Services Act 2001* (Cth).

There are several cogent reasons why the role of the Parliamentary Joint Committee in reviewing and monitoring the operation of ASIO questioning and detention powers needs to continue.

. Re-stating the unprecedented nature of the questioning and detention powers

The passage of time since the enactment of the legislation and the fact that public reporting of s. 34D warrants and operational information is now prohibited create a situation where the exceptional and unprecedented nature of the questioning and detention powers, in the breaching of the non-suspect threshold, is too readily overlooked. It is important to be reminded that:

(a) Comparable democracies such as the United Kingdom, Canada, New Zealand and the United States have not legislated for the detention of non-suspect citizens who may simply be thought to have information about terrorism offences.

(b) Indeed, final courts of appeal in the United States (in *Rasul v Bush* 124 S.Ct 2686 (2004) (United States Supreme Court), United Kingdom (in *A (FC) and others (FC) v Secretary of State for the Home Department* [2004] UKHL 56 (House of Lords) and New Zealand (in *Zaoui v The Attorney General and Others* [2004] NZSC 34 25 November 2004) (Supreme Court of New Zealand) have particularly sought to ensure access to the courts and compliance with minimum human rights standards for foreign nationals detained on terrorism related matters and allegations of terrorism involvement where the detention is anterior to a criminal law prosecution process.

(c) The legislation's detention provisions potentially attach to a range of persons with no involvement in terrorism offences, such as journalists, religious and ethnic leaders, commentators and politicians, friends and neighbours. The fact that only three warrants for questioning have been issued to date (according to the ASIO Annual Report for 2003-2004) does not detract from the possibility of a potentially much wider application to such persons at some time in the future.

. The expanded questioning and detention framework since the enactment of the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth) (the questioning and detention provisions)

The conferral of only a one-off power for the Parliamentary Joint Committee to review ASIO questioning and detention powers under s.29 (1) (bb) of the *Intelligence Services Act 2001* (Cth) preceded further far reaching legislative amendments. Such amendments indirectly, but significantly, expanded the reach and operation of the ASIO Questioning and Detention powers, the subject of the present review:

(a) *ASIO Legislation Amendment Act 2003* (Cth) enacted extensive provisions prohibiting the disclosure of information relating to warrants and questioning both before the expiry of the warrant and in the two years after the expiry of the warrant. These disclosure offences include unauthorised primary and secondary disclosures of an extensive range of information.

The effect of these prohibitions is to criminalise media and other reporting of material within the broad terms of the prohibitions, including the mere fact that a warrant has been issued in relation to a specific matter. Public accountability of the issue and operation of the detention and questioning warrants, including potential matters of illegality and impropriety, is dramatically curtailed. Accordingly, a deterrent is removed for misuse of power, literacy about case and policy issues is diminished and information not threatening national security is withheld from public and professional groups necessary to make comprehensive submissions to this inquiry.

Opportunities for informed public opinion deriving from reporting of the questioning and detention warrants is severely curtailed, if not eliminated. Generalised media reporting may have appraised issues such as predictability and consistency in the use of discretions under the warrants and the effectiveness of legislative safeguards in controlling the operation of those discretions. The suppression of public discussion and reporting of warrants effectively enlarges the scope of executive discretionary power

In turn, the volume of publicly available information against which this Committee can conduct its review functions is diminished. It is incumbent upon the Committee to appreciate that there is a real risk of the appearance of successful, but untested, operation of the new intelligence gathering powers given this suppression of informed commentary.

(b) The *Criminal Code Amendment (Terrorist Organisations) Act 2004* (Cth) implementation of a system of executive proscription of organisations is significant in that proscription attracts a range of criminal offences under ss 102.2-102.8 of the *Commonwealth Criminal Code*, including that of associating with a terrorist organisation, inserted by the *Anti-Terrorism Act (No.2) 2004* (Cth).

The executive model of proscription against organisations and the expanded range of offences relating to organisations under sections 102.2-102.8 of the *Commonwealth Criminal Code* in turn significantly expands the potential circumstances under s.34 C and s.34 D of the *ASIO Act 1979* (Cth) respectively where the Minister and issuing authority are “satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence”, beyond what was contemplated at the passage of the questioning and detention powers.

This combination of the suppression of reporting of warrant activities in circumstances where the warrants now apply to a significantly expanded set of “terrorism offences” over and above the original legislation, justifies the Committee having an ongoing and enhanced role in reviewing the use of ASIO questioning and detention powers.

. Possible further expansions of questioning and detention powers

The Commonwealth Attorney-General has suggested that a case might be made out for further expanding the grounds for the granting and duration of warrants for questioning and detention: see Carne, G “Brigitte and the French Connection: Security *Carte Blanche* Or *A La Carte*?” (2004) 9 *Deakin Law Review* 573, esp 591-596. In fact, the powers have twice been

significantly expanded over what was originally contemplated, namely, confining the powers to "politically motivated violence" "in very serious cases where such a step is necessary to prevent a terrorist attack" and in limiting the duration of a warrant to 48 hours.

Whilst no cogent case has been made out for such further expansion, the continual contestation of the "balance" in legislation points to the need for a continuing monitoring and review function for the Parliamentary Joint Committee over the questioning and detention powers. In particular, serious and systemic human rights abuses have occurred under the French system raised by the Hon. P Ruddock: see Carne, G "Brigitte and the French Connection: *Security Carte Blanche* Or *A La Carte*? (2004) 9 *Deakin Law Review* 573, 605-610.

In an environment where the "balance" in legislation is repeatedly contested and the nature of the terrorist threat is unpredictable, unknown, inevitable and indefinite, an ongoing role for the Committee is essential for proper consultative and deliberative processes, to test and ventilate inevitable executive claims for incremental expansions of powers and erosions of civil rights and to ensure legislative mechanisms are consistent with rule of law principles rather than reflecting an executive fiat.

. The narrow experiential basis to date of the operation of ASIO questioning and detention powers

Several considerations and issues about the narrow experiential base of the operation of ASIO questioning and detention powers confirm that it desirable that the Parliamentary Joint Committee continue to monitor the use of the powers through regular and periodic review:

(a) the issue of three questioning warrants only – this itself raises questions for the Committee about whether the claims by then Attorney General Williams in 2002 and 2003 that the legislation was truly exceptional - "it must be remembered that these warrants are measures of last resort. It is anticipated that they will be rarely used and only in extreme circumstances" and that "I hope that the powers under the legislation never have to be exercised", accurately reflect present experience and anticipated use of the warrants.

(b) The fact that there is no experience to date in the operation of a detention warrant – this is the most contentious part of the legislation, yet no practical experience exists from which the Parliamentary Joint Committee can evaluate the operation of the legislation and the Protocol (Statement of Procedures) in this situation.

(c) Two significant questions also persist in relation to the inclusion of a detention regime for non-suspects for intelligence gathering purposes: **(i)** Why in fact a detention regime is at all necessary for such purposes – contrast the Canadian investigative hearing model under Part 11.1 of the *Canadian Criminal Code* providing for a judicially conducted non-custodial investigative hearing for the purposes of gathering information relevant to actual or future terrorism offences, with arrest by warrant of non-suspects only in situations where they will evade service of the order to attend, are about to abscond, fail to attend or fail to remain in attendance at a hearing and **(ii)** continuing issues about the constitutionality of the legislation, in particular of the detention regime for non-suspects: see generally Carne, G "Detaining Questions Or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)"(2004) 27 *University of New South Wales Law Journal* 524.

It is desirable that the Committee be given the opportunity to review the practical circumstances of the operation of a detention warrant, which must necessarily involve considerations of alternative models and of constitutionality.

(d) the fact that only one Prescribed Authority has been used (and presumably within one city) means that there is an insufficient foundation for the Committee to examine the use of the many discretions exercisable by Prescribed Authorities under the legislation and the extent to which compliance with the Protocol has been achieved through the role of the Prescribed Authority. A further related issue which is properly examinable following experience of using other prescribed authorities are the arrangements under s.34B of the *ASIO Act 1979* (Cth) which provide for alternative classes of prescribed authorities.

. Relevant observations of the Inspector General of Intelligence and Security regarding operation of the questioning and detention powers

The observations in the 2003-2004 Annual Report of the Inspector General of Intelligence and Security that his immediate predecessor "gave an undertaking to the PJCAAD that he intended to attend the first few occasions where the new powers were used and then review his position after that" and it is then mentioned that "with the exception of only one day either Mr Blick, myself or one of my staff, have been present on all days when the subject of a section 34D warrant has been questioned, for the full duration of the questioning" are apposite in that information and observations about the operation of the questioning and detention powers are very much in their formative stages.

Similarly, it is premature for the review and monitoring role of the Parliamentary Joint Committee over the questioning and detention powers to cease at such an early and formative stage upon such a limited experiential basis. The fact that the Inspector General of Intelligence and Security has "raised several procedural and practical issues based on our experience in observing the execution of section 34D warrants" [and] that "These matters have been the subject of on-going discussions with ASIO and the Attorney-General's Department" indicate that unprecedented powers applying to non suspects for intelligence gathering purposes create live and novel issues for the protection of the rights of the subjects of S.34 D warrants which are still unfolding and which may require new solutions. The Parliamentary Joint Committee should have a key and continuing role in addressing these ongoing issues.

. Sunset clause and relevant matters concerning the operation of sunset clauses in other jurisdictions (Canada, UK): re-enacting the questioning and detention powers

The fact that under s.34 Y of the *ASIO Act 1979* (Cth) Division 3 of Part III ceases to have effect 3 years after it commences (Royal Assent being received on 22 July 2003) provides an essential focus supportive of the Parliamentary Joint Committee having a continuing role in monitoring and reviewing the questioning and detention powers.

For the many reasons outlined under the headings above, re-enactment of the ASIO questioning and detention powers should retain a three year sunset clause and the Parliamentary Joint Committee should have its capacity to review the operation, effectiveness and implications of the powers at three yearly intervals (from s.29 (1)(bb) of the *Intelligence Services Act 2001* (Cth)) included as a standard provision in an amended *Intelligence Services Act 2001* (Cth) and co-ordinated with this sunset clause.

The examples of the Canadian and United Kingdom legislation and the inclusion of sunset clauses in their most directly comparable legislation are instructive.

Canada

The Canadian legislation specifically limits the operation of the investigative hearing mechanism to terms of five years duration, unless specifically renewed by the Parliament. It should be recalled that this limit is imposed as a safeguard upon provisions which are not as far reaching as the ASIO questioning and detention powers.

Section 83.28 of the *Criminal Code* (Canada) provides for an investigative hearing for the purposes of the gathering of information for the purposes of an investigation of a terrorism offence.

Under section 83.32, s.83.28 (and ss 83.29 and 83.3) of the *Criminal Code* (Canada) cease to apply at the end of the fifteenth sitting day after December 31 2006, "unless, before the end of that day, the application of those sections is extended by a resolution – the text of which is established under subsection (2) – passed by both Houses of Parliament in accordance with the rules set out in subsection (3)"

Subsection (2) of s.83.32 reads: "The Governor General in Council may, by order, establish the text of a resolution providing for the extension of the application of sections 83.28, 83.29 and 83.3 and specifying the period of the extension, which may not exceed five years from the first day on which the resolution has been exceeded by both Houses of Parliament"

Subsection (4) of s.83.32 reads: "The application of sections 83.28, 83.29 and 83.3 may be further extended in accordance with the procedure set out in this section, with the words "December 31, 2006" in subsection (1) read as "the expiration of the most recent extension under this section".

Accordingly, the Canadian legislation- at its most expansive point only equivalent to an Australian questioning only warrant – includes a sunset clause specifically requiring reinstatement of the provisions every five years.

United Kingdom

Recent debate in the United Kingdom concerning the *Prevention of Terrorism Bill*, (introduced after the House of Lords' findings in *A (FC) and others v Secretary of State for the Home Department* about the indeterminate detention of foreign nationals under the *Anti-Terrorism, Crime and Security Act 2001* (UK)), which provides for control orders over persons for whom there are reasonable grounds for suspecting is or has been involved in terrorism related activity, centred largely upon the provision of a sunset clause.

The House of Lords (in its legislative capacity) insisted four times on a sunset clause which would have provided for the *Prevention of Terrorism Bill* to expire after eight months. Instead, the Home Secretary made concessions in the form of an independent reviewer to examine and report upon the effectiveness of the *Prevention of Terrorism* legislation, with a new draft counter-terrorism bill to be published and be subjected to full pre-legislative scrutiny prior to its introduction into the Commons in 2006, informed by the report of the independent reviewer and lengthy parliamentary scrutiny.

Section 13(1) of the *Prevention of Terrorism Act 2005* (UK) provides that “Except so far as otherwise provided under this section, sections 1 to 9 (dealing with control orders) expire at the end of the period of 12 months beginning with the day on which this Act is passed”. Section 13(2) allows the Home Secretary to make an order by statutory instrument enabling revival of sections 1 to 9 for a period not exceeding one year or for the sections to continue in force from the time they would otherwise expire for a period not exceeding one year. Section 13(4) requires that the making of a Section 13(2) order by the Home Secretary must be preceded by a draft being laid before Parliament and approved by a resolution of each House.

Again, the relevance for present consideration of ASIO’s questioning and detention powers is the insistence and eventual inclusion of a sunset clause in the UK legislation controlling movement, contacts and conduct that does not go as far as the detention of innocent persons who may be thought to have information relevant to a terrorism offence, but instead provides a linkage through reasonable suspicion of involvement in terrorism related activity.

The institution of these type of checks and balances in the UK legislation provides a strong relative and comparative indication as to why a further sunset clause linked to periodic Parliamentary Joint Committee monitoring and review of the ASIO questioning and detention provisions is highly desirable.

. Government’s preferred human rights model: *Australia’s National Framework for Human Rights National Action Plan* (role of the Parliamentary Joint Committee re Parliament in absence of a bill of rights in ensuring executive accountability)

A substantive continuing role for the Parliamentary Joint Committee is also consistent with the Government’s new framework for the protection of human rights in Australia: see Hon P Ruddock “New Australian Framework For Human Rights” (Media Release 211/2004, 23 December 2004), announcing release of the document *Australia’s National Framework For Human Rights National Action Plan*.

The document gives considerable emphasis to the role of responsible government and Parliamentary institutions as the most effective mechanisms for protecting human rights: For example, see:

> At pages 5-6: *Australia’s robust system of human rights protection* – “The central features of our constitutional system are the doctrines of “responsible government” under which the Executive is accountable to the Parliament and the Parliament to the people…In addition, a network of parliamentary committees exists, with specific responsibilities to review various spheres of government activity and legislation
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> At page 8: *Promoting a strong free democracy* - “Australia has one of the most effective representative democracies in the world. The Government considers that Australia’s federal structure, independent judiciary and robust representative parliamentary institutions play an integral role in protecting human rights and provide a bulwark against abuses of power and denials of fundamental freedoms”
>
> At page 71: *Representative government* – “Members of the Australian community can also play an active role in representative democracy by making submissions to Australian, State and Territory parliamentary committees, which examine issues of public concern or proposed legislation”

> At page 21-22: *Enhancing the effectiveness of national security* - “Efforts to achieve national security must not jeopardise basic human rights…Australia’s democratic traditions and processes are its greatest ally and greatest strength in the war on terror. These traditions and processes are the tools that will help combat terrorism and protect and preserve our human rights”

Such a substantive continuing role for the Parliamentary Joint Committee is consistent with this preferred approach of representative and responsible government to the protection of human rights, as the Committee’s processes at least in some part are able to respond to the particular deficiencies of that preferred representative and responsible government model in protecting human rights at the interface with national security matters.

Those shortcomings of accountability include the oft cited (and bipartisan) ministerial response of not commenting on matters of national security (in this instance, questioning and detention warrants, lending further dimensions to the prohibitions on primary and secondary disclosure of warrant and operational information instituted by the *ASIO Legislation Amendment Act 2003* (Cth)), not commenting upon “operational matters” (as defined by the commentator) and the use of the Glomar response to “neither to confirm nor deny” matters relating to national security.

Any Attorney General, from either side of politics, in the absence of a public interest disclosure provision, is then able to become the sole source of authorised public disclosures of information on the operation of warrants, thereby able to control debate and accountability through selective release of information and invoke “operational matters” as a rationalisation for declining further disclosure.

Continuing involvement by the Parliamentary Joint Committee in periodic review of the operation, effectiveness and implications of the questioning and detention powers would demonstrate a genuine method of providing substance to the defining principles of *Australia’s National Framework For Human Rights* in relation to innocent persons detained and questioned as the subject of s.34D warrants.

. The paradigm of “human security” and the role of the Parliamentary Joint Committee in implementing the representative and responsible government model for the protection of human rights in relation to questioning and detention powers

The Attorney-General, Hon P Ruddock, has claimed that “human security” is the appropriate paradigm, in that national security measures that protect against terrorism, even though they might diminish civil and political rights, actually enlarge overall human rights by providing a fundamental right to live in safety and security.

The concept has been borrowed from the Canadian Attorney-General and Minister for Justice, Irwin Cotler and far more contentiously, from the statements of the Secretary General of the United Nations, Kofi Annan and the UN High Commissioner for Human Rights, Louise Arbour.

It has been described by the Commonwealth Attorney-General as “the new framework for understanding counter-terrorism and the rule of law”.

This concept of “human security” as presented is both tendentious and contentious. Its basis is founded in every human being having the inherent right to life, a right explicitly recognised in

Article 6 of the *International Covenant of Civil and Political Rights*: “Every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of his life”.

However, there is no necessary, automatic or explicit linkage between the protection of national security (through counter-terrorism measures such as questioning and detention powers) and the protection of human rights *generally*, beyond the protection of a single, specific inherent right to life as found in Article 6 of the ICCPR.

Appropriation of this concept of “human security” ignores the fact that the *International Covenant of Civil and Political Rights*, apart from the Article 6 right to life, institutes a range of other *non-derogable* rights and derogable rights.

Therefore, the usages of the concept of “human security” have been abstracted from a context of these other rights, which have been effectively marginalised.

Such *non-derogable* rights cannot be compromised, even in situations “of time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed” (Article 4 of the ICCPR) Such rights include (amongst others):

Article 7: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment

Article 18: Everyone shall have the right to freedom of thought, conscience and religion.

Measures taken to derogate from *other derogable* rights under the *ICCPR* still must, (under Article 4) in times of public emergency threatening the life of the nation and which is officially proclaimed, satisfy the following conditions:

. to the extent strictly required by the exigencies of the situation

. such measures must not be inconsistent with other obligations under international law

. not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin

Article 9 of the *ICCPR* (a derogable right, but any derogation must comply with the principles above) is the right to liberty and security of the person:

> Everyone has the right to liberty and security of the 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 procedures as are established by law

UN Human Rights Committee General Comment 8 on Article 9, (having commented in paragraph 1 that Article 9 applies to all deprivations of liberty) in paragraph 4 states:

> 4. Also, if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions, ie it must not be arbitrary, and must not be based on grounds and procedures established by law (para 1), information of the reasons must be given (para 2) and court control of the detention must be available (para 4)…

The presence of a bill of rights in the United Kingdom (*Human Rights Act 1998*) and in *Canada* (*Canadian Charter of Rights and Freedoms)* means that legislative drafters, the UK and Canadian Parliaments, and their respective Committees, must address, reconcile and integrate issues of national security and civil and political rights in counter terrorism investigative intelligence gathering legislation within a human rights framework prescribed by a central constitutional or quasi-constitutional document. That is the day to day reality within which any talk of "human security" occurs within those jurisdictions.

Given the preferred representative and responsible government model framework for the protection of human rights in Australia (as outlined above), the Parliamentary Joint Committee should have an ongoing role in ensuring maintenance of the rule of law in relation to questioning and detention powers.

That is, within that preferred Parliamentary model, periodically examining and reporting upon (from practical experience from information about the operation of questioning and detention warrants) issues of necessity, proportionality, reasonableness in the drafting of the provisions and in their operation – to ensure that civil and political rights and national security matters are properly addressed, reconciled and integrated in counter terrorism intelligence gathering legislation.

The justifications for such a Committee role are of course greater in the absence of the framework of a bill of rights, as the executive and legislative drafters are not constrained by any fundamental document. Such constraints that do exist are merely political.

As Parliamentary Joint Committee Chair, Hon D Jull noted of the questioning and detention legislation in *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, "The Bill, in its original form, would undermine key legal rights and erode the civil liberties that make Australia a leading democracy". That original questioning and detention legislation provided a signal example of the inability of an unchecked executive to draft this type of legislation in a way that reflected and reinforced human rights principles, the very targets of terrorism.

That process for continuing and periodic Parliamentary Joint Committee review is also entirely consistent with statements from *Australia's National Framework For Human Rights National Action Plan*, which have been outlined above.

. Some broader issues relating to questioning and detention powers requiring further consideration by the Committee

Aside from the range of matters canvassed above, continuing involvement in the form of periodic review by the Parliamentary Joint Committee is also desirable in addressing several matters under the legislation which require strengthening and further monitoring:

(a) The need for an explicit right for a lawyer to be continuously present during questioning: the incommunicado model of the detention appears in the fact that the legislative drafting fails to create an explicit right for a lawyer to be present at all times during detention and questioning. The legislation consistently refers to 'contact' with a lawyer: see s.34C (3B), 34D (4) and (4A), 34TA (1), (2) and (4) and 34 U (1) and (2).

Significantly, s.34 TB (1) states "To avoid doubt, a person before a prescribed authority for questioning under a warrant issued under section 34D may be questioned

under the warrant in the absence of a lawyer of the person's choice". Contrast this ambivalent situation relating to the presence of legal representation with the presence of the Inspector General of Intelligence and Security under s.34HAB of the *ASIO Act 1979* (Cth).

The right of presence of an independent lawyer during questioning and a right of access at all times during detention is amongst the most effective safeguards against human rights abuses for the subject of a s.34 D warrant.

Such lawyer presence practically enables access to the Federal Court or High Court under respectively ss 19(2) and 23 of the *Federal Court of Australia Act 1976* (Cth) and s.75(v) of the *Commonwealth Constitution* and the *Judiciary Act 1903* (Cth), exercising the right confirmed to seek from a federal court a remedy relating to the warrant or treatment of the person in connection with the warrant in s.34E (3) of the *ASIO Act 1979* (Cth).

(b) To ensure substantive compliance with and availability of such a right canvassed in paragraph (a) above, the inclusion of a provision in the legislation allowing for legal aid for persons who are the subject of s.34D warrants

(c) A legal representative for the person the subject of a s.34 D warrant should be permitted to address the prescribed authority whenever a person exercising authority under the warrant requests of the prescribed authority permission for the questioning to continue at the 8 hour and 16 hour marks: see present position in *ASIO Act 1979* (Cth) s.34HB (3). The present prohibition on the legal adviser addressing the prescribed authority precludes such an address: see *ASIO Act 1979* (Cth) s.34U (4). Similarly, the legal representative for the person the subject of a s.34 D questioning only warrant should be permitted to address the prescribed authority whenever the prescribed authority intends to give a direction under s.34F (1) to detain that person (see also s.34F (2A)).

(d) In s.34A, the definition of "issuing authority" should be tightened to remove an open-ended discretion in paragraph (b) to appoint by regulation a class of persons declared as issuing authorities. The confining of issuing authorities to Federal judicial officers acting in a personal capacity acts as an important safeguard in the warrant process.

Accordingly, paragraph (b) should be amended so that the power to appoint another class of persons can only be invoked if there is a judicial finding as to the unconstitutionality of Federal judicial officers under paragraph (a) being appointed in a personal role as issuing authorities.

Conclusion: the need for a formalised and ongoing review role for the Parliamentary Joint Committee in relation to ASIO's questioning and detention powers

The range of the above considerations provide strong grounds for formalising within any re-enacted legislation a clear and specific continuing review and monitoring role over the ASIO questioning and detention powers for the Parliamentary Joint Committee on Intelligence Services. This should take the form, at a minimum, of amending s.29 of the *Intelligence Services Act 2001* "Functions of the Committee" to provide for three year periodic reviews of the operation, effectiveness and implications of the questioning and detention powers.

Such a role will be most effective, influential and timely when integrated with a further periodic time limitation (sunset clause) over the questioning and detention powers. Accordingly, any re-enactment of Division 3 of Part III of the *ASIO Act 1979* (Cth) should include an equivalent provision to the present s.34 Y "This Division ceases to have effect 3 years after it commences". Such a sunset clause would be consistent with the inclusion of a sunset clause in Canadian and UK legislation, neither of which goes so far as the Australian legislation to permit the detention of non-suspects for intelligence gathering purposes.

These measures would also enable the Committee to formally draw upon and amplify in its review, observations made in the annual reports of the Inspector General of Intelligence and Security: see, for example, paragraph 129 of the 2003-2004 report, where several procedural and practical issues based upon observation of the execution of section 34 D warrants have been raised by the past and present Inspector Generals.

These measures for the Parliamentary Joint Committee are entirely consistent with, and in fact reinforce, the Government's preferred position on the maintenance and advancement of human rights, focused strongly upon the role of representative and responsible government as articulated in the National Action Plan *Australia's National Framework For Human Rights* and claiming that the promotion and preservation of democratic processes and traditions (such as the public hearings, submissions and review function of this Committee) are the greatest guarantee against the effects of terrorism.

I would be pleased to provide further information in support of this submission or to attend a hearing of the Committee if requested.

Yours faithfully,

(Dr) Greg Carne

ATTACHMENTS:

Carne, G "Detaining Questions Or Compromising Constitutionality?: The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)" (2004) 27 *University of New South Wales Law Journal* 524-578

Carne, G "Brigitte And The French Connection: Security *Carte Blanche* Or *A La Carte*?" (2004) 9 *Deakin Law Review* 573-619