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MEMBER FOR GINNINDERRA

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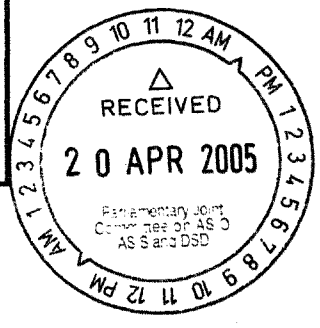

The Hon David Jull MP
Chairman
Joint Parliamentary Committee on
ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

Dear Mr Jull

Review of the Australian Security Intelligence Organisation special powers in relation to terrorism

Thank you for your letter of 9 December 2004 seeking a submission to your Committee's review of the Australian Security Intelligence Organisation's (ASIO) questioning and detention powers. I apologise for the delay in replying, however it appears that your original letter was not received in my Office. A copy was received by my Department on 24 March 2005.

There is no doubt that Australia must play a proactive role in combating the threat of terrorism both at home and in our region. A strong legislative framework is essential to empower our law enforcement and security agencies to deal effectively with likely terrorist threats. However, it is my firm belief that Australia's national interest in protecting and promoting peace and security are best served by also maintaining our commitment to fundamental human rights. Security measures should not infringe the fundamental civil and political rights of Australian citizens and permanent residents of our country.

It is against this background that I express my concern about the extent of the special powers granted to ASIO by Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (ASIO Act). This legislation provides extensive powers for the incommunicado detention and questioning of non-suspects for the purposes of counter-terrorism information gathering. General appeals to an increased threat of terrorism post 11 September 2001 cannot on their own be sufficient to justify such serious incursions into the fundamental rights of individuals.

Human rights law recognises that some rights, such as the right to liberty and security (but not the prohibition on torture, which is absolute) may be restricted over and above ordinary limits in times of emergency. Such measures must be of an exceptional and temporary nature; and they must be a proportionate response to a current or imminent threat. (UN Human Rights Committee General Comment No 29 (24 July 2001); *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553; *Marshall v United Kingdom* (10 July 2001, Appn No 41571/98); *Ireland v United Kingdom* (1978) 2 EHRR 25; *Lawless v Ireland* (No 3) (1961) 1 EHRR 15.)

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The need to test proportionality, in particular the need to justify extraordinary powers against the existence of an emergency, pervades not only international law but a long line of cases in the domestic law. For example, the need for proportionality was emphasised by the United States Supreme Court during the Second World War in *Korematsu v. United States* 323 U.S. 214 (1944); during the Korean Conflict by the High Court in the *Communist Party Case* (1951) 83 CLR 1 and recently during the present "war on terror" in an important decision by the House of Lords, concerning the detention of terrorists under UK anti-terrorist legislation: *A (FC) and Ors v Home Secretary* [2004] UKHL 56.

The lack of a national Bill of Rights in Australia, means that the opportunity to test the compatibility of Division 3 against internationally accepted minimum human rights standards is seriously limited.

In the Australian Capital Territory such important questions of legal policy must be developed in light of the ACT *Human Rights Act 2004* (HRA) which reflects the human rights standards set by the International Covenant on Civil and Political Rights (ICCPR). The HRA imposes a discipline on the ACT Executive to adopt a rational and proportionate approach to limitations on fundamental civil and political rights. By contrast, it does not appear that the development of this Commonwealth legislation was informed by a proper analysis of the ICCPR. Australia has been a party to the Covenant for over 30 years. In the absence of a national Bill of Rights, the international human rights standards of the ICCPR should play a central role as a benchmark of good law and policy.

In my view, the legislation imposes excessive restrictions on the fundamental rights to liberty, freedom of expression and access to legal advice and falls short of the ICCPR's standards.

I also draw the Committee's attention to the overall lack of transparency and accountability essential when exercising such powers in a democratic society. The secrecy imposed on persons subject to a warrant and their lawyers for two years under threat of criminal sanction is a matter of concern. This aspect of the law seriously undermines the role of the media and the Parliament in ensuring public accountability and the public's right to know. Importantly, it also impedes prompt access to the Australian Human Rights and Equal Opportunity Commission (HREOC). HREOC is the only independent body with jurisdiction to assess the conduct of Commonwealth agencies explicitly against ICCPR standards.

If Division 3, Part III of the ASIO Act is to have a continuing operation after 26 July 2006, I strongly recommend the inclusion of a further three year sunset clause and that your Committee be given an explicit and ongoing role in overseeing the operations of its provisions, including compliance with international human rights standards.

Yours sincerely

Jon Stanhope MLA
Chief Minister
12 APR 2005