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Mr Bret Walker SC
Independent National Security Legislation Monitor

Dear Mr Walker

Submission on ASIO Powers

We attach a submission on the questioning and detention powers conferred by the *Australian Security Intelligence Organisation Act 1979* (Cth).

Two articles that consider these powers at length are referred to in our submission, and are attached. The first, written by Lisa Burton, Nicola McGarrity and myself, is a comprehensive analysis of the questioning and detention powers (Annexure A). The second, written by Lisa Burton and myself, examines the oversight and accountability of the powers (Annexure B). Both articles have been the subject of peer review and are forthcoming in Australian law journals, the former in the *Melbourne University Law Review*, and the latter in the *Monash University Law Review*.

Our primary submission is that detention warrants should be repealed. Questioning warrants should be retained, but the criteria that must be satisfied in order to obtain a questioning warrant should be amended. Changes should also be made to the issuing process and more appropriate safeguards for the rights of individuals incorporated into the legislation.

Yours sincerely

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1. Availability of Warrants

Detention Warrants should be repealed (Issue 21)

Detention Warrants permit individuals who may not be suspected of any crime to be detained for up to seven days. In Australia, executive detention is the exception — not the rule. It should only be permitted where there is a clear justification for doing so. In the course of parliamentary debate, it was said that Detention Warrants were necessary ‘to protect the community from (terrorism)’¹ and would sometimes be ‘critical’ to public safety.² The former Attorney-General asserted that without Detention Warrants, ‘terrorists could be warned before they are caught, planned acts of terrorism known to ASIO could be rescheduled rather than prevented, and valuable evidence could be destroyed’.³ (*Annexure A, 30-34*)

Experience does not support these claims. ASIO has never applied for a Detention Warrant, despite stating that it ‘responds to literally thousands of counterterrorism leads’ each year and is ‘currently involved in several hundred counterterrorism investigations and inquiries’.⁴ More particularly, 16 Questioning Warrants have so far been issued. In none of these cases was it necessary for a person to be detained. Further, 37 people have been charged with terrorism offences since 2003, without the issue of one Detention Warrant. This suggests Detention Warrants are either unnecessary or ineffective. It is difficult to justify the continuing existence of extraordinary powers which permit such significant inroads into fundamental human rights if they are of little use. (*Annexure A, 43-51*)

Further, there is real reason to suspect the detention power will never been used. The Australian Federal Police can now detain terrorist suspects for up to eight days.⁵ This leaves little need for Detention Warrants — other than to detain non-suspects, which the Director-General has indicated ASIO would be wary to do.⁶ (*Annexure A, 46-47*)

2. Criteria for warrants

The criteria which must be satisfied in order to obtain a Questioning Warrant should be amended (Issues 7 and 14)

Questioning Warrants permit the coercive questioning of individuals who may not be suspected of any crime. This cannot be dismissed as a mere inconvenience; questioning can carry on over several days and lead to significant civil and criminal penalties. (*see section 5 below; Annexure A, 34-39*)

The person being questioned has no right to silence or privilege against self-incrimination. We accept these safeguards are not absolute, but it is dangerous to accept coercive questioning as

¹ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1935 (Daryl Williams).

² Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427 (Daryl Williams).

³ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1935 (Daryl Williams).

⁴ Senate Legal and Constitutional Affairs Legislation Committee, Senate, Estimates Hearing, 25 May 2011, 100 (David Irvine, Director-General of ASIO).

⁵ *Anti-Terrorism Act 2004* (Cth); *Crimes Act 1914* (Cth) ss 23DB(5)(b), 23DF(7); *National Security Legislation Act 2010* (Cth) sch 3 cl 16 (inserting s 23DB(11) into the *Crimes Act*).

⁶ Commonwealth, *Senate Estimates Hearing*, 24 May 2012, 110-112 (David Irvine).

the new norm. Lengthy periods of coercive questioning should only be permitted if this is a proportionate response to the threat of terrorism. The current criteria do not ensure this. (*Annexure A, 27-30*)

- *Reasonable grounds for believing warrant will assist the collection of intelligence*⁷
The power to coercively question non-suspects was said to be necessary to extract intelligence which would ‘avert terrorism offences’.⁸ However, this criterion only requires ASIO to show that ‘the warrant ... will substantially assist the collection of intelligence that is important in relation to a terrorism offence’.⁹ This sets a low threshold. It does not distinguish between past, present or future offences, offences that are likely or unlikely to occur, or serious or relatively minor offences. This is an inadequate basis for coercive questioning and means the issue of a Questioning Warrant may be a disproportionate measure. It would be preferable, for example, to require reasonable belief that issuing the warrant will substantially assist the prosecution or prevention of a terrorism offence.
- *The ‘last resort’ requirement (Issue 7)*¹⁰
The Attorney-General must be satisfied that relying on other methods of collecting the intelligence sought would be ineffective.¹¹ This more appropriately reflects the purpose of a Questioning Warrant.¹² From the outset, the special powers were justified as a measure of ‘last resort’.¹³ This criterion is the only place in the *ASIO Act* where this intention manifests, and should not be removed without substantive reassessment of the basis of the regime.

This criterion is a proper and important means of ensuring that Questioning Warrants which significantly restrict the liberties of the individual are not used when less intrusive measures would suffice. This enhances the proportionality of the special powers regime – though not, we argue, enough.

The Attorney-General’s Department has indicated that it is equipped to make the prediction that this criterion requires.¹⁴ The fact Questioning Warrants are rarely used does not necessarily mean that this requirement is too demanding. It could equally signal that Questioning Warrants are rarely necessary.

For these reasons, the ‘last resort’ requirement is not too demanding, and must be retained. If anything, the fact this important criterion is decided by the Attorney-General alone suggests it is subject to inadequate scrutiny. It should be scrutinised by the Issuing Authority as well. (*see further Section 3 below; Annexure A, 11-14*).

⁷ *ASIO Act* ss 34D(4)(a), 34E(1)(b).

⁸ Revised Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (Cth), 14.

⁹ *ASIO Act* ss 34D(4)(a), 34E(1)(b), 34F(4)(a), 34G(1)(b).

¹⁰ *ASIO Act* s 34D(4)(b)

¹¹ *ASIO Act* s 34D(4)(b).

¹² Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1936 (Daryl Williams); Commonwealth *Parliamentary Debates*, House of Representatives, 17 August 2005, 82 (Philip Ruddock, Attorney-General).

¹³ Commonwealth, *Parliamentary Debates*, House of Representatives, 21 March 2002, 1930 (Daryl Williams).

¹⁴ Attorney-General’s Department (Cth), Supplementary Submission No 102 to Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 20.

If Detention Warrants are retained, the criteria which must be satisfied in order to obtain a Detention Warrant should be amended (Issues 14 and 15)

None of the three, alternative criteria presently in place justify detention. They do not require ASIO to demonstrate that detention is reasonably necessary and appropriate to protect the public from a terrorist act, though that is the ostensible purpose of the power. This can be contrasted, for example, with the criteria which must be satisfied in order to obtain a Control Order.¹⁵ (*Annexure A, 14-16*)

- *Person may not appear for questioning*¹⁶
The belief that a person ‘may not appear’ for questioning does not justify detention, especially not for seven days. The person subject to the warrant may be an innocent bystander, akin to a witness. Nowhere else does the law permit the pre-emptive detention of witnesses who it is believed ‘may not’ appear for questioning which, the Monitor observed in the 2011 Report, is an everyday occurrence.¹⁷
- *Person may alert others or destroy evidence*¹⁸
The belief that a person ‘may alert a person involved in a terrorism offence that the offence is being investigated’ or ‘may destroy, damage or alter a record or thing ‘that may be requested in questioning’ would present a more compelling case for detention, if the criteria went further and required ASIO to show that this would derail the prevention or prosecution of a terrorism offence. However, the criteria do not require such urgency or necessity. There is a strong argument that section 34ZS of the *ASIO Act* or ordinary procedures of criminal justice are sufficient to guard against these risks. They do not justify detention.

ASIO is obviously cautious about applying for a Detention Warrant — and may never do so in the full range of circumstances that these criteria permit.¹⁹ This does not solve the problem. The rule of law requires executive discretion to be tightly constrained. A regime which relies on the prudence of unelected executive officers is incompatible with Australia’s public law principles. (*Annexure A, 43-51; Annexure B, 33-34*)

3. Issuing Process

All criteria should be scrutinised by the Attorney-General and the Issuing Authority (Issues 15 and 17)

All criteria should be subjected to strict, independent scrutiny given the gravity of the Special Powers. Issuing Authorities, being judicial officers, can bring powers of reason and analysis to the matter that the Attorney-General may lack. Further, the fact the Issuing Authority cannot directly scrutinise important criteria gives the troubling impression that the Issuing Authority is

¹⁵ *Criminal Code Act 1995* (Cth) s 104.4(1)(d).

¹⁶ *ASIO Act* s 34F(4)(d)(ii).

¹⁷ Independent National Security Legislation Monitor, *Annual Report* (2011), 34.

¹⁸ *ASIO Act* ss 34F(4)(d)(i) and (iii).

¹⁹ Vivienne Thom, Address to Supreme and Federal Court Judges’ Conference’ (Hobart, 26 January 2009), 6; Commonwealth, *Senate Estimates Hearing*, 24 May 2012, 110-112 (David Irvine).

appointed to give a ‘vener’ of judicial approval to an executive-controlled process.²⁰ This diminishes the apparent, if not actual, fairness of the issuing process.

- *‘Relying on other methods of collecting that intelligence would be ineffective’*²¹
This criterion ensures special powers warrants are used as measures of last resort. This is an important qualification which should be scrutinised by the Issuing Authority. It is difficult to see why the Attorney-General is any better placed to determine this matter than an Issuing Authority, unless the Attorney-General acts merely on ASIO’s advice.
- *Warrant can only be issued against a person aged 16 to 18 if Attorney-General ‘is satisfied on reasonable grounds that: ... it is likely the person will commit, is committing or has committed a terrorism offence’*²²
The decision to coercively question or detain a minor must be rigorously scrutinised. These questions are eminently suitable for determination by a judicial officer, and arguably unsuitable for determination by a government minister.
- *Criteria for repeat warrants against the same person*²³
The criteria should be scrutinised by Issuing Authorities to guard against the possibility of unwarranted ‘rolling’ warrants.
- *Detention criteria*²⁴
If Detention Warrants are retained, then the decision to deprive an individual of his or her liberty must be rigorously scrutinised. The detention criteria are again eminently suitable to judicial determination, and arguably unsuitable for determination by a government minister.

All Issuing Authorities should be former judicial officers (Issue 15, 17)

Presently, the Attorney-General may appoint sitting Federal Magistrates or judges of Federal, State or Territory to act as Issuing Authorities.²⁵ All Issuing Authorities should instead be former judicial officers, as is for Prescribed Authorities. Former judges tend to retain the same qualities of independence, impartiality and integrity that sitting judges are hoped to bring to the role, while the involvement of sitting judges in the non-judicial and, in some minds, oppressive questioning process may adversely affect the public’s confidence in the courts.

The power given to the Attorney-General to ‘declare that persons in a specified class are issuing authorities’,²⁶ regardless of their position, expertise or independence, has the potential to remove the issuing process of credibility. It has not proved necessary and should be repealed. (*Annexure A, 10-11*)

²⁰ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 36.

²¹ *ASIO Act* ss 34D(4)(b), 34F(4)(b).

²² *ASIO Act* ss 34ZE(4)(a) and (b).

²³ *ASIO Act* ss 34D(3)(c) and (d), 34F(3)(c) and (d), 34F(6).

²⁴ *ASIO Act* ss 34F(4)(d)(i) – (iii).

²⁵ *ASIO Act* s 34AB(1).

²⁶ *ASIO Act* s 34AB(3).

4. Human rights safeguards: legal representation, the privilege against self-incrimination and restrictions on communication

A person subject to a Questioning Warrant has few rights; far fewer than a person being questioned by police on suspicion of a crime. Most importantly, the person has no right to know the reason they are being questioned, no effective right to legal representation or advice, and no right to lawyer-client confidentiality. (*Annexure A, 21-25, 34-39*)

In the course of parliamentary debate, the government claimed that terrorism was ‘quite unlike ordinary crime, necessitating a response quite unlike the accepted responses to criminal activity’.²⁷ It asserted that the special powers warrants were preventative tools, not tools of law enforcement, and so need not be attenuated by the procedural safeguards expected in the criminal justice system.²⁸

However, the removal of these safeguards is generally arbitrary, and not tailored to serve any counter-terrorism purpose. While the questioning process is not criminal, it can lead to significant civil and criminal penalties. Most obviously, it is an offence punishable by five years imprisonment to fail to comply with the terms of a warrant.²⁹ More generally, questioning can last for several days and represents a significant intrusion into the privacy of the individual.

It is therefore imperative that the person subject to a warrant fully understands their legal obligations and their legal rights — including, for example, to challenge the legality of a warrant. To deny the person the procedural protections which are commensurate with the consequences of a warrant significantly diminishes the fairness and accountability of the regime. The legislation should be amended to ensure these procedural safeguards are only restricted where it is reasonably necessary and proportionate to do so. (*Annexure A, 34-43*)

Persons subject to a warrant should have full access to legal representation and advice (Issue 20)

The *ASIO Act* specifies that persons subject to a warrant must be permitted to contact a lawyer, but this ‘right’ is of limited value:

- the person may be barred from contacting his or her first lawyer of choice on national security grounds;³⁰
- this is a bare right to contact; the person may be questioned before his or her lawyer arrives and before he or she has received legal advice;³¹
- the lawyer must play a remarkably passive role. The lawyer (like the person subject to the warrant) is not told why the warrant was issued, is not permitted to ask questions, cross-examine or ‘intervene in questioning ... except to request clarification of an ambiguous question’,³² and may be ejected if deemed to be ‘disrupting proceedings’;³³ and

²⁷ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 99.

²⁸ Commonwealth, *Parliamentary Debates*, House of Representatives, 12 December 2002, 10427 (Daryl Williams).

²⁹ *ASIO Act* s 34L.

³⁰ *ASIO Act* s 34ZO.

³¹ *ASIO Act* s 34ZP(1).

³² *ASIO Act* s 34ZQ(6).

³³ *ASIO Act* s 34ZQ(9).

- most communication between a person and his or her lawyer must be capable of being monitored by ASIO,³⁴ restricting legal professional privilege.³⁵

These restrictions will inhibit full and frank communication between the person and their lawyer. They create a real risk that the person will not understand their legal rights or obligations, the importance of which is explained above. The three latter restrictions are arbitrary; they apply regardless of whether ASIO has or could show they are reasonably necessary. (*Annexure A, 41-43; Annexure B, 7-8, 32-35*)

The legislation must be amended to ensure lawyers can adequately represent their client's interests. For example, all communications between a person subject to a warrant and his or her lawyer should be confidential. (*Annexure A, 34-41*)

The abrogation of privilege against self-incrimination under a Questioning Warrant is not sufficiently balanced by the use immunity (Issue 12)

Information obtained through questioning cannot be used in criminal proceedings against the person ('*Use Immunity*'). This does not sufficiently balance out the loss of the privilege against self-incrimination because it does not prevent the information from being used in four significant ways:

- in proceedings for failing to comply with the terms of the warrant or giving false or misleading information;³⁶
- in civil proceedings against the person; for example, as the basis for deporting the person, cancelling their passport or obtaining a control order;
- as evidence in the criminal prosecution of another person; and
- to gather other evidence which can be used in criminal proceedings against the person. That is, there is no Derivative Use Immunity.

Thus the questioning process can still produce significant consequences for the subject, who may be denied effective legal representation or advice. (*Annexure A, 30-34*). If the privilege against self-incrimination is removed, then persons subject to a warrant should be given full Use and Derivative Use Immunity and afforded full rights to legal representation and advice.

The restrictions on communication imposed by section 34ZS of the ASIO Act are disproportionate (Issues 19 and 20)

Section 34ZS of the *ASIO Act* prohibits disclosure of a broad range of information about the special powers regime. The information captured by this provision is potentially innocuous, yet the offence is one of strict liability with no defence for innocent disclosures. The penalty for breaching section 34ZS is five years imprisonment.

Some disclosures are exempt from section 34ZS. However, the heavy penalty (and the fact persons subject to a warrant may not receive adequate legal advice) may discourage permitted disclosures. For example, in 2005 the Parliamentary Joint Committee on ASIO, ASIS and DSD reported that fear of prosecution had prevented some people from providing evidence to the

³⁴ *ASIO Act* s 34ZQ.

³⁵ Legal professional privilege only applies to confidential communications, defined in the *Evidence Act 1995* (Cth) as 'communication made in such circumstances that, when it was made the person who made it or the person to whom it was made was under an express or implied obligation not to disclose its contents': s 117.

³⁶ *ASIO Act* s 34L(9).

committee, even though it would have been permitted.³⁷ This ‘chilling’ effect may hinder the functions of other statutory watchdogs, discourage disclosures necessary to obtain legal advice and diminish legitimate public debate about the regime.

Further, section 34ZS(2) remains in place for two years after a warrant expires, making it ‘next to impossible to obtain’ ‘eyewitness and first-hand accounts of ... ASIO’s activities’.³⁸ This makes it difficult to test the legislation or the legality of a particular warrant in court, as well as in public.

For all these reasons, section 34ZS diminishes the transparency and accountability of the Regime. It should be more closely tailored to its counter-terrorism purpose; for example, by prohibiting only those disclosures which could prejudice national security, or including a broad defence for innocent or innocuous disclosures.

In particular, you asked whether the disparity between the penalty for breaching section 34ZS and the penalty imposed for breaching the safeguards in the Act is appropriate. An official who deliberately contravenes any of the safeguards set out in the *ASIO Act* faces a penalty of two years imprisonment; less than half of that which applies to section 34ZS. This is clearly inappropriate given the broad circumstances in which section 34ZS applies.

The penalty for breaching the safeguards is itself inadequate. It is simply too small for some of the contraventions which may occur. It is a ‘one size fits all’ penalty which has no connection to the severity of the offence; thus an official who allows questioning to run overtime faces the same penalty as an official who subjects a person to inhumane or degrading treatment. Different penalties which are commensurate with the gravity of the offence should apply. (*Annexure A, 41-44; 7-8; Annexure B, 10, 12, 24, 32, 35-36*)

If Detention Warrants are retained, then the restrictions on the ability of the person in detention to contact other should be amended

A person subject to a Detention Warrant is prohibited from contacting ‘*anyone* at any time while in custody in detention’,³⁹ except for:

- the statutory officials appointed to supervise the regime;
- persons specified in the warrant or by the Prescribed Authority; and
- a lawyer.

ASIO has not explained the need for this broad ban. It is unclear why lesser restrictions (such as a requirement that any conduct between the detainee and outsiders be monitored by ASIO or police officers) would not suffice, or why section 34ZS is insufficient. These alternatives should be considered.

³⁷ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), viii–ix.

³⁸ Jude McCulloch and Joo-Cheong Tham, ‘Secret State, Transparent Subject: The Australian Security Intelligence Organisation in the Age of Terror’ (2005) 38(3) *Australian & New Zealand Journal of Criminology* 400, 405.

³⁹ *ASIO Act* s 34K(10) (our emphasis).

5. Time Limits

The 24 hour time limit for Questioning Warrants is too long (Consideration 8)

24 hours questioning must not be mistaken for one day of questioning. Questioning is typically spread ‘over a number of days’, from early in the morning until late in the afternoon.⁴⁰ Significant periods of time are not ‘counted’ when calculating how much questioning time has elapsed, including break times and time taken by the Prescribed Authority to explain the questioning process.⁴¹ Thus ‘24 hours questioning’ is in fact a very significant and prolonged disruption of the life of an individual, who may not be suspected of any crime. This questioning may be spread out over the lifespan of the warrant, which can be a maximum of 28 days. The person may thus have the threat of questioning hanging over their head for up to a month.

Further:

- Section 34ZS of the *ASIO Act* prohibits the subject of a warrant from revealing the fact a warrant has been issued, unless authorised to do so. This makes it difficult for the person to explain their whereabouts, to family members of their employer. This emphasises the need to ensure the period of questioning or detention is as short as possible. (*Annexure A, 39-43*)
- ASIO can obtain multiple, successive warrants against the same person. The additional criteria ASIO must satisfy in order to obtain a repeat warrant may not pose a significant hurdle. There is also no limit on the number of repeat warrants which may be issued. Therefore, a person may be questioned (or detained) under successive warrants for even longer than these time limits appear to permit. (*Annexure A, 16-18*)

For all these reasons, the length of questioning should be restricted. The time limit should be shortened, or the ‘dead time’ provision removed. Questioning should be confined to a shorter period, for example one week. (*Annexure A, 25-27*).

The extended time limit for questioning through an interpreter should be repealed (Consideration 9)

Questioning involving an interpreter can carry on for twice as long: that is, for a maximum of 48 hours.⁴² This seems disproportionate to the likely impact of an interpreter on the questioning process. It may discourage a subject from requesting an interpreter in the first place. Further, this extended time limit applies if an interpreter ‘is present *at any time* while a person is questioned’,⁴³ regardless of for how long. In contrast, the Federal Police are not given any extra time to question a person suspected of a terrorism (or any other) offence because that person requires a translator.⁴⁴

For these reasons the extended time limit in the *ASIO Act* should be abolished. In the alternative, a flexible provision that permitted ASIO to apply for an extension of time from the

⁴⁰ Parliamentary Joint Committee on ASIO, ASIS and DSD, *ASIO’s Questioning and Detention Powers: Review of the Operation, Effectiveness and Implications of Division 3 of Part III in the Australian Security Intelligence Organisation Act 1979* (2005), 16- 18.

⁴¹ *ASIO Act* ss 34ZE(6), 34R(13); *Statement of Procedures – Warrants Issued Under Division 3 of Part III* (2006), cl 7.4 <<http://www.comlaw.gov.au/Details/F2006L03543/Explanatory%20Statement/Text>>.

⁴² *ASIO Act* s 34R(11).

⁴³ *ASIO Act* s 34R(8) (our emphasis).

⁴⁴ *Crimes Act* ss 23C and 23DB.

Prescribed Authority, but only for so long as reasonably necessary to accommodate the interpreter, would be preferable.⁴⁵ (*Annexure A*, 26-27)

If Detention Warrants are retained, the time limit on detention should also be reduced

The subject of a Detention Warrant may be detained for up to seven times longer than a person suspected of committing a crime can be detained by the AFP. This is a striking and concerning difference; especially given the subject need not be suspected of any crime, and Detention Warrants are not limited to circumstances where questioning is necessary to enable the prevention or prosecution of a terrorism offence. Unless ASIO can demonstrate some 'appreciable operational benefit' for seven days,⁴⁶ the time limit should be shortened to something akin to 48 hours. (*Annexure A*, 32-33)

6. Oversight and accountability

Powers of this gravity ought to be held to the highest possible standards of accountability and oversight. Federal Parliament has gone to great lengths to design an extensive framework capable of supervising the special powers regime in a manner which balances ASIO's operational needs with this need for accountability. However, this framework lacks transparency and independence.

Transparency is hindered by section 34ZS of the *ASIO Act* and the restrictions placed on the ability of lawyers to obtain information about the warrants to which their clients are subject. This lack of transparency is exacerbated by broad and unchecked powers given to the Attorney-General and Prime Minister to censor the reports of the IGIS and Parliamentary Joint Committee on Intelligence Community ('*PJCIS*').

It may be justifiable to censor information in order to protect national security. However, these powers are cast too broadly, again in terms which are not limited to information which could feasibly pose a security risk. Further, the Attorney-General is a key player in the regime and should not be permitted to censor the reports of the officials appointed to supervise it. There is a real risk that the Attorney-General will use this power at the direction of ASIO, as has been alleged in the past. (*Annexure B*, 16-17, 24-25, 34-35)

The accountability framework relies heavily on 'integrity' agencies, particularly the IGIS and Monitor. These agencies are 'emanations of the executive' and so lack the clear cut independence which courts provide. It is therefore particularly problematic that the Attorney-General can censor the *PJCIS*'s reports, and that the IGIS must consult with the Attorney-General and/or Director-General of ASIO about her inquiries and include their comments in her report. All officials appointed to supervise the regime should be trusted to redact security sensitive information from their own reports, as the Monitor is. Their reports should be entirely independent. (*Annexure B*, 15-16, 29-30, 36)

Further, these integrity agencies can only report and recommend change. The ability of the courts to supervise the regime (via judicial review) is weak. (*Annexure B*, 8-12) Thus the supervisory framework lacks forms of hard accountability. (*Annexure B*, 28, 34) The decisions of the Attorney-General are also subject to inadequate scrutiny. (*Annexure B*, 35)

⁴⁵ The Independent National Security Legislation Monitor made a similar suggestion in the 2011 Annual Report, at 32.

⁴⁶ Independent National Security Legislation Monitor, *Annual Report* (2011), 31.

These problems are unsurprising and to an extent insoluble, given the inherent difficulties of exposing security sensitive counter-terrorism judgments to external and open scrutiny. If the special powers cannot be adequately supervised, there is good reason to suggest they should not remain at all. (*Annexure B, 35-36*)