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Official Committee Hansard

JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of ASIO's questioning and detention powers

FRIDAY, 20 MAY 2005

CANBERRA

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JOINT STATUTORY COMMITTEE ON

ASIO, ASIS AND DSD

Friday, 20 May 2005

Members: Mr Jull *(Chair)*, Senators Ferguson, Sandy Macdonald, Robert Ray and Mr Byrne, Mr Kerr and Mr McArthur

Members in attendance: Senators Ferguson, Sandy Macdonald and Robert Ray and Mr Byrne, Mr McArthur and Mr Kerr

Terms of reference for the inquiry:

To inquire into and report on:

The operation, effectiveness and implications of:

(i) Division 3 Part III of the Australian Security and Intelligence Organisation Act 1979; and

(ii) the amendments made by the Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003, except item 24 of Schedule 1 to that Act (which included Division 3 Part III in the Australian Security Intelligence Organisation Act 1979; and

(c) To report the Committee's comments and recommendations to each House of Parliament and to the responsible Minister.

WITNESSES

BRYAN, Mr Neville, Principal Investigation Officer, Office of the Inspector-General of Intelligence and Security 1

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CARNELL, Mr Ian, Inspector-General of Intelligence and Security, Office of the Inspector-General of Intelligence and Security 1

LENEHAN, Mr Craig, Deputy Director, Legal Services Section, Human Rights and Equal Opportunity Commission 13

von DOUSSA, The Hon. John, QC, President, Human Rights and Equal Opportunity Commission 13

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Committee met at 9.03 am

BRYAN, Mr Neville, Principal Investigation Officer, Office of the Inspector-General of Intelligence and Security

CARNELL, Mr Ian, Inspector-General of Intelligence and Security, Office of the Inspector-General of Intelligence and Security

ACTING CHAIR (Senator Ferguson)—I declare open this public hearing of the Parliamentary Joint Committee on ASIO, ASIS and DSD. This review is conducted pursuant to section 29(1)(bb) of the Intelligence Services Act 2001. The committee is required to report on the operation, effectiveness and implications of division 3, part III of the ASIO Act and to report its findings to the parliament by 22 January 2006. The committee advertised the review on 17 December 2004. Ninety-six submissions have been received, three of them confidential. This is the second of four days of hearings and there will be further hearings in Sydney on 6 June and Melbourne on 7 June.

I should advise those present that the Attorney-General has agreed, in accordance with schedule 1, clause 20(2) of the Intelligence Services Act 2001, that these proceedings should be conducted in public session with the following exceptions: to deal with evidence that has or may have a connection to a current or potential prosecution; to deal with evidence which relates to a past, current or future investigation; to ensure that the identities of ASIO officers and employees are protected; and to ensure that the identities of prescribed authorities are protected. If or when any of the above circumstances arise, the committee will take evidence in closed session.

Today the committee will take evidence from the Inspector-General of Intelligence and Security, the Human Rights and Equal Opportunity Commission, Professor George Williams and Dr Greg Carne. Mr Carnell, I invite you to make some introductory remarks before we move to questioning.

Mr Carnell—I thought it might be useful if I start with some comments relating to three things: firstly, my written submission to the committee; secondly, some recommendations in other written submissions to the committee; and, thirdly, a legislative amendment which will be introduced into parliament shortly.

First, in my written submission a key point is that what the previous inspector-general, my staff and I have seen and read has been reassuring in regard to the way in which section 34D warrants have been effected. As a watchdog, one looks to find fault, but in the end we must call it as we find it. The behaviour of all the officials and the prescribed authorities in relation to these warrants has to date been professional and appropriate. It has certainly not gone anywhere near being cruel, inhumane, degrading or torture. The subjects have been treated with humanity and respect for human dignity. These are the requirements of section 34J of the ASIO Act.

I need to reiterate the evidence of Mr Richardson yesterday, that the warrants to date have not involved detention or certain other provisions in the ASIO Act. In such circumstances I support the idea of a further review by the committee in, say, three years time so that any practical experience with some particularly sensitive parts of these provisions can be carefully considered.

There is also the issue of the sunset clause. I listened with interest to the discussion yesterday. It seems to me that there is a reasonable case that a sunset clause is not necessary in the short or even perhaps the medium term. However, many of the submissions to the committee are rightly acutely conscious of the role of detention historically in oppression. That leads to thinking about whether a longer-term sunset clause is still appropriate. Options would include a six-year sunset clause with a three-year midpoint review, or even a nine-year sunset clause with two reviews before then.

My submission lists the safeguards in the legislation directly involving my position. Where applicable to date these have been satisfied. For the first three warrants, the office attended on 20 of the 21 days involved. For the reasons given in paragraph 21 of my submission, the practice is now to attend on the first day and then decide if further attendance is required. In the five further warrants, the result has been that I or my staff have attended on the first day and not on subsequent days. I would emphasise that, where there is not attendance on a particular day, my staff and I make a point of reading all of the transcripts carefully and, if necessary, viewing relevant parts of the video.

On one occasion only have I exercised the capacity under section 34HA to raise a concern with the prescribed authority, and that is outlined in paragraphs 23 to 25 of the submission. For completeness, I should mention that, in another case, the legal representative of the subject of the warrant did speak to my office's representative and voiced criticism of the prescribed authority and ASIO's solicitor. However, the decision was made not to raise this with the prescribed authority under section 34HA. The view was, correctly I believe, that the prescribed authority is outside the jurisdiction of the IGIS. Nor did the office representative agree with the criticisms that were being voiced of either the prescribed authority or of ASIO's solicitor. I should say that the lawyer in question was subsequently quoted in the media as saying my office is useless. Mr Blick wrote to him rebutting that criticism. Also for the sake of completeness, I should add that there have been no written or subsequent complaints lodged with my office.

My submission suggests some legislative refinements. I believe there should be some greater scope for legal representatives of subjects to address the prescribed authority. There should be the greatest possible clarity about two things, and they intersect in one instance: firstly, we need clarity about when time is questioning time and when it is of another character—I have labelled that 'procedural time', but you can use different labels—and, secondly, we need clarity about questioning as against questioning and detention warrants. The provisions I particularly have in mind here are section 34D(3) and its interaction with section 34HB, and also section 34F. In that case we have a provision with the subheading 'Detention of persons', but then, when one looks at least at subsection (1), it includes questioning-only warrants.

I also believe that a time limit should be inserted into section 34P for the provision of written reports to the Attorney-General on the extent to which the action taken under the warrant has assisted the organisation in carrying out its functions. Consistent with some other provisions, three months would seem to be an appropriate time requirement there. I also believe the provision of transcripts to me should be included in section 34Q on the basis that it should be automatic and not something I have to ask for. The director-general yesterday correctly pointed out that I could obtain these things if I needed to, but I think it would be easier if they were listed with things that I automatically receive. I might digress there and say that I took the director-general's reaction to be an indication of the extent to which he is committed to accountability

and the role of the IGIS and was therefore surprised at any thought that the IGIS might not get anything. Obviously, his successor will need to have those same qualities.

There are also policy issues. One is the provision of legal aid. Personally, I favour its provision being automatic but capped, as is usual. I heard the arguments from AGD yesterday, but I still maintain that these are extraordinary situations and unlikely to be frequent. Government bodies are generally wary of things that might be argued to them to be precedents in relation to other situations, but that should not be at the expense of dealing fairly with individuals in unusual circumstances. I think one only has to think of a non-legally-trained person faced with the serious and complex nature of coercive powers, use and derivative-use concepts, strong offence provisions and strict secrecy requirements to know that these things need to be explained. I believe they should be explained by more than the prescribed authority. The prescribed authority has done an excellent job, but these are very complex and serious matters to be putting to a person, particularly if the only time they hear them is when they first appear before the prescribed authority. I think we need to have two or three arrows in order to try to give them a proper understanding of their situation. One of those is obviously the capacity to consult with a lawyer before they appear before the prescribed authority.

Another policy issue is the payment of expenses to subjects of warrants. I heard the discussion yesterday and was reassured that there does not seem to be any policy argument against some sort of scheme. Clearly, they need to tease out who should administer it. I thought the Attorney-General's Department, indeed, might be well placed to administer it. It was perhaps only the modesty of Mr McDonald that prevented him putting that forward.

Then there is the issue of privacy. When I say that, I have three things in mind. Firstly, there is privacy when the subject and/or their legal representative wish to speak with the inspector-general. Secondly, there are situations where subjects have needed to pray. Thirdly, there is, naturally, consultation between the subject and their legal representative. In my experience, on the one occasion—and it was on that occasion that I raised a concern—the subject's legal representative and I readily had access to a private room, but the teething problem mentioned in my submission concerned an instance where a private space could not readily be found for a legal representative to speak to the office's representative. A space was found, but a little time was taken to find something satisfactory. Arrangements have also been made that have been adequate for those subjects who needed to pray undisturbed.

In the situation of the subject consulting their legal representative—and I should jump into the argument over 34U(2)—it seems to me that generally that ought to be in private, particularly where it is a questioning-only warrant. Indeed, in relation to a questioning-only warrant, one could only wonder how ASIO could actually administer the provision, given that the subject and their legal representative head off down the street together after the day's proceedings have concluded. Obviously there are some other situations where monitoring is needed for security purposes, but it seems to me that the current breadth of 34U(2) is too broad.

I will turn now briefly to some things raised in other submissions to the committee. At least two recommended that the IGIS be given the authority to stop questioning at any time and to order a detainee's release. I would make three points about this. Firstly, since its inception the IGIS Act has not provided the IGIS with directive or determinative powers. Reasons for that include the desirability of the IGIS not cutting across the executive responsibilities of agency

heads and the desirability of the IGIS not being an author or part-author of arrangements which he or she may have to later review. If the IGIS has significant directive determinative powers, is there a specific mechanism required to review the exercise of those powers? Having said that, I should add that if the need is there for prompt action to stop illegal or improper treatment then the IGIS could obviously be in a position to do so.

Secondly, supervision of action under the warrant is in the hands of the prescribed authority. So a key question is whether we can have confidence that all prescribed authorities will act legally and properly. There have been no issues to date. I would suggest that as long as prescribed authorities are drawn from the ranks of those who are deeply imbued with the importance of the rule of law in a civilised society and well used to exercising independence then they will indeed provide appropriate supervision of these warrants.

Thirdly, though, the recommendation did cause me to reflect on whether 34HA is sufficiently flexible. It allows the IGIS to inform a prescribed authority of a concern when the person is appearing before a prescribed authority for questioning under the warrant. While open to argument, this would seem to require physical appearance before the prescribed authority. In a scenario where the IGIS is concerned about conditions of detention, the matter could not apparently therefore be raised with the prescribed authority until questioning actually recommences. One can envisage extreme circumstances where that might be an inappropriate wait.

Another submission recommended that attendance by the IGIS at questioning sessions should be a legislative requirement. Currently 34HAB is permissive, not mandatory. It would be difficult to guarantee attendance at all questioning sessions in all circumstances, particularly if there were more than one questioning warrant executed simultaneously. That scenario is not beyond the bounds of possibility—particularly, if they were forestalling some imminent event, there might be a number of warrants executed in different places across the country. Obviously I am not divisible and my staff are limited in number. The provision to the IGIS of transcripts and video recordings also allows checking of what occurs, but obviously I have the view that it is important for us to make every possible effort to make sure there is someone there—preferably me—on at least the first day of each warrant. It is on the first day when many of the problems might be manifest.

Disappointingly, there were also submissions that were dismissive or that ignore the role of the IGIS. One even referred to the capacity to raise a concern as ‘rather useless’. This neglects the ability of the IGIS to write to the Attorney-General and/or the Prime Minister, to include comment in the annual report to parliament or indeed to make general comment to this committee and/or to the estimates committee. Perhaps even more importantly, other options include conducting a formal inquiry under the IGIS Act in which royal commission powers could be used.

Section 34T of division 3 specifically points out that my functions and powers under the IGIS Act are not limited or impeded by division 3. My position is more than one of a dead sheep. It is a pity that some commentators have not apparently taken the time to research the powers and approach of my office, or, for that matter, of the Commonwealth Ombudsman. Both offices are independent and possess very strong powers which can be called upon if necessary.

At least four submissions touch on an important issue concerning review of actions which might be taken by state or territory police or perhaps state or territory corrective services staff. It seems to me it would be useful to include provision of facilities to contact state or territory ombudsman offices or other state or territory statutory review bodies within section 34F(9). It currently requires provision of facilities to make contact with the IGIS or the Commonwealth Ombudsman. I think some extension of that to include those state and territory bodies would be appropriate.

Finally, I would like to comment on one element of submission 88. It refers, at page 14, to a media report to the effect that:

> ... it has in fact been reported that ASIO officers threatened a person with detention for three days under the Act if the person did not cooperate with a raid.

This was actually the subject of a complaint to my predecessor and he conducted an inquiry into it. His conclusion was that the complaint could not be sustained. Of course, it would not be proper for ASIO officers to make the sort of threat alleged. It is not part of their guidelines, nor of their training, and I have examined both of those. The director-general has agreed that during searches as much video and audio recording as possible should be done. This should generally provide the means of further checking that there are not threats made.

This brings me to the third area which I said I would cover. A bill is currently being prepared for introduction in the current sittings of parliament to implement various recommendations of the 2004 Flood report and a review of the Intelligence Services Act coordinated by PM&C. The opportunity is also being taken to propose some technical and other amendments to the Inspector-General of Intelligence and Security Act. One of the amendments concerns my capacity to enter premises. Currently, the IGIS Act provides, in section 19, that:

> The Inspector-General may, after notifying the head of an agency, at any reasonable time, enter any place occupied by the agency for the purposes of an inquiry under this Act.

This has two significant limitations within it: firstly, that an inquiry must be underway—and there are certain formal processes required to trigger an inquiry—and, secondly, that it must be a place occupied by the agency. In situations where a person is detained under or pursuant to a 34D warrant, I believe I should view, as early as possible, the conditions in which they are being held. However, this would usually be done as an inspection under section 9A of my act rather than an inquiry under division 3. Given the range of places which might be used for detention, it could well be a considerable stretch to say some of them are occupied by ASIO. The government has accepted that it should be clear and unambiguous that I can enter any place where a person is being detained in accordance with division 3 of part III of the ASIO Act. This will therefore be included in the bill to which I have referred, which I understand is to be introduced in the current sittings of parliament.

ACTING CHAIR—Thank you for your comprehensive opening remarks. I want to go back over one of the issues in relation to your attendance at questioning. Am I right in saying that you or a member of your office attended 20 out of the first 21 days?

Mr Carnell—Yes.

ACTING CHAIR—Was that with the first three?

Mr Carnell—That was with the first three warrants.

ACTING CHAIR—Then you attended the first day of all the subsequent ones.

Mr Carnell—Yes.

ACTING CHAIR—Have you personally attended most of those?

Mr Carnell—Yes.

ACTING CHAIR—As a committee, can we assume—I know we should not assume things—that you have been satisfied, with the 20 out of 21 days that you attended for the first three cases, that the questioning was conducted in the way that you consider to be appropriate?

Mr Carnell—Yes.

ACTING CHAIR—So you have now made the decision that, if you attend the first day, any issues that can arise are likely to be raised on the first day of questioning rather than on subsequent days.

Mr Carnell—Yes, but I do not rule out staying on for further days, depending on the circumstances. I would be looking at whether they have a legal representative, who is questioning from ASIO, who the prescribed authority is and how they behave on the first day. I am certainly not saying I should only be there on the first day.

ACTING CHAIR—You are obviously happy with the way the questioning is being conducted by those people involved, including the prescribed authority in charge and also ASIO themselves. Provided you are there for the first day to attend to any matters that arise, you are comfortable with the process taking place the way it does?

Mr Carnell—Yes, very much so.

ACTING CHAIR—You also raised the issue of privacy. Are there instances where people have been unable to have legal representation?

Mr Carnell—I think in each instance they have had a legal representative. Mr Bryan will correct me if I am wrong.

Mr Bryan—They most certainly have had access to legal representation, at least on the first day, but often the subjects of the warrants have dispensed with their legal representatives on subsequent days.

ACTING CHAIR—Have you had concerns that those being questioned have not had the opportunity to speak to legal representatives in what can be considered a private capacity?

Mr Carnell—No. There was the one occasion when some time was taken to find an appropriate place where that could occur but it did occur and on every other occasion there has certainly been adequate opportunity for them to speak with their legal representative, and the prescribed authorities have certainly made it clear that if there is any request for consultation they will adjourn the questioning and allow that to occur.

ACTING CHAIR—Does the act allow the prescribed authority enough flexibility to be able to move within the guidelines to your satisfaction?

Mr Carnell—Obviously, the main thing in my mind is that capacity to take submissions from the subject's legal representative. Indeed the prescribed authorities have taken the view that, whether it is clear or not, they can do that. They have on several occasions done so, reflecting the fact that in practical terms they need to.

Senator ROBERT RAY—We know that there has been no formal complaint made to IGIS or to the Ombudsman or an appeal made to the Federal Court but we know that they are all potential safeguards. This is a process of intelligence gathering, sometimes very time critical. A question that has come up is: does the questioning process continue on if the person has indicated they want to make a complaint to you about the way proceedings are going, complaint to the Ombudsman or take the matter up with the Federal Court, or all three at once? Could that be used as a device to slow down questioning so vital information cannot be evinced? Do you have an attitude to that? Do you think there should be a process governing that?

Mr Carnell—I think if you make it a mandatory requirement that questioning cease in those circumstances then there is the risk you have identified.

Senator ROBERT RAY—It is not mandatory at the moment, but it is unexplored territory and I am seeking your view of interpreting the meaning and the intent of the act, if you like.

Mr Carnell—Generally, I would expect the questioning to cease for the time being while those processes are pursued. There might be special circumstances where that is not the case, but my general expectation would be that it ought be suspended.

Senator ROBERT RAY—If you thought this was being used as a device to avoid questioning, would it be open to you to address the presiding authority with the view that yes, questioning can proceed somewhat longer while you look into the matter of the complaint?

Mr Carnell—Probably not, inasmuch as my jurisdiction is the activities of ASIO, and you would probably characterise that matter more as the activities of the subject of the warrant.

Senator ROBERT RAY—So you do not really have any authority over the presiding authority?

Mr Carnell—No. I have no jurisdiction over the subject of the warrant or over the prescribed authority. Obviously, I could be critical of ASIO if I believed they had not made the right submissions or attempted to persuade the prescribed authority of any particular matter, but that is only an indirect way of trying to have an effect.

Senator ROBERT RAY—Thanks.

Senator SANDY MACDONALD—You raised the issue of procedural time and questioning time; I think you said that needed to be looked at. But I do not think you teased out how that might be addressed. What is the timing process? Is there a stopwatch on the desk—how is it done?

Mr Carnell—The prescribed authorities announce the time. So they will say, 'The proceedings have commenced. The time is now such and such.' They will also note when questioning commences or is suspended and recommences. So there is a significant amount of announcing the time through the process. ASIO also has a person keeping track of the time who, if the prescribed authority on the odd occasion forgets to actually declare the time, will prompt the prescribed authority. So there is a very careful time sheet kept by both the prescribed authority and the ASIO person which is agreed, as it were, by virtue of announcing the time.

Senator SANDY MACDONALD—Have there been lengthy interventions by the legal representatives of the interviewees?

Mr Carnell—No, there have not. Actual questioning has by and large been unimpeded and, at least in my observation—I do not know what was in the mind of the prescribed authorities necessarily—has at no time gone anywhere near the situation where they needed to use the provisions to eject a legal representative.

Senator SANDY MACDONALD—What is your suggestion with respect to timing?

Mr Carnell—I think it needs to be clear in the legislation. There is that confusion—I think; it is a difficult read—when you first come to 34D(3), where it has the notion of the questioning period as starting when the person is first brought before the prescribed authority. When one thinks that through, that is not a neat fit with the provision that talks about eight, 16, 24 et cetera hours. So there needs to be some clarity in the legislation about these different concepts: there is the 28-day period of the warrant, there is the period in which the warrant actually operates and then within that there are questioning periods. I am sure the drafters could tease those things out so that the legislation is clear on the face of it.

Senator SANDY MACDONALD—Thank you.

Mr KERR—There are three areas that I wanted to follow up. The first is to ask you to clarify what you intended in your submission regarding the issues around section 34F. In your initial statement you referred to interrelationships between 34HD and 34F, and I am afraid I just was not fast enough to grab hold of the concept that you were putting to us.

Mr Carnell—Section 34F illustrates the point I was making about needing—in all these provisions—to be very clear about when a particular provision applies to warrants of all sorts and when it only applies to a warrant involving detention. Section 34F has a subheading of 'Detention of persons' but section 34F(1) is clearly contemplating all warrants, whether or not they involve detention.

Mr KERR—I understand the critique, but what is the solution that you are advancing? Is there a proposal that we ought to pick up from this?

Mr Carnell—It is to change the subheading of section 34F. I suppose it was also in my mind that clearly some other amendments will be put forward and probably progressed from this committee's deliberations. I just think that, in any further drafting of these provisions, the drafters need to be very aware that that is an issue that readily causes confusion. I am just reflecting on my reaction when I first read these provisions. It took a second—and, in a couple of instances, even a third—reading before I could be confident that I had a grip on it. I am conscious that, when a person is served with a warrant and immediately seeks some legal advice, the legal adviser is not going to be acquainted day-to-day with these provisions. For them to advise the subject properly, these provisions need to be as crystal clear as is possible.

Mr KERR—I think, through the evidence that we have heard, in relation to the issue about access to legal advisers that in practice private consultation with legal advisers at the request of those advisers has been permitted. I think your submission is that that should be codified and made part of the legislative framework. I just want to clarify that, because I think you hinted at perhaps a distinction between the circumstances of questioning warrants and detention warrants. I just want to tease out exactly where you stand in relation to an entitlement to seek legal advice without overhearing and where you stand on the way in which the term 'monitoring' should be interpreted or reviewed by us.

Mr Carnell—Certainly, as a general proposition, where it is a questioning-only warrant, I do not believe there should be such monitoring. To be candid, I think it is an open question as to whether you might want to leave some capacity for the prescribed authority to give a direction that there could still be monitoring in such an instance, but the starting point ought to be that, for questioning-only warrants, the sort of monitoring that section 34U envisages is not appropriate. With detention warrants, I can more readily see situations where monitoring—at least visual monitoring—is appropriate.

Mr KERR—Can I tease this out a little bit. At one level, what you have put seems to be an attractive division, but in detention warrants the prescribed authority already has the capacity to prevent a particular legal representative from acting for that person, so that in a sense there is a means by which those persons against whom there is any suspicion of collaboration or involvement in wrongful conduct by that person would be excluded in any case. So I just want to tease that out. Certainly, I have no particular objection to visual monitoring. That does not trouble me greatly. Notwithstanding the capacity to exclude the lawyer, is there ever a case to say that consultation between the person who is the subject of an examination and their lawyer should be overheard as part of this process?

Mr Carnell—I can envisage situations where, from a security point of view, that might be appropriate, but I share your wariness of that. I can see good arguments that section 34U(2) should be more circumscribed, even for detention warrants, but I do think that, particularly for detention warrants, there must be some capacity in special circumstances for monitoring to be done.

Mr KERR—And you think the proper course—

Mr Carnell—But I am not sure I—

Mr KERR—would be to put that discretion in the hands of the prescribed authority—in other words, ordinarily you can make those consultations in private but, on the request of ASIO, for reasons given, the prescribed authority could deal with that differently?

Mr Carnell—Yes. Obviously I do not have a completely firm position on this but my inclination would be to say that for questioning-only warrants no monitoring and for detention-only warrants if directed or permitted by the prescribed authority. It is an area where there can be debate.

Mr KERR—That helps at least tease out the starting point for consideration. The issue in your statement that you have no jurisdiction over the prescribed authority strictly is true, but given that, as far as this committee is concerned so much confidence in the probity of the system reposes in you, it certainly did not come to my thoughts that it would be outside your role to make adverse comments if, for example, particular prescribed authorities took it on themselves to act in ways which were unanticipated by the legislation. Certainly as I understand the matters—and we have had confidential submissions from a prescribed authority and we have had your input as to how these matters are conducted—there is no suggestion that prescribed authorities are doing anything of that kind. But against the background that this is a safeguard, how do we deal with the suggestion that it is outside your jurisdiction to address the conduct or decision making of prescribed authorities?

Mr Carnell—I certainly do not see it as a situation where I cannot even make comment about the prescribed authority. When I say outside my jurisdiction I could not, though, initiate, in all probability, a formal inquiry under my act into the behaviour of the prescribed authority. But yes, I would certainly see myself making comment. One could readily see me on the phone or writing to the director-general or the Attorney-General and/or even the Prime Minister. And as I said, there is my annual report, my appearances before this committee and before the estimates committee. I would certainly give you a personal assurance that nothing would go unremarked if it were troubling.

Mr KERR—I am reassured by that. The point you are making is that you do not believe you could constituent a formal review of the conduct under your legislation, but were there some aspect of that conduct that was troublesome, you would report on it?

Mr Carnell—Yes.

Mr KERR—And it would come to our attention?

Mr Carnell—Yes.

Mr KERR—Subject to all the other—

Mr Carnell—And if I still did not think I was getting satisfaction, as I alluded to, I could say I was going to do an inquiry into ASIO's activities. I might argue that ASIO did not press the prescribed authority sufficiently on a matter or should in fact have taken some action themselves. There would be indirect ways to—

Mr KERR—You do not feel there is a gap here that should be addressed legislatively?

Mr Carnell—No.

Mr KERR—Concerning the issue that Senator Ray raised, in ordinary circumstances upon a complaint being received—referring a matter either to you or to the Federal Court—and proceedings having been suspended, given the length of time involved in having a determination, at least in the latter case, do you think we should address that present area that has not been utilised? There are two possible ways: firstly, extending the length of the warrant for any period where a matter is suspended because of that circumstance arising, for example, you cannot get a repeat warrant unless there is new material so if a determination goes outside the 28-day period there may be some difficulty in pursuing the matter at all; and, secondly, making the sort of provision that Senator Ray talked about of clarifying the limited circumstances where, notwithstanding such a complaint, questioning could proceed.

Obviously, in my view, I would be very concerned to limit that to the narrowest possible degree, because I start from the same instinctive position as you do in that, where there are, superficially, proper grounds for somebody pursuing a legal remedy that is provided by the statute, the questioning ought not to proceed. But there may be circumstances of urgency or circumstances where it is clear that this is being used as a device for delay. Assuming we are maintaining this legislation into the future—and the case for that has been made to us—and that the legislation stays on foot, you would not want it to then be capable of being undermined in ways which defeat its effectiveness. I wonder whether you would perhaps reflect on those circumstances.

Mr Carnell—Certainly, the first possibility that you mentioned is attractive. One of the advantages might mean that there is a greater willingness to indeed suspend the questioning while those other processes followed. I must say that is an attractive proposition. Regarding the second possibility, I think it ought to be clear that questioning can continue in certain circumstances, and obviously we should tease out where in the spectrum one might see those circumstances sit. Both of them sound attractive propositions.

Mr BYRNE—With respect to the execution of the warrants, I take it you oversee that as well?

Mr Carnell—The act allows me to see the serving of the warrant. In practice, we have not accompanied the officers to do that and there have been no difficulties in those instances.

Mr BYRNE—But if there were then that would be something that would come under your jurisdiction?

Mr Carnell—It is certainly something that I could do.

Mr BYRNE—Have you had any concerns about the specificity of the language that has been used in those warrants?

Mr Carnell—On the occasion when I raised a formal concern, I did not necessarily have a sharp concern about what was in the warrant. But, given the limitations on legal representatives being able to address the prescribed authority, I thought my using the concern mechanism was a

way that the matter could then be ventilated. Dealing with it then and there was also useful, rather than making the legal representatives think about whether they should resort to the Federal Court, which would have brought these other issues to the fore. To my mind, it worked well. I made some comments, the legal representative made some comments, ASIO's solicitor responded and, in fact, the prescribed authority adjourned while he went over it carefully, came back and explained his reasoning. I thought that was a good way of dealing with it fairly promptly. At least half of my motivation was to allow that mechanism to operate, rather than having a sharp concern myself.

Mr BYRNE—So you would not propose any alteration to the language used in the warrants?

Mr Carnell—I have noticed in subsequent ones that there has certainly been a degree of specificity that I am very comfortable with.

Mr KERR—You have made the comment that greater clarity should be put in the act about the capacity of legal counsel to make submissions on points of law arising in the proceedings?

Mr Carnell—Yes.

Mr KERR—Do you want to add to that?

Mr Carnell—Yes, I should do so. I believe that the restrictions in the legislation concerning the capacity of legal representatives to intervene are entirely appropriate when questioning is occurring. The advantage I see in carefully defining in the act when is questioning time and when is other time is that, in relation to 'other time', the act ought to permit the prescribed authority to take representations on any procedural issue he wishes from the legal representative. The great advantage in making that clear distinction is that it would then open up that possibility, and that is why I see it as important. Absent that, it is just a matter of minor polishing and buffing-up of the legislation, but I do think it can carry with it an important policy purpose.

ACTING CHAIR—As there are no further questions, Mr Carnell, I thank you very much for appearing before us this morning. Your contribution will be very useful in our deliberations, I am sure.

Mr Carnell—Thank you.

[9.51 am]

LENEHAN, Mr Craig, Deputy Director, Legal Services Section, Human Rights and Equal Opportunity Commission

von DOUSSA, The Hon. John, QC, President, Human Rights and Equal Opportunity Commission

ACTING CHAIR—Welcome. I invite you to make some introductory remarks and then we will proceed to questioning.

Mr von Doussa—We thank the committee for inviting us to appear before this inquiry. By way of general introduction: the provisions of the ASIO Act under consideration by this committee relate to Australia's national security interests. Legislative measures directed at national security have become increasingly prevalent in the wake of the 11 September 2001 attack on the World Trade Centre, the Bali bombings and the bombings in Madrid. Those attacks were undoubtedly great tragedies. They involved a violation of the right to life, which is the most fundamental human right. Since those attacks, Australia, like many other nations, has found itself in a period of uncertainty and fear, particularly about the possibility of an attack on Australian soil or further attacks on Australian interests overseas. That uncertain context makes the task of the legislator a very difficult one. That is particularly so when the legislative process is sometimes presented as involving choices between, on the one hand, the fundamental freedoms which Australians have taken for granted and, on the other hand, the security of the nation and the lives of its citizens. The fundamental question is sometimes expressed as being: where do you draw the line between these two supposedly competing interests? The commission would like to suggest that international human rights law provides the answer to that difficult question. International human rights law was forged in the wake of devastating periods of global conflict and already strikes a balance between security interests and the rights which are considered fundamental to being human. It allows for protective security actions to be taken by states but demands that those actions remain within carefully crafted limits. In short, human rights law is all about drawing lines; it is not simply for idealistic purists. Instead, it lays down a map which can be followed by hard-headed pragmatists seeking guidance in an uncertain time.

In its submission, the commission has tried to apply those international law principles to the detention and questioning provisions of the ASIO Act. I will quickly highlight the commission's key points. We raise a general issue as to whether the detention authorised by the act infringes the rights to not be arbitrarily detained, which are guaranteed by article 9 of the International Covenant on Civil and Political Rights. The central issue is whether the detention authorised by the act is proportionate to the purpose of protecting national security interests. The commission is concerned that the provisions of the act do not currently fully meet that test. That is because the act currently is simply not sufficiently tightly drafted to reflect the fact that detention of nonsuspects is an extreme measure which should be reserved for extreme circumstances.

To deal with that issue, the commission would suggest that the act be amended so as to add the following additional limitations and safeguards. Firstly, the issuing authority should be required to be satisfied of the same matters as the Attorney-General. Currently the issuing authority is

only required to be satisfied of a lesser subset of matters. It is important and appropriate that the powers of the executive under the act be subjected to closer scrutiny. Secondly, the questioning and detention powers should be reserved for the more serious terrorism offences. This would require an amendment to the definition of 'terrorism offence' as it applies to the ASIO Act. Thirdly, the questioning and detention powers should be reserved for cases where the Attorney-General and the issuing authority are satisfied that there is a particular risk of harm to a person or property. We concede that describing the nature of the risk is going to be an issue. In our submissions, we have suggested the phrase 'real and imminent threat of harm to property or people' but if imminence was considered to impose too strict a time limitation then either 'identifiable' or 'specific' might be considered as alternative limitations on the powers.

In its submissions the commission also raises some particular concerns relating to arbitrary detention which arise from the provisions regarding interpreters and the issuing of more than one warrant in respect of a particular person. The commission has addressed those matters in its submissions. The submissions also deal with another topic: the commission is concerned that the protections given to compulsorily acquired information by the act are not sufficient to avoid so-called derivative use of the material. The commission considers that this may violate the right not to be compelled to testify against oneself, which is contained in article 14, item 3 of the ICCPR.

The commission has also raised a range of issues regarding the involvement of lawyers in detention and questioning proceedings which potentially offend a number of articles in the ICCPR. In particular, the commission has expressed concerned regarding restrictions preventing lawyers from addressing the prescribed authority when he or she is considering whether to allow the continuation of questioning; the absence of legislative guarantees of legal aid to the subjects of warrants; and the degree of privacy which is afforded to consult legal representatives. Finally, the commission has raised some issues regarding the application of the act to children, which may violate articles of the Convention on the Rights of the Child. We are happy to discuss those matters further if you wish.

Before concluding, I would like to touch on one other, more general issue, which has been raised in some of the other submissions. Others before this committee are urging you to reconsider whether the relevant provisions should continue to be subject to a sunset clause. In the commission's view, the retention of a sunset clause is highly desirable if the legislation is to be re-enacted after July next year. This will ensure that careful consideration is periodically given in the future to the ongoing needs of the legislation in the same or similar form as it stands at present. Up to now, the legislation has been sparingly used, and the Attorney-General's Department comment that it has been used carefully and judicially. But there is always the risk that under different management we could see the extreme measures which are contained in the act being more aggressively used. If that were to occur, the need for additional limitations may become evident. Again, as the Attorney-General's Department observe in their submission, there is always room for finetuning and improvement in legislation.

If there were a periodic review, it would provide an occasion to give that consideration to the adequacy and appropriateness of the legislation in light of events which have occurred. The presence of a sunset clause would also ensure that this legislation, as important as it is, were debated periodically in parliament. We make these submissions recognising that the act at

present does contain some extreme measures. Such measures might be appropriate at this time but we think they should be reviewed in the future.

ACTING CHAIR—This committee was involved in reviewing the legislation when it was first introduced. The committee made a number of recommendations which were accepted and which I think helped to enable the provisions of the act to protect the human rights of those people who might be the subject of questioning warrants.

You raised the issue of the sunset clause. It has been argued by A-G's, ASIO and others that the sunset clause should be done away with and some other mechanism put in for reviewing actions under the questioning or detention powers. I think it was even said by the director-general that he would not object to the activities under the questioning or detention powers being reviewed by a committee such as this on an annual basis. Wouldn't that have a chance of being a greater protection than would a sunset clause by which it was reviewed only every three years, if that were the period of the sunset clause?

Mr von Doussa—A periodic review is highly desirable. There is a measure of transparency arising through the annual reports. If it were thought that the capacity of the committee permitted a review on an annual basis, we would certainly support that. Our view is that if it were done every three years then that would probably be sufficient.

ACTING CHAIR—The annual reports are okay to a certain degree, but you tend to be 12 months behind on the activities that take place.

Mr von Doussa—Yes, I appreciate that.

ACTING CHAIR—If the review were conducted by this committee, at least it would be more current than any annual report you might get.

Mr von Doussa—The point that you make is a very fair one. Our submission—and I think some of the others that have come in—speaks of there being three questioning warrants—

ACTING CHAIR—There have been eight.

Mr von Doussa—but the submissions from the inspector-general indicate that there have been others that were certainly not known to us or, I gather, to others making submissions. So your suggestion would bring to light those events more quickly perhaps than the annual report does. Our submission is that there needs to be a periodic review. I do not think we had turned our mind to whether it ought to be annual or every three years.

ACTING CHAIR—Or as to who should do the review?

Mr von Doussa—In the first instance, we would support this committee doing the review. But the advantage of the sunset clause is that it ultimately gets the matter before the parliament, which we felt would focus everyone's attention more squarely on the major issues that might arise. This committee could conduct the review and make a number of recommendations but—with the greatest of respect to the committee—that might be where the recommendations stop.

At least if the act has to be passed again, so to speak, it means that there will be a public canvassing of whatever the recommendations of the committee are.

ACTING CHAIR—How do you describe a 'serious' terrorism offence?

Mr von Doussa—Of particular concern to us are the association offences. The use of that definition within terrorism offences may mean that people who are merely witnesses and not suspects become the subject of the questioning power and, I suppose, in an extreme case, the detention power. We readily concede that it is a difficult issue but our point is that, as the act is presently drafted, there would be room to pick up people who were not even suspects and subject them to these very draconian powers.

ACTING CHAIR—But that is the purpose of the act. A person does not necessarily have to be a suspect. The act covers someone who may have or could provide information as to potential terrorist threats.

Mr von Doussa—True, that is the purpose of the act. But our submission is that if it leads then to detention of people who are not even suspects then it is probable that the detention of those people will be arbitrary and in breach of section 9 of the ICCPR because it is a disproportionate measure.

Senator ROBERT RAY—But before you can detain them you have to jump two or three hurdles—you cannot arbitrary detain someone; you have to meet the three criteria set out in the act to do so, one of which is the danger of them passing on information which would aid or continue to aid a terrorist act. So it is not as though ASIO, a prescribed authority or the Attorney-General can just click their fingers and detain someone under this act.

Mr von Doussa—Certainly there are the hurdles, but there is always the risk in those exercises where you are dealing with people who are not suspects that detention is more than is necessary to deal with the particular situation.

Senator ROBERT RAY—But in those circumstances you have potential intervention by IGIS, potential intervention by the Ombudsman and potential for appeal to the Federal Court, which I think would take arbitrariness into account. They may not take other factors into account, but surely they would take that into account. That at least is some protection.

Mr von Doussa—Certainly I can see that it is some protection and they would all be relevant factors in deciding, at the end of the day, whether the detention was arbitrary.

Mr Lenehan—A further issue with the conditions for detaining people that you have just mentioned is that those matters only have to be considered by the Attorney. As the president has mentioned in his opening statement, that is not a matter that is then considered by the issuing authority. So, in our view, certainly those are important protections but they do not carry right through in the process, which we see as a flaw.

ACTING CHAIR—We have already heard evidence that the provisions of the act are used as a last resort. Although there is only a short period in which this act has applied in fact there have been no detentions. You place a lot of emphasis on the detention powers, but in fact nobody has

been detained under the powers of this act which means that it appears to have been used very sparingly as a method of last resort. In fact I think that, since the operation of the act, we have only had eight questioning warrants issued, no detention warrants and none of the act applied to any minors. That means it is being used very sparingly.

Mr von Doussa—That is right, but the power is there and our concern is with the underlying power—which may be used differently in other hands and at other times.

Mr KERR—Perhaps that is a very strong argument for keeping the mechanism of the sunset clause in existence because part of the confidence, I think, that this committee has about the way in which this legislation has in practice been implemented is an ad hominem one. I have only been on this committee for a short period of time, but I think other members share the view that those who have been charged with heading the agency of ASIO, the inspector-general and those who have carried through these processes as prescribed authorities have, as we understand it, acted with great restraint.

You make the point that people change and circumstances change and therefore reliance on past practice is no necessary indication of future conduct when the legislation is so broad. That is a perfectly understandable and, I think, a very legitimate critique. But if there is a continual process of review assessment where proper and focused scrutiny is placed on people to make sure that they stay within that kind of approach then perhaps some of those fears would be allayed to a degree. Obviously if we just said, 'This legislation has no sunset clause. Off it goes,' and then built nothing further into the system—and even the Director-General of ASIO said this to us—then public confidence would just not hold up in that kind of framework.

Mr von Doussa—You put very articulately the argument I was trying to put earlier. We do see that as important.

Mr KERR—Can I raise what I think is a pretty fundamental objection against one of your points—and I do not mean to be critical. You have argued that there must be an identifiable or specific threat of harm to property or people. In ASIO's unclassified submission to us they point out that these powers are generally used when other mechanisms are ineffectual. They set out the three circumstances. The first is the sort of thing that you raise—the immediate threat of harm. The second refers to where the intelligence agencies have had only limited insight 'because the security measures adopted by the individual or group have foiled attempts to identify those involved or to assess the full extent of the threat'. And the third is 'reasonable suspicion of terrorist activity but efforts to resolve it have been unsuccessful and those involved have refused to cooperate'. In other words, the reason for this kind of power is directed to the instances not merely where ASIO have come to know there is an imminent threat but where they have reached a point where their capacity to penetrate has been foiled. They have some suspicions but they could never satisfy the test that you put forward that there is an imminent threat—yet there may well be.

How would you address that? Let us assume the intelligence agencies are doing their job properly but, say, are being deflected by codes that have been found to be impenetrable to avoid detection. The agencies have exhausted the normal means. They have some suspicion that something might be happening; it is improbable that nothing is happening. They have links to people that they regard as dangerous. But the agencies could never satisfy the test that you have

put forward. How do you evaluate the merit of the case that they have put to us about the need to use these powers in these wider circumstances?

Mr von Doussa—I see the force of that. I am contemplating your proposition that agencies would never meet the test of a real and imminent threat or something of that kind. I would have thought that the picture you have just painted would establish circumstances of a real threat. You may not know what it is but the fact that you do not know what it is would, I would have thought, add to the reality of it.

Mr KERR—The fact that people seek to disguise their communication does not prove a threat. It may mean that they are a group of zealots or interesting religious fanatics or what have you who wish to avoid their communications being intercepted but that may have nothing to do with a threat. But this is a mechanism of testing whether there is a linkage.

Mr von Doussa—I would assume that when you went before the Attorney-General and the issuing authority there would be a much bigger context than just being unable to decipher communication between two groups. You would have a lot of information about the groups and you would have a lot of information about peripheral things, all of which I would have thought would build a picture of satisfying somebody that there was a real threat, simply because you have the identity of people that you are worried about and an inability to break coded traffic and so on that would be identified.

Mr KERR—I am more attracted to your idea of restricting it to investigations of serious terrorist offences. Assuring the linkage is to something that might derive intelligence towards a potentially serious terrorism offence then I would have thought that the other objection falls away. What can be the objection if there is an investigation about a potentially serious terrorism offence—something that might pose harm to physical property or persons—to say that someone who holds information material to that but has otherwise proved uncooperative or who might destroy information relevant to it, if we are to have these powers, would be caught up? It seems to me that if we were minded—and I do not know whether we will be minded—to accept that proposition then the idea that it is unreasonable and disproportionate to seek information for nonsuspects falls away. It seems to me a reasonable obligation of a citizen who may have some information material to a serious terrorism offence but has not provided cooperation or who may destroy evidence or what have you—or a reasonable suspicion that they would or communicate with those persons. I cannot see any disproportionality in that, if you still have this legislation.

Mr von Doussa—I do not think we are suggesting a disproportionality if you are just using a questioning warrant; I think our concern is that you then go the next step and detain as well.

Mr KERR—But you would only detain, as Senator Ray says—and I do not wish to adopt everything that Robert says about it—

Senator ROBERT RAY—I would have serious doubts if you did.

Mr KERR—As Senator Ray quite properly points out, you can only go to detention if there would be circumstances where you can establish a case that a person may be destroying some material evidence or alerting another person in relation to that, I would say, serious terrorism matter.

Mr Lenehan—The threshold for detaining—and I should have mentioned this to Senator Ray before—is actually a little bit lower than that. If you look at section 34C(3)(c) it is expressed in terms of 'may alert' or 'may not appear' or 'may destroy'. If you compare that with the Canadian provisions, which we have drawn attention to in our submission, the threshold is set significantly higher there—again remembering that you are dealing with nonsuspects.

Senator ROBERT RAY—Can I put a different proposition to you if we are worried about detention in this country? Let us say I started with a clean page and I looked at detention in this country. I would think the ability to detain people on remand for months and years at a time or the immigration department detaining citizens and noncitizens alike without supervision and deporting the odd one is far, far bigger than being able to detain a nonsuspect for a maximum of seven days where it has to go through the director-general, through the Attorney-General, through an issuing authority, supervised by a prescribed authority, overlooked by IGIS and with an appeal possibly to the Federal Court and the Ombudsman. I know you are arguing in principle, and I accept that, but I would have thought that, in terms of our priorities as a parliament, that is small beer compared with what else is happening out there in the community. That is a provocative question and I know you are going to hit me down, but go for it.

Mr von Doussa—You may be aware that we have been objecting to some of those other methods of detention you have mentioned—article 9.

ACTING CHAIR—We have noticed.

Mr Lenehan—Another point is that we are not saying no detention; we are saying detention with tougher limits.

Senator ROBERT RAY—You mentioned the Canadian legislation. How long can you be detained under the Canadian legislation?

Mr Lenehan—It does not actually provide for an upper limit, but it is not detention as a matter of course; it is detention under the supervision of a judge.

Senator ROBERT RAY—Yes, but theoretically you are saying that I could be detained longer than 168 hours?

Mr Lenehan—You would probably run into issues with the Canadian Charter of Rights and Freedoms.

Senator ROBERT RAY—But there is no limit in the legislation?

Mr Lenehan—There is not, but they have a bill of rights, unlike Australia, so the limit would be in the charter in those circumstances.

Senator ROBERT RAY—It seems to me that the Australian legislation is—if you have to use this term—slightly more draconian in its coverage, but it has far more safeguards put in it than the Canadian legislation. Can you point to the safeguards that exist in the Canadian legislation for a person questioned or detained?

Mr Lenehan—Yes. We do draw attention to those in our submission.

Senator ROBERT RAY—You draw attention to the scope under which action can be taken. I am thinking more of once action is taken—the degree of supervision and the ability of others to intervene to protect. Those sorts of things do not seem to be as strong in the Canadian system. It could be well argued that both are in balance for that reason but they do not seem to have the same protections as Australia does.

Mr Lenehan—The first point is that Canadian proceedings are conducted by a judge. The second point is that—

Senator ROBERT RAY—Let me stop you there. A judge is more important than a retired judge?

Mr Lenehan—No. As I mentioned before, an issuing authority does not need to be satisfied of all the relevant matters before a warrant issues. Some of those matters are considered between the Attorney and the Director-General of ASIO.

Senator ROBERT RAY—I am talking about the regime of questioning now. It could be an AAT person but practical experience has already indicated that enough retired judges are going to serve and we are never going to have to go to that option. So a retired judge in the Australian sense—usually a retired federal or state judge—will be the prescribed authority to supervise this.

Mr Lenehan—Yes. We do not quibble with the identity of the prescribed authority or the issuing authority; it is the nature of the powers. Under the Canadian legislation the judge is the person who really possesses the majority of the powers. Under our legislation there are the powers of the Attorney and the Director-General of ASIO, some of which are then carried down to the issuing authority.

Senator ROBERT RAY—Such as?

Mr Lenehan—The ones that I mentioned to you before, which are the matters on which they must be satisfied before a questioning or a detention warrant is issued. Specifically they are, firstly, whether there are alternative methods of gathering that intelligence, and that is one of the things that the Canadian judges are required to be satisfied of; and, secondly, the grounds for detention. Again, that is something which the Canadian judge decides; it is not something that is determined by the executive.

Senator ROBERT RAY—These matters are reviewable by IGIS. The matters that are in the warrant and the way they are executed, and in fact the whole behaviour from the very point when the director-general takes it up, going through to the Attorney-General—not that he is subject to it—IGIS can review and comment on directly to the ministers or the parliament, so there are safeguards there, surely.

Mr Lenehan—That is true, but perhaps by the time a complaint is made to IGIS—and I know that it has been IGIS practice to attend the questioning periods under these warrants—it is conceivable that the detention could already have taken place. The wrong to the person's rights

could have already taken place and you are really left with not much of a remedy in those circumstances.

Senator ROBERT RAY—I want you to convince me that the Canadian legislation is better but you have not yet, especially the unlimited. I know there are checks and balances there but there is a whole range of protections and limitations put in our legislation that I do not think you can point to in the Canadian legislation.

Mr Lenehan—As I have said, the Canadian proceedings would be subject to the Canadian Charter of Rights and Freedoms which specifically protects against arbitrary detention.

Senator ROBERT RAY—How long does it take to protect? How long does it take for you to invoke that and get an appeal going? It would be longer than the 168 hours that we statutorily mandate, I suspect.

Mr Lenehan—A judge who is conducting the proceedings would obviously be fairly concerned by a suggestion that they were in breach of the charter.

Senator ROBERT RAY—On what grounds can they detain in Canada?

Mr Lenehan—Those are set out in 83.28 and 83.29 of the Canadian legislation. There was some discussion in the department's evidence yesterday as to the grounds to detain, but there may have been some confusion there. They took the committee to the conditions which enliven the power to question. The power to detain is really an ancillary power to the questioning power. It only arises if the judge, or another judge who is conducting the proceedings, is satisfied on information in writing and under oath that the person is evading service of the order, is about to abscond, did not attend the examination, or did not with remain in attendance as required by the order. Those sorts of arrest provisions are fairly commonplace in Australian legislation. They are attached to things like royal commissions, and we do not quibble with those. The judge can issue an arrest warrant in those circumstances. The person is then brought before the judge who decides at that point whether there is a need for detention. They also have a power to release them under a recognisance, or bail if you like.

Senator ROBERT RAY—Do you know how many people have been detained under the Canadian system? It has been operating slightly longer than ours.

Mr Lenehan—We do not have that information. We would be happy to take that on notice.

Senator ROBERT RAY—Do you know if that is publicly available?

Mr Lenehan—I do not.

Senator ROBERT RAY—I have one last question on sunset clauses. Is there any magic about three years as compared with five?

ACTING CHAIR—Or six.

Senator ROBERT RAY—Or six, I suppose. I think we picked three to meet the electoral cycle.

Mr von Doussa—That may be so; I do not know. Shorter rather than longer would be our preference without being arbitrary about whether it is three years or one year. But five years is becoming quite a long time.

Mr Lenehan—I would like to make two points to perhaps try and convince you of the virtues of the Canadian legislation. First, the Canadian legislation provides, without conditions, a right to counsel. That is clearly in the act. Secondly—we have made this point in our submissions—when a person is detained under a detention warrant under the ASIO Act and they first come before the prescribed authority, the prescribed authority at that point does not have power to release them from detention because they would otherwise be acting inconsistently with the warrant. That is not the case with the Canadian legislation. As I have mentioned, when a person comes before the judge on an arrest warrant, the judge then considers whether further detention is necessary.

Senator ROBERT RAY—Yes, but you are dealing with a judge or a retired judge. As to their powers, there is no way I would want the prescribed authority to have the ability to overturn a detention warrant. That is why we divided it between issuing authority and prescribed authority. You would have to go back to the prescribed authority or the Federal Court for that, and I think that is proper. It makes it a much better defined role for the prescribed authority.

Mr Lenehan—We probably would not quibble with the idea that you go back to the issuing authority—if that is the point you are making—as long as it is a separate person from the executive who is deciding.

Senator ROBERT RAY—I think that is a fair point.

ACTING CHAIR—I want to go back to what I was talking about earlier—the concept of 'only the more serious terrorism offences', which is where we were diverted. Among your recommendations is the restriction of warrants. You are not talking about detention warrants; you say 'warrants', which include questioning warrants relating to only the more serious terrorism offences and to circumstances where real and imminent threat of harm to property and people is reasonably likely. If our intelligence agencies choose to issue a warrant for someone that they believe has information that can lead them to a terrorism offence, I remain utterly unconvinced that you can separate the more serious terrorism offences from other offences. In the course of that questioning, which in the initial stages might only appear to apply to what you might call a less serious terrorism offence, the information gathered may lead to what might be a more serious terrorism offence. I cannot see how you can try and separate what might be a more serious terrorism offence from one which might be a less serious terrorism offence. Terrorism is terrorism, and who knows where it leads until the information being sought by the intelligence agencies is gained, which then may lead them to what could be a serious terrorism offence. I am very concerned about your trying to delineate between a serious terrorism offence and a less serious terrorist offence.

Mr von Doussa—I think you have slightly overstated the submission we were putting. My understanding of it was that we were concerned about detention warrants. If we have used

language that covers just questioning warrants, I do not think that was actually intended. The concern is picking up people who are not suspects and subjecting them to this whole range of powers.

ACTING CHAIR—Which has never been used.

Mr von Doussa—No, it has not been used. We concede that. We acknowledge that the Attorney-General has said that these provisions appear at the moment to have been used carefully and sparingly. But our concern is more the fact that these executive powers are there and might, in other circumstances and under different management, be differently used.

ACTING CHAIR—One of the problems raised by the director-general was that, if that provision were not in place in the legislation, at some stage in the future an occasion may arise when they need to detain somebody who might otherwise get out of the country or go somewhere, and the mechanisms they would have to go through would not give them time to detain those people. With other processes to go through to detain people, they just would not have that power. He said that if the power is there, although it is rarely used—it has never been used and it may never be used in the future—at least it is there as a safeguard if at some stage in the future they find it necessary to enforce that part of the act. I could understand your having some concerns if there had already been some detentions that you could base your criticism on, but until such time as that detention power is used it would be difficult to convince me that we should not leave it there as a method of last resort, which is what they have insisted it would be used as.

Mr Lenehan—We are not saying that the detention power—or a detention power—should not remain, but we are concerned that there be limitations in the act which reflect exactly what you are saying: it is a measure of last resort.

Mr von Doussa—Our concern is how you get to that point.

Mr KERR—The issue is about how we get the proper degree of confidence in the fact that the administration of the legislation, which is very broad, remains as Senator Ferguson and this committee see it as having been. There are two ways you can do it. One is, as you say, to narrow down the legislation so the legal capacity to respond is much narrower. The other is to maintain effective oversight, which may involve continuing to ensure that there are some set provisions and a whole range of other review mechanisms so that, although the legislation is extraordinarily wide, it is all exercised with restraint.

There are two possibilities as to the way in which we deal with this, and obviously you can find any point on the continuum. I must say, I do think—contrary to Senator Ferguson—that there is a case for restricting detention to concerns about serious terrorism offences. It would be inconceivable that someone could be detained when the real focus of concern was their peripheral association—one of the association offences. It just would not happen. No-one is going to waste the resources of the agencies and go through that whole exercise—unless we fall into a period of totalitarian horror that would not be resisted by parliamentary processes—to investigate what is thought to be someone's peripheral association. You would only be resorting to those kinds of provisions when you may not have proof but you have some issue that you

want to investigate that relates to the sorts of threats that you are concerned with: threats to property or persons.

I do not think it would damage the legislation to remove the bits that will never be used—that is, to limit it in those circumstances to the more serious instances. I do not think it would damage the effectiveness of ASIO or create any difficulty whatsoever, so I am quite willing to find a midpoint along that continuum. But, equally, I accept what Senator Ferguson says: there is no material at all before us to suggest that it would ever be used in that way anyway.

Mr von Doussa—We would certainly support the view that, by having a review mechanism in there, you are putting in place a regime which is likely to make those administering it from time to time very cautious about the way in which it is administered. We highly support that. It is very important. But in the discussion at the moment we are overlooking the particular plight of a person who might get picked up inappropriately on the way through. That person's rights are not being protected by some subsequent review that might change the legislation for others. So there remains, we would suggest, a need to try and address this question of how to limit it to serious offences and not have a power that could be used in inappropriate circumstances.

Mr KERR—I think I may end up a bit one out with my colleagues on this discussion, but we will have it internally. I may be able to persuade them. We will see how that goes. But I do see some merit in the point you are making. You raise the issue of derivative use. It is a very important issue to raise, but in fact if it does offend our obligations then it also does so in ASIC's legislation. The Securities and Investments Commission's powers involve the same obligation to answer questions and so on. The Australian Crime Commission has precisely the same provisions. I imagine—it is conceivable; I do not know—there may be other agencies of the Commonwealth where such powers have been conferred. I appreciate they are limited and unusual, but we have seen fit to confer them. This is not the first time it has been done, and I think they have survived judicial review. In fact I am confident they have survived judicial review. So I do not think you could argue that it is improper for such conditions to exist in relation to legislation designed to equip our security and intelligence services with the capacity to investigate and proceed against those sorts of matters, when we have given like powers to bodies investigating crime or corporate misfeasance.

Mr von Doussa—I would try and argue it even if you think it cannot be argued. You are quite correct—at least I think you are—that similar powers to these exist in a number of other acts, but this has been a recurring point of debate in the community, about whether this derivative use should be permitted. You say that it may have been upheld in judicial review. I am in no position to help you on that. It probably has been. In a judicial review, the powers of the reviewing authority are limited to domestic law. The point we are trying to raise here is that this derivative use is at least arguably in breach of article 14.3 of the ICCPR, which is bringing in an international standard which would not be available on an internal review of the powers that exist in other acts.

Mr Lenehan—Mr Kerr, one further point of distinction with the examples you have raised is that they have as their end point the object of prosecution. It has been said to this committee and to the legal and constitutional committee that the point of this legislation is gathering intelligence. That seems to be quite a different object. If that is in fact the only object, then there should be that additional protection, we would say.

Mr KERR—I would actually put it the other way. If the aim of the exercise is to put you in jail, I would have thought it was more offensive to enable the evidence to be used in proceedings than in a situation where it was most unlikely to have that outcome.

Mr von Doussa—I think the complaint is that it is the derivative use in criminal proceedings subsequently that we are worried about. Obviously the intelligence-gathering agent will do whatever it wants to do.

Mr KERR—I was just trying to respond to the objection. The whole idea of the ACC, for example, is to enable criminal prosecutions. It either all goes or falls. I understand you are making the general point that this may offend against an international standard which we have subscribed to, but I guess the response from this committee could well be: if it is a fault, it is a fault that has been replicated across a number of other legislative instruments of far lesser controversy and has been part of the statute law for some time and in circumstances where the opportunity to test it against those instruments has not been pursued.

Mr Lenehan—Dr Carne, who is giving evidence before you later today, might like to disagree with you about the level of controversy. I understand he has got a fairly serious objection to what has happened elsewhere.

Mr McARTHUR—I will just raise the issue of the sunset clause. As I understand it, you admit that the legislation is working quite well and the administration of the legislation is working well. I put this question to you in view of your concern about the legislation: if we were reviewing it every five years under a sunset clause—if that became the tradition—and if, say, we were doing so under the atmosphere of a Bali bombing, where the electorate at large was encouraging the parliament to have more draconian powers, what would your attitude be if the review took place in that atmosphere?

Mr von Doussa—We envisage that that is a possibility. One hopes that it does not arise, but there is still a need for review. The review presumably would say that, given the ongoing risk and threat of terrorism et cetera, these powers are appropriate and the act should be continued. But the advantage of the review—and we have been through this, I think—is that people know it is going to happen, so there is just in the background another reason for complying with all the things that one needs to comply with and to exercise the act carefully. If there is no review, there is always the potential that some people might get a bit more aggressive in the use of these powers.

Mr McARTHUR—So you are suggesting that the sunset clause ensures a greater compliance with the current arrangements?

Mr von Doussa—It has that potential.

Mr McARTHUR—Would you be advocating a sunset clause ad infinitum?

Mr von Doussa—In this act, yes, because of the extent of the powers.

Mr McARTHUR—Are you a three- or a five-year man? I am not quite sure.

Mr von Doussa—I have been trying to avoided being committed to a particular view. As I said before, more frequently rather than less frequently would be desirable. The chair suggested annual reviews at one stage. If there is the capacity to do it annually, that is fine, but three years—

ACTING CHAIR—That was a review by this committee; not a full review of the legislation by the parliament.

Mr von Doussa—I think we would take the view that three years is an appropriate period.

Mr McARTHUR—You are happy with the possibility of a review by this committee, which is reasonably well informed on these issues?

Mr von Doussa—We would see that as highly desirable, but that is not, in our submission, a sufficient substitute for periodically requiring the act to be extended, as an additional measure.

ACTING CHAIR—As there are no further questions, thank you very much for appearing before us today and helping us with our deliberations as we look through the legislation again and make our recommendations.

Proceedings suspended from 10.42 am to 11.02 am

WILLIAMS, Professor George John, Private capacity

ACTING CHAIR—I call the committee to order and welcome Professor George Williams. I invite you to make an introductory statement and then we will proceed to questions.

Prof. Williams—I would like to thank the committee for the opportunity to give evidence today. I note that the submission was put in to the committee on behalf of myself and Dr Ben Saul at the University of New South Wales. Ben is unable to appear today. What I will say today will, of course, be my own views. His views are reflected in the submission.

I would also like to correct one matter in our submission. We stated in our submission that there was not a penalty for breaching section 34J, but that is not correct. In fact, section 34NB(4) does impose a penalty of up to two years imprisonment for someone who contravenes section 34J—by, for example, subjecting someone to cruel or inhuman punishment. The only thing I might note about that is that it is potentially anomalous that there is a two-year penalty for someone who subjects someone to something that might amount to torture yet the penalty is significantly larger, at five years, for disclosing certain information under the secrecy provisions.

I will start by saying that my view throughout this process, including going back to the early days after September 11, was that laws did need to be passed to improve the operational capacity of agencies like ASIO to protect Australia from the threats that terrorism poses. I believed that Australian law was inadequate in providing an appropriate framework for the prosecution of terrorism offences and also in terms of the powers that ASIO might need to deal with those matters through intelligence gathering. So I do start from the proposition that I think there needs to be an adequate legal regime. It is also my view that the legislation as enacted by parliament in June 2003 did at that point achieve the right balance. The quite stringent safeguards in the legislation relating to the role of the Inspector-General of Intelligence and Security, the role of issuing and prescribed authorities and a number of other matters I think at that point did lay down very significant safeguards that transformed the bill from something that was utterly inappropriate to something that came close to achieving the right balance. For me, it scraped over the line on that basis.

However, as I also said at that point, this is a law that must be seen as an exceptional law. When it is viewed in the light of Australian history and, indeed, of the far longer constitutional history of the United Kingdom, this is a law that can be compared to very few laws over six-, seven- or eight-hundred years in terms of its impact upon civil liberties, particularly in the area of detention of someone who is a citizen without any suspicion that they have committed a crime. The fact that this must be viewed as an exceptional measure—the sort of measure that you would normally only find during a period of war—means that there cannot be any reasonable basis for making the measure permanent. It would be akin, in my view, to making measures permanent during World War II and saying that at that point no end to the war was in sight so the very strict measures introduced during that war—and World War I—should simply be made a permanent feature of the law. That was not an argument that was advanced in World War I or World War II, when the life of the nation was threatened to a far greater extent. And I would suggest that that applies with even greater force here in dealing with the threat of terrorism which will understandably continue for the foreseeable future. My view, then, is that it has got to

be seen as an exceptional measure and, as such, there is not any reasonable basis for making it permanent. At best, the measure ought to be periodically reviewed and subject to appropriate sunset clauses.

I also want to talk a little about what might be justified at this point, some years after the original enactment of these provisions. My view is that the law ought to provide for a strong and coercive questioning power for ASIO. It is appropriate that that questioning power overrides the right to silence. It is appropriate that ASIO has the capacity to get the information that it needs through the processes outlined in the legislation. There are some areas where that questioning process clearly needs to be improved—in relation, for example, to the secrecy provisions and the role of lawyers within those processes—but in principle I would support a continuing questioning power of this kind.

Where I would differ from the submissions of the Attorney-General's Department and ASIO is that I do not believe that the detention power contained within the provisions should continue. My reasons for that relate firstly to the nature of that power being fundamentally at odds with Australia's democratic traditions and with the traditions of law-making in this country for many years into the past. This type of power is truly exceptional in the form that it is found in this legislation. It is not comparable to other types of detention powers that can be found in other comparable acts. It is also particularly exceptional in applying not to people suspected of any crime but only to people who might have appropriate intelligence information.

Something that has reinforced my conclusion that the detention power should not continue is that a power in this form is not found in any other comparable legislation in comparable nations. There is no equivalent power in the United States, Canada, the United Kingdom or, indeed, other countries you might wish to name that you might regard as comparable to Australia in terms of democratic and legal traditions. Those countries do have very stringent detention powers that relate to the detention of people suspected of committing terrorism offences and also for people who might be illegal entrants into a country, but they do not contain stringent detention powers of this kind that apply to people not suspected of any crime who indeed might be regarded simply as ordinary citizens.

I think it is also significant that in those other countries, even with the detention powers that they do have, the courts are now playing a very active role in winding back the ambit of those detention powers, even though they are narrower at this stage than what we have here. You can look to the American, UK and Canadian courts for decisions finding that the powers they have need to be wound back—the decision of the House of Lords in the A case last year is a very clear example of that. I think that those decisions and, indeed, the nature of our law by contrast do demonstrate just how out of kilter our law is with the laws in other countries.

You might ask: why haven't we had equivalent cases here? The answer is simple: Australia does not have the same human rights framework as those other nations. If we did I would have no doubt whatsoever that our laws would have been challenged in the same way. In fact, there would have been a very strong possibility, if we had had any of the equivalent protections of the United States, Canada or other nations, that the detention regime would have been struck down. It is only the fact that Australia is the only Western nation without a bill of rights that has enabled the detention regime to survive in this form.

The final argument I would put is simply to reflect upon the operation of the law and to demonstrate how exceptional it is in terms of the sorts of people it might apply to. A good example would be an investigative journalist who has conducted interviews with people overseas or in Australia to find information about terrorism. That person might have intelligence-grade information. It may be also that there is a reasonable belief that that person might destroy their notes in order to prevent their sources being revealed. That would be sufficient to enable that person to be detained for up to seven days. That person being held might not be able to notify their employer—the ABC, 2UE or whoever it may be. They would have their passport taken away. They would not have adequate access to legal advice. Essentially they would be treated in a worse state than if they had committed or were thought to have committed a criminal offence. They would be held for seven times longer and, most significantly, way beyond the period needed for questioning.

The fact that the current detention regime does go significantly beyond the period needed for questioning is the key constitutional weakness in the legislation. My own view is that as soon as ASIO does detain somebody for a period beyond questioning that will found the basis of a constitutional challenge. I am not sure what the outcome would be, but I would certainly argue that the legislation is suspect. I think if it is limited to questioning it would be upheld. If it goes beyond that into what might be seen as a punitive detention regime, that is where the High Court, I think, would look very carefully at this legislation.

To draw those things together, my view is that the detention regime should be reviewed and removed. It should be limited back to the period required to question someone. It is appropriate to detain them only for the period of questioning and not beyond that, for constitutional and other reasons. I think also the committee does need to look at the secrecy and legal issues raised by bodies including the Inspector-General of Intelligence and Security. I would agree with many of the other submissions on that basis.

ACTING CHAIR—I noticed that in your submission, and you mentioned it, you say that the special powers provided in this act are the sorts of powers that are only enacted at a time of war. I am just wondering when you expect the war on terrorism to be over. We do currently have a sunset clause. I know there has been some talk about the sunset clause being removed or extended. But we are dealing with a type of situation which we probably have not seen in history before.

Prof. Williams—I accept the premise that we are dealing with something where we do not have a fixed sense of when it is going to end. That is partly because terrorism will always be a threat and has always been a threat to Australia. It is now seen in light of what is called the war on terrorism, but that itself as a very problematic way of putting it, given that terrorism is a device, not an ideology, not a nation. We are dealing with something where it is not clear when the threat will end. What I would say is that it is clearly itself something that ought to be responded to by exceptional measures only. It would be like saying in the darkest days of World War II, when no-one could see an end in sight to the forces that were then threatening Australia, that the laws at that point should be put in place for the rest of the life of the nation. Nobody in their right mind at that point suggested that. It is very hard to see the end of things at the moment—I accept that. But I just do not think that means you make it permanent.

ACTING CHAIR—When you are talking in relation to historical activities of terrorists, guerillas or whatever you might have called them, the difference is that modern technology means that terrorism, by its nature, is now international. It is not something that is confined. I do not think we can actually compare the terrorism of today with what might loosely be termed the terrorism of yesterday.

Prof. Williams—Again, I accept that. It is a changing threat that raises fundamental problems in terms of how it is met by the different agencies. But, still, it is an exceptional threat. You can compare, for example, the Cold War period. During that time it was a long-running concern that raised issues about how Australia ought to respond. Yet that period did not give rise to legislation quite of this type. Indeed, it did not give rise to suggestions that things that ought to be put in place to deal with the Cold War would be permanent.

I think the characterisation of this as a war has given, in some people's minds, a justification for such a measure. I do not think that the characterisation of it as a war should then enable that legislation to be continued forever on the basis that the war will never end. It is a profoundly pessimistic way of approaching the issue. I think also it is bad policy to do so, because making something like this permanent is putting it on such a footing that it will be very difficult to deal with in the future. We will not have a sunset clause or other mechanisms to provide for the necessary periodic review. I am not saying that appropriate legislation should not continue; I am simply saying that it should not continue in a way that would clearly be possible after the war was considered to have ended its most difficult phase.

ACTING CHAIR—You raised the issue of detention and the constitutionality of the legislation. The government, in proposing this legislation, naturally would have sought advice as to the constitutionality. I suppose that, where there are two lawyers, there are always two different points of view, so there is likely to be a challenge if it is used. But the government would not have proceeded unless it felt it was on reasonably secure grounds in relation to the detention powers.

Senator ROBERT RAY—In other words, the High Court has never struck down a government action. Is that what you are saying?

ACTING CHAIR—I did not actually say that. We have listened for a couple of days now to evidence about the act as it has been used by ASIO. I think it is fair to say that we have heard nothing but complimentary remarks about the manner in which the act has been used by ASIO and the provisions of the act that provide for the prescribed authority and the inspector-general to monitor the events that have taken place under the eight questioning warrants. There has never been a detention warrant, which I think only goes to show that, as the Director-General said yesterday, we are talking about methods of last resort. I am just wondering why you would want to see the detention powers struck out when they have never been used. They are there as a method of last resort, a backstop, which has not been used and is unlikely to be used except in the most extreme circumstance. Is it because of your belief about the constitutionality or do you have other reasons that you believe the detention powers should be struck out?

Prof. Williams—Let me start with the constitutional issue. I accept that this is a point that is not certain. If you have two lawyers you may get three views if you are lucky—you never know. But my view is that the Attorney-General's Department would clearly have to recognise that

there is an open question here that could be litigated in the High Court. They may well take the view that, on balance, it might be upheld. That is a reasonable position. There is a range of reasonable positions. But it is clearly challengeable—I do not think they could dispute that.

The reason it is clearly challengeable is that there is significant High Court authority that says that the power to detain someone is, with some exceptions, a judicial function. It is the very basic element of our system that you ought not to be detained without charge and that you are innocent until you are proven guilty. Some of those exceptions I mentioned relate to asylum seekers, to mental illness and others. But the High Court has never recognised an exception relating to national security, where the executive or one of its agencies can detain someone. It may be that the High Court does recognise that.

My view is that the danger in the legislation is that, even if they do recognise such a power, they would likely limit it to the ability to detain someone for the purposes of appropriate questioning. What is the rationale for holding someone for an extra five days beyond the questioning period? That is where the legislation becomes problematic. That is where the High Court would say, 'Even if you have this power, how can you justify someone who is not a suspect being held for four or five further days?' That, to them, would seem awfully like something that is punitive and way beyond what could be justified. That is the argument that I think would be put. I think it would have some reasonable prospects of success. I would not put it any higher than that.

A number of High Court decisions even in the last year have dealt with these issues. Again, they did not have a national security context. But these matters of detention have been litigated frequently. I think it is a risk to have something on the books that is seen as so important that is vulnerable to challenge and would likely lead to a challenge. I am sure that ASIO itself would recognise that as a likely prospect if they used the power.

The problem with characterising it as a last resort is that it is not established in that form in the legislation. The thresholds are actually quite low. I used the example of a journalist who interviews someone where it might be thought that person would destroy their notes to protect their source. That is not a last resort situation, yet clearly it could fall within the ambit of the legislation. I accept your characterisation that ASIO has not misused its powers to the current date. My view is that it has showed commendable prudence in using the powers. I have carefully read the material and I have identified the fact that concerns have not been raised about their use.

But when we are dealing with a power that could be used so extensively and that it is argued ought to be in the books for a very long time, I am just not confident about how it might be used over three, 10 or 20 years. It is an awfully big step to take to say that a power that is not couched in terms of 'last resort' will be used wisely and appropriately by any government or by any director of ASIO in the future. I think the history of many nations demonstrates the wisdom of not putting such a power in people's hands for a long period of time. You just do not know how it will be used.

ACTING CHAIR—Is your major objection on constitutional grounds or on other grounds?

Prof. Williams—It is on several grounds—certainly constitutional, but also on the grounds that I think at this point in time the detention power cannot be justified. I think a questioning

power can be justified. But I do not think this type of power can be. Also, the fact that the police have extended power to detain where suspects are involved, and other measures that may follow through that, do give avenues for the detention of people. Those people can be charged and refused bail. I am very uneasy about continuing a power in the hands of ASIO with its secrecy and other provisions, and for that reason I think that aspect should be discontinued.

ACTING CHAIR—Do you have any problem with the questioning powers at all?

Prof. Williams—Yes, I do. As I said, I support them in principle, but the secrecy provisions certainly need to be carefully looked at. I think they go beyond what can be justified in stifling legitimate criticism and debate about the use of those powers. They might be used to prevent information coming to light about abuses of those powers, and they certainly chill political communication in terms of the capacity of journalists as well. I have spoken to journalists who are very concerned about the capacity to report these things.

Also, I think the access to lawyers is problematic. I would agree with the comments made by the Inspector-General of Intelligence and Security that there are issues there that suggest that these provisions need to be improved. The balance is not right in that area. I think the provisions regarding somebody's access to a lawyer and the ability to communicate effectively with a lawyer during the period of their questioning ought to be improved.

Senator ROBERT RAY—First of all, can I say that your submission is the only one that acknowledges improvements and good work by this committee—albeit only to then admonish us for not going far enough. We appreciate that. At the end of your submission you talk about a punitive detention regime, whereas most members of this committee believe that if the detention regime is punitive then it is not in accordance with the act. The reason—even be it at low threshold, as you argue—for detaining someone is essentially so they cannot pass on information directly, or even inadvertently, to others that will forewarn them and therefore maybe divert the terrorist attack from one target to another. I think the intent of detention is not to be punitive, not to intimidate, and therefore it has to meet that threshold not only with the director-general but also with the Attorney-General and the issuing authority at three stages and it is then subject, as you know, to a variety of other checks in the system. So would you like to describe to me why it is a punitive regime?

Prof. Williams—I used that word in the context of how the High Court might look at it, because it is a very relevant for those purposes. The High Court would look at a matter of substance, how the act operates, what it does, to determine whether it can be characterised as something for a preventative purpose, and that must be a legitimate preventative purpose that does not go beyond what is seen as necessary to be preventative. If it goes beyond that, the High Court may well find that it is punitive—that is, it amounts to some form of punishment or detention beyond what the purpose demands. The reason why I would describe it as punitive is that, in this instance, I think it goes beyond what can be justified as a matter of prevention. I think the act, in the detention aspect, is not well tailored. The range of people who can be detained is too broad. Take the journalist example: someone can be detained for a lengthy period on the basis of interview information they have received. In applying it to people who are not suspects that transforms it, particularly given the length of the detention, into something that a judicial body could well regard as going beyond prevention.

The other reason I would say it is punitive is that the High Court, to this point, has clearly said that detaining asylum seekers can be seen as preventative in the sense that you are preventing them from entering the country inappropriately, but the High Court has been very wary in dealing with any form of detention of Australian citizens. The threshold is very high in that area in terms of justifying the detention of Australians other than by an appropriate judicial process, because of the hundreds of years of history that have consistently warned against the dangers of executive detention.

Senator ROBERT RAY—If I sent you to Baxter or Villawood tomorrow and you were able to announce to some of the detainees there that the longest they can be detained for is 168 hours, only after the director of immigration ticks it, the minister for immigration approves it and an issuing authority agrees to it, and that they are allowed to have legal representation and are not allowed to self-incriminate, I put it to you, Professor Williams, that they would name their firstborn grandchild after you. That is in comparison—when we are talking about punitive regimes.

Prof. Williams—I agree with you. This is where it comes down to the High Court's position. The High Court has said very clearly that the sorts of protections that might apply to Australian citizens do not apply to asylum seekers. There are two standards here, and that is very clear on the High Court authority. Things that can be done with regard to the detention of asylum seekers cannot be done with regard to citizens. There must be a different regime. That is why, for example, if a matter dealing with Cornelia Rau or any of the other people that might have been detained goes to the High Court, it would be a fundamentally different case from the detention of asylum seekers.

Senator ROBERT RAY—I am glad you drew the distinction between asylum seekers and citizens, because others do not. In your submission, you draw attention to what you see as a potential weakness in the prescribed authority having AAT members, but on evidence we have so far it seems almost inconceivable that they are ever going to be used—that is, there are plenty of retired judges and so few cases that we are going to cover it without that. Do you think that almost rules that off and that you can almost taken AAT members out of the legislation now?

Prof. Williams—That is what I would do and that was the position I put when this issue came up a couple of years ago. I felt that there were going to be sufficient people and there was simply no need to include AAT members for that reason, and they would be best excluded, given that they are clearly members of the executive and it could have the appearance of being self-serving if they did make a decision. It would undermine confidence in the process.

Senator ROBERT RAY—Evidence we have taken publicly and even privately, though we can refer to this aspect of it, indicates that the questioning process—and we have access to all the videotapes if we require—has almost entirely been inquisitorial rather than adversarial and that there have been no cross-examination techniques at all. Is that at all reassuring to you?

Prof. Williams—It is very hard to answer that question having not seen the videotapes myself. That is why I am a little bit cautious in some things we put in the submission. There is also the general problem with scrutiny in this area and why the safeguards need to be there. With regard to your question, I think that might highlight again the need for adequate legal representation for the people involved in these processes. I recognise that people can choose

their own lawyer, subject on limited circumstances to that lawyer being removed, but I am not sure that people have adequate access to that lawyer to have the processes explained to them, to the lawyer being able to advise them during the questioning period. I could be wrong on this. I have not seen the information. The key concern for me is whether someone who is feeling very vulnerable and very alone as part of this process is really getting the assistance they need from the only person there who is likely to be on their side. I am not convinced that that would be possible under the current regime.

Senator ROBERT RAY—We are probably in a unique position to make those judgments. You have raised the issue of the position of journalists a couple of times. I should preface my comments by telling you that I am not at all sympathetic. I do not really understand the principle of why journalists are exempt on the basis of the ethics of their profession when victims should also have rights. If they have information that will at some stage prevent damage to innocent victims, they should have come forward in the first place and they would forfeit their right. They do not forfeit their right not to disclose their source; they just do up to five years in jail and stand by their principles. I have to tell you that every time I hear the words 'public interest' and 'journalism', unlike Goebbels, I do not reach for my gun but usually for a new piece of legislation. I have heard your argument in favour of using journalists as an example but I am not sure what the justification is in this case.

Prof. Williams—I would not create them as a special class. I would not provide any special exemptions for journalists. I could use another example of a family member who has heard information and has got a document and there is concern the family member might destroy the document because it might implicate someone. That might be a better example. It simply illustrates in a way that it is readily clear to people just how easily this could come up in a form that could lead to detention in a way that also suggests, I think, that the response would be heavy-handed and inappropriate. It could apply to anyone who is not a suspect but who has just got information and who might destroy a document to protect a friend, a loved one or someone else.

Mr KERR—You have argued that we should remove the present detention provisions, but I think I would misunderstand what you are saying if it were to exclude the possibility of detention through the period of questioning where that was appropriate and was part of ensuring that no disclosure was made during that particular time or the like. What you are putting to us needs to be clarified precisely. I think you are suggesting maintaining the capacity for detention but limiting it in a way which is not quite clear to me yet.

Prof. Williams—Thank you for the opportunity to clarify that. Any form of questioning, by its nature, involves detention. Simply being subpoenaed to give evidence in a court involves detention. My argument is that detention should not be provided for beyond the period necessary for questioning. So, to the extent somebody has to be held to have questions put to them with the prescribed authority, detention is clearly necessary and inevitable. But beyond that I do not think there is a clear enough justification for any additional detention. Does that make the point sufficiently clear?

Mr KERR—At the moment, if a warrant is issued for questioning you are not under detention. You go home, you go to lunch, you go home at night.

Prof. Williams—But you are detained for the period you are actually questioned.

Mr KERR—I understand in that sense. So your proposition is to remove anything other than the mandatory requirement to be present during the periods of questioning.

Prof. Williams—Certainly that would be my preferred position because I think that that is consistent with other questioning regimes. You would not normally find in these types of regimes the situation where somebody who is not a suspect being held other than when they are actually physically needed to be there to answer questions. There is a potential compromise from that that things might be seen as incidental to that—particularly that someone perhaps should not be let go during breaks of questioning because of how that might compromise the process. But, other than those sorts of incidental periods, my preference would be to limit it to the questioning period only.

Mr KERR—By way of objection, it has been put that the whole act is not framed around the idea of suspects and nonsuspects. It is aimed at persons who may have material that is relevant to an intelligence gathering. But in your framework you would permit the detention, in the ordinary sense of the language, of persons who were suspects. Is that right?

Prof. Williams—If somebody is a suspect and there is evidence, there are strong and coercive powers that the police can use to deal with those people. There is already an extended questioning and detention regime under the Criminal Code to deal with those people. If we end up lending some of the suspects issue into the ASIO regime, it becomes very problematic. My focus is that this legislation is directed at people who potentially have information relating to matters that might assist in the gathering of intelligence. There is nothing there to require any level of suspicion that they have committed any crime. If they did, that might be purely additional and incidental to what they may have done. The fact that there is not any requirement that they have any actual involvement in this means the threshold clearly is: does someone not being a suspect simply have information of the kind that is referred to in a warrant?

Mr KERR—You also raised concerns regarding secrecy and said you believed that that needed to be further examined. What would your proposal to us be? If the committee was minded to continue this legislation into the future or to recommend it, how would we address the concern you have about secrecy?

Prof. Williams—There are a number of individual points that can be made. You could deal with it two ways. One way would be to wind back what I see as an overly strict application of a secrecy provision. The definition of operational material is very broad. It is so broad that almost anything conceivably related to the process could fall within it, if a broader interpretation were taken. That is problematic because it leaves people in a situation where they could reasonably believe that they can simply say nothing to almost anyone. That includes people who might want to reveal information about the process that ought to come to light because the powers have not been appropriately used. It casts doubt on the process and undermines public confidence when people do not know what is happening and may feel that they are not going to be able to find out what is happening.

Also, the strict liability provisions are inappropriate because they apply a very strict test in circumstances where such a test is not reasonable. They may catch people in circumstances

where people ought not to be caught. There should be an intention element involved in that as there would normally be in crimes, particularly when we are dealing with something that extends for such a long period after the warrant and then a five-year penalty applies.

My own preference, however, would be to say that it cannot be rescued as easily by simply playing around at the edges of some definitions, because I accept that it is always going to be notoriously difficult to define these matters, as to what is in and out. I would prefer a model like that put forward in the submissions of people including Joo-Cheong Tham—that is, to look at the models involved in for example the Crime Commission and other bodies, where the prescribed authority has the ability to make determinations according to particular information that very strict secrecy provisions ought to apply to and a case-by-case basis would be more appropriate than simply a blanket restriction. People are left being able to say almost nothing. I would simply wonder: 'What has happened in some of these processes, and will I have to wait for two years to find out that things have happened that should not have occurred?'

Mr KERR—So your recommendation is that the capacity to identify the components that would not be permitted for disclosure should ultimately rest with the prescribed authority at the conclusion of whatever period of either questioning or detention, were it to survive this review when that process concluded?

Prof. Williams—Yes, I would prefer such a system. If we could draft a general regime that did this appropriately, I would be happy with that. I just think that the task of defining in generality what is appropriate and what is not is very difficult. I recognise the suggestions of things like putting a public interest element in there—that is a notoriously vague way of doing things as well. I would look to some of those other models where sensitive information is received and it is recognised that information ought not to be revealed because it could prejudice investigations or other matters. The models that are being pointed to in other submissions are for the power to lie with essentially an independent person to make those determinations as needed. Then you protect the public interest as necessary, without pretending we can capture things in a generic way. Either it becomes too permissive or it becomes too strict. This clearly is in the latter category.

Mr BYRNE—Professor Williams, in terms of the component of detention, I will create a hypothetical scenario for you: the authorities clearly believe that a terrorist attack is imminent and they have identified a person who they believe has essential information that will prevent that terrorist attack. They need to apprehend and detain that person. Are you saying that under that set of circumstances—I am a little bit unclear about your distinction; you mentioned 24 hours—these people should not be detained at all, even though that might be fundamentally necessary to get the information, or are you saying they should be detained for 24 hours at a maximum?

Prof. Williams—What I would say in a situation like that is that a warrant ought to be issued, that person should immediately be brought in for questioning and the questioning ought to require them to answer matters. If they do not answer those matters, that itself is a criminal offence for which they can be held. If the information is not provided, they simply enter the criminal process at that point in any event. If the information is provided over that period, then there are other criminal matters that can be used in terms of apprehending people or dealing with the matters as they arise. What becomes inappropriate is that after a person is questioned—

assuming they answer truthfully, appropriately and do not give rise to the criminal provisions—they can then be held for a period of a up to a week. I do not think that there is strong enough justification for the additional detention beyond what is needed for that actual questioning.

Mr BYRNE—Even if the release of that person then gave rise to the terrorist act being committed?

Prof. Williams—That is a very tough judgment to make. Personally I would look also to situations in other countries. It is not as if the United States, England or Canada have provisions such as this. None of those nations would see, even in that situation, it being appropriate to detain one of their own citizens who is not a suspect. If they were, they would enter the criminal process. That is the answer. In other circumstances those nations would get the information, they would have appropriate surveillance and they would seek to detain the people as necessary. Of course, it may be that the person who is released may be subject to further surveillance and other matters. No, I do not think they should be detained even in that situation because that is where the balance is wrong and it is also where there is the potential beyond the extreme case you put forward, which I agree is a potential case—

Mr BYRNE—Hasn't the legislation been crafted in light of that? The thing that strikes me about this is the framework. In discussions, both on and off the record, with the people who are implementing this they talk about the sense of urgency, sometimes, to get information to prevent a terrorist attack on Australia's soil. How do you balance that? It seems to be, just on the reading of it, that you have mechanisms that have been set up that do offer people protections—the right to go to the Federal Court, et cetera—but it is in the framework of these agencies believing, say, that there is an act that might be committed and they do need this information to prevent that act occurring. In a sense it is trying to prevent an act of war, if you want to use that term. How do we get that balance?

Prof. Williams—I agree; they should get that information. That is why, despite the objections of many people, I personally would support a coercive questioning regime that even denies someone their right to silence. That itself is an extreme measure that is only very rarely found in the law. However, beyond that I do not think it is justified that someone, having been subjected to that coercive regime, is then held where there is no suspicion they have committed a crime.

Mr BYRNE—Even if they believe that the release of that person would result in that crime being committed?

Prof. Williams—That is a very large judgment to take. Let us say they have a reasonable basis for believing that the person is involved in the preparation and organisation of a crime. There are very extensive provisions in the Criminal Code that deal with that. That person should be dealt with by the police. We may be dealing with a situation where somebody is not involved in any way, or an informal member of an association. We even have association provisions now in the criminal law. It is pretty hard to construct a situation where they have reasonable information but could not have that person enter into the criminal process.

Mr BYRNE—On what basis? What would happen? Say that person gets released after 24 hours but they believe all those preconditions would be met. What would then happen under the scenario you are putting up?

Prof. Williams—Let us say that someone was picked up out of this process and they were involved in planning an attack. In those circumstances the provisions in federal law enable the police—

Mr BYRNE—I did not mean planning an attack. Let us say they had information. Let us make that distinction. They are a vital key and their release would result in that attack being carried out. They are not a perpetrator of the attack but someone who is an essential link in the chain.

Prof. Williams—It is hard to think of a scenario where someone who is genuinely an essential link in the chain would not be covered by the criminal provisions, the definition of terrorism is so broad. It covers association—informal membership of organisations. You do not even have to join the organisation. You can simply have a loose membership. That then enlivens a much stricter process where somebody can be held indefinitely if they are denied bail.

Mr BYRNE—Provided you can establish that.

Prof. Williams—Of course, but this is where some of the fundamental values come in. Let us say we have a situation where we simply have a bit of a concern about something. We do not have any evidence. Holding someone in those circumstances is really finding them guilty rather than innocent in circumstances where we do not have enough information to go through the criminal process. This is also an example of where the balance would be got wrong because the power can be used and potentially abused in circumstances where it ought not to be.

Mr BYRNE—That is an extreme scenario. You can see that this legislation has not been created in a benign environment. It has been an environment where there has been direct assessment of a threat. The Director-General of ASIO was quite passionate yesterday about that, and he is obviously someone that we would take on face value. But where do you draw the balance? Is the legislation both anticipatory as well as for executing the performance of a task? I will just ask you one final question because I have been monopolising the conversation a bit. Were you saying that there are no circumstances where you in your judgment, notwithstanding the fact that there was a threat, would envisage keeping a person detained beyond, say, a 24-hour period under the detention power?

Prof. Williams—It could be longer than that if only because the questioning has got to be in eight-hour blocks and it may, indeed, go over a couple of days. But, no, I would not support a law that would provide for detention for an extra four days, say, up to a week, beyond that. The reason is that I think there are grave dangers in making law with regard to extreme situations such as that where you do, I think, push the balance too far one way. You can think of any number of examples: dealing with drug offences, dealing with Port Arthur—all sorts of things where we would say, 'If we had constructed the system differently and allowed people to be detained pre-emptively, we might have prevented something.' That is correct. I would have to agree with you that that is correct and that could happen. But the dangers to a democratic system in doing that are very well known. There are many examples from other nations where powers such as this, constructed for emergency or extreme situations, end up being used in a way that is against the people themselves. I am not saying that is going to happen today, but I am saying that it is a danger and it is something that ought to be taken into account in drafting these laws. I think that is also why the international community has set down ways of analysing these laws in

terms of drawing the balance. The wisdom of their approach suggests, I think, very strongly against drafting a detention regime in that way.

Mr BYRNE—But are some of your concerns somewhat ameliorated by the fact that we have a sunset clause where these things can be examined?

Prof. Williams—Yes. Indeed, as I started my submission I said that a couple of years ago when the compromise was reached that I personally barely was prepared to say I supported the legislation in that form, including the detention regime. I said at that point that I saw it as an extraordinary law for an extraordinary time. I am now at the point where, I suppose, I am on the other side. I have shifted my position to say that I do not think the detention regime could be continued. If the committee were minded to say it should continue, the absolute bottom line would be: it ought only to continue for a very limited period of time. Another sunset clause would be required and, even then, further changes to the legislation would be needed in areas such as secrecy, lawyers and other matters. That, for me, would be the scenario I hope we would not get to, but certainly that would be better than ending up with something permanently on the books.

ACTING CHAIR—Professor Williams, you raised the issue of secrecy and you are somewhat critical of the legislation. In terms of any public disclosure of the uses of the provisions of the act, what do you think would be adequate disclosures compatible with the security requirements?

Prof. Williams—I am not sure I understand the question. Do you mean what ought to be?

ACTING CHAIR—You have complained that there is too much secrecy, that there is not enough public disclosure of the use of the provisions under the act. What public disclosures do you want with regard to issues that you consider should not be made secret?

Prof. Williams—Let me give you an example. Let us say, for example, ASIO adopted as an operational technique something that we would regard as torture. Clearly that would be covered by the definition. Clearly that also would be something that could not be revealed for up to two years after the warrant. That is something, in my view, that ought to be able to be revealed because of the public interest in doing so. I am not saying they do engage in torture. I am just saying, 'How do we know?'

ACTING CHAIR—That is one of the reasons we have so many safeguards with the prescribed authority, with the issuing authority, with the reports that are made. This committee has the power to question people. There is the Federal Court. There are so many provisions now. I think torture is a very unusual example for you to use for the secrecy provisions. I presumed there were lots of other issues that you wanted made public.

Prof. Williams—I certainly do not have any agenda, if you like, of particular things that should be made public. My concern is that, even recognising the safeguards—and they are significant safeguards and I think that this committee and the parliament did an extraordinarily good job of building those safeguards in last time—I think it is still a problem when you have what is essentially a blanket secrecy provision. That is because, even though it may be clear to us that there are important and significant safeguards, that is not necessarily effective at the

community level. I think people are not always prepared to trust that people in official positions will always do the right thing. I think there need to be avenues for people to be able to speak about uses of powers that may not have been appropriate, that may not give rise to a Federal Court action but nonetheless are the sorts of matters that should be ventilated more publicly.

I think that the experience with the police and other agencies demonstrates that. The significance of these powers is that they take ASIO beyond their traditional functions into something that very directly impacts upon individual liberties and actions. That is why, with these particular powers, I would go beyond the normal secrecy provisions in the ASIO legislation and say that here, both in terms of the public interest and ASIO's maintenance of confidence in the public, things ought to be revealed and people ought to know that things can be revealed, such that they are confident that the legislation is being appropriately used.

ACTING CHAIR—So you would not be satisfied if there was an annual reporting mechanism to this committee where we could question all those people involved in the provisions of the act?

Prof. Williams—Not by itself, because I think that any mechanism that relies solely upon a parliamentary committee or upon public servants is problematic. I think that they are vital and necessary parts of the scrutiny process but it is very rare to find elements of public life where you cannot have freedom of information or where whistleblower laws or other matters do not apply. Here the provision is very strong, with a five-year penalty applying for disclosures for up to two years. I recognise the effectiveness of that sort of procedure but I do not think it is enough when it also has that blanket clause. It may well be that people would wonder. This committee may well do its job exceptionally well, but will it necessarily get all the information it needs to ask those questions? Will things be happening which only the individual might know and which they need to relate at the relevant time? I am not confident that the processes, by themselves, are good enough when you have such a strong secrecy provision.

Senator ROBERT RAY—I think we would argue that the disclosure of that information to an MP in the course of their parliamentary duty overrides the secrecy provisions, but that has not been tested yet.

Prof. Williams—It has not been tested and I have seen the legal advice that the committee has. This clause is drafted so broadly and it is a little unclear what its ambit is. One of the elements is not just what it clearly covers but whether an MP would be concerned about how they could use that information, because it is not clear in an ironclad way how that information may be used, say, in parliament. There are exceptions relating to information given for legal advice, but an exception relating to information given to MPs so that they can raise concerns in parliament is not in the legislation.

Senator ROBERT RAY—Under privilege, it would only relate to raising it in the proceedings of the parliament, which is slightly broader, but, yes, you could not go out and broadcast it, without going through parliamentary proceedings, and be protected.

Prof. Williams—That is right. If I was advising a member of parliament on this issue I would have to be quite cautious in the advice that I would give.

Senator ROBERT RAY—No, it relates more to the person who discloses it. The parliamentarian is covered.

Prof. Williams—Sorry. Yes, that is correct in that relationship.

Senator ROBERT RAY—If I give a speech in parliament it cannot be adduced in a court of law to prosecute me, so I am covered. It is the person giving the information—

Prof. Williams—I know this is a big issue in the community legal centres and other places. The definition of 'instituting proceedings' might be quite narrow. It is a little unclear as to what that stands for. There is real concern that people cannot reveal information that perhaps, in the public interest, should be able to get out.

Mr KERR—I would like to clarify this because I think Senator Ferguson raised an important point. Your suggestion is that there would not be a blanket secrecy provision, but if a case is made that particular subjects of questioning warrants should be subject to secrecy obligations for national security reasons, that could be done?

Prof. Williams—Yes, I agree. I accept completely that there will be very valid and important reason why certain information should not be revealed and should be subject to secrecy provisions. It is only the blanket nature of the provision and what I see as its overreach that concerns me. In fact, I would hope that a provision that gives strong powers to a prescribed authority would meet the legitimate concerns of bodies like ASIO that information is kept secret where it needs to be.

Mr KERR—I am not particularly offended by the idea that people outside might not be able to appreciate the degree to which this committee examines the conduct of agencies or how IGIS operates because they just cannot know.

We can do what we can to assure them that the job is being done appropriately, and my experience is that it has been and is being done. It is impossible for us to set out all those matters and to satisfy those concerns. I think it would be useful for us to get comment later from the Attorney-General's Department and ASIO as to whether such a provision which did not have a blanket provision but which was narrower—it might be just as wide, in the end, in a particular case—but directed towards national security related information might be acceptable.

ACTING CHAIR—I can understand your scepticism. We are not exactly a homogenous group here.

Prof. Williams—I am speaking based a little bit on what I hear from people I speak to in the community about this issue. I have spoken to many people in the Muslim community, people working in legal centres and other groups, who have asked about these provisions. I think one common element is, frankly, that they do not even know this committee exists. The work of the committee is not publicly known. A lot of this comes down to community known safeguards and public confidence in the process. When we have a process where people are not aware of safeguards and might be a little bit sceptical about them, I am not sure that is adequate. I think also there are dangers to ASIO if it deals with a process where the community are wondering what they can get away with and wondering whether in fact the safeguards are there in terms of

information getting out. There are too many examples in the past where you can point to things that should have come out that did not. Here there is a specific provision that prevents it in a very general way.

ACTING CHAIR—On behalf of the committee can I thank you, Professor Williams, very much for your contributions to this inquiry. Thanks for your attendance here today.

[11.57 am]

CARNE, Dr Greg, Private capacity

ACTING CHAIR—Welcome. I advise the committee that we have received a supplementary submission from Dr Carne. Is it the wish of the committee that the additional submission dated 20 May 2005 be accepted as evidence and authorised for publication? There being no objection, it is so ordered. Dr Carne, I invite you to make introductory statements and then we will proceed to questioning.

Dr Carne—Thank you very much to the committee for the opportunity to appear and speak to my submission. I will make a brief outline of it. I have actually drafted the submission and the supplementary submission in such a way as to provide several—and, I think, overwhelmingly cogent—reasons why this committee should have a continuing and legislated review and monitoring role linked to a continuing sunset clause in relation to the detention and questioning powers. I refer to page 2 of the submission about the unprecedented nature of these powers compared to other anglophone common-law liberal democracies where there is no detention of nonsuspect citizens.

Secondly, at page 3, I make several points about the reach of the detention and questioning powers, which are greatly expanded beyond what was originally contemplated at the passage of the original detention and questioning legislation. The safeguard of media reporting and scrutiny of the warrant powers has in fact been removed by extensive criminal prohibitions. I make that point at page 3. Similarly at page 3, the executive proscription of terrorist organisations now attracts a much broader array of offences which then provide the foundation for the exercise of the powers. Similarly, the subsequent association offence also provides a much broader foundation for those powers. Again, that is at page 3.

The Attorney-General has at various times floated proposals for a significant expansion of the detention powers—that is mentioned at pages 3 and 4. To my mind, the original and deeply flawed ASIO bill, which the chair of the committee, the Hon. David Jull, mentioned in his introductory remarks when handing down this committee's report three years ago, showed the clear inability of government institutions to draft matters in a proper way to reflect, defend and reinforce democratic rights and principles—the very targets of terrorism.

Presently there is also a very narrow experiential basis for the committee to rigorously assess the use of these powers—there have been no detention warrants, only three questioning warrants and the use of a single authority. Importantly, sunset clauses continue to be included in comparable legislation overseas. Upon the insistence of the House of Lords, the very recent UK Prevention of Terrorism Act 2005—I refer to it at pages 6 and 7 of the submission—included a sunset clause. Similarly, the Canadian Criminal Code—referred to at page 6 of our submission—which contains comparable provisions, has an in-built five-year sunset clause. A continuing committee review role on sunset clauses will also reinforce the government's preferred human rights model, set out in its major document, *Australia's National Framework for Human Rights National Action Plan*, as released last year by the Attorney-General. That plan leans strongly towards responsible government and parliamentary institutions, including 'an active role in

representative democracy by making submissions to ... parliamentary committees', as the most effective mechanisms for the protection of human rights and for combating terrorism. That is referred to at pages 7 and 8 of the submission. So you could say that continuing and formalised committee review is necessary to substantiate the government's preferred human rights model.

I would also like to draw the committee's attention to recent usages by the Attorney-General, Mr Ruddock, of the concept of human security. These usages are potentially contentious and I believe that they have been taken out of context and are in fact potentially misleading. I say this at pages 8 and 9 of the submission and also in the supplementary submission. There is no necessary or automatic connection between national security enactments and the creation of human security and the protection of human rights. The Attorney-General has quoted two distinguished Canadians: Canadian Attorney-General and Minister for Justice, Irwin Cotler, and the former Justice of the Canadian Supreme Court, Louise Arbour, who is now the UN High Commissioner for Human Rights. Both of these people need to be read in context; both of them, as you will see from the supplementary submission, favour rigorous, multidimensional accountability mechanisms in counter-terrorism legislation. They say that such mechanisms reinforce democratic institutions and will provide the most effective long-term response to terrorism.

I refer members of the committee in particular to page 2 of my supplementary submission and the checklist provided by the Canadian Attorney-General, Irwin Cotler, of what is necessary to attain a concept of human security in counter-terrorism legislation. I also alert the committee to the fact that the Canadian legislation goes not as far as the Australian legislation. So, the Canadian Attorney-General and Justice minister, who is also a former distinguished human rights professor at McGill University, has set down a number of criteria applying to the Canadian standards in the context of legislation that does not go as far as the current Australian detention and questioning provisions. Similarly, I have also included a statement by the former Justice of the Supreme Court of Canada, Louise Arbour, supporting a much more integrative and rigorous approach to multidimensional accountability mechanisms, of which sunset clauses and periodic committee review would seem to be an inescapable and integral part.

Indeed, the present safeguards around the Australian questioning and detention provisions would fail to meet the standards set down by the Canadian Attorney-General, Irwin Cotler, which Mr Ruddock has quoted several times. I simply make the point to committee members—who I hope have all had the time to have a look at my submissions—that there are a multitude of cogent and justifiable reasons, based on comparisons with UK and Canadian legislation, that support the need for an ongoing, involved and formalised review role for this committee that is linked to a sunset clause applying to questioning and detention powers. It is this very process of engagement with the community—with submission writers and so on—which builds in the notion of representative government and representative democracy, which provides a very powerful rejoinder to the sorts of totalitarian tendencies of terrorist organisations. That concludes my overview.

ACTING CHAIR—At the outset, I think you talked about 'expanded powers since the legislation came into effect'.

Dr Carne—Yes.

ACTING CHAIR—What expanded powers?

Dr Carne—I will put these in context. The original legislation as mooted by the former Attorney-General talked about imminent terrorist attacks, and there was a 48-hour limit. The legislation as passed extended that to 168 hours and removed the concept of detention and questioning in terms of an imminent terrorist attack.

The other angle I am also looking at is clearly that the basis of the various offences which the detention and questioning powers attach to in terms of a terrorism offence has in fact expanded in two ways: one is the association offence, which then provides the foundation for potentially triggering the questioning and detention powers in an intelligence-gathering context as distinct from a criminal law context; and there is also the ability for the proscription of organisations, no longer by the parliament but by the Attorney-General, and that in turn potentially enlarges the reach of the detention and questioning powers. That proscription of organisations in turn attracts other criminal offences which are terrorism offences, which then provide the foundation for potentially triggering the questioning and detention provisions. So I am looking at it from several different angles.

ACTING CHAIR—You are. I thought you were talking about an expansion of powers since the act was finally passed in June 2003, when in fact an enormous number of additional safeguards were put into the act compared to the original act that was before parliament.

Dr Carne—The amendments to the proscription and the amendments to the association offence came post July 2003.

ACTING CHAIR—But the proscription of terrorist organisations can be disallowed by the parliament.

Dr Carne—On the basis of passage by either house of parliament, and that—

ACTING CHAIR—Yes.

Dr Carne—Yes, I am fully aware of that.

ACTING CHAIR—So I cannot see how that is an expanded power, because parliament is still the ultimate arbiter.

Mr KERR—I do not want to enter into an argument, but I think what you are saying is that, because we now have a number of organisations which are proscribed, the involvement of any Australians with those organisations may trigger the use of these powers in ways which were not possible before they were proscribed. Is that what you are saying?

Dr Carne—Yes. There is a broader ambit—

Mr KERR—Why?

Dr Carne—There is a broader foundation for the notion of what we mean in the practical sense of 'terrorism offence' and that in turn provides a broader potential ambit for the reach of

the questioning and detention powers, because the terrorism offence is the concept used in section 34 of the legislation we are currently talking about to provide the foundation to trigger the warrant process. That is what I am getting at.

ACTING CHAIR—The other issue I would like to raise—and I think it is important that we hear your point of view—is that our previous witness made some distinctions between the questioning powers and the detention powers. I wonder whether you would like to comment on that. He was satisfied with the operation of the questioning powers but did not believe that we should retain the detention powers.

Dr Carne—I did not address this directly in my submission—there may be a passage here or there. But, as I mentioned at the start of the submission, it is important to recall the exceptional nature of these powers when you compare those in four other anglophone common-law democracies: the United States, Canada, the UK and New Zealand. These powers actually go beyond the powers in those jurisdictions.

There has been a terrible fudging in the media. I listened to a segment of these proceedings yesterday on *The World Today*. I just caught the end of it. There seems to be a terrible fudging—I am not saying it is by this committee—between criminal law investigative processes and intelligence gathering processes. I put forward various models three years ago, as did Stephen Donaghue of the Melbourne bar, based upon the Canadian legislation and tailored to Australian circumstances which do not involve a detention provision for investigative hearings. My preference would be that there should be no detention as such in that form. I feel much more comfortable with the Canadian model. I did not put that forward because I do not think that is so much of an issue at the moment in terms of this submission.

When you talk about detention and the language of detention before an investigative hearing, it is not about detention as such. There are capacities to detain if a person is at risk of absconding, not appearing or divulging information that should not be divulged. But, again, that is a much narrower compass than a week-long—and not only a week-long but also renewable—detention period. The thresholds for renewing that detention period are not very high. I think Mr Kerr may have written a paper about this for the Victorian Bar Association or something similar.

ACTING CHAIR—The problem I have is that we have been assured that the provisions have been used as a method of last resort. The detention provisions have not been used. They are in legislation but they have not been used. The questioning powers have been used. The evidence that has been brought to this committee both publicly and privately would suggest that through the safeguards that have been put into the law, many of which were recommended by this committee following hearings prior to the law being enacted, the law is being dealt with humanely. Having passed all of those safeguards, those involved indicate to this committee that in fact the operation of the law is functioning very well with very adequate safeguards for anybody who might be the subject of a warrant. We can only talk about questioning warrants because we have had no detention warrants or any warrants issued to minors.

Dr Carne—That is precisely the focus I have taken in the submission. As I said, it is only mentioned very briefly in passing in a comparative context. I would have to flick through the various pages to find it, but it is mentioned briefly. What I have focused on clearly is a continuing, significant, ongoing role for this committee in oversight and monitoring, having

looked at what the Attorney-General has said and borrowed from the writings of Irwin Cotler. I went away and read those writings in context. I think that, if you make any fair reading of them, Cotler talks about a multidimensional series of safeguards. I would encourage you to look at page 2 of the supplementary submission. There is a checklist there, which he talks about. Clearly, ongoing parliamentary review by your equivalent committee in Canada—the Security Intelligence Review Committee, which is composed of privy councillors; the upper house, of course, is a nominated house in Canada—is seen as very much an integral part of the checks and balances. Irwin Cotler, the Canadian Attorney-General, says that it is germane to the integrity and efficacy of antiterrorism legislation and it reassures the public that we are genuinely focused upon human security in its genuine meaning and not state security.

ACTING CHAIR—I think it is also fair to say that even the Director-General—I do not know whether you heard his public evidence—suggested that oversight by this committee on a regular basis would be quite appropriate under this current legislation.

Dr Carne—I would agree, because it is good for his organisation that they are seen as accountable and open before a particular committee. The other thing, of course, that we have to remember is that Dennis Richardson will not be ASIO Director-General for much longer.

ACTING CHAIR—We do understand that, but he is not the only Director-General of ASIO that there has ever been.

Dr Carne—No, of course not.

ACTING CHAIR—Although he has been a very good one, I must say.

Dr Carne—That is the point I was trying to make.

Senator ROBERT RAY—I just want to follow up on a comment you made, because I do not quite understand what you said about renewable detention being a low threshold. I think that the threshold for someone being detained a second time is quite high. I think it needs the Director-General of ASIO to approve it—and that person, whoever it is, would be very conscious not to make a wrong decision. It then needs the Attorney-General and then the issuing authority to approve the renewable detention. There are not the same three hurdles that it previously had; it has to be based on new information. I think it would be very hard to drum up falsified new information. I may not understand the act well enough but I cannot understand how that is a low threshold or a jump for a renewable detention.

Dr Carne—Let me try to clarify. What I am saying is that the original warrant is based on the prospect of obtaining information. I will have to go back and look at the legislation to quote you the precise language, but the language anticipates the ability to obtain information given the granting of the original warrant. It is almost inevitable, given the nature of the thing, that new information will be obtained; it is a self-fulfilling prophecy, in a way. As to the fourth category, I would have thought that the box would be fairly readily ticked. It is then just a question of whether there is any point in questioning the person further, given the expiration of 24 hours. That was my point. The alternative was a set of five or six other criteria, which I think were put forward by the Law Council to the Senate committee. Those additional criteria for further warrants were not taken up.

Senator ROBERT RAY—It is a bit like one of these grand prix jumping events where they go over several hurdles at once. When you want to detain someone for the second time you put an extra hurdle in, but that has to be related to the other three before they can be detained. I think it is a very high threshold. Originally Attorney-General Williams wanted to be able to detain people forever. That is when we all objected and said: 'No, you cannot do that. You cannot just use this as a backdoor method of detaining people for months and years at a time.' As I understand it—and please correct me if I am wrong, because my understanding of these laws is not always all that good—not only does it have to be based on new information but also that new information has to be related back to the three other hurdles you have to jump. That is a pretty high threshold.

Dr Carne—They would be cumulative criteria.

Senator ROBERT RAY—The justification you use for detention in the first place—circumstances in which someone is likely to abscond, disclose information, destroy documents et cetera—cannot just be 'freshened up'. It has to relate to the fourth one, which is the new information.

Dr Carne—This is all a question of interpretation.

Senator ROBERT RAY—Yes.

Dr Carne—We are really talking about hypotheses here. This is why I have said that there is a need for a continuing role for the committee, because I do not think you can accurately and safely make these sorts of judgments until you have a broader experiential basis. That is why I have encouraged the committee to think along the lines of what I was saying: there needs to be a further sunset clause and periodic review. That is entirely consistent with what happened recently with the 2005 act in the UK and the ongoing sunset clause in the Canadian legislation.

Senator ROBERT RAY—Let me get this clear: the Canadian sunset clause is five years?

Dr Carne—That is correct.

Senator ROBERT RAY—Not three?

Dr Carne—Not three.

Senator ROBERT RAY—One other matter you have raised is the constitutionality of this power. We are assured by the Attorney-General's Department that the Chief General Counsel has given as good an assurance as he can that this is constitutional—of course, we are not permitted to look at that. Do you have a general view that when legislation is in any doubt constitutionally the legal opinions that are obtained should always be public documents so that we can all make an evaluation before we vote on the legislation?

Dr Carne—Again, I think it should be available to this committee. If there are any national security reasons why it should not be available to the public—just like there are two versions of the ASIO report—then that advice should be publicly available, subject to those national security considerations.

Senator ROBERT RAY—Making it available to this committee is neither here nor there, but to you, Professor Williams, HREOC and these other organisations that have expertise—you are all firing in the dark. If we had the government's legal opinion and your evaluation of it we would be in a much better position to assess its validity, wouldn't we?

Dr Carne—I would have to go back and check the history of the advice, but the public documentation might suggest that the chief general counsel's opinion might have been obtained at some later point than the original legislation. But there are comments in *Hansard*, both in the parliament and the committee stages, about the level of advice that has been obtained. All I can refer you to is one of my articles that I attached about the constitutionality issues. Again, I did not raise this in this submission whatsoever; it is raised in passing in a line or two very briefly. I did not want to concentrate on that because, in a sense, it is not the focus at the moment. All I can say is that the former Solicitor-General Gavan Griffith had grave reservations about the sorts of information, in relation to constitutionality, that the Attorney-General's Department was submitting two or three years ago. I cite him in the New South Wales journal article and it is in the *Hansard*.

Senator ROBERT RAY—Thank you for that.

Mr KERR—Just to clarify, in relation to the renewal of detention warrants were that regime to remain, do you adopt and recommend to us the implementation of what the Law Council of Australia suggested would be additional measures that ought to be given attention before that renewal would occur?

Dr Carne—I think the Law Council's submission, having not read it for a couple of years, did not receive the attention at the time that it warranted. I take Senator Ray's point. It is a bit uncertain to me what this additional information means, but it would seem that at least some additional information would be obtained from a person detained and/or questioned under 24 hours of questioning, which would then provide the trigger for a further warrant. I do not think that particular threshold is high. Whether in fact the Law Council of Australia is the ideal model, I do not know. But I do not think it received sufficient attention at the time.

ACTING CHAIR—You do not make recommendations to the committee, but you do have conclusions. Am I right in suggesting that the main recommendation that you make is that we need a formalised and ongoing role for this committee reviewing legislation?

Dr Carne—In relation to the detention and questioning provisions, my recommendation or submission would be simply that you need to remain involved in a periodic review of the detention and questioning provisions for the 10 or 12 reasons I have set out in the submission, including in the supplementary submission, in terms of building in a system of review that involves periodic public participation, particularly in the absence of any sort of media scrutiny now because there are extensive criminal prohibitions, as Professor Williams was talking about before. So the so-called new security environment also demands lateral thinking about accountability mechanisms. I suppose what I am saying to the committee and to the chair today is that you need to build in a continuing sunset clause, whether it be three years or whatever, linked to a review of the detention and questioning provisions as a periodic review.

ACTING CHAIR—You talk about the oversight principle in your supplementary submission—

Dr Carne—This is on page 2, is it?

ACTING CHAIR—Yes. I have not really had a chance to read it in detail. You talk about this paper talking about including the following instruments and mechanisms for monitoring, review and redress, and you mention media scrutiny and sunshine—I am not quite sure—

Dr Carne—I am simply quoting from the Canadian attorney-general's—

ACTING CHAIR—I am not quite sure what that means though. What do you mean by 'media scrutiny and sunshine'?

Dr Carne—'Media scrutiny' means—

ACTING CHAIR—I understand that bit of it.

Dr Carne—It is a North American concept, I believe, referring to the ability to throw a public interest spotlight upon critical public law matters. That is my reading of it. But this is simply an extracted quotation from Irwin Cotler. You will see, at the second tab of the submission, that I have photocopied his article. The Attorney-General, Mr Ruddock, has been quoting Irwin Cotler on the concept of human security; I am saying that Irwin Cotler, a very respected international human rights lawyer and a former dean of Canada's McGill University law school, is actually talking about a rigorous, multidimensional series of instruments and mechanisms to monitor and review the Canadian legislation, which does not go as far as the detention and questioning provisions that we have in Australia. So 'human security' in Irwin Cotler's mind, which the Australian Attorney-General is now quoting as the basis for this national security legislation, has to be read in the Cotler context. Mr Ruddock is quoting Irwin Cotler but, on the other hand, Cotler goes on to say, 'This is how to reinforce and reinvigorate democratic institutions and to provide in the long-term a very strong bulwark against terrorism.'

Senator ROBERT RAY—One of the problems with all these overseas examples is that although there is nothing wrong in running them past us, because it enlightens us, we get a bit chauvinistic and frustrated when people say, 'Look at the United States—they have nothing like this.' But they do detain 1,100 people as material witnesses.

Dr Carne—That point was raised in the Hallius case.

Senator ROBERT RAY—People talk about the European Union, yet in France a magistrate can keep someone in jail for three years while they are investigating a possible offence and so on. In Canada there is no actual limit to the detention other than what the courts and their bill of rights might dictate. In some ways we have been a bit more up-front by saying, 'This is the law and there is the limit,' whereas all these other countries, if they cannot do what we want to do, find another way that is less supervised, less controlled and less fair.

Dr Carne—The Canadian criminal code creates a set of judicially supervised limits on preventative detention—the outer limit is 72 hours. The question of whether there is

differentiation in Canada between citizens and noncitizens is one I am not fully au fait with. The other issue is that the material witness provisions were, I think, heavily criticised by the US—I remember there were issues about noncompetence raised in the Hallius and Padilla cases in the US Supreme Court, and that is a controversial area. I am saying that it is all very well to quote the concept of human security, but you need to go away and read Irwin Cotler's whole article—he locates the concept of human security within an effective human rights mechanism. There is an idea that the approach to human rights as such is take it or leave it, as though there is no derogation from it or it is an absolute doctrine, whereas it is not. It actually sets out a system of proportionality and reasonableness to address these very types of situations. Within the parliamentary human rights model released by the Prime Minister and Mr Ruddock last year the choice for the government is clearly representative and responsible government. There are distinct issues in relation to national security, such as the genuine need for secrecy, and the need not to alert terrorist organisations to information. There needs to be lateral thinking and there needs to be methods to come up with new and unique checks and balances. There is no point in quoting just part of Irwin Cotler's article; you actually have to look at the whole concept of what he is talking about. That is all I am saying. I am happy to provide any information about the Canadian Criminal Code that will elucidate these issues.

Senator ROBERT RAY—I doubt whether you will be able to answer this because other people have looked at it and have not. Do you have any knowledge of or statistics on how many people may have been detained in Canada since the bill went through in, I think, July 2002?

Dr Carne—I think somewhere in the legislation there is a reporting requirement similar to the one in the ASIO bill. I have not actually looked at the report of the justice minister.

Senator ROBERT RAY—I would not expect that.

ACTING CHAIR—Dr Carne, we are in the process of reviewing the act and what we really need to find out is whether the act is doing the job that it was set out to do, whether it is doing it humanely and whether the safeguards are working. You have raised a whole range of issues in your submission. I guess the only real recommendation you made is about putting the review role into the act. You have not made any other specific recommendations about the act, have you?

Dr Carne—At the end of my submission I refer to some other details about legal representation. This is towards the end of the submission.

ACTING CHAIR—This is your initial submission?

Dr Carne—Yes, in the original submission. I do raise some other secondary issues, I suppose you would call them that. I did not want to go into these in the opening because I was conscious of the five-minute limit. But I do pick up a number of points about the presence of legal representatives and the definition of issuing authorities, which I think may have been canvassed briefly in Professor William's evidence.

So there are some other conclusions there, but what I am trying to put forward to you is to encourage you very strongly to put a continuing legislative review role—the sort of thing we are engaged in now—into the legislation, linked to a continuing sunset clause. That is entirely

compatible with the human rights document of the government in terms of reinforcing representative and responsible government. It deals with some unique ministerial responsibility issues which are clouded when it comes to national security matters and it is entirely consistent with the very recent legislation in the United Kingdom and the continuing sunset provision in the Canadian legislation. The other material simply provides a wealth of reasons, justifications and arguments to support that continuing role.

Mr KERR—Let us run past the first bit, about the sunset mechanism. That was a proposition I floated without much developed thought yesterday, but it still seems to me to have some attractiveness, which is that, if we recommend that the legislation have an ongoing life past its current sunset, we build in a rolling series of points at which review is automatically required and its continuation requires a positive resolution of this committee. In other words, the legislation will discontinue unless there is a positive recommendation from this committee each three or five years—let us not specify it at this point but at fixed points. We do not forecast a period where the objective requirements of our national security will come to an end, but we anticipate that it may be so in some future period of time. We also keep the scrutiny on the agencies, the organisations, the inspector-general and the like because they know that, if we are dissatisfied in the way it is being managed and if that positive resolution for the ongoing operation of the act is not made, the legislation will lapse.

Dr Carne—I think that is quite a good approach. There is clearly a model either in the current legislation or in the Canadian legislation for rolling sunset clauses. To come back to the chair's point, I also think that it may in fact be advantageous to the public role of ASIO to see that there is a process of review and scrutiny here that is independent and at arms-length and that deals with much broader generic issues rather than having the Inspector-General of Intelligence and Security deal with specific issues or the Commonwealth Ombudsman dealing with the Federal Police.

So there are a number of reasons for doing that. There is also the ability to build up an experiential basis over a period of time, but one trend that seems to be certain is that there will be accretions to executive power and when you take out media scrutiny you need to put something else in. There may be a case—and I would not agree with it—for blanket media withdrawal or prohibition, but I do not put that view. It seems to me that if you do that, again, in the new security environment—whatever that phrase might mean—you need then to think laterally and build in some sort of alternative new mechanism to replace what has been taken out.

Part of the problem with the removal of media scrutiny is that not even having generalised reporting makes it very difficult for people with some expertise in the area. A paper was produced by the Parliamentary Library which quoted a *Sydney Morning Herald* article about some arrests relating to the Brigitte incident, where it is clearly raised—and this was attaching when the legislation was being introduced in late 2003—that this could well be very generalised reporting with no identification of incidents or persons but that it might well fall foul of the prohibitions.

It is similar to the UK, for example, with the role of special counsel before their immigration panel dealing with persons suspected of having terrorist links overseas, and to Canada, with their legislation around access to information. When national security issues are involved they have a

special counsel to put forward the alternative case to the executive. I think there are opportunities to think laterally and to provide mechanisms which ensure national security but also a degree of public accountability, and ensure confidence in democratic institutions, which when it comes down to it are the bulwark against authoritarian terrorist ideologies.

ACTING CHAIR—In your submission in March you were obviously unaware of the latest statistics and information, because you talked about only three questioning warrants being issued when in fact we now know there have been eight.

Dr Carne—This is the point. I am simply quoting from what I am allowed to have.

ACTING CHAIR—Since it was made public at yesterday's hearing that there have been eight, it is not a matter of private discussions for the committee.

Dr Carne—I am simply quoting from the last ASIO report.

ACTING CHAIR—I do understand that. It is true that you say that, because there have not been any detention warrants issued, the joint committee cannot evaluate the legislation and protocols, but we also have some comfort in the knowledge that they are being used as a method of last resort, which is one of the issues that came up in the first case. The third thing you talked about was the fact that there had only been one prescribed authority used when in fact there have been more because eight warrants have been issued, which when evidenced to us gives us further insight into the operation of the prescribed authority. While much of the evidence has, of course, been heard in camera, the committee is aware of more than just the limited details that you raised in your initial submission. I just thought I ought to put that on the record, because you were not in a position to be aware of all these things.

Dr Carne—No, and doesn't this just illustrate the point about blanket media bans: without the most generalised reporting with very scant details that a warrant was issued actually precludes more accurate factual submissions in relation to this whole process?

ACTING CHAIR—The three warrants were in the annual report and the following warrants will be in the next annual report. It is just that it was brought before this committee for our information because it is already available.

Dr Carne—Sure, I take your point.

ACTING CHAIR—But I can understand why you did not have the knowledge.

Dr Carne—I am not disputing the point, but I obviously did not have time to read the transcript this morning. I will read it very keenly later today or on the weekend.

ACTING CHAIR—As there are no further questions, I thank you for appearing before the committee. You have made quite a comprehensive submission and supplementary submission, which will be most useful in our deliberations.

Dr Carne—Thank you for the opportunity. I am happy to provide any further information, via the secretary, if requested.

Resolved (on motion by **Senator Sandy Macdonald**):

That this committee authorises publication, including transcripts on the internet, of the evidence given before it at public hearing this day as part of the records of the committee's review of division 3 part III of the Australian Security Intelligence Organisation Act 1979.

Committee adjourned at 12.39 pm