Submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD: Review of Division 3 Part III of the *ASIO Act 1979* (Cth)

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I regret to say that international human rights experts, including those of the UN system, are unanimous in finding that many measures which States are currently adopting to counter terrorism infringe on human rights and fundamental freedoms. Human rights law makes ample provision for counter-terrorist action, even in the most exceptional circumstances. But compromising human rights cannot serve the struggle against terrorism. On the contrary, it facilitates achievement of the terrorist's objective - by ceding to [them] the moral high ground, and provoking tension, hatred and mistrust of government among precisely those parts of the population where he is most likely to find recruits. Upholding human rights is not merely compatible with successful counter-terrorism strategy. It is an essential element. (Kofi Annan, Secretary General of the United Nations[1])

A. Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') is established by the *Human Rights and Equal Opportunity Commission Act 1986* (Cth) ('HREOC Act'). It is Australia's national human rights institution.

2. The Commission's relevant functions are set out in section 11(1) of the HREOC Act and include the power to promote an understanding and acceptance, and the public discussion, of human rights in Australia.[2]

3. The Commission has previously made submissions to this Committee on proposed amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) (ASIO Act) and to other Parliamentary Committees on human rights issues arising from counter-terrorism legislation.[3]

4. In those submissions, the Commission has expressed similar sentiments to those expressed by Secretary-General Annan in the extract above. In short, international human rights law is not an 'optional extra' during times of concern about international terrorism.[4] Nor is it an open ended variable to be adjusted according to particular national security needs. Such an approach implies that human rights are somehow antithetical to issues of national security, necessitating a compromise or trade off. This ignores the fact that 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 actions to be taken by states, but demands that those actions remain within carefully crafted limits – most notably proportionality (which is discussed further below).

5. Concerns about the heightened risks of domestic terrorist attacks are plainly legitimate and require innovative measures on the part of all responsible states, including Australia. However, international human rights law was crafted for precisely these times. It provides clearly identifiable landmarks to guide states in their implementation of such measures in a period characterised by considerable uncertainty.[5]

6. Australia can and should be proud of an excellent human rights record during less difficult times. It should lead the way in staying true to its international obligations in this more

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[1] Address to the closing plenary of the International Summit on Democracy, Terrorism and Security, delivered in Madrid, Spain, 10 March 2005. Press Release, SG/SM/9757.
[2] Section 11(1)(g) of the HREOC Act.
[3] Available at http://www.humanrights.gov.au/legal/submissions/index.html
[4] See similarly Report of the High Commissioner of Human Rights entitled *Protection of human rights and fundamental freedoms while countering terrorism* E/CN.4/2005/100 paras 12-13.
[5] See generally: Office of the High Commissioner for Human Rights *Digest of Jurisprudence of the UN and Regional Organisations on the Protection of Human Rights While Countering Terrorism* available at http://www.ohchr.org/english/issues/terrorism/index.htm

challenging era. In that regard, the Commission considers that Division 3 of Part III of the ASIO Act currently poses a number of issues in terms of Australia's human rights obligations. It outlines those below. The Commission has made a number of recommendations for amendment or other action to respond to those concerns. In summary those concerns and recommendations are as follows:

- The Commission considers that Division 3 of Part III raises specific and more general concerns regarding arbitrary detention, which is proscribed by article 9(1) of the *International Covenant on Civil and Political Rights* (ICCPR).[6] The Commission makes a number of recommendations directed at avoiding arbitrary detention by ensuring that detention is proportional to the purpose of obtaining intelligence to avoid terrorist attacks (see section D).
- The Commission considers that the protections against self incrimination conferred by Division 3 of Part III do not protect against 'derivative use' of material obtained through the warrant procedures (as required by article 14(3) of the ICCPR). The Commission has recommended amendments to extend those protections (see section E).
- In its terms and operation, Division 3 of Part III limits the legal advice or representation available to the subjects of the warrant procedures. In the Commission's view, some of those limitations leave people without an 'effective remedy' for violations of their human rights. Australia is required to provide such remedies under article 2(3) of the ICCPR. Those restrictions also raise other human rights concerns. The Commission has recommended amendments to ensure that people who are subject to the warrant procedures are not effectively deprived of their rights through such restrictions (see section F).
- Division 3 of Part III operates on children aged between 16 and 18. The Commission is concerned that the protections provided to such children may be insufficient to avoid violations of various articles of the *Convention on the Rights of the Child*[7] (CRC). The Commission has made recommendations designed to avoid such violations (see section G).

7. If this Committee were minded to accept those recommendations, it would be reflecting something of an international trend towards re-working legislation which was passed in the wake of the attacks against the World Trade Centre on 11 September 2001. For example, the United States and the United Kingdom are at varying stages of that process.[8] In the case of the United Kingdom, that reconsideration arose as a direct result of the House of Lords finding that the measures initially chosen were inconsistent with human rights.[9] Indeed, the Director-General of the Australian Security Intelligence Organisation (ASIO) appeared to have such a process in mind when he commented recently:

> Perhaps those concerned that some terrorism laws go too far in the compromise of individual rights, should have more confidence in the capacity of our own democratic system, with its proper separation of powers, to ensure that any legislative excess, however unintended, can, and will, be corrected. Certainly, the European Court of Human

[6] Opened for signature 16 December 1966, 999 United Nations Treaty Series 171; entered into force 23 March 1976 except article 41 which came into force 28 March 1979; ratified by Australia 13 August 1980 except article 41 which was ratified by Australia 28 January 1993.
[7] Opened for signature 20 November 1989, 1577 United Nations Treaty Series 3; entered into force 2 September 1990; ratified by Australia 17 December 1990; declared an international instrument for the purposes of s 47(1) of HREOC Act on 22 December 1992; gazetted 3 January 1993 (see s 3 HREOC Act).
[8] In relation to the United Kingdom, see the recently passed *Prevention of Terrorism Act 2005* (UK) and A Thorp, The Prevention of Terrorism Bill *House of Commons Research Paper 05/14* 22 February 2005. In relation to the United States, see T Golden, 'U.S. Is Examining a Plan to Bolster the Rights of Detainees' in *New York Times*, 27 March 2005.
[9] See *A v Secretary of State for the Home Department* [2004] UKHL 56, discussed further below.

Rights has been required to address some very difficult matters of proportion and balance arising from some of the more complex terrorism cases in the United Kingdom, Ireland and Spain.[10]

B. Features of the legislation

8. This Committee is well aware of the features of Division 3 of Part III of the ASIO Act and the Commission does not propose to comprehensively outline those provisions in its submission. Instead, the Commission has set out below a general overview of the provisions which are relevant to this submission.

9. Division 3 of Part III effectively creates three classes of warrant:

- Warrants which require a person aged over 18 to appear before a 'prescribed authority' to provide information or produce records or things ('Questioning Warrants');
- Warrants authorising a police officer to take a person aged over 18 into custody and bring them before a 'prescribed authority' for such purposes ('Detention Warrants'); and
- Warrants for the detention and/or questioning of children before a 'prescribed authority' ('Children's Warrants'). Children's Warrants are only able to be sought and issued if the child is aged between 16 and 18 years and it is likely that the child will commit or has committed a terrorism offence. Further procedural protections apply to these warrants. These are discussed below in section G.

'Prescribed authorities' will normally be former federal court judges.[11]

10. Both Questioning and Detention Warrants may only be sought by the Director-General of ASIO after meeting certain procedural requirements. In particular, the Director General must seek the consent of the Attorney-General for the issue of a warrant.[12] In seeking that consent, the Director-General must provide a "draft request", which includes a draft of the proposed warrant, a statement of the facts and other grounds upon which the Director-General considers it necessary that the warrant be issued and a statement providing details of any previous requests for such warrants.[13] The Attorney-General may grant written consent to such a request, but only if she or he is satisfied (inter alia):

- that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence;
- that relying on other methods of collecting that intelligence would be ineffective; and
- in the case of Detention Warrants, that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
  - (a) may alert a person involved in a terrorism offence that the offence is being investigated;
  - (b) may not appear before the prescribed authority; or

[10] Mr Dennis Richardson AO, Address LawAsia Conference 2005 Gold Coast Wednesday 23 March 2005, available at http://www.asio.gov.au/Media/comp.htm.
[11] See s34B ASIO Act. If there are insufficient former judges, the Attorney may appoint a serving State or Territory judge or a member of a federal administrative authority as a prescribed authority.
[12] See s 34C(1) ASIO Act.
[13] See s 34C(2) ASIO Act.

(c) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[14]

11. Once the Attorney's approval has been obtained, a Questioning or Detention Warrant may be sought from an 'issuing authority'. An issuing authority is either a federal magistrate or a judge (acting in their personal, rather than judicial, capacity).[15] The request must be the same as the draft request provided to the Attorney (with any required changes) and must include a copy of the Attorney's consent.[16] An issuing authority must be satisfied that the Director General has followed the relevant procedural requirements in requesting the warrant and that there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[17]

12. A person who is the subject of a Detention Warrant must be brought immediately before a prescribed authority for questioning. Questioning under a Questioning Warrant must also take place before a prescribed authority. The ASIO Act includes offences for failing to appear as required under a warrant, failing to give information, records or things requested in accordance with the warrant and making a false or misleading statement.[18]

13. A limit is imposed on the period of detention. A person may be detained for a maximum of 7 days.[19]

14. Time limits on questioning are also imposed. A person may be questioned for a maximum period of 24 hours. However, the prescribed authority must authorise ongoing questioning every 8 hours.[20] The total time for questioning increases to 48 hours if 'an interpreter is present at any time while a person is questioned under a warrant'.[21] In the case of a Detention Warrant, the prescribed authority must direct that the person be released from detention:

- at the end of the 24 or 48 hour maximum period; or
- at such a time as the authority refuses permission to continue questioning or revokes an earlier granted permission.[22]

15. A further Questioning or Detention Warrant may be issued after a person has been released from detention.[23] However, the issuing authority must be satisfied that the warrant is justified by information which is additional to or materially different from that known to the Director-General at the time the Director-General sought the Attorney General's consent to request the issue of the earlier warrant.[24]

16. In the case of Detention Warrants, the person detained may not communicate with anyone while in custody or detention.[25] This prohibition is subject to certain exceptions,[26] including in

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[14] See s 34C(3) ASIO Act.
[15] See *Grollo v Palmer* (1995) 184 CLR 348.
[16] See s34C(4) ASIO Act.
[17] See s34D(1) ASIO Act.
[18] See s34G ASIO Act.
[19] See s34HC ASIO Act.
[20] See ss34HB(1),(2) and (6) ASIO Act.
[21] See s34HB(8) and (11) ASIO Act.
[22] See s34HB(7) ASIO Act.
[23] Such a warrant is required to be issued after release by reason of s34D(1A)(b)(ii), which requires the issuing authority to be satisfied that the person is not being detained. However, this may still be very shortly after release, depending upon the circumstances.
[24] See s34D(1A) ASIO Act.
[25] See s34F(8) ASIO Act.

relation to contact with lawyers. In giving consent for the issue of a Detention Warrant, the Attorney-General must be satisfied that the warrant permits the person detained to contact a lawyer of their choice at any time that the person is in detention in connection with the warrant, but which is a time after:

- the person is brought before the prescribed authority for questioning;
- the person has informed the prescribed authority of the identity of the lawyer they propose to contact; and
- ASIO has had the opportunity to ask the prescribed authority to prevent the person being detained from contacting that lawyer.[27]

No such provision is made in respect of Questioning Warrants. However, the prohibition on external communications does not apply to the subject of a Questioning Warrant, unless the prescribed authority orders the detention of that person.[28] If such a direction is made, the prescribed authority **may** (but need not) make a direction allowing them to contact a lawyer.[29]

17. The prescribed authority may prevent the subject of a Detention Warrant from contacting a lawyer if satisfied, on the basis of circumstances relating to that lawyer, that:

- a person may be alerted to the fact a terrorism offence is being investigated; or
- a record or thing that the person may be requested in connection with the warrant to produce may be destroyed, damaged or altered.[30]

18. The prescribed authority must provide a reasonable opportunity for the lawyer to advise the person detained during breaks in questioning.[31] However, contact between the lawyer and the person detained must be made in a way that can be monitored by a person exercising authority under the warrant.[32] The lawyer may not interrupt the questioning of the person detained or address the prescribed authority before whom questioning is being conducted, except to request clarification of an ambiguous question.[33] Indeed, the Act specifically provides that a person may be questioned in the absence of their lawyer.[34] In addition, a lawyer may be removed from the location where questioning is taking place if the prescribed authority considers that they are 'unduly interrupting questioning'.[35] The person detained is then to be given the opportunity to contact a further lawyer of their choice.[36]

19. Division 3 of Part III also includes certain safeguards and oversight provisions. The person who is the subject of a warrant or the prescribed authority may request an interpreter.[37] A number of rules govern the conduct of strip searches.[38] A person who is the subject of a Detention or Questioning Warrant must be treated with 'humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone

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[26] See s34F(9) ASIO Act.
[27] See s 34C(3B) ASIO Act.
[28] Under s34F(1)(a) ASIO Act.
[29] See s34F(1)(d) ASIO Act.
[30] See s 34TA ASIO Act.
[31] See s 34U(3) ASIO Act.
[32] See s34U(2) ASIO Act.
[33] See s34U(4) ASIO Act.
[34] See s34TB(1) ASIO Act.
[35] See s34U(5) ASIO Act.
[36] See s34U(6) ASIO Act.
[37] See ss34H and 34HAA ASIO Act.
[38] See ss34L-M ASIO Act.

exercising authority under the warrant or implementing or enforcing the direction'.[39] Offences apply to contraventions of these and other safeguards.[40]

20. It is not an offence to contravene a term of a 'procedural statement' provided for under s34C of the ASIO Act (the 'Protocol').[41] The Protocol deals with matters such as ensuring that detainees are allowed a minimum of 8 hours uninterrupted sleep in every 24 hour period,[42] are not questioned for more than four hours without being offered a break,[43] are provided with three meals per day[44] and are given a separate room or cell in which to sleep.[45] Contraventions of the Protocol may be the subject of a complaint to the ombudsman or the Inspector General of Intelligence Services (IGIS).[46] Division 3 of Part III makes other provision for the oversight roles of the ombudsman and the IGIS.[47] We discuss some of those oversight provisions in further detail below.

21. Division 3 of Part III ceases to have effect 3 years after commencement. [48] That is, on 23 July 2006.

C. Operation of the legislation to date

22. Very little is known by the Australian public about the operation of Division 3 of Part III, largely by reason of the expansive secrecy provisions.[49] We set out in this section what is on the public record.

23. As at 23 March 2005, no Detention Warrants had been sought or issued.[50]

24. Also as at 23 March 2005, three Questioning Warrants had been sought (and in each case issued).[51] The people who were the subjects of those warrants were questioned before the same prescribed authority. The time for questioning under those warrants was as follows:[52]

Person 1	Person 2	Person 3	Total hours
15 hours 57 minutes	10 hours 32 minutes	42 hours 36 minutes (interpreter required)	69 hours 5 minutes

25. It appears, from ASIO's 2003-4 Annual Report,[53] that one of those persons was Mr Faheem Khalid Lodhi, who is currently charged with certain terrorism offences (apparently related to Mr Willy Brigitte) and an offence under 34G of the ASIO Act for allegedly making false or misleading statements in purported compliance with a Questioning Warrant.

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[39] See s34J(2) ASIO Act.
[40] See s34NB ASIO Act.
[41] The Protocol appears as 'Annex 2' to the 2003/2004 Annual Report of the Inspector General of Intelligence Services.
[42] See para 6.3.
[43] See para 4.4.
[44] See para 6.2.
[45] See para 6.3.
[46] See s34NC ASIO Act.
[47] See ss 34E(1)(e), 34F(9)(c), 34HAB, 34HA, 34Q and 34QA ASIO Act.
[48] See s34Y ASIO Act.
[49] See s34VAA ASIO Act.
[50] Mr Dennis Richardson AO, Address LawAsia Conference 2005 Gold Coast Wednesday 23 March 2005, available at http://www.asio.gov.au/Media/comp.htm.
[51] Ibid.
[52] ASIO *Report to Parliament 2003-2004*, p40.
[53] Ibid pages 5 and 17.

26. Little is known about what material ASIO obtained as a result of the execution of the three warrants. However, ASIO has stated, in its 2003-2004 Annual Report that:

> the questioning warrants have provided valuable information[54]

27. The IGIS attended while questioning was carried out under all three warrants. The current and former IGIS has raised 'procedural and practical issues based on their experience in observing the execution of warrants' Those include:

- whether lawyers representing the subjects of such warrants should be given scope to address the Prescribed Authority concerning the continuation of questioning;
- the provision of legal aid to the subject of warrants;
- whether relevant terrorism offences were identified with sufficient specificity in the warrant documentation;
- the recording of elapsed time during questioning; and
- the degree of privacy which is afforded to the subject of such warrants to meet their religious obligations, consult their legal representatives or lodge complaints.[55]

28. The precise nature of those issues is unclear. They appear to be matters where the former and current IGIS considers the current regime could be improved. At the time of publication of the last annual report, those matters were being discussed between the present IGIS and the Attorney-General's Department.[56]

D. Arbitrary detention

29. Some commentators have suggested the main human rights concerns arising from ASIO's enhanced powers relate to the internationally recognised right to liberty and proscription of 'arbitrary detention'. Those matters are dealt with in article 9(1) of the ICCPR, which provides:

> Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

30. In approaching that issue, the Commission first notes that article 9(1) does allow for detention for security purposes.[57] However, such detention must not be 'arbitrary'. The term 'arbitrary' has been interpreted as requiring more than mere legality. In *Van Alphen v Netherlands*,[58] the Human Rights Committee[59] held that the term includes 'inappropriateness, injustice and lack of predictability'.[60] Where, for example, a person has been held on remand then not only must the detention be legal but the detention must be reasonable in all the circumstances.[61] Similar comments were made in Australia by the Full Federal Court in the matter of *MIMIA v Al Masri* :

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[54] Ibid p 5.
[55] IGIS *Annual Report 2003-2004*, p18.
[56] Ibid.
[57] Human Rights Committee*, General Comment No 8 Right to liberty and security of persons (Art. 9)*, Para 4 (1982).
[58] 305/88.
[59] The Human Rights Committee is the United Nations human rights treaty body created under article 28 of the ICCPR. Amongst other things, the Committee hears complaints submitted by individuals under the Optional Protocol to the ICCPR.
[60] At par 5.8
[61] Ibid.

> …we conclude that the text of Art 9…. requires that arbitrariness is not to be equated with 'against the law' but is to be interpreted more broadly, and so as to include a right not to be detained in circumstances which, in the individual case, are 'unproportional' or unjust.[62]

31. Like the Full Federal Court, the Human Rights Committee has stressed, on a number of occasions, that detention must meet the requirement of 'proportionality'.[63] 'Proportionality' in the context of article 9 requires one to consider the relationship between a purpose (the purpose underlying the person's detention) and the means by which that purpose is achieved (the particular form of detention). Put simply, the means must be 'proportional' to the purpose.

32. So formulated, proportionality could be in the eye of the beholder.[64] However, the Human Rights Committee has developed a clearer 'bright line' proportionality test for the purposes of article 9(1) which essentially involves asking whether the particular detention represents the **least restrictive means** of achieving the relevant purpose.[65] If it does not, then it will be disproportionate and thus arbitrary. That test has been variously expressed by the Human Rights Committee as imposing a requirement that detention not continue 'beyond the period for which a State can provide appropriate justification'[66] or that a person not be detained if it is 'not necessary in all the circumstances of the case'.[67]

33. Most analyses dealing with article 9(1) and the ASIO Act have focussed upon the Detention Warrants. However, the Questioning Warrant regime may also involve a species of detention for the purposes of article 9(1). The Human Rights Committee has observed that 'detention' is not to be narrowly understood and that article 9 applies to all forms of detention of deprivations of liberty whether they be criminal, civil, immigration, health or vagrancy related.[68] The distinction between measures constituting 'deprivation of' as opposed to 'restrictions upon' liberty is one of degree or intensity and not one of nature or substance. Nor does it depend in any way upon the labelling of something as 'detention'. Rather, it will depend upon criteria such as the type, duration, effects and manner of implementation of the measure in question.[69] In the Commission's view, many Questioning Warrants will involve detention for the purposes of article 9(1) by reason of the following matters:

- a person who is the subject of a Questioning Warrant will be required to attend a particular place (before the prescribed authority) or be guilty of an offence; [70]
- that person may be required to stay in that place for a period of up to 24 hours (or more if an interpreter is required or further warrants are issued). Again, failure to do so may

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[62] (2003) 126 FCR 54 at [152].

[63] See eg *A v Australia* UNHRC 560/93 para 9.2. See also Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary* NP Engel (1993) p 172.

[64] As has been suggested by S Joseph 'Australian Counter-Terrorism Legislation and the International Human Rights Framework' 27(2) *UNSWLJ* (2004) 428 at 443.

[65] See generally regarding proportionality and the tests applied internationally: J Kirk *"Constitutional Guarantees, Characterisation and Proportionality"* (1997) 21 MULR 1.

[66] *A v Australia* (UNHRC Communication No. 560/1993) at paragraph 9.4, *C v Australia* (UNHRC Communication No. 1014/2001) at paragraph 8.2, *Baban v Australia* at paragraph 7.2.

[67] *A v Australia* at paragraph 9.2.

[68] Human Rights Committee General Comment No 8 par 1.

[69] See, in the context of the *European Convention on Human Rights*, *Amuur v France* (1992) 22 EHRR 533, paragraph 42.

[70] See s34G(1) ASIO Act.

constitute an offence. In addition, a person seeking to leave a place where they were being questioned might be the subject of a ‘detention direction’ made by the prescribed authority;[71]

- that person will be exposed to onerous restrictions on their ability to communicate with third parties about certain matters;[72] and
- that person will be subjected to intense scrutiny, including having their communications with their lawyer monitored.[73]

34. The question then is: does the detention contemplated by the Questioning and Detention Warrants breach the prohibition on arbitrariness? The Commission considers it to be of assistance to divide that question into:

- concerns regarding arbitrary detention which relate to Division 3 of Part III as a whole (these are addressed in section D.1); and
- concerns regarding arbitrary detention which relate to specific aspects of the potential operation of Division 3 of Part III (these are dealt with in sections D.2-D.3).

D.1 General Concerns regarding the possible arbitrariness of the detention authorised by Division 3 of Part III

Detention of non-suspects

35. In asking whether the detention authorised is disproportionate, one must first identify the purpose of detention authorised by Division 3 of Part III.

36. Although not entirely clear,[74] that purpose has been characterised as being the collection of intelligence for the prevention of terrorist attacks.[75]

37. Some have suggested that the legislation fails the proportionality test by reason of the fact that there is no specifically known terrorist threat to Australia at the present time.[76] The Commission notes that the Director-General of ASIO has described the threat of terrorism within Australia in the following terms:

> Australia's terrorism laws have been a response to real threats and to real attacks. Bin Laden first 'legitimised' Australia as a specific terrorist target in a statement on 3 November 2001. Since then, we have been specifically mentioned on numerous occasions by bin Laden, his deputy, al Zawahiri, and the terrorist leader in Iraq, al Zarqawi…And the threats have been given substance by at least one aborted, disrupted or actual attack in Australia or against our interests overseas in each of the five years between 2000 and 2004 inclusive.[77]

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[71] Under s34F(1)(a) of the ASIO Act on the basis that the person ‘may not continue to appear, or may not appear again, before the prescribed authority’ (s34F(3)(b) ASIO Act).

[72] See the secrecy provisions in s34VAA(1) of the ASIO Act.

[73] See s34U(2) of the ASIO Act.

[74] See discussion in Senate Legal and Constitutional References Committee ‘*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*’ December 2002, Chapter 3.

[75] Evidence of the Attorney-General’s Department to the Senate Legal and Constitutional Committee, *Committee Hansard*, 12 November 2002, p3. Note that it was also said by the Department that ‘law enforcement was not the ‘primary purpose’ of the legislation and was, at most, an incidental purpose (ibid, p24).

[76] C Michaelsen ‘International Human Rights on Trial – The United Kingdom’s and Australia’s Legal Response to 9/11’ 25 *Sydney Law Review* (2003) p 275 at 283.

[77] Mr Dennis Richardson AO, Address LawAsia Conference 2005 Gold Coast Wednesday 23 March 2005, available at http://www.asio.gov.au/Media/comp.htm.

> The current threat level in Australia overall is medium, part of the definition of which is that a terrorist attack is considered feasible and could well occur. The next level up is high, and part of the definition of that is that a terrorist attack is considered likely.[78]

38. Considerable weight must be attached to the Director-General's (and ASIO's) assessments of the current threat to Australia. The Commission sees no reason to doubt that those assessments are well founded and informed by the considerable expertise and knowledge of ASIO and other Australian and international intelligence organisations.

39. However, that is not the end of the matter. As noted above, to satisfy the proportionality test, the detention authorised by the legislation must represent the least restrictive means of achieving the relevant purpose (collection of intelligence for the prevention of terrorist attacks).

40. The detention authorised by Division 3 of Part III, not being associated with an exercise of judicial power, is generally referred to as 'administrative detention'. [79] The Human Rights Committee and the Working Group on Arbitrary Detention[80] scrutinise administrative detention provisions particularly closely for potential arbitrariness.[81] Indeed, the Working Group has expressed concern regarding the use of administrative detention in connection with counter-terrorism measures.[82]

41. The detention authorised by Division 3 of Part III is not limited to persons suspected of committing an offence or to those with some involvement in a future offence. The provisions are aimed at anyone who (wittingly or unwittingly) is able to 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence'.[83] It should also be noted that the term 'intelligence' is not defined in the ASIO Act and appears to extend beyond hard, factual data. It rather seems to encompass material which is 'speculative and unverified'.[84] These features mean that Division 3 of Part III potentially authorises the detention of a very wide section of the Australian population.

42. Legislation providing for the administrative detention of people with no involvement with terrorism offences is largely absent from comparable foreign jurisdictions, including those which have a significantly higher risk of domestic terrorist attack than is the case with Australia. This is significant in the context of the issue of proportionality. It has been accepted that, in determining whether measures represent the least restrictive means of achieving a

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[78] Evidence before Legal and Constitutional Committee in a Senate Estimates Hearing, *Hansard*, 15 February 2005, pp26-27.

[79] As noted above, while a Chapter III judicial officer is the 'issuing authority', the warrant is issued in their personal capacity.

[80] The Working Group was established by resolution 1991/42 of the Commission on Human Rights, which extended and clarified its mandate in resolution 1997/50. The Working Group is composed of five independent experts appointed following consultations by the Chairman of the Commission on Human Rights. Like the Human Rights Committee the Working Group has an individual complaints procedure and publishes "decisions" or "opinions" on the website of the High Commissioner for Human Rights (http://www.unhchr.ch).

[81] See eg Human Rights Committee, Concluding Comments on Switzerland (1996) UN Doc CCPR/C/79/Add.70 and *Report of the Working Group on Arbitrary Detention* E/CN.4/2005/6, 1 December 2004, para 61.

[82] Ibid.

[83] Section 34C(3)(c) ASIO Act.

[84] J Hocking *Terror Laws* (2004) UNSW Press p236. See also the discussion by the Senate Legal and Constitutional Committee in *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002 at p15.

particular purpose, one can and should have regard to how similar purposes are achieved in other circumstances. [85]

43. In the United Kingdom there are provisions for making 'control orders' against an individual, where those orders are considered 'necessary for purposes connected with preventing or restricting **involvement by that individual in terrorism activities**'.[86] Power is also conferred upon police officers to arrest without warrant a person they reasonably suspect to be a terrorist.[87] Subject to a statutory procedure regarding extensions, such a person must be released 48 hours after their arrest.[88] Neither of those powers applies to those who merely have information with respect to a terrorism offence.

44. In the United States, the *USA Patriot Act 2001* made provision for the Attorney-General to detain non-citizens.[89] That power is enlivened upon the Attorney-General certifying that she or he has reasonable grounds to believe that the non-citizen:

- falls within certain categories of non-citizens who are 'deportable' or 'inadmissible' for engaging in certain terrorist activities[90] or activities violating the US laws against sabotage and espionage;[91] or

- is otherwise engaged in activity 'that endangers the national security of the United States'.[92]

Detention of such a person is restricted to an initial period of seven days. They must be released thereafter unless the government commences deportation proceedings or charges the detained person with a criminal offence. The provisions have been widely criticised.[93] Nevertheless, they do not authorise the detention of people who merely have information with respect to a terrorism offence.

45. While the practice of other states is not decisive of this point, it does raise doubts as to the necessity of the means chosen by Australia to achieve the stated purpose of gathering intelligence. A possible explanation for the absence of similar provisions in the United States and United Kingdom is that the relevant legislatures are content that their intelligence organisations have sufficient alternative means of obtaining the necessary intelligence. However, the same point might be made in respect of ASIO which has powers (under warrant) to:

- install and use listening devices;[94]
- inspect and make copies of postal articles;[95]
- hack into computer files and data-bases;[96]

[85] See, discussing proportionality in the context of the derogation provisions of the *European Convention on Human Rights*, *A v Secretary of State for the Home Department* [2004] UKHL 56 Lord Bingham at [35]; Lord Nicholls at [76] Lord Hope at [129]; Lord Rodger at [189] and Baroness Hale at [231]. This decision is discussed in further detail below.
[86] See s 1(3) *Prevention of Terrorism Act 2005* (UK).
[87] See s41(1) *Terrorism Act 2000* (UK).
[88] See s41(3) *Terrorism Act 2000* (UK).
[89] The relevant amendments were made to 8 U.S.C. (Aliens and Nationality Code) – see §1226a.
[90] See definition in § 1182 (a)(3)(B)(iii).
[91] See §1226a(3)(A).
[92] See §1226a(3)(B).
[93] See eg International Council on Human Rights Policy *Human Rights after September 11* (2002) at pp 24-25.
[94] See s26(3) ASIO Act.
[95] See ss27(2) and (3) ASIO Act.
[96] See s25A(4) ASIO Act.

- use tracking devices;[97]
- conduct searches of persons and premises (including covert searches);[98] and
- intercept telecommunications.[99]

46. This may explain the fact that as at 23 March 2005[100] ASIO had not sought any Detention Warrants and had only sought three Questioning Warrants. While this undoubtedly indicates admirable restraint, it also illustrates that ASIO has been able to conduct its work relying almost solely upon its considerable armoury of alternative intelligence gathering tools. In the Commission's view, this reinforces concerns over the necessity for (and thus proportionality of) the mechanisms provided for in Division 3 of Part III, particularly the more onerous Detention Warrants.

47. The approach taken in Canada is also instructive when considering the question of proportionality. Canada appears to be the only comparable jurisdiction where legislation provides for the questioning and detention of non-suspects in connection with past or future terrorism offences. [101] However, in contrast to the provisions of Division 3 of Part III, the Canadian approach is far more protective of the rights of the people who are subjected to that procedure. The significant differences include:

- The Canadian proceedings are controlled by a judicial officer.[102]

- The power to order a person to attend for questioning under the Canadian legislation is restricted to circumstances involving past terrorist offences or the risk of identifiable terrorist offences being committed. It is only enlivened if the judicial officer is satisfied that there are reasonable grounds for believing that:

  - a terrorism offence has been committed and that information concerning the offence or the whereabouts of the offender are likely to be obtained as a result of the order; or
  - a terrorism offence will be committed and that a person has direct and material information that relates to such an offence or which may reveal the whereabouts of a suspected future offender.[103]

  In contrast, as noted above, the ASIO Act requires that that the Attorney be satisfied that 'there are reasonable grounds for believing that issuing the warrant to be requested will substantially assist the collection of **intelligence** that is important in relation to a terrorism offence'. As was noted above, 'intelligence' is an undefined and nebulous term. Further, as was observed by Mr Fajgenbaum QC, in evidence before the Senate Legal and Constitutional Committee:

  > …the Canadian description of the circumstances, that the reasonable grounds where the person has direct and material information that relates to the terrorism offence,

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[97] See ss26B(1) and 26C(1) ASIO Act.
[98] See s25 ASIO Act.
[99] See s9(1) *Telecommunications (Interception) Act 1979* (Cth).
[100] See Mr Dennis Richardson AO, Address LawAsia Conference 2005 Gold Coast Wednesday 23 March 2005, available at http://www.asio.gov.au/Media/comp.htm.
[101] See s83.28 *Anti-Terrorism Act 2002* (CA).
[102] See ss83.28(1),(2) and (5) *Anti-Terrorism Act 2002* (CA).
[103] For future offence warrants, the judicial officer must also be satisfied that reasonable efforts have been made to obtain the information from the relevant person. Note in addition that, like Division 3 of Part III of the ASIO Act, the Canadian police must seek the prior consent of the Attorney-General.

would exclude the hypothetical, academic 'You may be able to give information about the nature of terror in Islam,' and it is more confined, I suspect, than the current provision in the proposal, which speaks about 'information in relation to a terrorism offence', without the use of the language 'direct and material information', which concentrates on the actual commission of the crime rather than background information.[104]

- The Canadian legislation confers power upon the judicial officer to issue an arrest warrant. However, such a warrant may only be issued if the judicial officer is satisfied (on an information in writing and under oath) that the person:

  - is evading service of the order for gathering information;
  - is about to abscond; or
  - did not attend the examination or did not remain in attendance as required.[105]

  In comparison, as noted above, the ASIO Act requires that the Attorney-General be satisfied that there are **reasonable grounds for believing that**, if the person is not immediately taken into custody and detained, the person **may**: alert a person involved in a terrorism offence that the offence is being investigated; not appear before the prescribed authority or destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[106]

- When such a person is arrested under the Canadian provisions, they are brought immediately before a judicial officer who **may**, to ensure compliance with the questioning order, order that the person be detained in custody.[107]

  This is significant because article 9(3) of the ICCPR requires that '[a]nyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release'. The judicial officer must be empowered to either direct pre-trial detention or order release and is to exercise their discretion on the basis that pre-trial detention should be the exception rather than the general rule.[108] While article 9(3) does not in its terms apply to administrative detainees, international legal scholars have suggested that it is relevant to the more general obligation to avoid arbitrary detention under article 9(1).[109] This proposition appears to be conceptually sound, as to hold otherwise would mean that non-suspects could be treated less favourably than those suspected of terrorism offences.

  While Division 3 of Part III of the ASIO Act ensures that the prescribed authority will generally be a former judge, it is not clear that such a person would be considered by the Human Rights Committee to have the requisite degree of 'institutional objectivity and impartiality'.[110] In particular, they would lack security of tenure which is an important

[104] See *Committee Hansard*, 22 November 2002, p161.
[105] See s83.29 *Anti-Terrorism Act 2002* (CA)
[106] See s 34C(3) ASIO Act.
[107] See s83.29(3) *Anti-Terrorism Act 2002* (CA)
[108] See Nowak, *UN Covenant on Civil and Political Rights - CCPR Commentary*, 1993, pp 176-7.
[109] S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 444.
[110] See *Kulomin v Hungary* 521/92, para 11.3.

guarantee of judicial independence.[111] Perhaps more significantly, although the prescribed authority may make a direction for a person's release from detention,[112] that direction must be consistent with the terms of the warrant, be approved by the Attorney-General in writing or be responsive to a concern raised by the IGIS under s34HA.[113] As such, their power to order release is far more constrained than is the case under the Canadian legislation.

- A person is protected from the direct **and** derivative use of material provided for the purposes of future prosecutions (see further discussion in section E below); [114]

- There are no limitations on the involvement of lawyers acting for the person to be questioned or requirement that communications with lawyers be able to be monitored[115] (see further discussion in section F below); and

- A person does not automatically come under onerous secrecy obligations[116] or (as is the case with the Detention Warrants) become subject to severe restrictions on their right to communicate with the outside world.[117]

Scope of the offences enlivening the power to seek and issue warrants

48. The powers to seek and issue Detention and Questioning Warrants are enlivened by, inter alia, a belief that a person has information relating to a 'terrorism offence'.[118] 'Terrorism offence' is defined to mean an offence against Division 72 or Part 5.3 of the *Criminal Code*. Those offence provisions are not limited to matters directly harming or threatening life or property. They include a range of lesser offences.

49. For example, section 102.8 of the *Criminal Code* appears in Part 5.3. It is in the following terms:

(1) A person commits an offence if:

(a) on 2 or more occasions:

(i) the person intentionally associates with another person who is a member of, or a person who promotes or directs the activities of, an organisation; and
(ii) the person knows that the organisation is a terrorist organisation; and
(iii) the association provides support to the organisation; and
(iv) the person intends that the support assist the organisation to expand or to continue to exist; and
(v) the person knows that the other person is a member of, or a person who promotes or directs the activities of, the organisation; and

[111] See Dr S Donaghue *Judicial Independence: Bradley, Fardon and Baker*, paper presented at 2005 Gilbert and Tobin Centre of Public Law Constitutional Law Conference available at http://www.gtcentre.unsw.edu.au/Conference-Papers-February-2005.asp
[112] See s34F(1)(f) ASIO Act.
[113] See s34F(2) ASIO Act.
[114] See s83.28(10) *Anti-Terrorism Act 2002* (CA)
[115] See s83.28(11) *Anti-Terrorism Act 2002* (CA) and cf s34U of the ASIO Act.
[116] Cf 34VAA of the ASIO Act.
[117] Cf s34F(8) ASIO Act.
[118] See ss 34C(3)(a) and 34D(1)(b) of the ASIO Act.

(b) the organisation is a terrorist organisation because of paragraph (b), (c), (d) or (e) of the definition of ***terrorist organisation*** in this Division (whether or not the organisation is a terrorist organisation because of paragraph (a) of that definition also).

Penalty: Imprisonment for 3 years.

50. This is a very wide offence of quite uncertain scope. As was observed by the Commission in evidence to the Senate Legal and Constitutional Committee inquiry into the bill which introduced that offence,[119] it potentially applies to the following situations:

- a person who writes an article or opinion piece against the Attorney-General's decision to proscribe a particular organisation and who communicates twice with a member of a terrorist organisation solely for the purposes of preparing such an article;[120]

- a wife who drives her husband to court on two occasions if the husband is on trial for his membership of a terrorist organisation. A potentially relevant exemption to the offence is provided in 102.8(4)(a) for close family members, but only when the association relates to a matter that could be reasonably regarded as 'a matter of family or domestic concern'. That vague term, which is not defined, leaves open the question of whether the wife in the example given would be caught by the offence;[121]

- a lawyer who communicates twice with members of a terrorist organisation for the purpose of providing legal advice regarding how the organisation's declaration as a 'terrorist organisation' might be revoked,[122] in the absence of any actual legal proceedings.[123]

51. Subject to satisfying the various procedural conditions outlined above, ASIO could use Division 3 of Part III to detain an innocent witness to those activities for up to 7 days to collect relevant intelligence. If the powers to detain were used in those circumstances, this would truly be a case of using a 'sledgehammer to crack a nut'. It would simply not represent a proportionate response to national security concerns.

52. Similar issues arise in relation to other offences in Part 5.3, such as membership of a terrorist organisation[124] (the friends, relatives and acquaintances of a person suspected of being a member are all exposed to Detention or Questioning Warrants) and the intentional or reckless possession of a 'thing' connected with terrorist acts[125] (anyone who saw the 'thing', which could be just about any object given the lack of a precise definition, would be exposed to a Detention or Questioning Warrant).

53. The Commission's concerns on this issue are not limited to the 'less serious' terrorism offences. Some commentators have observed that the 'terrorist act' offence[126] potentially

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[119] Anti-Terrorism Bill (No. 2) 2004.

[120] Section 102.9(6) provides 'This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication'. However, the scope of the implied freedom is very uncertain and it is difficult to predict in advance whether it would apply in a particular case (see eg A Stone, '*The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication',* [1999] MULR 26).

[121] See the comments of the Hon P. Georgiou MP, *Hansard*, 24 June 2004 at 30718.

[122] Under s102.1(17) of the Criminal Code.

[123] That activity is not covered by the legal advice/representation exemptions in 102.8(4)(d)

[124] See s102.2 of the *Criminal Code*.

[125] See s102.4 of the *Criminal Code*.

[126] See s101.1 of the Criminal Code.

applies to a striking worker who intentionally and seriously assaults a strike breaker whilst on a picket line.[127] That conduct is undoubtedly a criminal act (and would have constituted an offence even prior to the introduction of the new terrorism offences). It should be punished as such. However, it is unclear why a person who innocently witnessed the assault (for example a reporter attending the picket line for the purposes of gathering material for a current affairs programme or a peaceful striking co-worker) should be exposed to a Detention or Questioning Warrant.

54. It is to be hoped that common sense would dictate that the Questioning and Detention Warrants would not be used in these circumstances. However, rather than relying upon the exercise of administrative discretion, relevant limitations should, in the Commission's view, appear in the legislation. It should also be observed that the IGIS appears to be concerned by the fact that warrant documentation has not identified terrorism offences with sufficient specificity (see above). The fact that the legislation allows Detention and Questioning Warrants to be issued in connection with broadly defined offences, which can be identified vaguely in warrants, gives rise to a real risk of abuse.

Conclusions and recommendations

55. In light of the above, the Commission has some general concerns about the necessity for and thus arbitrariness of the detention authorised by Division 3 of Part III (considered as a whole). Those concerns might be addressed in a variety of ways. For example, Division 3 of Part III could be amended using the Canadian *Anti-Terrorism Act 2002* (CA) as a model. Some modifications would obviously be required if that approach were taken. In particular, appointing a serving judge as the prescribed authority seems likely to raise issues under Chapter III of the *Constitution*. However, as noted above, the real issue with the current arrangements for the prescribed authority is that their powers to consider the necessity for detention and order release are much narrower than under the Canadian legislation.

56. A more fundamental objection to using the Canadian provisions as a model was expressed by the Director-General of ASIO, who said that if a more restricted approach was taken to the power to detain, his concerns would be the risk that the subject of the warrant would communicate with terrorists and that the capacity to prevent a terrorist incident would be compromised.[128] As other witnesses who appeared before the Legal and Constitutional Committee noted, those concerns appear to overlook the possibility that the information known to ASIO indicates that a particular terrorist act will take place some time after the maximum authorised period of detention (say in three or four weeks time). It was also observed in that regard:

> …in any criminal investigation, particularly a long criminal investigation— as you would imagine any investigation into terrorism would be—there is a problem with security throughout the investigation. Every time an investigator speaks to a witness there is a security issue—you do not lock up all the witnesses you have spoken to...[129]

57. If it is nevertheless considered desirable to adhere as closely as possible to the current form of Division 3 of Part III, then the issue of arbitrary detention might be dealt with instead through the imposition of further limitations. If that approach is taken, the Commission considers that

[127] See eg S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 432.
[128] See *Committee Hansard*, 18 November 2002, p109-110.
[129] Evidence of Mr Lasry, *Committee Hansard*, 18 November 2002, p162.

the ASIO Act should be amended so as to restrict the use of the warrants (especially the Detention Warrants) to situations in which:

(a) only the more serious terrorism offences are involved; and

(b) the Attorney-General is satisfied that there are reasonable grounds for believing that there is a real and imminent threat of harm to property or people.

58. The Commission also is of the view that any proposal to re-enact the provisions of Division 3 of Part III after they cease to operate on 23 July 2006 should be subjected to very close scrutiny. In particular, there should be an examination of the level of threat posed by terrorism at that time; assessment of the value of the material which has been obtained under Division 3 of Part III; consideration of whether that material could have been obtained through less restrictive means and consideration as to why comparable nations facing greater risks have not enacted such measures. Any further legislative measures should also include sunset clauses to enable those issues to be reconsidered as conditions change.

D.2 Interpreter issue

59. The provisions regarding interpreters raise a specific issue under article 9(1). As noted above, the time permitted for questioning is doubled if 'an interpreter is present **at any time** while a person is questioned under a warrant' (emphasis added).[130]

60. This is relevant to the issue of the proportionality of detention in two respects: first, a person must be released from detention upon conclusion of the period allowed for questioning.[131] As such, that period is directly related to the period they are permitted to be detained. Second, as noted above, many Questioning Warrants will constitute a form of detention for the purposes of article 9 of the ICCPR.

61. It is unclear to the Commission why the bare fact that an interpreter has been present at some stage during the questioning process triggers a potential doubling of a person's questioning time - irrespective of how long the interpreter is present, whether questioning has been conducted through them and whether their presence has facilitated or impeded the questioning process.

62. The provisions regarding extensions of time where interpreters are involved should be amended so as to require the prescribed authority to form a view as to the effect the interpreter has had on the conduct of the particular proceedings. An extension of time should only be granted if the prescribed authority is satisfied that additional time has been required by reason of the presence of the interpreter. The prescribed authority should have the discretion to allow questioning to continue for a period considered sufficient to ameliorate any delay (subject to upper limits on the period by which questioning can be extended).

D.3 Repeat Warrants

63. A further specific issue regarding article 9(1) and Division 3 of Part III arises from so-called 'repeat' warrants.[132] As noted above, the Attorney and the issuing authority must be satisfied,

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[130] See sub-sections 34HB(8) and (11) ASIO Act.
[131] See s34HB(7) ASIO Act.
[132] See eg A Palmer Investigating and Prosecuting Terrorism: The Counter Terrorism Legislation and the Law of Evidence 27(2) *UNSWLJ* 2004 p373 at 377.

inter alia, that the issue of such a warrant is justified by information which is additional to or materially different from that known to the Director-General at the time the Director-General sought the Minister's consent to request the issue of the earlier warrant.[133] The legislation does not prevent the Director General from relying upon information obtained during questioning under an earlier warrant.

64. This opens undesirable loop-holes: for example, ASIO could deliberately decide not to pursue a line of questioning raised by a person's responses during an initial Detention Warrant. Those responses could then form the basis for a second Detention Warrant, where that line of questioning (and other matters) could be pursued.[134] The necessity for the second period of detention would be open to particular doubt, making it more likely to be arbitrary.

65. No repeat warrants have yet been sought and it is to be hoped that the issue does not arise. However, legislation which significantly infringes upon human rights should clearly define the limits beyond which the executive may not go. The provisions regarding repeat warrants should therefore be amended so as to require the issuing authority to be satisfied that the intelligence to be collected under the later warrant could not have been obtained under an earlier warrant or through other reasonable avenues.

E. Right to silence

66. As noted above, while Division 3 of Part III expressly provides that a person may not refuse to provide information, records or things on the grounds that to do so might incriminate that person. However, it is further provided in s34G(9) that :

> …the following are not admissible in evidence against the person in criminal proceedings other than proceedings for an offence against this section:
>
> (a) anything said by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to give information;
> (b) the production of a record or thing by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to produce a record or thing.

67. This protects a person from the direct use of material gathered under a Questioning or Detention Warrant. However, it does not give protection against what is referred to as 'derivative use', meaning the use of that material to uncover other evidence which can be used against the person in future criminal proceedings.[135]

68. This potentially raises an issue under article 14(3) of the ICCPR, which provides in part:

> In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality;
> …. (g) Not to be compelled to testify against himself or to confess guilt.

[133] See s34D(1A) ASIO Act.
[134] Ibid.
[135] See Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, at 61-64.

69. Some have suggested that the fact that the ASIO Act does not protect from derivative use is a violation of article 14(3)(g).[136] The Commission considers that the position is not entirely clear. The Human Rights Committee is yet to consider a communication involving derivative use. The jurisprudence of the Committee rather involves allegations of forced confessions, which more obviously violate article 14(3)(g).[137] However, the Committee has also issued a General Comment relating to article 14, in which it was said:

> Subparagraph 3 (g) provides that the accused may not be compelled to testify against himself or to confess guilt. In considering this safeguard the provisions of article 7 and article 10, paragraph 1, should be borne in mind. In order to compel the accused to confess or to testify against himself, frequently methods which violate these provisions are used. *The law should require that evidence provided by means of such methods or any other form of compulsion is wholly unacceptable.* (emphasis added)

70. The words 'evidence provided by…any other form of compulsion' appear to be sufficiently wide to apply to derivative use of material provided under the ASIO Act. In the Commission's view, the protection conferred by section 34G(9) should be widened to exclude such use. The provisions of the Canadian *Anti-Terrorism Act 2002* (CA)[138] may provide a useful drafting example.

F. Issues relating to lawyers

71. The Commission wishes to raise three issues regarding lawyers, which also appear to be matters of concern to the IGIS (see above):

- whether lawyers representing the subjects of such warrants should be given scope to address the prescribed authority over matters such as the continuation of questioning;
- the provision of legal aid to the subject of warrants; and
- the degree of privacy which is afforded to the subject of such warrants to consult their legal representatives.

Scope to address the prescribed authority

72. The role of the legal adviser is expressly limited by section 34U(4), which provides:

> The legal adviser may not intervene in questioning of the subject or address the prescribed authority before whom the subject is being questioned, except to request clarification of an ambiguous question.

Indeed, it may be the case that a lawyer is not permitted to attend during questioning. The ASIO Act provides (to avoid doubt) that a person may be questioned in the absence of their lawyer.[139] A lawyer may also be excluded if the prescribed authority considers their conduct disrupts questioning.[140] Moreover, where a person is detained pursuant to a direction made by

[136] See eg C Michaelson 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' 25 *Sydney Law Review* (2003) p 275 at 286.
[137] See eg *Berry v Jamaica*, 330/1998.
[138] See s83.28(10) *Anti-Terrorism Act 2002* (CA), which provides: 'no evidence derived from the evidence obtained from the person shall be used or received against the person in any criminal proceedings against that person…[other than an offence connected with perjury]'
[139] See s34 TB(1) ASIO Act. However, the prescribed authority must provide a reasonable opportunity for the legal adviser to advise the person who is the subject of the warrant during breaks (see s34U(3)).
[140] See s34U(5) ASIO Act.

the prescribed authority following the issue of a Questioning Warrant, they have no right to contact a lawyer, although the prescribed authority **may** allow such contact. [141]

73. The prescribed authority has a number of important discretions which are intended to safeguard the rights of the subject of a warrant. As noted above, those include the discretion to direct that a person be detained,[142] the discretion to release a person from detention[143] and the discretion to extend periods of questioning at the 8 and 16 hour marks.[144] Those discretions have obvious and serious ramifications for the rights of the person who is the subject of the warrant. The IGIS has apparently raised particular concerns about the limitations preventing lawyers from addressing the prescribed authority on extensions of time (see above).

74. Denying a person the opportunity to address the prescribed authority through their lawyer on those matters is problematic for a number of reasons. First, it deprives the prescribed authority of a potentially useful perspective on the legal limits of those discretions and the matters which should be taken into account.

75. Perhaps more seriously, it potentially violates Australia's obligation to provide an effective remedy for violations of the ICCPR, including arbitrary detention. The obligation to provide an effective remedy appears in article 2(3) of the ICCPR, which states:

> Each State Party to the present Covenant undertakes:
>
> (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;
>
> (b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;
>
> (c) To ensure that the competent authorities shall enforce such remedies when granted.

76. Whether a victim has available to them an **effective** remedy may only be determined in particular cases, having regard to matters such as the relevant circumstances and the features of the right or freedom in question.[145]

77. In many instances, the obligation will require a range of judicial and administrative or informal remedies. That can be seen in the case of *Keenan v United Kingdom*[146], where the European Court of Human Rights found a breach of the analogous article of the *European Convention on Human Rights* (article 13). Mr Keenan was a prisoner, who was subjected to cruel and inhuman punishment and subsequently hanged himself. The cruel and inhuman punishment involved a period of segregation detention in circumstances where Mr Keenan was suffering from a mental illness and was at risk of harming himself. The United Kingdom argued that Mr Keenan had available to him a range of remedies, including judicial review, a complaint under the prisons complaints procedure or a complaint to the ombudsman. The Court first observed that the effect of obligation to provide an effective remedy was to:

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[141] See s34F(1)(d) ASIO Act.
[142] See s34F(1)(a) ASIO Act.
[143] See s34F(1)(f) ASIO Act.
[144] See s34(HB) ASIO Act.
[145] See M Nowak *UN Covenant on Civil and Political Rights* NP Engel (1993) p61.
[146] (2001) 33 EHRR 913.

…require the provision of a domestic remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they conform to their Convention obligations under this provision. The scope of the obligation under Article 13 varies depending on the nature of the applicant's complaint under the Convention. Nevertheless, the remedy required by Article 13 must be "effective" in practice as well as in law. In particular, its exercise must not be unjustifiably hindered by the acts or omissions of the authorities of the respondent State…[147]

78. The Court went on to observe that none of the remedies which the United Kingdom relied upon would have produced any result until after the Mr Keenan had completed his separation detention. As such, the United Kingdom had failed to provide an effective remedy:

> Mark Keenan had been punished in circumstances disclosing a breach of [the article proscribing cruel or inhuman treatment] and he had the right, under Article 13 of the Convention, to a remedy which would have quashed that punishment **before it had either been executed or come to an end**. There has therefore been a breach of Article 13 in this respect.[148]

79. The ASIO Act does not purport to oust the jurisdiction of the High Court or Federal Court and the prescribed authority is required to draw to the attention of a person who is the subject of a warrant that they may seek a relevant remedy from the Federal Court.[149] However, this in itself is unlikely to be sufficient, given the time it would potentially take to approach a Court for relevant relief. As in *Keenan*, in many instances the violation will be complete by the time a Court is asked to remedy it.[150] Moreover if:

- the prescribed authority refuses to exercise their discretion to allow the subject of a Questioning Warrant to contact a lawyer after a detention direction is made under s34F(1)(a);
- a person's lawyer is excluded from the proceedings under s34U(5); or
- a person's lawyer is not permitted to be present during the questioning period under s34TB(1),

significant practical obstacles to seeking judicial review will arise.

80. A person subjected to the powers conferred by Division 3 of Part III may also complain to the IGIS or the ombudsman regarding their detention. In addition, the IGIS may express concerns to the prescribed authority regarding impropriety or illegality in connection with the actual or purported exercise of powers conferred by Division 3 of Part III. However, the IGIS is not required to attend on every occasion a person is subjected to those powers.[151] Hence, again,

[147] Ibid para [123].
[148] Ibid para [127].
[149] See 34E(f) ASIO Act.
[150] See Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, at 124-126.
[151] In his 2003/2005 annual report, the current IGIS noted 'with the exception of only one day either Mr Blick, myself, or one of my staff, have been present on all days when the subject of a section 34D warrant has been questioned, for the full duration of the questioning. The exception was a relatively brief period of questioning on one day, which was video-taped and for which a full written transcript was also provided to my office' (p17, para 127). However, he also (correctly) observed that he was under no obligation to do so (p17, para 125).

there appears to be a significant risk that the remedies offered by the ombudsman and the IGIS will be of no utility in **preventing** a violation before it is complete.

81. In light of the above, it will often be the case that the most direct and effective remedy the subject of a Questioning or Detention Warrant has for a violation of their right to liberty will be to seek the exercise of the powers of the prescribed authority to direct release. Indeed, the prescribed authority was described in the Explanatory Memorandum as one of:

> a number of safeguards to ensure that the new powers are exercised reasonably.[152]

82. The potential effectiveness of that safeguard or remedy is dramatically curtailed by limiting the capacity of lawyers to ask for the exercise of the powers conferred on the prescribed authority or excluding lawyers from questioning altogether. Note, in that regard, that the Human Rights Committee has placed particular importance upon detained people being able to access lawyers to prevent possible violations of the ICCPR.[153]

83. There should certainly be limits (determined by the prescribed authority) on the time that can be taken in such applications. However, a blanket prohibition is simply not warranted and puts Australia in potential breach of article 2(3).

Provision of legal aid

84. It would appear, from the issues raised by the IGIS, that legal aid may not be available to persons who are subject to Questioning and Detention Warrants. The Legal and Constitutional Committee recommended that such funding be made available.[154]

85. Article 14(3)(d) of the ICCPR requires the provision of legal aid (subject to certain conditions) where a person has been charged with a criminal offence. People who are the subject of warrants will generally not be in that position. However, the Human Rights Committee has observed that **anyone who is detained pending charge** should have access to legal aid if they are unable to afford legal representation,[155] regardless of whether they have been charged or not. Some have suggested that the Committee considers such rights to be implied from article 9(1), on the basis that legal representation is important to guard against arbitrary detention.[156] A fuller explanation might be that the Committee considers that legal representation is an essential element in providing an effective remedy for breach of article 9(1).[157]

The degree of privacy which is afforded to the subject of such warrants to consult their legal representatives

86. Section 35U(2) provides:

> The contact [with a person's lawyer] must be made in a way that can be monitored by a person exercising authority under the warrant.

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[152] Explanatory Memorandum, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, 20 March 2003, General Outline.
[153] See eg *General Comment 20*, Replacing general comment 7 concerning prohibition.
of torture and cruel treatment or punishment (Article 7) (Forty-fourth session, 1992) para 11.
[154] Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, recommendation 19, p147.
[155] See Concluding Comments on Ireland (2000) UN Doc A/55/40, paras 422-451, paras 17-18.
[156] See S Joseph *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* Second Edition OUP (2004) p334.
[157] See discussion of article 2(3) above.

87. As was noted by the majority of the members of the Senate Legal and Constitutional Committee (which recommended that monitoring be limited to visual monitoring[158]), this is inconsistent with the *Basic Principles on the Role of Lawyers Adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, [159] which provide (at para 8):

> All arrested, detained or imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within the hearing, of law enforcement officials.

88. It also appears to raise issues regarding a person's right to privacy guaranteed by article 17 of the ICCPR.[160]

Recommendations

89. The Commission recommends that the concerns outlined above be addressed as follows:

- Section 34TB(1) of the ASIO Act be amended to clarify that, if a lawyer of a person's choice is available at the place where questioning is taking place and has not been excluded under s34U(5), they must be permitted to be present during questioning under a Warrant;

- Section 34U(2) of the ASIO Act be amended to provide that only visual monitoring of a person's contact with their lawyer is permissible. As noted above, a similar recommendation was made by the Senate Legal and Constitutional Committee; [161]

- Section 34F should be amended so as to require the prescribed authority to allow a person the subject of a Questioning Warrant to contact a lawyer (if they have not already done so) upon the making of a detention direction under s34F(1)(a). If considered necessary, this could be subject to similar limits to those provided in s34TA (allowing the prescribed authority to prevent such contact in certain circumstances relating to the particular lawyer chosen);

- Provisions should be inserted to expressly require the provision of legal aid. This could be done by requiring the prescribed authority to ascertain whether a person requires legal aid. The prescribed authority could be given power to suspend questioning in appropriate cases until the Commonwealth made such funding available; and

- Section 34U(4) should be repealed. It should be replaced by a provision making clear that the person detained or his or her legal representative may make representations to the prescribed authority on the various discretions conferred by Division 3 of Part III, particularly those provided for under s34F(1) and 34HB. The

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[158] Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, recommendation 9, p142.
[159] Havana, Cuba, 27 August to 7 September 1990.
[160] See the Human Rights Committee's *Concluding Comments on Portugal* (2003) UN doc CCPR/CO/78/PRT for a discussion of article 17 and the professional duties owed by legal advisers.
[161] Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, recommendation 9, p142.

making of such submissions should be subject to the control of the prescribed authority.[162]

G. Rights of children

90. Both this Committee and the Legal and Constitutional Committee recommended that Division 3 of Part III not apply to children.[163] However, as enacted, Division 3 of Part III does provide that children aged between 16 and 18 may be the subject of Questioning and Detention Warrants, if:

- the Attorney is satisfied on reasonable grounds that it is likely that the child will commit, is committing or has committed a terrorism offence;[164]
- the Attorney and the issuing authority are satisfied that the warrant provides for the child to contact a parent, guardian or other person able to represent their interests. Such contact must be able to take place at any time the person is in custody or detention;[165] and
- the Attorney and the issuing authority are satisfied that the warrant provides that the child can only be questioned in the presence of a parent, guardian or other person able to represent their interests, and then only for continuous periods of two hours.[166]

91. It has been suggested that, even with those safeguards, Division 3 of Part III violates the CRC.[167] The CRC contains a number of obligations which are similar in nature to those discussed above in relation to the ICCPR. It also contains some additional obligations. We consider the more relevant provisions below.

Right not to be arbitrarily detained

92. Like article 9(1) of the ICCPR, article 37(b) of the CRC states that "no child shall be deprived of his or her liberty unlawfully or arbitrarily". Article 37(b) also includes two additional obligations which have no comparable provision in the ICCPR: detention of children should be a "measure of *last resort*" and should only be for the "*shortest appropriate period* of time". These additional obligations are arguably somewhat similar in substance to the proportionality test applied under article 9(1).[168] However, they appear to require an even stricter approach.

93. A central issue raised above regarding arbitrary detention was the application of Division 3 of Part III to 'innocent bystanders'. That objection plainly has less force in relation to the provisions for 16-18 year old children, who are necessarily suspected of some involvement in past or future terrorism offences. However, the following points should be noted:

- The concerns regarding interpreters and repeat warrants raised above in relation to the detention of adults apply equally to children;

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[162] See similarly s23DA(3) *Crimes Act 1914* (Cth), discussed below.
[163] See Parliamentary Joint Committee on ASIO, ASIS and DSD *'An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002'*, recommendation 10 at p51, para 3.84 and Senate Legal and Constitutional References Committee '*Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*' December 2002, recommendation 27, p152.
[164] See s34NA(4)(a) ASIO Act.
[165] See s34NA(6)(a) ASIO Act.
[166] See s34NA(6)(b) ASIO Act.
[167] See eg C Michaelson 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' 25 *Sydney Law Review* (2003) p 275 at 286.
[168] See S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 446.

- So too do the concerns regarding the fact that the terrorist offence provisions are very wide. In particular, it seems to the Commission highly likely that the children of parents involved in terrorism will be particularly vulnerable to Detention or Questioning Warrants in relation to the offence of associating with terrorist organisations. That offence was discussed above. As was observed in relation to the example of the wife driving her husband to court, the scope of the defence for close family members in relation to a matter of 'family concern'[169] is uncertain. Given that the Attorney has only to be satisfied on reasonable grounds that it is **likely** that the child will commit, is committing or has committed the offence of association, there seems to be considerable scope to detain children by reference to the association offence.

94. In the Commission's view, those matters raise concerns over the ASIO Act's compatibility with article 37(b) of the CRC, particularly given the more strictly worded obligations to only detain children as a "measure of last resort" and for the "shortest appropriate period of time".

95. It is also perhaps instructive to observe that the *Crimes Act 1914* (Cth) provides for quite different procedures of arrest and detention in the case of children who are reasonably suspected of having committed (or being in the process of committing) a terrorism offence.[170] Times for questioning of children under that provision are limited to two hours.[171] There is provision for an extension of up to an additional 20 hours, however this must be granted by a magistrate or (if a magistrate is unavailable) a justice of the peace.[172] A detained child or his or her legal representative may make representations to the judicial officer about the application for extension.[173] There is no power to compel information or other material.[174] The child must be allowed to contact and consult with a legal practitioner, and consultations must be allowed to take place in private.[175]

96. The Commission would prefer the approach suggested by this Committee and the Legal and Constitutional Committee (that is, Division 3 of Part III should not apply to children). However, if children are to be subject to those provisions, then in addition to the more general amendments regarding detention suggested above:

- Consideration should be given to adopting an approach which more closely resembles the approach under the *Crimes Act 1914* (Cth); and

- The 'best interests of the child principle' (article 3(1) of the CRC) be more plainly incorporated into Division 3 of Part III in the manner described below.

Other relevant CRC rights

97. The CRC includes other provisions in similar terms to the ICCPR rights discussed above:

- The right to silence is dealt with in article 40(2)(b)(iv) in very similar terms to the text of article 14(3)(g) of the ICCPR. As such, it seems arguable that article 40(2)(b)(iv) of the

[169] Provided for in 102.8(4)(a) of the *Criminal Code*.
[170] Arrest is dealt with in Division 4 of Part I. Detention and questioning are dealt with in Divisions 1 and 3 of Part IC. The detention provisions were recently amended by the *Anti-terrorism Act 2004* (Cth) to extend the maximum time for detention for terrorism offences. Additional 'dead time' provisions were also included for such offences.
[171] See s23CA(4) *Crimes Act 1914* (Cth).
[172] See s23DA *Crimes Act 1914* (Cth).
[173] See s23DA(3) *Crimes Act 1914* (Cth).
[174] See s23S *Crimes Act 1914* (Cth).
[175] See s23G(3) *Crimes Act 1914* (Cth).

CRC is sufficiently wide to cover 'derivative use'. It is also noteworthy that the Committee on the Rights of the Child has stressed the importance of upholding article 40(2)(b)(iv) during terrorist related emergencies.[176]

- Article 16 of the CRC confers a right to privacy in similar terms to article 17 of the ICCPR. Again, in interpreting that obligation, some importance has been placed upon the rights of children to receive confidential legal advice.[177]

- The CRC also includes an 'implementation clause', which has a similar effect to article 2(3) of the ICCPR (which deals with effective remedies). That provision requires all legislative and administrative measures to implement the rights conferred by the CRC. The Committee on the Rights of the Child has indicated that that obligation includes the provision of effective remedies to protect children from violation of those rights.[178]

98. Those obligations represent further reasons for the implementation of the recomendations regarding derivative use immunity and involvement of lawyers suggested above.

99. The CRC also includes relevant rights in addition to those in the ICCPR. For example, Article 3(1) of the CRC requires that in 'all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration'. Article 3(1) does not require the best interests of the child to be the sole consideration in all decision-making. In *Minister of State for Immigration and Ethnic Affairs* v *Ah Hin Teoh*[179], Mason CJ and Deane J noted:

> The article is careful to avoid putting the best interests of the child as *the* primary consideration; it does no more than give those interests first importance along with other considerations as may, in the circumstances of a given case, require equal, but not paramount, weight.[180]

Later, their Honours stated:

> A decision-maker with an eye to the principle enshrined in the Convention would be looking to the best interests of the children as a primary consideration, asking whether the force of any other consideration outweighed it.[181]

100. Division 3 of Part III does not expressly require the Attorney, the issuing authority or the Director General of ASIO to consider whether subjecting a particular child to a Detention or Questioning Warrant will be in their best interests. The Protocol provides that questioning or detention may only take place under conditions that take full account of the subject's particular needs and any special requirements having regard to their age.[182] However, this does not address the more fundamental question of whether it is in the particular child's best interests to be subjected to those processes at all. Amendments should be made to require consideration of that issue.

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[176] See *Concluding Comments*, United Kingdom IRCO, Add.34 paras 20 and 34.
[177] See discussion in *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children Fund (UNICEF), 2002, at 215 and 217.
[178] See discussion in *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children Fund (UNICEF), 2002, at 56.
[179] (1995) 183 CLR 273.
[180] At 289.
[181] At 292. This is consistent with the view UNICEF has taken of the article. UNICEF has also stated that the article requires the child's interests to be the subject of active consideration (see *Implementation Handbook for the Convention on the Rights of the Child*, United Nations Children Fund (UNICEF), 2002 at p40).
[182] See para 6.1.

101. Another relevant provision of the CRC is article 12, which provides:

> (1) States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> (2) For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

102. That obligation represents a further reason for ensuring that children are able to make submissions through their lawyer to the prescribed authority on issues concerning their detention. Such issues directly and significantly affect the child within the meaning of article 12 of the CRC.

H. Derogation

103. The drafters of the ICCPR envisaged that there would be occasions when some of the human rights set out in the Covenant would be justifiably infringed by States in times of public emergency. A procedure for the derogation from certain rights was provided in article 4 of the ICCPR which applies 'in times of public emergency which threatens the life of the nation'.

104. That power of derogation is carefully circumscribed so as to avoid the arbitrary disregard for human rights. It also includes certain procedural requirements, particularly official proclamation at the domestic level[183] and notification of the other states parties to the ICCPR.[184] Australia has not sought to use that procedure and has never suggested that it relies upon article 4 in enacting counter-terrorism legislation. As some commentators have observed, that does not deprive Australia of its substantive rights of derogation.[185] Australia could still raise the defence conferred by article 4 if an Optional Protocol complaint was made to the Human Rights Committee in relation to the operation of Division 3 of Part III.[186] While that may be so, a failure to meet those procedural requirements in cases of purported derogation would also expose Australia to international criticism for failing to meet its obligations under the ICCPR.[187]

105. It should also be noted that there has been some controversy as to whether terrorism constitutes a 'public emergency threatening the imminent life of the [Australian] nation'.[188] In the United Kingdom the House of Lords recently concluded, considering the analogous provisions of the *European Convention on Human Rights*, that such an emergency does exist: see *A v Secretary of State for the Home Department*.[189] The legislation in question in that matter provided for the potentially indefinite detention of certain foreign nationals suspected of being 'international terrorists'.

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[183] See article 4(1).
[184] Via the Secretary-General of the United Nations - See article 4(3).
[185] See S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 447.
[186] See *Landinelli Silva v Uruguay* (34/78) para 8.3.
[187] See eg *Concluding Comments on Mexico* CCPR/C/79/Add 109, 27 July 1999 and *Concluding Comments on Ireland* CCPR/C/79/Add 21, 3 August 1993.
[188] Compare C Michaelson 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' 25 Sydney Law Review (2003) p 275 at 300-301 with S Joseph Australian Counter-Terrorism Legislation and the International Human Rights Framework 27(2) *UNSWLJ* (2004) 428 at 448-9.
[189] [2004] UKHL 56.

106. Although Australia may be in a different position to the United Kingdom, we will assume for the purposes of this submission that there is currently a relevant public emergency threatening the life of the Australian nation (albeit one that has not been the subject of any relevant official domestic proclamation or international notification by Australia for the purposes of article 4). Even on that assumption, Article 4(1) appears unlikely to allow Australia to avoid a breach of the ICCPR in connection with Division 3 of Part III.

107. In addition to the existence of an emergency, article 4(1) includes the following requirements:

- the measures must be strictly required by the exigencies of the situation;
- the measures cannot be inconsistent with other requirements of international law;
- and the measures must not involve discrimination solely on the grounds of race, sex, colour, language, religion or social origin.

108. The first requirement is a proportionality test (see discussion of arbitrary detention in section D above). This was made clear by the Human Rights Committee in its General Comment on article 4, where it stated:

> A fundamental requirement for any measures derogating from the Covenant, as set forth in article 4, paragraph 1, is that such measures are limited to the extent strictly required by the exigencies of the situation. This requirement relates to the duration, geographical coverage and material scope of the state of emergency and any measures of derogation resorted to because of the emergency. Derogation from some Covenant obligations in emergency situations is clearly distinct from restrictions or limitations allowed even in normal times under several provisions of the Covenant. Nevertheless, the obligation to limit any derogations to those strictly required by the exigencies of the situation reflects the principle of proportionality which is common to derogation and limitation powers. Moreover, the mere fact that a permissible derogation from a specific provision may, of itself, be justified by the exigencies of the situation does not obviate the requirement that specific measures taken pursuant to the derogation must also be shown to be required by the exigencies of the situation. In practice, this will ensure that no provision of the Covenant, however validly derogated from will be entirely inapplicable to the behaviour of a State party.[190]

109. As was noted above, the Commission's principal concern regarding Division 3 of Part III is that it authorises arbitrary detention contrary to article 9(1) of the ICCPR, by reason of the fact that it **does not satisfy the proportionality test**. For similar reasons, it seems to the Commission very difficult to assert that such measures would be limited to what is strictly required by the exigencies of any emergency currently existing in Australia.[191] As such, the Commission is of the view that article 4 does not relevantly relieve Australia of its obligations under article 9(1) of the ICCPR.

110. It is relevant to note in that regard that the House of Lords took a similar view of the legislation providing for the indefinite detention of non-nationals in *A v Secretary of State for the Home Department*.[192] Amongst other things, their Lordships concluded that it was difficult

[190] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, para 4.
[191] Indeed, Joseph expresses doubt as to whether there could ever be a valid derogation where the right in question would otherwise be violated through want of proportionality (see S Joseph *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* Second Edition OUP (2004) pp 826-7).
[192] [2004] UKHL 56.

to see how the Court could be satisfied that the provisions in question could be a proportionate response, when the government appeared content to allow British citizens who represented such a threat to remain free.[193] Their Lordships also noted that other measures (such as monitoring devices) would achieve the government's end in a less restrictive fashion.[194]

111. Many of the other matters discussed above involve rights from which derogation may not be permitted. Article 4(2) of the ICCPR expressly provides that certain rights are not subject to suspension under any circumstances.[195] The Human Rights Committee has observed that there are other rights, in addition to those specified in article 4(2), which cannot be subject to lawful derogation. Amongst other things, the Committee stated:

> States parties may in no circumstances invoke article 4 of the Covenant as justification for acting in violation of humanitarian law or peremptory norms of international law, for instance by … deviating from fundamental principles of fair trial, including the presumption of innocence.[196]

The right to silence is a further fundamental principle of a fair trial. It is closely related to the presumption of innocence[197] and therefore arguably another right from which derogation is not permitted.

112. It will be recalled that the issues regarding the right to address the prescribed authority and access to legal aid involved the right to an effective remedy for violations of the ICCPR (article 2(3)). In dealing with derogations from that right, the Human Rights Committee has stated:

> Article 2, paragraph 3, of the Covenant requires a State party to the Covenant to provide remedies for any violation of the provisions of the Covenant. This clause is not mentioned in the list of non-derogable provisions in article 4, paragraph 2, but it constitutes a treaty obligation inherent in the Covenant as a whole. Even if a State party, during a state of emergency, and to the extent that such measures are strictly required by the exigencies of the situation, may introduce adjustments to the practical functioning of its procedures governing judicial or other remedies, the State party must comply with the fundamental obligation, under article 2, paragraph 3, of the Covenant to provide a remedy that is effective.

113. Even if derogation from those rights is currently permitted, then issues would arise as to whether they are strictly required by the exigencies of the situation. The Commission has endeavoured to set out above possible amendments which would constitute less restrictive means of providing for national security. The availability of those alternatives casts doubt upon the necessity for or proportionality of the existing provisions.

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[193] See eg Lord Bingham at [35]; Lord Nicholls at [76] Lord Hope at [129]; Lord Rodger at [189] and Baroness Hale at [231].

[194] See eg Lord Bingham at [35] and Lord Scott at [155].

[195] The list of non-derogable rights includes the right to life (article 6); freedom of thought, conscience and religion (article 18); freedom from torture or cruel, inhuman or degrading punishment or treatment (article 7); the right to recognition everywhere as a person before the law (article 16) and the principles of precision and non-retroactivity of criminal law (article 15).

[196] Human Rights Committee, *General Comment No. 29: States of Emergency (Article 4)*, 31 August 2001, para 11.

[197] See S Joseph *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* Second Edition OUP (2004) p450.

114. As regards Australia's obligations under CROC, there is no derogation procedure under that international instrument.

I. Conclusion

115. In her address to the Biennial Conference of the International Commission of Jurists in Berlin on 27 August 2004,[198] Ms Louise Arbour the High Commissioner for Human Rights (and former Justice of the Canadian Supreme Court) observed:

> I firmly believe that terrorism must be confronted in a manner that respects human rights law. Insisting on a human rights-based approach and a rule of law approach to countering terrorism is imperative. It is particularly critical, in time of crisis, when clarity of vision may be lacking and when institutions may appear to be failing, that all branches of governance be called upon to play their proper role and that none abdicate to the superior claim of another…For even though it may be painted as an obstacle to efficient law enforcement, support for human rights and the rule of law actually works to improve human security. Societies that respect the rule of law do not provide the executive a blanket authority even in dealing with exceptional situations. They embrace the vital roles of the judiciary and the legislature in ensuring that governments take a balanced and lawful approach to complex issues of national interest. A well-honed system of checks and balances provides the orderly expression of conflicting views within a country and increases confidence that the government is responsive to the interest of the public rather than to the whim of the executive. Ultimately, respect for the rule of law lessens the likelihood of social upheaval, creating greater stability both for a given society and its neighbours.

116. This is the challenge that Australia currently faces. Australia has an international legal obligation to protect its citizens from the risks of terrorist attacks described by the Director-General in the extracts above. Those attacks threaten the right to life, one of the most fundamental rights protected by the ICCPR.[199] However, the steps it takes in fulfilling that obligation must not in themselves threaten the values and principles embodied in instruments like the ICCPR, which already provides a 'road map' for the steps that may be taken to combat terrorism in free and democratic societies. In the Commission's view, Division 3 of Part III of the ASIO Act represents a departure from that map in a number of significant respects. The Commission has made recommendations which are designed to rectify that situation, while still protecting Australia's security interests.

117. Of course, as the level of threat posed by terrorism changes, further adjustments to the existing set of legislative counter-terrorism measures may be required. This is recognised in international human rights law, particularly through the concept of proportionality discussed above. As such, international human rights law should be used to test the need for new legislative counter-terrorism proposals and the ongoing need for existing legislative measures, including Division 3 of Part III of the ASIO Act. This will ensure that Australia effectively confronts national security threats without eroding the fundamental features and values of the society which we seek to protect through counter-terrorism measures.

4 April 2005

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[198] Available at http://www.unhchr.ch/huricane/huricane.nsf/NewsRoom?OpenFrameSet

[199] See article 6. See also Security Council resolution 1373 (2001).