2

Questioning and detention regime

Constitutional validity

2.1 A primary issue raised before the Committee is whether the Commonwealth Parliament can validly confer on the Executive the power to detain a person[1] for the purpose of intelligence gathering in relation to a terrorism offence.[2] Central to the question of constitutionality is whether the form of detention, authorised by Division 3 Part III of the ASIO Act, is characterised as punitive or non-punitive.

2.2 Legal experts, including George Tannin SC, State Counsel for Western Australia, have argued that it is by no means certain the 'intelligence gathering' is a valid exception to the general rule, that the executive may not detain a non-suspect. [3] Witnesses have also emphasised the distinction between being compelled to attend and answer questions

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1 The compulsory powers to question and detain apply equally to everyone in the territory of Australia, which extends to every external Territory (s. 4A).

2 Professor George Williams and Dr Ben Saul submission no. 55, p. 10; Dr Greg Carne submission no. 67 annex no. 1 *Detaining Questions or Compromising Constitutionality?: The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth*), (2004) 27 UNSWLJ 524-578;Joo-Cheong Tham and Stephen Sempill submission no. 35 p. 145.

3 Department of Premier and Cabinet, Government of Western Australia submission no. 71, p. 4; B. Selway QC, "*The Rise and Rise of Reasonable Proportionality Test in Public Law*" (1996) 7(3) Public Law Review 212,214. See *Fardon v Attorney-General (Qld)* [2004] HCA 46, GummowJ [80]; See *also Chu Keng Lim v Minister for Immigration* (1992) 110 ALR 97, pp. 114-115.

before an administrative investigative hearing and the power to arrest and detain in custody.[4]

2.3 ASIO's existing special powers to conduct surveillance, to obtain an executive search warrant, to enter premises, remove and examine computers, and track vehicles are tailored for intelligence-gathering purposes and, in the view of many witnesses, these powers are sufficient to meet the challenge of the new level of terrorist related activity.[5] Whether the procedural safeguards are sufficient to ensure that the law is implemented for purely intelligence-gathering purposes and not law enforcement also arose as an important consideration as part of the argument on constitutionality.[6]

2.4 The Attorney-General's Department has maintained that the powers were constitutionally valid in the original Bill and remain so notwithstanding subsequent amendments.[7] Some reliance is placed on recent High Court judgments in the area of immigration detention and the safeguards built into the legislation.[8] However, whether the questioning and detention powers under Division 3 Part III may be characterised as punitive or not is a novel question in Australian law. Evidence before the Committee suggests that the issue is one on which respectable legal opinion differs and the matter will remain an open question until it is the subject of judgment by the High Court of Australia.[9]

International human rights standards

2.5 Many witnesses wished to direct the Committee's attention to the importance of maintaining protection of fundamental human rights standards. In particular, the absence in Australia of a national bill of rights was said to be a systemic weakness in Australia's legal system which means the opportunity to test compatibility of Division 3 Part III against internationally accepted minimum human rights standards is seriously limited. Numerous witnesses drew attention to the importance of the International Covenant on Civil and Political Rights

4 Dr Greg Carne supplementary submission no. 100, p. 2.

5 Islamic Council of New South Wales transcript, public hearing 6 June 2005, p. 47; Islamic Council of Victoria transcript, public hearing 7 June 2005, p. 61.

6 Joo-Cheong Tham transcript, public hearing June 7 2005, p. 15.

7 AGD supplementary submission no. 102, p. 1.

8 AGD supplementary submission no. 102, p. 1. See for example, *Al- Kateb v Godwin* [2004] HCA 37.

9 Professor George Williams transcript, public hearing 20 May 2005, p. 29.

(ICCPR) and, in the ACT, the role of the *Human Rights Act 2004* (ACT) as a benchmark against which compatibility of legislation must be measured.[10]

An alternative model

2.6 There was also a significant focus on the detention aspects of the Division 3 Part III, particularly the possibility of detaining a non-suspect and whether the legislation adequately ensures that detention is a measure of last resort. It is clear that the power to detain for up to 168 hours to enforce a questioning warrant remains a matter of contention.[11]

2.7 The Law Council of Australia reiterated their view that intelligence sought under Division 3 Part III could be obtained by the Australian Crimes Commission (ACC) or under a system which is comparable to the ACC compulsory questioning regime. It was argued that an ACC type regime was more appropriate and less likely to result in detention for a period beyond that necessary for the purpose of questioning – a concern also raised by Professor George Williams[12] and Dr Greg Carne.[13]

2.8 Under the *Australian Crime Commission Act 1984*, the ACC already has the power to summons witnesses and suspects to be questioned but does not have the power to detain people.[14] The Law Council's proposed model would permit questioning for a limited period of four hours with scope for a four hour extension and a requirement for judicial approval from the issuing authority for any further extension of time. During hearings the Law Council emphasised their view that questioning periods should be limited so that 'it really is just in relation to questioning'.[15]

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10 HREOC transcript, public hearing 20 May 2005, pp. 13, 14; NACLC transcript, public hearing 6 June 2005, p. 29; Law Institute of Victoria transcript, public hearing 7 June 2005, p. 2; Amnesty International transcript, public hearing 7 June 2005, p. 72; Mr Jon Stanhope, Chief Minister, ACT Government submission 93, p. 2.

11 Media, Entertainment & Arts Alliance submission no. 32, p. 124; Professor George Williams transcript, public hearing 20 May 2005, pp. 31,43; Law Council of Australia transcript, public hearing 6 June 2005, p. 17; PIAC transcript, public hearing 6 June 2005, p. 63; Pax Christie submission no. 31, p.3.

12 Professor George Williams transcript, public hearing 20 May 2005, p. 34.

13 Dr Greg Carne transcript, public hearing 20 May 2005, pp. 46, 47.

14 Law Council of Australia, submission to the Senate Legal and Constitutional References Committee Inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, November 2002, p.9

15 Law Council of Australia transcript, public hearing 6 June 2005, p. 25.

Breadth of ASIO questioning and detention powers

2.9 A number of witnesses argued that the threshold test for the issuing a warrant is lower than that necessary to achieve the purpose of the legislation.[16] Under paragraphs 34C(3)(a) and 34D(1)(b), the Minister and the issuing authority respectively must be satisfied 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. (*Emphasis added*)*.[17]

2.10 On the introduction of the original *ASIO Legislation Amendment (Terrorism) Bill* in 2002, the then Attorney-General, Mr Daryl Williams MP, said the Bill was necessary to strengthen the power of ASIO to 'investigate terrorism offences' in order to:

> ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes... These warrants are a measure of last resort. And they are subject to a number of strict safeguards.[18]

2.11 On the reintroduction of the legislation on 26 June 2003, he explained to the House that:

> We need this legislation to give our intelligence agencies vital tools to deter and prevent terrorism….

And, on 17 August 2005, the current Attorney-General affirmed that:

> Questioning warrants are particularly useful where the threat of terrorism is immediate and other methods of intelligence collection will be either too slow or ineffective at obtaining information about suspicious activity.[19]

2.12 In its submission to the inquiry, ASIO summarised the value of questioning warrants, which it says come to the fore in situations where:

16 HREOC submission no. 85, pp. 16-17; Professor George Williams transcript, public hearing 20 May 2005, pp. 29, 34; Joo-Cheong Tham transcript, public hearing 7 June 2005, p.14; Patrick Emerton transcript, public hearing 7 June 2005, p. 23; Law Council of Australia transcript, public hearing 6 June, p.19 ; Islamic Council of Victoria transcript, public hearing 7 June 2005, p. 62.

17 The Minister (but not the Issuing Authority), must also be satisfied that 'relying on other methods of collecting that intelligence would be ineffective': paragraph 34C (3) (b).

18 Hansard House of Representative p. 1930 Second Reading Speech, 21 March 2002.

19 Hansard House of Representatives p. 55, Questions Without Notice, 17 August 2005.

- The threat of harm is immediate and other methods of intelligence collection will be too slow or too indirect to be effective in the time available; or
- Limited insight has been gained into a terrorist activity but the security measures adopted by the individual or group have foiled attempts to identify all those involved or to assess the full extent of the threat; or
- There is reasonable suspicion of terrorist activity but efforts to resolve it have been unsuccessful and those involved have refused to cooperate.[20]

2.13 The Committee received various submissions, which argued that, if the purpose of the legislation is to respond to a threat of serious and immediate harm and prevent an act of terrorism, these concepts should be reflected in the legislation.[21] It was said that the breadth of the current powers leaves open the possibility of using the extra ordinary powers in circumstances and for purposes not intended by the Parliament.

2.14 Several witnesses, including the National Association of Community Legal Services (NACLC) and the Public Interest Advocacy Centre (PIAC), argued that the threshold for a warrant should include specific reference to the prevention of terrorism and be linked to terrorist acts, rather than more generically to terrorism offences.[22] It was proposed that existing formula be substituted for:

> there are reasonable grounds for believing that issuing the warrant… will substantially assist the collection of intelligence, *the collection of which is necessary to prevent an imminent terrorist act.*

Imminent is intended to mean an identifiable and immediate terrorist act – requiring both a degree of immediacy and an act of terrorism rather than any terrorism offence.[23]

2.15 Similarly, Joo-Cheong Tham and Stephen Sempill proposed that the grounds should require a:

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20 ASIO submission no. 95, p. 5.

21 Patrick Emerton transcript, public hearing 7 June 2005, p. 26.

22 Joo-Cheong Tham transcript, public hearing 7 June 2005, p. 15; PIAC supplementary submission no. 104, p. 1; HREOC submission no. 85, p. 18; National Association of Community Legal Centres submission no. 42, p.5; Federation of Community Legal Centres transcript, public hearing 7 June 2005, p. 48.

23 HREOC transcript, public hearing 20 May 2005, p. 14; NACLC transcript, public hearing 6 June 2005, p. 30; PIAC transcript, public hearing 6 June 2005, p. 63.

reasonable suspicion of an *imminent* terrorism offence involving *material risk* of *serious physical injury* or *serious property damage*.[24]

2.16 By way of background, a terrorist act is defined by the *Criminal Code 1995* as an action or threat of action, which causes or is intended to cause, death, serious physical harm to a person or serious damage to property, endangers life or creates a serious threat to public health and safety.[25] The threat or action must be carried out with the intention of advancing a political, religious or ideological cause and is intended to coerce or intimidate an Australian government or the government of a foreign country, or intimidate the public or section of the public.[26]

2.17 A 'terrorism offence' includes an actual or threatened act of terrorism, and acts done in preparation of terrorist acts, such as training and so forth.[27] It is also includes international terrorist activities involving the use explosives in a public place, or against a government facility, public transport system or other infrastructure.[28] These offences are clearly at the most serious end of criminal activity. The Committee also notes that Division 11 of the *Criminal Code 1995* extends criminal responsibility to ancillary offences of attempt, complicity and common purpose, incitement, and conspiracy to commit a terrorism offence.[29]

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24 Joo-Cheong Tham submission no. 99, p. 17.

25 The definition of act of terrorism also extends to the serious disruption or destruction of an electronic system, including, for example, information, telecommunications, financial, systems, essential government services, public utility, or transport system (s.100.2).

26 Subsection 100.1 *Criminal Code 1995*. The offence also includes threats or acts of terrorism intended to harm an individual or a public of another country. Subsection 100.4 *Criminal Code 1995*.

27 Division 101 *Criminal Code 1995* includes the offence of committing an terrorist acts attracts a penalty of life imprisonment (s101.1); knowingly or recklessly providing or receiving training connected with preparation, engagement or assistance in a terrorist act attracts a penalty of 25 years and 15 years respectively (s.101.2); knowingly or recklessly possessing things connected with the preparation, engagement or assistance in a terrorist act attracts a penalty of 15 years and 10 years respectively (s.101.4) , knowingly or recklessly collecting or making document likely to facilitate terrorist act (s.101.5); and any act in preparation for or planning a terrorist act is subject to life imprisonment (s.101.6) *Criminal Code 1995*.

28 See Chapter 4 Division 72, offences to give effect to Australia's obligations under the International Convention for the Suppression of Terrorist Bombings, done at New York on 15 December 1997.

29 According to media reports the charges laid against 5 suspects in relation to the attempted bombings on 21 July 2005 in London, included, conspiracy to murder, attempted murder, conspiring to endanger life by using explosives, making or possessing

2.18 Offences that relate to a person's connections with a 'terrorist organisation' do not require any direct connection to a person engaged in an act of terrorism.[30] A terrorist organisation is defined as an organisation that is directly or indirectly, engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act. The definition is not limited to those organisations proscribed in Australia under the *Criminal Code 1995;* however, the public may logically anticipate that ASIO will direct its attention to those proscribed organisations.

2.19 Offences such as associating with a person who is a member of a terrorism organisation (directly or indirectly), or providing any form of training to a 'terrorist organisation' are regarded by some witnesses as an unjustified interference with freedom of association and lacking in legal certainty. For example, the criminalising of the provision of training in legal services or training in political lobbying, while technically a terrorism offence, may not have direct connection to acts of terrorism. The Committee recognises that these activities may be intended to assist a transition from acts of violence to political participation and, over time, opinions will differ on the nature of an organisation.

2.20 Importantly, lawyers who have represented subjects of warrants have cast doubt on the connection between the questioning and the purpose of the legislation, suggesting the current law is open to potential misuse. These witnesses believe the questioning powers are being used to supplement general policing powers and that this is fostered by the breadth of the power which permits a fishing expedition.[31]

2.21 Finally, the Committee was reminded that amendments to the *Criminal Code 1995* have increased the number and type of 'terrorism offences' (including ancillary offences), which have effectively extended ASIO's questioning and detention powers beyond that conceived in the original legislation introduced in 2002.[32] The extension of powers has occurred without the need to amend the ASIO Act, and has, therefore, not been subject to the degree of

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an explosive with the intent to endanger life or cause serious injury to property. Three others were charged with failure to disclose information to the police. See Genevieve Roberts, *London attacks: the charges*, The Independent, 9 August 2005.

30 See subsections 102.1; 102.2, 102.3, 102.4; 102.5, 102.6, 102.7, 102.8 *Criminal Code 1995*.

31 See Chapter 1.

32 Dr Greg Carne transcript, public hearing 20 May 2005, p. 43.

Parliamentary scrutiny and public justification that may be expected of extra–ordinary powers.

Conclusion

2.22 The Committee notes that the emphasis on an immediate threat of an act of terrorism, evident in the policy statements, is not fully reflected in the legislation. It also recognises that public perception of terrorism is generally of threatened or actual acts of violence. However, there is bi-partisan support for criminalising a wider range of terrorist-related conduct. The question is whether ASIO requires the power of compulsory questioning and detention in respect to non-suspects to gather intelligence in relation to the broader range of offences.

2.23 It is important to ensure that such legislation is framed so as to achieve the purpose for which it was intended and prevent the potential for misuse. Raising the threshold would be one means of ensuring that ASIO operations are properly directed to intelligence gathering to support law enforcement efforts where there is an identifiable risk of an act of terrorism. However, any refinement of the test should not restrict the powers to such a narrow time frame as to render them ineffective in the face of an imminent threat.

Role of the issuing authority

2.24 As noted above, concern was raised that the ASIO Act does not adequately reflect the intention that the special counterterrorism powers are to be used only as a measure of last resort. The limited role of the issuing authority in the approval of warrants was singled out for comment. A clearer role for the issuing authority was advocated.

2.25 By way of background, the Director-General may seek the Minister's consent to request the issue of a warrant under section 34C. The Minister's discretion to agree to the request is subject to his satisfaction that there are:

- reasonable grounds for believing that the issuing of the warrant to be requested will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and

- that relying on other methods of collection of intelligence would be ineffective.[33]

2.26 Where the warrant is for the detention of the person, the Minister must also be satisfied that the person:

- may alert a person involved in a terrorism offence that the offence is being investigated; or
- may not appear before the prescribed authority; or
- may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.[34]

2.27 By contrast, the issuing authority may issue the warrant provided he or she is satisfied that:

- the Director-General has correctly fulfilled the procedural requirements and obtained the Minister's consent; and
- there are reasonable grounds for believing the warrant will substantially assist with the collection of intelligence that is important in relation to a terrorism offence.[35]

2.28 Currently, there is no requirement that the issuing authority take account of the efficacy of relying on other methods of collecting the intelligence, in respect of a questioning-only or a detention warrant. Nor is there any requirement that the issuing authority be satisfied of the additional grounds necessary to trigger a warrant for detention.

2.29 A number of witnesses proposed that the issuing authority should be required to be satisfied on the same grounds as the Minister, as a precondition to the issuing of a warrant for questioning or detention.[36] Different standards and the narrower duties of the issuing authority were criticised as reducing the role of the issuing

33 Paragraph 34C (1) (2) (3) (a) (b). The Minister must also be satisfied that all the 'adopting acts' in relation to a written statement as required by paragraph 34C (3) (ba) have been done. A protocol setting out the procedures and conditions to be applied during questioning and detention was presented to each House of Parliament on 12 August 2003.

34 Paragraph 34C (3) (c) (i) (ii) (iii).

35 Paragraph 34D (1)(a)(b).

36 NACLC transcript, public hearing 6 June 2005, pp. 30, 38; PIAC transcript, public hearing 6 June 2005, p. 69; Patrick Emerton transcript, public hearing 7 June 2005, p.32.

authority to one of merely providing a 'veneer' of judicial approval to a warrant.[37]

Effectiveness of alternative methods of intelligence collection

2.30 In particular, it was argued that the issuing authority should be satisfied that reliance on other methods of collecting the intelligence would not be effective. It was suggested that ASIO should be required to satisfy the test by reference to the use of other mechanisms provided for under the ASIO Act.[38]

2.31 The AGD advised that the limitations on the issuing authority in this respect were deliberate, and, in its view, justifiable on the grounds that the Minister is in the better position to know whether alternative means of intelligence gathering would be ineffective.[39]

2.32 It was also argued that the issuing authority must be satisfied that the legislative requirements of the Act have been fulfilled. This includes a requirement that ASIO has provided adequate facts and grounds to justify the Minister's satisfaction that other methods of intelligence collection would be ineffective. The AGD stated:

> In practice, the issuing authority is provided with the same draft warrant material as the Attorney-General. Accordingly, if it is clear from the documentation that ASIO has not, or has clearly not adequately, addressed the issue about the use and reliance on other methods of intelligence collection, it would be open to the issuing authority to refuse to issue the warrant.[40]

2.33 The Committee accepts that, in practice, if the material was manifestly inadequate, an issuing authority may reject the request. However, the role of the issuing authority under paragraph 34D(1)(a) is limited to one of being satisfied that the request is made in the same terms as those presented to the Minister, except for any changes the Attorney-General required, and is accompanied by a copy of the Minister's consent.[41] The issuing authority is not empowered to alter the

37 Liberty Victoria submission no. 79, p. 7; see also Michael Head, *'ASIO, Secrecy and Lack of Accountability'*, (2004) 11(4) Murdoch University Electronic Journal of Law.

38 PIAC transcript, public hearing 6 June 2005, p. 72.

39 AGD transcript, public hearing 19 May 2005, p. 25; AGD, supplementary submission no. 102, p. 20.

40 AGD supplementary submission no. 102, p. 20.

41 Paragraph 34D (1) (a) and subsection 34C (4).

warrant but must issue the warrant, in the same terms as that consented to by the Minister or reject it.[42]

2.34 The issuing authority who gave evidence to the Committee advised that the written briefs accompanying the requests for warrant were extensive and included a statement expressing the opinion that the information could not be obtained through other means.[43] However, he also agreed that he had no means of testing the statement.

2.35 The Committee notes that, in the criminal law context, an officer is not necessarily required to demonstrate that information can be obtained another way.[44] However, there is a persuasive argument that, in the context of extraordinary and coercive powers that are to be used as a measure of last resort, the issuing authority should be independently satisfied that other methods of collection would not be effective. This will require ASIO to provide a factual basis to their claim that other methods of intelligence gathering would not be effective. It will also act as a strong safeguard against potential misuse of coercive questioning powers, for example, to lay the groundwork for charge of false and misleading information, where the information is already known to the agency.

Recommendation 1

The Committee recommends that the issuing authority be required to be satisfied that other methods of intelligence gathering would not be effective.

2.36 At the time of the inquiry, there had been no request for a detention warrant. Consequently, there is no evidence before the Committee about the efficacy of the present statutory requirements.[45]

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42 Subsection 34D (2) (5).

43 Transcript, classified hearing 6 June 2005, p. 1.

44 The Committee notes that it is not a requirement for the issue of a warrant under Part 1 AA of the *Crimes Act 1914*, that an applicant disclose to an issuing officer the possibility that documents could be obtained through a mechanism other than a search warrant., see Donaghue S., *Search Questions: The Validity of Search Warrants under Pt 1AA of the Crimes Act 1914*, (1999) 23(1) Crim LJ 8 p. 16.

45 HREOC transcript, public hearing 20 May 2005, p. 16; Joo-Cheong Tham submission no. 35, p. 18; VLA transcript, public hearing June 7 2005, p. 36.

Distinction between questioning-only and questioning and detention warrants

2.37 During the course of the Committee's inquiry, the lack of legislative clarity in the distinction between a questioning-only warrant and warrants for detention and questioning emerged as a consistent theme. While a complete duplication of provisions would be undesirable, it is clear that the legislation is difficult to read, even for experienced legal practitioners, and this has given rise to considerable confusion in the community and the legal profession. [46]

2.38 Mr. Ian Carnell, the IGIS, has stated that:

> There would be merit in having the greatest possible clarity in distinguishing between those provisions which are specific to 'questioning and detention' warrants, from those provisions which refer specifically to 'questioning' only warrants. This comment also applies to the protocol required under the ASIO Act.
>
> The current arrangement is complex in parts and any move to simplify the existing structure would assist the subject, their legal representatives and the community generally to understand an important and sensitive piece of legislation.[47]

2.39 The lack of clarity adversely affects both the accessibility of the law and the capacity of individuals to exercise their rights and duties under the law. During hearings, the IGIS proposed that if a lawyer for a person who is subject to a warrant is to advise his or her client properly, these provisions 'need to be as crystal clear as possible'.[48]

2.40 The current confusion is due, in part, to the history and development of the legislation which was initially conceived of as primarily a detention regime. It is sufficient to note that the emphasis on the detention of persons meant there was no clear distinction between, for example, a summons to appear for an examination and a warrant for arrest where the person breached the summons. Bi-partisan agreement to modify the original scheme resulted in a number of amendments, and while many of amendments strengthened the safeguards in the legislation, it also contributed to a more complex

46 IGIS transcript, public hearing 20 May 2005, p. 8.

47 IGIS submission no. 74, p. 9.

48 IGIS transcript, public hearing 20 May 2005, p. 9.

piece of law which contains a number of inconsistencies and ambiguities.

Provisions in relation to warrants

2.41 For example, section 34D, entitled 'Warrants for questioning etc.', confers the discretion on an issuing authority to issue, subject to certain conditions, warrants for questioning and for questioning and detention. It encompasses, amongst other things, the threshold tests that must be satisfied for the issuing of a warrant[49]; the procedural requirements that must be met if the application is for a repeat detention warrant;[50] the authority to require a person to appear for questioning;[51] and the authority for a police officer to take a person into custody and bring that person before a prescribed authority.[52]

2.42 Section 34D also deals with the critical issue of the individual's right to contact with the outside world and access to lawyers, and permits certain conditions to be applied. In contrast to the clear, but qualified, right of access to a single lawyer of choice for the subject of a detention warrant under section 34C (B), the right of access to a lawyer for a person who is subject of a questioning-only warrant is discretionary.[53] Issues concerning access of legal representation are dealt with more fully in Chapter 3.

Directions by the prescribed authority

2.43 Section 34F, which provides for a wide range of directions that may be made by the prescribed authority, operates under the heading, 'Detention of persons', and confers powers on the prescribed authority to make certain directions consistent with the warrant. Those directions include directions for further questioning, for detention, contact with lawyers and family and so forth. Despite the heading, the list of directions clearly relates to a person whether he or

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49 Subsection 34D (1).

50 Subsection 34 D (1A).

51 Paragraph 34D (2) (a).

52 Paragraph 34D (2) (b).

53 A warrant for detention must permit the person to contact 'identified persons' at 'specified times' when he or she is in custody or detention (subparagraph 34D (2) (b) (ii)); and may specify the times at which a detainee may contact their lawyer of choice, subject to right of ASIO to object to that lawyer (subparagraph 34D (4A) (a) (b) (I) (ii) (iii) and section 34TA). Note 3 of subsection 34D (4) is a signpost to subsection 34C (3)). Patrick Emerton transcript public hearing 7 June 2005, p. 25.

she is the subject of a questioning-only warrant or a warrant for detention and questioning.[54]

2.44 The legislation should provide greater distinction between the type of conditions that can be imposed and directions that can be made in relation to a person under a questioning-only warrant compared to a questioning and detention warrant. Further matters relating to periods of detention and periods of questions are discussed in more detail below.

Recommendation 2

The Committee recommends that, in order to provide greater certainty and clarity to the operation of the Act, the legislation be amended to distinguish more clearly between the regimes that apply to a person subject to a questioning-only warrant and that applying to detention.

Regulating periods of detention

2.45 Further confusion has arisen over the period of detention that is provided for under a detention warrant and the link between detention and permissible periods of questioning.

2.46 Paragraph 34D (2)(b)(i) limits the periods of detention to the 'questioning period(s)' described in paragraphs 34D (3)(a)(b) and (c). The provisions must in turn be read in conjunction with section 34HB, headed 'End of questioning under warrant'. Although the intention appears to be to link the detention to the questioning, the provisions are ambiguous. First, it is possible to interpret the provisions as applying to both questioning-only and detention warrants. Second, the provisions probably do not achieve the purpose of ensuring that detention is for the shortest period necessary (see below).

2.47 Under subsection 34D (3) the 'questioning period' (detention period) starts when a person is first brought before the prescribed authority and must end when either:

- ASIO has no further questions to ask;[55]

54 The heading is not an indication that the Government has accepted the view the compulsory questioning is *per se* a form of detention.

55 Paragraphs 34D (3) (a) and 34D (5) (a).

- Section 34HB applies – that is, a period of 8 hours or 16 hours has expired and the prescribed authority does not permit further questioning to continue;[56]
- The maximum 24 hours of questioning has been reached or 48 hours where an interpreter is used;[57]
- the person has been detained for 168 hours (7 days) continuously since they were first brought before the prescribed authority.[58]

2.48 The 'questioning period' is a technical term and AGD agreed that:

> The terminology (questioning period) is potentially confusing and misleading as the term is only used in the context of a warrant authorising detention (and not for a questioning-only warrant).

2.49 The Committee welcomes AGD proposal to amend the provision to refer to 'detention periods' instead of 'questioning periods' to alleviate the confusion.[59] However, two further issues remain unresolved and further clarification may be necessary.

Detention beyond that required for questioning

2.50 Professor George Williams has argued that the effect of subsection 34D(3) and section 34HC may be to enable the executive to detain a person for a period which goes beyond the purpose, namely of gathering intelligence related to a terrorism offence. During the second reading debate, the then Attorney-General, the Hon Daryl Williams QC, stated that the intention of the warrant is to:

> allow a total of 24 hours of detention for questioning in eight-hour blocks over a maximum period of seven continuous days, or 168 hours. [60]

2.51 Professor Williams suggested that:

> after a person is questioned – assuming they answer truthfully, appropriately and do not give rise to the criminal

56 Paragraph 34D (3) (b) and subsection 34HB (1) (2) (3) (4) (7).
57 Subsections34HB (6) and 34HB (8) (9) (10) (11) (12).
58 Paragraph 34D (3) (c) and section 34HC.
59 AGD submission no. 84, p. 27.
60 House of Representative Hansard, 26 June 2003, p. 17657.

provisions – they can then be held for a period of up to a week.[61]

If detention were to continue beyond that necessary for the purpose of questioning, it may be considered punitive by the High Court.[62] The High Court has held that administrative detention which is punitive is unconstitutional. Punitive detention can only be authorised by a Chapter III court.[63]

2.52 As there is now no need to obtain further warrants for questioning beyond 48 hours (the original scheme), it is even more important to ensure a clear connection between the detention and questioning for the purpose of intelligence gathering.[64] Although detention for up 168 hours is intended to be the maximum, there is no incentive for questioning to be done more expeditiously and for the detention period to be minimised.[65]

Recommendation 3

The Committee recommends that the Act be amended to achieve a clearer understanding of the connection between the period of detention and the allowable period of questioning.

Regulation of questioning periods

2.53 Section 34HB regulates the periods of questioning that are permitted under a questioning-only and a questioning and detention warrant. It limits questioning periods to 8 and 16-hour blocks and sets a maximum limit of 24 hours.[66] The prescribed authority may permit the continuation of questioning; and requests for the continuation of

61 Professor George Williams transcript, public hearing 20 May 2005, p.37.

62 Professor George Williams transcript, public hearing 20 May 2005, pp.31, 32.

63 *Lim v Minister for Immigration* (1992) 176 CLR 1, 28-29; *Kable v Director of Public Prosecutions (NSW)* (1995) 189 CLR 51,97,131; *Kruger v Commonwealth (Stolen Generations Case)* (1997) 190 CLR 1, 84,109,161.

64 Carne G., *Detaining Questions or Compromising Constitutionality? The ASIO Legislation Amendment (Terrorism) Act 2003 (Cth*), UNSW Law Journal 27(2) p.556.

65 Section 34HC provides that a person may not be detained under this Division for a continuous period of more than 168 hours.

66 Subsection 34HB (1) (2) and (6).

questioning may be made in the absence of the person being questioned, their legal adviser, parent or guardian.[67]

2.54 In these circumstances, it is unclear whether the requirement, that anyone exercising authority under a warrant must ensure that questioning stops at 24 hours, applies.[68]

2.55 The Law Council of Australia raised a concern that the present provisions allow a person to be questioned for 24 hours without a break and that this amounts to a form of detention.[69] In practice, of the 13 people questioned under the 14 warrant to date, nine were questioned for less than 8 hours, four were questioned for between 10 and 16 hours and in one case, where an interpreter was required, the subject was questioned for over 42 hours. However, in none of these cases was questioning conducted continuously without breaks, and, in fact, the subjects went home between questioning sessions. Two examples of questioning periods are provided in Chapter 1.

2.56 The Protocol requires that a subject must not be questioned continuously for more than 4 hours without being offered a break.[70] The break must be a minimum of 30 minutes' duration. A subject may elect to continue questioning without taking a break, or after taking a break shorter than 30 minutes, provided the prescribed authority is satisfied that this is entirely voluntary.

2.57 The Protocol is not a legislative instrument and may not be directly enforceable in the courts.[71] However, its application is relevant to the prohibition on cruel, inhuman or degrading treatment or punishment. That aside, neither the legislation nor the Protocol, contains an express prohibition on the continuous questioning of a person for the maximum 24-hour period or 48 hours, where an interpreter is required.

2.58 Clarification in the statute would remove some of the concern about the possibility of extended periods of questioning and the excessive burden this may place on subjects. The legislation could be redrafted to prohibit continuous questioning over an extended period, and more accurately reflect the requirements of the Protocol. In addition,

67 Subsection 34HB (3). Paragraph 34HB (3) (e) and (f) also permit a request be made in the absence of another person who meets the requirements of subsection 34NA (7); and anyone the person is permitted to contact by a direction under section 34F.

68 Subsection 34HB (6); Patrick Emerton transcript, public hearing, 7 June 2005, p. 3.

69 Law Council of Australia transcript, public hearing 6 June 2005, p. 25.

70 Subsection 4.4 ASIO Protocol made pursuant to subsection 34C (3A) of the ASIO Act.

71 Women's International League for Peace and Freedom submission No.17, p. 59.

the duty of the prescribed authority to oversee the questioning process and enforce the standards of the Act and the Protocol should be clearly provided for in the legislation.[72]

Questioning over the period of a valid warrant

2.59 The IGIS has also expressed concern about the intersection of provisions which deal with periods of questioning (section 34HB) and the 28 day period that a warrant may be in force (subsection 34D(6)).

2.60 While a person may not be detained for more than 168 hours continuously, it is not clear whether questioning under a questioning-only warrant should also be limited to no more than seven days. There is no limitation under section 34HB on the period over which questioning may take place, which suggests that questioning may take place at any time while the warrant is valid, up to 28 days.[73] In practice, this has been the case. Two illustrations of this are provided in Chapter 1 at pages 17 and 18. To date there have been no challenges to this process.

72 See Role of the prescribed authority, Chapter 3.

73 Subject to the limitation that questioning may only occur for a maximum of 24 hours or 48 hours if an interpreter is used. Paragraph 34D (6)(b) provides that the warrant must specify the period during which the warrant is to be in force, which must not exceed more than 28 days.