
The Parliament of the Commonwealth of Australia

ASIO's Questioning and Detention Powers

**Review of the operation, effectiveness and implications of
Division 3 of Part III in the *Australian Security Intelligence
Organisation Act 1979***

Parliamentary Joint Committee on ASIO, ASIS and DSD

November 2005
Canberra

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Foreword

The *ASIO Legislation Amendment (Terrorism) Bill 2002* was passed by the Parliament following three separate parliamentary committee reports, including a major review conducted by this Committee, and significant compromises to accommodate the range of views across the political spectrum. The questioning and detention powers were eventually passed by the Parliament with bipartisan support.

One amendment to the Bill arising from this long process of parliamentary review and debate was a three-year sunset clause. Section 34Y of the *ASIO Act 1979* provides that the questioning and detention powers established by Division 3 of Part III of the Act will cease to be in force from 23 July 2006. The Committee's review is thus designed to precede and inform consideration by the Government and the Parliament of the need to legislate again for these provisions or some variation of them.

The significance of January 2006 as the completion date of the Committee's review is that the emergency provisions of Division 3 of Part III cease to have effect in July 2006. The Committee's recommendations therefore form part of the process of deciding whether to re-enact these provisions, and if so with what, if any, amendment.

The PJCAAD's review covers the operation since July 2003 of the important new powers currently available under legislation to the Australian Security Intelligence Organisation (ASIO), the Commonwealth's domestic security intelligence agency.

ASIO is responsible for protecting Australia and its people from espionage, sabotage, politically motivated violence including terrorism, and the promotion of communal violence, attacks on Australia's defence system and acts of foreign interference. ASIO carries responsibility for these matters 'whether directed from, or committed within, Australia or not.' ASIO also has responsibility for 'the

carrying out of Australia 's responsibilities to any foreign country' in relation to the same matters.¹

Division 3 of Part III of the ASIO Act enables ASIO to obtain a warrant from an 'issuing authority' for a person to appear before a 'prescribed authority' for questioning in order to obtain intelligence that is important in relation to a terrorism offence. A warrant may also provide for a person to be detained for questioning if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority, or may destroy or damage evidence.

Significantly, it is not necessary for an adult to be suspected of or charged with a terrorism offence for a questioning or detention warrant to be issued. The purpose of detention is to gain information, not to lay charges which might lead to prosecution. The primary threshold is whether 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'.²

The conduct of this review

Information about the review was advertised in the *Australian* newspaper on Friday, 17 January 2005. Details about the inquiry and a background paper prepared by the Committee Secretariat were made available on the Committee's website. In addition, the Committee sought submissions from the Attorney-General, ASIO, a wide range of other government agencies, non-government organisations and individuals. One hundred and thirteen submissions were received.

An important issue in the conduct of the Committee's review has been the application of the secrecy provisions of the legislation to the conduct of the inquiry itself. Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* requires the Committee to review the 'operation, effectiveness and implications' of the legislation. At the same time, however, it appeared that persons who have been subject to questioning warrants and their legal advisers would be severely constrained, if not prohibited, from disclosing publicly or privately any information relating to the issuing of a warrant or the questioning or detention of a person in connection with the warrant.

This was a matter of concern to the Committee as it sought to undertake as thorough a review as possible, while not wishing to expose individuals who might wish to give evidence before the Committee to any serious legal ramifications.

¹ See the definition of 'security' in section 4 of the *ASIO Act 1979*.

² See paragraph 34C (3) (a) of the *ASIO Act 1979*.

While it is clear these secrecy provisions guard against the release of information that might jeopardise or compromise sensitive intelligence collection operations, such secrecy associated with new and controversial legislation is of concern both for the Committee's review and for the longer term scrutiny of the legislation.

The Committee sought advice from the Clerks of both Houses and then asked Mr Bret Walker, SC, for an opinion on the rights of witnesses and the powers of the Committee to hear evidence given the restrictions of both the *Intelligence Services Act 2001* under which the Committee operates and the *ASIO Act 1979*, with its strict secrecy provisions at section 34VAA.

The opinion from Mr Walker³ advised the Committee that the provisions of section 34VAA of the ASIO Act have no effect whatsoever on the activities of persons including members of the Committee, the Committee staff, prospective witnesses, witnesses and persons assisting, for example, agency heads in providing information required by the Committee (within lawful limits as noted above). So long as those activities comprise part of or are being engaged in for the purposes of conducting or complying with the requirements of the mandatory review entrusted to the Committee by Parliament in subpara 29(1)(bb)(i) of the Intelligence Services Act, those persons will not be committing any offence of the kind created by those provisions. However, the Committee was required to operate, in the taking of evidence, within the limits placed on it by the Intelligence Services Act. To allay fears that had been expressed to the Committee about the possible liability of witnesses, the Committee produced a statement to witnesses explaining their position and directing them to the legal opinion on the website.⁴

During the inquiry, the Committee received evidence from ASIO, Attorney-General's Department (AGD) and the Australian Federal Police (AFP) at a public hearing on 19 May. ASIO, AGD and AFP gave further evidence in-camera on 19 May, and evidence was also heard in-camera from the prescribed authority. On 6 June in Sydney and on 7 June in Melbourne evidence was heard in-camera from some of the lawyers for the subjects of warrants and from the issuing authority. Final in-camera hearings were held on 8 August and 18 August in Canberra.⁵

The report recommends a range of additional measures if Division 3 of Part III of the *ASIO Act* is to continue to have effect beyond 23 July 2006.

³ The full opinion is available on the Committee's website at http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/Walker%20opinion.pdf

⁴ A copy of this statement to witnesses is available at Appendix E.

⁵ A list of witnesses appearing at the hearings can be found at Appendix B. Copies of the transcripts of evidence from the public hearings and the volumes of unclassified submissions are available from the Committee Secretariat and at the Committee's website.



Membership of the Committee

Chair	The Hon David Jull MP	
Members	Mr Stewart McArthur MP	Senator Alan Ferguson
	The Hon Duncan Kerr SC MP	Senator The Hon Robert Ray
	Mr Anthony Byrne MP	Senator Sandy Macdonald (till 6 July 2005) Senator Julian McGauran (from 8 September 2005)

Committee Secretariat

Secretary	Ms Margaret Swieringa
Inquiry Secretary	Ms Sonya Fladun (till 20 April 2005)
	Ms Jill Greenwell (from 2 May 2005 till 11 July 2005)
	Ms Jane Hearn (from 11 July 2005)
Research Officers	Dr Cathryn Ollif (from 16 May 2005)
	Mr Alexander Seccombe (from 8 June 2005 to 9 September 2005)
Executive Assistant	Mrs Donna Quintus-Bosz



Terms of reference

29 Functions of the Committee are:

(bb) To review, by 22 January 2006, the operation, effectiveness and implications of:

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

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

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



List of abbreviations

AAT	Administrative Appeals Tribunal
ACC	Australian Crime Commission
AFP	Australian Federal Police
AGD	Attorney-General's Department
AGS	Australian Government Solicitor
AMCRAN	Australian Muslim Civil Rights Advocacy Network
ASIC	Australian Securities and Investment Commission
ASIO	Australian Security Intelligence Organisation
ASIS	Australian Secret Intelligence Service
DSD	Defence Signals Directorate
FCLC	Federation of Community Legal Centres
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Commission of Jurists
ICNSW	Islamic Council of New South Wales
ICV	Islamic Council of Victoria

IGIS	Inspector-General of Intelligence and Security
LCA	Law Council of Australia
LIV	Law Institute of Victoria
NACLC	National Association of Community Legal Centres
PIAC	Public Interest Advocacy Centre
PJCAAD	Parliamentary Joint Committee on ASIO, ASIS and DSD (The Committee)
UTS	University of Technology Sydney
VCCR	Vienna Convention on Consular Relations
VLA	Victoria Legal Aid



List of recommendations

2 Questioning and detention regime

Recommendation 1

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

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.

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.

3 Legal representation and access to complaint mechanisms

Recommendation 4

The Committee recommends that:

- a person who is the subject of a questioning-only warrant have a statutory right to consult a lawyer of choice; and
- the legal adviser be entitled to be present during the questioning process and only be excluded on the same grounds as for a detention warrant, ie where there are substantial reasons for believing the person or the person's conduct may pose a threat to national security.

Recommendation 5

The Committee recommends that subsection 34U (4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority.

Recommendation 6

The Committee recommends that Division 3 Part III be amended to provide a clearer distinction between procedural time and questioning time.

Recommendation 7

The Committee recommends that:

- Subsection 34U (2) be amended and communications between a lawyer and his or her client be recognised as confidential; and
- adequate facilities be provided to ensure the confidentiality of communications between lawyer and client in all places of questioning and detention.

Recommendation 8

The Committee recommends that, in the absence of separate statutory right of judicial review, that a note to s34E be adopted as a signpost to existing legal bases for judicial review.

Recommendation 9

The Committee recommends that Regulation 3B be amended to allow the Secretary to consider disclosing information, which is not prejudicial to national security, to a lawyer during the questioning procedure.

Recommendation 10

The Committee recommends that:

- the supervisory role of the prescribed authority be clearly expressed; and
- ASIO be required to provide a copy of the statement of facts and grounds on which the warrant was issued to the prescribed authority before questioning commences.

Recommendation 11

The Committee recommends that:

- a subject of a questioning-only warrant have a clear right of access to the IGIS or the Ombudsman and be provided with reasonable facilities to do so; and
- there be an explicit provision for a prescribed authority to direct the suspension of questioning in order to facilitate access to the IGIS or Ombudsman provided the representation is not vexatious.

Recommendation 12

The Committee recommends that an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers be provided.

Recommendation 13

The Committee recommends that reasonable financial assistance for legal representation at rates applicable under the Special Circumstances Scheme be made available automatically to the subject of a section 34D warrant.

Recommendation 14

The Committee recommends that the Commonwealth establish a scheme for the payment of reasonable witness expenses.

5 Implications for democratic and liberal processes

Recommendation 15

The Committee recommends that the penalty for disclosure of operational information be similar to the maximum penalty for an official who contravenes safeguards.

Recommendation 16

The Committee recommends that the term 'operational information' be reconsidered to reflect more clearly the operational concerns and needs of ASIO. In particular, consideration be given to redefining section 34VAA(5).

Recommendation 17

The Committee recommends that:

- consideration be given to amending the Act so that the secrecy provisions affecting questioning-only warrants be revised to allow for disclosure of the existence of the warrant; and
- consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority.

Recommendation 18

The Committee recommends that ASIO include in its Annual Report, in addition to information required in the Act under section 94, the following information:

- the number and length of questioning sessions within any total questioning time for each warrant;
- the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court; and
- if any, the number and nature of charges laid under this Act, as a result of warrants issued.

6 Continuation of the legislation

Recommendation 19

The Committee recommends that:

- Section 34Y be maintained in Division 3 Part III of the *ASIO Act 1979*, but be amended to encompass a sunset clause to come into effect on 22 November 2011; and
- Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011.

Operation of the legislation

- 1.1 At the first hearing, an initial and central question on the operation of Division 3 Part III was put to both ASIO and the Attorney-General's Department:

Senator Ray: Putting aside the question of the sunset clause, in giving evidence today, are you arguing for any increased powers in the existing legislation ...?

Mr Richardson: No.

Mr McDonald: With us the answer is no as well. In fact the amendments we included in our submission are about clarifying the powers, probably in the direction of the rights of the individual.

Senator Ray: Director-General, you are satisfied that the existing powers equip you to do the job you need to do?

Mr Richardson: Yes.

- 1.2 The Committee reviewed the operations of the existing provisions. There is, therefore, no expectation that the Act which will be re-introduced into the Parliament next year will contain amendments which would increase any powers.

Current provisions for questioning and detention

- 1.3 The relevant provisions of Division 3 of Part III of the ASIO Act are provided at [Appendix D](#).
- 1.4 The legislation enables ASIO to obtain a warrant from an ‘issuing authority’ for the questioning of a person before a ‘prescribed authority’ in order to obtain intelligence that is important in relation to a terrorism offence. A warrant may also provide for a person to be detained for questioning if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority, or may destroy or damage evidence.
- 1.5 Warrants for questioning and detention have no effect in relation to persons under 16 years of age and may only be issued in relation to persons aged between 16 and 18 years if it is likely that the child will commit, is committing, or has committed a terrorism offence.
- 1.6 The subject of a warrant cannot be detained for more than 168 hours. They can be questioned under a warrant for no more than a total of 24 hours and once they have been questioned for this period of time they must be released – unless they have used an interpreter, in which case they can be questioned for up to 48 hours. Questioning can occur in blocks of up to eight hours for adults and two hours for persons aged between 16 and 18 years. There appears to be some confusion in the Act as to the time limit of 168 hours, which appears to apply to both questioning and questioning and detention warrants, and the length of a warrant, which is 28 days.¹ The Attorney-General’s Department described this as an issue requiring clarification. The department’s submission asserts that the meaning of the ‘technical’ term ‘questioning period’ is used to cover the period in which a person is detained’ and presumably not to a questioning only warrant.² This is not clear in the current legislation.
- 1.7 Questioning is conducted in the presence of a ‘prescribed authority’. ‘Prescribed authorities’ are initially drawn from the ranks of former superior court judges. If there are insufficient former judges, then serving superior court judges can be appointed. If there are insufficient serving judges then a President or Deputy President of the

1 See Chapter 2.

2 AGD submission, pp. 26-27.

Administrative Appeals Tribunal (AAT) can be appointed, so long as that person holds legal qualifications.

- 1.8 The ASIO Act also provides for a protocol setting out standards which must be adhered to when questioning and detention occur under a warrant.
- 1.9 The protocol has been developed and issued by the Director-General of Security after consulting with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police. The protocol was also approved by the Attorney-General and presented to each House of Parliament. The PJCAAD was briefed in writing, about the protocol.
- 1.10 The protocol covers such things as the treatment of a person undergoing questioning (eg when breaks in questioning must be taken, access to drinking water and toilet facilities), facilities related to health and welfare (such as food and accommodation), and video recording of procedures. The text of the Protocol is at [Appendix E](#).
- 1.11 As mentioned above, the *ASIO Legislation Amendment Act 2003* also introduced secrecy provisions into the legislation which prohibit:
 - (i) while a warrant is in force (up to 28 days), disclosure of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant; and
 - (ii) while a warrant is in force and during the period of two years after the expiry of the warrant, disclosure of any ASIO operational information acquired as a direct or indirect result of the issue of a warrant, unless the disclosure is permitted under another provision.
- 1.12 The penalty for infringing these provisions is a maximum of 5 years imprisonment.

Operation of the legislation

- 1.13 The Attorney-General's Department (AGD), ASIO, the Australian Federal Police (AFP), and the Inspector General of Intelligence and Security (IGIS) all provided submissions and gave evidence on the operations of the Act. In addition, the Committee took evidence from one of the prescribed authorities, one of the issuing authorities and three of the lawyers for the subjects of warrants.

- 1.14 Prior to the conduct of the Committee's review, very few details about the operation of the legislation were publicly available. ASIO is concerned to maintain the security of sensitive counter-terrorism investigations. Moreover, as referred to above, the strict secrecy provisions of the legislation prevent the disclosure of certain information by persons subject to a warrant or by their legal representatives for up to two years after the expiry of the warrant.
- 1.15 However, it is the Committee's view that this process of review, without impinging on sensitive matters of national security, should make public as much information as possible about the operations of the Act. It is vital if public understanding of the processes is to be accurate and public confidence is to be maintained. It was clear to the Committee during the course of the inquiry that the secrecy surrounding the operation of the Act has sometimes been counter productive to these aims.³ Moreover, although the Committee acknowledges that investigations can span long periods of time, the review, of its nature, will generally occur at some distance from any individual questioning warrant. Furthermore, in respect of the secrecy provisions of the Act (section 34VAA), evidence on the operations of the Act given to the Committee in its role of statutory oversight is protected, albeit subject to the caveats on disclosure in the *Intelligence Services Act 2001*.⁴
- 1.16 The extent of public reporting and the operations of the secrecy provisions will be canvassed in more detail in Chapter 5.

Warrants

Numbers and types

- 1.17 In accordance with the reporting requirements of subsection 94(1A) of the ASIO Act, ASIO provided the following information on the operation of the questioning and detention regime through its Annual Report to Parliament 2003-2004,⁵ the first year of the operation of the legislation:

3 Mr Richardson expressed frustration at misunderstandings in the community about the legislation: 'It does not always help when some people make over-the-top comments about the legislation - that is, that we have the right to go into anyone's home at any time of the day or night, pull them out of bed and detain them for seven days.' ASIO transcript, public hearing 19 May 2005, p. 28.

4 See advice from Mr Bret Walker on the Committee website.

5 ASIO Annual Report, 2003-2004, pp. 39-40

- The number of requests made under section 34C to issuing authorities during the year for the issue of warrants under section 34D: 3
- The number of warrants issued during the year under section 34D: 3
- The number of warrants issued during the year that meet the requirement in paragraph 34D(2)(a) (about requiring a person to appear before a prescribed authority): 3
- The number of hours each person appeared before a prescribed authority for questioning under a warrant issued during the year that meets the requirement in paragraph 34D(2)(a) and the total of all those hours for all those persons:

Questioning Warrants 2003-2004	
Person 1	15 hours, 57 minutes
Person 2	10 hours, 32 minutes
Person 3	42 hours, 36 minutes (interpreter required)
Total Hours	69 hours, 5 minutes

- The number of warrants issued during the year that meet the requirement in paragraph 34D(2)(b) (for authorising a person to be taken into custody, brought before a prescribed authority and detained): 0
- The number of times each prescribed authority had people appear for questioning before him or her under warrants issued during the year: 3 people appeared before the same authority.

1.18 In its submission to the Committee in May, ASIO advised that the following additional warrants were issued:

Questioning warrants 2004-2005	
Person 4	15 hours, 50 minutes
Person 5	5 hours, 17 minutes
Person 6	5 hours, 59 minutes
Person 7	12 hours, 49 minutes
Person 8	2 hours, 38 minutes
Total Hours for 8 warrants	111 hours 7 minutes

- 1.19 At the final hearing on 8 August 2005, ASIO notified the Committee of an additional six warrants:

Questioning warrants 2005	
Person 9	5 hours 24 minutes
Person 10	4 hours 5 minutes
Person 11	4hours 5 minutes
Person 12	1 hour 38 minutes
Person 13	5 hours 17 minutes
Person 14	6 hours 2 minutes
Total Hours for 14 warrants ⁶	137hours 38 minutes

- 1.20 In a public speech on 23 March 2005, the Director-General of Security indicated that while the ASIO Act's questioning power had been utilised, the detention power had not.⁷ However, Mr Richardson did report to the Committee that ASIO had considered issuing a detention warrant on one occasion. This was not pursued 'on the basis, firstly, of a judgement that we came to that the issue was not as imminent as we had initially thought and, secondly, on the basis of legal advice that the case was marginal.'⁸ By the end of the review, there had still been no detention warrants issued.
- 1.21 No minor, between the ages of 16 and 18, has been detained or questioned. No one has been strip searched.⁹

Procedures: prescribed authorities & issuing authorities

- 1.22 With respect to the issuing of warrants, the Attorney-General's Department must review the warrants to ensure they meet the legislative requirements. The department reported that it had made only minor amendments to warrants issued to date.¹⁰

6 Although 14 warrants have been issued they have covered 13 people as one person was the subject of two warrants.

7 Speech by the Director-General of Security, Mr Dennis Richardson, LawAsia Conference, 23 March 2005.

8 ASIO transcript, public hearing 19 May 2005, p. 11 and classified hearing 19 May 2005, p. 2.

9 ASIO transcript, public hearing 19 May 2005, p. 5.

10 AGD submission no. 84, p. 23.

- 1.23 The role of the Attorney-General's Department is largely a procedural one. The department's submission provided little specific evidence on the actual use of the powers, as they pertained to the department, in relation to any specific warrant. They reported to the Committee that the department was responsible for the appointment of the prescribed authorities and issuing authorities. At the time of writing, they had appointed and retained 25 people in five states as prescribed authorities, all former judges. It had not been necessary to use current, Territory Supreme or District Court judges or the President or Deputy President of the AAT. The officers from the Attorney-General's Department advised the Committee that '[they] have not had any difficulty with recruitment.'¹¹
- 1.24 Senator Ray asked whether, in the light of this experience and given the anxieties over the potential conflict of interest associated with AAT appointments, this category of appointments should not be deleted from the legislation.¹² The department did not agree with the suggestion. They saw the prescribed authorities as performing a vital role and they foresaw problems if there were to be insufficient numbers in a particular jurisdiction in the future. They noted that the order of priority for selection of prescribed authorities was set in the act with precedence being given to former judges.¹³
- 1.25 Six issuing authorities have been appointed from four states, all in compliance with the Act. The Attorney-General's Department liaises with both authorities on questions of process in order 'to minimise direct contact between these authorities and ASIO [and]... to ensure the authorities are as impartial as possible during the questioning process.'¹⁴
- 1.26 ASIO has used four issuing authorities in various states:
- 1 for 11 warrants
 - 3 for 1 warrant each.
- 1.27 ASIO has used four prescribed authorities in various states:
- 1 for 8 warrants
 - 2 for 5 warrants
 - 1 for 1 warrant.
-

11 AGD transcript, public hearing 19 May 2005, p. 25.

12 Transcript, public hearing 19 May 2005, p. 33.

13 AGD supplementary submission no.102, p. 19.

14 AGD submission no. 84, p. 24.

- 1.28 To date, the Attorney-General has not rejected any request for a warrant which the Director-General of Security has made. None of the issuing authorities has rejected a request for a warrant made by the Attorney-General.¹⁵ The issuing authority, who gave evidence to the inquiry¹⁶, informed the Committee that the written briefs accompanying the requests for warrants were very extensive and the quality of information was appropriate.¹⁷ The issuing authority also noted that there was usually an opinion within the brief that the information sought could not be obtained by other means.¹⁸ This criterion is not a test required of the issuing authority under the Act and he did note that he had no way of testing the assertion. Moreover, he had no way of knowing whether the subsequent questioning remained within the terms of the warrant as issued.¹⁹ The issuing authority who spoke to the Committee had not sought to make amendments to any of the draft warrants presented to him.
- 1.29 Neither the prescribed authority nor the lawyers for the subjects of warrants receives the comprehensive briefs of material supplied by ASIO to the Attorney-General or to the issuing authority when requesting a warrant. While the Committee believes that it is not appropriate for this brief to go to the lawyer, in respect of the prescribed authority, this raises the question of his capacity to control the scope or relevance of the questioning.²⁰

Specificity of warrants

- 1.30 A question was raised with the Committee about how specific the warrants were.²¹ The issuing authority indicated that the briefs accompanying warrants had much quite specific information within them; however, there were questions about whether there was sufficient specificity in the warrants themselves to allow the lawyer to have a discussion with his client, to get instructions and prepare for

15 ASIO transcript, public hearing 19 May 2005, pp.24-25

16 This issuing authority had issued 11 of the 14 warrants issued to date.

17 IA transcript, classified hearing 6 June 2005, p. 1.

18 IA transcript, classified hearing 6 June 2005, p. 1.

19 IA transcript, classified hearing 6 June 2005, p. 2. This, he said, was a problem with all warrants.

20 The implications of this arrangement and a recommendation on specificity of warrants and the level of information provided to the prescribed authority are provided in chapter 3.

21 The specificity on one warrant has been the subject of a complaint. See paragraph 1.61 below.

the questioning.²² Lawyers for the subjects of warrants told the Committee that they and their clients did not see the supporting documentation for a warrant; they saw only the warrant itself. Their view was that 'the warrant on its face is lacking in detail'²³. They argued that:

The trigger for the issue of a warrant is that somebody has information concerning terrorist related offences that are specified in a particular part of the Criminal Code. It might be a series of offences or it might be a series of suspected offences, but at the very least a warrant should have on its face what sections of the Criminal Code the agency is investigating because, in a sense, they are investigating whether or not somebody has information that relates to specific charges.²⁴

[A]ny rights, such as they are, which exist in the act to make application to the Federal Court or to make complaint are in my experience rendered almost ineffective or inoperable because it is impossible as a responsible legal practitioner to give your client advice about the merits of any actions, causes of any actions or likelihood of any success in a vacuum or absence of information.²⁵

- 1.31 One lawyer explained that the lack of specificity affected the possible scope of the questioning and appeared to infringe the intentions of the act:

[I]t seems to me that if after 12 hours of questioning I, as a reasonably intelligent lawyer, cannot work out what they are getting at then the scope of the questioning was just far too broad. ... that would not seem to me to satisfy the legislative requirements of the Act for having a warrant issued.²⁶

- 1.32 This was a matter of some concern to the Committee. The Committee acknowledges that the detail on the warrant should not be such that it disclosed sensitive information with which ASIO is working; however, the secrecy provisions of the Act protect the information in the warrant not only from general public knowledge, but from disclosure beyond the people involved in the questioning itself.
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22 Lawyers transcript, classified hearing, 6 June 2005, p. 5.

23 Lawyers transcript, classified hearing, 6 June 2005, p. 5.

24 Lawyers transcript, classified hearing, 6 June 2005, p. 6.

25 Lawyers transcript, classified hearing, 7 June 2005, p. 1.

26 Lawyers transcript, classified hearing, 7 June 2005, p. 2.

Therefore the purpose of the detail is to guide the prescribed authority in his supervision of the questioning, the questioner in the focus of the questions, the lawyer for the subject of the warrant in his advice to his client, and the IGIS or the Federal Court in their judgement on any complaint or appeal. Specificity is therefore crucial. Mr Patrick Emerton, albeit on the basis of principle rather than specific knowledge, nevertheless expressed concern about the possibility of vague or overly general warrants.

If warrants are being worded in that way – ‘We suspect this person has information relevant to some terrorism offence or other’ – and that is all they say ... If they read like that, I would think that that is outrageous, to be frank.²⁷

- 1.33 The Committee was supplied with a template for a warrant in the ASIO submission. In the course of the hearings, it sought copies of individual warrants from ASIO and the Attorney-General’s Department. It was informed that the only addition to the template was the name of the subject, dates and places to attend. At the final hearing on 8 August 2005, ASIO advised the Committee that:

The fact that no further information is included in the warrant is consistent with the fact that this is an intelligence gathering exercise. It is the practice in the warrant to specify the particular terrorism offences that we assess the person is likely to be able to give information in relation to. ... I know that, in one case only, the warrant did not refer to terrorism offence provisions. We then reverted to the practice of specifying the actual provisions. [However ASIO also explained] there must be a real, practical limitation on how you could address that concern [regarding specificity].²⁸

- 1.34 The implications of this, specifically the need for better guidance as to the lawful scope of the questioning, are discussed in Chapter 3.

Timing of the issuing of warrants

- 1.35 Mr Richardson reported that ASIO always sought to serve warrants at an appropriate time and place²⁹ and as discreetly as possible. Of the fourteen warrants served so far, twelve have been served at the

27 Emerton transcript, public hearing 7 June 2005, p. 32.

28 ASIO transcript, classified hearing 8 August 2005, p. 5.

29 ASIO transcript, public hearing 19 May 2005, p.

person's home and two at the place of work.³⁰ All warrants have included a *Notice* which explained the terms of the warrant in plain English, and on one occasion in Arabic, and outlined both the rights and obligations of the subject.³¹ To date, warrants have been served in sufficient time before the subject has been required for questioning, allowing the subject time to seek legal representation.³² All persons served with a warrant attended on the appointed day and time; no one failed to attend.³³ In relation to the later warrants issued in this review period, there was a complaint about the timing of the questioning. That will be dealt with below when complaints are discussed.

Legal representation

- 1.36 Almost all persons who have been subject to questioning warrants have had access to legal representation at all times.³⁴ There were two exceptions. One, where the legal representative 'did not attend questioning on some occasions.'³⁵ ASIO reported that the subject himself had dispensed with his legal representative.³⁶ Both ASIO and the department reported that the person confirmed that he was 'comfortable with questioning proceeding without the legal representative being present.'³⁷ A second circumstance occurred in one of the additional warrants issued in mid-2005 when a subject did not have a lawyer on the first day, but did after that. The Committee was told that 'it was his choice.'³⁸
- 1.37 No legal representative has been removed under paragraph 34U(5), whereby the prescribed authority may remove a lawyer whose conduct has been unduly disruptive. However, a number of the legal representatives for the subjects of warrants argued that the

30 ASIO classified submission, p. 25.

31 This includes the secrecy provisions of the Act, the right to legal representation, the need to provide all passports to ASIO as soon as practicable, details of the financial assistance scheme.

32 ASIO classified submission, p. 25.

33 ASIO transcript classified hearing, 19 May 2005, p. 19.

34 AGD submission no.84, p. 20.

35 AGD submission no. 84, p. 20.

36 ASIO classified submission, p. 33.

37 AGD submission no. 84, p. 20 and ASIO classified submission, p. 33.

38 ASIO transcript, classified hearing 8 August 2005, p. 4.

prohibition on legal representatives intervening on behalf of their clients was unfair.³⁹

- 1.38 One of the issues raised by some witnesses was the provision in the legislation that relates to the right of ASIO to monitor consultations between lawyers and their clients. **[A sentence has been removed here under protest at the request of ASIO. The Committee did not accept that the content of this sentence constituted a national security concern. The Committee has a statutory responsibility to report to the Parliament on the operations of this provision and regards required deletions that cannot be justified as a violation of that duty.]** The prescribed authority who gave evidence to the Committee put forward the view that he believed that subjects of warrants should have access to a legal representative as a matter of right. He also explained that if a subject or a legal representative wanted to discuss something during a questioning period over which he presided, he, 'without their giving me any reasons, adjourned so that they might speak quietly among themselves.'⁴⁰ In noting this practice, the IGIS was asked whether the right of legal representatives for private consultation should be codified.⁴¹ The IGIS expressed the view that:

Certainly, as a general proposition, where it is a questioning-only warrant, I do not believe there should be such monitoring ...the starting point ought to be that for questioning-only warrants, the sort of monitoring that section 34U envisages is not appropriate. With detention warrants, I can more readily see situations where monitoring - at least visual monitoring - is appropriate.⁴²

- 1.39 The Attorney-General's Department has approved all applications made by the subjects of warrants for financial assistance to cover legal costs.
- 1.40 Issues arising from submissions and possible recommendations relating to legal representation and legal aid will be discussed in Chapter 3.

39 See discussion on the nature of the questioning below.

40 PA transcript, classified hearing 19 May 2005, p.17.

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

42 IGIS transcript, public hearing 20 May 2005, p. 9. NB This matter will be addressed further in Chapter 3.

Process of questioning

The nature of the questioning

- 1.41 The Act provides that the questioning of subjects of warrants is to be videoed and that the Inspector-General of Intelligence and Security may attend. Mr Carnell informed the Committee that he attended 20 of the 21 days of questioning under the first three warrants.⁴³ For subsequent warrants, either he himself or someone from his office has attended the first day of questioning. Where neither he nor his staff has attended on other days, particular attention is paid to the transcript of the proceedings.⁴⁴ Copies of all transcripts and videos of questioning are available to the IGIS and to date have been supplied. The IGIS has asked that the transcripts should be made automatically available to his office, and that the provision be codified at section 34Q, rather than as at present at the discretion of ASIO. The Director-General of ASIO agreed.⁴⁵ The IGIS made a number of other suggestions for legislative amendment in relation to his experience of the operations of the Act. They will be canvassed in Chapter 3.
- 1.42 On request, the Committee was also provided with copies of the video tapes and the transcripts of the questioning for the first 8 warrants. However, the request for the video tapes and the transcripts for the last six warrants was not granted by ASIO. Questioning is conducted by ASIO officers and/or officers from the Australian Government Solicitor's Office. In addition to the prescribed authority and the IGIS, police officers, ASIO advisers, the legal representative of the subject, transcription and audio-visual service personnel are also present, in all more than 10 people. The designations of those present are explained to the subject. The level of potential supervision of the questioning process is, therefore, considerable. The Director-General of ASIO told the Committee that the process was very resource intensive.
- 1.43 Substantial briefs are prepared for the Attorney-General and for the issuing authority and the preparation of these briefs is itself time consuming and resource intensive.⁴⁶

43 IGIS transcript, public hearing 20 May 2005, p.2.

44 IGIS transcript, public hearing 20 May 2005, p.2.

45 ASIO transcript, public hearing 19 May 2005, p. 20. The Director General did point out that the IGIS had a right to copies of the transcripts under his Act; however Mr Carnell pointed out that he wanted the transcripts provided as a matter of course.

46 AGD transcript, classified hearing 19 May 2005, p.11.

- 1.44 The IGIS described the behaviour of officials in relation to the questioning warrants as 'professional and appropriate' and that 'the subjects of warrants were treated with humanity and respect for human dignity',⁴⁷ even in the face of 'abusive and evasive comments.'⁴⁸ The prescribed authority described the nature of the questioning as 'questions merely to get information' rather than cross examination. This, he believed, was 'much fairer'.⁴⁹ From the Committee's observations of the questioning, it was very formal and certainly polite and dispassionate, if persistent.
- 1.45 However, lawyers who represented subjects of warrants have raised concerns about both the general approach to questioning and the nature of the questions asked. They drew a distinction between proper treatment and professional behaviour, which they acknowledged, and the proper legal safeguards necessary for fair treatment.⁵⁰ They doubted whether the questioning was directed at the purpose of the legislation, that is, to gather intelligence that is important in relation to a terrorism offence or to prevent planned terrorist attacks.⁵¹ They described much of the questioning as relating to historic circumstances and with no connection with any imminent terrorist threat. They also believed that the questioning powers were being used to supplement general policing powers, made possible by the lack of a derivative use immunity and by the presence at the questioning of police who seemed to be investigating police, on one occasion State police apparently concerned with a non-terrorist related matter.⁵²
- 1.46 Thus ASIO questioning could become, in a real sense, a de facto police interrogation. These powers are as wide as they are and more powerful than police questioning powers because they are designed
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47 IGIS transcript, public hearing 20 May 2005, p. 1.

48 IGIS address to the Safeguarding Australia 2005 Conference, Canberra, July 2005, p. 12.

49 PA transcript, classified hearing 19 May 2005, p.18.

50 Lawyers transcript, classified hearing 7 June 2005, p.1.

51 The Attorney-General in the second reading speech on the Bill, both on 21 March 2002 and 26 June 2003, indicated that the purpose of the bill was 'to empower ASIO to seek a warrant which allows the questioning and detention of persons who may have information that may assist in preventing terrorist attacks or in prosecuting those who have committed terrorism offences.' And the warrants issued would 'substantially assist in the collection of intelligence that is important in relation to a terrorism offence.' (HR Hansard 21 March 2002, p. 1390) And the powers were to 'give our intelligence agencies vital tools to deter and prevent terrorism ... to identify - and, more importantly, prevent - planned terrorist attacks.' (HR Hansard 26 June 2003, pp. 17668 - 69.)

52 Lawyers transcript, classified hearing 7 June 2005, p.5 and classified hearing 18 August 2005, p. 10.

for use in national security issues, to ward off the threat of imminent terrorist attacks.⁵³

- 1.47 The lawyers objected to some questions on the basis that, in any other forum, including bodies with coercive questioning powers, the questions would be considered objectionable or improper.⁵⁴

For example, it is common practice for ASIO's representatives to ask questions that repeatedly suggest answers⁵⁵ and to continue asking those questions even after they have been repeatedly refuted. ... [and]

It is common for the ASIO lawyer to warn the questioning subject of the dire position they are in if they lie or continue to lie. ... [and]

Some questions posed are not accurately based on the witness's previous answers. Such questions are arguably improper and would normally attract an objection.⁵⁶ [and]

We had had eight hours of questioning that was quite circular and rambling. ... If you are not getting at a particular point, why should you be able to continue with something that is a great imposition on someone's life?⁵⁷

- 1.48 A further complaint was that some questioning was not designed to elicit information, as that information was already in ASIO's possession, but rather to create an offence under section 34G.⁵⁸

[T]racts of questioning were not intelligence gathering; they were for no other purpose than preparing ground for a possible prosecution for giving false and misleading answers.⁵⁹

53 Lawyers transcript, classified hearing 6 June 2005, p. 2. See also comments at the conclusion of this chapter.

54 Whether lawyers should have some capacity to intervene will be considered in Chapter 3.

55 A complaint about suggesting answers was also made in relation to the identification of people. The view was that the methodology used in relation to this was flawed. Lawyers transcript, classified hearing 6 June 2005, p.7.

56 Lawyers transcript, classified hearing 6 June 2005, p. 2.

57 Lawyers transcript, classified hearing, 7 June 2005, p. 2.

58 Lawyers transcript, classified hearing 6 June 2005, p. 9.

59 Lawyers transcript, classified hearing 18 August 2005, p.3.

Questioning periods

- 1.49 At the beginning of a questioning warrant, the prescribed authority is obliged (section 34E) to explain the warrant to the person. The requirements are very specific, covering the rights and obligations of a subject, and it is the Committee's view on the basis of its observations that each prescribed authority performed this function thoroughly. In some cases, these preliminary procedures took half an hour or longer. Questioning time is calculated separately from procedural time.
- 1.50 The ASIO Annual Report listed the questioning warrants issued and gave overall times for the questioning periods.⁶⁰ It should be made clear that this questioning does not take place in a continuous block of time⁶¹, but over a number of days and that questioning within a day is also broken at various times on the request of any of the parties and at the discretion of the prescribed authority. In fact, most questioning has been broken every couple of hours within any single day. A prescribed authority informed the Committee that:
- There were many breaks during the course of the day. There were morning tea breaks, lunch for an hour, prayers ... There were adjournments for legal discussions.⁶²
- 1.51 It is also important to note that questioning warrants are not detention warrants; subjects have the right to, and do, return home each day.
- 1.52 In addition, questioning must be broken every four hours⁶³ and may not continue beyond eight hours without the permission of the prescribed authority. This requirement has been observed in practice; the prescribed authorities have reminded those questioning a subject that an eight hour period has been completed and that application should be made to continue.
- 1.53 This clarification is not meant to underestimate the burden constituted by long periods of questioning over a number of days. Indeed, a number of the lawyers for subjects of warrants noted the time spent under questioning, even though it was within the

60 See paragraphs 1.17, 1.18 and 1.19 above. These questioning times exclude procedural time.

61 An assumption that many submissions have made.

62 PA transcript classified hearing 19 May 2005, p.18.

63 This is set out in the protocol.

Example 1: Questioning over 23 days or 10 hours 35 minutes

	Day 1	Day 2 (3 days later)	Day 3 (10 days later)	Day 4 (9 days later)
10.00				10.05
10.15	10.20			
10.30				
10.45				
11.00				
11.15				
11.30				11.39
11.45				11.55
12.00				
12.15				
12.30				12.31
12.45	12.55			
13.00				
13.15				
13.30				
13.45		1.46		
14.00	2.04		2.10	
14.15				
14.30				
14.45	2.54			
15.00				
15.15	3.23	3.23		
15.30			3.44	
15.45		3.49		
16.00	4.13		4.03-10	
16.15				
16.30		4.38		
16.45			4.44 -5	
17.00		5.05	Prayers	
17.15			5.20	
17.30		5.30		
17.45			5.54	
18.00				

Times on shaded areas indicate exact time of start and finish.

Example 2: Questioning over 21 days or 43 hours 43 minutes

	Day 1	Day 2 (next day)	Day 3 (5 days later)	Day 4 (next day)	Day 5 (6 days later)	Day 6 (next day)	Day 7 (next day)	Day 8 (3 days later)	Day 9 (2 days later)
09.00		9.10				9.08	9.05		9.05
9.15			9.24						
9.30									
9.45									
10.00	10.11			10.09					
10.15		10.28			10.25				10.30
10.30							10.36		
10.45		10.47	10.46			10.52			10.50
11.00			11.03				10.58		
11.15						11.14			
11.30		^^		11.32	11.40			11.23	
11.45	11.36			11.55					11.58
12.00	12.02				12.14				Prayers
12.15									12.12
12.30									
12.45	12.50	12.55			12.53	12.53	12.56		12.56
13.00			1.00	1.01				1.02	
13.15									
13.30									
13.45									
14.00	2.04			2.03	2.02	2.02		2.05	2.02
14.15		2.18	2.13				2.15		
14.30									
14.45									
15.00					3.01			3.14	3.07
15.15				3.25		3.25			3.22
15.30	3.27	**		3.42				3.25	
15.45	3.43					3.42			
16.00			4.08	4.11			4.05		
16.15								4.25	
16.30									4.28
16.45		4.55							
17.00	5.13					5.08			
17.15									

^^ 2 minute toilet break. ** 4 minute break by request.

prescribed limits, was significant – ‘far longer than you would normally have a witness in court.’⁶⁴

- 1.54 By way of example, the tables on the previous pages illustrate the times for questioning for two actual warrants. In the first example the questioning took place on four separate days and within the 28 days of the warrant. The days and times were discussed with the officials, the subject of the warrant and his lawyer. Shaded areas are questioning times, although this also includes procedural time.
- 1.55 In the second example, the questioning took place on nine days and within the 28 day period of the warrant. Again the procedural time is included in the shaded area. This procedural time accounts for any discrepancies between the times on the table and those that might be noted in the ASIO Annual Report as the questioning period for a particular warrant.

Use of an interpreter

- 1.56 Sections 34H, 34HAA and 34HB of the ASIO Act provide for the use of interpreters. This entitlement can be requested by the subject of the warrant and is decided by the prescribed authority based on reasonable grounds that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language. In the first eight questioning warrants, an interpreter was requested on four occasions and granted on one.⁶⁵ The Committee was not supplied with information regarding interpreters in relation to the last six warrants.
- 1.57 It was the view of the Director-General that ‘we would be open to real criticism if we served the warrant in a language that we knew the person did not understand’.⁶⁶ In one case where a person subject to a questioning warrant was denied an interpreter, ASIO’s view was that the subject’s fluency was adequate based on the agency’s experience of the person concerned. The Director-General told the Committee that ASIO had obtained statutory declarations from the employer attesting to the standard of the subject’s English.⁶⁷ This does not

64 Lawyers transcript, classified hearing 6 June 2005, p. 3.

65 The first request for the use of an interpreter was the basis on which the Government sought additional amendments to the ASIO Act in November 2003 to extend the time for questioning using an interpreter to 48 hours.

66 ASIO transcript, classified hearing 19 May 2005, p.15.

67 ASIO transcript, public hearing 19 May 2005, p. 22.

appear to have been the case and ASIO corrected the record on this question.⁶⁸ In opposing the use of an interpreter, the questioner stressed to the prescribed authority the wording in the act that the requirement was 'an adequate knowledge of English' and 'reasonable fluency' not 'perfect fluency or complete mastery'. The decision of the prescribed authority was made on the basis of questions put to the subject as well as the submission of the questioner. In the second case where an interpreter was requested during a questioning warrant, the prescribed authority made a decision to refuse the request after representations from the Australian Government Solicitor. In a third case, the subject of a warrant requested an interpreter at the time of the issuing of a warrant, but then did not maintain his request for one when he came before the prescribed authority. This case took place after the introduction of the extended time period for the use of interpreters.

- 1.58 The Committee does not question the particular decisions made in the above cases. The Committee, however, would agree with the Director-General's assessment that it is an area where 'real criticism' might be levelled if the decision is not correct. The Committee also notes that the extended time for questioning where an interpreter is used (48 rather than 24 hours) is very likely to inhibit a subject asking for the use of one, even where that might be advisable.
- 1.59 Language skills and levels of proficiency are a complicated area of judgement. Reasonable fluency in common, office or everyday chat is not necessarily the same thing as reasonable fluency for prolonged questioning where precision of understanding, or lack of it, has serious consequences. It is not a judgement to be taken lightly and ASIO might be better to err on the side of caution.
- 1.60 If the agency were to unreasonably deny an interpreter which has been requested it might weaken ASIO's case in the event of a later prosecution. Similarly, if the extended time allocated to questioning with an interpreter should dissuade the subject from requesting one, this might have the same effect. Again, this could weaken ASIO's case in any subsequent court action, especially one involving the truthfulness and accuracy of answers to questions.

68 ASIO transcript, classified hearing 8 August 2005, p. 8.

Complaints

- 1.61 No appeals have been made to the Federal Court under subsection 34E(1)(f). No complaints have been made to the Ombudsman in relation to the Australian Federal Police under subsection 34E(1)(e)(ii).
- 1.62 The criticisms outlined above on the specificity of the warrants, the nature and purpose of the questioning and the ability of lawyers to intervene translated into three formal complaints made through the Inspector General of Intelligence and Security or his representative. These complaints were raised with the Inspector-General or his representative at questioning sessions: one related to the specificity of the warrant; another related to the right of a lawyer to object to a question, and a third involved issues about the prescribed authority and the solicitor representing ASIO. One further complaint was made as a result of additional warrants issued while this review was underway, although it did not directly relate to the terms of the warrant or the questioning.
- 1.63 The IGIS reported that on one occasion, after the legal representative having discussed with him the lack of information in the warrant, he (the IGIS) raised it with the prescribed authority pursuant to section 34HA. The prescribed authority heard submissions from the legal representative and the AGS officer representing ASIO, and ruled that the warrant was not flawed.⁶⁹
- 1.64 One lawyer expressed concern to the IGIS about his inability to object to some of the questions. The IGIS did not raise the matter with the prescribed authority as a formal concern, but the prescribed authority chose to take a broad view of paragraph 34U(4).
- 1.65 In another instance, a legal representative was critical of the approach of the AGS lawyer, acting on behalf of ASIO, and of the prescribed authority. While there was not considered to be any illegality or impropriety, the Committee was advised that this was, in part, a prompt to the IGIS's suggestion that the Act be amended to provide clearer authority to the legal representatives to address the prescribed authority on some matters.
- 1.66 The most recent complaint was not in respect of the form of the warrant or the nature of the questioning, but whether the interests of the person had been prejudiced by media stories. In respect of this, the IGIS has initiated an inquiry, pursuant to section 14 of the IGIS

⁶⁹ IGIS submission, p.4. See also Chapters 2 and 3.

Act and advised the complainant that whether there was unauthorised contact with the media by an ASIO staff member or a police officer was the subject of investigations by the relevant agencies. The outcomes of these investigations were to be monitored by the Commonwealth Ombudsman and the IGIS.⁷⁰

1.67 This last complaint and others were made directly to the Committee as part of this review. They covered a range of matters in the operations of the Act, including legal process and practical arrangements. Lawyers who had had experience of different prescribed authorities, noted different approaches to the strictness with which the role of the lawyers was interpreted:

- A lawyer sought to make a complaint to the IGIS in the course of questioning. The IGIS was not present at the time and the request was refused by the prescribed authority, although agreed by the AGS solicitor, on the basis that there was no right under the legislation or the facilities to make a complaint (a telephone) or to stop the questioning.⁷¹
- A request for a break in the questioning so that a subject could seek legal advice was refused.⁷²
- Secrecy provisions prevent any lawyers involved in the process from having professional discussions with colleagues who are also involved in the process.⁷³
- The time for the conduct of questioning was rigidly set – for Saturdays or Fridays (mosque day) against the objections of the lawyers or the subjects of warrants.⁷⁴
- Lawyers are not seated next to clients. ‘The first time ... there was a witness box. ... I was not next to my client. ... Effectively you have eye contact communication and that was all. The second time ... between my client and me there was an ASIO officer.’⁷⁵
- Detrimental media coverage of searches under warrant occurred contemporaneously with questioning warrants, precluding subjects from publicly defending themselves:

70 IGIS supplementary confidential submission no. 112, p. 3.

71 Lawyers transcript, classified hearing 18 August 2005, p.3.

72 Lawyers transcript, classified hearing 18 August 2005, p.3

73 Lawyers transcript, classified hearing 18 August 2005, p.8.

74 Lawyers transcript, classified hearing 18 August 2005, p.4.

75 Lawyers transcript, classified hearing 18 August 2005, p.4.

[The claim that secrecy provisions did not apply] is at the very least disingenuous because there were questioning warrants which were in force during that period. To suggest that our clients were free to respond in the media is, quite frankly, not right. ... [T]hese people have been labelled as terrorists without having been charged as terrorists, without having the capacity to defend themselves in the media at that time, without being able to point to anything that would dispute the specific allegations, because that is operational information. If there was a plot to blow up anything, charge them with conspiracy to commit an offence.⁷⁶

- 1.68 The implications of these complaints and any recommendations consequent upon them will be dealt with in Chapters 3 and 5.

Outcomes and usefulness

- 1.69 In commenting on the operations of Division 3 Part III powers in the first three years, the Director-General of Security noted that ASIO had been concerned that the compromises made by the Parliament might have made the legislation unduly complex. He reported to the Committee, however, that:

Our concerns were misplaced. We were wrong in worrying about it. As it has turned out, the balance in the legislation has so far been very workable and it has operated very smoothly, although it is very resource intensive.⁷⁷

- 1.70 The Attorney-General's Department also reported that the 'legislation has achieved its objectives' and the Australian Federal Police stated that 'the powers have been used appropriately by ASIO ... [and] they have worked well in practice.'⁷⁸

- 1.71 As to the usefulness of the powers the Director-General was emphatic that the powers had been valuable:

[T]he use of the questioning warrant was critical in the Brigitte investigation. That was an example of where there was actual planning being undertaken for a terrorist attack in Australia and the questioning regime materially assisted in

76 Lawyers transcript, classified hearing 18 August 2005, p.1.

77 ASIO transcript, public hearing 19 May 2005, p. 4.

78 AGD and AFP transcript, public hearing 19 May 2005, p. 5.

understanding what lay behind that threat and what was going on.⁷⁹

- 1.72 Although the purpose of the warrants is stated to be the collection of intelligence, charges have been laid. Of the 14 warrants issued to date, three people have been charged following questioning warrants issued in relation to them. One other person has been charged although not himself questioned under warrant. In all, at the time of writing, 15 charges have been laid in relation to these four people. The following specific charges have been laid as a result of the use of questioning warrants:

The table has been removed at the request of ASIO. The Committee did not accept that the information contained in the table constituted a national security concern or was prejudicial to prospective trials.

Conclusions

- 1.73 On the actual operations of the Act, the Attorney-General's Department drew the conclusion that it had operated 'as intended', that ASIO had 'requested and used the powers judiciously and carefully'. The submission reported that 'AGD understands that use of the powers has provided valuable information'.⁸⁰ This view was reiterated in relation to the additional six warrants issued late in this review process. However, in the course of the inquiry, the number of warrants rose from three to 14.
- 1.74 The Committee questioned witnesses about the intentions of the provisions and the way they have, in fact, operated. Whether the questioning powers were intended to be purely for intelligence gathering or part of police investigations matters. Intelligence gathering, where compulsory questioning is the only way to elicit information, which is important in relation to a terrorist offence, was put forward on the introduction of the Bill as necessary for the protection of the community. It was to be a measure of last resort. The assumption was that extraordinary powers were necessary to protect the community in the face of terrorism threats. Secrecy, it was argued, was necessary because the powers are part of the intelligence gathering of ASIO, whose methods and collected information needed

79 ASIO transcript, public hearing 19 May 2005, p. 4.

80 AGD submission, pp. 3-4.

to be protected on national security grounds. Because the powers were extraordinary, because they involved secret processes and a secret service, because they could not be scrutinised in the way that normal police powers are scrutinised, the Parliament inserted into the Act a series of protections, including the protection of immunity from prosecution, albeit not derivative use immunity, for any information given under compulsion.

- 1.75 The Committee, therefore, would be concerned if the use of the powers were to slip, in practice, into investigative and policing powers and to be simply part of ongoing policing operations. Separating police investigations from intelligence gathering is important. Maintaining the separate functions, methods and systems of accountability of ASIO and the criminal law is also important.⁸¹

⁸¹ There is a discussion of the legal implications of any such shift in Chapters 2 and 3.

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 person¹ 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

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, Gummow] [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 Williams¹² 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

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:

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 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

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

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

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 warrant⁴⁹; 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

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 Subsections 34HB (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 to 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.

Legal representation and access to complaint mechanisms

Legal representation

- 3.1 During the inquiry, witnesses, including the IGIS, raised a number of issues in relation to access to legal advice and the role of lawyers during questioning.¹
- 3.2 The starting point is subsection 34 F (8), which provides that a person is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. While a number of exceptions apply, such as a guaranteed right of access to the IGIS and Ombudsman, one submission argued that these were insufficient.²
- 3.3 There is no guarantee of a right of access to a legal adviser under Division 3 Part III.³ The rights of a subject of a warrant to contact a legal adviser and to legal representation during questioning is regulated solely by:
- the terms of the warrant;⁴
 - the discretion of the prescribed authority;⁵ and

1 See for example, HREOC submission no. 85, p.20; Law Institute of Victoria submission no. 82 p.14; PIAC submission no. 90, p. 25, Patrick Emerton submission no. 86, p. 30.

2 Patrick Emerton submission no. 86, p. 25.

3 PIAC submission no. 90, p.25.

4 Section 34D.

5 Sections 34 F and 34HB.

- the provisions of section 34 U.

3.4 Some witnesses raised concerns about the significant restrictions placed on the right of a subject of a warrant to contact a legal adviser, the powers to exclude lawyers from questioning procedures and to question a person in the absence of their lawyer. The differences that apply between questioning-only, questioning and detention warrants and directions of the prescribed authority would also benefit from clarification.

Contacts with lawyers

3.5 A detention warrant must permit the person to contact a single lawyer of choice at any time while they are detained.⁶ However, contact with a lawyer is not permitted until the person is brought before the prescribed authority and ASIO has had an opportunity to oppose access to the particular lawyer of choice.⁷

3.6 Access may be denied if the prescribed authority is 'satisfied on the basis of circumstances relating to that lawyer', that if contact is permitted a person involved in a terrorism offence may be alerted that the offence is being investigated; or a record or thing that may be requested to be produced may be destroyed, damaged or altered.⁸ Although contact with another lawyer of choice is permitted, so too is the prescribed authority entitled to exclude that person on the same grounds.

3.7 When a questioning-only warrant is issued, the Attorney General has no statutory obligation to ensure that such a warrant permits access to a lawyer and a warrant may be issued that prevents access or is simply silent on the matter. AGD has stated that:

Where a questioning warrant is executed, the warrant and the Act do not limit or prevent a subject from contacting a lawyer for the purposes of the questioning proceedings. This reflects a policy rationale that subjects are being questioned to elicit information only, and that as they are considered to comply with the terms of the warrant, there is no operational need to limit that person's contact with a lawyer.

3.8 However, as the Protocol is silent on the matter, the right to contact a legal adviser remains unclear.⁹ The prescribed authority has the discretion to

6 Paragraph 34C (3B) (a).

7 Paragraphs 34C (3) (b) (i) (ii) (iii).

8 Paragraph 34TA (2) (a) and (b).

9 AGD submission no. 84, p. 27 states that: "...such directions could be given in cases where a person has been brought before the prescribed authority on a questioning only warrant (and

make a direction to permit a person to contact others, including a lawyer or member of the family, but is not required to do so and may prevent access without breaching the Act or the Protocol.¹⁰ A clearly stated positive right of contact with a lawyer would therefore more accurately reflect the policy rationale.

3.9 Whereas a person held under a detention warrant must, subject to certain qualifications, be permitted to contact a single lawyer of choice, there is no equivalent protection for a person subject to a questioning-only warrant who is later detained under a direction of the prescribed authority.¹¹ The Committee notes that, in practice, those subject to questioning-only warrants have invariably been accorded the right to legal representation. The Committee also notes that the right to legal representation is not in dispute. Accordingly, there is no apparent reason that would justify the inconsistency.

3.10 In the words of one witness:

This is obviously inadequate – no person should be held in detention in Australia without the right to contact a lawyer.¹²

3.11 The Committee notes AGD's proposal to amend paragraph 34F(1)(d) to make it clear that the prescribed authority is required to issue a direction permitting a person, who is the subject of a detention direction, to contact certain persons (including a lawyer).¹³

3.12 The National Association of Community Legal Centres argued that, even where a person is permitted to contact a lawyer:

ASIO may question them prior to the arrival of the lawyer and before they have a chance to obtain legal advice. The failure to ensure adequate legal representation is aggravated by the person being required to answer questions or face penalty.¹⁴

has therefore not previously been subject to restrictions on contact with others)." The prescribed authority is limited by subsection 34F (2) to directions which are consistent with the warrant or have been approved in writing by the Minister: Paragraphs 34F (2) (a) and (b).

10 Paragraph 34F (1) (d).

11 Subsection 34C (3B); Patrick Emerton transcript, public hearing 7 June 2005, p. 25.

12 Patrick Emerton submission no. 86, p. 26.

13 AGD submission no. 84, p. 27.

14 NACLCL submission no. 42, p. 6.

Right to representation

- 3.13 In practice, each of the questioning-only warrants issued have been served in a reasonable time before the specified time to appear, providing subject with an opportunity to seek legal advice. An Australian Government Solicitor (AGS) lawyer is present to advise ASIO and the prescribed authority on aspects of the law and the subjects of warrants have had a lawyer present during questioning sessions, although it was reported that on two occasions there was not a lawyer present throughout proceedings.¹⁵ (See Chapter 1).
- 3.14 There is no evidence that the current practice of allowing contact with a lawyer and permitting representation has led to difficulties or frustrated the purpose of the process. However, it is clear that a number of issues concerning access to a lawyer and representations should be re-examined. In this regard, the Committee recalls its original recommendation that lawyers be entitled to be present during the entire proceedings and maintains that, as a general rule, where a person has elected to be represented, questioning in the absence of the lawyer should not occur.¹⁶
- 3.15 It is also appropriate to refer to the examination regime under the *Australian Crime Commission Act 2002*. The examination regime expressly provides for a person to be represented by a legal practitioner and prohibits the exclusion of the representative by direction of the examiner.¹⁷ The Committee is not aware that the ACC has been frustrated in performing its function as a result of the recognition of the basic right to legal advice and representation.
- 3.16 Having regard to these factors, the Committee is not persuaded that restrictions on access to lawyers or exclusions of lawyers from the process achieve the purpose of Division 3 Part III.
- 3.17 The legislation should be amended to guarantee the right of a person subject to a questioning-only or questioning and detention warrant to have access to a lawyer and representation throughout the questioning process. The discretion to deny access to a particular lawyer should only be available in exceptional circumstances, where the government has strong grounds of concern or where the lawyer has been assessed as a threat to national security.

15 IGIS transcript, public hearing, 20 May 2005, p.6.

16 Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisations Legislation Amendment (Terrorism) Bill 2002* May 2002, p. xiv.

17 Subsection 25A (2) and 25A (4) of the *Australian Crime Commission Act 2002*.

Recommendation 4

The Committee recommends that:

- a person who is the subject of a questioning-only warrant have a statutory right to consult a lawyer of choice; and
- the legal adviser be entitled to be present during the questioning process and only be excluded on the same grounds as for a detention warrant, ie where there are substantial reasons for believing the person or the person's conduct may pose a threat to national security.

The role of lawyers during questioning

- 3.18 Under section 34U the role of the legal adviser during questioning is restricted in a number of ways. The prescribed authority is required to ensure that a 'reasonable opportunity' is provided for the legal adviser to provide advice to his or her client during breaks in questioning.¹⁸ However, a legal adviser may not intervene in questioning or address the prescribed authority, except to request a clarification of an ambiguous question.¹⁹ A lawyer may also be removed if their conduct is 'unduly disrupting the questioning'.²⁰
- 3.19 As noted above, a person may be questioned without their lawyer being present.²¹ And ASIO may make submissions to extend questioning beyond the permissible 8 and 16 hours periods in the absence of the individual and their legal adviser.²²
- 3.20 While the practical effect of section 34U is to ensure that questioning is not unduly disrupted, the IGIS has observed that:

While this limitation exists for good reason, it has the potential to be the cause of some frustration when lawyers wish to raise procedural queries with the prescribed authority, but are unable to do so due to the limitations... [of section 34U].

18 Subsection 34U (3). The note to subsection 34U(3) explains that as warrants only permit questioning while the person is 'before the prescribed authority', the prescribed authority can control whether questioning occurs 'by controlling whether the person is before them'.

19 Subsection 34U (4).

20 Subsection 34U (5).

21 Subsection 34TB.

22 Subsection 34HB (3).

- 3.21 The subject of a section 34D warrant is able to raise queries directly with the prescribed authority; however,
- ... not surprisingly can sometimes have difficulty in fully expressing their point of view.²³
- 3.22 The evidence of the IGIS indicated that, in practice, the prescribed authorities have interpreted section 34U 'fairly strictly, by not permitting any questions put to them by lawyers other than to clarify ambiguity'.²⁴ The IGIS noted that some flexibility has been shown by, for example, allowing the lawyer to respond to an ASIO request that questioning be allowed to continue.²⁵ However, the Committee has been told in evidence that lawyers and the subjects of the warrants have been excluded when a submission for an extension of time has been made and that a request for questioning to cease to allow for a complaint to be made to IGIS has been denied. There appears to be no consistent practice in this regard and some clarification is necessary to ensure that representation is effective.
- 3.23 IGIS has proposed that a clearer role for lawyers can be achieved by providing:
- clearer authority in the ASIO Act for legal representatives to address the prescribed authority, at least in relation to certain matters; and
 - the legislation should be amended to make a clearer distinction between 'procedural time' and 'questioning time'.
- 3.24 The Committee finds merit in both of these proposals.²⁶

Interventions and representations

- 3.25 The prescribed authority is responsible for supervising the questioning process and, as HREOC observed:

The prescribed authority has a number of important discretions which are intended to safeguard the rights of the subject of a warrant...²⁷

The powers of the prescribed authority include the discretion to:

- direct that a person be detained;

23 IGIS submission no. 74, p.6.

24 IGIS submission no. 74, p.6.

25 IGIS submission no. 74, p.6.

26 See recommendations 5 and 6 below.

27 HREOC submission no. 85, p.21.

- release a person from detention;
 - direct the person's further appearance for questioning;
 - make a direction to address concerns raised by the IGIS;
 - make a direction to contact a person and disclose certain information; and
 - extend periods of questioning at the 8 and 16 hour mark.²⁸
- 3.26 HREOC argued that denying a person the opportunity to address the prescribed authority through their lawyer on these matters is restrictive because it deprives the prescribed authority of a useful perspective on limits of those discretions and the matters which should be taken into account.²⁹ The current restrictions also prevent an adviser from raising an objection to any question even where it is arguable that the question goes outside the scope of the warrant. It was argued that, in turn, this undermines the ability of the lawyer properly to represent his or her client and limits the prescribed authority's ability to discharge his duty to ensure the lawfulness of the process.³⁰
- 3.27 Procedural fairness may require that the prescribed authority hear submissions from the lawyer before discretions are exercised or when matters, such as the scope of a question, need to be addressed. As noted below, the IGIS has indicated that prescribed authorities have in fact taken submissions from legal representatives reflecting the practical need to do so.³¹ However, this appears to have generally occurred during what might be termed 'procedural time' (see below).
- 3.28 The Committee is mindful that some matters will arise during the course of questioning and will need to be dealt with straight away. Provided that interventions are not vexatious, a subject of a warrant should be able to make representations through his lawyer directly to the prescribed authority during the questioning period.

28 Section 34HB.

29 HREOC submission no. 85, p.21.

30 HREOC submission no. 85, p. 21.

31 IGIS transcript, public hearing, 20 May 2005, p.7.

Recommendation 5

The Committee recommends that subsection 34U (4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority.

Procedural time

- 3.29 Current section 34HB provides guidance on the periods of time during which individuals can be questioned. ‘The provisions are expressed in terms of the calculation of when questioning occurs rather than a simple elapse of time.’³² In practice, there are periods which are not counted toward questioning time; for example, the time required to explain the meaning of the warrant. Breaks in questioning are also required to deal with ‘housekeeping’ matters, to permit audio and video tapes to be changed and address the personal needs of the individual, such as religious observance.³³
- 3.30 The notion of ‘procedural time’ to deal with housekeeping could also provide an additional opportunity for legal representatives to raise procedural and substantive matters with the prescribed authority.
- 3.31 The IGIS has advised that, in practice, the prescribed authority and an ASIO timekeeper keep a strict log of periods during which questioning occurs. The notion of procedural time encompasses all the other time when the prescribed authority is present; for example, the time taken to explain the meaning of the warrants and the person’s rights under the warrant.
- 3.32 Procedural time is also taken to deal with housekeeping matters, such as changing audio and video tapes or to meet the needs of the subject; for example, for religious observance, personal or medical needs. This does not count toward questioning time. A clearer distinction in the legislation will also provide greater opportunity for legal representatives to raise both procedural and substantive issues during ‘procedural time’.

32 IGIS submission no. 74, p.6.

33 Section 4 of the Protocol requires that, as a minimum, a person must be offered a break of 30 minutes ever four hours.

Recommendation 6

The Committee recommends that Division 3 Part III be amended to provide a clearer distinction between procedural time and questioning time.

Monitoring communications – privacy and privilege

- 3.33 Subsection 34U(2) requires that contact between a lawyer and their client is done in such a way as it can be monitored. It follows that all lawyer/client communications that take place during the execution of the warrant may be monitored. Subsection 34U (1) applies that requirement to the initial contact with a legal adviser gives rise to the inference that legal advice during breaks may also be monitored.³⁴
- 3.34 In hearings, the then Director-General of ASIO, Mr Richardson, observed that, in relation to detention warrants, there is a mechanism whereby ASIO can object to a particular lawyer and the decision rests with the prescribed authority. It was suggested that, where there is no objection to a lawyer, there is unlikely to be strong reason why the communication should be monitored.³⁵
- 3.35 The duty of confidentiality and legal professional privilege is premised on the principle 'that it is desirable for the administration of justice for clients to make full disclosure to their legal representatives so they can receive full, informed legal advice'.³⁶ PIAC objected to the lack of protection for private conversations and said that:
- This strikes at the heart of the basis of the relationship between client and lawyer, on which legal privilege is predicated, and by which the lawyer may give frank and fearless advice to their client based on full information.³⁷
- 3.36 It was also noted by the majority of the members of the Senate Legal and Constitutional Committee that 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 Offences, which provides that:

34 Professor Williams submission no. 55, p.6.

35 Mr Richardson and Mr Kerr transcript, public hearing, 19 May 2005, p. 20.

36 Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 69, para. 13.1.

37 PIAC submission no. 90, p. 25.

All arrested, detained and 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 hearing, of law enforcement officials.³⁸

- 3.37 Further, while section 34WA affirms that Division 3 Part III does not affect the law relating to legal professional privilege, the Commonwealth law of evidence protects only those lawyer client communications, which are confidential and made for the dominant purpose of giving legal advice.³⁹ Thus, for example, a lawyer who is the subject of a warrant may refuse to answer a question or produce a record, document or thing, which is privileged. However, as PIAC pointed out:

No such privilege arises if the communications between the lawyer and the client are not confidential in the first place.

- 3.38 The Committee has been informed that facilities for consultation have generally been adequate and confidentiality has been respected. The practice to date is a pragmatic approach, as subsection 34U (2) is of little value where a subject to a questioning-only warrant can communicate outside the place of questioning.
- 3.39 There are important public policy reasons for preserving the duty of confidentiality and legal professional privilege and these principles should not be compromised except in the most exceptional circumstances. The Committee considers that confidentiality should be fully protected where the person is subject to a questioning-only warrant.

38 Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism,) Bill 2002 and related matters*, December 2002, p.52: Principle 8 *United Nations Basic Principles on the Role of Lawyers*, UN Doc A/CONF.144/28/Rev.1 (1990).

39 Section 118 Evidence Act 1995 provides that evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of (a) a confidential communication made between the client and the lawyer; or (b) a confidential communication made between 2 or more lawyers acting for the client; or (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer; for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

Recommendation 7

The Committee recommends that:

- Subsection 34U (2) be amended and communications between a lawyer and his or her client be recognised as confidential; and
- adequate facilities be provided to ensure the confidentiality of communications between lawyer and client in all places of questioning and detention.

Access to complaint mechanisms

Availability of federal court remedy

3.40 Following a recommendation by this Committee,⁴⁰ paragraph 34E (1) (f) of the ASIO Act, was inserted so as to require the prescribed authority to explain to the subject of a warrant that:

the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant.

Subsection 34E (3) further provides that:

At least once in every 24 hour period during which questioning of the person under the warrant occurs, the prescribed authority before whom the person appears for questioning must inform the person of the fact that the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant.

3.41 While these provisions ensure the subject of the warrant is aware of their right to review, there remain concerns about the drafting of Division 3 Part III and the availability and effectiveness of remedies. As mentioned above, restrictions on access to lawyers and legal representation during proceedings may impede access to the court where, for example, the prescribed authority:

40 PJC ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May 2002, p. 63; See also Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*; December 2002.

- refuses to exercise their discretion to allow the subject of a questioning warrant to contact a lawyer after a detention direction is made under paragraph 34F(1)(a);
 - a person's lawyer is excluded from the proceedings under subsection 34U(5); or
 - a person's lawyer is not permitted to be present during the questioning period under subsection 34TB (1).⁴¹
- 3.42 In addition, some witnesses, including lawyers for subjects of warrants, have raised concerns about:
- grounds of review and reliance on the common law;
 - lack of specificity on the face of the warrant;
 - access to statements of facts and grounds which support the request for the warrant.

Grounds for review

- 3.43 There is no statutory right to judicial review of an administrative decision or conduct for the purpose of making an administrative decision under the ASIO Act. Such decisions are excluded from the operation of *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).⁴² Consequently, a subject of a warrant must rely upon common law principles of judicial review and prerogative writs to obtain a remedy.
- 3.44 Access to the original jurisdiction of the Federal Court and the High Court of Australia is guaranteed by subsection 19(2) and section 23 of the *Federal Court of Australia Act 1976* (Cth) and 75(v) of the *Commonwealth Constitution* and section 39(B) *Judiciary Act 1903* (Cth) respectively.
- 3.45 Notwithstanding these avenues, several witnesses advocated that a clearer statutory right of access to the court should be expressed in the ASIO Act. In particular, the Law Institute of Victoria argued that Division 3 Part III lacks sufficient safeguards against arbitrary detention and fails to provide a clear right to challenge the lawfulness of detention.⁴³

41 HREOC submission no. 85, p.22.

42 Schedule 1 *Administrative Decisions (Judicial Review) Act 1977*. Exclusion from the ADJR Act also means there is no statutory right to reasons for a decision, which is otherwise available pursuant to section 13 ADJR.

43 Law Institute of Victoria submission no. 82, 15. In these circumstances the person would have to rely on the prerogative writ of *habeas corpus*.

- 3.46 A number of the factors, which have a bearing on the effectiveness of judicial review where national security considerations apply, were considered by the Senate Legal and Constitutional Reference Committee inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.⁴⁴ That discussion will not be repeated here; suffice it to say that historically the courts have shown a great degree of deference in matters that involve an evaluation of security intelligence.⁴⁵ The Senate Committee concluded that it may be difficult for a plaintiff to succeed unless there is some tangible evidence of bad faith or some basis for concluding that the relevant conduct, decision or opinion was ‘manifestly unreasonable’ or so ‘devoid of any plausible justification that no reasonable person could have come to it in the circumstances.’⁴⁶
- 3.47 It has been suggested that a separate clear statutory right of access to the court in the ASIO Act would remove some of the doubts and concerns about the scope of the right of review. If this approach is accepted, a provision which confers the right of review must be formulated in sufficiently broad terms as to allow substantive objections to be made and adjudicated by the Federal Court. An alternative approach to creating a separate statutory regime would be to include a note to s34E, as a signpost to subsection 19(2) and s23 of the *Federal Court of Australia Act 1976* (Cth) and 75(v) of the *Commonwealth Constitution* and the *Judiciary Act 1903* (Cth).

Recommendation 8

The Committee recommends that, in the absence of separate statutory right of judicial review, that a note to s34E be adopted as a signpost to existing legal bases for judicial review.

Specificity of warrants

- 3.48 Lawyers have complained that warrants lack sufficient detail about offences and that, where references are made, there are so many offences listed as to render the warrant vague and meaningless. The Committee is aware that, at least in one case, this has resulted in a complaint to the IGIS

44 Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, p. 121.

45 *Associated Provincial Picture House v Wednesday Corporation* (1948) 1 KB 223.

46 Senate Legal and Constitutional Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, p. 123.

immediately prior to questioning. The matter was raised by the IGIS and determined by the prescribed authority at the time.

- 3.49 It has been argued that a Division 3 Part III warrant that lacks specific detail of the scope of matters to be dealt with under questioning is invalid. Lack of specificity also increases the risk of questioning that is not sufficiently connected to the purpose of the warrant, increasing the possibility of legal challenge.
- 3.50 While it is arguable that the collection of intelligence is necessarily a more open-ended exercise, it is not unlimited and must still fall within the statutory limits imposed by paragraph 34D (1) (b).

Access to ASIO statement of facts and grounds

- 3.51 Lawyers for subjects of section 34 D warrants are not required to be security cleared to represent their client during a questioning procedure. Subsection 34U (2A) requires that the legal adviser be given a copy of the warrant but does not entitle the legal adviser access to information which supports the warrant.⁴⁷
- 3.52 Lawyers for subjects have complained that lack of access to information upon which the warrant is based makes assessing the relevance of questions more difficult. It also makes it more difficult to test the reasonableness of directions of the prescribed authority to detain, require further questioning or extend the questioning period.
- 3.53 This Committee has previously recommended that a panel of security cleared lawyers be available in order to avoid problems associated with representing a person where national security considerations apply.⁴⁸
- 3.54 Clearly, it is not possible to release security information that would 'prejudice the interests of national security' to a lawyer who is not security cleared. However, not all security information is prejudicial to national security and the Secretary of the Attorney-General's could be authorised to consider disclosing information to lawyers representing a client during questioning proceedings.
- 3.55 Under Regulation 3B *ASIO Regulations 1980*, disclosure of security information is prohibited unless the lawyer has been given a security clearance by the Attorney General's Department or the Secretary is

47 Paragraph 34U (2A) (a) (b).

48 Recommendation 6, Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May 2002, p. xiv.

satisfied that giving access to the security information would not ‘prejudice the interests of security’ and conditions may be applied.⁴⁹ Regulation 3B could be amended to permit consideration of release of information at an earlier stage.

- 3.56 By way of background, where information relevant to a proceedings for judicial review is likely to ‘prejudice national security’, the provisions of the new *National Security Information (Criminal and Civil Proceedings) Act 2005* will apply. In this context, ‘likely to prejudice national security’ means that there is a real, not merely a remote, possibility that a disclosure of national security information will prejudice national security.⁵⁰ In practice, this means that a lawyer representing a party to civil or criminal proceeding in a federal court in relation to Division 3 Part III of the ASIO Act must be security cleared.⁵¹

Recommendation 9

The Committee recommends that Regulation 3B be amended to allow the Secretary to consider disclosing information, which is not prejudicial to national security, to a lawyer during the questioning procedure.

Role of the prescribed authority

- 3.57 Matters concerning the role of lawyers, representations to the prescribed authority and the access to information bring into focus the need to clarify

49 Subsection 3B (2) states that access to security information may be given subject to any conditions that the Secretary considers appropriate including, but not limited to, conditions relating to the use, handling, storage or disclosure of the information. Subsection 3B (3) provides that nothing in the regulation entitles a lawyer who is given a security clearance by the Attorney-General’s Department to be given access to security information.

50 Norberry J., *National Security Information Legislation Amendment Bill 2005*, Law and Bills Digest Section, Department of Parliamentary Services, 29 April 2005, no.144, 2004-05, p 6.

51 The Attorney General may issue a certificate to exclude certain information or particular witnesses. But the court makes the final decision about whether the information can be excluded or disclosed in an edited or summarised form and must consider the matter in a closed hearing. The court can also stay a proceeding where it would have a substantially adverse effect on the substantive hearing. The Committee notes that while this would be to the clear advantage of a defendant in a criminal case, in the context of judicial review of a Division 3 Part III warrant, it would effectively shield ASIO and the responsible Minister from accountability.

the role of the prescribed authority. AGD described the role of the prescribed authority in the following terms:

The main role of the prescribed authority is to supervise the questioning of the subject of a warrant, inform the person of their rights, and ensure the terms of the warrant, the ASIO Act and the Protocol are complied with.⁵²

- 3.58 Section 34E could be amended to express more clearly the role of the prescribed authority as the body responsible for regulating the conduct of the questioning and ensure that questioning conforms to the legal requirements of Division 3 Part III of the ASIO Act.
- 3.59 The Committee believes that, for the prescribed authority to discharge fully their responsibilities, it is important that they have access to relevant information. The prescribed authority is not currently provided with a copy of ASIO's statement of facts and grounds which support the issuing of the warrant. Access to this information will assist the prescribed authority exercise their supervisory role and a copy of all the relevant documentation should be provided before questioning begins.

Recommendation 10

The Committee recommends that:

- the supervisory role of the prescribed authority be clearly expressed; and
- ASIO be required to provide a copy of the statement of facts and grounds on which the warrant was issued to the prescribed authority before questioning commences.

Access to a federal court

- 3.60 The legislation is silent on the procedural arrangement for when a subject of a warrant wishes to exercise their right to make an application to a federal court.⁵³ ASIO suggested that, where a person informs the prescribed authority that he or she intends to initiate proceedings, the person must be informed of their right to contact a lawyer.⁵⁴ There is no
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52 AGD submission no. 84, p.13.

53 Legal Adviser transcript, public hearing, 19 May, p.23.

54 Legal Adviser, ASIO, transcript, public hearing, 19 May, p.23.

statutory provision that requires the individual be so advised, but good practice would require it be done.

- 3.61 It was also common ground between ASIO and the prescribed authority that appeared before the Committee, that, upon being notified that proceedings were to be filed in the Federal Court, the questioning process would cease until the matter had been determined by the court.
- 3.62 Although the Committee regards the position adopted by ASIO and the prescribed authority who gave evidence to the inquiry as proper, the supervision of the questioning procedure is the responsibility of the prescribed authority and there may be sound reasons for not ceasing the questioning process at the moment the prescribed authority is alerted to the intention to exercise the right. Clarification about the procedure to be followed in such cases could be provided by amendment to Division 3 Part III or an addition to the Protocol, which already provides guidance on contact with the IGIS and Commonwealth Ombudsman. The principle to which the amended protocol should give effect is that, except when the prescribed authority believes on reasonable grounds that the questioning relates to a possible imminent threat to life, the questioning must cease upon an application being made to the Federal Court – until determined by the court. If the prescribed authority believes on reasonable grounds that the questioning relates to a possible imminent threat to life, then questioning may be permitted to continue unless enjoined, notwithstanding an application being made to the Federal Court.

Access to IGIS and the Commonwealth Ombudsman

- 3.63 Section 34E requires the prescribed authority to explain at the commencement of questioning the fact that the person has a right to make a complaint orally or in writing to the IGIS in relation to ASIO or to the Commonwealth Ombudsman in relation to the Australian Federal Police. Subsection 34G(8) provides that a person subject to a detention warrant may be prevented from contacting anyone, except the IGIS and the Ombudsman, and that anyone holding a person in custody or detention must give the person facilities for contacting IGIS or the Ombudsman.⁵⁵ A person who is subject to a questioning-only warrant is free to contact the IGIS or Ombudsman outside the questioning procedure.

⁵⁵ Subparagraph 34G (9) (b) (i) (ii).

- 3.64 Under section 34HA, if the IGIS is concerned about impropriety or illegality in the way, for example, the questions that are being asked or the nature of the questions, the IGIS may inform the prescribed authority who is required to take that concern into account. Questioning may be suspended or a direction given to address the IGIS' concern.
- 3.65 These provisions are intended to provide a safeguard against *incommunicado* detention and ensure prompt access to an independent complaint mechanism; however, during hearings the Committee heard evidence of two practical shortcomings in the current arrangement. Section 34HA only operates when the IGIS is present and the person is before the prescribed authority. There is no rule that requires the prescribed authority to suspend questioning to permit a contact with the IGIS or Ombudsman during a period of questioning or to ensure that facilities are made available to lodge a complaint.
- 3.66 Where there are grounds for complaint, for example, that questioning is or has gone outside the scope of the warrant or that a person is not being treated with dignity, the matter should be dealt with by the prescribed authority. However, if, in the view of the legal representative, the matter is not dealt with satisfactorily, there is a limited scope to prevent breaches where access to the IGIS is delayed.
- 3.67 There was evidence, outlined in Chapter 1, that a request to a prescribed authority to cease questioning to allow contact with the IGIS and access to a telephone was denied. Provision for representations during the questioning period will help to overcome this type of difficulty. However, while it is preferable that the prescribed authority has discretion to regulate the proceedings, it is also important that access to the IGIS be facilitated.

Recommendation 11

The Committee recommends that:

- a subject of a questioning-only warrant have a clear right of access to the IGIS or the Ombudsman and be provided with reasonable facilities to do so; and
- there be an explicit provision for a prescribed authority to direct the suspension of questioning in order to facilitate access to the IGIS or Ombudsman provided the representation is not vexatious.

Access to State Ombudsman

3.68 A number of witnesses pointed out that while access to the IGIS and the Commonwealth Ombudsman has been expressly preserved, there is not equivalent protection for complaints to be made to other bodies. Consequently, although State police officers are empowered to assist in the execution of a warrant, there is no protection of the rights of subjects of a warrant to contact a State Ombudsman where he or she wishes to lodge a complaint about the conduct of a State police officer.⁵⁶

Recommendation 12

The Committee recommends that an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers be provided.

⁵⁶ Federation of Community Legal Centres, submission no. 47, p. 7.

Financial assistance

Financial assistance for legal representation

- 3.69 Some witnesses have suggested that subjects of section 34D warrant should have an automatic right to legal aid.⁵⁷ Legal aid is administered through State-based Legal Aid Commissions and subject to means and merit testing under the various statutory regimes. There is no separate allocation by the Commonwealth to State Legal Aid Commissions for questioning procedures.
- 3.70 Financial assistance under the Special Circumstances Scheme administered by the Indigenous Justice and Legal Assistance Division of AGD is available to a person who is subject to a questioning or detention warrant. As the title suggests the Scheme is intended to cover special circumstances not covered by other statutory or non-statutory programs. The applicant's financial circumstances (means testing) are not a relevant consideration in deciding whether to make a grant. Merit tests, which apply under State legal aid schemes, are not relevant as a questioning procedure is not a court proceeding and no question of the prospects of success arises.⁵⁸
- 3.71 Under the Special Circumstances Scheme reasonable expenses are covered retrospectively where a person has been subject to a warrant and therefore unable to notify AGD that an application for financial assistance will be lodged.⁵⁹ This is another feature of the Scheme which distinguishes it from the core of legal aid funding.
- 3.72 The Special Circumstances Scheme is an administrative (non statutory) scheme and the grant of financial assistance remains discretionary. AGD has argued that this is essential to retain a level of control and oversight over expenditure and that there are no compelling reasons to create an automatic right to assistance.
- 3.73 Conversely, the IGIS has proposed that there are good arguments for ensuring that a person subject to a compulsory questioning warrant should have automatic access to necessary legal assistance, at the rate applicable under the Special Circumstances Scheme.⁶⁰ During hearings, the IGIS argued that:

57 HREOC submission no. 85, p.23; Victoria Legal Aid, submission no. 47, p.4; transcript, public hearing, 7 June 2005, p. 35-36 and 38-39.

58 Attorney General's Department submission no. 84, p.25.

59 Attorney General's Department submission no. 84, p.25.

60 IGIS submission no. 74, p.7.

Government bodies are generally wary of things that might be argued to them to be precedents in relation to other situations, but that should not be at the expense of dealing fairly with individuals in unusual circumstances. I think one only has to think of a non-legally trained person faced with serious and complex nature of coercive powers, use and derivative use concepts, strong offence provisions and strict secrecy requirements to know that these things need to be explained. I believe they should be explained by more than the prescribed authority...One of those is obviously the capacity to consult with a lawyer before they appear before the prescribed authority.

- 3.74 The Committee agrees that the nature of the proceedings is complex and take place in unusual circumstances of compulsion where the matters dealt with are serious and with the potential for serious criminal penalties. While the role of the prescribed authority in explaining these matters to the subject is an important safeguard, it is not sufficient that these matters only be explained once the person is already before the prescribed authority. It would seem that this type of procedure is the type of special circumstance that the Scheme is intended to cover. The Committee also understands that the Secretary of AGD has approved assistance in all cases so far.
- 3.75 The Scheme is discretionary and funding is limited. Consequently, if a significant increase in warrants were to occur, funding may be strained and will come into competition with other priorities and demands. In these circumstances it would be prudent to ensure that financial assistance for legal representation for subjects of section 34D warrants be the subject of a separate allocation and that reasonable assistance be provided automatically.

Recommendation 13

The Committee recommends that reasonable financial assistance for legal representation at rates applicable under the Special Circumstances Scheme be made available automatically to the subject of a section 34D warrant.

Witness expenses

- 3.76 The IGIS also raised the question of the reimbursement of reasonable expenses which may be incurred by a subject of a warrant. The Committee is concerned that the strict secrecy provisions have the potential to result in

financial disadvantage. The loss of earnings, loss of leave entitlements, costs associated with travel, child care or loss of earnings may be significant in some cases.⁶¹

- 3.77 There was a general agreement between members of the Committee, ASIO, AGD and IGIS that it would be appropriate to examine the possibility of establishing a scheme to provide reasonable level of compensation for out of pocket expenses incurred as a result of the obligation to comply with a section 34D warrant.
- 3.78 AGD argued that that expenses of this kind would normally be dealt with by the operational agency and drew the Committee's attention to the provision for compensation under section 26 *Australian Crime Commission Act 2002* and Regulation 5 and Schedule 2 to the *Australian Crime Commission Regulations 2002*. Under that scheme witness expenses at the amount set out in Schedule 2 of the High Court Rules at a rate of \$93.20 per day apply. AGD proposed that, if such a scheme is to be developed, it be modelled on the ACC program and that flat rate witness expenses should be covered, such as that set out in the High Court Rules and that it should be administered by ASIO.⁶²
- 3.79 The Committee recalls that that then Director-General stated that:
- Certainly, we would not have any issue from a security perspective. Indeed, it is in [ASIO's] security interests not to have people unfairly dismissed from jobs, as that can have other consequences for us.⁶³
- 3.80 The possibility that the prescribed authority be the body to decide on questions of compensation was canvassed but rejected by AGD. The Committee agrees that this would confuse the role of the prescribed authority.
- 3.81 There is no evidence before the Committee on the effectiveness of the ACC scheme; however, it provides a useful model that may appropriately be applied in this context. It has the appeal of being simple to administer, but may not, in fact, be sufficient to cover reasonable out of pocket expenses in all cases. Therefore, some flexibility would be needed to ensure that a person is properly compensated.

61 See for example, transcript, public hearing 19 May 2005, p.18 -19; transcript, public hearing, 20 May 2005, p.3; IGIS submission no. 74, p. 8; AGD supplementary submission no. 102, p. 23.

62 AGD supplementary submission no. 102, p.23.

63 Transcript, public hearing, 19 May 2005, p.19.

Recommendation 14

The Committee recommends that the Commonwealth establish a scheme for the payment of reasonable witness expenses.

Implications for the Muslim Community

4.1 Under Division 3 Part III of the ASIO Act, so far, there have been fourteen questioning warrants issued and no detention warrants. From the evidence taken during this review, it was argued strongly to the Committee that the anti-terrorist laws have had a significant, negative impact on Australia's Muslim community.

4.2 Mr Roude from the Islamic Council of New South Wales summed up the impact on the Muslim community when he said:

We want to live in a country where we have rights like any other people and where we are seen in a good light as Australian citizens, not always targeted and seen as possible threats to Australian security. This is the feeling at the moment. We are seen as possible terrorists. If you talk to members of the community, that feeling exists. We have to allay the fears somewhat.¹

4.3 The Australian Muslim Civil Rights Advocacy Network (AMCRAN) stated:

There is little doubt that the Muslim community bears the brunt of the legislation; indeed, evidence of this is already apparent. At the time of publication, all people arrested under the legislation have been Muslim, and all of the 17 proscribed terrorist organisations are linked to Muslim organisations.²

4.4 The Equal Opportunity Commission of Victoria made the point in its submission, that anti-terrorism measures may be seen by some sections of the community as:

... justifying harsher treatment of groups more readily identified as the 'recipients' of those measures. Sadly, the brunt of hostility

1 ICNSW transcript public hearing 6 June 2005, p. 44.

2 AMCRAN 2004, *'Terrorism Laws: ASIO, the Police and You'*, p. 6.

in this context has been borne by Australia's Islamic and Arab-speaking communities.³

- 4.5 In similar vein, the Islamic Council of New South Wales believed that 'the effect of the anti-terrorism laws on the community is unprecedented'.⁴ The Australian Muslim community has suffered an increased level of race and religious vilification resulting from local and global events. At the hearing, the Council stated:

The Australian Muslim community need to feel protected and involved within the fabric of Australian society. The current ASIO laws and any proposed increase in powers will only act to reinforce anti-Muslim sentiments that are not in the best interests of a harmonious society.⁵

- 4.6 The Islamic Council of Victoria also believed that the legislation had a negative impact on the Muslim community:

... despite assurances to the contrary, it is a fact that any laws that increase the powers of a clandestine organisation such as ASIO in connection with this threat of terrorism have a particular and pronounced impact on the Australian Muslim community.⁶

- 4.7 Four specific areas of concern were identified from the many submissions and evidence given to the Committee in relation to the impact on the Muslim community, namely:

- The Act's impact on civil liberties and democratic rights;
- Lack of information about the Act;
- Apprehension in the Muslim community; and
- The perception that the Act specifically targets the Muslim community.

- 4.8 These are discussed below in detail.

Impact on civil liberties and democratic rights

- 4.9 Many submissions and witnesses dealt with questions relating to civil liberties and democratic rights as they affect the whole Australian community and these are dealt with in Chapters 2, 3 and 5. However, only Muslim organisations have been listed as terrorist organisations and, so far, only members of the Muslim community have been subject to

3 Equal Opportunity Commission of Victoria submission no.68, p. 10.

4 Islamic Council of NSW submission no.89, p. 1.

5 ICNSW transcript, public hearing 6 June 2005, p. 43.

6 ICV transcript, public hearing, 7 June 2005, p. 61.

questioning warrants. Therefore, the Muslim community feels most acutely restrictions to their democratic rights and civil liberties. Their concerns include such matters as freedom from discrimination, freedom of speech, a legal right against self-incrimination, freedom from fear and a right to seek assistance and support from the community. These concerns as they specifically affect Muslims are dealt with in this Chapter.

- 4.10 The National Association of Community Legal Centres (NACLC) raised the question as to whether these laws actually indirectly discriminate against the Australian Muslim community. NACLC pointed out that singling out one group could be discriminatory under the United Nations Convention on the Elimination of All Forms of Racial Discrimination. NACLC stated:

... the impact of these laws on Muslim and Arab communities in Australia ... may amount to indirect discrimination and, therefore, may be inconsistent with the Convention.⁷

- 4.11 The Islamic Council of Victoria (ICV) argued that many Australian Muslims have come from countries in which there is little respect for human rights and now they believe that their civil liberties are being eroded in Australia by non-disclosure and secrecy provisions in laws. For example:

... where a person who may not have committed any offence disappears for seven days. They cannot tell family or friends or religious leaders or employers. They cannot receive counselling for what would be a highly traumatic experience for fear of five years imprisonment.

- 4.12 The ICV submitted that the secrecy provisions should be repealed, stressing the social impact when persons are not permitted to speak about the traumatic experience of detention or questioning:

That level of secrecy – not being able to talk to religious leaders, counsellors or one's family – has a really debilitating effect on the community.⁸

- 4.13 The Islamic Council of New South Wales (ICNSW) was similarly concerned about its inability to provide assistance to the Muslim community owing to the secrecy provisions:

We are most concerned that these secrecy provisions will hamper the work that the Islamic Council and other Muslim welfare organisations are able to provide. It is our mission to assist

7 NACLC transcript, public hearing 7 June 2005, p. 27.

8 ICV transcript, public hearing 6 June 2005, p. 70.

members of the community in times of uncertainty or instability such as would be caused by detention under the Act and to provide support to them and their family members. How can we possibly provide assistance to our members when they are prohibited from approaching our organisation or anyone for help, counselling or other assistance?⁹

- 4.14 The ICV also believed that the secrecy provisions removed an important mechanism by which ASIO is held accountable according to democratic principles. If the secrecy provisions are not to be repealed, the ICV requested that the Act be amended so that the onus for showing the necessity for nondisclosure be shifted to the prescribed authority:

The authority should make a case-by-case assessment of the necessity of nondisclosure of information on the basis that it is in the interests of national security.¹⁰

- 4.15 The absence of the right to silence was also of concern to the ICV which stated that this absence made the right to 'unfettered' legal advice and representation critical, given that:

... a number of criminal offences may flow as a result of the questioning. This right to access is all the more imperative in view of the fact that many Australian Muslims come from non-English-speaking backgrounds.¹¹

Lack of information about the Act

- 4.16 In its submission to the Committee, the Law Institute of Victoria (LIV) noted a general lack of information about the Act and commented that this lack of information:

... limits the capacity of organisations, such as the LIV, to provide informed comment on the operation, effectiveness and implications of ASIO's questioning and detention powers.¹²

- 4.17 The Federation of Community Legal Centres (FCLC) spoke of a number of examples which, it believed, illustrated the lack of available information on the laws. On one occasion it informed a member of the Muslim community in Victoria who was involved in sending charity money overseas that he should contact the Australian Federal Police and the Attorney-General's Department to disclose his activities.

9 ICNSW transcript, public hearing 6 June 2005, page 42.

10 ICV transcript public hearing 6 June 2005, p. 70.

11 ICV transcript, public hearing 6 June 2005, p. 70.

12 LIV submission no. 82, p. 5.

- 4.18 The FCLC noted a ‘real lack of factual, neutral information about the new legislation’ and contrasted the lack of information about the anti-terrorism laws with changes to family law for which it has found ‘reams of information’.¹³
- 4.19 In an attempt to address the lack of information on Australia’s anti-terror legislation, the Australian Muslim Civil Rights Advocacy Network published, in conjunction with the NSW Council for Civil Liberties and the UTS Community Law Centre, an information booklet called *Terrorism Laws: ASIO, the Police and You*. AMCRAN is currently producing a second edition of the booklet, which will also be produced in Arabic, Bahasa Indonesia and Urdu.¹⁴
- 4.20 The Attorney-General’s Department commented in its submission to the Committee that:
- In recognition of the importance of accurate information concerning Australia’s terrorism laws, this Department provided comments on the Australian Muslim Civil Rights Advocacy Network booklet *Terrorism Laws: ASIO, the Police and You*. We understand that AMCRAN regarded our comments as constructive and will incorporate most of these comments into the second edition of the booklet.¹⁵
- 4.21 The (then) Director-General of ASIO, Mr Richardson, informed the Committee that ASIO had been co-operating and working with community groups to ensure there was dissemination of information about the Act. One option, currently being considered, is to ‘disseminate information in more languages than we do’.¹⁶
- 4.22 The Chief Executive Officer of the Islamic Council of Victoria praised Mr Richardson for his ‘integrity’ and the ‘measured and restrained way in which ASIO has, under his guidance thus far, exercised its powers under division 3’; however, Mr Gould stated:
- ... his presentation to the community merely served to highlight how vague the circumstances that could trigger these coercive powers really are. At the end of a significant period of questions the audience had no greater clarity on how division 3 operates in practice. It is important to reiterate that it is not a lack of

13 FCLC transcript, public hearing 7 June 2005, p. 55.

14 AMCRAN submission no.107, p. 3.

15 AGD supplementary submission no.102, p. 22.

16 ASIO transcript, public hearing, 19 May 2005, p. 27.

understanding of these laws that creates fear and distrust in our community, but the laws themselves.¹⁷

- 4.23 ASIO accepted that the Muslim communities today are more concerned about ASIO's activities compared with prior to September 11 and ASIO stated that it was trying to address these concerns, but that:

... beyond a certain point our job is such that I think it would be naïve of us to assume that we would ever be the most popular organisation with everyone.¹⁸

- 4.24 Regarding attempts by the Australian Federal Police to keep the community informed, the Committee heard that Commissioner Keelty has been:

... very active in engaging senior members of the Islamic community around the country, ... trying to lay out exactly what our procedures are and why we are doing what we are doing. Each of our office managers around the country is required to have regular meetings with the Islamic community councils or their equivalents. They do that and they are establishing very good relations with those groups. We have also incorporated a range of material in our training courses, particularly for the people involved in the counterterrorism area but also more broadly on Islamic culture, society and religion.¹⁹

- 4.25 The Australian Federal Police saw a need to facilitate an understanding of why and how the AFP operated in the community on counter-terrorism and it, therefore, had a lot more formal and informal contact with members of the community, particularly the Islamic councils. The AFP stated:

... I think there is a greater level of understanding of what we are trying to achieve, that we are acting within the law and that we do have a job to do.²⁰

Apprehension in the Muslim community

- 4.26 Mr Richardson, gave evidence that he was not aware of any sentiment that the Act was creating fear within the Muslim community.²¹

17 ICV transcript, public hearing 7 June 2005, p. 62.

18 ASIO transcript, public hearing 19 May 2005, p. 27.

19 AFP transcript, public hearing, 19 May 2005, p. 27.

20 AFP transcript, public hearing, 19 May 2005, p. 28.

21 ASIO transcript, public hearing 19 May 2005, p. 26.

- 4.27 However, the Committee heard from various Muslim organisations that, although ASIO has so far used its new powers responsibly, the Act had created widespread fear and suspicion in the Muslim community towards ASIO.²²
- 4.28 The Federation of Community Legal Centres advised that the legislation ‘leads to genuine fear in the community’ because it does not clearly state how powers are to be exercised.²³ It is very ‘important that all legislation is very clear’ about what it does and does not allow.
- 4.29 It was the experience of the Federation of Community Legal Centres that the level of fear within Melbourne’s Muslim community was such that people would not attend information sessions about ASIO’s powers simply because they feared showing interest in anything to do with terrorism:
- There is no way for us to get information to or discuss these laws within those communities, which is a concern for us. ... we are all experiencing how the laws are impacting on people in the community from that particular background. ... With the people we have tried to engage, the fear is not about terrorism so much but about the impact the laws might have on them or their communities. This is coming straight from workers who work with people in the field.²⁴
- 4.30 It has also been the experience of the National Association of Community Legal Centres in Sydney that:
- ... attendance at community legal centre public education forums has been low, and we have been informed that this is because of fear of and a reluctance to attend forums that focus on counter-terrorism.²⁵
- 4.31 In its submission, the Attorney-General’s Department expressed its belief that:
- While lack of relevance to individual circumstances is a more likely factor in non-attendance at forums, if fear is a factor for some, it is more likely that misinformation about the legislation rather than its actual impact is the cause of the problem.²⁶
- 4.32 Speaking about the breadth of ASIO’s powers under division 3 of part III of the ASIO Act, Mr Gould said that the uncertainty that pervades division
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22 FCLC transcript, public hearing, 7 June 2005, p. 45.

23 FCLC transcript, public hearing, p. 47.

24 FCLC transcript, public hearing 7 June 2005, p. 53.

25 NACLC transcript, public hearing 7 June 2005, p. 31.

26 AGD supplementary submission no. 102, p. 22.

3 is a matter of significant concern to the Muslim community and the laws have created fear and distrust within the community. As an example of why members of the Muslim community may feel afraid of the new laws, Mr Gould noted that:

... as a predominantly migrant community many Australian Muslims have a practice of sending money back to family members overseas or visiting extended family in their ancestral villages. Further, at certain times of their religious calendar charitable giving is a prescribed part of the Muslim faith. Although these are legitimate charitable donations, what certainty does the community have that the broad discretions under the Act are not triggered in those circumstances?²⁷

4.33 Inevitably, he said, people in the Muslim community now feel frightened of running foul of the new laws and this is creating 'a climate of fear, apprehension and a fundamental distrust of the government'.²⁸ Mr Gould went on to say that it is not a fear of being the subject of criminal proceedings but rather:

... it is that they are going to be picked up off the street and disappear for seven days, they are not going to be able to speak to anyone about it and the media cannot report it.²⁹

4.34 This opinion from the Islamic Council of Victoria was reinforced by a lawyer for a subject of a warrant when commenting on lawyer-client confidentiality:

... there is a great feeling of paranoia in that community that ASIO is listening to you even when you are just walking down the street if you have your mobile phone in your pocket.³⁰

4.35 According to the ICNSW, people who have been questioned by ASIO or the police, whether or not under an ASIO warrant, are more fearful of being involved in any social activity:

... they are more fearful for the safety of their children, discouraging them from engaging in social activities or anything that can be seen as political. This is an alarming phenomenon which we have felt helpless to improve since the secrecy provisions effectively discourage these people to openly discuss their experience.³¹

27 ICV transcript, public hearing 7 June 2005, p. 62.

28 ICV transcript, public hearing 7 June 2005, p. 62.

29 ICV transcript, public hearing 7 June 2005, p. 66.

30 Transcript, classified hearing 7 May 2005, p. 5.

31 ICNSW transcript, public hearing 6 June 2005, p. 43.

- 4.36 The Committee accepts that a climate of fear created by the Act does exist in the Muslim community. The Committee took note of the Islamic Council of Victoria's opinion that 'there is a direct relationship between the level of fear and the expansiveness of ASIO's powers'.³²

Perception that the Act targets the Muslim community

- 4.37 The International Commission of Jurists' (ICJ) submission stated that while the legislation under consideration threatens the basic rights and fundamental freedoms of every Australian citizen, the threat is most visible in Australia's Muslim community. The submission stated:

Notwithstanding the fact that many Muslim leaders in our community have come out strongly against terrorism and have declared that such acts have no place in Islam, many Muslims feel shock and fear at the way they are portrayed in the media, and feel they bear the brunt of this legislation.³³

- 4.38 The Australian Muslim Civil Rights Advocacy Network drew the Committee's attention to the Human Rights and Equal Opportunities Commission's *Ismae - Listen* report, which surveyed 1,400 people and found that it was a common belief amongst Muslims that the legislation under review is targeted at Muslims. The submission cited one respondent who said:

There is a fear in the community that one day you will wake up and your husband will be taken away under the new ASIO laws.³⁴

- 4.39 This fear in the Muslim community that they are being targeted by the counter-terrorism legislation was compounded because all proscribed organisations are, so far, Muslim organisations.³⁵ The Islamic Council of Victoria stated:

World events in recent years have impacted on the Australian Muslim community in a manner which is unprecedented in our history. The term 'terrorism' is not value neutral. Ill-conceived and unsupported racial and religious stereotypes have reinforced an intractable link between the term 'terrorist' and people of Islamic faith.³⁶

- 4.40 The Council noted that, in its work as the peak body, it found in the Muslim community at large:

32 ICV transcript, public hearing, 6 June 2005, p. 69.

33 ICJ submission no.60, p. 5.

34 Dr M. Kadous, AMCRAN transcript, public hearing, 6 June 2005, p. 53

35 Ms M. Dias, FLC transcript, public hearing, 7 June 2005, p. 54

36 ICV transcript, public hearing 7 June 2005, p. 61.

a discernible level of distrust of the intentions of and the motivations behind this legislation, which is essentially seen as singling our community out. I hastily reassure you that I am a law-abiding citizen, but if ASIO were to come knocking on my door all I know is that I am a Muslim and the fact that I am a law-abiding citizen has to be proven. That is the perception that a lot of the community has.³⁷

- 4.41 The (then) Director-General of ASIO agreed that a perception that the act targets Muslims did exist within the Muslim community and noted 'that there should be such a perception is understandable'.³⁸ The Director-General advised that:

The government, members of parliament and officials have spoken at length about this. We have sought to reassure that we do not target communities. We target individuals and groups. But it is a very big challenge to retain the confidence of a broader community grouping when you are targeting individuals and groups within that broader community.

Conclusion

- 4.42 The ICJ pointed out that the legislation under review could have a negative effect on Australia's ability to deal with the threat of terrorism if the laws alienate members of the Muslim community and thus limit ASIO's ability to gather intelligence.³⁹ The British experience during its long battle with the IRA showed that a government fighting terrorism relies on co-operation from:

... the co-religionists or fellow nationals who decide (or can be persuaded) to provide the state with tips on where to find the terrorists.⁴⁰

- 4.43 The Committee was satisfied that there has been a definite impact on the Australian Muslim community as a result of the anti-terrorism legislation. The Committee found that many in the Australian Muslim community believe the Act has impacted on their civil liberties and democratic rights; that there is a lack of information about the Act; that the Act has created apprehension in the Muslim community; and that there is a perception that the Act specifically targets the Muslim community.

37 ICV transcript, public hearing 7 June 2005, p. 66.

38 ASIO transcript, public hearing 19 May 2005, p. 26.

39 ICJ submission no.60, p. 6.

40 Thomas, E. & McGuire, S. 'Terror at Rush Hour', *The Bulletin*, p.25.

- 4.44 Following the conclusion of hearings related to this review, Muslim communities in the western world have come under more scrutiny as a result of the bombings in London. Police have used the media to ask Muslims in Australia to work with them to 'keep Australia safe'.⁴¹
- 4.45 Both the Prime Minister and the Leader of the Opposition have commented on the role of the Muslim community in containing terrorism. The Prime Minister told Muslim leaders to make it their 'absolute responsibility' not to encourage inflammatory attacks or undermine basic community values of tolerance and freedom. In the same news item, it was reported that the Leader of the Opposition also 'called on Muslim leaders to repudiate support for terrorism'.⁴² On 23 August 2005, the Prime Minister called Muslim leaders together to a meeting in Canberra to discuss counter-terrorism policies.
- 4.46 However, the Committee suggests that there is also a broad community responsibility to discourage inflammatory attacks which undermine community values of tolerance and freedom. Muslims too are being affected by intolerant and inflammatory opinions which are being aired on talkback radio and such opinions create community conflict, give licence to verbal and physical attacks on Muslim people and alienate Muslim youth from mainstream Australia. Mr Roude told the Committee:

Since the introduction of these laws, we have noticed a sense of fear. We have noticed that, for example, a person who once claimed to be a proud Australian of Muslim faith has stated to ask questions like: 'How am I seen? Am I part of that community?' Particularly when you listen to talkback radio, you feel that you are in a state of war, the way you are criticised, the way you are condemned and the way you are seen by not only people who phone radio announcers but the announcers themselves, who inflame the situation.⁴³

- 4.47 In its supplementary submission, the Australian Muslim Civil Rights Advocacy Network noted that:

We note with disappointment that it does not appear that governments or the agencies have taken on this role in any meaningful way.⁴⁴

41 Clennell, A. and Morris, L. *Police call for Muslim help in safety fight*, Sydney Morning Herald, July 21, 2005.

42 Sydney Morning Herald on-line, *Muslims leaders asked to preach peace*, July 25, <http://www.smh.com.au/news/breaking-news/muslims-leaders-asked-to-preach-peace/2005/07/25/1122143776607.html#>

43 ICNSW transcript, public hearing, 6 June 2005, p. 45.

44 AMCRAN supplementary submission no. 107, p.3.

- 4.48 The Committee is of the view that the Australian government, members of Parliament and the Muslim community all have a responsibility to contain, so far as they can consistent with freedom of speech, inflammatory remarks within the community.

Implications for democratic and liberal processes

Public perceptions

- 5.1 As with most inquiries, the overwhelming majority of submissions either opposed or were critical of aspects of the legislation. Most of the submissions received by the Committee expressed concerns that the questioning and detention powers eroded democracy and civil rights. The overriding message in submissions was that Australia has a duty to preserve the integrity of its liberal democracy. Many people and organisations expressed concern that, although ASIO has so far been judicious in its use of its extended powers, it is the scope for abuse of those powers which is of concern.

It is important in examining legislation such as this that one considers not only how it has been used but how it could be used.¹

- 5.2 Many of the 109 submissions were from citizens who have no stated affiliation with advocacy groups or other organisations, but who, despite some inaccuracies in their knowledge of the Act, clearly felt concerned about the consequences of ASIO's increased powers. For example, a brief and to the point handwritten submission stated, in part:

I believe the ASIO Act as amended in 2003 is destructive of civil liberty in Australia. It permits detention of citizens on mere suspicion, so that mere rumour could be enough to cause an indefinite imprisonment. This is the kind of law which permitted

1 AMCRAN transcript public hearing, 6 June 2005, p.53.

the secret police of past totalitarian states to oppress the citizenry.
It was to save us from this that we fought World War II.²

- 5.3 The powers given to ASIO by the legislation under review drew a lot of comment in the submissions. There is a perception among some in the community that ASIO's powers are now inconsistent with or pose a threat to the operation of democracy.³ Central to these concerns was the inclusion of the secrecy provisions. It was argued that, if ASIO abused its powers, the secrecy provisions would allow the abuse to be concealed.

A system of open and accountable government and government agencies is a prerequisite for true and meaningful democracy. These laws open the door for abuses of power and, of even greater concern, the concealment of these abuses. The secrecy provisions contained in the Act are unreasonable in an open, democratic society and should be amended.⁴

- 5.4 ASIO was described as a 'necessarily clandestine organisation' which has been given an extremely wide-ranging discretion to decide what sort of political activity will be investigated and what sort will not. It was argued that in a democracy, the legitimacy of political activity must be determined in the open, not by an organisation which, by its very nature, is difficult to subject to democratic processes.⁵ Other submissions argued that the legislation might turn ASIO into a coercive agency which could enforce what are, in effect, the political and foreign policy imperatives of the government of the day.

[I]f a small group in a democracy poses a threat of violence to the rest, the policing of this threat must be undertaken in a way that is not seen simply to be an attack upon the dissent and diversity that is always a legitimate part of a democracy. If that small group is located within a broader community, it is not open to a democratic authority – which is committed to the legitimacy of political, religious and cultural pluralism – simply to exclude that broader community and make it in its entirety an object of coercive investigation and policing.⁶

- 5.5 Concern was also expressed about the removal of the right to silence⁷ and the removal of the privilege against self-incrimination.⁸ If detained:

2 Ms R. Dunlop submission no.46, p.1.

3 Mr P. Emerton transcript public hearing, 7 June 2005 p. 23.

4 *UnitingCare* NSW.ACT submission no.53, p.1.

5 Mr P. Emerton transcript public hearing, p. 23.

6 Mr P. Emerton, submission no.86, p. 5.

7 Under subsection 34 G (3) the failure to answer any questions put to a person in custody under a warrant is an offence punishable by 5 years of imprisonment.

... the onus of proof should be upon the investigating body to prove that a 'defendant' is in possession of information etc. rather than that person having to prove that they are not in possession of matters in connection with a 'terrorist' act.⁹

- 5.6 Many submissions made the point that while it is in Australia's national interest to protect and promote peace and security we must also maintain our commitment to fundamental human rights.

Security measures should not infringe the fundamental civil and political rights of Australian citizens and permanent residents of our country.¹⁰

- 5.7 A repeated comment was that, as our legal system is based on the presumption of innocence, people who are detained for questioning must continue to be seen as innocent until proven otherwise.
- 5.8 The secrecy provisions under the legislation drew a lot of comment in both the submissions and at the hearings, particularly in regard to the impact of the provisions on detainees and their families and employers, but also with respect to the future of free press. These specific concerns are discussed in more detail below.

Secrecy provisions

- 5.9 The secrecy provisions, or section 34VAA, were not part of the original bill introduced into the Parliament in 2002. They were introduced on 27 November 2003 as a result of 'operational and practical limitations that have arisen in the use of these new powers by ASIO.'¹¹ The Attorney-General stated that the purpose of the provisions was to protect 'the effectiveness of intelligence gathering operations in relation to terrorist offences' and that they were demanding, but 'this was because we are dealing with information that could result in the loss of life.'¹² The Attorney stressed at the end of his second reading speech that, as the law was reasonably adapted to serve a legitimate purpose, it did not infringe

8 Under subsection 34 G (8)

9 Ms P. Finegan submission no.7, p.2.

10 Mr J Stanhope MLA, submission no. 93, p.1.

11 Attorney-General, Hon Philip Ruddock, MP, House of Representatives Hansard, 2 December 2003, p. 23481-2.

12 Attorney-General, Hon Philip Ruddock, MP, House of Representatives Hansard, 2 December 2003, p. 23483.

upon implied constitutional freedom of political communication.¹³ At the time, the Labor opposition acknowledged that the change wrought by section 34VAA would be 'the most controversial of areas'.¹⁴ However, it accepted the amendments as 'reasonable' and 'balanced' and consistent with provisions applying to the Australian Crime Commission in its investigations into serious criminal activity.¹⁵ The provisions were opposed by the Democrats and the Greens.

5.10 The secrecy provisions under section 34VAA create new offences which criminalise the unauthorised disclosure of information relating to questioning and detention warrants. The Attorney-General's Department described the provisions in the following way:

While subjects are permitted to contact persons, they must not reveal information to those persons contrary to section 34VAA titled 'Secrecy relating to warrants and questioning'.

Section 34 VAA protects the effectiveness of intelligence gathering operations by prohibiting:

- while a warrant is in force, disclosure without authorisation of the existence of the warrant and any fact relating to the content of the warrant or to the questioning or detention of a person under the warrant; and
- while a warrant is in force and during the period of two years after the expiry of the warrant, disclosure without authorisation of any ASIO operational information.

Operational information (subsection 34VAA(5)) is information that indicates one or more of the following:

- (a) information that ASIO has or had;
- (b) a source of information that ASIO has or had;
- (c) an operational capability, method or plan of ASIO.

While section 34VAA imposes restrictions on the type of information that can be disclosed, exceptions exist where, among other things, a disclosure is:

- made for the purpose of obtaining legal advice in connection with a warrant or obtaining representation in legal proceedings seeking a remedy relating to such a warrant or the treatment of a person in connection with a warrant;
- permitted by a prescribed authority;
- permitted by the Director-General of ASIO;

13 Attorney-General, Hon Philip Ruddock, MP, House of Representatives Hansard, 2 December 2003, p. 23484.

14 Mr McClelland, MP, House of Representatives Hansard, 2 December 2003, p. 23465.

15 Mr McClelland, MP, House of Representatives Hansard, 2 December 2003, p. 23465-6.

- made by a person representing the interests of a minor or made by a parent, guardian or sibling of a minor when the representation is made to a parent, guardian or sibling, or person representing the interest of a minor, or to the IGIS, Ombudsman, prescribed authority, or person exercising authority under the warrant.¹⁶

5.11 Opposition to the secrecy provisions was a dominant theme of submissions to this review. Complaints were wide-ranging, covering legal principle, the limitations on scrutiny, the lack of accountability, freedom of speech and the press, the difficulty of family and community members in providing support to those questioned, and the inconsistent and, at times, impractical application of the provisions.

5.12 It was of concern to many that section 34VAA meant that no one could monitor ASIO or express concern, if need be, about how ASIO executed warrants. Advocacy groups and others stated that they are unable to monitor the process or the effectiveness of the interrogations because they are not a matter of public record.

These secrecy provisions violate the rule of law. One aspect of the rule of law is to provide the accountability of all arms of government and government bodies. The secrecy provisions clearly raise accountability issues. It is recognised safeguards are included in the legislation, making it an offence for ASIO to act ultra vires. However, the effectiveness of these safeguards is undermined. A complaint by an individual who has been detained under a compulsory questioning and detention warrant is obviously required to set the complaint procedure in motion. However, because of the secrecy provisions, this will not occur for at least 2 years. The evidentiary trail will run cold, as will the political and social impact of the complaint. The capacity for individuals to hold ASIO accountable for its actions is therefore seriously eroded.¹⁷

5.13 The ICJ concurred. They argued that 'because of [the 2-year ban], there is little public scrutiny of the operation of the questioning powers. We have really no way of knowing what is going on. In this way, Australia's laws are even more oppressive than those in the US and the UK'.¹⁸

16 Attorney-General's Department submission no. 84, p.18.

17 Civil Rights Network (Melbourne) submission no. 78, p. 4.

18 ICJ submission no.60, p. 5.

Implications for the Press

5.14 Numerous submissions from the media and the public took up the concerns about scrutiny, but expressed them in terms of freedom of the press, the right to know within a liberal and democratic process.

5.15 A typical submission stated:

I am particularly concerned that the legislation leaves open the possibility of third parties, such as journalists, facing hefty jail terms for disclosing information connected to or in relation to a warrant issued under the Act, for a full two years after the warrant's issue. ... I believe the current legislation unduly sacrifices media freedom. It is important that our public institutions are open to public scrutiny and are accountable. To inoculate them from such scrutiny is the first step on a slippery slope to autocracy.¹⁹

5.16 The need to keep public institutions accountable and the role of the media in this function was raised in many submissions. One journalist stated:

Independence of a society means an ability to self-assess and freedom to question its functions. If a government warrant is carried out in entire secrecy, then the system tends to lean towards politics clearly separated from democracy. ... Prohibition of information publication for two years compromises immediacy. Those 24 months become a period of inaction and a tool of silencing.²⁰

5.17 Under the Act's secrecy provisions, it is illegal to report or disclose any operational information about ASIO including anything about ASIO's capabilities, practices or plans. Breaching this provision carries a penalty of up to five years' imprisonment²¹ and a number of submissions objected to this section of the Act. Several submissions noted the discrepancy between a maximum two-year prison sentence for an official breaking the safeguards in the Act (section 34NB) and a journalist disclosing information about ASIO facing up to five years' gaol. A five year gaol term for revealing 'operational information' seemed to many to be too harsh, particularly in comparison to certain criminal offences where penalties are less severe. Mr Ryan stated:

19 Mr J. Purnell submission no.63, p.1.

20 Ms M Edmonds submission no. 36, p.1.

21 Subsection 34VAA (5)

[a] person who reports on the activities of another is subject to a longer period of gaol than the person who does the wrong thing in the first place.²²

- 5.18 The Attorney-General's Department argued that the penalty of five years was consistent with the penalties for section 34G offences and were in recognition of the seriousness of passing on operational information. The Committee recognises the importance of protecting operational information, but notes that public's confidence in its operations is also significant.

Recommendation 15

The Committee recommends that the penalty for disclosure of operational information be similar to the maximum penalty for an official who contravenes safeguards.

- 5.19 The effect of the severity of the punishment for breaches of section 34VAA and the duration of the prohibition was to prevent all reporting about the agency. Mr Emerton noted that the secrecy provisions rendered ASIO's conduct 'virtually immune from public scrutiny'.²³ Mr Wolpe from Fairfax stated:

Clearly, there are fundamental values and principles at stake in these debates. In a democracy, it is imperative to reconcile the interests of the protection of national security and the exercise of the rights of freedom of the press – we have a responsibility, jointly, to try to do so. In our judgment the ASIO legislation enacted so far has failed to satisfactorily reconcile these issues.²⁴

- 5.20 In its submission to the Committee, the Attorney-General's Department stated that there are no specific examples of journalists not publishing stories because of the secrecy provisions.²⁵ The Attorney-General's Department stated that the restrictions are necessary as disclosing operational information might jeopardise an investigation, even to the extent of severely damaging ASIO's ability to perform its duties. However, the Department noted that it would be impossible to successfully prosecute a person for disclosing operational information unless they had obtained such information as a result of a warrant being

22 Media, Entertainment and Arts Alliance transcript, 6 June 2005, p.3.

23 Mr P. Emerton submission no. 86, p. 26.

24 Fairfax Holdings submission no.73, p.1.

25 AGD supplementary submission no.102, p.5.

issued. A journalist who disclosed operational information, having obtained it by any other means, could not be prosecuted.²⁶ This might be strictly true; that a prosecution under section 34VAA might not be readily achieved.

5.21 The breadth of the definition of 'operational matters' was a further cause for concern. Fairfax Holdings acknowledged that paragraph 34VAA(5)(c) was necessary to protect ASIO's operations and allow it to perform its duties. However this submission and the Media, Entertainment and Arts Alliance both believed that subsection (a) in particular – restricting the disclosure of 'information that the Organisation has or had' – completely removed from scrutiny all discussion of ASIO's activities in relation to terrorism.²⁷ The breadth of the definition was arguably unconstitutional as it was 'potentially grossly disproportionate to the goal of protecting national security.'²⁸

5.22 In response, the Attorney-General's Department said that, although previous submissions suggested that the term 'operational information' used in the secrecy provisions was too broad²⁹, it must be read:

... in context with the other elements of the offence. In order to commit an offence for the disclosure of operational information, a person must have obtained the information as a direct or indirect result of a warrant being issued, or as a result of anything authorised under the ASIO Act in connection with the warrant.³⁰

5.23 This argument is similar to that put forward by the AGD in relation to the severity of penalties. It does not address the objection of the breadth of the definition. If it is possible to protect sources and operational capabilities, methods and plans, and yet preserve some transparency, the Committee suggests that would be in the interests of the integrity of the system to find a middle course on this question.³¹

26 AGD supplementary submission no.102, pp.4-5

27 Fairfax Holdings submission no 73, p. 3.

28 Fairfax Holdings submission no 73, p. 4.

29 It referred to '(a) information ASIO has or had, (b) a source of information or (c) ASIO's operational capabilities, methods or plans.

30 AGD supplementary submission no. 102, pp. 4-5

31 One submission made the point that if the press were allowed greater disclosure of ASIO's role and activities that this may engender more public support for ASIO. The Media, Entertainment and Arts Alliance submission no.65, p.5.

Recommendation 16

The Committee recommends that the term ‘operational information’ be reconsidered to reflect more clearly the operational concerns and needs of ASIO. In particular, consideration be given to redefining section 34VAA(5).

- 5.24 With respect to the overall regime under section 34VAA, Fairfax believed that there was scope for the use of a more flexible system which kept in mind the public interest and dealt with each case on its merits. They believed that, in rare and exceptional circumstances where an extended period of non-disclosure was needed, a suppression order in the interests of national security would be warranted.³² The Media Entertainment and Arts Alliance argued that there should be a reference to public interest in the permitted public disclosures under the Act.³³ The process used by the Australian Crime Commission was cited as a model that might be adopted.
- 5.25 Mr Joo-Cheong Tham and Mr Stephen Sempill argued for the repeal of the whole section to be replaced by a provision of a power for the prescribed authority or the issuing authority to issue orders for non-disclosure.³⁴
- 5.26 Professor Williams thought the secrecy provisions were overly strict and the definition of operational matters very broad. They were likely to prevent people who wished to report inappropriate use of the powers and they cast doubt on the process and undermined public confidence. He did not believe that strict liability should be applied as
- they apply a very strict test in circumstances where such a test is not reasonable. They may catch people in circumstances where people ought not to be caught. There should be an intention element involved as there would normally be in crimes, particularly when we are dealing with something that extends for such a long period after the warrant and then a five year penalty applies.³⁵
- 5.27 In recognition of the difficulty of defining in generality what is appropriate, Professor Williams’ preference, was to investigate the models of the Australian Crime Commission and such bodies where the prescribed authority has the ability to make determinations about whether

32 Fairfax Holdings submission no 73, p. 3.

33 Media, Entertainment and Arts Alliance submission no 65, p.2.

34 Joo-Cheong Tham and Sempill, submission no 35, p.23.

35 Williams transcript, public hearing 20 May 2005, pp. 35-36.

the very strict secrecy provisions should apply. This decision, he said, would be made at the conclusion of a period of questioning or detention. The decision would be made by an independent person and, therefore, both the public interest and national security could be protected.³⁶

5.28 The AGD rejected these suggestions on a number of grounds. ASIO needed a strong, effective and workable regime. ASIO investigations were fast moving and complex. Alerting other members of a terrorist network could be dangerous. It was unclear who would or could make a determination of the status of information – the issuing authority or the prescribed authority. The suggestion was, therefore, impractical and unworkable.

It would require ASIO to make an assessment, and then the independent party to make a determination, as to what information may or may not be disclosed at each step of the process. This would require additional procedural time while a person is being questioned or a break in the questioning to go back to the issuing authority, who may or may not be available. ... It would add a further layer of administrative complexity ... and detract from the objective of the regime which is to get important information in relation to a terrorism offence.³⁷

5.29 The Attorney-General's Department did not accept that the provisions were a blanket prohibition of disclosure and pointed to both the limits on the time (subsections 34VAA(1) and (2)) and the permitted disclosures under the act (subsection 34VAA(5)).

5.30 The Committee notes, however, that these permitted disclosures are, with the exception of minors, almost all related to people involved in the questioning process. Other disclosures can be made with the permission of the prescribed authority or the Director-General of Security.³⁸ None appears to address the question of scrutiny.

5.31 The matters with which the ACC deals are likely to be as complex and serious as those facing ASIO. The secrecy provisions of the ACC have proved to be effective and manageable to implement. It is the Committee's view that the model of the ACC is worth consideration.

Unauthorised disclosure

5.32 Other issues raised concerned contradictions and absurdities in the operations of the secrecy provisions of the Act. One submission expressed

36 Williams transcript, public hearing 20 May 2005, p. 36

37 AGD supplementary submission no 102, p. 3.

38 AGD supplementary submission no 102, p. 5.

concern that the press may be used to print stories favourable to the government agenda through information leaked presumably from government sources, about the execution of warrants, raids, etc. In such a case, the person who becomes the subject of the media articles has no power to tell his side of the story because of the secrecy provisions. In a confidential submission, a lawyer who appeared for the subject of a warrant stated:

... it appeared material was briefed or leaked to the media to create sensational stories about the matter, often with aspects that appeared favourable to the government agenda. ... any person who seeks to correct such stories by giving the full information or even a proper explanation to the media would face the serious risk of prosecution under these provisions.³⁹

- 5.33 This case occurred in 2003. At the time this material occurred in the media there were no secrecy provisions. It was cited by the Attorney-General's Department as illustrative of the need for 'strong and broad secrecy provisions'⁴⁰.
- 5.34 During the course of this review, a similar circumstance arose. Searches were conducted on houses in Sydney and Melbourne on 22 and 27 June 2005. There was considerable publicity given to the 'raids', photographs of the houses and significant details about the purposes of the search warrants. Subjects were described as 'known extremists'⁴¹ or a 'radical Islamic network'⁴² belonging to a 'cell'⁴³ and had 'attended training camps'⁴⁴ and talked about carrying out attacks similar to those overseas. They 'cased'⁴⁵ the Melbourne Stock Exchange. The sources of the information, directly quoted, were described variously as 'surveillance officers', 'authorities' 'counterterrorism agencies'. The reports contained considerable detail of operations – the fact that homes had been bugged, particular movements that had been under surveillance, the assessments and intentions of the authorities. However, most reports dissolved into 'plenty of talk ... but no specific intent'⁴⁶ and insufficient evidence for charges.
- 5.35 The Inspector-General of Intelligence and Security, Mr Carnell, was also critical. He said:

39 Confidential submission.

40 AGD supplementary submission no 102, p.5.

41 Martin Chulov & Cameron Stewart, Australian, Thursday 23 June 2005

42 Keith Moor, Herald Sun, Friday 24 June 2005.

43 Keith Moor, Mark Dunn, Paul Anderson, Herald Sun, 23 and 24 June 2005

44 Martin Chulov , Australian, 23 June 2005 and Keith Moor, Herald Sun 23 June 2005.

45 Keith Moor, Herald Sun, Friday 24 June 2005.

46 Keith Moor, Herald Sun, Friday 24 June 2005.

I'm uncomfortable with so much material appearing in the media, and I'm uncomfortable with the residence of one person alleged to have been caught up in these things appearing in the media. The first concern is ... if these are matters of national security, they shouldn't be bandied about freely and in apparent detail in the media. ... Secondly, it's a matter of intrusiveness and privacy rights. And the capacity of these people to respond is relatively limited, I think.⁴⁷

- 5.36 The perceived lack of natural justice was a matter of concern to the Committee.

They could be vilified in the media but have no chance under these current provisions to respond, unless of course the Director-General authorises some sort of response.⁴⁸

It was asserted publicly that they could speak – it was only a search warrant – but we know with regard to at least some of these people, and presumably the ones who are identified and located and whose houses were photographed, whose lives were put into a circumstance where they are now in the public mind seen as persons suspected of gross disloyalty to their own country, that they cannot respond ... because it may be ... an offence under a questioning regime which contemporaneously occurred.⁴⁹

- 5.37 The information in 2005, similar to that in 2003, appeared to be 'a quite inspired set of leaks that were published on the same day in several different newspapers under different by-lines as exclusives, obviously put into the public domain by somebody in authority.'⁵⁰ ASIO's view was that the reporting of the raids was speculative rather than a correct representation of the events.

- 5.38 The Committee was informed that investigations were being carried out into the unauthorised disclosures.

Community support and welfare

- 5.39 The Islamic Councils and other Muslim welfare organisations also expressed concern that secrecy provisions hampered their work.

It is our mission to assist members of the community in times of uncertainty or instability such as would be caused by detention under the Act, and to provide support to them and their family

47 Mr Ian Carnell, Dateline, 23 August 2005.

48 Transcript, classified hearing 8 August 2005, p.11.

49 Transcript, classified hearing 8 August 2005, p.13.

50 Transcript, classified hearing 8 August 2005, p.13.

members. Yet how can we possibly provide assistance to our members when they are prohibited from approaching our organisation or anyone for help, counselling or other assistance?⁵¹

- 5.40 The two year period prohibiting a detained person from speaking to family, friends or employers about the detention was also of concern to many people.
- 5.41 A number of witnesses suggested that the prohibition on subjects stating where they were was not just potentially a difficulty in explaining themselves to employers and family, but reached farcical levels when the refusal to say had the effect of indicating what had happened to them anyway. Lawyers had similar problems in explaining their whereabouts in normal conversations with colleagues.⁵²
- 5.42 In its submission to the Committee, the Attorney-General's Department told the Committee that the perception that detainees cannot inform their employer or family members is incorrect:
- [t]hese provisions are flexible enough to allow such contact in appropriate circumstances. ... there are cases where it is against the objectives of the legislation for the employer or other people to be advised. But in cases where a warrant subject has good reasons for contacting their employer or another person and there are no genuine security concerns about such contact, the current provisions would allow such a disclosure to be permitted.⁵³
- 5.43 The Committee understands that there are disclosures permitted under the Act. However, the problems and objections raised in this chapter deserve consideration. It is clear that the content of the questioning will need to be protected. The Committee accepts that there are circumstances where urgency and potential danger would and should prohibit any disclosure of the fact that a warrant exists. These circumstances would be those which would trigger a detention warrant. The Committee is satisfied that strict secrecy provisions might still apply to detention warrants. Any thorough re-consideration of secrecy surrounding detention warrants, however, can only be made in the light of the operation of detention warrants when, and if, they are used in future.
- 5.44 However, the Committee believes that changes to the secrecy regime for questioning-only warrants should be considered. It has asked ASIO and the AGD to consider ways in which a level of disclosure, particularly as to

51 Mr A. Roude, Islamic Council of NSW Inc. submission no. 89, p.3.

52 Lawyers transcript, classified hearing 7 June 2005, p. 3.

53 AGD supplementary submission no.102, p.5.

the existence of the warrant, can be achieved. The Department declined the Committee's request but made the following suggestion:

One possibility is to require the relevant decision-maker to take into account certain factors in deciding whether to permit a particular disclosure. These factors could include requiring the Director-General, the Attorney-General, and the prescribed authority to take into account the person's family and employment interests, the public interest, and the security risk of the information being disclosed. In addition to addressing the notification issue, requiring the decision-maker to take into account the public interest may assist a person who wishes to defend themselves where information is leaked about that person being questioned under an ASIO warrant.⁵⁴

5.45 The Committee notes the views of the AGD.

Recommendation 17

The Committee recommends that:

- **consideration be given to amending the Act so that the secrecy provisions affecting questioning-only warrants be revised to allow for disclosure of the existence of the warrant; and**
- **consideration be given to shifting the determination of the need for greater non-disclosure to the prescribed authority.**

ASIO's public reporting on warrants

5.46 ASIO currently reports on the number of warrants and the total number of hours of questioning and detention in its Annual Report to the Parliament. These requirements were included as a result of this Committee's earlier recommendations on the original Bill.⁵⁵

5.47 Despite this reporting, the level of concern in the community and among representative and interest groups about the length of questioning periods is significant and strong. A number of submissions indicated that there was a real perception in the community that ASIO now lacks accountability. The International Commission of Jurists and the Federation of Community Legal Services reflected the general view expressed in submissions:

54 AGD supplementary submission no.111, p.2.

55 Recommendation 11, *An Advisory Report on the Australian Security Intelligence Organisations Legislation Amendment (Terrorism) Bill 2002*, May 2002, p.xvi.

Because of the [two year ban] there is little public scrutiny of the operation of the questioning powers. We have really no way of knowing what is going on.⁵⁶

The coercive nature of ASIO's special powers is exacerbated by the secrecy that surrounds them. The capacity of individuals and communities to express concern about the exercise of powers and to keep ASIO accountable is curtailed. ... A system of open and accountable government is a pre-requisite for true and meaningful democracy. This system in turn requires that people are at liberty to divulge information regarding their treatment by government agencies to the media and to their communities.⁵⁷

- 5.48 Public confidence in the performance of ASIO would be improved if more detailed reporting to the Parliament was provided. Information on the number and length of the questioning sessions within the total period of each warrant would assist. ASIO should also report whether there have been any formal complaints to the IGIS, the Ombudsman or appeals to the Federal Court. If charges are laid as a result of warrants issued, these should also be listed.
- 5.49 The IGIS has advised that he is satisfied that ASIO has adopted proper administrative practices to support the procedures. The information should therefore be readily available without any additional administrative burden.
- 5.50 It is the Committee's view that with increased powers, especially powers which infringe significantly on individual liberties, there are increased responsibilities for public accounting.

56 ICJ submission no. 60, p. 5.

57 Federation of Community Legal Services submission no.50, p. 10.

Recommendation 18

The Committee recommends that ASIO include in its Annual Report, in addition to information required in the Act under section 94, the following information:

- the number and length of questioning sessions within any total questioning time for each warrant;
- the number of formal complaints made to the IGIS, the Ombudsman or appeals made to the Federal Court; and
- if any, the number and nature of charges laid under this Act, as a result of warrants issued.

Continuation of the legislation

Proportionality

- 6.1 Legally, the use of extraordinary powers, which restrict the rights and liberties of citizens¹, is acceptable only in times of proclaimed public emergencies.² In a liberal, democratic society, under these circumstances, the restriction of rights must be proportionate to the nature, level and duration of the threat and not a precedent for permanent, restrictive, legal arrangements. The Centre of Public Law argued that:

It is vital to view these powers as temporary, exceptional measures ...;

to regard 'national security' as being a vital interest because of its capacity to protect and maintain rights and liberties ...; and

the debate should be one about limiting rights and liberties only for the purpose of safeguarding rights and liberties from terrorist threats.³

1 Over and above ordinary limits.

2 However, this does not extend to the non-derogable rights, such as the right to life and freedom from torture and slavery. States of emergency, which require the derogation of rights, should also be proclaimed domestically and notified to the other states parties to the ICCPR through the Secretary-General of the UN. HREOC submission no. 85, p.28.

3 Centre of Public Law submission no. 55, p. 2.

- 6.2 A public emergency was defined for the Committee as one that is actual or imminent and one that threatens the 'life of the nation'.⁴
- 6.3 The need to test proportionality, in particular the need to justify extraordinary powers against the existence of an emergency, pervades not only international law but a long line of cases in the domestic law of comparable jurisdictions.⁵ Most recently, in December 2004, in the case of *A v Home Secretary*, Lord Hoffman argued that the then circumstances in Britain did not compare with emergencies previously weathered.

Of course the government has a duty to protect the lives and property of its citizens. But that is a duty it owes all the time and which it must discharge without destroying our constitutional freedoms. There may be nations too fragile or fissiparous to withstand a serious act of violence. But that is not the case in the United Kingdom.

This is a nation which has been tested in adversity, which has survived physical destruction and catastrophic loss of life. ... Whether we would survive Hitler hung in the balance, but there is no doubt we will survive Al Qaeda. ... Terrorist violence, serious as it is, does not threaten our institutions of government or our existence as a civil community.⁶

- 6.4 The London Metropolitan Police Commissioner, Sir Ian Blair, after the bomb attacks on 7 July 2005, echoed similar 'proportionate' sentiments:

If London can survive the Blitz, it can survive four miserable events like this.⁷

4 Centre of Public Law submission no. 55, p. 4.

5 Mr Jon Stanhope, Chief Minister, ACT Government submission no. 93, p.1-2; See for example, UN Human Rights Committee General Comment No.29 (24 July 2001); *Brannigan and McBride v United Kingdom* (1993) 17 EHRR 539; *Aksoy v Turkey* (1996) 23 EHRR 553; *Marshall v United Kingdom* (10 July 2001, Appn No 41571/98); *Ireland v United Kingdom* (1978) 2 EHRR 25; *Lawless v Ireland* (No.3) (1961) 1 EHRR 15. The need to test proportionality was emphasised by the United States Supreme Court during the Second World War in *Korematsu v United States* 323 U.S. 214 (1944); during the Korean Conflict by the High Court of Australia in the *Communist Party Case* (1951) 83 CLR 1.

6 Paragraphs 95-96, decision in *A v Home Secretary* quoted from Centre of Public Law submission no. 55, p. 4.; *A (FC) and Ors v Home Secretary* [2004] UKHL 56.

7 *The Bulletin*, 19 July 2005, p. 20. The article also noted that during the blitz, 20,000 civilians died between 1940 and 1941, 1,500 on one night.

- 6.5 Many submissions questioned whether the extraordinary powers given to ASIO under Division 3 Part III are proportionate to the level of terrorist threat which Australia is currently facing or likely to face.
- 6.6 Proportionality is a legal principle which requires that:
- The legislative objective must be sufficiently important to justify limiting fundamental rights;
 - The measures adopted must be rationally connected to that objective; and
 - The means used must be no more than that which is necessary.
- 6.7 The Centre for Public Law argued that, in times of emergency, measures that are necessary may be over and above that ordinarily permitted if measures that are least restrictive have failed. Measures must last only as long as the emergency.⁸

Australia's security environment

- 6.8 When the legislation was first introduced, the Attorney-General acknowledged that:
- These measures are extraordinary, but so too is the evil at which they are directed.⁹
- 6.9 The security context was the aftermath of the terrorist attacks on the World Trade Centre on 11 September 2001, and the Attorney-General went on to stress the importance that:
- Australia does not forget the catastrophic results that terrorism can produce.¹⁰
- 6.10 The nature of terrorism was perceived to pose a threat entirely different from any danger previously faced by Australia. It was described by the Attorney-General as quite unlike ordinary crime, necessitating a response quite unlike the accepted responses to criminal activity. The way terrorist networks are organised, and the horrific destruction which terrorist acts can inflict on ordinary citizens going about their daily lives, called for extraordinary measures to protect the lives and the rights of Australians and Australian interests.

8 Centre of Public Law submission no. 55, p.3.

9 The Hon Daryl Williams, MP, Attorney-General, *ASIO Legislation Amendment (Terrorism) Bill 2002*, Second reading House of Representatives, *Hansard*, 21 March 2002, p. 1932.

10 *ibid*

- 6.11 In the Second Reading debate in September 2002, the level of threat in 2002 was described by the Attorney-General:

While there is no specific threat to Australia, our profile as a terrorist target has risen and we remain on heightened security alert. Our interests abroad also face a higher level of terrorist threat, as evidenced by the plan to attack the Australian High Commission in Singapore and the fact that recently we have seen the Australian Embassy in East Timor closed temporarily as a result of a terrorist threat.¹¹

- 6.12 Fears of terrorist attack were heightened by the Bali bombing, when 80 Australians were killed in October 2002. The extraordinary measures encompassed by the Bill were now characterized, in the debate in June 2003, as an attempt to protect the Australian people 'against a known threat'.

The consequences of that threat have already been demonstrated starkly in events on September 11 and, particularly as far as Australians are concerned, on 12 October last year in Bali – and less starkly in myriad different ways in many countries around the globe who have experienced terrorist incidents over the course of the last few years. We have a definite identified threat to this country"¹²

- 6.13 And, in his concluding remarks, the Attorney-General said:

We have always said that we recognise that this bill is extraordinary; indeed, I have indicated repeatedly that I hope the powers under the bill never have to be exercised. But this bill is about intelligence gathering in extraordinary circumstances..."¹³

- 6.14 An important safeguard introduced into the present legislation is the sunset clause, included as an amendment to the original Bill. Whether the extraordinary measures introduced in 2002 are justified in the present security environment is fundamental to this Committee's review of the implications of the legislation. The nature of the threat facing Australia and Australians, its severity and likely

11 The Hon Daryl Williams, MP, Attorney-General, *ASIO Legislation Amendment (Terrorism) Bill 2002*, Second reading House of Representatives, *Hansard*, 23 September 2002, p.7040

12 Hon. K Beazley, MP, *ASIO Legislation Amendment (Terrorism) Bill 2002*, Second Reading, House of Representatives, *Hansard*, 26 June 2003, p.17678

13 Hon. Daryl Williams, MP, Attorney-General, *ASIO Legislation Amendment (Terrorism) Bill 2002*, Second Reading, House of Representatives, *Hansard*, 26 June 2003, p.17671

duration provide the context for the Committee's assessment of the need to restore powers previously used in Australia only during the World Wars.

- 6.15 In his appearance before the Committee, the then Director-General of Security, Mr Dennis Richardson, said that:

If we have learnt anything from the past few years, it is that we need strong and balanced counterterrorism laws in place to be able to respond effectively to the threat of terrorism.¹⁴

- 6.16 On the nature of the current threat, Mr Richardson argued that:

[I]n each of the five years between 2000 and 2004 inclusive, there was either a disrupted, an aborted or an actual attack involving Australia or Australian interests abroad. In 2000, we had the planning by Jack Roche ... to attack the Israeli Embassy in Canberra and consulate in Sydney. In 2001, we had disruption to the planning by Jemaah Islamiah in Singapore to attack Western interests in Singapore – mainly US, but including the Australian High Commission. In 2002, we had Bali. In 2003, we had the disruption to the planning by Willie Brigitte and others in Australia to carry out a terrorist attack here. On 9 September 2004, we had the attack against the Australian Embassy in Jakarta.¹⁵

- 6.17 The Director-General described the threat as a long term generational threat and asserted that further attacks were inevitable.¹⁶

- 6.18 The Committee notes that, despite the above examples, no significant terrorist violence has occurred inside Australia, at least since the mid nineteen eighties.¹⁷ Anti-terrorist legislation such as Division 3 Part III is primarily directed at the domestic threat. Apart from the secrecy

14 ASIO transcript, public hearing 19 May 2005, p. 2.

15 ASIO transcript, public hearing 19 May 2005, p. 2.

16 ASIO transcript, public hearing 19 May 2005, p. 2.

17 There were a series of actual bombings in Australia which might be described as politically motivated violence: the Hilton bombing in 1978, the assassination of the Turkish Consul-General in 1980, the bombing of the Israeli Consulate General and the Hakoah Club in 1982. Jenny Hocking, in *Terror Laws*, makes the point that 'a peak of 83 such incidents of politically motivated violence and vandalism was reached in 1971', see p. 111. In 1886 the Protective Services Coordination Centre released information on 'identifiable terrorist incidents in Australia between 1970 and 1985', including 16 incidents of violence which can be attributable to Yugoslav separatists (one death resulting), five incidents attributed to the Ananda Marga (three deaths) and two deaths from an attack by the Justice Commandos of the Armenian Genocide. See Hocking, *op. cit.* p. 121.

provisions, the power cannot be exercised outside the territory of Australia. However, the Committee recognises that Australia has intelligence sharing obligations which, in a world where terrorist groups operate across borders for both the planning and execution of terrorist acts, intelligence gathered in one jurisdiction could save lives, Australian and others, in another jurisdiction. This is a serious and important obligation.

- 6.19 Nevertheless, in passing legislation that restricts the rights of Australians in this country, the level and immediacy of threat as it pertains to this country must have some significance and be given some weight in considering the necessity for extraordinary powers.
- 6.20 Most submissions queried whether the present legislation is in fact balanced or necessitated by the current threat level in Australia. None questioned the need to protect Australians from terrorist attacks. The ICJ noted in its submission that the 'conviction of Jack Roche ... for conspiring to bomb the Israeli Embassy here in Canberra suggests that there are individuals out there who are capable of committing a terrorist act in Australia.'¹⁸ However, most submissions did question whether the present security situation is as grave and immediate as, for example, the threat of attack on Australia and its territories by Japan in World War II.¹⁹ The Federation of Community Legal Services (Victoria) drew attention to ASIO's assessment that the level of threat to Australia is 'medium' and submitted that a medium threat level does not justify emergency powers.
- 6.21 The Committee believes that it is important to try to be as measured and as accurate as possible in making assessments of threat levels.
- 6.22 Taking account of all the evidence received during the inquiry, and acknowledging that attacks are always possible, evidenced by the recent attacks in London and Bali, the Committee notes that ASIO assesses that the current threat level is medium.

The Sunset Clause

- 6.23 Three of the 113 submissions put to the Committee argued that the sunset clause should be removed from the legislation. These were

18 ICJ submission no. 60, p. 2.

19 Submissions from the Law Council of Australia no. 80 and the Human Rights and Equal Opportunity Commission no. 85.

submissions from ASIO, the Attorney-General's Department and the Australian Federal Police. The arguments of these agencies focused on the utility of the provisions and the professional way in which they had been exercised to date. All other submissions to the review argued strongly that the sunset clause must be retained. These submissions focused on legal principle and the extraordinary nature of the legislation, rather than the way it has been administered and its outcomes. To some extent the arguments have been at cross purposes.

- 6.24 ASIO argued that the sunset provision, section 34Y, should be removed, 'that the questioning and detention powers become a permanent part of the suite of counter-terrorism laws'.²⁰ Its reasons for this argument were that 'many of the concerns about how the powers might be used have been unfounded.' ASIO has not, and would not, waste resources or expose methods unnecessarily by using its powers excessively.²¹
- 6.25 The Attorney-General's Department argued that the sunset clause should be removed because the provision had worked well and provided valuable information within the framework of extensive safeguards and accountability mechanisms. The Department also noted that ASIO had adopted a responsible and measured approach to the use of its powers.²² They further argued that a sunset clause was too inflexible and might coincide with a time of national crisis, taking resources away from protecting the Australian community.²³
- 6.26 The Australian Federal Police argued that the laws should be permanent because 'the terrorism environment which required the establishment of the powers is unlikely to change in the near future.'²⁴
- 6.27 The starting point for many of the other submissions was that the powers were unnecessary, that the existing powers of law enforcement and the criminal code were sufficient to deal with the level of threat and that the threat level was not as great as dangers faced by the nation at other times. The overwhelming view was that the Division 3 Part III should not be renewed at all. However, most argued that, if the provision were to be re-enacted, it must contain a

20 ASIO transcript, public hearing 19 May 2005, p. 2.

21 ASIO submission no. 95, p.7.

22 AGD submission no. 95, p.28.

23 AGD supplementary submission no. 102, p.10.

24 AFP transcript, public hearing 19 May 2005, p. 6.

further sunset clause and that this should be accompanied by a further parliamentary review by this Committee.

To go to your point about whether or not the sunset clause should be given a further date in the future: we would say yes. If we cannot have these detention powers and questioning powers stopped now and the normal criminal law standards effected, if we cannot achieve that as our first aim, then we would say, extend the sunset clause and keep a very tight view on it.²⁵

- 6.28 In support of this view, it was very strongly argued that the powers must be considered as temporary and exceptional, that national security is important only insofar as it maintains our rights and liberties and that the legislation is inconsistent with basic democratic and judicial principles.²⁶ The Centre for Public Law believed that the detention powers, as yet unused, should not be re-enacted and the questioning powers, if re-enacted, should be subject to a further three year sunset clause.

[The legislation] has got to be seen as an exceptional measure and, as such, there is not any reasonable basis for making it permanent.²⁷

- 6.29 Dr Greg Carne also argued that the powers are exceptional and unprecedented. He believed that the sunset clause was necessary and made more necessary by the way the powers were expanded in November 2003 when the introduction of the secrecy provisions meant that scrutiny and public accountability, including over potential matters of illegality and impropriety, were dramatically curtailed.²⁸ Further, he believed that the experiential base for assessing the use of the powers so far is too narrow.²⁹ Finally, he argued that the abandonment of the sunset clause would be at odds with the Government's policy in *Australia's National Framework for Human Rights National Action Plan*, which says that the protection of

25 Law Council of Australia transcript, public hearing 6 June 2005, p. 18.

26 Centre for Public Law submission no. 55, p. 3 and p. 9.

27 Centre for Public Law transcript, public hearing 20 May 2005, pp.27-28.

28 Dr Greg Carne submission no. 67, pp. 2-3.

29 Dr Greg Carne submission no. 67, p. 5. This view of the lack of an experiential base was put by a number of submissions, including the Federation of Community Legal Services, transcript, public hearing 7 June 2005, p.56 and Victoria Legal Aid, transcript, public hearing 7 June 2005, p.42.

human rights in Australia occurs not through a Bill of Rights, but through our parliamentary system.³⁰

- 6.30 Various submissions rejected the view that the professional use of the powers justified their being made permanent. This argument was based on the view that the law itself was what mattered, not the intentions of the public servants.

But there is always the risk that under different management we could see the extreme measures that are contained in the act being more aggressively used.³¹

Even if one can show that, under the management of the capable and eloquent Mr Richardson, ASIO used its powers prudently it is no guarantee that they will be used prudently in the future – certainly when the sunset has passed.³²

- 6.31 In respect of the Attorney-General's Department's argument that the review might coincide with a crisis and therefore be difficult to comply with, other submissions rejected this argument as having no merit. Mr Moglia from Legal Aid Victoria pointed out that 'it would never be convenient and that is why there are fixed periods for a sunset clause.'³³ Committee members reminded ASIO and the Attorney-General's Department that genuine public scrutiny was an integral part of public confidence in the operations of the powers and an essential safeguard.³⁴

- 6.32 It was further argued that the fact of an inquiry, fixed in the context of the potential lapse of the legislation, did more than anything else to ensure the probity of its operation.

But the advantage of the review is that people know it is going to happen, so there is just in the background another reason for complying with all the things that one needs to comply with and to exercise the act carefully.³⁵

A sunset clause providing public parliamentary debate is the most fundamental safeguard in a representative democracy.³⁶

30 Dr Greg Carne submission no. 67, p. 7.

31 HREOC transcript, public hearing 20 May 2005, p.14.

32 AMCRAN transcript, public hearing 6 June 2005, p. 5.

33 Legal Aid Victoria transcript, public hearing 7 June 2005, p.36.

34 Transcript, classified hearing 8 August 2005, p.19.

35 HREOC transcript, public hearing 20 May 2005, p. 25.

36 NACLIC transcript, public hearing 6 June 2005, p. 28.

- 6.33 Mr Moglia argued that the process of review and the sunset clause were linked to a principle which required that the justification for continuing exceptional powers rested with the government and the parliament rather than the people.

It is our submission that the onus rightly rests on the parliament to prove, to whatever standard, that there is a requirement for ongoing powers of this kind. It would be wrong to suggest that it is for the community to prove to parliament by lobbying or any other kind of review process that it [Division 3 Part III] should be removed. The onus lies with ASIO, this committee or the parliament in general to have specific exceptional reasons why these exceptional powers should exist. It is what has happened so far and it should continue. The onus should be on those who would grant powers rather than those who would seek to change the day to day laws.³⁷

- 6.34 The Inspector General of Intelligence and Security affirmed that the use of the powers to date had been professional and that, therefore, in the short term, the sunset clause might not be necessary. However, he acknowledged the arguments put by other submissions of the 'role of detention historically in oppression' and, on balance, supported the continuation of a sunset clause albeit with a longer cycle.³⁸
- 6.35 The Committee would also note that, in something so amorphous as a war on terrorism, where the end point might be difficult, or indeed impossible, to define, it is even more important that extraordinary legislation, developed to deal with these exceptional circumstances, be reviewed regularly and publicly to ensure that the extraordinary does not become ordinary by default.
- 6.36 The Committee finds the arguments in favour of retaining the sunset clause the more compelling. A sunset clause, which means that the legislation must be introduced anew, ensures that the public and parliamentary debate on the need for the powers will be regularly held and of the most focussed kind. The debate on the legislation will necessarily be more extensive if it must go through a Committee review, such as the current one, and then be debated as legislation in the chambers of the House of Representatives and the Senate. Only a

37 Victoria Legal Aid transcript, public hearing 7 June 2005, p.36.

38 IGIS transcript, public hearing 20 May 2005, p. 2.

sunset clause will achieve this. Anything else is potentially academic or indefinitely deferrable.

Conclusions

- 6.37 There is no state of emergency in Australia in the strict legal sense of the concept.
- 6.38 There are, however, for the foreseeable future, threats of possible terrorist attacks in Australia.
- 6.39 Some people in Australia might be inclined or induced to participate in such activity.
- 6.40 It is valuable to monitor such people, through ASIO's various intelligence gathering methods, to seek to prevent such possible actions.
- 6.41 The questioning regime set up under Division 3 Part III has been useful in this regard.
- 6.42 The regime has some deficiencies as discussed in this report and amendments should be made to the Act accordingly.
- 6.43 To date, the powers have been used within the bounds of the law and they have been administered in a professional way.
- 6.44 However, the powers are extraordinary and should not be seen as a permanent part of the Australian legal landscape.
- The whole range of the powers has not yet been exercised and therefore there is no basis to judge whether those powers not yet used are workable, whether they are reasonable, whether they would be used wisely, whether they are constitutionally valid.
 - The period of the exercise of the questioning powers has been for only a very short time (two years prior to this review) and while they are subject to legislated controls, the capacity to scrutinise their operation, as they are used by a secret service, is not extensive and certainly not as immediate as is the case with the criminal justice system.
 - They are subject to the quality of the administration of the service at any particular time.

- 6.45 Therefore, given the extent and nature of the powers and the secret nature of their use, scrutiny of the most rigorous kind must remain in place.
- 6.46 As they should not be permanent and should be scrutinised as thoroughly as possible, it is the Committee's view that the sunset clause must remain.
- 6.47 However, the Committee acknowledges that three years is a brief period of time for consideration of the operation of any legislation, particularly legislation that is to be used only as a last resort; therefore, the period of the sunset clause should be increased.

Recommendation 19

The Committee recommends that:

- **Section 34Y be maintained in Division 3 Part III of the *ASIO Act 1979*, but be amended to encompass a sunset clause to come into effect on 22 November 2011; and**
- **Paragraph 29(1)(bb) of the *Intelligence Services Act 2001* be amended to require the Parliamentary Joint Committee on Intelligence and Security to review the operations, effectiveness and implications of the powers in Division 3 Part III and report to the Parliament on 22 June 2011.**

Hon David Jull MP

Chairman



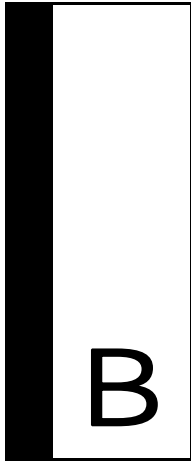
Appendix A – List of Submissions

1. New South Wales Ombudsman
2. New South Wales Commission for Children and Young People
3. Mr Benjo Keaney
4. National Union of Students
5. Australian Civil Liberties Union
6. Mr Jalal Chami
7. Mr Pat Finegan
8. Mr Zuleyha Kip
9. Mr Samir Dandachli
10. Mr Khaled DiabMs Ra
11. Mr Rany Soss
12. Mr Mehmet Kose
13. Mr Nayeefa Chowdhury
14. Mr Ahsan Khandoker
15. Mr Shawn Whelan
16. Ms Roslinah Rasdi
17. Women’s International League for Peace and Freedom
18. Mr Robin Gaskell
19. Mr Benjamin Nitschke
20. Ms Z. Dandachli
21. Ms Anneliese Hauptstein
22. Mr Osama Mah
23. NOWAR South Australia
24. Mr Imrul Alam
25. Mr S. Turner
26. Mr John Sved
27. Ms Julia Beehag
28. Ms Julie Lehmann

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29. Ms Joan Coxsedg and Mr Gerry Harant
 30. Mr Sam Varghese
 31. Pax Christi Australia
 32. Matthew Philip
 33. UN Australia
 34. Ms Jane Mackenzie
 35. Mr Joo-Cheong Tham and Mr Stephen Sempill
 36. Ms Maria Edmonds
 37. Ms Belinda Connolly
 38. Ms Matthew Nelson
 39. Ms Rachael Antony
 40. Berwyn Lewis
 41. Youth Affairs Network of Queensland
 42. National Human Rights Network
National Association of Community Legal Centres
 43. Ms Camilla Pandolfini
 44. Mr Mike Browning
 45. Citizens Commission on Human Rights
 46. Ms Rosemary Dunlop
 47. Victoria Legal Aid
 48. Illawarra Legal Centre Inc
 49. Commonwealth Ombudsman
 50. Federation of Community Legal Centres (Vic) Inc
 51. Ms Anne-Maree Williams
 52. Mr Justin Whelan
 53. UnitingCare NSW.ACT
 54. Civil Rights Network
 55. Professor George Williams, Gilbert-Tobin Centre of Public Law
 56. UTS Community Law Centre, University of Technology
 57. Islamic Council of Victoria
 58. Northern Migrant Resource Centre
 59. University of Technology Progressive Law Students' Network
 60. International Commission of Jurists
 61. Ms Juliet Suich
 62. Atosha McCaw
 63. Mr John Purnell
 64. SEARCH Foundation
 65. Media, Entertainment and Arts Alliance
 66. Confidential
 67. Dr Greg Carne
 68. Equal Opportunity Commission of Victoria
 69. International Federation of Journalists

70. Ms Melissa Jones
71. Confidential
72. Liverpool Women's Health Centre
73. John Fairfax Holdings Ltd
74. Inspector-General of Intelligence and Security
75. Caston Centre for Human Rights Law
76. Queensland Government
77. Office of the Deputy Commissioner (Operations)
Western Australian Police Service
78. Civil Rights Network (Melbourne)
79. Liberty Victoria
80. The Law Council of Australia
81. Amnesty International Australia
82. Law Institute of Victoria
83. Australian Federal Police
84. Attorney-General's Department
85. Human Rights and Equal Opportunity Commission
86. Mr Patrick Emerton
87. Security-in-Confidence
88. AMCRAN (Australian Muslim Civil Rights Advocacy Network)
89. Islamic Council of New South Wales
90. Public Interest Advocacy Centre
91. Australian Press Council
92. Northern Territory Government
93. Mr Jon Stanhope MLA, Chief Minister, ACT Government
94. Human Rights Coalition, Public Advocates' Office
95. Australian Security Intelligence Organisation (ASIO)
96. Government of Tasmania
97. Australian Broadcasting Corporation
98. Mr Bruce C. Wolpe, John Fairfax Holding Ltd (Supplementary Submission)
99. Mr Joo-Cheong Tham (Supplementary Submission)
100. Dr Greg Carne (Supplementary Submission)
101. Mr Rae Desmond Jones
102. Attorney-General's Department (Supplementary Submission)
103. Mr Eugene Lock
104. Public Interest Advocacy Centre (Supplementary Submission)
105. Mr David Hopkins
106. National Association of Community Legal Centres (Supplementary Submission)
107. AMCRAN - Australian Muslim Civil Rights Advocacy Network
(Supplementary Submission)
108. Ms Meg Stewart
109. Federation of Community Legal Centres (Vic) Inc (Supplementary Submission)

- 110. Victoria Legal Aid (Supplementary Submission)
- 111. Confidential
- 112. Confidential
- 113. Secret



Appendix B – List of Witnesses appearing at Private and Public Hearings

Canberra (Public Hearing) – 19 May 2005

Australian Security Intelligence Organisation (ASIO)

Mr Dennis Richardson, Director-General of Security

Legal Adviser

Attorney-General's Department

Mr Geoffrey McDonald, Assistant Secretary, Security Law Branch

Ms Annette Willing, Principal Legal Officer, Security Law Branch, Security
and Critical Infrastructure Division

Mr Douglas Rutherford, Senior Legal Officer, Security Law Branch

Australian Federal Police

Dr Grant Wardlaw, National Manager Intelligence

Federal Agent Simon Crowther, Senior Legislation Officer

Office of the Commonwealth Ombudsman

Professor John McMillan, Commonwealth Ombudsman

Mr Damien Browne, Senior Assistant Ombudsman

Mrs Elizabeth Hampton, Director, Law Enforcement

Canberra (Private Hearing) – 19 May 2005

Australian Security Intelligence Organisation (ASIO)

Mr Dennis Richardson, Director-General of Security

Legal Adviser

Attorney-General's Department

Mr Geoffrey McDonald, Assistant Secretary, Security Law Branch

Ms Annette Willing, Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division

Mr Douglas Rutherford, Senior Legal Officer, Security Law Branch

Australian Federal Police

Dr Grant Wardlaw, National Manager Intelligence

Federal Agent Simon Crowther, Senior Legislation Officer

Prescribed Authority

Canberra (Public Hearing) – 20 May 2005

Inspector-General of Intelligence and Security

Mr Ian Carnell, Inspector-General of Intelligence and Security

Mr Neville Bryan, Principal Investigation Officer

Human Rights and Equal Opportunity Commission

The Hon. John von Doussa QC, President

Mr Craig Lenehan, Deputy Director, Legal Services Section

Professor George Williams - private capacity

Dr Greg Carne - private capacity

Sydney (Public Hearing) – 6 June 2005

Media, Entertainment and Arts Alliance

Mr Mark Ryan, Assistant Federal Secretary

John Fairfax Holdings Ltd

Mr Bruce Wolpe, Manager Corporate Affairs

Australian Press Council

Professor Kenneth McKinnon, Chairman

Mr Jack Herman, Executive Secretary

Law Council of Australia

Mr John North, President

National Association of Community Legal Centres

Ms Julie Bishop, Director

Ms Joanna Shulman, Convener

Ms Annie Pettitt, Convener

Ms Alison Aggarwal, Human Rights Policy Officer

Islamic Council of New South Wales

Mr Ali Roude, Deputy Chairman

Australian Muslim Civil Rights Advocacy Network (AMCRAN)

Dr Mohammed Kadous, Co-convener

Ms Agnes Chong, Co-convener

Public Interest Advocacy Centre

Ms Robin Banks, Chief Executive Officer

Ms Jane Stratton, Policy Officer

Sydney (Private Hearing) – 6 June 2005

Lawyers for subjects of warrants

Issuing Authority

Melbourne (Public Hearing) – 7 June 2005

Law Institute of Victoria

Mr Robert Stary, Executive Member, Criminal Law Section

Mrs Claire Macken, Member, Administrative and Human Rights Section

Mr Joo-Cheong Tham – private capacity

Mr Stephen Sempill – private capacity

Mr Patrick Emerton – private capacity

Victoria Legal Aid

Mr Simon Moglia, Associate Public Defender

Federation of Community Legal Centres (Victoria)

Ms Marika Dias, Representative

Mr Richard Duffy, Representative

Mr Dan Nicholson, Representative

Islamic Council of Victoria

Mr Rowan Gould, Chief Executive Officer

Ms Victoria Sentas, Volunteer

Amnesty International

Ms Nicole Bieske, Member of National Legal Team

Ms Rebecca Smith, Advocacy Coordinator

Melbourne (Private Hearing) – 7 June 2005

Lawyer for subject of warrants

Canberra (Private Hearing) – 8 August 2005

Australian Security Intelligence Organisation

Mr Paul O'Sullivan, Director-General of Security

Legal Adviser

Assistant Legal Adviser

Attorney-General's Department

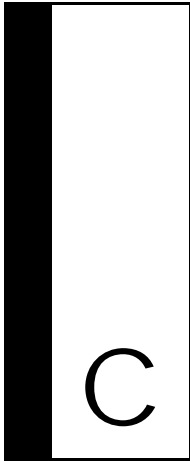
Mr Geoffrey McDonald, Assistant Secretary, Security Law Branch

Ms Annette Willing, Principal Legal Officer, Security Law Branch

Mr Douglas Rutherford, Senior Legal Officer, Security Law Branch

Canberra (Private Hearing) – 18 August 2005

Lawyer for subject of warrants



Appendix C - History of the legislation

The ASIO Legislation Amendment (Terrorism) Bill 2002 was part of a suite of anti-terrorism legislation introduced into the Parliament in March 2002.

The following summarises the purpose of the legislation, its passage through both Houses of the Parliament with a particular focus on the reviews carried out by Parliamentary Committees, and some of the more contentious aspects of the proposed legislation.

Purpose of the legislation

The purpose of the ASIO Legislation Amendment (Terrorism) Bill 2002 was to amend the ASIO Act by expanding the special powers available to ASIO to collect intelligence relating to the threat of terrorism. The Attorney-General, in his second reading speech, stated:

Importantly, we have introduced a range of new terrorism offences. In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences.¹

Specifically, the Bill proposed:

- including the definition of a terrorism offence in the ASIO Act;

¹ The Hon Daryl Williams MP, Second Reading Speech, *ASIO Legislation Amendment (Terrorism) Bill 2002*, House of Representatives *Hansard*, 21 March 2002, p. 1930.

- providing a power to detain, search and question person before a prescribed authority; and
- permit personal searches to be authorised in conjunction with detention warrants.

The Bill was referred to the PJCAAD for review and an advisory report. In conjunction with a suite of other counter-terrorism legislation, the Bill was also referred to the Senate Legal and Constitutional Legislation Committee. Both Committees were given until 3 May 2002 to report.

The proposed legislation, in its original form, provided for the questioning of persons without legal representation and with the right to silence removed. It provided for the incommunicado detention of persons without charge for up to 48 hours, and, by allowing for warrants to be repeatedly sought and issued, provided for the possibility of indefinite detention.

Passage of the legislation through both Houses of Parliament

PJCAAD Review June 2002

The ASIO Legislation Amendment (Terrorism) Bill 2002 was the most contentious review undertaken by the PJCAAD with over 150 submissions being received from ASIO, other government departments and agencies, non-government organisations and interested individuals. The Committee had a private briefing from ASIO and conducted public hearings in Sydney and Melbourne. Most of the non-government witnesses were opposed to the introduction of the legislation or critical of various aspects of it.

On 14 May 2002, the House of Representatives and Senate resolved that the time for the PJCAAD to present its report on Bill be extended to 11 June 2002. The Committee reported to the Parliament on 5 June 2002.

The PJCAAD report entitled An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, made recommendations in relation to three main areas:

- the issue of warrants;
- the detention regime, including legal representation and protection against self-incrimination; and,
- accountability measures.

In summary, the Committee's proposals were:

Issue of warrants,

- all warrants should be issued by a Federal Magistrate and, in those cases where detention would exceed 96 hours Federal Judges to issue all warrants;
- members of the AAT undertake all duties of the prescribed authority excluding the power to issue warrants;
- the Bill be amended so as to make the maximum period of detention of a person no more than 7 days (168 hours);

The detention regime

- provision be made for legal representation for persons subject to a warrant, such as the creation of a panel of security cleared lawyers;
- the prescribed authority be required to advise the person subject to a warrant that they have the right to seek judicial review after 24 hours of detention;
- a protocol be developed governing custody, detention and the interview process;
- the Bill be amended to provide protection against self-incrimination for the provision of information relating to a terrorism offence and to include a penalty clauses for officials who do not comply with the provisions of the Bill;
- no person under the age of eighteen years be questioned or detained.

Accountability measures

- publication of the information relating to the issuing of warrants in ASIO's Annual Report to Parliament.
- information relating to the issuing of warrants be provided to the Inspector General of Intelligence and Security (IGIS)
- the IGIS be given the authority to suspend, on the basis of non-compliance with the law or an impropriety occurring, an interview being conducted under the warrant procedures (any such case being immediately reported to the PJCAAD).

- In view of the controversial nature of the legislation and the need to review its operation, the Committee further recommended the inclusion of the sunset clause which would terminate the legislation three years from the date of commencement. As a consequence the Government and the Parliament would be obliged to revisit the legislation if it was desired that its provisions should continue to have effect.

The text of the PJCAAD report can be found on the Committee's website at: <http://www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm>.

Senate Legal and Constitutional Legislation Committee Reviews

The Senate Legal and Constitutional Legislation Committee reported on 18 June 2002. The Senate Committee made a number of additional observations on certain issues dealing with legal and constitutional matters. These issues included:

- the administrative detention of non-suspects;
- the executive power to issue warrants; and;
- the particular powers of questioning and detention in the Bill.

Noting that the Government had not yet responded to the Joint Committee's report, the Senate Committee made the recommendation that if the Government accepted all the Joint Committee's recommendations, the Bill as amended should proceed without further review.

The text of the Senate Committee's June report can be found at: http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/asio/report/report.pdf.

The Government did not accept all of the Joint Committees recommendations. Subsequently, the Senate Legal and Constitutional Legislation Committee completed a further and more detailed report which was tabled in the Senate in December 2002.

In this second report the Senate Committee reinforced the JCAAD recommendations and extended them, *inter alia* recommending that:

Issue of warrants

- the Bill be amended to provide for the appointment by the Attorney-General as a Prescribed Authority a number of retired federal or state judges, with at least 10 years' experience on a superior court, and that the appointment should be for a maximum period of three years;
- the definition of Issuing Authority proposed be amended to refer to a retired federal or state judge appointed by the Minister, as for the Prescribed Authority;
- the Bill be amended to preclude a Prescribed Authority that has issued a warrant from supervising questioning under the same warrant;
- the maximum time allowable for questioning under a warrant be modeled on the questioning periods and down-time set out in the *(Cth) Crimes Act 1914* ;
- an extension of time for questioning under the original warrant be given by the Prescribed Authority only where it is satisfied that there are reasonable grounds to believe further questioning is likely to yield relevant intelligence;
- that, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of a person, a second warrant could be issued for that person, for questioning for a maximum period modeled on the provisions of the *(Cth) Crimes Act 1914*;
- where a person has been the subject of two consecutive warrants, no further warrants are permitted for the next seven days after the completion of questioning;
- the Bill include a provision ensuring that once questioning has finished a person is free to leave;

Detention regime:

- the Bill be amended to recognise that communications between a person and his or her legal adviser must be confidential and that legal professional privilege not be compromised;

- the Prescribed Authority be given the power to refuse to permit a particular legal adviser to attend the questioning of a person when it is believed on reasonable grounds that the legal adviser represents a security risk (but that in such circumstances the person being questioned be able to choose another legal adviser;
- that an interpreter be provided on request by the person being questioned;
- the provisions of the Bill not apply to anyone under the age of 18 years.

Accountability measures

- the Bill make explicit the right of the Inspector-General of Intelligence and Security (IGIS) to attend during the questioning process; and
- The Senate Legal and Constitutional Legislation Committee also recommended the insertion of a sunset clause of three years from the date of commencement of the legislation.

The text of the Senate Committee's June report can be found at:

http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/asio_2/report/contents.htm.

Final passage of the proposed legislation.

In December 2002, the Senate amended the Bill to reflect the recommendations of the PJCAAD and the Senate Committee. The Government accepted many of the recommendations, made by the PJCAAD and the Senate Committee with the notable exception of those relating to:

- complete access to legal representation during detention
- questioning or detention of children, and
- a proposed 3 year sunset clause.

Following the tabling of the Senate Legal and Constitutional Legislation Committee report, the Bill was the subject, along with other unrelated matters, of long debate in both Houses on the 12-13 December 2002. In the absence of agreement between the House of Representatives and the Senate on various proposed amendments at 11.42 am on the 13 December the Bill was laid aside by the House of Representatives.

Subsequently, in March 2003, an extensively amended Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 [No.2] was introduced into the House of Representatives. (Amendments included, the application of the legislation to minors between 16 and 18 only, a three-year sunset clause, and an amendment to the Intelligence Services Act empowering the PJCAAD to review the questioning and detention provisions before their expiry). After considerable debate and little amendment from the previously proposed Senate amendments, the Bill finally passed both Houses in June 2003 and commenced operation after Royal Assent on 23 July 2003.

December 2003 amendments

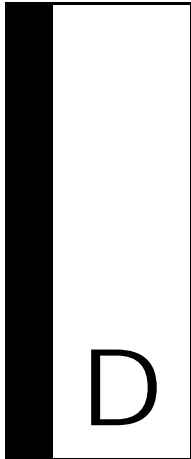
Less than four months after the commencement of the *ASIO Legislation Amendment (Terrorism) Act 2003*, the newly appointed Attorney-General, the Hon Philip Ruddock MP, announced in early November 2003, that he had asked for a report on what he considered to be the 'shortcomings' of the legislation.²

On 27 November 2003, the Government introduced the *Australian Security Intelligence Organisation Legislation Amendment Bill 2003*. The purpose of this legislation was to amend the new Division 3, Part 111 of the *ASIO Act* to:

- extend the maximum period during which a person using an interpreter can be held for questioning under an ASIO warrant;
- require the subject of an ASIO warrant to surrender their passport/s and make them criminally liable if they leave Australia without permission from the Director-General of Security while a warrant is in force;
- create new offences relating to the primary or secondary disclosure of information about ASIO warrants or operational information; and
- clarify the ability of the prescribed authority to direct, in limited circumstances and where the warrant authorised questioning only, that the subject of a questioning warrant be detained.

After comparatively brief debate and passage through the House of Representatives and the Senate, the *ASIO Legislation Amendment Act 2003* received Royal Assent on 17 December 2003 and commenced on the following day.

2 Comments of the Attorney-General on the Nine Network 'Sunday' program, 2 November 2003, http://sunday.ninemsn.com.au/sunday/political_transcripts/article_1434.asp?s=1



Appendix D – Division 3 Part III of the *ASIO Act 1979*

Australian Security Intelligence Organisation Act 1979

Act No. 113 of 1979 as amended

This compilation was prepared on 13 September 2004
taking into account amendments up to Act No. 125 of 2004

[Note: Division 3 of Part III ceases to be in force on 23 July 2006, *see*
section 34Y]

The text of any of those amendments not in force
on that date is appended in the Notes section The operation of amendments
that have been incorporated may be affected by application provisions that
are set out in the Notes section

Prepared by the Office of Legislative Drafting,
Attorney-General's Department, Canberra

N.B. This extract includes:

- Table of Contents
- ss 1-4 (definitions)
- ss 34A-34Y (terrorism offences) Page numbers for Part 3 Div 3
reflect the amended document

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An Act relating to the Australian Security Intelligence Organisation

Part I—Preliminary

1 Short title [see Note 1]

This Act may be cited as the *Australian Security Intelligence Organisation Act 1979*.

2 Commencement [see Note 1]

This Act shall come into operation on a date to be fixed by Proclamation.

3 Repeal

The *Australian Security Intelligence Organisation Act 1956* and the *Australian Security Intelligence Organisation Act 1976* are repealed.

4 Definitions

In this Act, unless the contrary intention appears:

activities prejudicial to security includes any activities concerning which Australia has responsibilities to a foreign country as referred to in paragraph (b) of the definition of ***security*** in this section.

acts of foreign interference means activities relating to Australia that are carried on by or on behalf of, are directed or subsidised by or are undertaken in active collaboration with, a foreign power, being activities that:

- (a) are clandestine or deceptive and:
 - (i) are carried on for intelligence purposes;
 - (ii) are carried on for the purpose of affecting political or governmental processes; or
 - (iii) are otherwise detrimental to the interests of Australia; or
- (b) involve a threat to any person.

attacks on Australia's defence system means activities that are intended to, and are likely to, obstruct, hinder or interfere with the performance by the Defence Force of its functions or with the carrying out of other activities by or for the Commonwealth for the purposes of the defence or safety of the Commonwealth.

Australia, when used in a geographical sense, includes the external Territories.

authority of the Commonwealth includes:

- (a) a Department of State or an Agency within the meaning of the *Public Service Act 1999*;

- (b) the Defence Force;
- (c) a body, whether incorporated or not, established for public purposes by or under a law of the Commonwealth or of a Territory;
- (d) the holder of an office established for public purposes by or under a law of the Commonwealth or of a Territory;
- (e) a prescribed body established in relation to public purposes that are of concern to the Commonwealth and any State or States; and
- (f) a company the whole of the share capital of which is held by the Commonwealth.

certified copy, in relation to a warrant or an instrument revoking a warrant, means a copy of the warrant or instrument that has been certified in writing by the Director-General or a Deputy Director-General to be a true copy of the warrant or instrument.

Committee on ASIO, ASIS and DSD means the Parliamentary Joint Committee on ASIO, ASIS and DSD established under the *Intelligence Services Act 2001*.

Deputy Director-General means an officer of the Organisation who holds office as Deputy Director-General of Security.

Director-General means the Director-General of Security holding office under this Act.

foreign intelligence means intelligence relating to the capabilities, intentions or activities of a foreign power.

foreign power means:

- (a) a foreign government;
- (b) an entity that is directed or controlled by a foreign government or governments; or
- (c) a foreign political organisation.

frisk search means:

- (a) a search of a person conducted by quickly running the hands over the person's outer garments; and
- (b) an examination of anything worn or carried by the person that is conveniently and voluntarily removed by the person.

intelligence or **security agency** means the Australian Secret Intelligence Service, the Office of National Assessments, that part of the Department of Defence known as the Defence Signals Directorate or that part of the Department of Defence known as the Defence Intelligence Organisation.

Judge means a Judge of a court created by the Parliament.

ordinary search means a search of a person or of articles on his or her person that may include:

- (a) requiring the person to remove his or her overcoat, coat or jacket and any gloves, shoes and hat; and
- (b) an examination of those items.

Organisation means the Australian Security Intelligence Organisation.

permanent resident means a person:

- (a) in the case of a natural person:
 - (i) who is not an Australian citizen;
 - (ii) whose normal place of residence is situated in Australia;
 - (iii) whose presence in Australia is not subject to any limitation as to time imposed by law; and
 - (iv) who is not an unlawful non-citizen within the meaning of the *Migration Act 1958*; or
- (b) in the case of a body corporate:
 - (i) which is incorporated under a law in force in a State or Territory; and
 - (ii) the activities of which are not controlled (whether directly or indirectly) by a foreign power.

politically motivated violence means:

- (a) acts or threats of violence or unlawful harm that are intended or likely to achieve a political objective, whether in Australia or elsewhere, including acts or threats carried on for the purpose of influencing the policy or acts of a government, whether in Australia or elsewhere; or
- (b) acts that:
 - (i) involve violence or are intended or are likely to involve or lead to violence (whether by the persons who carry on those acts or by other persons); and
 - (ii) are directed to overthrowing or destroying, or assisting in the overthrow or destruction of, the government or the constitutional system of government of the Commonwealth or of a State or Territory; or
- (ba) acts that are terrorism offences; or
- (c) acts that are offences punishable under the *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Crimes (Hostages) Act 1989* or Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* or under Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*; or
- (d) acts that:
 - (i) are offences punishable under the *Crimes (Internationally Protected Persons) Act 1976*; or
 - (ii) threaten or endanger any person or class of persons specified by the Minister for the purposes of this subparagraph by notice in writing given to the Director-General.

promotion of communal violence means activities that are directed to promoting violence between different groups of persons in the Australian community so as to endanger the peace, order or good government of the Commonwealth.

security means:

- (a) the protection of, and of the people of, the Commonwealth and the several States and Territories from:
 - (i) espionage;
 - (ii) sabotage;
 - (iii) politically motivated violence;
 - (iv) promotion of communal violence;

- (v) attacks on Australia’s defence system; or
- (vi) acts of foreign interference;
whether directed from, or committed within, Australia or not; and
- (b) the carrying out of Australia’s responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).

seizable item means anything that could present a danger to a person or that could be used to assist a person to escape from lawful custody.

State includes the Australian Capital Territory and the Northern Territory.

strip search means a search of a person or of articles on his or her person that may include:

- (a) requiring the person to remove all of his or her garments; and
- (b) an examination of the person’s body (but not of the person’s body cavities) and of those garments.

terrorism offence means an offence against Division 72 or Part 5.3 of the *Criminal Code*.

Note: A person can commit a terrorism offence against Part 5.3 of the *Criminal Code* even if no terrorist act (as defined in that Part) occurs.

Territory does not include the Australian Capital Territory or the Northern Territory.

violence includes the kidnapping or detention of a person.

Division 3—Special powers relating to terrorism offences

Subdivision A—Preliminary

34A Definitions

In this Division:

Federal Magistrate has the same meaning as in the *Federal Magistrates Act 1999*.

issuing authority means:

- (a) a person appointed under section 34AB; or
- (b) a member of a class of persons declared by regulations made for the purposes of that section to be issuing authorities.

lawyer means a person enrolled as a legal practitioner of a federal court or the Supreme Court of a State or Territory.

police officer means a member or special member of the Australian Federal Police or a member of the police force or police service of a State or Territory.

prescribed authority means a person appointed under section 34B.

record has the same meaning as in Division 2.

superior court means:

- (a) the High Court; or
- (b) the Federal Court of Australia; or
- (c) the Family Court of Australia or of a State; or
- (d) the Supreme Court of a State or Territory; or
- (e) the District Court (or equivalent) of a State or Territory.

34AB Issuing authorities

- (1) The Minister may, by writing, appoint as an issuing authority a person who is:
 - (a) a Federal Magistrate; or
 - (b) a Judge.
- (2) The Minister must not appoint a person unless:
 - (a) the person has, by writing, consented to being appointed; and
 - (b) the consent is in force.
- (3) The regulations may declare that persons in a specified class are issuing authorities.
- (4) The regulations may specify a class of persons partly by reference to the facts that the persons have consented to being issuing authorities and their consents are in force.

34B Prescribed authorities

- (1) The Minister may, by writing, appoint as a prescribed authority a person who has served as a judge in one or more superior courts for a period of 5 years and no longer holds a commission as a judge of a superior court.
- (2) If the Minister is of the view that there is an insufficient number of people to act as a prescribed authority under subsection (1), the Minister may, by writing, appoint as a prescribed authority a person who is currently serving as a judge in a State or Territory Supreme Court or District Court (or an equivalent) and has done so for a period of at least 5 years.
- (3) If the Minister is of the view that there are insufficient persons available under subsections (1) and (2), the Minister may, by writing, appoint as a prescribed authority a person who holds an appointment to the Administrative Appeals Tribunal as President or Deputy President and who is enrolled as a legal practitioner of a federal court or of the Supreme Court of a State or Territory and has been enrolled for at least 5 years.
- (4) The Minister must not appoint a person under subsection (1), (2) or (3) unless:
 - (a) the person has by writing consented to being appointed; and
 - (b) the consent is in force.

Subdivision B—Questioning, detention etc.

34C Requesting warrants

- (1) The Director-General may seek the Minister's consent to request the issue of a warrant under section 34D in relation to a person.
- (1A) To avoid doubt, this section operates in relation to a request for the issue of a warrant under section 34D in relation to a person, even if such a request has previously been made in relation to the person.
- (2) In seeking the Minister's consent, the Director-General must give the Minister a draft request that includes:
 - (a) a draft of the warrant to be requested; and
 - (b) a statement of the facts and other grounds on which the Director-General considers it necessary that the warrant should be issued; and
 - (c) a statement of the particulars and outcomes of all previous requests for the issue of a warrant under section 34D relating to the person; and
 - (d) if one or more warrants were issued under section 34D as a result of the previous requests—a statement of:
 - (i) the period for which the person has been questioned under each of those warrants before the draft request is given to the Minister; and
 - (ii) if any of those warrants authorised the detention of the person—the period for which the person has been detained in connection with each such warrant before the draft request is given to the Minister.
- (3) The Minister may, by writing, consent to the making of the request, but only if the Minister is satisfied:

- (a) 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; and
- (b) that relying on other methods of collecting that intelligence would be ineffective; and
- (ba) that all of the acts (the *adopting acts*) described in subsection (3A) in relation to a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D have been done; and
- (c) if the warrant to be requested is to authorise the person to be taken into custody immediately, brought before a prescribed authority immediately for questioning and detained—that there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained, the person:
 - (i) may alert a person involved in a terrorism offence that the offence is being investigated; or
 - (ii) may not appear before the prescribed authority; or
 - (iii) may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

The Minister may make his or her consent subject to changes being made to the draft request.

- (3A) The adopting acts in relation to a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D are as follows:
 - (a) consultation of the following persons by the Director-General about making such a statement:
 - (i) the Inspector-General of Intelligence and Security;
 - (ii) the Commissioner of Police appointed under the *Australian Federal Police Act 1979*;
 - (b) making of the statement by the Director-General after that consultation;
 - (c) approval of the statement by the Minister;
 - (d) presentation of the statement to each House of the Parliament;
 - (e) briefing (in writing or orally) the Parliamentary Joint Committee on ASIO, ASIS and DSD (whether before or after presentation of the statement to each House of the Parliament).
- (3B) In consenting to the making of a request to issue a warrant authorising the person to be taken into custody immediately, brought before a prescribed authority immediately for questioning and detained, the Minister must ensure that the warrant to be requested is to permit the person to contact a single lawyer of the person's choice (subject to section 34TA) at any time that:
 - (a) is a time while the person is in detention in connection with the warrant; and
 - (b) is after:
 - (i) the person has been brought before a prescribed authority for questioning; and
 - (ii) the person has informed the prescribed authority, in the presence of a person exercising authority under the warrant, of the identity of the lawyer whom the person proposes to contact; and

- (iii) a person exercising authority under the warrant has had an opportunity to request the prescribed authority to direct under section 34TA that the person be prevented from contacting the lawyer.

(3D) If, before the Director-General seeks the Minister's consent to the request (the *proposed request*), the person has been detained under this Division in connection with one or more warrants (the *earlier warrants*) issued under section 34D, and the proposed request is for a warrant meeting the requirement in paragraph 34D(2)(b):

- (a) the Minister must take account of those facts in deciding whether to consent; and
- (b) the Minister may consent only if the Minister is satisfied that the issue of the warrant to be requested is justified by information that 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 last of the earlier warrants issued before the seeking of the Minister's consent to the proposed request.

This subsection has effect in addition to subsection (3).

- (4) If the Minister has consented under subsection (3), the Director-General may request the warrant by giving an issuing authority:
 - (a) a request that is the same as the draft request except for the changes (if any) required by the Minister; and
 - (b) a copy of the Minister's consent.

34D Warrants for questioning etc.

- (1) An issuing authority may issue a warrant under this section relating to a person, but only if:
 - (a) the Director-General has requested it in accordance with subsection 34C(4); and
 - (b) the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.
- (1A) If the person has already been detained under this Division in connection with one or more warrants (the *earlier warrants*) issued under this section, and the warrant requested is to meet the requirement in paragraph (2)(b):
 - (a) the issuing authority must take account of those facts in deciding whether to issue the warrant requested; and
 - (b) the issuing authority may issue the warrant requested only if the authority is satisfied that:
 - (i) the issue of that warrant is justified by information 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 last of the earlier warrants issued before the seeking of the Minister's consent to the request for the issue of the warrant requested; and
 - (ii) the person is not being detained under this Division in connection with one of the earlier warrants.

This subsection has effect in addition to subsection (1).

- (2) The warrant must, in the same terms as the draft warrant given to the issuing authority as part of the request, either:
- (a) require a specified person to appear before a prescribed authority for questioning under the warrant immediately after the person is notified of the issue of the warrant, or at a time specified in the warrant; or
 - (b) do both of the following:
 - (i) authorise a specified person to be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning under the warrant and detained under arrangements made by a police officer for the period (the *questioning period*) described in subsection (3);
 - (ii) permit the person to contact identified persons at specified times when the person is in custody or detention authorised by the warrant.
- (3) The questioning period starts when the person is first brought before a prescribed authority under the warrant and ends at the first time one of the following events happens:
- (a) someone exercising authority under the warrant informs the prescribed authority before whom the person is appearing for questioning that the Organisation does not have any further request described in paragraph (5)(a) to make of the person;
 - (b) section 34HB prohibits anyone exercising authority under the warrant from questioning the person under the warrant;
 - (c) the passage of 168 hours starting when the person was first brought before a prescribed authority under the warrant.
- (4) The warrant may identify someone whom the person is permitted to contact by reference to the fact that he or she is a lawyer of the person's choice or has a particular legal or familial relationship with the person. This does not limit the ways in which the warrant may identify persons whom the person is permitted to contact.

Note 1: The warrant may identify persons by reference to a class. See subsection 46(2) of the *Acts Interpretation Act 1901*.

Note 2: Section 34F permits the person to contact the Inspector-General of Intelligence and Security and the Ombudsman while the person is in custody or detention, so the warrant must identify them.

Note 3: A warrant authorising the person to be taken into custody and detained must permit the person to contact a single lawyer of the person's choice, so the warrant must identify such a lawyer.

- (4A) The warrant may specify times when the person is permitted to contact someone identified as a lawyer of the person's choice by reference to the fact that the times are:
- (a) while the person is in detention in connection with the warrant; and
 - (b) after:
 - (i) the person has been brought before a prescribed authority for questioning; and
 - (ii) the person has informed the prescribed authority, in the presence of a person exercising authority under the warrant, of the identity of the lawyer whom the person proposes to contact; and

- (iii) a person exercising authority under the warrant has had an opportunity to request the prescribed authority to direct under section 34TA that the person be prevented from contacting the lawyer.
- (5) Also, the warrant must, in the same terms as the draft warrant given to the issuing authority as part of the request:
 - (a) authorise the Organisation, subject to any restrictions or conditions, to question the person before a prescribed authority by requesting the person to do either or both of the following:
 - (i) give information that is or may be relevant to intelligence that is important in relation to a terrorism offence;
 - (ii) produce records or things that are or may be relevant to intelligence that is important in relation to a terrorism offence; and
 - (b) authorise the Organisation, subject to any restrictions or conditions, to make copies and/or transcripts of a record produced by the person before a prescribed authority in response to a request in accordance with the warrant.
- (6) Also, the warrant must:
 - (a) be signed by the issuing authority who issues it; and
 - (b) specify the period during which the warrant is to be in force, which must not be more than 28 days.

34DA Person taken into custody under warrant to be immediately brought before prescribed authority

If the person is taken into custody by a police officer exercising authority under the warrant, the officer must make arrangements for the person to be immediately brought before a prescribed authority for questioning.

34E Prescribed authority must explain warrant

- (1) When the person first appears before a prescribed authority for questioning under the warrant, the prescribed authority must inform the person of the following:
 - (a) whether the warrant authorises detention of the person by a police officer and, if it does, the period for which the warrant authorises detention of the person;
 - (b) what the warrant authorises the Organisation to do;
 - (c) the effect of section 34G (including the fact that the section creates offences);
 - (d) the period for which the warrant is in force;
 - (e) the person's right to make a complaint orally or in writing:
 - (i) to the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* in relation to the Organisation; or
 - (ii) to the Ombudsman under the *Complaints (Australian Federal Police) Act 1981* in relation to the Australian Federal Police;
 - (f) the fact that the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant;

- (g) whether there is any limit on the person contacting others and, if the warrant permits the person to contact identified persons at specified times when the person is in custody or detention authorised by the warrant, who the identified persons are and what the specified times are.
- (2) To avoid doubt, subsection (1) does not apply to a prescribed authority if the person has previously appeared before another prescribed authority for questioning under the warrant.
- (2A) The prescribed authority before whom the person appears for questioning must inform the person of the role of the prescribed authority, and the reason for the presence of each other person who is present at any time during the questioning. However:
 - (a) the prescribed authority must not name any person except with the consent of the person to be named; and
 - (b) the obligation to inform the person being questioned about a particular person's reason for presence need only be complied with once (even if that particular person subsequently returns to the questioning).
- (3) At least once in every 24-hour period during which questioning of the person under the warrant occurs, the prescribed authority before whom the person appears for questioning must inform the person of the fact that the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant.

34F Detention of persons

Directions relating to detention or further appearance

- (1) At any time when a person is before a prescribed authority for questioning under a warrant, the authority may give any of the following directions:
 - (a) a direction to detain the person;
 - (b) a direction for the further detention of the person;
 - (c) a direction about any arrangements for the person's detention;
 - (d) a direction permitting the person to contact an identified person (including someone identified by reference to the fact that he or she has a particular legal or familial relationship with the person) or any person and to disclose information other than specified information while in contact;
 - (e) a direction for the person's further appearance before the prescribed authority for questioning under the warrant;
 - (f) a direction that the person be released from detention.
- (2) The prescribed authority is only to give a direction that:
 - (a) is consistent with the warrant; or
 - (b) has been approved in writing by the Minister.However, the prescribed authority may give a direction that is not covered by paragraph (a) or (b) if he or she has been informed under section 34HA of a concern of the Inspector-General of Intelligence and Security and is satisfied that giving the direction is necessary to address the concern satisfactorily.
- (2A) To avoid doubt, the mere fact that the warrant is one meeting the requirement in paragraph 34D(2)(a) does not prevent a direction under subsection (1) of this

section from being consistent with the warrant for the purposes of subsection (2) of this section.

Note: A warrant meeting the requirement in paragraph 34D(2)(a) requires a person to appear before a prescribed authority for questioning under the warrant (rather than authorising the person to be taken into custody, brought before a prescribed authority and detained).

- (3) The prescribed authority is only to give a direction described in paragraph (1)(a) or (b) if he or she is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person:
 - (a) may alert a person involved in a terrorism offence that the offence is being investigated; or
 - (b) may not continue to appear, or may not appear again, before a prescribed authority; or
 - (c) may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.
- (4) A direction under subsection (1) must not result in:
 - (a) a person being detained after the end of the questioning period described in section 34D for the warrant; or
 - (b) a person's detention being arranged by a person who is not a police officer.

Giving effect to directions

- (5) Directions given by a prescribed authority have effect, and may be implemented or enforced, according to their terms.
- (6) A police officer may take a person into custody and bring him or her before a prescribed authority for questioning under a warrant issued under section 34D if the person fails to appear before a prescribed authority as required by the warrant or a direction given by a prescribed authority under this section.

Direction has no effect on further warrant

- (7) This section does not prevent any of the following occurring in relation to a person who has been released after having been detained under this Division in connection with a warrant issued under section 34D:
 - (a) an issuing authority issuing a further warrant under that section;
 - (b) the person being detained under this Division in connection with the further warrant.

Communications while in custody or detention

- (8) A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.
- (9) However:
 - (a) the person may contact anyone whom the warrant under which he or she is detained, or a direction described in paragraph (1)(d), permits the person to contact; and
 - (b) subsection (8) does not affect the following provisions in relation to contact between the person and the Inspector-General of Intelligence and Security or the Ombudsman:

- (i) sections 10 and 13 of the *Inspector-General of Intelligence and Security Act 1986*;
 - (ii) section 22 of the *Complaints (Australian Federal Police) Act 1981*;
and
 - (c) anyone holding the person in custody or detention under this Division must give the person facilities for contacting the Inspector-General of Intelligence and Security or the Ombudsman to make a complaint orally under a section mentioned in paragraph (b) if the person requests them.
- Note: The sections mentioned in paragraph (9)(b) give the person an entitlement to facilities for making a written complaint.

34G Giving information and producing things etc.

- (1) A person must appear before a prescribed authority for questioning, as required by a warrant issued under section 34D or a direction given under section 34F.

Penalty: Imprisonment for 5 years.

- (2) Strict liability applies to the circumstance of an offence against subsection (1) that:

- (a) the warrant was issued under section 34D; or
- (b) the direction was given under section 34F.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

- (3) A person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant.

Penalty: Imprisonment for 5 years.

- (4) Subsection (3) does not apply if the person does not have the information.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Code*).

- (5) If:

- (a) a person is before a prescribed authority for questioning under a warrant;
and
- (b) the person makes a statement that is, to the person's knowledge, false or misleading in a material particular; and
- (c) the statement is made in purported compliance with a request for information made in accordance with the warrant;

the person is guilty of an offence.

Penalty: Imprisonment for 5 years.

- (6) A person who is before a prescribed authority for questioning under a warrant must not fail to produce any record or thing that the person is requested in accordance with the warrant to produce.

Penalty: Imprisonment for 5 years.

- (7) Subsection (6) does not apply if the person does not have possession or control of the record or thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Code*).

- (8) For the purposes of subsections (3) and (6), the person may not fail:
 - (a) to give information; or
 - (b) to produce a record or thing;in accordance with a request made of the person in accordance with the warrant, on the ground that the information, or production of the record or thing, might tend to incriminate the person or make the person liable to a penalty.
- (9) However, 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.

34H Interpreter provided at request of prescribed authority

- (1) This section applies if the prescribed authority before whom a person first appears for questioning under a warrant believes on reasonable grounds that the person is unable, because of inadequate knowledge of the English language or a physical disability, to communicate with reasonable fluency in that language.
- (2) A person exercising authority under the warrant must arrange for the presence of an interpreter.
- (3) The prescribed authority must defer informing under section 34E the person to be questioned under the warrant until the interpreter is present.
- (4) A person exercising authority under the warrant must defer the questioning under the warrant until the interpreter is present.

34HAA Interpreter provided at request of person being questioned

- (1) This section applies if a person appearing before a prescribed authority under a warrant requests the presence of an interpreter.
- (2) A person exercising authority under the warrant must arrange for the presence of an interpreter, unless the prescribed authority believes on reasonable grounds that the person who made the request has an adequate knowledge of the English language, or is physically able, to communicate with reasonable fluency in that language.
- (3) If questioning under the warrant has not commenced and the prescribed authority determines that an interpreter is to be present:
 - (a) the prescribed authority must defer informing under section 34E the person to be questioned under the warrant until the interpreter is present; and
 - (b) a person exercising authority under the warrant must defer the questioning until the interpreter is present.
- (4) If questioning under the warrant commences before the person being questioned requests the presence of an interpreter and the prescribed authority determines that an interpreter is to be present:

- (a) a person exercising authority under the warrant must defer any further questioning until the interpreter is present; and
- (b) when the interpreter is present, the prescribed authority must again inform the person of anything of which he or she was previously informed under section 34E.

34HAB Inspector-General of Intelligence and Security may be present at questioning or taking into custody

To avoid doubt, for the purposes of performing functions under the *Inspector-General of Intelligence and Security Act 1986*, the Inspector-General of Intelligence and Security, or an APS employee assisting the Inspector-General, may be present at the questioning or taking into custody of a person under this Division.

34HA Suspension of questioning etc. in response to concern of Inspector-General of Intelligence and Security

- (1) This section applies if the Inspector-General of Intelligence and Security is concerned about impropriety or illegality in connection with the exercise or purported exercise of powers under this Division in relation to a person specified in a warrant issued under section 34D.

Note: For example, the Inspector-General may be concerned because he or she has been present at a questioning under section 34HAB.

- (2) When the person is appearing before a prescribed authority for questioning under the warrant, the Inspector-General may inform the prescribed authority of the Inspector-General's concern. If the Inspector-General does so, he or she must also inform the Director-General of the concern as soon as practicable afterwards.
- (3) The prescribed authority must consider the Inspector-General's concern.
- (4) The prescribed authority may give a direction deferring:
 - (a) questioning of the person under the warrant; or
 - (b) the exercise of another power under this Division that is specified in the direction;

until the prescribed authority is satisfied that the Inspector-General's concern has been satisfactorily addressed.

Note: The prescribed authority may give directions under section 34F instead or as well. These could:

- (a) deal with the Inspector-General's concern in a way satisfactory to the prescribed authority; or
- (b) deal with treatment of the person while questioning is deferred; or
- (c) provide for release of the person from detention if the prescribed authority is satisfied that the Inspector-General's concern cannot be satisfactorily addressed within the remainder of the period for which the person may be detained under the warrant.

34HB End of questioning under warrant

- (1) Anyone exercising authority under a warrant issued under section 34D must not question a person under the warrant if the person has been questioned under the

warrant for a total of 8 hours, unless the prescribed authority before whom the person was being questioned just before the end of that 8 hours permits the questioning to continue for the purposes of this subsection.

- (2) Anyone exercising authority under a warrant issued under section 34D must not question a person under the warrant if the person has been questioned under the warrant for a total of 16 hours, unless the prescribed authority before whom the person was being questioned just before the end of that 16 hours permits the questioning to continue for the purposes of this subsection.
- (3) Anyone exercising authority under the warrant may request the prescribed authority to permit the questioning to continue for the purposes of subsection (1) or (2). The request may be made in the absence of:
 - (a) the person being questioned; and
 - (b) a legal adviser to that person; and
 - (c) a parent of that person; and
 - (d) a guardian of that person; and
 - (e) another person who meets the requirements of subsection 34NA(7) in relation to that person; and
 - (f) anyone the person being questioned is permitted by a direction under section 34F to contact.
- (4) The prescribed authority may permit the questioning to continue for the purposes of subsection (1) or (2), but only if he or she is satisfied that:
 - (a) there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence; and
 - (b) persons exercising authority under the warrant conducted the questioning of the person properly and without delay in the period mentioned in that subsection.
- (5) The prescribed authority may revoke the permission. Revocation of the permission does not affect the legality of anything done in relation to the person under the warrant before the revocation.
- (6) Anyone exercising authority under a warrant issued under section 34D must not question a person under the warrant if the person has been questioned under the warrant for a total of 24 hours.

Release from detention when further questioning is prohibited

- (7) If the warrant meets the requirement in paragraph 34D(2)(b), the prescribed authority must, at whichever one of the following times is relevant, direct under paragraph 34F(1)(f) that the person be released immediately from detention:
 - (a) at the end of the period mentioned in subsection (1) or (2), if the prescribed authority does not permit, for the purposes of that subsection, the continuation of questioning;
 - (b) immediately after revoking the permission, if the permission was given but later revoked;
 - (c) at the end of the period described in subsection (6).

Subsection 34F(2) does not prevent the prescribed authority from giving a direction in accordance with this subsection.

Extra time for questioning with interpreter present

- (8) Subsections (9), (10), (11) and (12) apply if, because of section 34H or 34HAA, an interpreter is present at any time while a person is questioned under a warrant issued under section 34D.
- (9) Anyone exercising authority under the warrant must not question the person under the warrant if the person has been questioned under the warrant for a total of 24, 32 or 40 hours, unless the prescribed authority before whom the person was being questioned just before the duration of that questioning reached that total permits the questioning to continue beyond that total for the purposes of this subsection.
- (10) Subsections (3), (4) and (5) and paragraph (7)(b) apply in relation to permitting, for the purposes of subsection (9), the questioning to continue beyond a total mentioned in subsection (9) in the same way as they apply in relation to permitting the questioning to continue for the purposes of subsection (1) or (2).
- (11) Subsection (6) and paragraph (7)(c) apply as if that subsection referred to a total of 48 hours (instead of 24 hours).
- (12) Paragraph (7)(a) applies as if it referred to the time at which the duration of questioning reached the total mentioned in subsection (1), (2) or (9) beyond which the questioning is not permitted to continue.

34HC Person may not be detained for more than 168 hours continuously

A person may not be detained under this Division for a continuous period of more than 168 hours.

Subdivision C—Miscellaneous

34J Humane treatment of person specified in warrant

- (1) This section applies to a person specified in a warrant issued under section 34D while anything is being done in relation to the person under the warrant or a direction given under section 34F.
- (2) The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction.

34JA Entering premises to take person into custody

- (1) If:
 - (a) either a warrant issued under section 34D or subsection 34F(6) authorises a person to be taken into custody; and
 - (b) a police officer believes on reasonable grounds that the person is on any premises;

the officer may enter the premises, using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching the premises for the person or taking the person into custody.

- (2) However, if subsection 34F(6) authorises a person to be taken into custody, a police officer must not enter a dwelling house under subsection (1) of this section at any time during the period:
- (a) commencing at 9 pm on a day; and
 - (b) ending at 6 am on the following day;
- unless the officer believes on reasonable grounds that it would not be practicable to take the person into custody under subsection 34F(6), either at the dwelling house or elsewhere, at another time.
- (3) In this section:

dwelling house includes an aircraft, vehicle or vessel, and a room in a hotel, motel, boarding house or club, in which people ordinarily retire for the night.

premises includes any land, place, vehicle, vessel or aircraft.

34JB Use of force in taking person into custody and detaining person

- (1) A police officer may use such force as is necessary and reasonable in:
- (a) taking a person into custody under:
 - (i) a warrant issued under section 34D; or
 - (ii) subsection 34F(6); or
 - (b) preventing the escape of a person from such custody; or
 - (c) bringing a person before a prescribed authority for questioning under such a warrant; or
 - (d) detaining a person in connection with such a warrant.
- (2) However, a police officer must not, in the course of an act described in subsection (1) in relation to a person, use more force, or subject the person to greater indignity, than is necessary and reasonable to do the act.
- (3) Without limiting the operation of subsection (2), a police officer must not, in the course of an act described in subsection (1) in relation to a person:
- (a) do anything that is likely to cause the death of, or grievous bodily harm to, the person unless the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the officer); or
 - (b) if the person is attempting to escape being taken into custody by fleeing—do such a thing unless:
 - (i) the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person (including the officer); and
 - (ii) the person has, if practicable, been called on to surrender and the officer believes on reasonable grounds that the person cannot be taken into custody in any other manner.

34JBA Surrender of passport by person in relation to whom warrant is sought

- (1) If the Director-General has sought the Minister's consent to request the issue of a warrant under section 34D in relation to a person, then, as soon as practicable after that person is notified of that action and of the effect of this subsection, the person must deliver to an enforcement officer every passport that:
- (a) is an Australian passport (as defined in the *Passports Act 1938*), or a foreign passport, that has been issued to the person; and
 - (b) the person has in his or her possession or control.

Penalty: Imprisonment for 5 years.

- (2) The Director-General must cause a passport delivered under subsection (1) to be returned to the person to whom it was issued, as soon as practicable after the first of the following events:
- (a) the Minister refuses to consent to request the issue of a warrant under section 34D in relation to the person;
 - (b) an issuing authority refuses to issue a warrant under section 34D in relation to the person;
 - (c) if a warrant under section 34D is issued in relation to the person—the period specified in the warrant under paragraph 34D(6)(b) ends;
- but the Director-General may cause the passport to be returned to that person earlier.
- (3) Subsection (2) does not require:
- (a) the return of a passport during a period specified under paragraph 34D(6)(b) in another warrant that specifies the person to whom the passport was issued; or
 - (b) the return of a passport that has been cancelled.
- (4) If a warrant under section 34D is issued in relation to the person, a person approved under subsection 24(1) in relation to the warrant may, after a passport of the first-mentioned person is delivered under subsection (1) and before it is returned under subsection (2):
- (a) inspect or examine the passport; and
 - (b) make copies or transcripts of it.
- (5) In this section:

enforcement officer means any of the following:

- (a) a member of the Australian Federal Police;
- (b) an officer of the police force of a State or Territory;
- (c) an officer of Customs (within the meaning of the *Customs Act 1901*).

34JBB Person in relation to whom warrant is sought must not leave Australia without permission

- (1) A person commits an offence if:
- (a) the person has been notified:
 - (i) that the Director-General has sought the Minister's consent to request the issue of a warrant under section 34D in relation to the person; and
 - (ii) of the effect of this subsection in connection with that action; and
 - (b) the person leaves Australia; and

- (c) the leaving occurs after the person has been notified that the Director-General has sought the Minister's consent and of the effect of this subsection in connection with that action, and before the first of the following events:
 - (i) if the Minister refuses to consent to request the issue of a warrant under section 34D in relation to the person—that refusal;
 - (i) if an issuing authority refuses to issue a warrant under section 34D in relation to the person—that refusal;
 - (ii) if a warrant under section 34D is issued in relation to the person—the period specified in the warrant under paragraph 34D(6)(b) ends; and
- (d) the person does not have written permission from the Director-General to leave Australia at the time the person leaves Australia.

Penalty: Imprisonment for 5 years.

- (2) The Director-General may give written permission for a person to leave Australia at a specified time. The permission may be given either unconditionally or subject to specified conditions.

Note 1: The Director-General may revoke or amend the permission. See subsection 33(3) of the *Acts Interpretation Act 1901*.

Note 2: If permission is given subject to a condition and the condition is not met, the permission is not in force.

34JC Surrender of passport by person specified in warrant

- (1) As soon as practicable after the person specified in a warrant issued under section 34D is notified of the issue of the warrant and of the effect of this subsection, the person must deliver to someone exercising authority under the warrant every passport that:
 - (a) is an Australian passport (as defined in the *Passports Act 1938*), or a foreign passport, that has been issued to the person; and
 - (b) the person has in his or her possession or control.

Penalty: Imprisonment for 5 years.

- (2) The Director-General must cause a passport delivered under subsection (1) to be returned to the person to whom it was issued, as soon as practicable after the end of the period specified in the warrant under paragraph 34D(6)(b) (about how long the warrant is in force), but may cause the passport to be returned to that person earlier.
- (3) However, subsection (2) does not require:
 - (a) the return of a passport during a period specified under paragraph 34D(6)(b) in another warrant that specifies the person to whom the passport was issued; or
 - (b) the return of a passport that has been cancelled.
- (4) After a passport is delivered under subsection (1) and before it is returned under subsection (2), a person approved under subsection 24(1) in relation to the warrant mentioned in subsection (1) of this section may:
 - (a) inspect or examine the passport; and
 - (b) make copies or transcripts of it.

34JD Person specified in warrant must not leave Australia without permission

- (1) A person commits an offence if:
 - (a) the person has been notified of:
 - (i) the issue of a warrant under section 34D that specifies the person; and
 - (ii) the effect of this subsection in connection with the warrant; and
 - (b) the person leaves Australia; and
 - (c) the leaving occurs:
 - (i) after the person has been notified of the issue of the warrant and of the effect of this subsection in connection with the warrant; and
 - (ii) before the end of the period specified in the warrant as the period during which the warrant is to be in force; and
 - (d) the person does not have written permission from the Director-General to leave Australia at the time the person leaves Australia.

Penalty: Imprisonment for 5 years.

- (2) The Director-General may give written permission for a person to leave Australia at a specified time. The permission may be given either unconditionally or subject to specified conditions.

Note 1: The Director-General may revoke or amend the permission. See subsection 33(3) of the *Acts Interpretation Act 1901*.

Note 2: If permission is given subject to a condition and the condition is not met, the permission is not in force.

34K Video recording of procedures

- (1) The Director-General must ensure that video recordings are made of the following:
 - (a) a person's appearance before a prescribed authority for questioning under a warrant;
 - (b) any other matter or thing that the prescribed authority directs is to be video recorded.
- (2) The Director-General must ensure that, if practicable, video recordings are made of any complaint by a person specified in a warrant issued under section 34D when he or she is not appearing before a prescribed authority for questioning under the warrant.

34L Power to conduct an ordinary search or a strip search

- (1) If a person has been detained under this Division, a police officer may:
 - (a) conduct an ordinary search of the person; or
 - (b) subject to this section, conduct a strip search of the person.
- (1A) An ordinary search of the person under this section must, if practicable, be conducted by a police officer of the same sex as the person being searched.
- (2) A strip search may be conducted if:

- (a) a police officer suspects on reasonable grounds that the person has a seizable item on his or her person; and
 - (b) the police officer suspects on reasonable grounds that it is necessary to conduct a strip search of the person in order to recover that item; and
 - (c) a prescribed authority has approved the conduct of the search.
- (3) The prescribed authority's approval may be obtained by telephone, fax or other electronic means.
- (4) A strip search may also be conducted if the person consents in writing.
- (5) A medical practitioner may be present when a strip search is conducted, and he or she may assist in the search.
- (6) If a prescribed authority gives or refuses to give an approval for the purposes of paragraph (2)(c), the prescribed authority must make a record of the decision and of the reasons for the decision.
- (7) Such force as is necessary and reasonable in the circumstances may be used to conduct a strip search under subsection (1).
- (8) Any item:
- (a) of a kind mentioned in paragraph (2)(a); or
 - (b) that is relevant to collection of intelligence that is important in relation to a terrorism offence;
- that is found during a search under this section may be seized.

34M Rules for conduct of strip search

- (1) A strip search under section 34L:
- (a) must be conducted in a private area; and
 - (b) must be conducted by a police officer who is of the same sex as the person being searched; and
 - (c) subject to subsections (3) and (3A), must not be conducted in the presence or view of a person who is of the opposite sex to the person being searched; and
 - (d) must not be conducted in the presence or view of a person whose presence is not necessary for the purposes of the search; and
 - (e) must not be conducted on a person who is under 16; and
 - (f) if, in a prescribed authority's opinion, the person being searched is at least 16 but under 18, or is incapable of managing his or her affairs:
 - (i) may only be conducted if a prescribed authority orders that it be conducted; and
 - (ii) must be conducted in the presence of a parent or guardian of the person or, if that is not acceptable to the person, in the presence of someone else who can represent the person's interests and who, as far as is practicable in the circumstances, is acceptable to the person; and
 - (g) must not involve a search of a person's body cavities; and
 - (h) must not involve the removal of more garments than the police officer conducting the search believes on reasonable grounds to be necessary to determine whether the person has a seizable item on his or her person; and

- (i) must not involve more visual inspection than the police officer believes on reasonable grounds to be necessary to determine whether the person has a seizable item on his or her person.
- (2) For the purposes of subparagraph (1)(f)(ii), none of the following can represent the person's interests:
 - (a) a police officer;
 - (b) the Director-General;
 - (c) an officer or employee of the Organisation;
 - (d) a person approved under subsection 24(1).
- (3) A strip search may be conducted in the presence of a medical practitioner of the opposite sex to the person searched if a medical practitioner of the same sex as the person being searched is not available within a reasonable time.
- (3A) Paragraph (1)(c) does not apply to a parent, guardian or personal representative of the person being searched if the person being searched has no objection to the person being present.
- (4) If any of a person's garments are seized as a result of a strip search, the person must be provided with adequate clothing.

34N Power to remove, retain and copy materials etc.

- (1) In addition to the things that the Organisation is authorised to do that are specified in the warrant, the Organisation is also authorised:
 - (a) to remove and retain for such time as is reasonable any record or other thing produced before a prescribed authority in response to a request in accordance with the warrant, for the purposes of:
 - (i) inspecting or examining it; and
 - (ii) in the case of a record—making copies or transcripts of it, in accordance with the warrant; and
 - (b) subject to section 34M, to examine any items or things removed from a person during a search of the person under this Division; and
 - (c) to retain for such time as is reasonable, and make copies of, any item seized under paragraph 34L(8)(b); and
 - (d) to do any other thing reasonably incidental to:
 - (i) paragraph (a), (b) or (c); or
 - (ii) any of the things that the Organisation is authorised to do that are specified in the warrant.
- (2) A police officer may retain for such time as is reasonable any seizable item seized by the officer under paragraph 34L(8)(a).

34NA Special rules for young people

Rules for persons under 16

- (1) A warrant issued under section 34D has no effect if the person specified in it is under 16.

- (2) If a person appears before a prescribed authority for questioning as a result of the issue of a warrant under section 34D and the prescribed authority is satisfied on reasonable grounds that the person is under 16, the prescribed authority must, as soon as practicable:
 - (a) give a direction that the person is not to be questioned; and
 - (b) if the person is in detention—give a direction under paragraph 34F(1)(f) that the person be released from detention.
- (3) Subsection 34F(2) does not prevent the prescribed authority from giving a direction in accordance with paragraph (2)(b) of this section.

Rules for persons who are at least 16 but under 18

- (4) If the Director-General seeks the Minister's consent to request the issue of a warrant under section 34D in relation to a person and the Minister is satisfied on reasonable grounds that the person is at least 16 but under 18, the Minister may consent only if he or she is satisfied on reasonable grounds that:
 - (a) it is likely that the person will commit, is committing or has committed a terrorism offence; and
 - (b) the draft warrant to be included in the request will meet the requirements in subsection (6).
- (5) An issuing authority may issue a warrant under section 34D relating to a person whom the authority is satisfied on reasonable grounds is at least 16 but under 18 only if the draft warrant included in the request for the warrant meets the requirements in subsection (6).

Note: Section 34D requires that a warrant issued under that section be in the same form as the draft warrant included in the request.

- (6) If subsection (4) or (5) applies, the draft warrant must:
 - (a) if the warrant authorises the person to be taken into custody and detained—permit the person to contact, at any time when the person is in custody or detention authorised by the warrant:
 - (i) a parent or guardian of the person; and
 - (ii) if it is not acceptable to the person to be questioned in the presence of one of his or her parents or guardians—another person who meets the requirements in subsection (7); and
 - (b) authorise the Organisation to question the person before a prescribed authority:
 - (i) only in the presence of a parent or guardian of the person or, if that is not acceptable to the person, of another person who meets the requirements in subsection (7); and
 - (ii) only for continuous periods of 2 hours or less, separated by breaks directed by the prescribed authority.

Note: The prescribed authority may set the breaks between periods of questioning by giving appropriate directions under paragraph 34F(1)(e) for the person's further appearance before the prescribed authority for questioning.

- (7) The other person must:
 - (a) be able to represent the person's interests; and
 - (b) as far as practicable in the circumstances, be acceptable to the person and to the prescribed authority; and

- (c) not be one of the following:
 - (i) a police officer;
 - (ii) the Director-General;
 - (iii) an officer or employee of the Organisation;
 - (iv) a person approved under subsection 24(1).
- (8) If a person appears before a prescribed authority for questioning under a warrant issued under section 34D and the prescribed authority is satisfied on reasonable grounds that the person is at least 16 but under 18, the prescribed authority must, as soon as practicable:
 - (a) inform the person that the person:
 - (i) may request that one of the person's parents or guardians or one other person who meets the requirements in subsection (7) be present during the questioning; and
 - (ii) may contact the person's parents or guardians and another person who meets the requirements in subsection (7), at any time when the person is in custody or detention authorised by the warrant; and
 - (iii) may contact a single lawyer of the person's choice when the person is in detention authorised by the warrant; and
 - (b) if the person requests that one of the person's parents or guardians be present during the questioning—direct everyone proposing to question the person under the warrant not to do so in the absence of the parent or guardian; and
 - (c) if the person does not request that one of the person's parents or guardians be present during the questioning—direct everyone proposing to question the person under the warrant not to do so in the absence of another person (other than the prescribed authority) who meets the requirements in subsection (7); and
 - (d) direct under paragraph 34F(1)(d) that the person may contact someone described in subparagraph (a)(ii) of this subsection at any time described in that subparagraph; and
 - (e) direct everyone proposing to question the person under the warrant that questioning is to occur only for continuous periods of 2 hours or less, separated by breaks directed by the prescribed authority.

Note: The prescribed authority may set the breaks between periods of questioning by giving appropriate directions under paragraph 34F(1)(e) for the person's further appearance before the prescribed authority for questioning.
- (9) Subsection 34F(2) does not prevent the prescribed authority from giving a direction in accordance with paragraph (8)(d) of this section.
- (10) To avoid doubt, paragraphs (6)(b) and (8)(e) do not affect the operation of section 34HB.

34NB Offences of contravening safeguards

- (1) A person commits an offence if:
 - (a) the person has been approved under section 24 to exercise authority conferred by a warrant issued under section 34D; and
 - (b) the person exercises, or purports to exercise, the authority; and

- (c) the exercise or purported exercise contravenes a condition or restriction in the warrant on the authority; and
- (d) the person knows of the contravention.

Penalty: Imprisonment for 2 years.

- (2) A person commits an offence if:
- (a) the person is a police officer; and
 - (b) the person engages in conduct; and
 - (c) the conduct contravenes section 34DA; and
 - (d) the person knows of the contravention.

Penalty: Imprisonment for 2 years.

- (3) A person commits an offence if:
- (a) the person is identified (whether by name, reference to a class that includes the person or some other means) in a direction given by a prescribed authority under paragraph 34F(1)(c), (d), (e) or (f) or subsection 34HA(4), 34NA(2) or (8) or 34V(3) as a person who is to implement the direction; and
 - (b) the person engages in conduct; and
 - (c) the conduct contravenes the direction; and
 - (d) the person knows of the contravention.

Penalty: Imprisonment for 2 years.

- (4) A person commits an offence if:
- (a) the person engages in conduct; and
 - (b) the conduct contravenes paragraph 34F(9)(c), subsection 34H(4), paragraph 34HAA(3)(b) or (4)(a) or subsection 34J(2); and
 - (c) the person knows of the contravention.

Penalty: Imprisonment for 2 years.

- (4A) A person commits an offence if:
- (a) the person has been approved under section 24 to exercise authority conferred by a warrant issued under section 34D; and
 - (b) the person exercises, or purports to exercise, the authority by questioning another person; and
 - (c) the questioning contravenes section 34HB; and
 - (d) the person knows of the contravention.

Penalty: Imprisonment for 2 years.

- (5) A person (the *searcher*) commits an offence if:
- (a) the searcher is a police officer; and
 - (b) the searcher conducts a strip search of a person detained under this Division; and
 - (c) the search is conducted:
 - (i) without either the approval of a prescribed authority or the consent of the detained person; or
 - (ii) in a way that contravenes subsection 34M(1); and

- (d) the searcher knows of the lack of approval and consent or of the contravention.

Penalty: Imprisonment for 2 years.

- (6) A person (the *searcher*) commits an offence if:
 - (a) the searcher is a police officer who is conducting or has conducted a strip search of a person detained under this Division; and
 - (b) the searcher engages in conduct; and
 - (c) the conduct contravenes subsection 34M(4); and
 - (d) the searcher knows of the contravention.

Penalty: Imprisonment for 2 years.

- (7) In this section:

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

34NC Complaints about contravention of procedural statement

- (1) Contravention of the written statement of procedures mentioned in section 34C of this Act may be the subject of a complaint:
 - (a) to the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*; or
 - (b) to the Ombudsman under Part III of the *Complaints (Australian Federal Police) Act 1981*.
- (2) This section does not limit the subjects of complaint under the *Inspector-General of Intelligence and Security Act 1986* or Part III of the *Complaints (Australian Federal Police) Act 1981*.

34P Providing reports to the Minister

The Director-General must give the Minister, for each warrant issued under section 34D, a written report on the extent to which the action taken under the warrant has assisted the Organisation in carrying out its functions.

34Q Providing information to the Inspector-General

The Director-General must, as soon as practicable, give the following to the Inspector-General of Intelligence and Security:

- (aa) a copy of any draft request given to the Minister under subsection 34C(2) in seeking the Minister's consent to request the issue of a warrant under section 34D;
- (a) a copy of any warrant issued under section 34D;
- (b) a copy of any video recording made under section 34K;
- (c) a statement containing details of any seizure, taking into custody, or detention under this Division;
- (d) a statement describing any action the Director-General has taken as a result of being informed of the Inspector-General's concern under section 34HA.

34QA Reporting by Inspector-General on multiple warrants

- (1) This section imposes requirements on the Inspector-General of Intelligence and Security if:
 - (a) a person is detained under this Division in connection with a warrant issued under section 34D; and
 - (b) one or more other warrants (the *later warrants*) meeting the requirement in paragraph 34D(2)(b) are issued later under that section in relation to the person.
- (2) The Inspector-General must inspect a copy of the draft request given to the Minister under subsection 34C(2) for each of the warrants, to determine whether the draft request for each of the later warrants included information described in paragraph 34C(3D)(b).

Note: Paragraph 34C(3D)(b) describes information 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 last warrant that:

- (a) was issued under section 34D before the seeking of the Minister's consent to the request proposed in the draft request; and
 - (b) was a warrant in connection with which the person was detained under this Division.
- (3) The Inspector-General must report on the outcome of the inspection in his or her annual report for the year in which he or she carries out the examination. For this purpose, *annual report* means a report under section 35 of the *Inspector-General of Intelligence and Security Act 1986*.

34R Discontinuing action before warrants expire

If, before a warrant issued under section 34D ceases to be in force, the Director-General is satisfied that the grounds on which the warrant was issued have ceased to exist, the Director-General must:

- (a) inform the Minister, and the issuing authority who issued the warrant, accordingly; and
- (b) take such steps as are necessary to ensure that action under the warrant is discontinued.

34S Certain records obtained under warrant to be destroyed

The Director-General must cause a record or copy to be destroyed if:

- (a) the record or copy was made because of a warrant issued under section 34D; and
- (b) the record or copy is in the possession or custody, or under the control, of the Organisation; and
- (c) the Director-General is satisfied that the record or copy is not required for the purposes of the performance of functions or exercise of powers under this Act.

34SA Status of issuing authorities and prescribed authorities

- (1) An issuing authority or prescribed authority has, in the performance of his or her duties under this Division, the same protection and immunity as a Justice of the High Court.
- (2) If a person who is a member of a court created by the Parliament has under this Division a function, power or duty that is neither judicial nor incidental to a judicial function or power, the person has the function, power or duty in a personal capacity and not as a court or a member of a court.

34T Certain functions and powers not affected

- (1) This Division does not affect a function or power of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*.
- (2) This Division does not affect a function or power of the Ombudsman under the *Complaints (Australian Federal Police) Act 1981*.

34TA Limit on contact of lawyer of choice

- (1) The person (the *subject*) specified in a warrant issued under section 34D that meets the requirement in paragraph 34D(2)(b) may be prevented from contacting a particular lawyer of the subject's choice if the prescribed authority before whom the subject appears for questioning under the warrant so directs.
- (2) The prescribed authority may so direct only if the authority is satisfied, on the basis of circumstances relating to that lawyer, that, if the subject is permitted to contact the lawyer:
 - (a) a person involved in a terrorism offence may be alerted that the offence is being investigated; or
 - (b) a record or thing that the person may be requested in accordance with the warrant to produce may be destroyed, damaged or altered.
- (3) This section has effect despite paragraph 34F(9)(a).
- (4) To avoid doubt, subsection (1) does not prevent the subject from choosing another lawyer to contact, but the subject may be prevented from contacting that other lawyer under another application of that subsection.

34TB Questioning person in absence of lawyer of person's choice

- (1) To avoid doubt, a person before a prescribed authority for questioning under a warrant issued under section 34D may be questioned under the warrant in the absence of a lawyer of the person's choice.

Note: As the warrant authorises questioning of the person only while the person is before a prescribed authority, the prescribed authority can control whether questioning occurs by controlling whether the person is present before the prescribed authority.
- (2) This section does not permit questioning of the person by a person exercising authority under the warrant at a time when a person exercising authority under the warrant is required by another section of this Division not to question the person.

Example: This section does not permit the person to be questioned when a person exercising authority under the warrant is required by section 34H or section 34HAA to defer questioning because an interpreter is not present.

34U Involvement of lawyers

- (1) This section applies if the person (the *subject*) specified in a warrant issued under section 34D contacts another person as a legal adviser as permitted by the warrant or a direction under paragraph 34F(1)(d).

Contact to be able to be monitored

- (2) The contact must be made in a way that can be monitored by a person exercising authority under the warrant.

Legal adviser to be given copy of the warrant

- (2A) A person exercising authority under the warrant must give the legal adviser a copy of the warrant. This subsection does not:
 - (a) require more than one person to give the legal adviser a copy of the warrant; or
 - (b) entitle the legal adviser to be given a copy of, or see, a document other than the warrant.

Breaks in questioning to give legal advice

- (3) The prescribed authority before whom the subject is being questioned must provide a reasonable opportunity for the legal adviser to advise the subject during breaks in the questioning.

Note: The prescribed authority may set the breaks between periods of questioning by giving appropriate directions under paragraph 34F(1)(e) for the person's further appearance before the prescribed authority for questioning.

- (4) 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.

Removal of legal adviser for disrupting questioning

- (5) If the prescribed authority considers the legal adviser's conduct is unduly disrupting the questioning, the authority may direct a person exercising authority under the warrant to remove the legal adviser from the place where the questioning is occurring.
- (6) If the prescribed authority directs the removal of the legal adviser, the prescribed authority must also direct under paragraph 34F(1)(d) that the subject may contact someone else as a legal adviser. Subsection 34F(2) does not prevent the prescribed authority from giving the direction under paragraph 34F(1)(d) in accordance with this subsection.

If legal adviser also represents young person

- (12) If section 34V also applies to the legal adviser in another capacity in relation to the subject, this section does not apply to conduct of the legal adviser in that other capacity.

34V Conduct of parents etc.

- (1) This section applies in relation to a person (the *representative*) who:
 - (a) is either:
 - (i) the parent or guardian of a person (the *subject*) specified in a warrant issued under section 34D; or
 - (ii) another person who meets the requirements in subsection 34NA(7) in relation to the subject; and
 - (b) either:
 - (i) is or has been contacted by the subject as permitted by the warrant or a direction under paragraph 34F(1)(d); or
 - (ii) is or has been present when the subject was before a prescribed authority for questioning under the warrant.
- (2) If a prescribed authority considers the representative's conduct is unduly disrupting questioning of the subject, the authority may direct a person exercising authority under the warrant to remove the representative from the place where the questioning is occurring.
- (3) If the prescribed authority directs the removal of the representative, the prescribed authority must also:
 - (a) inform the subject that the subject:
 - (i) may request that one of the subject's parents or guardians or one other person who meets the requirements in subsection 34NA(7), other than the representative, be present during the questioning; and
 - (ii) may contact a person covered by subparagraph (i) to request the person to be present during the questioning; and
 - (b) if the subject requests that one of the subject's parents or guardians, other than the representative, be present during the questioning—direct everyone proposing to question the subject under the warrant not to do so in the absence of the parent or guardian; and
 - (c) if the subject does not request that one of the subject's parents or guardians, other than the representative, be present during the questioning—direct everyone proposing to question the subject under the warrant not to do so in the absence of another person (other than the prescribed authority) who meets the requirements in subsection 34NA(7); and
 - (d) direct under paragraph 34F(1)(d) that the subject may contact a person covered by subparagraph (a)(i) of this subsection to request the person to be present during the questioning.

Subsection 34F(2) does not prevent the prescribed authority from giving the direction under paragraph 34F(1)(d) in accordance with this subsection.

34VAA Secrecy relating to warrants and questioning

Before the expiry of the warrant

- (1) A person (the *discloser*) commits an offence if:
 - (a) a warrant has been issued under section 34D; and
 - (b) the discloser discloses information; and

- (c) either or both of the following apply:
 - (i) the information indicates the fact that the warrant has been issued or a fact relating to the content of the warrant or to the questioning or detention of a person in connection with the warrant;
 - (ii) the information is operational information; and
- (d) if subparagraph (c)(ii) applies but subparagraph (c)(i) does not—the discloser has the information as a direct or indirect result of:
 - (i) the issue of the warrant; or
 - (ii) the doing of anything authorised by the warrant, by a direction given under subsection 34F(1) in connection with the warrant or by another provision of this Division in connection with the warrant; and
- (e) the disclosure occurs before the end of the period specified in the warrant as the period for which the warrant is to be in force; and
- (f) the disclosure is not a permitted disclosure.

Penalty: Imprisonment for 5 years.

In the 2 years after the expiry of the warrant

- (2) A person (the **discloser**) commits an offence if:
 - (a) a warrant has been issued under section 34D; and
 - (b) the discloser discloses information; and
 - (c) the information is operational information; and
 - (d) the discloser has the information as a direct or indirect result of:
 - (i) the issue of the warrant; or
 - (ii) the doing of anything authorised by the warrant, by a direction given under subsection 34F(1) in connection with the warrant or by another provision of this Division in connection with the warrant; and
 - (e) the disclosure occurs before the end of the 2 years starting at the end of the period specified in the warrant as the period during which the warrant is to be in force; and
 - (f) the disclosure is not a permitted disclosure.

Penalty: Imprisonment for 5 years.

Strict liability

- (3) Strict liability applies to paragraphs (1)(c) and (2)(c) if the discloser is:
 - (a) the person (the **subject**) specified in the warrant; or
 - (b) a lawyer who has at any time been:
 - (i) present, as the subject's legal adviser, at the questioning of the subject under the warrant; or
 - (ii) contacted for the purpose of the subject obtaining legal advice in connection with the warrant; or
 - (iii) contacted for the purpose of the subject obtaining representation in legal proceedings seeking a remedy relating to the warrant or the treatment of the subject in connection with the warrant.

Otherwise, the fault element applying to paragraphs (1)(c) and (2)(c) is recklessness.

Note: For strict liability, see section 6.1 of the *Criminal Code*. For recklessness, see section 5.4 of the *Criminal Code*.

Extended geographical jurisdiction—category D

- (4) Section 15.4 of the *Criminal Code* (extended geographical jurisdiction—category D) applies to an offence against subsection (1) or (2).

Definitions

- (5) In this section:

operational information means information indicating one or more of the following:

- (a) information that the Organisation has or had;
- (b) a source of information (other than the person specified in the warrant mentioned in subsection (1) or (2)) that the Organisation has or had;
- (c) an operational capability, method or plan of the Organisation.

permitted disclosure means any of the following:

- (a) a disclosure made by a person in the course of any of the following:
 - (i) exercising a power, or performing a function or duty, under this Act;
 - (ii) doing anything the person is authorised to do by a warrant issued under this Act;
 - (iii) doing anything the person is required or permitted to do by a direction under subsection 34F(1);
 - (iv) exercising a power (including a power to make a complaint), or performing a function or duty, under the *Complaints (Australian Federal Police) Act 1981* or the *Inspector-General of Intelligence and Security Act 1986*;
- (b) a disclosure that is:
 - (i) made in the course of the questioning of a person under a warrant issued under section 34D; and
 - (ii) made by a person who is present at the questioning when making the disclosure;
- (c) a disclosure to a lawyer for the purpose of:
 - (i) obtaining legal advice in connection with a warrant issued under section 34D; or
 - (ii) obtaining representation in legal proceedings seeking a remedy relating to such a warrant or the treatment of a person in connection with such a warrant;
- (d) a disclosure for the purpose of the initiation, conduct or conclusion (by judgment or settlement) of legal proceedings relating to such a remedy;
- (e) a disclosure that is permitted by a prescribed authority to be made;
- (f) a disclosure to one or more of the following persons, by the representative mentioned in subsection 34V(1) or by a parent, guardian or sibling of the subject mentioned in that subsection, of information described in paragraph (1)(c) or (2)(c) of this section in relation to the warrant mentioned in that subsection:
 - (i) a parent, guardian or sibling of the subject;
 - (ii) the representative;

- (iii) a prescribed authority;
 - (iv) a person exercising authority under the warrant;
 - (v) the Inspector-General of Intelligence and Security;
 - (vi) the Ombudsman;
 - (g) a disclosure permitted by the Director-General;
 - (h) a disclosure permitted by the Minister;
 - (i) a disclosure prescribed by the regulations.
- (6) For the purposes of paragraph (e) of the definition of **permitted disclosure** in subsection (5), a prescribed authority may give written permission, not inconsistent with the regulations (if any), for:
- (a) a person contacted as described in subsection 34U(1); or
 - (b) the representative mentioned in subsection 34V(1);
- to disclose specified information to a specified person. The permission may be given either unconditionally or subject to specified conditions.
- Note 1: The prescribed authority may revoke or amend the permission. See subsection 33(3) of the *Acts Interpretation Act 1901*.
- Note 2: If permission is given subject to a condition and the condition is not met, the permission is not in force.
- (7) For the purposes of paragraph (g) of the definition of **permitted disclosure** in subsection (5), the Director-General may give written permission for a disclosure. The permission may be given either unconditionally or subject to specified conditions.
- Note 1: The Director-General may revoke or amend the permission. See subsection 33(3) of the *Acts Interpretation Act 1901*.
- Note 2: If permission is given subject to a condition and the condition is not met, the permission is not in force.
- (8) For the purposes of paragraph (h) of the definition of **permitted disclosure** in subsection (5), the Minister may, after obtaining advice from the Director-General, give written permission for a disclosure. The permission may be given either unconditionally or subject to specified conditions.
- Note 1: The Minister may, after obtaining advice from the Director-General, revoke or amend the permission. See subsection 33(3) of the *Acts Interpretation Act 1901*.
- Note 2: If permission is given subject to a condition and the condition is not met, the permission is not in force.
- (9) Regulations made for the purposes of paragraph (i) of the definition of **permitted disclosure** in subsection (5) may prescribe a disclosure by reference to one or more of the following:
- (a) the person making the disclosure;
 - (b) the person to whom the disclosure is made;
 - (c) the circumstances in which the disclosure is made;
 - (d) the purpose of the disclosure;
 - (e) the nature of information disclosed;
 - (f) an opinion of a specified person about the possible or likely effect of the disclosure.

This subsection does not limit the way in which such regulations may prescribe a disclosure.

Offences apply to original and previously disclosed information

- (10) To avoid doubt, subsections (1) and (2) apply whether or not the discloser has the information that he or she discloses as a result of a disclosure by someone else.

Relationship with other laws prohibiting disclosure

- (11) This section has effect in addition to, and does not limit, other laws of the Commonwealth that prohibit the disclosure of information.

Implied freedom of political communication

- (12) This section does not apply to the extent (if any) that it would infringe any constitutional doctrine of implied freedom of political communication.

34VA Lawyers' access to information for proceedings relating to warrant

The regulations may prohibit or regulate access to information, access to which is otherwise controlled or limited on security grounds, by lawyers acting for a person in connection with proceedings for a remedy relating to:

- (a) a warrant issued under section 34D in relation to the person; or
- (b) the treatment of the person in connection with such a warrant.

34W Rules of Court about proceedings connected with warrants

Rules of Court of the High Court or the Federal Court of Australia may make special provision in relation to proceedings for a remedy relating to a warrant issued under section 34D or the treatment of a person in connection with such a warrant.

34WA Law relating to legal professional privilege not affected

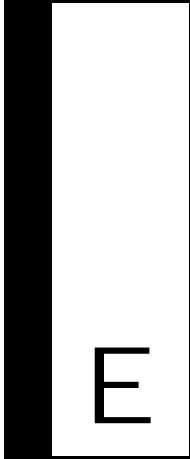
To avoid doubt, this Division does not affect the law relating to legal professional privilege.

34X Jurisdiction of State and Territory courts excluded

- (1) A court of a State or Territory does not have jurisdiction in proceedings for a remedy if:
- (a) the remedy relates to a warrant issued under section 34D or the treatment of a person in connection with such a warrant; and
 - (b) the proceedings are commenced while the warrant is in force.
- (2) This section has effect despite any other law of the Commonwealth (whether passed or made before or after the commencement of this section).

34Y Cessation of effect of Division

This Division ceases to have effect 3 years after it commences.



Appendix E – The Protocol

ATTORNEY-GENERAL
THE HON DARYL WILLIAMS AM QC MP

NEWS RELEASE

12 August 2003
98/03

ASIO PROTOCOL TO GUIDE WARRANT PROCESS

I have today tabled a Protocol to guide the execution of detention and questioning warrants under the new provisions of the *Australian Security Intelligence Organisation*

Legislation Amendment (Terrorism) Act 2003 (the Act).

This Protocol fleshes out the detail of the operation of warrants under the Act, which provides the Australian Security Intelligence Organisation (ASIO) with the tools it needs to identify and, where possible, prevent Australians from being hurt or killed by acts of terrorism.

The legislation was passed in June, in the final sitting week before the winter recess. Since that time, ASIO, together with the Australian Federal Police and the Attorney-General's Department have been working on the Protocol.

The Protocol covers, among other matters, arrangements for custody and detention, interview duration periods and breaks.

It sets out standards in relation to facilities for custody, arrangements for recording of interviews and measures to ensure the welfare of people subject to a warrant.

The Protocol also sets out measures for accountability and arrangements for the making of complaints.

Relevant standards, including United Nations Rules in relation to detained persons, have been taken into account in preparing the document.

The Act sets out a clear process for the finalisation of the Protocol, including formal consultation between the Director-General of Security, the Commissioner of the Australian Federal Police and the Inspector-General of Intelligence and Security.

Following approval by the AFP and the IGIS, the Protocol is then submitted to the Attorney-General for approval and, once approved, is presented to each House of Parliament and briefing provided to the Parliamentary Joint Committee on ASIO, ASIS and DSD.

**AUSTRALIAN SECURITY INTELLIGENCE ORGANISATION LEGISLATION
AMENDMENT (TERRORISM) ACT 2003**

BRIEFING ON PROTOCOL

The *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (the Act) amends the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) to enhance the capacity of the Australian Security Intelligence Organisation (ASIO) to combat terrorism. It grants ASIO powers to collect intelligence that may substantially assist in the investigation of terrorism offences. The Act provides ASIO with the ability to seek a warrant to detain and question people for the purposes of investigating terrorism offences.

The Act provides in sections 34C(3)(ba) and 34C(3A) for the development of a written statement of procedures (Protocol) to be followed in the exercise of authority to take persons into custody, detain persons and conduct questioning under warrants issued under section 34D. The Act also provides that no action can be taken under the warrant until the Protocol has been made.

The Protocol has been developed in accordance with the requirements of sections 34C(3)(ba) and 34C(3A) of the Act. The Protocol has been developed by the Director-General of Security in consultation with the Australian Federal Police (AFP), the Inspector-General of Intelligence and Security (IGIS) and the Attorney-General's Department. The Protocol has been approved by the Attorney-General, the AFP and the IGIS in accordance with the requirements of the Act.

The Protocol is designed to be read in conjunction with the Act, and expands on the requirements of the Act. Wherever possible reference has been made in the Protocol to the corresponding provision of the Act. The Protocol is not a legislative instrument. This means that where a discrepancy exists between the Protocol and the Act, the provisions of the Act will prevail.

The Protocol sets out the basic standards that will apply in the questioning and detention of persons under a section 34D warrant. It clarifies concepts used in the Act and addresses issues such as the:

- (i) transportation of a person under a warrant;
- (ii) treatment of a person being questioned, e.g. the conditions applicable during questioning such as access to fresh drinking water and toilet and sanitary facilities at all times during questioning;
- (iii) supervision of detention under a warrant and the conduct of any searches undertaken pursuant to a warrant;
- (iv) health and welfare of a person subject to a warrant, such as the accommodation facilities and food and sleep requirements;
- (v) video recording of procedures;
- (vi) contact with other persons and a complaint mechanism; and
- (vii) arrangements for liaison with other persons such as the Inspector-General of Intelligence and Security and the Commissioner of the relevant police service.

COMMONWEALTH OF AUSTRALIA
Australian Security Intelligence Organisation

PROTOCOL

This Protocol is made pursuant to the requirement in subsection 34C(3A) that the Director-General make a written statement of procedures to be followed in the exercise of authority under warrants issued under section 34D of the *Australian Security Intelligence Organisation Act 1979*. The Protocol sets out the basic standards applicable in relation to the detention and questioning of a person pursuant to a warrant issued under section 34D of that Act.

This document is to be read in accordance with the provisions of Part III of the ASIO Act, and the terms of any warrant issued under section 34D.

Definitions

In this Protocol, the following terms have the meanings indicated:

ASIO Act means the *Australian Security Intelligence Organisation Act 1979*.

police officer and prescribed authority have the meanings given in section 34 A of the ASIO Act *subject* means a person:

- (a) specified in a warrant under section 34D of the ASIO Act as being required to appear before a prescribed authority for questioning under the warrant; or
- (b) in relation to whom a warrant under section 34D of the ASIO Act authorises the person to be brought before a prescribed authority for questioning and detained under arrangements made by a police officer.

General

A written record must be maintained recording the following information:

- (a) the identity of the subject;
- (b) the authority for the questioning or detention of the subject;
- (c) the date and time of detention and release of the subject;
- (d) details of any period during which the subject is questioned pursuant to the warrant; and
- (e) details as to the location(s) of any detention or questioning.

The Director-General must annex this report to any report made under section 34P.

Transport

In any case where a subject is to be transported, a police officer must arrange transportation. The transportation must be safe and dignified.

A police officer must remain present during the transportation of any subject who is being detained.

A subject must not be transported in any vehicle with inadequate ventilation or light, or in a way which would expose the subject to unnecessary physical hardship.

Questioning

4.1 Manner

All persons present during questioning or any period of detention pursuant to the warrant must interact with the subject in a manner that is both humane and courteous, and must not speak to a subject in a demeaning manner.

A subject must not be questioned in a manner that is unfair or oppressive in the circumstances.

A police officer must remain present at all times during the questioning of a subject.

4.2 Language

Information given to a subject must be conveyed in a language the subject can understand.

An interpreter must be provided for a subject who, in the opinion of the prescribed authority, does not understand, or cannot communicate effectively in, English as required by section 34H.

4.3 Explanation of effect of warrant

The prescribed authority must explain to a subject the effect of the warrant in accordance with section 34E, and must satisfy him or herself that the subject has understood the explanations given.

In particular, the prescribed authority must explain to the subject the use which may be made of any information or materials provided by the subject, including any derivative use for the purpose of criminal investigations.

The prescribed authority must explain to a subject the function or role of all officers present during questioning.

4.4 Conditions

A subject shall have access to fresh drinking water and toilet and sanitary facilities at all times during questioning.

A subject must not be questioned continuously for more than 4 hours without being offered a break.

Such break shall, at a minimum, be 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.

Detention

5.1 Police supervision

Taking into custody and subsequent detention shall be effected under arrangements made by a police officer. These arrangements shall be consistent with applicable police practices and procedures in relation to custody of persons, save where such practices are inconsistent with the terms of the warrant or this Protocol.

A police officer shall supervise all detention pursuant to a warrant.

The prescribed authority shall be responsible for issuing directions on any matters relating to the detention of the subject during questioning.

5.2 Personal effects

A subject shall not have access to, or be able to manufacture, any implement that could be used as a weapon.

A subject shall not be permitted to retain any listening or recording devices or any communications equipment during any periods of detention or questioning.

A subject must be permitted, upon request, to retain any clothing or personal effects during questioning unless the prescribed authority has reason to believe that the subject may use such items to:

- (a) injure him or herself, or other persons;
- (b) damage property; or

(c) attempt to escape.

During periods of detention in which the subject is not being questioned, decisions on the retention of items by the subject shall be the responsibility of a police officer supervising detention. Any effects belonging to a subject which he or she is not allowed to retain in detention must be itemised and placed in safe custody. An inventory of the property retained is to be signed by the subject where the subject is able and willing to do so.

On release from detention all such articles must be returned to the subject who must be asked to sign a receipt for them.

A subject who is not permitted to wear his or her own clothing shall be provided with an outfit of clothing suitable for the climate and adequate to maintain good health and dignity. Such clothing shall in no manner be degrading or humiliating.

5.3 Searches

An ordinary or frisk search of a subject must, if practicable, be conducted by a police officer of the same sex as the subject.

Any strip search of a subject conducted pursuant to section 34L of the ASIO Act must comply with the requirements of section 34M, including the requirement that the search be conducted by a police officer of the same sex as the subject.

Any search of a subject must be conducted with appropriate sensitivity.

5.4 Use of force and restraint

A police officer may only use the minimum force reasonably necessary in the circumstances, and may only use instruments of restraint as is reasonably necessary in the circumstances.

In particular, the use of force or instruments of restraint must not be applied as a punishment.

Restraint may only be applied by a police officer, and must not be applied for a longer time than is necessary.

The Director-General must include in a report under section 34P advice about any force or restraint employed by a police officer in the execution of the warrant.

Health and Welfare

6.1 Facilities and Accommodation

Facilities employed for questioning or detention shall have adequate fresh air and ventilation, floor space, lighting and heating and cooling appropriate to the climatic conditions.

Facilities employed shall have sufficient natural or artificial light to permit reading.

Facilities employed for detention and questioning need not be the same throughout the warrant period.

Where a subject is under the age of 18 years, any period of 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.

Food

A subject shall have access to fresh drinking water at all times.

A subject shall be provided with three meals a day at the usual hours or at the times necessary to meet religious requirements.

Food shall be of sufficient nutritional value, adequate for health and wellbeing, be culturally appropriate and well-prepared and served.

A subject shall be provided with special dietary food where such food is necessary for medical reasons, on account of a subject's religious beliefs, because the subject is a vegetarian, or where the subject has other special needs.

6.3 Sleep

A subject shall be provided with a separate bed, and must be accorded a separate room or cell in which to sleep where facilities permit.

A subject shall be provided with sufficient clean bedding, kept in good order and changed often enough to ensure its cleanliness.

Except where otherwise directed by the prescribed authority, a subject must be accorded the opportunity for a minimum continuous, undisturbed period of 8 hours sleep during any 24 hour period of detention.

6.4 Personal Hygiene

A subject shall be provided with access to clean toilet and sanitary facilities for the subject to use as required in a clean and decent manner.

A subject shall be permitted to bathe or shower daily in facilities that are clean, adequate, and at a temperature suitable for the climate.

A subject shall be provided with such toilet articles as are necessary for health and cleanliness and the maintenance of self-respect.

A subject shall be permitted to undertake bathing, toileting and dressing in private, subject to the requirements of safety and security.

6.5 Health Care

A subject shall be provided with necessary medical or other health care when required.

Arrangements shall be made for any recommendation made or treatment prescribed by a medical or health professional to be given effect.

6.6 Religion

A subject shall be permitted to engage in religious practices as required by their religion, subject to the requirements of safety and security.

6.7 Subjects under the age of 18 years

Where the subject is under the age of 18 years, the operation of this protocol is limited as provided in section 34NA of the ASIO Act, as well as by the particular provisions of this protocol applying to subjects under 18.

7 Video recording of procedures

7.1 Facilities for recording

ASIO shall be responsible for ensuring that there are facilities available for the making of video recordings in accordance with section 34K of the ASIO Act, and for ensuring that such recordings are made in compliance with that provision.

The facilities must be appropriate to enable a clear visual recording to be made of the subject's appearance before the prescribed authority for the duration of questioning.

The facilities must also enable a clear audio recording of all questions, answers and statements made during questioning, including any statements made by the prescribed authority in accordance with section 34E.

In the event that there is a failure in the recording equipment, or if the recording has to be suspended, during the subject's appearance before the prescribed authority for questioning, the prescribed authority must direct that questioning of the subject be suspended until recording may be resumed.

7.2 Notification to the subject

Upon the commencement or resumption of any recording for the purpose of questioning in accordance with subsection 34K(1), the prescribed authority shall inform the subject that the questioning is being recorded, and shall state the time and date of the questioning.

7.3 Security of recordings

ASIO shall ensure that a master version is retained of any video recording of the subject's appearance before a prescribed authority. The master version shall be sealed in the presence of the prescribed authority and the label shall be signed by the prescribed authority. The sealed master version shall be made available to the Inspector-General of Intelligence and Security on request.

ASIO shall be responsible for ensuring that any copies of video recordings made pursuant to section 34K are securely maintained and that a register is kept of any persons or agencies who have access to such copies.

As required under section 34S, the Director-General must cause the destruction of a video recording, or copy of a video recording, which is in ASIO's possession or custody or under ASIO's control, if the Director-General is satisfied that the video recording or copy is not required for the purposes of the performance of functions or the exercise of powers under the ASIO Act.

8 Contact

A subject who has been taken into custody or detained shall be permitted to contact a person specified in the warrant as a person with whom the subject may have contact, or a person falling within a class of persons so specified in the warrant, or, where applicable, a person identified in a direction described in paragraph 34F(1)(d).

A subject shall be provided with access to such facilities as are, in the view of the prescribed authority, appropriate for such contact in all the circumstances.

Except where directed otherwise by the prescribed authority, such contact shall only be permitted within the presence of officers present for the purposes of executing or supervising the execution of the warrant.

9 Complaints Mechanism

In accordance with subsection 34F(9), a subject must be permitted to contact the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman during the period of the warrant or following, including when the subject is being questioned or in detention.

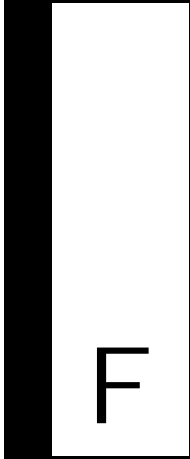
A subject must be provided with such facilities as are, in the view of the prescribed authority, appropriate to make such complaint.

A subject shall be permitted to make such complaint outside of the hearing of officers present for the purposes of executing or supervising the execution of the warrant.

The Director-General must include in a report made under section 34P an account of any complaint made in relation to the execution of the warrant, to the extent known.

10 Arrangements for Liaison

As soon as possible following the issuing of a warrant, the Director-General shall ensure that the Inspector-General of Intelligence and Security, the nominated prescribed authority, and the Commissioner of the relevant police service(s) are informed as to the details of the warrant, and as to the proposed arrangements for its execution.



Statement given to witnesses concerning the giving of evidence to the Review of Division 3 Part III of the *ASIO Act 1979*

Submissions made to or evidence given before the Joint Parliamentary Committee on ASIO, ASIS and DSD in respect of its statutory review of Division 3 Part III of the *ASIO Act 1979* are protected by the provisions of the *Parliamentary Privileges Act 1987* relating to the protection of witnesses, namely subsections 12(1) and (2) and 16 (3) and (4)¹. Furthermore, anybody threatening such a prosecution may be committing an offence.

The Committee advises persons who intend to give evidence or make submissions to the review of Division 3 Part III of the ASIO Act that it has received legal advice that the provisions of sec 34VAA of the ASIO Act do not apply, subject to restrictions placed on the Committee by section 29(3) and Schedule 1 clauses 2, 3 and 4 of the *Intelligence Services Act 2001*². That is, within the bounds of those restrictions, it would not be an offence for persons to provide evidence or documents to the inquiry. Potential witnesses must note, however, that the Committee is not entitled to examine and is not interested in examining the intelligence or the subject matter(s) discussed under a questioning warrant. It wishes to pursue only those procedures used in the operation of the questioning and detention powers under the ASIO Act.

The Committee will take such evidence in-camera and witnesses are reminded that any unauthorised disclosure of evidence taken in-camera by a

¹ See Attachment A

² See Attachment B

witness or other person could be proceeded against as a contempt of Parliament and prosecuted as an offence under section 13 of the *Parliamentary Privileges Act 1987*.³

A copy of the legal opinion relating to this matter is available on the Committee's website at:

http://www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/index.htm

Margaret Swieringa

Secretary

³ See Attachment C

ATTACHMENT A

Parliamentary Privileges Act 1987

12 Protection of witnesses

(1) A person shall not, by fraud, intimidation, force or threat, by the offer or promise of any inducement or benefit, or by other improper means, influence another person in respect of any evidence given or to be given before a House or a committee, or induce another person to refrain from giving any such evidence.

Penalty:

(a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

(2) A person shall not inflict any penalty or injury upon, or deprive of any benefit, another person on account of:

(a) the giving or proposed giving of any evidence; or

(b) any evidence given or to be given before a House or a committee.

Penalty:

(a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.

16 Parliamentary privilege in court proceedings

(3) In proceedings in any court or tribunal, it is not lawful for evidence to be tendered or received, questions asked or statements, submissions or comments made, concerning proceedings in Parliament, by way of, or for the purpose of:

(a) questioning or relying on the truth, motive, intention or good faith of anything forming part of those proceedings in Parliament;

(b) otherwise questioning or establishing the credibility, motive, intention or good faith of any person; or

(c) drawing, or inviting the drawing of, inferences or conclusions wholly or partly from anything forming part of those proceedings in Parliament.

(4) A court or tribunal shall not:

(a) require to be produced, or admit into evidence, a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera, or admit evidence relating to such a document; or

(b) admit evidence concerning any oral evidence taken by a House or a committee in camera or require to be produced or admit into evidence a document recording or reporting any such oral evidence; unless a House or a committee has published, or authorised the publication of, that document or a report of that oral evidence.

ATTACHEMENT B

Intelligence Services Act 2001

Section 29

3. *The functions of the Committee do not include:*

- (a) reviewing the intelligence gathering priorities of ASIO, ASIS or DSD; or*
- (b) reviewing the sources of information, other operational assistance or operational methods available to ASIO, ASIS or DSD; or*
- (c) reviewing particular operations that have been, are being or are proposed to be undertaken by ASIO, ASIS or DSD; or*
- (d) reviewing information provided by, or by an agency of, a foreign government where that government does not consent to the disclosure of the information; or*
- (e) reviewing an aspect of the activities of ASIO, ASIS or DSD that does not affect an Australian person; or*
- (f) reviewing the rules made under section 15 of this Act; or*
- (g) conducting inquiries into individual complaints about the activities of ASIO, ASIS or DSD.*

And

Schedule 1

2 Power to obtain information and documents

- (1) The Chair or another member authorised by the Committee may give a person written notice requiring the person to appear before the Committee to give evidence or to produce documents to the Committee.*
- (2) The notice must specify the day on which, and the time and place at which, the person is required to appear or to produce documents. The day must not be less than 5 days after the day on which the notice is given to the person.*
- (3) The notice must also specify the nature of the evidence or documents to be provided to the Committee, and in the case of documents, the form in which they are to be provided.*
- (4) A requirement under this clause must not be made of:*
 - (a) an agency head; or*
 - (b) a staff member or agent of an agency; or*
 - (c) the Inspector-General of Intelligence and Security; or*
 - (d) a member of the staff of the Inspector-General of Intelligence and Security.*

- (5) *A requirement under this clause may only be made of a person if the Committee has reasonable grounds for believing that the person is capable of giving evidence or producing documents relevant to a matter that the Committee is reviewing or that has been referred to the Committee.*
- (7) *The Commonwealth must pay a person who has been given a notice requiring the person to appear before the Committee such allowances for the person's travelling and other expenses as are prescribed.*

3 Provision of information to Committee by ASIO, ASIS and DSD

- (1) *The Chair or another member authorised by the Committee may give a written notice to an agency head requiring him or her to appear before the Committee to give evidence or to produce documents to the Committee.*
- (2) *The notice must specify the day on which, and the time and place at which, the agency head is required to appear or to produce documents. The day must not be less than 5 days after the day on which the notice is given to the agency head.*
- (3) *The notice must also specify the nature of the evidence or documents to be provided to the Committee, and in the case of documents, the form in which they are to be provided.*
- (4) *A requirement under this clause may only be made of the agency head if the Committee has reasonable grounds for believing that the agency head is capable of giving evidence or producing documents relevant to a matter that has been referred to the Committee.*

The evidence is to be given by:

- (a) *if the agency head nominates a staff member to give the evidence – the staff member or both the staff member and the agency head; or*
- (b) *in any other case – the agency head.*

4 Certificates by Minister

- (1) *If:*
 - (a) *a person is about to give or is giving evidence to the Committee or is about to produce a document to the Committee (whether or not required to do so under clause 2 or 3); and*
 - (b) *a Minister responsible for an agency is of the opinion that, to prevent the disclosure of operationally sensitive information:*
 - (i) *the person (not being an agency head) should not give evidence before the Committee; or*
 - (ii) *the person should not give evidence before the Committee relating to a particular matter; or*

(iii) in a case where a person has commenced to give evidence before the Committee:

*(A) the person should not continue to give evidence before the Committee; or
(B) the person should not give, or continue to give, evidence relating to a particular matter before the Committee; or*

*(iv) the person should not produce documents to the Committee; or
(v) the person should not produce documents of a particular kind to the Committee;*

the Minister may give to the presiding member of the Committee a certificate in relation to the matter stating the Minister's opinion.

(2) The Minister's certificate must also specify:

*(a) in a case to which subparagraph (1)(b)(ii) or (v) applies – the matter in relation to which the Minister is satisfied that the person should not give, or continue to give, evidence, or specifying the kind of documents that the Minister is satisfied the person should not produce, as the case requires; and
(b) in a case to which sub-subparagraph (1)(b)(iii)(B) applies – the matter in relation to which the Minister is satisfied that the person should not give, or continue to give, evidence.*

(3) The Minister must give a copy of a certificate under subclause (1) to the President of the Senate, to the Speaker of the House of Representatives and to the person required to give evidence or produce documents.

(4) A decision of the Minister under subclause(1) must not be questioned in any court or tribunal.

(5) Where the Minister gives a certificate under subclause(1) in relation to a person:

(a) if the certificate states that the person should not give, or continue to give, evidence before the Committee – the Committee must not receive, or continue to receive, as the case may be, evidence from the person; or

(b) if the certificate states that the person should not give, or continue to give, evidence before the Committee relating to a particular matter – the Committee must not receive, or continue to receive, as the case may be, evidence from the person relating to that matter; or

(c) if the certificate states that the person should not produce documents, or documents of a particular kind, to the Committee – the

Committee must not receive documents, or documents of that kind, as the case may be, from the person.

ATTACHMENT C

Parliamentary Privileges Act 1987

13 Unauthorised disclosure of evidence

A person shall not, without the authority of a House or a committee, publish or disclose:

(a) a document that has been prepared for the purpose of submission, and submitted, to a House or a committee and has been directed by a House or a committee to be treated as evidence taken in camera; or

(b) any oral evidence taken by a House or a committee in camera, or a report of any such oral evidence; unless a House or a committee has published, or authorised the publication of, that document or that oral evidence.

Penalty:

(a) in the case of a natural person, \$5,000 or imprisonment for 6 months; or

(b) in the case of a corporation, \$25,000.