COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of ASIO's questioning and detention powers

THURSDAY, 19 MAY 2005

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JOINT STATUTORY COMMITTEE ON

ASIO, ASIS AND DSD

Thursday, 19 May 2005

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

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

Terms of reference for the inquiry:

To inquire into and report on:

The operation, effectiveness and implications of Division 3 Part III of the ASIO Act 1979.

WITNESSES

Committee met at 9.05 am

McDONALD, Mr Geoffrey Angus, Assistant Secretary, Security Law Branch, Attorney-General's Department

RUTHERFORD, Mr Douglas Bjorn, Senior Legal Officer, Security Law Branch, Attorney-General's Department

WILLING, Ms Annette Maree, Principal Legal Officer, Security Law Branch, Security and Critical Infrastructure Division, Attorney-General's Department

LEGAL ADVISER, Australian Security Intelligence Organisation

RICHARDSON, Mr Dennis James, Director-General, Australian Security Intelligence Organisation

CROWTHER, Federal Agent Simon Andrew, Senior Legislation Officer, Australian Federal Police

WARDLAW, Dr Grant Ronald, National Manager, Intelligence, Australian Federal Police

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

I should advise those present that the Attorney-General has agreed, in accordance with schedule 1, clause 22 of the Intelligence Services Act 2001, that these proceedings should be conducted in public session with the following exceptions: evidence that has or may have a connection to a current or potential prosecution; evidence which relates to a past, current or future investigation to ensure that the identities of ASIO officers and employees are protected and to ensure that the identities of prescribed authorities are protected. If or when any of the above circumstances arise the committee will take evidence in closed session.

Today the committee will take evidence from ASIO, the Attorney-General's Department and the Australian Federal Police. I welcome representatives of each of those organisations. I invite you to make some opening remarks before we proceed to questions. I will invite the Director-General of ASIO to speak first. On behalf of the committee, we should extend our congratulations to the Director-General on his new appointment. You have had a long, close association with this committee, and we have appreciated all that you have done in helping us to do our work successfully. While personally we may miss you, I am sure that you are looking forward to your new appointment and we wish you well, knowing that Australia is in safe hands.

Mr Richardson—Thank you very much. I would like to reciprocate those sentiments because I consider that this committee plays a very important role. I hope that I have always interacted with the committee in a manner that is consistent with that. As you know, ASIO has provided the committee with both an unclassified and a classified submission. The classified submission does not contain any proposals in respect of the legislation which are not in the unclassified submission. The classified submission does, however, contain detail of the value of the questioning power by reference to specific cases.

Against that background I would like to make an opening statement to provide background and context to ASIO's suggestion that the questioning and detention powers be renewed in legislation which does not contain a sunset clause. In other words, we propose that the questioning and detention powers become a permanent part of the suite of counter-terrorism laws enacted by the parliament over the past three years or so.

If we have learnt anything from the past few years, it is that we need strong and balanced counter-terrorism laws in place to be able to respond effectively to the threat of terrorism. In other words, effective laws must be in place before terrorists strike, as it is virtually impossible to play legislative catch-up after an actual attack or after an identified threat has emerged. Indeed, that is one of the reasons, but by no means the only reason, why the great majority of people in this country who have trained with al-Qaeda and other terrorist groups will never be held to legal account for their actions.

In considering the proposal to renew the legislation without a sunset clause, I think it is reasonable to address the following issues: the nature of the threat; the quality or otherwise of the existing legislation, especially in terms of the balance between the power in the legislation and individual rights and freedoms; the usefulness of the legislation; and also whether, if the legislation was made permanent, it could be amended in some way to provide confidence to the community and to the parliament that the powers would always be properly exercised.

Turning to the nature of the threat, I have spoken previously about this and I will not repeat everything that has been said before. However, I will make a couple of observations. First of all, in 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, who is now in custody in Western Australia, to attack the Israeli embassy in Canberra and the Israeli consulate in Sydney. In 2001, we had the 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. If we go through this year without an actual attack or a disrupted attack against Australia or Australian interests, it will be the first year in the last six that that has happened.

The second point I make, in terms of the threat, is that it is a long-term, generational threat. It will have its ups and downs. We will go through periods where, from the outside, not much appears to be happening. We will go through extended periods without attacks. However, given the nature of the philosophy and ideology that drive al-Qaeda and associated groups, given the continued attraction of small groups of people globally to that ideology and given the capacity for people to continue to be trained, it is inevitable that we will have further attacks. Against that

background, I think it is important to have legislation in place to deal with situations as they emerge and not to be reactive.

Turning to the quality—or otherwise—of the existing legislation, I make the observation that the legislation which the parliament passed in July 2003 was very carefully considered. It was the subject of considerable public debate and considerable consideration in parliament. I think it is worth noting for the record that on 14 October 2001 the government announced a wide-ranging review of counter-terrorism arrangements, including a review of legislative changes. Subsequently, in the first half of 2002, the parliament debated and passed a suite of new laws, including the Security Legislation Amendment (Terrorism) Act, the Suppression of the Financing of Terrorism Act, the Criminal Code Amendment (Suppression of Terrorist Bombings) Act, the Border Security Legislation Amendment Act and the Telecommunications Interception Legislation Amendment Act. That suite of legislation had bipartisan support.

The bill containing ASIO's new powers was introduced into the House of Representatives on 21 March 2002, nine days after the legislation I have just outlined. The new ASIO powers were given royal assent on 22 July 2003—exactly one year and 17 days after the other legislation, and following three separate parliamentary committees and hearings. Understandably, the bill was the subject of extensive public debate and, like the ASIO Act 1979 and all subsequent amendments to it, it eventually passed through the parliament with bipartisan support. I think it is worth reflecting on that, because the legislation was not rushed; the legislation was, in fact, very carefully considered and subjected to wide-ranging inquiries with opportunities—as, again, there are this time—for the public to express views.

Looking at the balance in the legislation, I would simply make the following points: first of all, in recognition of the fact that the questioning and detention powers were extraordinary and unlike powers in the ASIO Act, a decision was taken by the parliament to remove the approval for the exercise of the questioning and detention power from the executive to the judiciary. All other ASIO powers are approved by the Attorney-General. The questioning and detention power is subject to approval beyond the Attorney.

The second point I would make concerns the access which individuals have to lawyers of choice. Although there is one qualification to that in the detention regime, there is the requirement that people appearing for questioning have a full understanding of their rights—that, for example, they are advised of their right to appeal to the Federal Court and of their right to take up issues with the Inspector-General of Intelligence and Security. All questioning takes place before a prescribed authority—an individual beyond the executive of the government—and it is that person who makes the decisions about the conduct of the questioning, consistent with the protocol that has been tabled in the parliament. All questioning is also videoed.

The questioning power has been utilised on eight separate occasions since the legislation was enacted in July 2003. The detention power has not yet been utilised. No individual between the ages of 16 and 18 years has yet been questioned and there has been no strip searching undertaken. The fact that there have been no detentions, no questioning thus far of 16- to 18-year-olds and no strip searching is entirely consistent with expectations expressed to this committee at the time and is consistent with what was stated by the then Attorney-General in his second reading speech. It is a good thing that those powers have not had to be utilised. It is essential, in our view, however, that those powers remain in legislation. They meet the threshold

in the legislation. In the event that they are needed they will be important for the safety of the community.

In terms of the usefulness of the legislation to this point, I would note that, firstly, it has worked very smoothly so far. To be frank, there was a concern in the Attorney-General's Department and in ASIO that the legislation would be unduly complex and difficult to administer. The legislation that was initially introduced into the parliament with our support and advice was much simpler and was, of course, tougher. We debated among ourselves whether the compromises that had been made in the parliament would make it unduly complex. 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 resource intensive. But I suppose, given the powers in the legislation, you would expect it to be resource intensive. I would also make the observation that the use of the questioning warrant was critical in the Brigitte investigation. That is an example of where there was actual planning being undertaken for a terrorist attack in Australia and the questioning regime materially assisted in understanding what lay behind that threat and what was going on.

If the committee was minded after its deliberations to recommend that the legislation be permanent rather than contain a sunset clause, I think it is reasonable to ask the question: what further confidence could be given to the community and to the public in terms of reassuring the community and the public about the proper use of these powers? We have two suggestions, but there might be others. One would be to have a review of the workings of the legislation, and conduct under the legislation, built into the legislation. In other words, it may be possible to amend the legislation, for instance, to require that a report be made to this joint parliamentary committee, every year, on the operation of the legislation and the conduct of questioning or any detention. In other words, it may be possible to give this committee the power to make inquiries beyond what is required to be put into our publicly available annual report.

Another possibility, and it could go hand in glove with a yearly report to the PJC, would be for the PJC to be given the power every two or three years to review the legislation more extensively, as you are doing now. If you were minded to remove the sunset clause, you could have an annual reporting mechanism to the PJC which would entitle the committee to, firstly, reporting of a classified nature and, secondly, a more thorough review of the workings of the legislation, say, every three years. That is all I wanted to say in introduction. Thank you.

ACTING CHAIR—Mr McDonald, do you wish to make an opening statement?

Mr McDonald—Yes, thank you. I will start by saying to Mr Richardson, on behalf of the department, that we would like to wish you the best in your new appointment. The dealings we have had with you over the years have been tremendous. You are certainly a good public sector model. I will now turn to the business at hand. You will appreciate that the department has provided a written submission. I do not propose to repeat the contents of that submission now. However, I would like to make some observations about some of the key issues that have been raised in the submissions that you have received in recent weeks. The first concerns the constitutionality of the ASIO questioning and detention powers. I want to reassure you that we have conferred with the Chief General Counsel. He has reviewed those submissions that assert that there are some concerns in this area and he is of the view that there is nothing in those submissions that causes him concern about the constitutionality of the legislation. In its current

form it is constitutional. The legislation has been in place for a couple of years now. People have been questioned on numerous occasions. They have had legal advice. No-one has challenged this legislation on the grounds of constitutionality.

The second area of concern is to do with our human rights obligations. The comments about them are quite similar to some of the comments that were made when the legislation was first put together. I assure you that our department has examined these points again, these submissions, and we do not believe that this legislation is inconsistent with those human rights obligations. The legislation is quite detailed and it is backed up with protocols. It is much more detailed than the legislation in other countries in this area. For example, the Canadian legislation goes for about three pages. Ours goes for 45 pages. The reason it contains 45 pages is that it is very specific and has a lot of built-in accountability mechanisms and safeguards. It is not arbitrary and so much of its focus is about ensuring that there are reasonable limitations to it.

The department has also been watching the use of the legislation with interest. Mr Richardson certainly emphasised some observations which we would agree with. It is not always the case that we turn up here two years after a piece of legislation has been enacted and are able to say that the legislation has achieved its policy objectives. You will note from what has already been said by Mr Richardson—and what I expect will be said later in this process—and from the submissions that you have received that there are specific cases where this regime has been used. Indeed, there has been enough happening there to see circumstances where the detention regime might have to be used as a last resort.

In many ways, this legislation has worked in the way that—and some of the people here are involved in it—the committee and the parliament hoped it would work. It is just pleasing to see that that is the case. The distinguishing feature of our Australian legislation is that there is no rush to detention. The emphasis is on what is needed for questioning and for the collection of intelligence. The emphasis is on that and the whole legislation is designed to avoid detaining the person any longer than is necessary. I look forward to further questions that you may ask. I reiterate that our view is that the sunset clause should be removed. We feel that this legislation has been demonstrated to work and that in terms of continuing accountability and review of the legislation it is not necessary for us to have that sunset clause.

ACTING CHAIR—Dr Wardlaw, before we move to general questions, do you have an opening statement you wish to make to the inquiry?

Dr Wardlaw—Yes. We are here to state that the AFP believes that the questioning and detention powers that are under review here have been used appropriately by ASIO, that from our perspective they have worked well in practice and that we support ASIO still needing these powers to assist in the collection of intelligence in relation to terrorism offences. Our role in the exercise of these powers is set out in the publicly available protocol, which has been published in accordance with section 34C of the act and in some operational guidelines which the AFP and ASIO have developed to guide the execution of non-custodial and custodial warrants in line with the protocol. That includes procedures to be followed in contact with and involving the state and territory police services.

The role of the AFP in these warrants is to provide law enforcement support to ASIO. With regard to exercising the powers, the sorts of things we do include: planning the execution of the

warrant, which in the case of a custodial warrant would include undertaking an operational risk assessment of the subject and their premises to determine the appropriate preparation and the anticipated level of force that may be required as well as evaluating the premises that are proposed to be used for questioning or detention; executing the warrant where assistance in this regard is requested by ASIO; transportation of the subject of a custodial warrant to a place where they will be detained; being present during the questioning; supervising the subject of a custodial warrant when they are not being questioned or during their detention; and assessing the impact of the proposed warrant action on current and future criminal investigations.

At ASIO's request, we have been present when ASIO served non-custodial warrants on subjects, and we believe that the protocols and guidelines that have been developed have ensured that the execution of non-custodial warrants goes smoothly. The protocols and the guidelines have not yet been used in the context of detention powers. It is the view of the AFP that the sunset clause for these powers should be removed because the terrorism environment which required the establishment of the powers is unlikely to change in the near future. We believe that the statutory system for the approval and use of these powers appropriately balances operational needs with accountability safeguards.

ACTING CHAIR—We have received some 95 submissions, many of which are calling for either the removal of this legislation or some radical surgery. It could be argued that, over the period of time that the legislation has been in operation, there have only been eight warrants issued for questioning, no warrants for detention and no detention or questioning of minors and, as such, that demonstrates a lack of need for these powers. What is your view? How would you argue against that proposition?

Mr Richardson—I would find that to be a very odd view. The reason why I would find that to be an odd views is that, when this legislation was being considered in 2003, I think you will find that some of the same people who put that view now were arguing that the legislation would be abused and that we could not be trusted. In giving evidence before this committee, I was pressed as to how often I thought the powers would be used. At the time I said that I thought the questioning powers might be used three or four times a year. By coincidence rather than anything else, that is more or less how it has turned out. The power has been used on eight occasions since July 2003.

As I said in my opening statement, it was stated explicitly at the time that the detention power would rarely be used and, indeed, we hoped it would never be used. If you look at the benchmark for the use of the detention power, you would hope that we would only ever rarely get into that position in this country. But, if we do get into that position, that power will be important. I think you do not have powers on the statute books of this kind in the expectation that they are going to be used in quantity. You would hope that we live in a society where powers of this kind only have to be used occasionally and, in some cases, rarely but you have them there to meet certain situations that can arise—and we know that those situations can arise in this country. They have arisen over the last few years. We know that we remain a target of terrorist groups such as al-Qaeda and Jemaah Islamiah. We know that because their leaders tell us, and they tell us regularly in public statements. I think having powers of this kind on the statute books with proper balances, proper safeguards and proper accountability mechanisms is quite essential in meeting that challenge.

ACTING CHAIR—Does anyone else wish to comment?

Mr McDonald—Only that I would agree with that. In fact, in the past two years we have had more to work on. We have had situations where these powers have been used. You have details in the submissions of some of those cases. When you read the circumstances of those cases you see they raise real matters of concern and they show, if anything, that there is more evidence now than there was then almost that the powers are needed.

ACTING CHAIR—I guess the general question that follows, for the public record, is: on those occasions that you have used these powers, have you been able to gain information through the operation of these powers that you would not have been able to otherwise get through ASIO's normal activities or through a normal AFP investigation?

Mr Richardson—Yes, and I believe that that is demonstrated in the classified submission that we have presented to the committee, but again you will make your own judgment on that. In a number of those cases it is very clear that without the questioning power we would not have obtained the information we did.

ACTING CHAIR—Some other countries that you might loosely describe as like-minded to the Australian government have not legislated for the detention of nonsuspects, which could lead to the argument that our laws are more severe than those of those countries as far as rights of individuals are concerned. Why do you think it is necessary for us to have these laws when those comparable countries—I think the UK is one of them—do not?

Mr Richardson—I think you need to look at the suite of legislation that is available to governments. For instance, the United States does not have a power of this kind. That did not prevent the United States putting some 1,100 people in custody following September 11 as 'material witnesses' or potential material witnesses. Some of those people remained in custody in the United States for over 12 months. We have nothing comparable to that, and I am not suggesting we should. In the UK there is a power to detain for up to seven days. That resides with the police. The decision making for that detention is at a much lower level in their system than the decision making here in Australia.

Mr McDonald—Even under the Canadian system, the general statement that you cannot detain nonsuspects is a generalisation as well. If you read subparagraph 83.28(4)(b) of the Canadian Criminal Code—

ACTING CHAIR—I promise you I have not read it.

Mr McDonald—I can give you a copy. It deals with dealing with suspects but it also, using clever wording, deals with people who are nonsuspects. It provides that the judge, who is equivalent to our issuing officer, must be satisfied that there are reasonable grounds to believe that a terrorism offence will be committed and that a person has direct or material information that relates to terrorism offences or that may reveal the whereabouts of an individual who the person seeking the order suspects may commit a terrorism offence. So that can get people who are quite peripheral to the commission of the offence. In terms of how long they can keep them in custody and preservation of their rights, the Canadian law has three pages—bare powers. We have quite a thorough regime compared to that.

Mr Richardson—I might make another observation, Chair, concerning Willie Brigitte, the Frenchman who was in Australia planning a terrorist act—the case is detailed in the classified submission. One of the individuals who we believe was involved with Brigitte was questioned, not detained, under the ASIO powers. Willie Brigitte is currently in custody in France where he can be kept for up to three years while an investigating magistrate determines whether there is a case for him to answer. France is part of the EU and operates under the European Court of Human Rights, which is so often held out as the model to which we ought to aspire.

Senator ROBERT RAY—My question is directed to the Director-General, to Mr McDonald and to Dr Wardlaw. Putting aside the question of the sunset clause, in giving evidence today are you arguing for any increased powers in the existing legislation other than the removal of the sunset clause?

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 ROBERT RAY—Director-General, you are satisfied that the existing powers equip you to do the job you need to do?

Mr Richardson—Yes.

Senator ROBERT RAY—Turning to the sunset clause, a cynic might argue that you have observed all the niceties of this because there is a sunset clause, that it has that effect, and that to remove it at this stage would give you the licence that your critics allege you really want—I do not, but they would. Is there any contemplation, however, if the parliament were not minded to remove the sunset clause, to extend its duration to, say, five years?

Mr Richardson—Is there what?

Senator ROBERT RAY—To extend the sunset clause to five years rather than every three. Is that sufficient or do you still argue for its total removal?

Mr Richardson—I would argue for its removal for the reasons I have outlined in my opening statement, but if the parliament decided on a five-year sunset clause, then that is what we would operate within.

Senator ROBERT RAY—Do you think three years has been too short because you operate for two years and then you are reviewed for a year?

Mr Richardson—I agree. I think three years is very short for that reason. I personally think it is a relatively easy argument for someone to run to say, 'You guys have behaved yourselves because of the sunset clause; take it away and mayhem will break out.' The legislation simply does not allow for that. This is legislation that was considered by three separate parliamentary committees. The legislation is being reviewed again two years down the track for very good reason—that is, these are exceptional powers and there is concern about possible abuse. Equally,

because of the concern about possible abuse, arising out of those three separate parliamentary committee hearings a variety of accountability arrangements were placed in the legislation.

As I said, the use of the power—the final approval—has been taken out of the hands of the executive and placed in the hands of the judiciary. The questioning takes place not only within the framework of the act and the protocol but before a prescribed authority, a legally qualified person—more often than not, a retired judge. It is that person who determines the precise detail of the questioning. There is a very clear right for legal representation; there is a very clear right to appeal to the Federal Court; there is a very clear right to raise any matter with the Inspector-General of Intelligence and Security; and there is a very clear right for ASIO to report publicly on the use of these powers—the only power that ASIO has in respect of which it must report publicly.

I understand that putting forward a proposal that the sunset clause be removed is not an easy decision, and I can understand the debate and the issues that will emerge and be discussed around that. But I think there are ways of giving the public and the parliament the mechanism, the machinery, an assurance and some confidence that if the sunset clause is removed people will continue to operate legally and also with propriety, bearing in mind that no-one really has an interest in losing their job. I do not think that whoever is sitting in my job is going to have an interest in having their public career ending in disgrace by abuse of power. I do not think the amendments are unusual in that there is a specific penalty for people who knowingly abuse the act. That does not exist in other Public Service legislation, because you can prosecute people under the broader Criminal Code. I do not think too many people working in ASIO exactly want to conduct themselves in a way that will lead to them ending up in jail. So I think there are some very practical reasons, as well as reasons of principle, which could lead you to consider removing the sunset clause.

Senator ROBERT RAY—Mr McDonald, do you have anything you want to add?

Mr McDonald—One of the problems with a sunset clause is that it fixes you on a very precise timetable, while, if we have a review or we rely on the general oversight role of the PJC, we are not stuck to that timetable. If the sunset clause happened to coincide with plans for a major terrorist act or, indeed, a terrorist act occurred just before it, it would be a considerably more difficult enterprise for us to go through this process in those circumstances. One of the real problems with a sunset clause is that, three years out, five years out or whatever, you really cannot be sure what the situation will be at that particular time. That is an additional point.

Senator ROBERT RAY—I do not find that at all compelling. You are saying that if you fail in the future it would be a bad time to review legislation and have it delivered.

Mr McDonald—No, I am not.

Senator ROBERT RAY—That is the implication.

Mr McDonald—No, I am not saying that. I am saying that we could have a security crisis at the very time that we need to be going through this process. If it were a review process, we would be able to make arrangements to allow us to go through the particular crisis. The difficulty is that review processes and passing legislation are very resource-intensive and significant

processes. That is the point I am making. If you have a review mechanism that sets a time frame, that ensures that if we have a problem in the way the legislation has been administered then they will be locked into that and they will be accountable as a result of that. However, the problem with the absolute fixed sunset clause is that you are setting a timetable that could create practical difficulties.

Senator ROBERT RAY—I have a question for the Director-General. He seems to have come up with a compelling and unique argument for this legislation—that if you do not have it, as is the case in France and the US, the vacuum is filled by more nebulous methods of detention that are far more draconian. I think Carlos is still assisting French authorities with their inquiries six years later, isn't he?

Mr Richardson—Yes.

Senator ROBERT RAY—And, as you point out, 1,100 got detained in the US. None of that can happen here because you have existing powers, controlled and stated. In other words, I think what you are arguing is that we are up-front, we do it direct and we do not do it by indirect means.

Mr Richardson—That is right.

Senator SANDY MACDONALD—My first question is to the AFP. From an investigative point of view, could the AFP ever foresee a situation where these questioning and detention powers were not necessary?

Dr Wardlaw—I think only if the terrorist environment changed significantly so that there was no need to go to these powers to get the information. The submissions have made it clear that these powers are only used where other methods have failed or are not likely to produce the required intelligence. In the environment we are working in, and are projected to work in, I cannot see that changing.

Senator SANDY MACDONALD—This question is for both you, Mr Richardson, and Mr McDonald: without the questioning warrant with Brigitte, would it have been possible for him to be have been detained under previous existing legislation?

Mr Richardson—I would like to answer that. Brigitte was not question or detained under our legislation.

Senator ROBERT RAY—I think what Senator Macdonald was asking was, in the absence of the existing legislation, if the same circumstances occurred, what other alternatives would have been available to you?

Mr Richardson—There are not any.

Senator SANDY MACDONALD—I have one final question at this stage. Has the use of the detention powers under division 3 been contemplated at any time?

Mr Richardson—The exercise of detention power has been considered on one occasion. It was on the basis of, firstly, a judgment that we came to that the issue was not as imminent as we initially thought and, secondly, that on the basis of legal advice we took a decision to seek a questioning warrant, not a detention warrant.

Mr KERR—I want to clarify the basis of the proposition that the sunset clause should be removed. On one level the argument is that we require extraordinary powers because we face an extraordinary security environment—that the security environment is different in a marked way to what it was through the periods, for example, where we had bombings at the CHOGM meetings or where we had attacks on Israeli embassies all around the world and the upsurge of Cold War related tensions. Before that, there were concerns about a whole range of activities that we now call terrorism. The threat profile now is significantly higher and is likely to remain so, at least on the immediate horizon. The argument is, because we have a high level of threat, that justifies extraordinary measures. But, of course, the counterargument is that threat circumstances and world circumstances continue to evolve from change, often in unimaginable ways. The fall of the Soviet Union, for example, transformed the world in a matter of weeks. It is quite plausible, if we accept that there is a heightened threat circumstance globally directed at Australian interests, that at some future time—in three, five, 10 or 15 years—that would cease to be the case. But, if we do not have a sunset clause, the legislative framework becomes part of the routine apparatus of our security environment.

I think a number of critics have described this process as legislative creep—you develop a response necessary for a particular circumstance at a time when it is justified but then it becomes part of the established repertoire of the way society operates. Although the response might be called an extraordinary power or described as related to certain circumstances, in fact it becomes simply another way that the security services or the police go about their business. We have seen this in a number of areas.

I suppose what I am asking flows from the suggestion you made, Mr Richardson, that we may need to give the public some greater confidence about the way in which we as a parliament supervise the exercise of these extraordinary powers—whether it really is the contention that has been put forward by the three witnesses who were speaking that this should be embedded as a routine part of the way the security services operate or whether we have an argument that says that, if the international environment changes and the threat profile goes back roughly to what it was hitherto or we never thought we required such powers, we can end them. Obviously, if the second is the case that you are putting to us then we need an intelligent mechanism—and you have suggested some steps that might be relevant to that—of telling the Australian public that we will operate in that way and saying, 'You can have confidence that, once this parliament is persuaded that that heightened threat circumstance that legitimately entitles us to take these extraordinary measures has ended, we will cease to take those extraordinary measures.'

Mr Richardson—I understand that set of propositions. Personally I think a lesson that has to be learned and passed on—and I think it is an important lesson for those of us who have been involved in seeking to meet the challenge over the last few years—is, as you said, that things can change and they can change quickly. I hope that our security environment returns to what it was, or what we thought it was, prior to September 11. In fact, the threat environment prior to September 11 was worse than what it was after September 11 because we simply did not know what was developing. Our knowledge of the threat environment is now greater.

But, because of precisely your point, that things can change quickly, even in the event of an assessment being made that the threat environment has returned to pre conditions, I think it is important to have legislation like this on the statute books so that, if the unexpected happens or comes out of the blue, we have the capacity to deal with it effectively. Two things happen if you do not do that. First of all, when something does happen, people hit the panic buttons and you have legislation considered in a crisis rather than in the cool light of day. You are more likely, in my view, to get unusual legislation in that situation as opposed to legislation that is considered, as this was, over a much lengthier period of time.

Secondly, unless you have it on the statute books, in the event of something happening you are playing catch-up; you are going around the mulberry bush. If we return to an environment where the threat is assessed to be considerably reduced, I would hope that would mean that, year after year, the unclassified ASIO report states that the questioning and detention powers have not been used. I would hope that, year after year, this parliamentary committee conducts its inquiries or does not have a need to; that the review every three years can pursue those issues and make a decision or, essentially, that there is nothing to review. I think that is a desirable state to aim for. I think it would be a good thing if we returned to an environment where ASIO's annual report just put a zero beside 'questioning and detention powers'.

Mr KERR—Assuming that Mr McDonald agrees with that analysis, if we are essentially being asked to remove a sunset clause not with the understanding that at some future stage, through the kind of informal review process that you are speaking of, the legislation will be repealed then, rather, it is a check against its misuse. Can I follow up on the point that Senator Ray raised about the cynic: he sees that what has happened in the relatively short time frame has been the very careful application of minimal utilisation of this legislation, but he fears that there is an intent to use the legislation more intensively in the future or he believes that there is an ad hominem risk that, after His Excellency has commenced service in the name of the Australian community as ambassador to Washington, the government may appoint somebody less committed to human rights or that a future government, whatever its colour, may wish to utilise these powers further and the culture of ASIO changes but the legislation is in place; that recommendations are made by this committee that abuses are to be checked but the government of the day does not introduce such legislation. Potentially, that is the cynical approach: the concern that a future government of some kind or a future administration of ASIO will misuse these powers.

I suppose a concern would be that a committee of this kind, a parliamentary committee, actually needs teeth so that if the legislation starts to be misused it can be repealed. I am thinking aloud as I hear your submission, but perhaps there is some middle ground that you might like to think about—and you need not respond immediately—which would be to have the legislation ongoing, subject to a favourable report of this committee on a regular basis such as a three- or five-year process. In other words, there is no point at which the legislation necessarily expires but there is a parliamentary check on the conduct of the agency and the way in which the government implements that legislation by having a mechanism that says: 'If this is working other than you say it ought then the parliament itself has a mechanism; if we report unfavourably on the legislation then it ceases to operate.' I wonder whether a mechanism of that kind might work.

Mr Richardson—Personally, I think that would be fine. From a personal perspective, I think that would be a very constructive way to go. I will pick up a couple of points you have made. In terms of who sits in my job and in terms of the organisation, when this legislation was being considered by this committee and, indeed, in speeches given by some members of this committee to the parliament when the legislation was being debated, it was stated that it was important to have the legislation framed in the way it was, it was important to have the accountability arrangements in the legislation expressed as they were, because, while there was confidence in ASIO and the leadership of ASIO, leaderships can change and cultures can change. In other words, that very point was used as an argument for the accountability arrangements that are already in the legislation. So I think that is an important point to note. Finally, I think your own suggestion of one way to go would be a very practical way to go. Personally, given the accountability arrangements in the legislation, when you read that through I think it would be pretty difficult to abuse the legislation; but, if you were going to make the legislation ongoing, I think there would be a real need to give the community and the parliament some confidence that there are additional mechanisms there, and I think your suggestion would be one way to go.

Mr KERR—Could I take you to a couple of other specific points. The first is about detention of nonsuspects. I have had the benefit of reading both the classified and unclassified submissions. Without trying to traverse area that might be awkward, is it possible to distinguish between the case that can be made for continuing the legislation which permits the detention of suspects and permitting only a questioning regime with respect to nonsuspects? I find it difficult, having read all this material, to conceptualise a circumstance where it would seem plausible that a case could be made that detention was required in relation to a nonsuspect. I think it might give greater community confidence in the system—given that we have not actually had a detention instance required yet—if we made that distinction. Again, I am sure you have not directed your attention—I do not think any of the submissions direct attention—to that possibility. But just having read the material and having tried to give some consideration to the point that ASIO is seeking to have us cement in place this legislation on an ongoing basis, there might be some greater community confidence in taking that approach. There is an understanding that you can be compelled to answer questions and that failure to answer those questions honestly and straightforwardly would still be subject to criminal penalties. Most Australians would say that somebody—even inadvertently—in receipt of information relevant to a possible terrorist activity does have an obligation to present themselves to answer those questions. But the query I have is: with a nonsuspect, is there any plausible case to require their detention?

Mr Richardson—No, I think that proposal would undermine the intent and purpose of the legislation, which is not based around the concept of suspect. It is very deliberately based around the concept of intelligence gathering. This legislation is not based on the concept of suspect at all. I think to introduce that concept into the legislation would fundamentally change it. I would much prefer, in those circumstances. to see a continuation of a sunset clause.

Mr KERR—I am not worrying about that; I am just looking at a modification to the legislation.

Mr Richardson—No, it would fundamentally change it, Mr Kerr.

Mr KERR—In what circumstances do you envisage—plausibly—that you would seek a detention warrant in respect of a nonsuspect?

Mr Richardson—For a start, we are not dealing with suspects. That is the first thing. We are dealing with people who might have information or might be involved in—et cetera. It would be possible for someone to have information about planning for terrorist activity. We were aware of that person having the information but they are not involved in the planning and therefore do not meet the definition of a suspect.

Mr KERR—I will return to this in the session—

Senator ROBERT RAY—We have got off the track. Initially when this legislation came up detention was not for the purpose of punishment or intimidation; it was merely to stop disclosure to third parties of the fact that they were being interviewed. I thought that was the crucial part about it.

Mr Richardson—Yes, that is quite right.

Mr KERR—That is why I said that somebody not suspected of involvement is unlikely to be—anyway, I will return to that subject at a later time.

Legal Adviser—As to the circumstances in which a person can be detained, one of those circumstances is if there are reasonable grounds for believing that the person may alert another person involved in a terrorism offence that the offence is being investigated. A person would not necessarily have to be a suspect for there to be reasonable grounds that they may alert another person about the terrorism offence.

Mr BYRNE—Shouldn't you be looking at this in the context of trying to prevent a terrorist attack? Effectively you are trying to use all appropriate methods to gain information to prevent it. Isn't that the framework that this legislation has been cast in?

Mr Richardson—Yes.

Mr KERR—I will refer to that later. There is another submission from the inspector-general, which you have not commented on in your submission, that makes a number of suggestions for legislative amendment. Do you have a response to that submission?

Mr Richardson—No. I think his suggestions go to, first, intervention by a lawyer on procedural grounds and distinguishing between that and the questioning time. That is fine. Secondly, he makes a suggestion that there be a requirement in legislation that there be a report to the Attorney-General within three months. We do not have an issue with that. I forget the third.

Legal Adviser—The final one was to do with witness expenses.

Mr Richardson—Yes, witness expenses, and we do not have an issue with that.

Senator ROBERT RAY—Wasn't the fourth that when legal advice is given to a client that it be done privately rather than be able to be observed? Or was that someone else?

Mr Richardson—I think that may be another.

Senator ROBERT RAY—We will have to check that.

Mr KERR—The issue is that it be observed visually rather than—

Legal Adviser—It was not IGIS, though.

Mr KERR—Was it the Ombudsman?

Senator ROBERT RAY—We have read so many.

Mr KERR—I think it was IGIS.

Mr McDonald—I can assist there. It was Mr Blick, in 2003. It was not a specific recommendation of an amendment. He said that he thought that by and large the facilities were excellent and should have facilities for questioning subjects and their legal representatives and he has no concerns. However, he did note some difficulties on a privacy level when the prescribed authority adjourned questioning at various times to permit subjects to consult their legal representatives and so on. So it was more a general privacy issue.

Mr KERR—It is also raised specifically in the submission to this committee, at paragraph 29. At dot point 4 he states:

- the degree of privacy which is afforded to the subject of such warrants to meet their religious obligations, consult their legal representatives or lodge complaints ...

Mr McDonald—That is consistent with our understanding. What he is focusing on is just making sure they have some level of privacy to do that, but he is not recommending any changes to the legislation. The current IGIS said:

I can advise that after some very minor teething problems at the outset, the provision of facilities for the above purposes—

that he has seen in recent times—

has been appropriate.

In fact, he comments:

ASIO and the various Prescribed Authorities have shown appropriate sensitivity to the needs of the subjects of section 34D warrants.

Mr KERR—I think that is a little elusive of the substance of the submission.

Mr McDonald—It was not meant to be.

Mr Richardson—You can question the inspector-general on his evidence. We cannot really comment on what he is intending.

Mr KERR—These are the issues that the inspector-general says he has raised. It would be of assistance, given our review, to have the response of ASIO, the Attorney's department and the AFP. Having raised as concerns those issues that he says he has raised with you, and those being part of the public submission, it would obviously be material for us to hear your response.

Mr Richardson—I would suggest that you go to the inspector-general on that. You can also question the prescribed authority. I think you will find that we make every effort to provide proper conditions for people being questioned.

Senator ROBERT RAY—I think you indicated earlier, though, that given the IGIS's view you thought you could accommodate it.

Mr Richardson—I do not think you will find he has a legislative suggestion there—

Senator ROBERT RAY—No, it is procedural.

Mr Richardson—but if he does you can consider it. I do not think you will find that he is expressing a view that we have been improper in that regard.

Mr KERR—Please understand that there is no suggestion of impropriety here, but the IGIS raises these matters and asks questions, I suppose, rather than putting them forward as direct submissions. He asks, firstly:

- whether lawyers representing the subjects of such warrants should be given additional scope to address the Prescribed Authority.

I take it from your response to Senator Ray and your previous responses that you would have no objection. Were we to take that as—

Mr Richardson—No, it depends what he is meaning there. Again, you would need to go back to the intent of the legislation and also, I think, to the committee's previous inquiries. It was not the intent of the legislation to have a process where the legal representative would interject in the way in which a legal representative might do in a court of law.

Mr KERR—I understand that, but this is just to assist us. Because this is dealt with at length in the inspector-general's submission to us—and certainly we can raise it with him further—it strikes me that it would be irresponsible of us not to seek your views in relation to what his proposal is. His concern was to limit it, particularly to procedural matters, I think.

Mr Richardson—That is fine. We do not have an issue with that.

Mr KERR—I do not want to summarise in one sentence what he says in paragraphs 30 to 41, but he raises the issue of the distinction between questioning time and procedural time, which I think you said you have no difficulty with.

Mr Richardson—We are relaxed about that.

Legal Adviser—His first issue is raised in conjunction with the second issue—regarding the distinction between questioning time and procedural time, which is the specific issue that arose on a practical level.

Mr KERR—The third point he raises is legal aid. It is not a matter that I imagine you have a submission on, Mr Richardson, but obviously he has concern about that. The Attorney's department would be the proper respondent to that, Mr McDonald.

Mr McDonald—The situation with legal assistance is that we have a special scheme. We have certainly taken into account his comments about that. Mr Blick noted that the subjects of warrants have been able to seek legal aid in relation to compliance with warrants. Although traditionally the provision of legal aid has been discretionary he suggests that, in the extraordinary circumstance of questioning warrants where the purpose is to obtain intelligence that cannot be used in proceedings, there seems to be a case for automatic provision of legal aid. We believe that the current arrangements for financial assistance under the special circumstances scheme administered by the AGD are sufficient. It would not be appropriate to remove the discretion to provide funds under the scheme because the fund comprises a finite pool of public moneys appropriated for the purpose and each application should really be considered on its merits. The other point to make is that all the applications for financial assistance to date for all those cases that you have details of have been approved. There has not been any difficulty. But if you have an automatic system—and the system is pretty lawyerised as it is—the potential for it to get out of hand would be significant. However, we do not have any evidence that the current system does not work.

Mr KERR—I suppose the parallel would be the Dietrich decision of the High Court that says that, where you are subject to legal proceedings that involve very serious consequences, proceedings should not, or cannot, proceed unless legal aid is supplied. That certainly throws burdens on the Commonwealth in meeting that in the budget but presumably the same issues about needing to be properly advised in these areas arise. They are serious matters. They are extraordinary—I think that is the language that is being used. As I understand it, legal aid has been provided in every case in which it has been requested to date.

Mr Richardson—I do not know whether this will help the issue you go to but we have provided to you in our classified submission a copy of the standard letter that we send to people subject to questioning warrants. Part of the letter does say, 'Under the act you are entitled to a lawyer present during questioning. You may be eligible for financial assistance under the Commonwealth special circumstances scheme, including reimbursement for reasonable legal costs and related expenses incurred in connection with your questioning under the warrant. Attached to this notice is further information about the scheme and an application form for financial assistance.'

Mr KERR—Yes. That is why I wonder whether we are, in a sense, struggling too hard with an issue which really could be resolved by the simple answer: yes.

Mr McDonald—No. With all the experience that we have had with providing legal assistance over many, many years, the department is quite firmly of the view that this type of system works better. The day that people can point to cases where the system is not working, the amount of money has been unfairly held back or something like that then there can be a legitimate

criticism. But the reality is that this is working. Let's not upset something that is working quite well.

Senator ROBERT RAY—This came out of one of the submissions and it is not something I had previously thought through. But the first time you detain someone, you detain them for seven days and they cannot disclose the matter. How in heaven's name does that person explain to their boss—say they are a bus driver—why they have not turned up for seven days? For nonsuspects, it could mean the sack and that could mean a long stretch of unemployment. It is hard to see under the legislation how you can even give a nod and a wink to save the person.

Legal Adviser—The bottom line is that the director-general, among others, has a discretion to permit disclosure to certain persons. There may be emergency situations where the person might simply not be permitted to contact—

Senator ROBERT RAY—I have to tell you that if you say, 'We have just picked up your bus driver as a suspected terrorist,' it is not going to do their employment prospects much good. It is something we did not really pick up in the original legislation. It is not something I blame you for in any way whatsoever. But in certain circumstances it could have a devastating effect on the life of a nonsuspect—someone who is trying to assist you.

Mr Richardson—This does not answer your question fully but I can think of one specific case which I could give details of in camera where it would be against our interests to in fact advise the employer.

Senator ROBERT RAY—Yes, it may be. Anyway, we might take that up at another time.

Mr KERR—Just going through those dot points—and please come back to us in more detail with a response if appropriate at a later stage—the next dot point was the payment of expenses for people who are subject to 34D warrants. The inspector-general raised a similar point to Senator Ray and said that not only might there be awkwardness in explanation but at the very least there will almost certainly be loss of wages and maybe a whole range of other financial consequences simply because of the obligation to comply. Would there be any objection to a scheme meeting those costs?

Mr Richardson—I have the easy job in responding to that: from a security prospective, obviously not. But it is a legal policy question.

Mr KERR—I can see why you have been made ambassador!

Mr McDonald—It is not very often he does that. This is an issue we have given some thought to and clearly some of these other expenses are not covered by the special circumstances scheme. I suppose there are also examples in other contexts. You would be aware of the Australian Crime Commission processes. They are something that we are interested in considering in the context of this process. The difficulty, I suppose, is working out an appropriate way to dispense such expenses. The normal situation with the Crime Commission is for the Crime Commission to do it. On the other hand, for an organisation like ASIO I can imagine there would be practical issues for them and there may be problems in involving yet another body. However, there is no question that you can think of instances where a person could

be out of pocket. I do not know whether the Director-General of ASIO could elaborate more. I am not certain whether in any of the specific cases there have been any problems to date. But certainly there could be in a theoretical sense.

Mr KERR—Obviously there are a range of possible circumstances. A person might lose a few hours pay. But these processes can extend over several days. We have had a look at the background papers and seen some of the time frames that they extend over. Take a hypothetical—and, I hope, a never-to-happen circumstance—of a perfectly innocent but probably not the best employee who becomes aware of some intelligence that you require. They have to cooperate but are on a last warning from their boss who says, 'If you don't turn up for work dead on time and work properly, you are off.' So they lose their job as a consequence. They cannot tell the boss. You can imagine circumstances where people could suffer quite large financial losses as a consequence. It seems that the immediate foreseeability of at least some loss and of the possibility of it being more extended is something that we ought to have a framework to respond to.

Mr Richardson—I have just one comment: if there were no legal policy impediment, one simple approach would be to put that decision making in the hands of the prescribed authority—that is, a person who is regularly faced with making decisions of those kinds. Certainly, we would not have any issue from a security perspective. Indeed, it is in our security interests not to have people unfairly dismissed from jobs, as that can have other consequences for us.

Mr KERR—That is a very good suggestion, subject to Mr McDonald's capacity to unzip the Commonwealth treasure chest.

Mr McDonald—Even with that suggestion there could be some difficulties. That would still be quite different from existing models in that you do not have the presiding magistrate dishing out the witness expenses. But it certainly deserves to be given consideration. Of course, one of the things with it is: how many more people do we want to have involved in this process? So I think the director-general's suggestion is one that we need to consider through this process.

Proceedings suspended from 10.37 am to 11.04 am

ACTING CHAIR—I call the committee to order.

Mr KERR—Going through the inspector-general's dot points: I think we have dealt with the next dot point, concerning the degree of privacy afforded to persons of religious organisations when consulting their legal representatives or lodging complaints, but I invite you to say anything further you might wish to say that would condition our response to that proposition.

Mr Richardson—I think every effort is made to accommodate that. If the inspector-general has suggestions as to how it could be improved, then we would certainly want to pick up on them.

Mr KERR—The act, as I understand it, requires the consultation between a person the subject of questioning, with their lawyer, to be monitored. I think the suggestion was put forward that that should be by visual means rather than by the overhearing of the terms of that discussion. Would that be a problem were it to be implemented?

Legal Adviser—The legislation says that the contact with the lawyer must be in such a way as to enable it to be monitored. It does not limit it to visual monitoring.

Mr KERR—I understand that. But I think the implication of the inspector-general's comments—or Mr Blick's or comments at some point in these documents—was that it ought to be limited to visual monitoring—in other words, to supervise that there is no passing of materials or something of that kind rather than to listen to what is being provided by way of legal advice or requested by way of legal assistance.

Mr Richardson—I will make one comment on it. In relation to detention warrants, there is a mechanism there whereby ASIO can object to a particular lawyer and the decision rests with the prescribed authority. I do not think that mechanism is in the legislation in respect of questioning warrants.

Mr KERR—I am just trying to deal with this issue. Perhaps we could find a balance. We could say, 'You can object to the selection of the lawyer,' but, provided no objection exists to the propriety of the lawyer, is there any reason why that is confidential?

Mr Richardson—That is a fair issue to put on the table.

Mr KERR—The other point I think that was accepted was the timeliness of reporting. The specific recommendation that was made was about the provision of transcript to IGIS. It requires that a copy be produced to the inspector-general. Would there be a problem with that?

Mr Richardson—Does that relate to the report back to the Attorney or is that separate?

Mr KERR—He refers to ASIO's practice of creating a transcript of each questioning session. He says that it is created by ASIO for its own purposes but may be relied on in court proceedings. He points out that IGIS has been provided a copy of each transcript but that it has been at discretion. He says that he thinks it should be in the legislation.

Mr Richardson—It really does not worry me. I simply note—and the IGIS ought to be aware of this—that the IGIS has legal authority to access any material in ASIO. You can do that, but he already has the authority to seek whatever he wishes. He already has the authority to go into ASIO, any time of the day or night, and access anything. If he wanted a transcript, he would have it. If he wants to put it in legislation, it does not worry us. As long as there is no implication from anyone that he does not already have access to whatever he wants.

Legal Adviser—And, in any event, the legislation does require that he be given a copy of the video recording of the proceedings.

Mr McDonald—I think it is probably prompted by the fact that there is a specific provision about the video recording. He is probably also wanting to see the transcript.

Mr KERR—He may be a belt-and-braces man as well.

Mr McDonald—The practice suggests that he always gets a transcript anyway.

Mr Richardson—Yes. It is simply not an issue.

Mr KERR—Those were the points that were raised in that submission, which I think he refers to at paragraph 66. I think he puts them as amendments. He says, 'Although I have proposed a number of technical amendments'. I think he actually is making recommendations, although they are put forward in quite an elliptical way. I think we are entitled to regard them as proposed amendments. Of course, if there are any further responses to those matters, please do not hesitate to raise them.

Mr BYRNE—Since this legislation has been enforced, has there been any contemplation of issuing a questioning warrant for a person aged between 16 and 18?

Mr Richardson—No.

Mr BYRNE—And there is nothing in the foreseeable future, I take it.

Mr Richardson—I will not say that, because there are people who are below the age of 18 who could easily be of security interest. I note that there have been people below the age of 18 who have undertaken terrorist attacks in other countries, and it was against that background that the provision relating to 16- to 18-year-olds was put in.

Mr BYRNE—With regard to the framework of proceeding down the path of issuing questioning warrants, is it fair to characterise the issuing of a questioning warrant as a measure of last resort?

Mr Richardson—Yes. It was not a requirement of the legislation.

Mr BYRNE—I understood that; I saw the brief. So you are effectively saying that there are no other means for us to obtain this particular information because of the threat to national security and, therefore, we have to go down this path.

Mr Richardson—Yes. Indeed, that is one of the issues that we must satisfy ourselves about before seeking approval from the Attorney-General to go to an issuing authority, and it is an issue which, under the legislation, the Attorney is specifically required to satisfy himself on.

Mr BYRNE—With regard to people who have a difficulty with English, for example, where the period can be extended to 48 hours, who makes an adjudication?

Mr Richardson—The prescribed authority.

Mr BYRNE—If that person is maintaining that they do not fully understand the question, what is the process whereby a person would say, 'That person does understand'?

Legal Adviser—The person could always make a complaint to the Inspector-General of Intelligence and Security. In fact, at the outset of the questioning warrant and in every 24 hours, the prescribed authority must outline a series of matters set out in the act to the subject of the questioning warrant, including the right of that person to make a complaint to the inspector-general.

Mr Richardson—By way of background: the legislation initially did not have a provision relating to people who needed an interpreter. There was simply a 24-hour questioning period. However, in our first use of the questioning warrant, an individual who had very good English sought an interpreter. We were able to get statutory declarations from his employer and we were able to demonstrate by other means just how good his English was. The prescribed authority took a decision that he did not need an interpreter. Indeed, he had no need of one and he rarely asked for any clarification of any issue. That brought home to us the fact that someone could seek to frustrate the intent and purpose of the questioning regime by claiming or by being able to convince people that they did not have a proper grasp of English. Due to that experience, the parliament amended the legislation in December 2003. Finally, there has been an instance where an interpreter was provided to someone being questioned because the prescribed authority properly took the decision, which we did not oppose, that the person did indeed need one.

Mr BYRNE—I would be careful about the questions. In that set of circumstances, would the questioning then be interrupted and an independent assessment conducted as to whether or not this person fully comprehended the questions that were being asked?

Mr Richardson—I will rely on others for what the detail of the legislation says. I think you will find that it rests with the prescribed authority and if he wanted to get an independent authority, he could.

Mr KERR—One of the issues is that the provision of an interpreter automatically doubles the amount of available time for questioning.

Mr Richardson—Yes.

Mr KERR—One of the suggestions, by way of amendment, is to say that the prescribed authority should have the capacity to manage this. Rather than there being an automatically doubling, it would give the prescribed authority the responsibility of extending the period for questioning to the degree appropriate to respond to time lost by the use of an interpreter. If there is only minor delay, you do not extend the period far greater than the duration of that delay.

Mr Richardson—I think that is making it more complex rather than simpler. Under the legislation, the prescribed authority needs to make an independent decision on the continuation of questioning after every eight hours anyway and may revoke an extension of questioning at any time.

Mr McDonald—And, under the protocol, every four hours there are breaks. So in dealing with the problem that Mr Byrne was referring to, that can be accommodated under the existing legislation. The 48-hour thing is because you still have the same rules in relation to extensions—prescribed authority. So it is not an automatic 48 hours; it simply sets an absolute upper limit. You only have to go to some of these international meetings where the other side does not have English to appreciate just how much extra time it takes—it really does sometimes.

Mr BYRNE—Who provides the interpreter?

Mr Richardson—I am not sure.

Legal Adviser—The arrangements have been made through ASIO with a community organisation which provides interpreters.

Mr BYRNE—So generally those people are comfortable with those providing the interpreting.

Legal Adviser—Yes.

Mr BYRNE—You can imagine a set of circumstances where the person might say, 'That person did not interpret correctly what I said.'

Mr Richardson—That is right, but you need to look at the totality of it. What is ASIO's authority here? First of all, there is a prescribed authority who is a retired judge. The whole thing is videoed. There is right of appeal to the Federal Court; there is right of complaint to the IGIS. It is wrapped around a fairly commonsense arrangement. Clearly if an individual felt uncomfortable with the interpreter, they could take that issue up with the prescribed authority or indeed with the inspector-general.

Mr BYRNE—Does the person's legal representation that might be being questioned get a copy of the tape of the proceedings?

Mr McDonald—No.

Mr KERR—What would happen if the mechanism of a request or an appeal to the Federal Court were sought? I understand what would happen if the complaint were to be made to IGIS—IGIS would just turn up and the complaint would be made. That is one of the gaps. I cannot quite understand what would happen if somebody actually said, 'I want to exercise this right.' They have to be told that they have a right to apply to the Federal Court.

Mr Richardson—They are told that.

Mr KERR—I understand that, but I am asking what would actually happen if they said, 'I'd like to do that.'

Legal Adviser—You would expect that the person would have legal representation.

Mr KERR—Yes.

Legal Adviser—They would have to be informed of their right to contact a lawyer. One of the permitted disclosures is to disclose information to the Federal Court for the purpose of seeking a remedy.

Mr McDonald—Of course the whole process of this questioning, if you look at what has happened in practice, is that it is in blocks—it really is. So, as was the case with the opportunity to query whether the interpreter was adequate or not, or whether they needed an interpreter through part of the process, there would be opportunities to explore these options too, based on the current experience with them.

Mr KERR—I am still puzzled. Would the proceedings stop at that stage?

Mr Richardson—My assumption as a dumb layperson is this: first of all, the prescribed authority is a retired judge. That person, I assume, knows the law. Where someone being questioned says, 'I want to appeal to the Federal Court about all of this,' and he does it in a proper way, my assumption would be that the prescribed authority would suspend the proceedings until such time as the appeal is heard.

Legal Adviser—That is absolutely correct. That is what the prescribed authority would do, just as the prescribed authority now will say, 'The questioning period is now finished and we will deal with some procedural issues,' for example, when the subject needs to have a break for prayers, meals or whatever. The questioning period is controlled and the prescribed authority is very careful to make clear what constitutes questioning period and what does not. It does not have to roll for the whole eight hours.

Mr KERR—That was also my assumption of what would happen, but the act does not spell it out.

Legal Adviser—I think it is available under the act for the prescribed authority to control when the questioning actually takes place.

Mr KERR—Yes, indeed.

Mr McDonald—Also, the IGIS can raise a concern with the prescribed authority as well.

Mr BYRNE—On a hypothetical basis: if you issued a questioning warrant and then had cause to believe, based on some other stuff that you had picked up, that that person could be moving to destroy evidence or something like that, would you then implement a detention warrant fairly quickly?

Mr Richardson—That is right.

Mr BYRNE—Have there been any scenarios, with some of the warrants that have been issued so far, where that has been a concern?

Mr Richardson—No. But there has only been the one issue, which I mentioned before, where we gave initial consideration to an application for a detention warrant.

Senator ROBERT RAY—When you say there have been eight warrants issued, have you approved eight or have there been any others approved by you but not by the Attorney-General?

Mr Richardson—No. Under the legislation, for a warrant to go to an issuing authority it must go through the Attorney-General.

Senator ROBERT RAY—It is assessed by you and it goes to the Attorney-General. I am asking: were any assessed by you but rejected by the Attorney General?

Mr Richardson—No.

Senator ROBERT RAY—The next question is: were any assessed by you, approved by the Attorney-General and knocked back by the issuing authority?

Mr Richardson—No.

Senator ROBERT RAY—Good.

ACTING CHAIR—I would like to put another scenario onto that. Some of the submissions have raised the issuing authority, but they have initially said that in the request for a warrant that goes to the A-G's, the A-G has to assess the possibility of other collection methods when forming a view about issuing them a warrant.

Mr Richardson—That is right.

ACTING CHAIR—But the issuing authority does not?

Mr Richardson—No. That is because the judgment was made at the time that the legislation was being considered that that is a proper judgment for the Attorney-General, not for the issuing authority.

Senator ROBERT RAY—They have not been security cleared, have they? You cannot tell them all the crown jewels.

Mr McDonald—You would not be able to tell them. Just practically, you would not be able to tell them. The reality is that the Attorney has a day-to-day awareness of the security situation.

Senator ROBERT RAY—I understand, but you might confirm this because it has not been put directly in evidence before us, that you have had no difficulty in recruiting enough judges or magistrates to be on the issuing authority—first of all?

Mr McDonald—No, we have not had any difficulty with recruitment with either.

Senator ROBERT RAY—For the prescribed authority you have been asked to recruit, I think in priority order, former federal judges, then retired state judges and then senior members of the AAT. Am I right in saying that you have not even had to go beyond retired federal judges so far?

Mr McDonald—We have some retired state judges.

Senator ROBERT RAY—You have not had to go to the AAT?

Legal Adviser—Are you talking about the prescribed authority?

Senator ROBERT RAY—Yes, I am.

Legal Adviser—I think that is correct.

Senator ROBERT RAY—There was some concern that if you eventually had to go to the AAT with renewable terms, it might cause some conflict of interest. You have not had to do that?

Mr Richardson—No.

Mr McDonald—No.

Senator ROBERT RAY—Maybe the Australian Federal Police or the director-general could answer this question: have you ever been close to having to use the strip search powers?

Mr Richardson—No.

ACTING CHAIR—I want to raise another issue which was raised in a number of submissions, particularly by some ethnic groups in the community—and others such as equal opportunity groups et cetera. Typical is the statement from the Islamic Council of New South Wales which says:

There is a general perception within the Muslim community that the terrorism-laws are "100% directed at Muslims"—

and I think this is supported by a couple of the equal opportunity groups that have put in submissions. I guess this question is to the Attorney-General's Department: have you had any direct complaints from Muslim communities in regard to this legislation?

Mr McDonald—I am not aware of any specific complaints about the operation of the legislation in relation to specific cases. Various organisations have made submissions to the Senate Legal and Constitutional Legislation Committee in the context of specific proposals. For example, last year when we put forward what has become known as 'the association offence', some of these groups put in submissions and raised concerns about aspects of that legislation that were then considered by the Senate legislation committee. Of course, we were very concerned to ensure that that legislation was sensitive to those concerns. For example, under that offence we have exceptions to do with religious practices and the like.

ACTING CHAIR—Do you have any comments, Mr Richardson?

Mr Richardson—Yes. Firstly, there is that perception. For the council to say there is this perception would probably be an accurate statement. Indeed, that there should be such a perception is understandable. The biggest security challenge we face at the moment is in respect of people who hide within Islam and who seek to justify what they do in the name of Islam. That being the case, it is inevitable that most of our targets today will be people who claim to be Muslims and who therefore might reside in Australian Muslim communities. 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. I spent a Saturday morning—last November, from memory—in Melbourne with the Islamic Council of Victoria addressing a meeting about the ASIO Act and the questioning and detention regime. I took about 1½ hours of questioning, and I think the statement of perception is an accurate one. But the story does not stop there.

ACTING CHAIR—Apart from the visit to Victoria, is there any across-the-board effort made to make sure that Muslim communities are given access to information in their own language about the terrorist laws, maybe targeted to their own media outlets?

Mr McDonald—We have certainly been cooperating and working with the groups to ensure there is dissemination of information. We even received a letter from one of the groups, AMCRAN, thanking us for some contributions that we made to some information that they were circulating in the community. We are also at the moment—and I mentioned this to the PJC a couple of weeks ago—looking at our strategies because the PJC has recommended, for example in relation to listing terrorist organisations, that we perhaps try and disseminate information in more languages than we do. I think it is an area where you can almost never do enough and also that people can only absorb so much. But we certainly have it at heart to keep working on. I have spoken to the Attorney and we are getting some support to keep working on it.

Dr Wardlaw—Commissioner Keelty has been very active in engaging senior members of the Islamic community around the country, understanding that the perception that you have articulated has widespread acceptance, and 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 also have incorporated a range of material in our training courses, particularly for the people involved in the counter-terrorism area but also more broadly on Islamic culture, society and religion.

ACTING CHAIR—Does ASIO have any other program?

Mr Richardson—Yes. We have regular contact around the country. I have two very simple bottom line points. Firstly, we have an obligation to act within the law, with propriety and with integrity. Secondly, we have an obligation to do our job, and we will not not do our job simply because we are going to face criticism.

ACTING CHAIR—How would you describe the relationship with Muslim communities today compared to what it was like prior to 9-11?

Mr Richardson—My personal opinion is that there is clearly more concern there, and that is understandable. If you look at what we have been properly required to do within the law since 9-11, I think it is very understandable that there would be concern and indeed questions in certain sections of the community. We try our best to address those. However, beyond a certain point our job is such that I think it would be naive of us to assume that we would ever be the most popular organisation with everyone.

ACTING CHAIR—Does the AFP have any comment to make about its current relationship with the community compared to that of six years ago?

Dr Wardlaw—The director-general's comments are probably apposite for us, too. The only additional comment I would make is that, probably because of the need to facilitate an understanding of why and how we are operating in the community in counter-terrorism matters, we have a lot more formal and informal contact with members of the community, particularly Islamic councils. At that level, 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. But, as the director-general points out, there is still concern, and probably at lower levels in the community, as that information and contact is not as common, a greater concern is expressed.

Mr Richardson—I might add that this is not a complaint in respect of the individuals; it is simply a statement of fact. 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. Subject to the legislation and subject to a lot of other things—yes. But that comment is often made in a way that I think is quite deliberately designed to mislead in respect of the legislation.

Senator ROBERT RAY—People who would report those comments say that it is in the public interest. They have given us several submissions which, in large measure, say that they should be exempt from all these laws, that they should not be in any way penalised for disclosing national security material if they themselves regard it in the public interest. Are you at all sympathetic to this?

Mr Richardson—No.

Senator ROBERT RAY—It was a leading question.

ACTING CHAIR—I presume you have had a chance to read the submission from the Australian Press Council?

Mr Richardson—About the secrecy provisions?

ACTING CHAIR—Particularly where they talk about the penalties imposed upon disclosure and suggest that there should be no penalty unless the disclosure is a threat to national security. They have made a number of submissions.

Mr Richardson—I would simply note that similar secrecy provisions exist in respect of the Australian Crime Commission. This is not the first piece of legislation which has that provision. I accept, however, that legislation in this area comes under certain scrutiny and does arouse a degree of public comment, as our other legislation might. I do not want to digress, but a good example of this is strip searching. You will recall that the initial legislation had a proposal for the strip searching of anyone et cetera. That arose not because we were seeking it but because there was a considered judgment, taken on grounds of legal policy, that the most uncontroversial way to insert into the ASIO Act the powers to strip search was to simply take the provisions that already exist in a range of other legislation. We naively did that and, as one person said to me in a session, 'Mr Richardson, you've been around long enough to know that this is not a matter of rationality; it is a matter of emotions.'

Mr McDonald—I think the criminal law branch might have borne some responsibility for that recommendation too.

Senator ROBERT RAY—There is a similar issue with self-incrimination but being able to use the information to further pursue other inquiries that may gather evidence to prosecute. My understanding is that that is in a whole range of other pieces of legislation as well.

Mr Richardson—Yes.

ACTING CHAIR—There are restrictions on what people who have been subject to these provisions are allowed to divulge. What restrictions are there on ASIO, the A-G's Department or the Attorney-General in relation to what can be said about an individual or a case?

Mr Richardson—In terms of ASIO, it is very simple: we are constrained by legislation as to how we can use information. We can provide information to others only for purposes relevant to our functions as defined in the act.

ACTING CHAIR—What about A-G's?

Mr McDonald—We are covered by the secrecy provisions, just like anyone else. In fact, we are very conscious of that. There are many occasions when there are things you would like to say that you cannot say because of it.

Senator ROBERT RAY—Of course; that is your responsibility. So ASIO is covered by legislation, the Federal Police are covered by legislation and the Attorney-General's Department is covered by legislation. I assume both the issuing authority and the prescribed authority are covered. What about ministers' officers?

Mr McDonald—Everyone is covered by the legislation.

Senator ROBERT RAY—But you are covered by other legislation as well—about disclosure—aren't you?

Mr McDonald—Yes. There is a lot of overlap, but these offences are quite specifically about these processes. In performing our duties, we have access to information that is particularly sensitive, and therefore there is a penalty regime and requirements which are stricter than, let us say, section 70 of the Crimes Act.

Mr Richardson—I stand to be corrected, Senator, but I think a member of a minister's staff is covered by the secrecy provisions in the same way as an individual, in the same way as their lawyer, in the same way as the media.

Mr McDonald—As a clarification, there is a specific exception where it is specifically permitted by the Attorney-General. But, of course, that is something that is outlined very clearly. It would have to be a very specific decision, and that is to do with circumstances where the Attorney-General obtains advice from the director-general—it might be necessary from a public safety perspective or something like that, where some information would need to be divulged. I do not think you are really asking about that situation but, from a technical, legal perspective, there is that as well.

Senator ROBERT RAY—How do you go from a legal perspective when it is necessary to disclose information gleaned through this process to foreign intelligence services to assist them to prevent a terrorist act?

Mr Richardson—We have processes in place in ASIO which determine thresholds in respect of sharing material with other countries, which, in part, relate to their human rights record. But we can share it with foreign intelligence services, and we most certainly would if it were relevant to preventing an attack.

Legal Adviser—That would be another permitted disclosure.

Senator ROBERT RAY—I was asking whether there were any legal impediments to that, not whether it is right or wrong. It is right to do so.

Mr Richardson—No, there are not.

ACTING CHAIR—The reason I raised this issue in the first place is that one of our submissions, written by a barrister who has been involved in a questioning warrant—a legal counsel—states:

> 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. In the future, 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.

What he is suggesting is that if information of a certain flavour is leaked, there is no right of reply.

Mr Richardson—I would pursue that with the individual. You might want to do that in camera, and then you might want to pursue with us the question of leaking and the like. I just need to know the specific case.

Senator ROBERT RAY—If there was a leak—and I am not presuming there has been—you have the power to release someone to respond, don't you? You have the powers under the act to disclose certain matters.

Legal Adviser—Yes.

Senator ROBERT RAY—You could authorise someone to respond.

Mr Richardson—Any authorisation that the person in my position considered would have to be consistent with the ASIO Act. In other words, we could not leak the information simply for the purpose of putting out a counter view.

ACTING CHAIR—We are not suggesting that you would leak the information.

Mr Richardson—Sorry.

Senator ROBERT RAY—That was not my question. If you had concluded that somewhere in the process—which you cannot define, obviously—there had been a leak about this, that information came out and you did not know whether it had come from the prescribed authority, from a solicitor or whomever else, you would, absolutely necessarily, be in a position to

authorise someone to respond. I would have thought you could release them under the act to at least make a response to those points.

Mr Richardson—Provided the authorisation was consistent with the legal requirements of the act. In relation to any specific case, I would have to take legal advice.

Mr KERR—My impression in the last few years is that there has been considerable media attention to instances where certain people have been portrayed as probably having linkages to certain groups. That may be a false understanding on my part and I will certainly pursue it and invite responses later. The suggestion that leaking from a favourable government perspective can be dealt with by the imposition of sanctions seems a bit naïve. I was Minister for Justice for three years. I cannot remember how many investigations I instigated about leaks of cabinet documents and various other things—it was in the order of nine. In not one instance was the AFP able to identify the source of the leak. Sometimes a report came back saying that it had narrowed it down to a number of persons about whom suspicions were held, but that was all.

ACTING CHAIR—I don't think you were alone.

Mr KERR—I do not think I was alone. It is one of the grave failings of the AFP that in this area their rate of success, their strike rate, is zero. It is an immensely hard thing to do to chase down a leak. Yet in this area, once a story is out in the public domain suggesting that somebody has been the subject of these questioning warrants or might be implicated with terrorism, you would think it is a normal human response that they would want to respond to it and trying to find a balance in that area is something I would appreciate your attention being directed to.

Mr Richardson—I personally think you are confusing a number of issues here.

Mr KERR—Possibly.

Mr Richardson—You are introducing the general issue of leaking into a specific legislative regime. There were one or two public references to the first one or two questioning warrants. I think you will find that since the secrecy provisions were passed by the parliament in December 2003, there has been no information put out in the public arena suggesting that individuals had been questioned for this purpose or for that purpose. In fact, it was precisely because of what was in the media in relation to the first one or two questioning warrants that we came to a strong view that there was a need for a secrecy provision feeding off what is already in the Australian Crime Commission Act.

Mr KERR—I may be confusing my recall of those first couple of instances with the post-legislative—

Mr Richardson—You are—I can be quite firm on it. Also, you have access to all the videos, to all the material, to the prescribed authority and it will be fairly easy to establish whether there has been any information in the media relating to people being questioned by ASIO under warrant since the secrecy provisions came in.

Mr KERR—I have no reason to doubt what you say, as you would have been much more focused on the time lines than me. Nonetheless, I suppose the underlying principle still remains:

were such an instance to happen, it would be broadly the community's view, and certainly the individual's view, that they ought to be able to respond.

Legal Adviser—They could always seek—

Mr Richardson—Wait a minute. It would be an absolute dog's breakfast if you had a situation where if someone broke the law by leaking something—

Mr KERR—I am not suggesting they do.

Mr Richardson—you then gave someone else the opportunity to respond and it went on in public. I would have thought the proper thing to do if the law were broken would be to investigate it.

Mr KERR—I have just displayed my degree of confidence in the effectiveness of an investigation of this kind—

Mr Richardson—You are not talking—

Mr KERR—where it is believed that the leak comes from within government.

Mr Richardson—You are not talking about information that is widely circulated; you are talking about—

Mr KERR—Cabinet documents are not widely circulated, either.

Mr Richardson—You are talking here about information relating to a questioning regime, which is very tightly held within ASIO and which is limited to very few people in the Attorney-General's Department and elsewhere. This is not material that goes widely. If the law is broken, that ought to be investigated. The damage done by the breaking of the law should not be multiplied—the information should not be added to—by giving someone else the right of reply.

Mr KERR—I am not suggesting that this information is widely held. But I know lots of confidential information that is leaked and is extremely damaging and is narrowly held.

Mr Richardson—This is not confidential information

Mr KERR—Let us take an example of where a disclosure was made in breach: the very damaging allegations which were made after a commission inquiry about my former colleague Senator Richardson, regarding certain matters that were supposed to be followed up by the Crime Commission in Queensland. Once these things come out, whoever is responsible, you would expect that people might wish to be able to respond. They may not wish to respond; they may wish to go to ground. But I am just asking about the principle here.

Mr Richardson—All I can say is that there have been eight questioning warrants since July 2003. That is not many. I am not sure how many there have been since the secrecy provisions were introduced in December 2003. It would be a simple exercise of research to ascertain whether there is any evidence of material coming out of government or elsewhere that was

damaging to any of the individuals who have been the subject of questioning warrants since the secrecy provisions came in.

Mr BYRNE—I have a question as to how you determine where the questioning warrants are going to be issued.

Mr Richardson—It is basically determined by where the individual is located. We have up until now always—I think I am right here—gone to an issuing authority within the jurisdiction in which the individual resides.

Mr BYRNE—But say on a hypothetical basis you were issuing one of these warrants at a place of work, would that then not provide some sort of difficulty because of people who might observe that and then question why this person is being served with a warrant?

Mr Richardson—It depends upon the urgency. The warrants so far have been issued at a time and place which avoids that. However, if it was urgent enough then so be it. We would seek to do our best to avoid that. But if there was a requirement to do it and we had no other option but to do it in circumstances where it ran the risk of someone being embarrassed then I do not think we could turn away from it because of that.

Mr BYRNE—So your predominant determining factor is time. That is the predominant criterion which then determines the manner in which, and where, it is going to be served.

Mr Richardson—Yes. We have always sought—and, indeed, I think you will find the material in our submission—to serve the warrant at an appropriate time and in an appropriate place.

Mr BYRNE—I might follow that up with you at another time and in another place.

Mr Richardson—Yes. Certainly all of that information is available.

Mr BYRNE—I know. I am aware of that.

Mr KERR—I have one final question to go on the public record, Mr McDonald, about your statements about the constitutional validity.

Mr McDonald—Yes.

Mr KERR—It is not common practice for attorneys to disclose that legal information but, given that we have a submission from the state of Western Australia, from the Department of the Premier and Cabinet, suggesting that there may be significant doubts in raising these issues, it would certainly assist if consideration were to be given as to whether that advice should be tendered to us. But whether or not it is, do you accept the argument of proportionality or does the advice accept it but draw a different conclusion? Secondly, does your advice regarding the constitutionality of this legislation relate to the degree of threat? This, of course, then goes back to the question of whether this can be permanently entrenched in circumstances where the threat may not exist in the form that it does now.

Mr McDonald—I cannot go into the detail of the advice. However, all the submissions that were provided to you were considered by the Chief General Counsel. Those sorts of issues were raised in those submissions, so the Chief General Counsel has seen all those arguments and takes the view that the legislation is constitutional.

Mr KERR—Has he given specific consideration to the Western Australian submission?

Mr McDonald—Yes. Western Australia has a strong tradition of showing interest in Commonwealth constitutional—

Mr KERR—The other question that I ask is on the second point of this question about the conditionality. Is the advice posited on the existence of a state of threat? That is not a matter of disclosing the legal advice.

Mr McDonald—I think that would start getting us into the details of the legal advice.

Mr KERR—It is a meaningless statement to us saying that it has been cleared if the factual circumstances are that it is posited on the present environment and you are asking for the legislation to be extended indefinitely. I am just asking: is it posited on the existence of a state of threat beyond that normally experienced by Australia?

Mr McDonald—I would like to take that question on notice.

Mr KERR—All I am saying is that I cannot accept it as meaning anything. You have given us a statement that this has been ticked off by government legal advisers and that they say what is being proposed is constitutional. I am asking a question that actually identifies the content of that statement because, if you cannot answer that question, I will disregard that assurance.

Mr McDonald—Those sorts of issues were raised in the various submissions. The Chief General Counsel has looked at those submissions and is satisfied there is not a problem with the constitutionality of this legislation. You can read into that answer, if you go through those submissions, that we have looked at quite a few issues. In terms of getting into the specific aspects of the Chief General Counsel's consideration of this issue, that is something I really cannot get into without conferring.

Mr KERR—Could you get back to us, because you obviously understand the implication of the question.

Mr McDonald—I understand your question, do not worry about that.

Senator ROBERT RAY—If you have a good legal opinion, reasonably argued, that favours the government, we will get it; if not, we will not. That has been the iron law of Labor and Liberal governments in the last 20 years.

ACTING CHAIR—Before I ask whether there are any final issues, I would like to return to one issue, which is the sunset clause. Britain retained a sunset clause in its antiterrorist legislation against the IRA for 20 years when, it is fair to say, it was probably under a more direct threat than we are facing today. You both argued that we should get rid of the sunset clause

and instead, perhaps, put in a replacement requirement that ASIO report yearly, or at regular intervals, to this committee on the activities that take place under the questioning and detention powers. That is not a requirement at present; you are not obliged to report to this committee on the activities of all the powers that you use in the questioning and detention area.

There are arguments for and against sunset clauses and whether or not we extend the period; that is something that we can debate later. Do you think that, by making it a requirement for ASIO to report to this committee, it would perhaps in some ways strengthen the legislation, because there is no requirement at present except to review the legislation every three years?

Mr Richardson—It certainly would. It would certainly be a strengthening of the accountability arrangements. I simply put that suggestion on the table. I thought that the community and others would look for some additional measures if the sunset clause were to be removed. If you put the two measures together—the annual report, with the suggestion made by Mr Kerr that every five years the legislation be reviewed to tick off on whether it should be rescinded—it might give that reassurance.

Mr McDonald—I would like to put on the record that certainly the department would need to confer with the minister about those suggestions; it would need to give them more careful consideration. I think I need to make that clear.

ACTING CHAIR—I understand that, Mr McDonald. Because we may not get the chance again for Mr Richardson to put his views on the record—and he has worked closely with this committee for the past five or six years—I thought it was important to get his view. He actually places some confidence in this committee with his suggestion.

Mr Richardson—I would also note that both our submissions have been properly provided to people within government, and I certainly have not heard anything back about them. I certainly have had no bolts of lightning, so I assume that they have not caused too much concern.

Mr KERR—No, they just got rid of you as a result of the submissions!

Mr Richardson—If I could add one other point: going back to the secrecy provision—and this may not fully address the issue—in a situation where an individual and/or their lawyer believe that there had been information put into the public arena that was wrong and was damaging or highly damaging, they do of course have the right under the legislation to seek approval to use relevant information, so there is a remedy there.

Senator ROBERT RAY—Quite a number of the submissions have made the point to us that they think it is unfair that you have the right, in seeking a warrant, to withdraw someone's passport. It is really a double-edged question. If you did not have the right to withdraw their passport, would it be much more likely that you would seek a detaining warrant rather than a questioning warrant? Secondly, don't you already have the power and influence to withdraw someone's passport, irrespective of this legislation?

Mr Richardson—In answer to the first question, I think you could argue that it would, in certain circumstances, increase the argument for a detention warrant as opposed to a questioning warrant. Secondly, there is a process which enables ASIO to make a security assessment in

respect of an individual and, on the basis of that assessment, for the foreign minister to either deny or cancel a passport. You can, however, have situations emerge quite quickly, as we did in the Brigitte case, that would make that very difficult. Again, it was in relation to our practical experience in responding to the circumstances of the Brigitte case whereby we put up for consideration the passport cancellation issue, which was passed by the parliament in December 2003.

Senator ROBERT RAY—Is there an automatic restoration of passport when the questioning warrant period has expired?

Mr Richardson—Yes.

Senator ROBERT RAY—So, in many ways, people have more rights under that regime than the alternative method.

Mr Richardson—That is right. The other regime cancels—or withdraws, now—the passport. There is process of appeal to the AAT. We have, in at least one case, made another assessment further down the track with changed circumstances and withdrawn our earlier assessment. However, this is designed specifically for the purpose of the questioning. Once that is completed, the individual automatically gets their passport back.

Proceedings suspended from 12.07 pm to 4.16 pm

BROWNE, Mr Damien, Senior Assistant Ombudsman, Office of the Commonwealth Ombudsman

HAMPTON, Mrs Elizabeth, Director, Law Enforcement, Office of the Commonwealth Ombudsman

McMILLAN, Professor John, Commonwealth Ombudsman, Office of the Commonwealth Ombudsman

ACTING CHAIR—Professor McMillan, I invite you to make an introductory statement before we proceed to questioning.

Prof. McMillan—Thank you for the opportunity to meet with the committee to supplement the written submission. Our written submission is, as you can see, a brief submission which recounts the experience that my officers had in a limited way with the new powers conferred by this legislation. Essentially there are two points I would make. The first is that my office have, since the enactment of this legislation, taken steps to address or deal with the role that is conferred upon us, really, of acting as a complaints authority in the event that any person who is arrested or being questioned should wish to contact us. We have the limited role only of oversighting complaints against the Australian Federal Police.

The first point I would like to make on that is that it is a role that we take seriously. I think that the role played by the Ombudsman and the Inspector-General of Intelligence and Security is an important accountability mechanism that is perhaps sometimes overlooked in some of the public discussion of this issue. Much of the public discussion tends to focus upon the nature of the powers and the absence of judicial review of those powers. The roles of the Ombudsman and that of the Inspector-General of Intelligence and Security are the executive accountability mechanisms that are used. In my experience, both in this area and in other areas, it is an effective mechanism. It is effective, for example, because we make a special point of being in contact regularly with the Australian Federal Police, the Inspector-General of Intelligence and Security and, to a limited extent, the Australian Security Intelligence Organisation to discuss the need for protocols. I met this week with the Inspector-General of Intelligence and Security to share information about what they have been doing and what we have been doing. We also ensure that, for example, one member of the office is available 24 hours a day to be contacted on the mobile phone should anybody wish to do so.

As well, I think we probably bring to that accountability oversight role a considerable amount of experience of that kind in developing protocols with agencies concerning the exercise of sensitive coercive powers in areas of some difficulty and nicety. In similar areas, for example, we have developed protocols with the Australian Federal Police and the Australian Crime Commission concerning their use of telephone interception warrants and warrants to conduct controlled operations. The development of protocols is an important issue that we address with the Department of Immigration and Multicultural and Indigenous Affairs concerning the management of detention centres. So it is an oversight accountability role that is familiar and practised in a few different areas. My experience certainly is that it is taken seriously by the agencies with which we deal. Generally, I think I can report that we have a very good working

relationship with bodies like the Australian Federal Police. They recognise that we are an independent external oversight agency and that we have different roles, but that we need to be able to work cooperatively in areas of this kind.

ACTING CHAIR—Your remit does not extend to ASIO, does it?

Prof. McMillan—No, it does not. So that is essentially the first point I would make in my submission: the form of accountability that is built in does, in that respect, work very well and has been an effective mechanism for keeping the attention of different agencies on the sensitivity of those powers, if their attention was not otherwise on it.

The second point, which is dealt with more in the written submission, is the one area of difficulty that we see in this area and that we have seen in other areas as well—namely, that in areas of law enforcement there is quite a deal of cooperative arrangement and interchange activity between the federal and state agencies and the accountability and oversight framework has not kept up with that very well. This legislation is a good example. It says that a person is to be informed about, and may contact, the Inspector-General of Intelligence and Security or the Commonwealth Ombudsman and yet the law enforcement authority that may be used to cordon off premises, to enter premises with the use of force and even to transport somebody to a location for questioning may well be a state police force, and that is not acknowledged in the legislation.

If the person said immediately, 'I want to contact the Ombudsman,' unless the people from ASIO were well attuned to the local oversight arrangements it could get very confusing. In some states it is the ombudsman that has jurisdiction over police complaints. In other states it is a body named the police complaints authority or the office of police integrity or the crime and misconduct commission. Bearing in mind there is a very tight time frame written into this legislation for arrest, questioning and detention it can become confusing very quickly.

Indeed, we have had the experience in some other areas where there has been cooperative Commonwealth-state activity but it can take a considerable amount of time. In one investigation I undertook recently it took my office a matter of months to work out whether it was a Commonwealth agency or a state police force that had in fact arrested somebody and taken them into immigration detention. It was some months before we could investigate the substance of the person's complaint. That is the area of difficulty. We have discussed that with the Australian Federal Police, with ASIO and the Inspector-General of Intelligence and Security so there is a keen awareness of the problem. Hopefully, then, at an executive level the issue can easily be resolved, but if the framework is addressing the accountability issue it is better that it is addressing it properly.

ACTING CHAIR—I notice in your submission that you talk about complaints being made about joint ASIO-AFP operations. How difficult is it for you to then investigate a complaint where you have oversight of the AFP side of the operation but not of the ASIO side? Is it possible or impossible?

Prof. McMillan—If we are working effectively with the other agencies, I think we could probably resolve it quickly if the identity and the official status of the officers involved could be clarified. We discussed this with the Inspector-General of Intelligence and Security the other day

and he said that—and presumably this is one of the things that he will talk about with the committee when he gives evidence; I think he is giving evidence tomorrow—he has been focused on being able to identify quickly whether an officer involved in an operation is an ASIO officer or an AFP officer. Sometimes it is not easy to tell from uniforms or plain clothes. So long as we can identify quickly who the officer worked for then I think any other confusion could be resolved because I think there is a good understanding—among our four agencies at least: ASIO, AFP, IGIS and ourselves—as to the limits of our own jurisdictional powers.

Mr KERR—You say the real problem is if state police get involved. Has that happened? There is nothing that stands out in the submissions that I have seen that suggests in these kinds of matters that it has happened.

Senator ROBERT RAY—State police have been involved in one or two instances.

Mr KERR—I am just asking.

Prof. McMillan—State police have been used. Certainly we have not received any complaints since this new legislation came into operation. It may be that people prefer to rely initially upon either contacting a lawyer of their own choice or the presence of a prescribed authority, a judge, while the questioning is being undertaken. But, yes, state police have been used.

ACTING CHAIR—We are looking at this legislation in the light of the sunset clause. We have to decide whether we still require it, whether it is working well or whether it can be improved. Those are the three areas we are looking at. I guess we would like to hear from your perspective as to whether you think it is required, whether you think it is working well or whether you have observed any areas where you think it might be improved.

Prof. McMillan—As to the first question of whether it is required, I really have no opinion because—

ACTING CHAIR—I know it is not your role.

Prof. McMillan—I have no sense of intelligence that ASIO has collected.

ACTING CHAIR—That is the purpose of the sunset clause—to review it.

Prof. McMillan—As to the second question of whether it is working well, I suppose all I can say is that, insofar as the legislation (a) contains numerous and detailed provisions that have to be understood by the officers involved and (b) some accountability mechanisms, that aspect of it I think is working well. Our experience is that the agencies—ASIO, particularly, and the other oversight agencies—are taking their roles seriously and talking, and that there is a good understanding of the detail of the legislation. I suppose that has been our experience across the board—that if you do have executive oversight agencies like the ombudsmen and inspectors general then it does tend to work very well because our main role is to keep everybody focused on the detail of the legislation. As Mr Kerr would know, another area where we have a similar oversight is the use of telephone interception warrants—and there is a highly complex, detailed framework of legislation which I think is understood very well by the officers who administer it, partly because you have this regular presence of executive oversight agencies that are meeting

regularly, asking questions, looking at your protocols, doing audits and things like that. If these powers were being used regularly, we would consider the option, rather than just discussing things before the event, of doing, for example, a periodic audit on the manuals, the understanding of officers, the paperwork and how it is being used, and the like.

Mr KERR—I was just wondering how you would implement. As I understand it, at the moment the warrants have to be served by AFP officers—or can they be state police? I am not sure. It seems to me that the main operational side of this is done between ASIO and the AFP. State police might provide perimeter security, and there may be some interrelationships that may provide information giving rise to matters that need to be investigated by the state police. If we are making suggestions to improve this legislation—and I presume that goes also to suggestions that might be relevant to your legislation, conditional on this sunset clause being pushed out or removed—how would you operationalise our recommendations? What would be the gravamen of what we should be suggesting or saying to the government if we were to pick up your concern that there is not an effective mechanism to deal with instances where state police are involved?

Prof. McMillan—This is an initial response, but there are two possibilities. One is to amend the legislation to provide that a person is to be informed of their right to complain to the IGIS, the Commonwealth Ombudsman or, if state police have been used, the appropriate authority for receiving complaints against police in that state. The second would be to prepare a paper for the government on harmonisation of the accountability and oversight arrangements where there is cooperative action by Commonwealth and state police agencies. Perhaps I can add to that second proposal, that the government prepare a statement, that that is an initiative we have been pushing in another area in relation to joint Commonwealth-state police activity in relation to DNA profiling, use of surveillance and other powers. There is a need, probably through the Standing Committee of Attorneys-General. They already have on their agenda to develop papers on harmonisation.

Mr KERR—So there is a short-term and long-term solution.

Prof. McMillan—Yes. One is a legislative solution and the other is an operational executive level solution.

ACTING CHAIR—Thank you very much, Professor McMillan, for your opening statement, which covered much of the area that we are interested in. I thank your colleagues for coming along. We will make our deliberations at some later stage.

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

That the committee authorises publication, including publication of the proof transcript on the internet, of the evidence given before it at public hearing this day, as part of the record of the committee's review of division 111 part 3 of the ASIO Act 1979.

Committee adjourned at 4.32 pm