Chapter 6

QUESTIONING

> A person subject to a warrant for questioning or detention and questioning has no right to silence, no protection against self-incrimination, no presumption of innocence and an evidential burden to prove they have no information regarding terrorism. By themselves, or in conjunction with a lack of adequate legal representation, the provisions make it extremely difficult for a person without knowledge to escape the offence of failing to provide information, or for a person with knowledge to be the subject of a fair process. The removal is clearly in opposition to not only fundamental human rights espoused in international agreements but to community values.[1]

6.1 The proposed questioning regime was subject to much criticism during this inquiry, as exemplified by the submission quoted above. This chapter discusses:

- the role of the prescribed authority;
- legal representation;
- periods of questioning;
- the right to silence and the use of evidence in subsequent criminal proceedings; and
- whether there should be any exemptions from the duty to disclose information.

6.2 Suggested alternative questioning models, including who should conduct the questioning, are discussed in Chapter 8. Possible constitutional issues that may arise are discussed in Chapter 5 in relation to the issue of warrants.

The role of the prescribed authority

6.3 A key part of the questioning regime is the role of the prescribed authority before whom questioning must take place. The prescribed authority must be a senior legal member of the Administrative Appeals Tribunal: either the Deputy President, or a senior member or member who has been enrolled as a legal practitioner for at least five years (proposed section 34B).

6.4 The respective roles of the prescribed authority and ASIO are somewhat vague in the Bill. The prescribed authority has certain statutory duties, such as

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1 Federation of Community Legal Centres (Vic) Inc *Submission 243*, p. 17, citing the Universal Declaration of Human Rights art 11(1), the International Covenant on Civil and Political Rights (ICCPR) art 14(2), the United Nations Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment principle 36(1) concerning the presumption of innocence, and art 14(3)(g) of the ICCPR dealing with self-incrimination.

informing the person being questioned of the effect and duration of the warrant; the legal consequences of non-compliance with the warrant; the right to make a complaint to the Inspector-General of Intelligence and Security (IGIS) and the Ombudsman; and the right to seek judicial review and who the person may contact (proposed section 34E). The prescribed authority must defer questioning until an interpreter is present in appropriate cases (proposed subsection 34H(3)). Where the IGIS raises concerns about impropriety or illegality in relation to the exercise of powers under the Bill, the prescribed authority must consider that concern and may direct that questioning or the exercise of other powers be deferred until satisfied that the concern has been satisfactorily addressed (proposed section 34HA). These safeguards are discussed in more detail in Chapter 9.

6.5 The prescribed authority also has the right to direct that a person's legal representative or, in the case of a young person, a parent, guardian or approved person be removed from questioning if their presence is 'unduly disrupting' the questioning (proposed subsections 34U(5) and 34(V)(2) respectively).

6.6 A prescribed authority may issue directions for a person to be detained, further detained, appear for questioning, or be released from detention.[2] However, there are certain limits on the prescribed authority's powers to issue directions:

- Directions must either be consistent with the warrant or must be approved in writing by the Attorney-General, except where a direction (other than a direction for detention or further detention) is considered necessary to address concerns raised by the IGIS (proposed subsection 34F(2)).
- Detention or further detention can only be required if the prescribed authority is satisfied that there are reasonable grounds for believing that, if the person is not detained, he or she may alert a person involved in a terrorist offence, may fail to appear before the prescribed authority or may destroy, damage or alter evidence described in the warrant (proposed subsection 34F(3)).
- A direction cannot result in a person being detained for more than 48 hours at a time after the person first appears before a prescribed authority under the warrant, subject to an overall time limit of 168 hours (seven days) from the time the person first appeared before a prescribed authority under another warrant (proposed paragraphs 34F(4)(a) and (aa)).
- The prescribed authority may only issue a direction when the person appears before the authority for questioning (proposed subsection 34F(1)).

6.7 Thus it appears the prescribed authority has no power to end detention while a person is in detention but is not present for questioning. In theory, the prescribed authority *should* be able to order that a detainee be released before the end of the period specified in the warrant if the prescribed authority is not satisfied that continued detention and questioning will substantially assist the collection of intelligence (see proposed paragraph 34D(1)(b)). But it is not clear that the prescribed

2 Proposed subsection 34F(1).

authority can order that a detainee be released on the grounds that the conditions, such as those relating to further appearances (proposed paragraph 34F(1)(e)) and detention arrangements (proposed paragraph 34F(1)(c)), are not being met.

6.8 Mr Bret Walker SC on behalf of the Law Council of Australia argued that detention of non-suspects must be coterminous with the questioning and should not continue once questioning has finished:

> … if there are only a few questions to be asked, you do not have a right to maintain somebody in detention for what I will call the statutory maximum. You detain for the purpose of questioning, from which it follows that, if there is no further purpose of questioning, the person must be free to go.[3]

6.9 The Committee heard evidence about the extent to which it would be appropriate for the prescribed authority to become involved in the questioning process. Mr Walker argued on behalf of the Law Council of Australia that the prescribed authority 'must not become engaged on anything which sees them lining up with the institution which is doing the questioning', and likened the role to that of a chaperone:

> … as I understand the role of a chaperone, it is not to run interference on things but, by their simple presence and by the nature of the person, to perhaps instil a sense of propriety that might not otherwise happen … The idea is that if you have got a respectable retired judge, and I would add a lawyer not controlled by government — and I stress not controlled by government, including not approved by government — then the chances of the security services misbehaving are hugely reduced, I would have thought. People do tend to behave better when they are in the presence of people whom they cannot control.[4]

6.10 Mr Stephen Southwood, also of the Law Council of Australia, added that another key part of the prescribed authority's role would be to ensure that questioning took place 'within the confines of the warrant' and for the 'proper intended purpose'.[5] Dr Stephen Donaghue argued, like the Law Council, that a retired judge would be most suitable in this role:

> The questioning is not being conducted by the prescribed authority … it is being supervised by them. It seems to be desirable to have someone acting in that position who would be as likely as can be managed to intervene to make sure that the process takes place appropriately. It seems to me that that is why they are there, at the end of the day - to ensure that the process is conducted appropriately. I would submit that a sitting Supreme Court judge, or a retired judge of any court, is less likely to be in a position to be pressured by the executive in the way that they exercise that function than

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3 *Hansard*, 26 November 2002, p. 247.

4 *Hansard*, 26 November 2002, p. 256.

5 *Hansard*, 26 November 2002, p. 256.

> an AAT member, who is likely to have had a less distinguished legal career and is likely to be dependent on the safeguard in my view. There are certainly a great many Supreme Court judges or retired judges who would exercise that function very vigorously.[6]

6.11 Alternatives to the current proposal of who would be a prescribed authority are discussed further in Chapter 8. However, what is clear is the emphasis, both in submissions and during public hearings, that the role must be truly independent to act as an important protection for the rights of those people being questioned and detained.

Legal representation

6.12 One of the PJCAAD's key concerns about the original Bill was the lack of provision for legal representation.[7] The PJCAAD recommended that a panel of senior lawyers recommended by the Law Council of Australia be formed, and that the prescribed authority must advise the person of the availability of such representation. The lawyer would be allowed to be present in proceedings before the prescribed authority and represent the person at any hearings to extend detention.[8]

6.13 The Government introduced amendments which met the PJCAAD's recommendation in part. As set out in Chapter 2, a warrant may specify that a person is permitted to contact an 'approved lawyer' or someone with whom the person has 'a particular legal or familial relationship' (proposed subsection 34D(4)). Access to an approved lawyer is a mandatory requirement if the warrant allows a person to be taken into custody immediately (proposed subsection 34C(3B)), except in the first 48 hours of detention in certain circumstances: if the Minister is satisfied on reasonable grounds that the person is at least 18 years old, it is likely that a terrorism offence that may have serious consequences is being committed or about to be committed, and it is 'appropriate in all the circumstances', the person will not be permitted to contact a legal adviser (proposed subsection 34C(3C)).

6.14 Proposed section 34U governs the involvement of all legal advisers, including approved lawyers:

- The person being questioned must be given a reasonable opportunity for the legal adviser to provide advice during breaks in questioning. However, contact must be able to be monitored;
- The legal adviser may not intervene in questioning or address the prescribed authority, except to request clarification of an ambiguous question; and
- The legal adviser may be removed if the prescribed authority considers his or her conduct is unduly disrupting the questioning. In such a case, the prescribed

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6 *Hansard*, 22 November 2002, p. 176.

7 PJCAAD pp. 33-36.

8 PJCAAD Recommendation 6.

authority must direct that the person may contact an approved lawyer other than the person who has been removed.

6.15 The legal adviser commits an offence if he or she communicates information to an unauthorised third person about the detention or questioning, while the person is being detained (proposed subsection 34U(7)). If the person is not in detention, no such obligation of confidentiality exists.

Evidence to the Committee

6.16 Many submissions raised concerns about the legal representation provisions, particularly in relation to:

- the lawyer's role in proceedings;
- the system of approved lawyers; and
- the ability to prevent access to a lawyer in certain circumstances during the first 48 hours of detention.

The lawyer's role

6.17 Dr Carne queried whether the legislation gave lawyers any real role, arguing that while the Bill provides for contact it contains no 'specificity as to the right of continuous presence' during questioning.[9] However, certain provisions implicitly recognise the presence of lawyers during questioning, by referring to breaks to give legal advice, limitations on lawyers' ability to intervene and sanctions for disrupting questioning.[10]

6.18 Mr Gavan Griffith QC also queried whether in practice lawyers would have any effective role:

> The function of the qualified legal representation is limited to that of an excluded onlooker, confined merely to ensuring that the questions asked are understandable, and at risk of removal from the interrogation process for any interruption. Such truncated rights of legal representations are of such nominal content that it would make little difference if the Act said plainly what it does, and provide that there be no right of legal representation. Such is its real operation and effect.[11]

6.19 Professor George Williams went even further in relation to the lack of privacy in consultations:

> … having your conversation listened to with your lawyer actually pretty much undermines the value of having a lawyer, particularly if it is a lawyer you do not even know. You could imagine: somebody walks in whom you have never seen before and you do not know whether they are an ASIO

9 *Submission 24*, p. 16.

10 Proposed subsections 34U(3), (4) & (5) respectively.

11 *Submission 235*, p. 11.

> officer, some other Commonwealth officer, someone who has been given a security clearance as part of the Commonwealth process or someone else. They walk in, you know that ASIO is listening to the conversation and you attempt to get some frank legal advice. It strikes me as very unreal to even contemplate that that could work. In the end I think the more apt description is that your access to legal advice, at least after the first 48 hours, is really another opportunity for intelligence gathering. In the end it is not an opportunity for free and frank legal advice - it is simply a way of getting more information.[12]

6.20 The Committee notes that the right to have a lawyer of one's own choice and to communicate privately are basic principles recognised in the *United Nations Basic Principles on the Role of Lawyers 1990*.[13]

Approved lawyers

6.21 There is some lack of clarity in the Bill's distinction between 'approved lawyers' appointed by the Minister under proposed section 34AA and 'legal advisers', which are mentioned only in section 34U. The Attorney-General's Department explained that the term 'legal adviser' would take its ordinary English meaning and would be interpreted as meaning a person admitted as a legal practitioner, and that the term covers both approved lawyers and those selected by the person being questioned.[14]

6.22 A concern that became evident during the inquiry was the process for the selection of approved lawyers. Under proposed section 34AA, a person would become an 'approved lawyer' based on a security assessment and 'any other matter that the Minister considers is relevant'. This is a very wide discretion which may leave little scope for judicial review (for example, on the grounds of bias or unreasonableness). The Law Council of Australia stated that it was 'totally opposed to a regime where a person is granted access only to government approved and vetted lawyers'.[15] During hearings, Mr Bret Walker SC elaborated:

> The notion of a government approval necessary in order to be a lawyer to represent the interests of and to be present … for people who have been subjected to very serious questioning otherwise in secret by the executive government is, in my view, extremely dangerous. You must not have, in my view, the capacity for executive government, in practical terms unexaminably, to vet the lawyers who can be there in order to be a physical, mental, institutional inhibition on an abuse of power by the executive government. It seems to me that there is something very important about

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12 *Hansard*, 13 November 2002, p. 68.

13 UN Doc A/CONF.144/28/Rev.1 (1990). Principle 1 recognises the right to have a lawyer of choice at all stages of criminal proceedings, while Principle 8 recognises the right of detainees to communicate privately with their lawyers.

14 Attorney-General's Department 'Answers to Questions on Notice' 21 November 2002, p. 3.

15 *Submission 299*, p. 25.

> 'lawyer of one's own choice', once one puts aside the fact, of course, that quite often one does not have a practical choice if one does not have any money.[16]

6.23 Mr Lex Lasry, Chairman of the Criminal Bar Association in Victoria, also criticised the proposed vetting process:

> I think, by and large, lawyers would be reluctant to go through the process they would be required to go through in order to be described as 'approved'. … [L]awyers of good repute, perhaps of a certain number of years standing, who are willing to give undertakings about confidentiality and the like, in whatever circumstances are necessary to preserve security and secrecy, ought to be able to be engaged in the process … [T]he lawyers of choice of the person being questioned and wanting to engage their services, so long as they fulfil those requirements, should not have to go through some sort of administrative vetting process so that they wind up having to be approved by, among others, the Attorney-General.[17]

6.24 Other organisations representing lawyers and civil liberties groups expressed similar views about the right to a lawyer of one's choice. Liberty Victoria argued that where a person is subject to interrogation whilst being detained incommunicado and under threat of substantial criminal penalties, 'the right to legal representation and the role of the legal representative must be completely unfettered.'[18] Mr Phillip Boulten on behalf of the Association of Criminal Defence Lawyers Association (NSW) also argued that people should be able to choose their own lawyers, while acknowledging that a power of veto may be appropriate in certain circumstances:

> It is reasonable, though, to expect that sometimes a particular lawyer may jeopardise the inquiry. This could be due either to a lawyer's connections to other people who have been questioned by the authority — therefore, a conflict of interest would exist — or, unfortunately, to some lawyers actually being connected problematically to terrorist movements. The Association would understand the relevant body — whether it be the Australian Crime Commission or a prescribed authority — to have the power such as currently exists in the *New South Wales Crime Commission Act 1985*. This act gives the authority a power to, as it were, veto a lawyer if there was a real risk that the investigation would be jeopardised by that lawyer's attendance at the proceedings.[19]

6.25 Section 13B of the *New South Wales Crime Commission Act 1985* states that the Commission may refuse to permit a particular legal practitioner to represent a particular witness in an investigation if it believes on reasonable grounds and in good faith that to allow representation by the particular legal practitioner will, or is likely to,

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16 *Hansard*, 26 November 2002, p. 249.

17 *Hansard*, 22 November 2002, p. 163.

18 Liberty Victoria, *Submission 242*, p. 7.

19 *Hansard*, 26 November 2002, p. 229.

prejudice its investigation. There does not appear to be any right of appeal against such a ruling in the Act.

6.26 Mr Bret Walker on behalf of the Law Council also preferred the NSW Crime Commission model, acknowledging that there might be circumstances where ASIO could show grounds to the prescribed authority why a particular lawyer should not be allowed to appear:

> I see absolutely no reason why that would not work, with grounds shown to the prescribed authority. There is the sanity check; this is not just paranoia. The profession fears that, under the pretext of approving lawyers, there will be a determined effort to remove all lawyers generically. That is, it will not be an objection to a lawyer because of what he or she has or has not done in the past; it will be an objection to lawyers, and it will be very easily dressed up as an objection to particular people.[20]

6.27 However, the Attorney-General's Department argued that the responsibility for determining whether or not a lawyer is a security risk should remain with the Attorney-General:

> I think it could be argued that it is unlikely the judge would be in a position to draw upon experience or expertise to judge the nature of the submissions being put by ASIO as to whether or not they are a security risk or a security threat. The Attorney-General - being a member of the National Security Committee of Cabinet and one who receives briefings in relation to security and signs ASIO's warrants - would, I suggest, be in a better position to make that determination. I would suspect that the other practical problem is that, in nine out of ten cases, the nature of the application [for a warrant] was so quick …[21]

Prevention of access in the first 48 hours

6.28 Some submissions expressed concern regarding the potential to delay access to legal representation, for example, in arguing that it was 'unnecessary, excessive and inappropriate' given the requirements for lawyers to be security cleared and the sanctions for unauthorised communications.[22] Mr Bret Walker SC on behalf of the Law Council of Australia argued that it was particularly difficult to justify the exclusion of a lawyer where the person is not a suspect:

> With a non-suspect it is quite difficult to understand why the presence of a lawyer would add appreciably to the risk of the offence being committed, unless and until the government has — quite apart from what I will call 'paranoid fantasy' — real substance and belief, based on facts, that lawyers do add to the possibility of bombs going off. It they are talking about security leaks, then again I stress that they have got to ask themselves: are

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20 *Hansard*, 26 November 2002, pp. 252-253.

21 *Hansard*, 13 November 2002, p. 50.

22 Dr Carne *Submission 24*, p. 16.

> there not holes elsewhere in the dyke, and why would you say of the profession which most successfully practises confidentiality that they are the ones to be kept out?
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> My view is that the resistance of the government to the presence of lawyers at the questioning of, I stress, non suspects engenders doubts about the integrity of the process. And there is no substance for the [contention] that the presence of lawyers adds to the danger of bombs going off — no substance at all. If there is, then perhaps it is time that the population can be let into the secret by the security services that are meant to be protecting us.[23]

6.29 Mr Walker agreed that circumstances might require that the commencement of questioning is not delayed, but stated that in practice this should not require access to legal representation to be denied:

> No talk of safeguards in terms of access to lawyers would be cogent if it did not recognise that safeguards should not destroy the intended efficacy of the system in which they are intended to play a part. But that, I think, is relatively easily done. It is routine — not unusual — for lawyers to be called out at odd hours and at very short notice.[24]

6.30 He suggested that in 'ordinary cases' under the proposed regime, a person might be given two hours to contact a lawyer before questioning could start. However, in urgent cases where a terrorist attack might be imminent and intelligence is crucial, ASIO could put grounds to the prescribed authority to allow questioning to commence immediately.[25]

6.31 The Committee notes that during the PJCAAD's inquiry, the Director-General of ASIO had stated:

> I have no comment on the suggestion that someone detained should have access to independent legal advice. However, I would have concerns from where I sit about someone detained having access to a legal representative, up front, to engage in an adversarial process. I believe that would defeat the purpose of the timely intelligence in certain crucial situations.[26]

6.32 However, during this inquiry, Mr Walker argued:

> I thoroughly oppose, and no argument has given any reason to uphold, the notion that emergency means no lawyers. It can only mean no waiting for lawyers.[27]

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23 *Hansard*, 26 November 2002, p. 254.

24 *Hansard*, 26 November 2002, p. 252.

25 *Hansard*, 26 November 2002, p. 252.

26 Director-General of Security, *Transcript*, p. 24, cited in PJCAAD p. 35.

27 *Hansard*, 26 November 2002, p. 252.

6.33 Dr Carne pointed to the impact that delay in access to a lawyer would have on other safeguards. He argued that the lack of entitlement during the first 48 hours 'effectively nullifies the right to seek judicial review before the federal court'.[28] This may be particularly significant, given that habeas corpus and judicial review remedies may only be considered by a competent lawyer and are only effective in order to stop questioning and detention. Such safeguards may have no residual value once a person has been detained and released, and it is significant that overseas practice points to large numbers of detentions on a short turn around.

6.34 On the other hand, Mr Connellan, speaking on behalf of the Victorian Bar Council, spoke of the Attorney-General's capacity to delay access to a lawyer in the following terms:

> In fact, that is similar to the sort of bar that is set under the Victorian Crimes Act [section 464C], where you have a right of access to a lawyer and to family members, as in ordinary criminal investigations, but that right can be denied if there are reasonable grounds for suspecting that access would lead to harm to other persons, the destruction of evidence or something along that line, which is similar to what is being put there. . . . we would not have a problem with that approach because there are very clear grounds of a fairly narrow type.[29]

6.35 Section 464C of the *Crimes Act* 1958 (Vic) provides that, before any questioning of a person in custody may take place, an investigating official must defer it for a reasonable time to allow the person to communicate with a legal practitioner, unless the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence, or that the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed.

Periods of questioning

6.36 Apart from a provision specifying that a young person may not be questioned without a break for more than two hours (discussed in more detail in Chapter 10), the Bill is silent as to the period for which a person may be questioned when appearing before a prescribed authority on a questioning or detention/questioning warrant.

6.37 The Law Council of Australia argued:

> Questioning should occur broadly in accordance with well recognised criminal investigation procedures. It should be for a defined period of 4 hours with a 4 hour extension. Any further extension beyond this should require judicial approval from the authority issuing the warrant for

28 Dr Carne *Submission 24*, p. 16.

29 *Hansard*, 22 November 2002, p. 207.

> questioning. Equally, a person being questioned should be entitled to legal representation during the process.[30]

6.38 This four hour period corresponds to the time for which a person may questioned following arrest for a federal offence.[31] (Those provisions refer to a maximum 'investigation period' of four hours, defined to exclude periods during which questioning is suspended or delayed for various reasons, such as transport of the person, attendance for medical treatment, or time spent waiting for the attendance of legal advisers, interpreters or other approved persons.)

6.39 During the public hearings, Mr Walker elaborated on why he considered the current limit in the Bill of seven days to be excessive:

> The period is one which should be adaptable in the sense that there is a maximum period during which you can be questioning — allowing, of course, for all the breaks that have to happen in questioning as a matter of humane treatment — but seven days appears excessive ... It would seem absurd that non-suspects are subjected to that much more than suspects. If we look at our ordinary criminal law, the statutes are variously four plus eight [hours] or four plus four [hours], for example, in populous jurisdictions.[32]

6.40 Mr Walker suggested that an appropriate maximum detention period imposed 'quite arbitrarily' might be 24 or 48 hours, and expressed a 'strong preference' for 24 hours.[33]

6.41 Mr Phillip Boulten on behalf of the Criminal Defence Lawyers Association (NSW) also compared the proposed provisions with the provisions for questioning suspects under the Crimes Act, namely four hours with the potential for an eight hour extension. He noted that the Crimes Act model could allow for longer periods of detention than the simple 12 hours of questioning, given that there could be substantial 'down times' for such matters as meal breaks and waiting for lawyers or interpreters to attend:

> It is very common for a person to be in a police station for the best part of a day or sometimes even into a second day, all because of still complying with four hours plus eight hours questioning. It is my submission that if ASIO cannot get the answers to their questions within four plus eight hours then either they have nothing to get from the person or the person is truly recalcitrant and uncooperative and is unlikely, then, to find themselves the subject of the criminal charges which would apply to those who refused to answer questions or who give dishonest and misleading answers. You

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30 *Submission 299*, p. 10.

31 *Crimes Act* 1914, s. 23C. The time limit in relation to Indigenous people is two hours.

32 *Hansard*, 26 November 2002, p. 254.

33 Ibid.

> cannot force people to tell you things; you can only encourage them properly to tell you things.[34]

The right to silence and privilege against self-incrimination

6.42 The Bill takes away the common law right to silence and the privilege against self-incrimination. Amongst the proposed new offences punishable by a maximum penalty of five years' imprisonment are the offences of failing to give information in accordance with the warrant, knowingly making a false or misleading statement during questioning and failing to produce any record or thing requested in accordance with the warrant, unless the person can prove that he or she does not have the record or thing (proposed section 34G). Self-incrimination is not a ground for refusing to give information or produce a thing, but that information or thing may not be used in criminal proceedings against the person (proposed subsections 34G(8) and (9)).

6.43 As the Victorian Bar noted, any information obtained by ASIO during the proposed questioning regime may, like other information gleaned in the course of gathering intelligence, be passed on to federal, State or Territory police or the NCA where it appears to relate to an indictable offence.[35]

6.44 Some submissions argued that the removal of the right to silence was unacceptable.[36] However, others noted that precedent existed in Australia in the *Royal Commissions Act* 1902 and the *National Crime Authority Act* 1984.[37]

Duty to disclose in other legislation

6.45 In Australia, there are few examples of a mandatory duty to disclose information.[38] A duty to answer questions or provide documents will only ordinarily arise either in response to a summons or subpoena, or as the result of a statutory power given to the executive to require information in specific contexts, such as customs, taxation, companies and securities regulation, social security, national security and immigration.[39] The Attorney-General may also compel the production of information relating to unlawful associations.[40]

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34 *Hansard*, 26 November 2002, pp. 233-234.

35 *Submission 307*, p. 3, referring to the ASIO Act s. 18(3) which deals with information that has come into ASIO's possession in the course of exercising its functions.

36 For example, the United Nations Association of Australia *Submission 30*, p. 3; the Women's International League for Peace and Freedom *Submission 35*, p. 3; Victorian Council of Social Services *Submission 81*, pp. 2-3.

37 Dr Stephen Donaghue *Submission 61*, p. 10.

38 Historically, the common law contained an offence of misprision of felony. This was committed where a person knew that an offence may be or has been committed but failed reasonably to disclose this to the relevant authorities (*R v. Stone* [1981] VR 737). These offences have generally been abolished and/or replaced with statutory offences that relate to compounding or concealing crimes where the person benefits.

39 For example, *Customs Act* 1901, ss. 64AE & 214B *; Income Tax Assessment Act* 1997, s. 900-175; *Australian Securities and Investment Commission Act* 1989, ss. 30–33; *Insurance*

6.46 However, various commissions of inquiry have been given powers to require information to be given. Royal Commissions have the power to compel witnesses, backed by a power to punish witnesses for contempt. The Australian Securities and Investments Commission can compel witnesses to produce documents or answer questions, backed by criminal penalties for failure to comply.[41] Under the *National Crime Authority Act* 1984 a member may, in the context of a special investigation, order a person to give evidence before a hearing or to produce a document that is relevant to a special investigation. [42]

6.47 There is, however, no general duty to disclose information that may be relevant to a terrorism offence.

The UK duty to disclose

6.48 As a result of legislative amendments in 2001,[43] there is a positive obligation in the UK to disclose information which a person knows or believes might be of material assistance in preventing an act of terrorism or securing the apprehension, prosecution or conviction of a terrorist.[44] The person must give that information as soon as reasonably practicable, which he or she may do by telling a police officer (that is, without being in custody). Failure to do so without a reasonable excuse is an offence punishable by a maximum of five years' imprisonment. (However, unlike the current Bill, the person may not be detained purely on the grounds that he or she may know something that is relevant.)

6.49 There has been some criticism of the UK duty to give information. While the duty is expressed generally, a review of the legislation has observed that 'prosecutions are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties'.[45]

Acquisitions and Takeovers Act 1991, s. 73; *Social Security (Administration) Act* 1999, Part 5, Div 1; *National Crime Authority Act* 1984, s. 29; *Inspector General of Intelligence and Security Act* 1986, s. 18; *Migration Act* 1958, ss. 18, 306D–F.

40 Under the *Crimes Act* 1914, s. 30AB the Attorney-General may require a person to answer questions, furnish information or allow documents to be inspected if he or she believes that the person has any information or documents relating to an unlawful association.

41 *Royal Commissions Act* 1902, subsection 2(1). See also *Australian Securities and Investments Commission Act 2001*, section 30; *New South Wales Crimes Commission Act 1985*, subsection 16(1); *National Crime Authority Act* 1984, subsection 28(1); *Independent Commission Against Corruption Act* 1988, paragraph 35(1)(b).

42 *National Crime Authority Act* 1984, ss. 28 and 29.

43 *Anti-Terrorism, Crime and Security Act 2001* (UK), s. 117. This followed UK legislation in the 1970s that imposed a duty on all persons to give police information relating to the commission or possible commission of terrorist offences (the *Prevention of Terrorism (Temporary Provisions) Acts 1974–1989* (UK)).

44 Ibid, section 38B. There is also a specific obligation to disclose information regarding possible offences which a person acquires in the course of a trade, profession, business or employment (Terrorism Act 2000, s. 19).

45 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, vol. 1, p. 94.

6.50 During this inquiry, Dr Greg Carne suggested the adoption of a general duty of disclosure similar to the UK provisions. He proposed an offence of non-disclosure of information without reasonable excuse 'where a person actually has information which he or she knows or believes may reasonably assist in preventing an imminent terrorist attack resulting in probable loss of life or serious injury'.[46] It is significant that this model relates to terrorist *attacks* rather than terrorist *offences*. He proposed that arrest could only be pursuant to warrant 'so as to discourage intimidation and coercion by the suggestion of criminal charges against persons merely thought to have information'.[47]

6.51 By contrast, Dr Stephen Donaghue did not support the adoption of such a duty. While he recognised its potential value, he pointed to problems:

> The difficulty, it seems to me, is that it makes people guilty of a serious criminal offence in circumstances where they might not appreciate that they had an obligation to come forward and give you the information … [T]here may well be … cases where you technically commit the offence but do not really know that you had an obligation to come forward, because in our society … you pretty much do not have an obligation to come forward and tell the police anything.[48]

6.52 Dr Donaghue preferred an approach 'whereby the lines are a bit clearer and it is quite clear what the person's obligations are', namely, that the person would only have to answer questions asked before a prescribed authority.[49] This would appear to be preferable.

Reversal of the onus of proof

6.53 The proposed offences of failing to give the information, record or thing requested in accordance with the warrant reverse the onus of proof. The person being questioned must raise evidence to prove that he or she does not have the information, record or thing (proposed subsections 34G(4) and (7)).[50]

6.54 The reversed onus was opposed by several submissions, including the Federation of Community Legal Centres (Victoria)[51] and Amnesty International, which objected on two grounds:

> [B]y removing the requirement for the prosecution to build a *prima facie* case against the defendant and shifting the burden of proof onto the person

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46 *Submission 24*, p. 12.

47 *Submission 24*, p. 13.

48 *Hansard*, 22 November 2002, p. 178

49 *Hansard*, 22 November 2002, p. 178.

50 Subsection 13(3) of the *Criminal Code* provides that the defendant bears an evidential onus.

51 *Submission 243*, p. 18; *Submission 153*, pp. 5-6 (Mr Mohammed Waleed Kadous and Ms Agnes Chong); *Submission 243*, p. 18 (Federation of Community Legal Centres (Victoria) Ltd).

> held in detention, the 'reverse onus' violates the principle of the right to be presumed innocent until proven guilty, and the right to a fair trial'.[52]

6.55 There were also concerns that these provisions would unduly impact on vulnerable detainees, including those with language difficulties and children (discussed in more detail in Chapter 10).

The privilege against self-incrimination

6.56 Ordinarily, a duty to answer questions or provide documents would carry with it an exemption corresponding to the common law privilege against self-incrimination. The privilege relates primarily to the giving of answers and the production of documents which tend to implicate that person in the commission of the offence with which he or she is charged.[53] It also extends to protect a person from revealing anything that may lead to the discovery of adverse evidence that is beyond the person's possession or power.[54] In this respect, it is a privilege against the derivative use of evidence given by the person.

6.57 It is clear that the Bill abrogates the privilege against self-incrimination. This abrogation is not unique: it also applies in relation to royal commissions and other inquiries.[55]

Use of compelled evidence: use and derivative use immunities

6.58 Normally, where the privilege against self-incrimination is abrogated, any evidence the person is compelled to give may not be used in subsequent proceedings against him or her.

6.59 The Bill protects the person against direct use of the answers in criminal proceedings against them (proposed section 34 G(9)), that is, it provides a *use immunity*. However, the Bill does not protect the person from indirect or *derivative use* of any answers they give. Thus if police find evidence based on the person's answers during questioning (for example, by later executing a search warrant of the person's premises and finding incriminating material there), that evidence may be used against the person. The Attorney-General's Department explained:

> If law enforcement agencies gain information that supports or indicates admissions that might be made by an individual in the interview … they can prosecute the individual separately on that basis …[56]

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52 *Submission 136*, p. 16.

53 *Environmental Protection Authority v. Caltex Refining Co. Pty. Ltd.* (1993) 118 ALR 392.

54 *Hamilton v. Oades* (1989) 166 CLR 486 at pp. 503, 508.

55 *Royal Commissions Act* 1902, section 6A; *Australian Securities and Investments Commission Act 2001*, section 68; *Independent Commission Against Corruption Act* 1988, subsection 37(2); *New South Wales Crime Commission Act 1985*, subsection 18B(1); The privilege against self-incrimination is not expressly abrogated by the *National Crime Authority Act* 1984. But given the obligation to answer questions, coupled with the absence of a reasonable excuse provision and the presence of a 'use immunity', the privilege may be abrogated by necessary implication.

6.60 In such a case, the prosecution would not be relying on the answers in the questioning process (which is prohibited) but on 'evidence that flowed out of what they might have learnt there'.[57]

6.61 Use and derivative use immunities reflect a balance between the competing public interest in obtaining the truth before commissions of inquiry, and the public interest in the administration of justice and prosecutions of offenders. The Joint Committee on the National Crime Authority stated the issue in this way:

> When faced with a witness who claims self-incrimination [inquiries and investigative bodies] must decide which of two outcomes is the more important to them at this stage of their investigations: the nature of the information which the witness may be able to supply, or the determination of the offences the person may (or may not) have committed.[58]

6.62 An emphasis on intelligence collection would mean a concession in relation to prosecution. This would involve a compulsion to answer questions with a protection in the form of 'use' and possibly a 'derivative use immunity'. An emphasis on prosecution, on the other hand, would mean a concession in relation to intelligence. This would involve a right to silence and to legal representation, whatever the consequences. Over the past decade, derivative use immunities have been largely abandoned, having been removed from legislation dealing with the NCA, NSW Crime Commission, ICAC and Royal Commissions.

6.63 An example of the competing policy considerations is the *National Crime Authority Act* 1984*,* which originally contained both a use immunity and a derivative use immunity that protected a witness from prosecution using any information, document or thing obtained as a direct or indirect consequence of the answer or the production of the primary evidence.[59] This reflected 'a legislative intention that the NCA should not use its coercive powers against the main suspects under investigation'.[60] Broadly, the argument was that an investigatory team should use the process to gather a wide range of evidence and develop a broad picture to further their

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56 *Hansard*, 12 November 2002, p. 9.

57 *Hansard*, 12 November 2002, p. 10.

58 Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, p. 115.

59 *National Crime Authority Act* 1984-*2000*, subsections 30(5) (offence against Commonwealth or Territory law) and 30(7) (offence against State law).

60 Donaghue, op. cit., p. 233. This view was reflected in evidence before in evidence by Ms Betty King QC, former member of the NCA, to the Joint Committee on the National Crime Authority (*Third Evaluation of the National Crime Authority*, April 1998, p. 119): 'the hearing should [not] be utilised … to bring in the people who are the subject of the investigation, but to bring in people who can provide information about the actual matter, or about the people who are the subject. You do not want to bring people in purely for the purpose of claiming self-incrimination'.

investigation. However, over time, the approach hindered investigatory teams,[61] and in 2001 the derivative use immunity was repealed. The justification was that the NCA had a critical role in the fight against serious and organised crime and that the public interest in having 'full and effective investigatory powers' and allowing for subsequent court proceedings outweighed the merits of giving full protection to self-incriminatory material.[62]

6.64 Dr Donaghue told the Committee that one of the consequences of the statutory changes is that the correspondence between the immunities and the privilege against self-incrimination has been broken:

> Going back a step, if you still have your privilege against self-incrimination, you get two things: firstly, you get to not confess …; and, secondly, you get to not give answers that will get investigators going down a train of inquiry that will ultimately lead to your incrimination. The privilege, when it exists in common law, gives you both those things. When it is abrogated, as it is in Australia, you get the first but you never get the second.[63]

6.65 Dr Donaghue told the Committee that the use immunity in the Bill was 'clearly appropriate' because the proposed regime was most likely to get information from 'bit players' rather than key suspects:

> My own view is that the only people who are motivated by the threat of five years in jail for refusing to answer questions are people who are not already serious criminals. Nobody is going to admit that they have participated in a serious terrorism offence because if they do not admit it they are going to get five years jail, because they know that the consequences are more serious if they do answer … This regime helps you with bit players; it helps you with accomplices and people around the side and it is useful to do that. When you question the bit players you want to be able to use the information that they give you to prosecute the terrorists. The bill should, in my opinion, facilitate that use.[64]

6.66 While there may be arguments in favour of also providing derivative use immunity in the questioning process, the Committee notes that the derivative use immunity has been abrogated in Australia in other legislation dealing with commissions of inquiry, as stated above. Dr Donaghue told the Committee that Australia was 'out of step with the USA, Canada and Europe'[65] but stated that he was

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61 These arguments were given in evidence before the NCA Committee: Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, p. 119.

62 National Crime Authority Legislation Amendment Bill 2001, *Explanatory Memorandum*, p. 8.

63 *Hansard*, 22 November 2002, p. 174.

64 *Hansard*, 22 November 2002, p. 171.

65 Dr Donaghue stated that in the USA, Canada and the UK (as a result of Article 6 of the European Convention on Human Rights) the removal of the privilege against self-incrimination without providing protection against derivative use of the information was not permitted.

not arguing for derivative use immunity in the Bill, 'essentially because I think that is largely a lost argument':

> If this bill were to give a higher level of protection, that would surprise me, because I would have thought that terrorism offences were at the more serious end of the offences that you are trying to find with these things. I cannot see why you would give a terrorist suspect more protection than a drug runner or a murderer.[66]

Use of the evidence: the hearsay rule

6.67 'Evidence' before the prescribed authority would not automatically be admissible in subsequent civil or criminal proceedings because of the hearsay rule. As Dr Donaghue explained:

> There are problems with using the information that is given under coercive questioning, not because of any human rights issues or fairness issues, but because of the straight hearsay rule that applies normally — that is, if you tell one body something then that is not evidence in a court unless you can get the person to repeat it [subsequently before a court].[67]

6.68 Dr Donaghue noted that the hearsay difficulty has been overcome in other legislation, such as the *Australian Securities and Investments Commission Act* 1989*,* and suggested similar provision should be made in this Bill.[68] He referred to sections 77 to 79 of that Act, which allow for statements made at an ASIC examination to be admitted in evidence before a court or tribunal when the witness is absent, and provide guidance as to how that evidence should be treated.

6.69 There is no such provision in the Bill. Thus answers and documents given before the prescribed authority may have little direct impact upon third parties because it may be difficult to get the person to repeat the evidence in court if they might incriminate themselves in so doing.

Uncertainty as to how the information might be used

6.70 The Victorian Bar criticised the lack of provision in the Bill for the manner in which the information may later be used.[69]

6.71 While the Bill clearly provides that statements before a prescribed authority cannot be used as direct evidence against the person, there may be an argument that statements may be used for limited purposes. They might be admissible to prove prior inconsistent statements, provided they are used solely for the purpose of attacking the

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66 *Hansard*, 13 November 2002, pp. 174-175.

67 Dr Stephen Donaghue, *Hansard*, 22 November 2002, p. 171.

68 Dr Stephen Donaghue, *Hansard*, 22 November 2002, p. 171.

69 *Submission 307*, p. 4. The submission also argued that if basic rights were to be abrogated, the justification needed to be clearly made out.

credibility of the witness rather than proving an incriminating fact.[70] It may also be the case that inferences could be drawn from a person's silence.[71] Drawing on the UK experience of the removal of the right to silence, one submission suggested that 'Whilst it initially was meant to relate only to suspected terrorists, we now see that adverse inferences may be drawn against persons remaining silent in the face of questioning'.[72] The Committee received no further evidence on these issues, but notes the concerns.

Tainting of evidence

6.72 While it is clearly intended that statements made before a prescribed authority may be used as evidence against third parties, the Committee received some evidence to suggest that the way in which the evidence was obtained might limit its use.

6.73 Professor George Williams argued that '[i]ncreasing the volume and intensity of information gathering through additional coercive methods' might lead to the gathering of information that is inadmissible in court. In particular, he said:

> The lack of procedural fairness resulting from how the evidence has been collected may prejudice the reliability of the material and the capacity to have a fair trial.[73]

6.74 For example, it is possible that a judge in a criminal trial might reject the evidence on the basis that it was obtained 'under duress'. Section 84 of the *Evidence Act 1995* requires that evidence must be rejected if it was by influenced by violence or by certain other conduct, including 'oppressive, inhuman or degrading conduct' or a related threat. Section 138 of the Act also allows evidence to be rejected if it is obtained improperly or in contravention of the law. A judge may take into account whether the impropriety 'was contrary to or inconsistent with a right of a person recognised by the International Covenant on Civil and Political Rights'.[74] A particular concern is whether an official does something in the course of questioning which he or she ought reasonably to know is 'likely to impair substantially the ability of the person being questioned to respond rationally to the questioning'.[75]

6.75 However, it might be difficult to argue that evidence obtained under a lawful warrant should be rejected, provided there is no breach of the legislation, regulations or protocols. So, in considering whether to reject evidence, a judge may also consider

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70 See Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, 2001, pp. 212–213 discussing a Canadian case: *R v. Kuldip* (1990) 61 CCC (3d) 385.

71 The rule in *Jones v. Dunkel* (1958-59) 101 CLR 298 provides that a defendant's failure to give evidence at his or her own trial can lead to adverse inferences as to their guilt. It is unclear how this rule would apply in the context of a compulsory questioning process.

72 New South Wales Young Lawyers Human Rights Committee *Submission 141*, p. 2.

73 *Submission 22*, p. 7.

74 *Evidence Act* 1995, paragraph 138(3)(f).

75 *Evidence Act* 1995, paragraph 138(2)(a).

the significance of the evidence, the seriousness of the offence and the extent to which it is or is not possible to obtain the evidence in other ways.

6.76 The Attorney-General's Department acknowledged that there 'may be some scope for the operation of [section 138] where the subject of a warrant commences civil proceedings'. However, the Department pointed to various mitigating factors:

> The Bill provides that the subject of a warrant must be treated with humanity, respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment (s34J). Further, the Inspector-General of Intelligence and Security may inform the prescribed authority about any concerns he or she may have about illegality or impropriety in connection with the exercise of powers under a warrant. The prescribed authority may give a direction deferring questioning until satisfied that the concerns have been satisfactorily addressed (s34HA). These protections would prevent any evidence being tainted by improper or illegal behaviour and further limit the practical application of sections 84 and 138 of the *Evidence Act 1995*.[76]

Possible exemptions from the duty to disclose

6.77 Some submissions expressed concern that people could be compelled to answer questions and produce documents in spite of particular duties of confidence arising from the nature of their professions. In particular, the application to doctors and lawyers,[77] members of parliament and the judiciary,[78] and journalists[79] was questioned.

Journalists

6.78 Minter Ellison Lawyers on behalf of John Fairfax Holdings Ltd proposed an alternative model for journalists. Principal among their concerns was that the measures would 'place journalists in a position of conflict with their professional obligations'[80] that would 'affect [them] in their role as gatherers, holders and dispersers of information'[81] and, ultimately, reduce the 'free flow of information essential to a functioning democracy'.[82]

6.79 In evidence, Mr Michael Gawenda, editor of *The Age*, elaborated on those concerns:

> Compelling journalists to divulge information goes to the heart of our profession and how we serve the public interest. The protection of sources is

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76 Attorney-General's Department 'Answers to questions on notice', 21 November 2002.

77 Amnesty International *Submission 136*, p. 21, Mr Chris Connors *Submission 2*.

78 NSWCCL *Submission 132*, p. 3.

79 NSWCCL *Submission 132*, p. 3; John Fairfax Holdings Ltd *Submission 142*.

80 John Fairfax Holdings Ltd *Submission 142*, p. 2.

81 Ibid, p. 1.

82 Ibid, p. 4.

> fundamental to how we do our job. If we cannot give assurances of confidentiality to sources, we cannot report … Stated plainly, this bill in its current form places all journalists in the invidious position of breaking their professional bond and code of ethics or defying legal authority and risking severe penalties for doing so. At the same time we recognise that our ability to protect our sources is not absolute. If it is to be overwritten, however, it should only be in the most compelling circumstances.[83]

6.80 John Fairfax Ltd argued for a qualified privilege in which a journalist could not be subject to a warrant unless the issuing authority 'is satisfied that it is the only way to get the information, that it is necessary and that it is in the public interest'.[84] This proposal was supported by a joint submission from the ABC, Commercial Television Australia and SBS.[85]

6.81 The Committee notes that a concern that the public interest in the free flow of information must be weighed against the public interest in preventing possible acts of terrorism. As the Attorney-General commented in the very early stages of the debate:

> We're talking about life and death situations. I don't think the interests of journalism weigh heavily in the balancing exercise that we're engaging in here.[86]

6.82 There are also practical issues that limit the effectiveness of this approach. A test that is based on a showing that 'the intelligence cannot be collected by any other means'[87] is only slightly stronger than the test proposed in the Bill 'that relying on other methods of collecting intelligence would be ineffective'.[88] Moreover, both tests would seem to rely on information that is only within the control of ASIO.

6.83 A more considerable problem may be the test that the warrant must be 'in the public interest'[89] or that it must 'not be contrary to the public interest'.[90] This seems merely to restate the issuing authority's ultimate task of balancing public interests.

Legal professional privilege

6.84 The Bill is silent on legal professional privilege, that is, the protection of confidential communications between lawyers and their clients. The Committee was concerned to know whether it was intended that lawyers might be subject to the duty to answer questions before a prescribed authority, either in relation to information

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83 *Hansard*, 22 November 2002, p. 180.

84 Mr Bruce Wolpe, ibid, p. 183.

85 *Submission 405*.

86 The Hon. Daryl Williams MP, 'Attorney-General Defends New Anti-Terrorism Laws' Transcript of Interview, *Lateline*, 27 November 2001.

87 *Submission 142*, p. 5.

88 Proposed paragraph 34C(3)(b).

89 Mr Bruce Wolpe, *Hansard*, 22 November 2002, p. 183.

90 *Submission 142*, p. 5.

received while advising a client being questioned under this regime or in relation to previous confidential communications with clients.

6.85 The modern rationale for legal professional privilege is the need to ensure that there is a freedom and candour of communication between lawyer and client:

> [I]ts justification is to be found in the fact that the proper functioning of our legal system depends upon a freedom of communication between legal advisers and their clients which would not exist if either could be compelled to disclose what passed between them for the purpose of giving or receiving advice.[91]

6.86 The privilege is more than a rule of evidence or procedure: it is part of the common law.[92] Traditionally, it protects communications in the context of actual or anticipated legal proceedings. It also protects other 'professional communications in a professional capacity' between lawyers and clients.[93] Moreover, the privilege may protect communications between lawyers and third parties when they are prepared for, or in contemplation of, existing or anticipated litigation.[94]

6.87 A representative of ASIO told the Committee that lawyers appearing before the prescribed authority would be protected by legal professional privilege, stating:

> … normally under statutory interpretation, if one is to exclude legal professional privilege, it has to be either explicitly provided for or it has to be implicitly necessary in order to give effect to the legislation.[95]

6.88 The fact that the Bill expressly abrogates the privilege against self-incrimination but not legal professional privilege suggests an intention that lawyer-client privilege should be preserved. On the other hand, the fact that there is a clear obligation to answer questions and a statutory use immunity could arguably indicate that lawyer-client privilege is abrogated by 'necessary implication'.

6.89 Given the importance of this privilege in preserving free communications between lawyer and client, it may be desirable to spell out in legislation that legal professional privilege is not affected.

No indemnity for breach of confidence

6.90 A related issue is the extent to which a person who has been compelled to produce information should be indemnified for any breach of confidence or breach of

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91 *Baker v. Campbell* (1983) 153 CLR 52, per Dawson J at p. 128. Traditionally, the rationale of the privilege was understood to be the 'maintenance of confidence pursuant to a contractual duty which arises out of a professional relationship' (ibid).

92 Ibid.

93 Ibid, per Dawson J at p. 128.

94 Suzanne McNicol, *The Law of Privilege*, Law Book Company, 1992, p. 46. See also *Nickmar Pty Ltd v. Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 44.

95 *Hansard*, 26 November 2002, p. 273.

any other personal or statutory duty of confidence or secrecy. The Anti-Terrorism, Crime and Security Act 2001 (UK) introduced, in relation to control over terrorist assets and finances, a duty to disclose, along with indemnities for disclosure. The Committee notes that there is no such provision in this Bill.