Chapter 8

ALTERNATIVE MODELS

8.1 In submissions and evidence attention was squarely focused on a choice as to which agency should be responsible for questioning before the prescribed authority. Attention focused predominantly on a choice between ASIO and the AFP. However, in addressing that choice, other alternatives were proposed that focused more widely to include a choice as to the agency responsible for overseeing questioning. Attention focused on the proposed Australian Crime Commission, the Canadian investigative hearing model, a royal commission model and a special tribunal of retired judges.

8.2 Each is discussed in turn below.

The questioning agency

8.3 A large number of submissions argued that the new functions had the potential to turn ASIO into a 'state police' or 'secret police'.[1] The NSW Council for Civil Liberties argued that the Bill would effect 'a fundamental shift in the role of ASIO and in the rights of Australian citizens both in the extent of the powers of detention given and the fact that the powers are being given to a body with little or no public accountability'.[2]

8.4 Four federal ALP parliamentarians submitted that questioning should be conducted by the AFP, with ASIO 'able to observe and assist with questioning'.[3] Consideration of such a suggestion was the first term of reference for this inquiry.

8.5 The proposal met with some criticism. Dr Greg Carne opposed the model on the basis that it would become 'over time a de facto form of custodial questioning of non-suspects which is indistinguishable in practical terms from the custodial questioning of persons reasonably suspected of terrorism offences'.[4]

8.6 Both ASIO and AFP also argued against the transfer of function. The Director-General of ASIO rejected the suggestion on the basis that AFP 'is focused on law enforcement and the collection of information directly related to its law enforcement investigations' whereas ASIO is 'more at the preventive end of the spectrum, consistent with the wording in the [ASIO Act]'.[5] The AFP Commissioner

---

1 For example, the Islamic Council of NSW, *Submission 234*, p. 1.

2 *Submission 132*, p. 1

3 Mr Kim Beazley MP, Senator John Faulkner, Mr Daryl Melham MP and Senator Robert Ray *Submission 133*, p. 4.

4 *Submission 24A*, p. 2.

5 *Hansard*, 12 November 2002, p. 5. Presumably, the Director-General was referring to the statement of ASIO's functions in section 17 of the ASIO Act

indicated that '[t]he AFP has consistently maintained the view that it does not believe that compulsory questioning powers should be given to the [AFP]'.[6] The AFPA indicated that their 'NICLE'[7] model did not point to any greater role for the AFP.[8]

8.7 The Law Council of Australia opposed questioning by either the AFP *or* ASIO, but supported the vesting of coercive questioning powers in the ACC.[9] The AFPA, having pointed to disadvantages in the AFP being given coercive intelligence gathering powers, also suggested that the ACC might be an appropriate alternative.[10]

ASIO

8.8 ASIO is an intelligence-gathering agency, not a law enforcement body. Much of what it would want to do is covert and is not captured by the standard rules applying to warrants in relation to law enforcement bodies. It does have certain powers, such as powers to conduct searches of premises and powers relating to telephone interceptions, listening devices, tracking devices, and computer access which are governed by warrants. But, in exercising these powers, ASIO does not perform a law enforcement role or maintain a direct relationship with the criminal justice system.

Roles and responsibilities

8.9 The *Australian Security Intelligence Organisation Act* 1979 defines the roles, functions and powers of ASIO. One of the functions of ASIO is to 'obtain, correlate and evaluate intelligence relevant to security'.[11] Another is to supply security assessments to Commonwealth agencies. These contain advice about whether a 'prescribed administrative action' should be taken regarding individuals on security grounds, such as denying them entry to Australia or access to sensitive information.

8.10 ASIO may communicate intelligence to appropriate persons or authorities[12] and provide advice to Ministers, authorities and other prescribed persons.[13] Specifically, it may communicate intelligence to State authorities in respect of a proposed 'prescribed administrative action' in that State that would affect security for the purposes of the Commonwealth.[14] The Minister may not override the opinion of

---

6 *Hansard*, 14 November 2002, p. 73.

7 Nationally Integrated Criminal Law Enforcement Model: *Submission 144*, Attachment: 'Australia's National Security Response: "Time to bring Order to the Law"', p. 3.

8 '[t]here was some concern that we were putting forward a model to expand the role of the AFP. That was not the intention at all': *Hansard*, 18 November 2002, p. 135.

9 *Submission 299*, p. 4.

10 *Hansard*, 18 November 2002, p. 140.

11 *Australian Security Intelligence Organisation Act* 1979, paragraph 17(1)(a).

12 Ibid., paragraph 17(1)(b).

13 Ibid., paragraph 17(1)(c).

14 Ibid., section 40. This is subject to a restriction that, in effect, intelligence is only to be communicated to a State authority through a Commonwealth agency and in the form of a security assessment.

the Director-General 'concerning the nature of the advice that should be given'.[15] Nor may s/he override the Director-General's opinion concerning the appropriateness of targeting a particular person without a written direction containing reasons, which is copied to the Inspector-General and the Prime Minister.[16] The Act does not give ASIO any guarantee of access to information held by other agencies, but other legislation permits relevant authorities to disclose to ASIO certain restricted information, such as that relating to taxation[17] or financial transactions.[18]

AFP

8.11 The AFP has primary responsibility for investigating offences against Commonwealth laws. Commonwealth offences are found in the *Crimes Act* 1914, the *Criminal Code* and in a raft of other Commonwealth legislation such as the *Customs Act* 1901. The AFP also has links with police services in the States and Northern Territory, the NCA, the Australian Transactions Reports and Analysis Centre (AUSTRAC) and the Australian Customs Service (ACS). Its criminal intelligence liaison staff are based in 16 countries. It has a representative attached to Interpol and provides members for United Nations peacekeeping operations. The AFP also undertakes special functions–such as providing for the safety and security of individuals and interests identified by the Commonwealth or the AFP as being at risk.

Roles and responsibilities

8.12 The *Australian Federal Police Act* 1979 describes the powers and functions of the AFP. These functions include the provision of 'police services' for the Australian Capital Territory and in relation to Commonwealth laws, property and places. 'Police services' relate to crime prevention, protection of persons against injury or death and protection of property from damage.[19] The special areas of focus in 1999-2001 were:

> countering and otherwise investigating illicit drug trafficking, organised crime, serious fraud against the Commonwealth, money laundering and the interception of assets involved in or derived from these activities … continuing to develop a capacity to deal with new forms of criminal activity requiring special attention to be directed at the investigation of economic crime, in all its forms, transnational crime and crime involving information technology and communications (including electronic commerce).[20]

---

15 Ibid., subsection 8(4).

16 Ibid., subsection 8(5).

17 The Tax Commissioner may 'despite any taxation secrecy provision … disclose tax information to an authorised ASIO officer if [s/he] is satisfied that the information is relevant to the performance of ASIO's [statutory] functions': *Taxation Administration Act* 1953, section 3EA.

18 A similar discretion is afforded to the Director of AUSTRAC: *Financial Transaction Reports 1988*, section 27AA.

19 *Australian Federal Police Act* 1979, s. 4(1).

20 Australian Federal Police, *Annual Report 2000-2001*, p. 12.

Cooperation with ASIO

8.13 The *Crimes Act* 1914 empowers a police officer executing a search warrant[21] to obtain such assistance 'as is necessary and reasonable in the circumstances' and a person who is not a constable may otherwise be authorised to assist so far 'as is necessary and reasonable in the circumstances'.[22] In *Dunesky v. Commonwealth* the High Court upheld the use of Australian Tax Office officials to help identify relevant material to police investigating fraud offences.[23] Arguably, this would also allow ASIO officers to assist the AFP in executing search warrants.

Responsibility for questioning

As noted above, both ASIO and AFP rejected any transfer to the AFP. Commissioner Mick Keelty explained that the desired outcome of the questioning process needed to be considered:

> The consequences of the AFP interviewing somebody under caution are that more likely than not if they made self-incriminatory remarks they would be charged and prosecuted. As I understand it, the purpose of ASIO having access to the powers to make somebody make self-incriminatory remarks is to discover the whole framework or picture of the issue that they are dealing with … The consequences of what they say to an ASIO questioner are quite different from those if questioned by the police.[24]

8.14 He pointed to the perceptions of those being questioned:

> I think it would be hard for an individual to see the AFP acting in one circumstance as a police organisation that is going to make an arrest and launch a prosecution, and then see the same organisation - the Australian Federal Police, with Australian Federal Police powers - coming to talk to them in a circumstance that is not going to have the same sort of outcome. I think the effectiveness on the individual would be less if the AFP did it.[25]

8.15 In addition, he remarked that the changed role could be difficult for police:

> We are trained to provide people with a clear outline of their rights before interviewing them and with a clear understanding of access to legal assistance. It would be very different for us to then have a section of the organisation that goes out and acts quite differently.[26]

---

21 Warrants may be executed by Commonwealth or State or Territory police.

22 *Crimes Act* 1914, section 3G.

23 See *Dunesky v. Commonwealth* (1996) 89 A Crim R 372.

24 *Hansard*, 14 November 2002, p. 77.

25 *Hansard*, 14 November 2002, p. 79.

26 *Hansard*, 14 November 2002, p. 79.

Expertise in subject matter and familiarity with process

8.16 Various submissions pointed to the relative expertise of the AFP and ASIO and the application of that expertise to the task of questioning to obtain intelligence in relation to terrorist acts. A number of witnesses recognised the subject matter expertise of ASIO in relation to intelligence and politically motivated violence. The Director-General of ASIO said: 'I would have thought the interests of the community would be served by people with subject knowledge doing the questioning'.[27]

8.17 Chris Maxwell QC, while disagreeing generally with the measures proposed in the Bill, said that, in his view, 'if it were going to be effective, I would want ASIO doing the questioning … it seems to me that you would want the expert asking questions'.[28] Similarly, while concerned about issues of secrecy and accountability, Professor Williams acknowledged that 'the proposal, sensibly, has a key role for ASIO in the questioning'. He would prefer that questioning was conducted by AFP, but that 'ASIO should [not] be denied from asking questions that they think are relevant'.[29]

8.18 Other submissions emphasised the procedural expertise of the AFP. For example, the AFPA argued that '[h]olding individuals for questioning, interaction between lawyers and suspects or detained witnesses and collection of evidence or intelligence within a tightly legislated environment are classic police functions'.[30] On the other hand. it also argued, based in part on the ASIO focus on politically motivated violence, that '[t]he work of ASIO and the AFP, while not identical, has gradually come to overlap'.[31]

Expertise in collection of evidence

8.19 Another difficulty is the extent to which actual intelligence collection practices may be incompatible with the rules regarding the collection of evidence. The AFPA pointed to the fact that 'ASIO would find itself in the position of dealing with evidence with all the handling, disclosure and open court consequences that go with such handling'.[32] Victoria Police emphasised 'the need to ensure that any information that comes into the hands of police … is admissible in any criminal proceeding'.[33] In respect of their involvement in the process, they said:

> If operational police were to assist ASIO … then it would do so under the clear understanding that if criminal offences were detected then the

27 *Hansard*, 12 November 2002, p. 34.

28 *Hansard*, 22 November 2002, p. 210.

29 *Hansard*, 13 November 2002, p. 71.

30 *Submission 144*, p. 8.

31 *Submission 144*, p. 4.

32 *Submission 144*, p. 9.

33 *Submission 241*, p. 1.

> standards of investigation, interview and detention as required under the *Crimes Act* 1958 (Vic) should be followed in all cases.[34]

Secrecy

8.20 One area of concern related to the secrecy attached to ASIO activities and ASIO officers. The AFPA argue that the '[p]rotection of identity of ASIO officers by law in all cases is curious and inconsistent with accountability regimes that apply to persons with powers of arrest, detention and interrogation'.[35] A similar view was expressed by Professor Williams who thought it would be 'difficult, if not impossible, for ASIO both to be sufficiently secretive to adequately fulfil its primary mission, as well as to be sufficiently open to scrutiny to exercise the powers set out in the ASIO Bill'.[36] The New South Wales Council for Civil Liberties similarly said that '[t]he nature of ASIO's secrecy provisions work against its ability to effectively police terrorism and these new powers are incompatible with its traditional functions'.[37]

Accountability

8.21 A related issue was the relative lines of accountability that applied to ASIO and AFP. This is discussed more fully in the context of protocols and safeguards.

Coordination and cooperation

8.22 A basic issue is whether the proposed powers must be vested in one agency or whether possible competing structures or purposes can be resolved by cooperation.

8.23 The AFP Commissioner stated that '[t]he general relationship between the AFP and ASIO has historically been cooperative and very close in relation to some specific cases of mutual interest'. Since the events in New York and Bali, he said 'that relationship has been further developed' describing it as 'a genuine partnership to protect the interests of the Australian community'.[38] He indicated that there were 'no impediments' to the sharing of information or intelligence between ASIO and AFP.[39]

8.24 The AFP Commissioner indicated that AFP already had an extensive cooperation framework with ASIO. In its regional and head offices, it has a number of 'protective security investigators' who act as the 'day to day go-betweens between the AFP, ASIO regional offices and ASIO headquarters'.[40] At the national level, AFP and

---

34 *Submission 241*, p. 1.

35 *Submission 144*, p. 9.

36 *Submission 22*, p. 5.

37 *Submission 132*, p. 1.

38 *Hansard*, 14 November 2002, p. 74.

39 *Hansard*, 14 November 2002, p. 75.

40 *Hansard*, 14 November 2002, p. 75.

ASIO cooperated via the PSCC where, for example, the agencies 'exchange information about threat levels against missions or high office holders'.[41]

8.25 The Committee's attention was drawn to the establishment of a Joint Counterterrorism Intelligence Coordination Unit, comprised of AFP, ASIO, ASIS, DIGO and DSD officers, that aimed to ensure a 'seamless transition between intelligence and criminal investigations involving terrorists and terrorist related acts'.[42] Along with the Unit is a proposed 'counterterrorism information oversight committee' that would 'determine when an intelligence matter becomes a criminal investigation' and enhance the transfer of information and intelligence in relation to such issues.[43]

8.26 Against these considerations is an obvious argument based on efficiency. One concern raised by AFPA is the possible multitude of agencies involved. It argues that 'the public is being denied a cohesive response by Government due to the existence of an excessive number of agencies [whose] roles and jurisdiction cannot be clearly delineated or kept accountable'.[44] The Queensland Police Service also argued:

> It is difficult to see how the sharing of security intelligence gathering powers between the two agencies could bring about *more* efficient or effective security intelligence arrangements.[45]

Extraterritoriality

8.27 Some concerns relate to the offshore interaction between AFP and ASIO. ASIO is primarily focused on gathering intelligence on threats to domestic security. AFP has both an international and domestic capacity. AFPA argue that, as overseas terrorists will ordinarily be the target, there would be a conflict between ASIO and AFP.[46] In particular, they argue, action by ASIO may frustrate AFP investigations.[47]

8.28 The offshore issue may pose problems for the operation of ASIO and AFP. Anti-terrorist laws are largely domestic but the threat to Australia may be largely international. In the *Protective Security Review*, Justice Hope suggested that the international threat was more significant in Australia than the domestic threat: 'the greatest risk appears to be the possibility of international terrorist activity originating from abroad'.[48] This international aspect may require that terrorism laws operate extraterritorially. In turn, particular issues may arise in relation to extradition, mutual assistance with other countries in criminal matters, prisoner exchange arrangements and other practical considerations.

---

41 *Hansard*, 14 November 2002, p. 75.

42 Commissioner Mick Keelty, *Hansard*, 14 November 2002, p. 73.

43 *Hansard*, 14 November 2002, p. 73.

44 *Submission 144*, p. 3.

45 *Submission 205*, p. 2.

46 *Submission 144*, p. 9.

47 *Submission 144*, p. 9.

48 Protective Security Review, p. xv.

8.29 On the other hand, both ASIO and AFP have an offshore mandate and capacity. ASIO's statutory mandate *does* relate to the protection of the Commonwealth and the States and Territories, and their people, from politically motivated violence (including terrorism) '*whether directed from, or committed within, Australia or not*'.[49]

Practical issues

8.30 An issue of practical concern is that, regardless of whether AFP might have primary responsibility, ASIO is likely to have an active presence in the questioning. Although this might not be a formal role,[50] it could have significant implications. This was stated by the Director-General of ASIO as a primary motivation for the Bill:

> [D]espite the fact that in other jurisdictions it is the police who do this, invariably sitting behind the police are security intelligence organisations. We actually put forward the suggestion that in the interests of transparency and accountability, given that nine times out of 10 it would be ASIO information that would lead to the activation of legislation like this, it should be ASIO that is up front … and … accountable in respect of it. We thought the time had come, that standards and attitudes have moved on to a point where rather than sitting behind law enforcement in this situation, as happens in other jurisdictions, we would go one step further.[51]

Wider issues

8.31 Arguably, more is at stake in the Bill than the choice between ASIO and AFP. A number of submissions and witnesses argued that structural issues, such as the choice between ASIO and AFP, wrongly diverted attention from operational issues, such as the incidents of the compulsory questioning and detention powers. One submission expressed the view that 'exactly the same arguments in relation to civil liberties [that apply to the regime involving ASIO] apply to any regime involving AFP'.[52] FCLC Victoria argued that '[c]learly, it is no more appropriate for the AFP to be able to detain and question non-suspects' than for ASIO to perform this function.[53]

8.32 The Islamic Council of Victoria suggested that '[t]he detention of any person not suspected of a crime is unacceptable regardless of who carries out the detention' and that '[t]o grant these powers to police would be just as serious a violation of democratic rights as for ASIO'.[54] Similarly, the Islamic Council of NSW argued that 'the detention and interrogation powers themselves are draconian, and therefore

---

49 *Australian Security Intelligence Organisation Act* 1979, section 4.

50 In evidence before the Committee, the legal adviser for ASIO, said: 'I am not aware of ASIO ever being cloaked with AFP authority for the purposes of interviews': *Hansard*, 13 November 2002, p. 40.

51 *Hansard*, 12 November 2002, p. 34.

52 *Submission 12*, p. 4.

53 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 7.

54 *Submission 135*, p. 2, emphasis added.

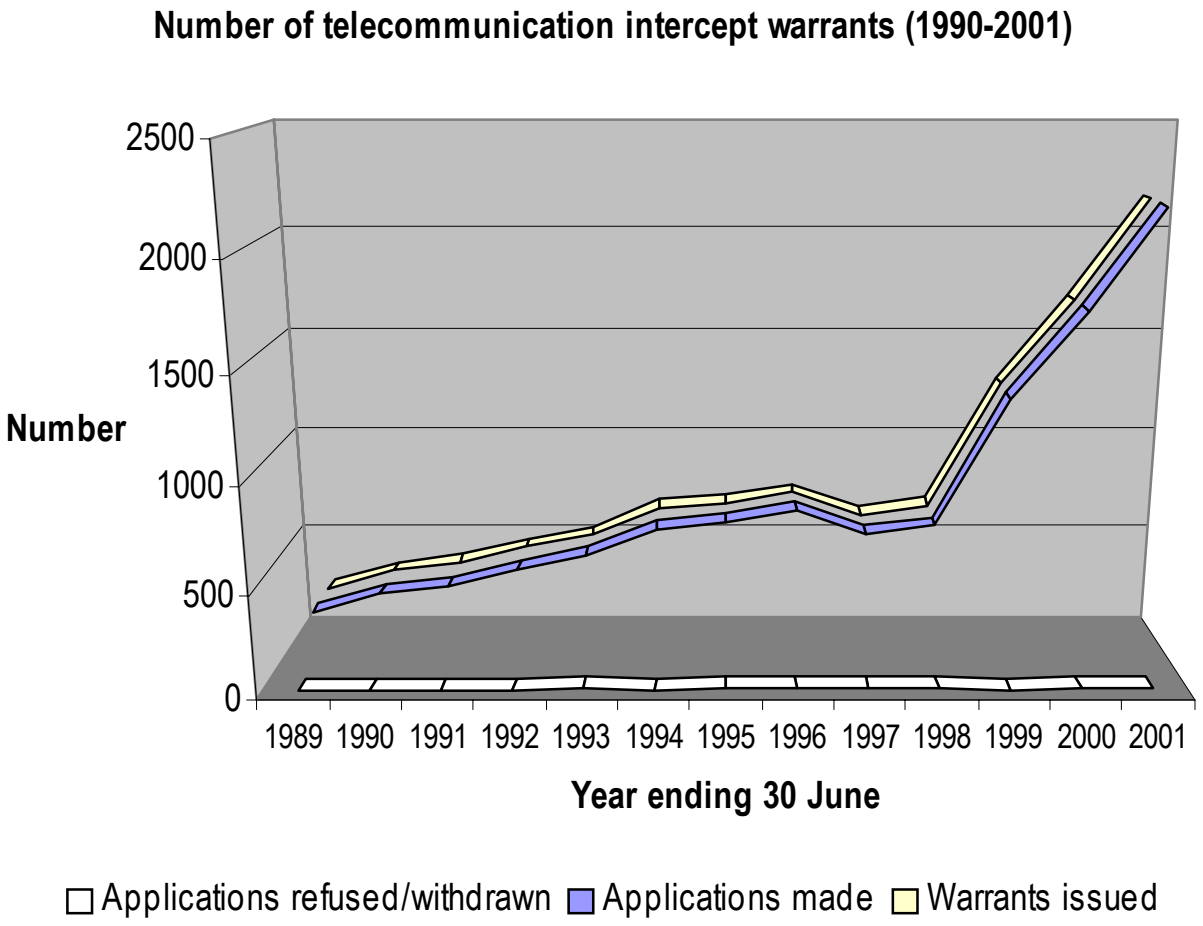
shouldn't simply be transferred to another agency, such as the [AFP] as a compromise to avoid the problem of transforming ASIO into a secret police'.[55]

The Prescribed Authority

The AAT

8.33 Various submissions argued that the AAT, members of which would be prescribed authorities, is not sufficiently independent of the government to maintain public confidence in the warrants process. Concerns were expressed by reference to its performance in relation to other warrants and its role in relation to merits review.

8.34 Since 30 June 1998, when AAT members were empowered to issue telecommunications interception warrants there has been a rapid growth in the number of warrants sought and issued. The graph below represents statistics drawn from reports published by the Attorney-General's Department between 1991 and 2000[56] and answers to questions on notice from the Attorney-General's Department.[57]



55 Islamic Council of NSW, *Submission 234*, p. 1.

56 Pursuant to the *Telecommunications (Interception) Act* 1979, paragraph 100(2)(a).

57 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 8.

8.35 The suggestion was that these statistics demonstrated insufficient impartiality. Dr Greg Carne argued '[i]t is no coincidence that the explosion in telecommunications interception warrants has occurred when the task of issuing the warrants has been assigned to AAT members'.[58] In response, the Attorney-General's Department argued that the increase in warrants was indeed a coincidence, attributable to other factors:[59]

- increasing availability of telecommunications services, particularly pre-paid mobile services and increased use of such services by criminals;
- a general increase in government funding during certain years for law enforcement agencies under major law enforcement initiatives such as the National Illicit Drug Strategy;
- changes in work practices and technology which have led to more efficient and effective use of agencies' capacity to execute warrants; and
- increased success in the use of TI product in fighting crime.

8.36 The Department also suggested that law enforcement agencies were 'well educated and advised in relation to the grounds on which TI warrants may be issued' and that this was reflected in the low rate of refusals on technical grounds.[60]

8.37 Another suggestion was that the proposed new role was incompatible with its existing merits review role. Liberty Victoria made the following argument:

> It is manifestly inappropriate for an independent body, established as a mechanism by which citizens can hold the executive accountable for its decision, to be the body from which individuals are drawn to supervise the forced examination of detained persons by an agency of the executive Government … The proposed scheme would render the AAT member an active participant in the conduct of an investigation.[61]

8.38 Dr Greg Carne has suggested that prescribed authorities should not be appointed from the Administrative Appeals Tribunal unless they have tenure pursuant to subsection 8(2) of the *Administrative Appeals Tribunal Act* 1975. Subsection 8(2)

> is intended to provided greater capacity to resist Executive and bureaucratic pressure in the exercise of functions and discretions, to lessen the seeking of preferment or reappointment to higher levels of seniority in the AAT, and to provide public reassurance of non-judicial independence.[62]

8.39 Other concerns as to whether AAT members should serve as the Prescribed Authority were raised in relation to alternative models which are discussed below.

---

58 *Submission 24*, p. 15.

59 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 9.

60 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 9.

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

62 *Submission 24*, p. 15.

Retired judges

Generally

8.40 A simple alternative to the AAT model was the appointment of retired judges as prescribed authorities. In relation to other models (discussed below), Dr Donaghue suggested that this approach would increase public confidence in the questioning and detention process and 'increas[e] the prospect that there would be adequate independent assessment of the need to invoke the procedures set out in the Bill'.[63] He or she would be 'better placed to ensure that the questioning was appropriate'.

8.41 Dr Donaghue elaborated on his support for a retired judge in evidence:

> 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 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 an AAT member, who is likely to have had a less distinguished legal career and is likely to be dependent on the government for their continued appointment to the AAT. If it is a safeguard, it is a better safeguard in my view. There are certainly a great many … retired judges who would exercise that function very vigorously.[64]

8.42 He also suggested the appointment of sitting judges of the State Supreme Courts. It is unclear to the Committee whether there may be a separation of powers issue in relation to this aspect of the proposal. In *Kable's Case* the role of State judges was examined in the context of a State preventive detention regime. The concerns expressed in the judgments in that case may indicate that such an issue does arise, given the capacity of these judges to exercise federal judicial power.

Special tribunal

8.43 A related recommendation was the establishment of a special tribunal.

8.44 The views of Dr Gavan Griffith QC were discussed in Chapter 5. Basically, his submission was that the line of authority supporting *Grollo v. Palmer*, and the *persona designata* doctrine in Australia,[65] was based on 'fragile and impermanent reasoning.'[66] He argued that the High Court was likely to evolve 'to a position to find that warrant powers are incompatible with judicial function'.[67] Accordingly, he

---

63 Ibid, p. 8.

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

65 *Church of Scientology v. Woodward*; *Jones v. Commonwealth* (1987) 71 ALR 497; *Hilton v. Wells* (1985) 157 CLR 57

66 Dr Gavan Griffith QC, *Submission 235*, p. 2

67 Dr Gavan Griffith QC, *Submission 235*, p. 2

pointed to the need for a tribunal charged with issuing warrants under the Bill along with other coercive warrants for ASIO and AFP:

> In the 17 years since *Hilton v. Wells* there has been an obvious need to establish an impartial authority, possibly constituted by retired federal or other judges, to maintain public confidence in the issue of warrants such as interception warrants and, now, the warrants under the ASIO Bill.[68]

8.45 In evidence he elaborated on the nature of his recommendation:

> My own suggestion is that it would be appropriate, if it is desired to keep a public confidence in the process, to establish some form of tribunal, particularly constituted by a retired federal judge … There is no difficulty about that and that would seem to be a more appropriate mechanism, both for the purpose of signing the warrants and I would suggest also for the purpose of being the examining authority. If it is the case, as Mr Richardson says, that it may only happen [irregularly] … it would seem to me there would be no difficulty in having a particular examining authority designated, or several authorities, such as a retired judge. You would only need one or two throughout Australia for the process. You do not have to have pot luck of any member of the Administrative Appeals Tribunal who, to some extent, even though it is required that they be a qualified lawyer, may have no further experience than that of a conveyancing clerk.[69]

8.46 The suggestion for establishment of a tribunal of retired judges received significant support. The Victorian Bar thought it 'had a tremendous amount to commend it'.[70] Dr Donaghue had originally suggested that the ACC be taken as a model but withdrew because of his concern with the powers being triggered by a police board rather than a board of ministers. He deferred to the suggestion of Dr Griffith and said that there was 'effectively no difference' between the model proposed by Dr Griffith and the Canadian investigative hearing model

> In each case you have a small group of people who you can give coercive powers to in a specific range of circumstances who will supervise the questioning that occurs. You could do that under the Royal Commissions Act with about two amendments … to increase the level of sanctions.[71]

8.47 Mr Bret Walker SC, on behalf of the Law Council of Australia, pointed to the fact that the retired judge model might resolve other more institutional objections:

> We were struck by the possibility that a retired judge … model may overcome in particular the disadvantage of using certain institutions, be it the AFP or the ACC, for things which really go beyond their major remit.[72]

---

68 Mr Gavan Griffith QC, *Submission 235*, p. 4.

69 *Hansard*, 22 November 2002, p. 150.

70 *Hansard*, 22 November 2002, p. 160.

71 *Hansard*, 22 November 2002, p. 170.

72 *Hansard*, 22 November 2002, p. 255.

Issuing Authority and Prescribed Authority

8.48 One of the possible benefits of the retired judge model is that the appointees could serve both as issuing authorities and prescribed authorities, although the same person could not simultaneously fulfil both roles in relation to the same warrant. This possibility was highlighted in evidence by Dr Donaghue:

> [The appointment of retired judges] would be a big improvement, although I think if you were doing that you should be combining the prescribed authority and the issuing authority. You could do that without Chapter III problems and you would avoid the current Chapter III problem by having the issuing authority being a judge. There is no real difference between the community confidence in a retired judge or a sitting judge, so you could put those roles back together and give it to a retired judge. I think that would be a large improvement, both in the supervising of the questioning as it goes on and in the process of issuing the warrant in the first place.[73]

The Australian Crime Commission

8.49 Another model that was discussed during the inquiry was the allocation of the questioning powers to the Australian Crime Commission, the body proposed to assume the responsibilities of the National Crime Authority amongst other things.[74]

8.50 The Law Council of Australia, while opposing the proposed detention powers in the Bill, supported the exercise of coercive questioning powers by the proposed Australian Crime Commission.[75] The Law Council noted that such questioning 'while undesirable in principle, might be justified by the extraordinary circumstances of direct terrorist threat to the nation'.[76] Moreover, the Law Council stated that, in its view, 'compulsory questioning can meet the criteria provided by the United Nations High Commissioner for Human Rights for assessing laws combating terrorism'.[77]

8.51 The Law Council submission was endorsed by various parties. Gavan Griffith QC said that he 'entirely agree[d]' with the force of the argument in their submission: '[i]t seems to me to make a compelling case that the scheme of the legislation, if required, should be modified so that it is applied by the ACC rather than ASIO'.[78]

---

73 *Hansard*, 22 November 2002, p. 172.

74 The Australian Crime Commission Establishment Bill 2002 was passed on 19 November 2002 after amendments in the Senate.

75 *Submission 299*, p. 4.

76 *Submission 299*, pp. 3-4.

77 *Submission 299*, p. 10, referring to a statement by the High commissioner for Human Rights "Human Rights: A United Framework", UN Doc E/CN.4/2002/18 (27 February 2002), para 2, which set out the criteria for balancing human rights protection and combating terrorism in the implementation of UN Security Council Resolution 1373 (2001).

78 *Hansard*, 22 November 2002, p. 148.

8.52 The ACC proposal was also put forward by AFPA. 'In short', they said, their submission was that 'consideration should be given to the merging of ASIO with the ACC where the activities of both the [ABCI] and ASIO can be better aligned'.[79]

8.53 The Association of Criminal Defence Lawyers (ACDL) also argued in favour of the ACC, with a caveat as to the oversight and accountability processes:

> There is a strong argument that can be mounted in favour of granting the coercive questioning powers envisaged in the Bill to the proposed [ACC]. But the [ACDL] has its concerns about this body, whose oversight committee is presently intended to comprise solely of police officers.[80]

8.54 Another issue they raised was the timeliness of the proposed ACC. The ACDL argued that the ACC model would 'prove somewhat clumsy in a true emergency situation' and suggested that 'for this reason, questioning by the AFP in a police station would be more practical'.[81]

8.55 A key advantage of the ACC proposal was that it would incorporate aspects of the commission of inquiry model that addressed the detention issue. Essentially, they relate to the capacity to detain a person for failure to attend or answer questions, or for more substantive offences, with an unhindered power to continue questioning. These aspects were covered under the heading 'Alternative Model' in Chapter 7.

8.56 Another advantage, pressed by AFPA, was that the proposal would involve greater accountability to government, 'smoother communication of intelligence to ASIO from State Police Agencies', and less opportunity for strategic manipulation of the flow of information to law enforcement agencies by terrorist organisations.[82]

Canadian investigative hearing model

8.57 The recent Canadian Anti-Terrorism Act 2002 inserted new provisions in the Canadian Criminal Code to allow for investigation hearings before a judicial officer for the purpose of gathering information.[83]

8.58 With the Attorney-General's consent, a police officer may apply to a judge for an order to attend an investigative hearing before the judge. The judge may not issue an order unless there are reasonable grounds to believe that a terrorism offence has been or will be committed and that information concerning the offence or the whereabouts of a suspect is likely to be obtained.

---

79 *Submission 144*, p. 5.

80 *Submission 236*, p. 3.

81 Association of Criminal Defence Lawyers, *Submission 236*, p. 3.

82 *Submission 144*, p. 6.

83 The Act also provided for recognizance hearings before a judicial officer, to act as a prevention mechanism.

8.59 An order may require the person to 'remain in attendance until excused', and may include any other terms or conditions including those 'for the protection of the interests of the person named in the order and of third parties or for the protection of any ongoing investigation'. The person is obliged to answer questions and produce documents, but may object to answering on grounds of a legal privilege or immunity. The person may not claim the privilege against self-incrimination, but is protected by use and derivative use immunities. He or she may instruct or retain a lawyer at any stage. The person may be arrested under warrant if the judge is satisfied that the person is evading service of the order, is about to abscond, did not attend the investigation or did not remain in attendance. At the return, the judge may order that the person be detained or released on recognisance.

8.60 Dr Carne suggested that an Australian adaptation of the Canadian model would need to take account of constitutional limitations, particularly those concerning judicial officers. He proposed that such a model could be structured around the *Royal Commissions Act* 1902.[84] Dr Stephen Donaghue also suggested that a questioning regime, based on this Act or the *National Crime Authority Act* 1984, would be similar to the Canadian approach and would not encounter constitutional difficulties.[85] The Canadian model was strongly supported by the Victorian Bar: 'It seems to us that this is an ideal model, subject to the setting up of an appropriate tribunal of "presiding judges", to which this committee ought to give serious consideration'.[86]

Royal commission

8.61 At least two submissions pointed to the possibility of a royal commission model. It was suggested that a royal commission model would take advantage of an existing statutory framework for the conduct of coercive questioning. Moreover, in many respects, a royal commission model is very similar to the Canadian model:

> The provisions of the *Royal Commissions Act* 1902 in the power to summon witnesses and take evidence, the requirements of witness attendance and the production of documents [generally], requirements to give evidence and produce documents and things and use immunity provisions for witnesses in subsequent civil and criminal proceedings are very similar to the investigative hearing provisions of the Canadian *Criminal Code*.[87]

8.62 Dr Donaghue told the Committee that the *Royal Commissions Act* 1902 would need only two minor amendments to allow for this regime: an increase in the penalty for refusing to answer questions, from the existing six months to five years, and a power to require a person not to disclose that he or she had been questioned, similar to what was in the existing legislation for the National Crime Authority.[88]

---

84 *Submission 24,* p. 11.

85 *Submission 61*, p. 8.

86 *Hansard*, 22 November 2002, p. 160.

87 *Submission 24*, p. 11.

88 *Hansard*, 22 November 2002, p. 170.

8.63 There is some flexibility in the way this model might operate. Dr Carne recommended the establishment of a standing royal commission 'with a series of Commissioners … and with provisions for suspension or adjournment of commission proceedings and for the calling of persons to give evidence and produce documents at short notice'.[89] By contrast Dr Donaghue recommended an 'ad hoc' royal commission on the basis that, '[i]f ASIO write to say they need this two or three times a year you do not need a new legislative structure to do it' which begs the question as to 'why you would need to create a standing royal commission'.[90] He recommended a group of between three and five retired judges to act on letters patent as and when required.

8.64 As with the ACC model, a key advantage of the royal commission model relates to the capacity to detain a person for failure to attend or answer questions, or for more substantive offences, with an unhindered power to continue questioning. These aspects were covered under the heading 'Alternative Model' in Chapter 7.

Step by step approach

8.65 As noted in Chapter 7, Dr Stephen Donaghue proposed what Dr Gavan Griffith described as a 'step by step' approach in which, after an initial period of questioning and detention, questions of detention would be considered and reviewed by the prescribed authority according to some recognised standards for example, detention in relation to a procedural offence (eg failure to answer questions), or a more substantive offence (eg membership of a terrorist organisation). Dr Donaghue developed this proposal within the framework of the *Royal Commissions Act* 1902. However, in the Committee's view, the 'step by step' approach would also be possible under the other regimes such as the Canadian, ACC or Retired Judge models.

8.66 One of the most positive aspects of this approach is that it allows the process to be tailored by the prescribed authority to the circumstances of each case, moving from compulsory questioning, to detention, extended detention and, ultimately, arrest. Essentially, it enables the process to adjust to extent of cooperation in each case.

8.67 Various parties stressed the value of cooperation. Dr Carne emphasised that the existing commission of inquiry model and the legislation in Canada and the United Kingdom had an underlying principle that people 'are first given the opportunity to comply with the obligation to produce information or documents in a non-custodial situation'. He argued that this is a 'central principle to democratic governance and reflects the equally important concept of reasonable suspicion'.[91]

8.68 Mr John McFarlane made the following comment on the issue:

> I think that provided somebody is willing to discuss the issues with you, you can probably get some very good quality intelligence from it. It requires the skill and understanding of how to conduct a good interview. It does not have

89 *Submission 24*, p. 11.

90 *Hansard*, 22 November 2002, p. 172.

91 *Submission 24A*, p. 3.

> to be threatening. Some of the best interviews I have seen have been done extremely gently. Some of the best interrogations, even in … the major spy cases, were done by a man who used to sit down in the armchair, puff away on his pipe, and patiently continue to go over the whole scenario until the person that he was interviewing effectively gave him the whole story.[92]

8.69 At the same time, voluntary questioning may be inconsistent or incompatible with the framework of the Bill. The legal adviser to ASIO suggested that, in a circumstance of goodwill, there might be no legal foundation for the warrant:

> If the person was voluntarily providing information to the AFP and giving the AFP full details as to what they knew relevant to the conduct, there would really be no need for an ASIO warrant. The ASIO warrant is basically a coercive means of extracting intelligence from persons. So, in those circumstances, I doubt that ASIO would even have the ability to sustain the test in order to gain access to a warrant ['that relying on other methods of collecting that intelligence would be ineffective'[93]].[94]

8.70 On the one hand, this comment tends to focus attention on the exceptional or 'last resort' nature of the proposed questioning and detention process. On the other hand, it tends to focus attention on the possibly arbitrary distinction between the roles of AFP and ASIO. Moreover, it tends to focus attention on the lack of cooperation that may be an inherent presumption in the process for issuing warrants. One of the key issues for the inquiry has been the extent to which this presumption confrontation may translate into a presumption in favour of detention, on the basis that a person who is called before the prescribed authority may alert a person involved in a terrorist offence, may fail to appear or may destroy, damage or alter evidence.[95]

8.71 While there may be a presumption of a lack of cooperation at the outset, it would not seem to require a presumption in favour of detention or the possibility of detention for between 48 and 168 hours. Moreover, there would seem to be a clear role for the prescribed authority to test the presumption during the questioning process and, if necessary, to act upon the presumption in a more satisfactory and certain way.

> A basic principle is that the preferred model would instil the greater confidence of the parliament and the community in the fact that, whatever powers were provided, they would be carried forward in a proper and accountable way. Whatever model the parliament and the community had more confidence in would be the preferable one. Both of these models are different to the one that is in the bill. Speaking personally, I think a model encompassing retired judges would line up better with the model in the bill than the one within the ACC.[96]

---

92 *Hansard*, 13 November 2002, p. 9.

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

94 *Hansard*, 18 November 2002, p. 118 (emphasis added).

95 Proposed paragraph 34C(3)(c).

96 *Hansard*, 26 November 2002, p. 271.