The Senate

Legal and Constitutional References Committee

Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters

December 2002

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TERMS OF REFERENCE

On 21 October 2002, the Senate referred the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002, together with the following matters, to the Senate Legal and Constitutional References Committee for inquiry and report by 3 December 2002:

i. the development of an alternative regime in which questioning to obtain intelligence relating to terrorism is conducted not by ASIO but by the Australian Federal Police (AFP), including appropriate arrangements for detention of terrorist suspects, and questioning of persons not suspected of any offence;

ii. the relationship between ASIO and the AFP in the investigation of terrorist activities or offences;

iii. the adequacy of Australia's current information and intelligence gathering methods to investigate potential terrorist activities or offences;

iv. recent overseas legislation dealing with the investigation of potential terrorist activities or offences;

v. whether the bill in its current or amended form is constitutionally sound; and

vi. the implications for civil and political rights of the bill and any proposed alternatives.

RECOMMENDATIONS

Recommendation 1

The Committee recommends that proposed section 34B should be amended to provide for the appointment by the Attorney-General as a Prescribed Authority of a number of retired federal or state judges, with at least 10 years' experience on a superior court, and that the appointments should be for a maximum period of three years.

Recommendation 2

The Committee recommends that the definition of Issuing Authority in proposed section 34AB should be amended to refer to a retired federal or state judge appointed by the Minister, as for the Prescribed Authority. The Attorney-General should not be able to appoint persons as 'members of a class prescribed by regulations'.

Recommendation 3

The Committee recommends that a Prescribed Authority that has issued a warrant should not be permitted to supervise questioning under the same warrant.

Recommendation 4

The Committee recommends that the maximum time allowable for questioning under the warrant should be modelled on the questioning periods and down-time set out in sections 23C and 23D of the *Crimes Act* 1914. The provisions relating to maximum times allowable are to be provided for in legislation.

Recommendation 5

The Committee recommends that an extension of time for questioning under the original warrant should be given by the Prescribed Authority where it is satisfied that there are reasonable grounds to believe further questioning is likely to yield relevant intelligence, with the questioning regime modelled on the provisions of the *Crimes Act* 1914.

Recommendation 6

The Committee further recommends that, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of a person, a second warrant can be issued for that person, for questioning for a maximum period modelled on the provisions of the *Crimes Act* 1914.

Recommendation 7

The Committee recommends that where a person has been the subject of two consecutive warrants, no further warrants are permitted for the next seven days after the completion of questioning, and then only if the threshold test and processes that apply to the second warrant are met. The Bill must also include a provision ensuring once questioning has finished a person is free to leave.

Recommendation 8

The majority of the Committee recommends that the Bill include a provision ensuring that once questioning has finished, a person is free to leave.

Government Senators support this recommendation subject to the proviso that it would not apply where the Prescribed Authority otherwise directs, in accordance with proposed section 34F(3) (that the Prescribed Authority is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, or may destroy, damage or alter a thing the person has been requested to provide under the warrant) and it is likely that a terrorism offence that may have serious consequences is being committed, or is about to be committed.

Recommendation 9

The majority of the Committee recommends that proposed subsection 34U(2) should be amended to recognise that, while visual monitoring of a person's contact with his or her legal adviser may be permissible, the communications between a person and his or her legal adviser must be confidential.

Government Senators support the recommendation subject to an exception where the Prescribed Authority is satisfied based on advice from ASIO that confidential communication may prejudice public safety.

Recommendation 10

The Committee recommends that the Bill should expressly provide that legal professional privilege is not affected.

Recommendation 11

The majority of the Committee recommends that proposed section 34AA concerning approved lawyers should not proceed. Instead, the Prescribed Authority should be given the power to refuse to permit a particular legal adviser to be present on the application of ASIO if the Prescribed Authority believes on reasonable grounds that the particular person represents a security risk and that to allow representation by that person may prejudice public safety.

Government Senators support this recommendation insofar as it allows for a person to choose his or her own lawyer. However, in cases where the person's first nominated legal adviser has been refused permission to be present, Government Senators consider that the person being questioned should have access to an approved lawyer if he or she wishes.

Recommendation 12

The Committee recommends that where the Prescribed Authority has refused to permit a particular legal adviser to be present, the person being questioned or detained should be able to choose another legal adviser.

Recommendation 13

The Committee recommends that access to a legal adviser should not be barred under the terms of a warrant, but that if the Prescribed Authority is satisfied on the application of ASIO that there is a real and immediate threat to public safety, the Prescribed Authority should be empowered to order that questioning commence without waiting for the attendance of a legal adviser. Once a legal adviser arrives, he or she should have immediate access to the person being questioned. The Prescribed Authority should also have the power to order that questioning should proceed where he or she is satisfied that consecutive nominations of legal advisers constitute an attempt to frustrate the questioning process.

Recommendation 14

The Committee recommends that denial of access to a legal adviser who has arrived after questioning has commenced should be listed as an offence in the Bill.

Recommendation 15

The majority of the Committee recommends that proposed section 34G should be amended to remove the evidential burden placed on the person who is appearing for questioning under a warrant to show that he or she does not have the information sought or possession or control of the relevant record or thing.

Senator Scullion dissents from this recommendation.

Recommendation 16

The Committee recommends that the Prescribed Authority be required to inform the person being questioned of the function of all parties who are present during questioning.

Recommendation 17

The Committee recommends that information required to be given under proposed section 34E, as well as the person's right to request an interpreter, should be given both orally and in writing, with translation into the person's first language where appropriate.

Recommendation 18

The Committee recommends that proposed section 34H be amended to provide that an interpreter is also to be provided on request by the person being questioned.

Recommendation 19

The Committee recommends that a person being questioned should have access to legal aid funding as appropriate.

Recommendation 20

The Committee recommends that the Bill should make explicit the IGIS's right to attend during the questioning process.

Recommendation 21

The Committee recommends that the Bill should include a requirement that ordinary searches and frisk searches, as far as practicable, should be conducted by an officer of the same gender as the person being searched.

Recommendation 22

The Committee recommends that:

(i) reference to adoption of a written statement of procedures in proposed paragraph 34C(3)(ba) and proposed subsection 34(3A) should be amended to require such procedures to be included in regulations;

(ii) those regulations must be made prior to the Minister giving consent to a request for a warrant; and

(iii) powers under the warrants must be exercised in accordance with those regulations.

Recommendation 23

The Committee recommends that the regulations should include but not be limited to specifying the place and conditions of custody and detention, including overnight detention, security arrangements, the time limits on questioning, including required breaks in questioning, and further guidelines on searches, consistent with current policing protocols.

Recommendation 24

The Committee recommends that ASIO develop and implement separate disciplinary procedures in relation to officers who conduct questioning.

Recommendation 25

The Committee recommends that proposed subsection 94(1A) should be amended to require the report to include information about the total number of hours of questioning under warrants, the hours of questioning and length of detention in respect of each person questioned, and number of warrants for questioning heard before each Prescribed Authority.

Recommendation 26

The majority of the Committee recommends the insertion of a sunset clause of three years from the date of commencement of the legislation.

Senator Scullion dissents from this recommendation.

Recommendation 27

The majority of the Committee recommends that the Bill not apply to anyone under the age of 18 years.

Senator Scullion dissents from this recommendation and supports the existing provisions in the Bill as they apply to young people.

ABBREVIATIONS

AAT	Administrative Appeals Tribunal
ABCI	Australian Bureau of Criminal Intelligence
ACC	Australian Crime Commission (proposed)
AFP	Australian Federal Police
AFPA	Australian Federal Police Association
ASIO	Australian Security Intelligence Organisation
ASIO Act	*Australian Security Intelligence Organisation Act 1979*
ASIC	Australian Securities and Investments Commission
ASIS	Australian Secret Intelligence Service
CROC	Convention on the Rights of the Child
DIGO	Defence Imagery and Geospatial Organisation
DSD	Defence Signals Directorate
FCLC (Victoria)	Federation of Community Legal Centres (Victoria)
HREOC	Human Rights and Equal Opportunity Commission
ICCPR	International Covenant on Civil and Political Rights
ICJ (Australia)	International Commission of Jurists (Australian Section)
IGIS	Inspector-General of Intelligence and Security
NCA	National Crime Authority
NSWCCL	New South Wales Council for Civil Liberties Inc.
PIAC	Public Interest Advocacy Centre
PJCAAD	Parliamentary Joint Committee on ASIO, ASIS and DSD
VCOSS	Victorian Council of Social Service

FOREWORD

Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.[1]

...

In order to prevent potential perpetrators of terrorism offences from carrying out their crimes, we must enhance the powers of ASIO to gather relevant intelligence in relation to terrorism offences. Although ASIO can seek other types of search warrants, it is not presently empowered to obtain a warrant to question a person. In order to prevent terrorist attacks, it is crucial that we are able to question would-be perpetrators of terrorist offences or those who may have knowledge of planned terrorist attacks.[2]

In the introduction to its Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002, tabled In June 2002, the Parliamentary Joint Committee on ASIO, DSD and ASIS, commented that the Bill was the 'most controversial piece of legislation ever reviewed by the Committee'.[3]

Despite substantial Government amendments following the Joint Committee report, the Bill remains highly controversial. Of the four hundred and five submissions received during this very brief inquiry, almost all either objected to parts of the Bill, some raising legal issues, or expressed outright opposition to the Bill as a whole.

The proposed detention provisions provoked the most critical comment. In particular, the concept that a person who is not suspected of having committed an offence may be detained incommunicado for questioning and held without charge for up to a week is seen by almost all as incompatible with the rights and freedoms enjoyed in this country.

Other provisions also attracted much comment, including the proposed questioning regime which, for the first time, would allow ASIO officers to question suspects and non-suspects who are to be compelled to cooperate through measures such the loss of the common law right to silence; the loss of the privilege against self-incrimination, (replaced with a use immunity). The restricted access to legal advice also attracted criticism.

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1 International Covenant on Civil and Political Rights, Article 9 (1).

2 The Hon. Daryl Williams AM QC MP, Attorney-General, *House of Representatives Hansard,* 23 September 2002, p7038.

3 Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, 5 June 2002, p. 1.

The submissions also exposed a number of misconceptions about the legislation. For example, the Bill does not give ASIO powers to detain people at whim - a warrant must be obtained in accordance with the conditions described above; and the Australian Federal Police execute the detention warrant, not ASIO officers.

It should be acknowledged that there are a number of safeguards built into the Bill. Some of the more important include:

- a requirement that the Director-General of ASIO satisfy the Attorney-General there are 'reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence';
- a requirement that questioning be conducted in front of a prescribed authority (a member of the Administrative Appeals Tribunal with legal qualifications);
- a requirement that the prescribed authority explain that the person has a right to complain to the Inspector-General of Intelligence and Security in relation to the conduct of ASIO, and to the Commonwealth Ombudsman in relation to the Australian Federal Police;
- a requirement that questioning must be videotaped and a copy provided to the Inspector-General of Intelligence and Security;
- limits on the period a person may be held incommunicado; and
- limits on the period of detention.

Safeguards and limitations notwithstanding, it cannot be denied that this legislation is extraordinary, a fact which the Government does not dispute. But so too are the circumstances that have arisen since September 11 2000. As the Attorney General noted in the second reading debate:

> These measures are extraordinary, but so too is the evil at which they are directed. The measures are transparent and subject to considerable safeguards. I am confident that the limits placed on these new powers will ensure that they are appropriately used.

Both of the major parties acknowledge the need for greater powers for the intelligence services to combat the terrorism threat. But to what extent is it necessary to sacrifice individual rights and liberties in order combat this threat? This is the fundamental question faced by this Committee and which must be faced by the Parliament in concluding the debate on this Bill.

In this report, the Committee has given careful consideration as to how the Government's requirements to improve capabilities to respond to the changed security environment might be best reconciled with the objective of maintaining, to the maximum extent possible, individual rights and freedoms. These are difficult objectives.

The Committee proposes a model that borrows from a number of different models contained in other legislation both in Australia and overseas. At its heart is the

establishment of a panel of retired judges, independent from the executive but not part of the judiciary, whose task it would be to issue warrants under this legislation and closely supervise the questioning process. The proposal in the Bill, that the warrant process be initiated by the Director-General of ASIO, and require the approval of the Attorney-General, is retained.

The Committee believes that this model has a number of advantages. It will add to public confidence in the intelligence gathering process, ensure questioning is fair and minimise the constitutional difficulties that may have arisen under the model proposed in the Bill. It also maintains the executive's power to initiate a warrants process where the circumstances demand this to happen.

While there is some opposition to allowing ASIO to question people directly, including among senior ALP figures, the model proposed by the Committee recognises the utility of allowing this proposal to proceed, with safeguards.

The Committee was particularly perturbed about the length of detention and the time limits on questioning that would be possible under the Bill. These provisions are greatly out of step with the provisions that would apply had the person been charged with an offence. The Committee seeks to ameliorate their effect.

The Committee also recognises and accepts that there may well be circumstances where there should be no right to silence during questioning. Legal advice is another matter. While an enhanced prescribed authority will improve the protections available to those undergoing questioning, the Committee considers that legal advisers should be available throughout the process.

Committee members were concerned about the possibility that persons under the age of 18 might be subject to the provisions of this Bill. Undeniably, it is possible that persons legally classified as children might be involved in terrorist activities, but it remains true that young people are particularly vulnerable to the type of coercive regime proposed. The Committee therefore believes that the dangers of seeking intelligence information from this age group are such that they should be excluded from the scope of the legislation, and dealt with, where appropriate, under the ordinary criminal justice provisions.

The Committee recognises that this report will be met with disappointment by many who have made submissions and who would prefer that it not be further considered by Parliament. For its part, the Government may also consider that the Committee's proposals would unnecessarily restrict ASIO's operations.

Nonetheless, the Committee believes that the report provides a basis for improving and progressing the legislation, while keeping its provisions within acceptable bounds and respecting the rights and freedoms that are fundamental to the Australian community.

Chapter 1

INTRODUCTION

1.1 On 21 October 2002, the Senate referred the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters to the Senate Legal and Constitutional References Committee for inquiry and report by 3 December 2002.

1.2 The motion establishing the inquiry was as follows:

The Senate:

(a) notes with concern that:

(i) the Government's response to the Parliamentary Joint Committee on ASIO, ASIS and DSD is inadequate;

(ii) the Government proposes that, for the first time, Australians not suspected of any offence could be detained by ASIO for questioning;

(iii) the Government proposes those detained by ASIO do not have the right to legal advice for the first 48 hours of their detention;

(iv) the Government proposes children can be detained by ASIO for questioning; and

(v) the Government's proposals will significantly change the role of ASIO by giving it powers of coercion and detention; and

(b) therefore refers the ASIO Legislation Amendment (Terrorism) Bill 2002, together with the following matters, to the Senate Legal and Constitutional References Committee for inquiry and report by 3 December 2002:

i. the development of an alternative regime in which questioning to obtain intelligence relating to terrorism is conducted not by ASIO but by the Australian Federal Police (AFP), including appropriate arrangements for detention of terrorist suspects, and questioning of persons not suspected of any offence;

ii. the relationship between ASIO and the AFP in the investigation of terrorist activities or offences;

iii. the adequacy of Australia's current information and intelligence gathering methods to investigate potential terrorist activities or offences;

iv. recent overseas legislation dealing with the investigation of potential terrorist activities or offences;

v. whether the Bill in its current or amended form is constitutionally sound; and

vi. the implications for civil and political rights of the Bill and any proposed alternatives.

Background

1.3 The Bill was introduced in the House of Representatives on 21 March 2002 and was subsequently referred to two parliamentary committees:

- The House of Representatives referred the Bill to the Parliamentary Joint Committee on ASIO, ASIS and DSD (the PJCAAD) on 21 March 2002 for an advisory report.
- On the same day, the Senate referred the provisions of the Bill to the Senate Legal and Constitutional Legislation Committee.

The Parliamentary Joint Committee on ASIO, ASIS and DSD

1.4 On 5 June 2002 the PJCAAD tabled its report, making 15 recommendations to the Government. The recommendations addressed three main areas of concern: the issue of warrants; the detention regime, including legal representation and protection against self-incrimination; and accountability measures.

1.5 These recommendations and the Government's response to them are discussed in more detail in Chapter 2.

The Senate Legal and Constitutional Legislation Committee

1.6 Having agreed to complete its inquiry after the PJCAAD had tabled its report,[1] the Senate Committee tabled its report on 18 June 2002.[2] The Senate Committee noted that the two Committees have different roles: the PJCAAD was concerned with security operations, particularly the activities of security agencies such as ASIO, and the Senate Committee had a role in considering legal and constitutional issues. The Senate Committee stated that it had decided not to adjudicate on the PJCAAD's report, but made some additional observations on certain issues in light of the information it had received.[3]

1.7 The Senate Committee's report briefly addressed three issues:

- whether it is constitutionally valid for the executive to authorise the detention of a person who is not a suspect;
- whether the issue by magistrates of warrants for questioning is an exercise of executive power that is incompatible with their role as judicial officers; and
- the powers of detention and questioning included in the Bill.

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1 Senate Legal and Constitutional Legislation Committee, *Inquiry into the Provisions of the Australian Security Intelligence Organisation Legislation amendment (Terrorism) Bill 2002 - Interim Report*, May 2002.

2 Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Security Intelligence Organisation Legislation amendment (Terrorism) Bill 2002*, June 2002.

3 Ibid, p. 1.

1.8 Noting that the Government had not yet responded to the PJCAAD's report, the Senate Committee recommended that, if the Government accepted all the PJCAAD's recommendations, the Bill as amended should proceed without further review by that Committee.[4]

The Government's response

1.9 The Government subsequently introduced a range of amendments which addressed most of the PJCAAD's recommendations. Further details are in Chapter 2.

1.10 The amended Bill was passed by the House of Representatives on 24 September 2002.

Conduct of the inquiry

1.11 The Committee advertised the inquiry in *The Australian* newspaper of 23 October 2002 and wrote to over one hundred and thirty organisations and individuals, inviting submissions by 7 November 2002.

1.12 The Committee received 435 submissions and these are listed at Appendix 1. Submissions were placed on the Committee's website for ease of access by the public.

1.13 The Committee held hearings in Canberra on 12, 13, 14 and 18 November 2002, in Melbourne on 22 November and in Sydney on 26 November 2002. Proof transcripts of these hearings were placed on the Hansard website as they became available. A list of witnesses who appeared at the hearings is at Appendix 2.

Scope of the report

1.14 Chapter 2 outlines the main provisions of the Bill and discusses the amendments recommended by the PJCAAD and the Government's response to them.

1.15 Chapter 3 considers the purposes of the Bill and the need for the proposed questioning and detention powers.

1.16 Chapter 4 discusses the issue of the heads of constitutional power supporting the Bill.

1.17 Chapter 5 considers various issues arising in connection with warrants, particularly whether they can appropriately be issued by judicial officers in the light of the constitutional separation of powers doctrine.

1.18 Chapter 6 deals with the matter of questioning, including the role of the Prescribed Authority, legal representation for the person against whom the warrant was issued and the obligation to answer the questions.

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4 Ibid, p. 7.

1.19 Chapter 7 focuses on detention, its possible purposes and their constitutional validity.

1.20 Chapter 8 considers models other than that contained in the Bill.

1.21 Chapter 9 discusses written procedural protocols and other safeguards.

1.22 Chapter 10 deals with the application of the proposed questioning and detention regime to children.

1.23 Chapter 11 sets out the Committee's conclusions.

Acknowledgements

1.24 The Committee thanks all those organisations and individuals who made submissions and gave evidence at public hearings.

Note on references

1.25 References in this report are to individual submissions as received by the Committee, not to a bound volume. References to the Hansard transcript are to the proof Hansard. Page numbers may vary between the proof and the official Hansard transcript.

Chapter 2

THE BILL

Introduction

2.1 The Bill amends the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) to give the Australian Security Intelligence Organisation (ASIO) additional powers in relation to collecting intelligence that may substantially assist in the investigation of terrorism offences.

2.2 The key change is that ASIO is empowered to seek a warrant to detain and question people for up to 48 hours for the purposes of investigating such offences: such people need not be suspects in relation to those offences.

Warrants for questioning

2.3 The Director-General of Security (who is the Director of ASIO) may request an issuing authority (defined as a person, appointed by the Minister, who is a federal judge or federal magistrate, or a member of another class of people nominated in regulations - proposed section 34AB) to issue a warrant that will either:

- require a person to appear before a 'prescribed authority' to provide information or produce records or things; or
- authorise a police officer to take the person into custody and bring him or her before a 'prescribed authority' for such purposes (proposed section 34D).

2.4 The 'prescribed authority' is 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).

Grounds for issue of a warrant

2.5 Before the Director-General can seek a warrant, the Minister must give consent. The Minister must be given a draft of the warrant and a statement of relevant matters, and must be satisfied before giving consent:

- that there are reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence;
- that relying on other methods of collecting the intelligence would be ineffective;
- that written procedures that are to be followed in exercising powers under a warrant have been approved in accordance with the Act; and
- if the person has already been detained, that the continuous period of detention would not exceed 168 hours (7 days) (proposed section 34C).

2.6 Where the warrant authorises the person to be taken into custody immediately and detained, the Minister must also be satisfied that there are reasonable grounds for believing that the person (i) might otherwise alert a person involved in a terrorism offence that the offence is being investigated, (ii) may not appear before the prescribed authority, or (iii) may destroy relevant documents or things that he or she may be required to produce (proposed section 34C). The warrant in that case must permit the person to contact identified persons at specified times when the person is in custody or detention (proposed paragraph 34C(2)(b)).

Issue of a warrant

2.7 An issuing authority (defined above in paragraph 2.3) may only issue a warrant if satisfied that there are reasonable grounds for believing that such action will substantially assist in the collection of intelligence that is important in relation to a terrorism offence (proposed section 34D). The warrant must be in the same terms as the draft warrant and must specify the period for which it is in force, not exceeding 28 days.

Powers and duties of the prescribed authority

2.8 When the person first appears before the prescribed authority for questioning under the warrant, the prescribed authority must inform him or her of:

- the effect of the warrant;
- the length of time the warrant is in force;
- 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 (see below); and
- the right to seek a remedy from a federal court relating to the warrant or the person's treatment under it, and
- whether there is any limit on the person contacting other people and, if the warrant permits contact with identified people at specified times, who those people are and what the specified times are (proposed section 34E).

2.9 If the prescribed authority believes on reasonable grounds that the person detained is unable to communicate with reasonable fluency in English, interpreting services must be provided before any questioning can take place (proposed section 34H).[1]

2.10 The prescribed authority must be present throughout the questioning process. The prescribed authority may give directions relating to nominated issues, including the person's detention or further detention, release from detention or permission to contact an identified person (proposed section 34F). Such directions must be either

1 This provision is similar to section 23N of the *Crimes Act 1914*, which deals with questioning of people arrested for Commonwealth offences.

consistent with the warrant or approved in writing by the Minister, unless a direction is necessary to address a concern raised by the IGIS.

2.11 Where the IGIS is concerned about 'impropriety or illegality' in the exercise of powers in the Bill, he or she may inform the prescribed authority, who must consider those concerns. The prescribed authority may then give a direction deferring questioning of the person or the exercise of another power, until the prescribed authority is satisfied that the concerns have been addressed (proposed section 34HA).

2.12 Apart from these provisions, the Bill is largely silent as to the role of the prescribed authority in relation to the actual questioning. Proposed subsection 34D(5) states that the warrant must authorise ASIO 'subject to any restrictions or conditions' to question the person before the prescribed authority, but no elaboration is given.

Search of people detained

2.13 A detained person may be searched by a police officer, by either an ordinary search or, subject to certain conditions, a strip search (proposed section 34L). The Bill sets out various rules governing the conduct of strip searches (proposed section 34M): these are very similar to the general rules for strip searches under the *Crimes Act 1914* (for example, the strip search must be conducted in a private area by a police officer of the same gender as the detained person).

Extension of detention

2.14 The Director-General may request successive warrants, each of which may not exceed 48 hours. Where the person's continuous detention could exceed 96 hours, the Director-General must make a request only to an issuing authority who is a judge or member of a prescribed class (proposed subsection 34C(5)).

2.15 When the person is before a prescribed authority, the prescribed authority can give a direction for further detention (proposed subsection 34F(1)). The direction cannot result in a person being detained at a time more than 48 hours after the person first appeared for questioning under the warrant (proposed paragraph 34F(4)(a)). The extension may also not result in a continuous period of detention of more than 168 hours from the time the person first appeared before any prescribed authority for questioning under an earlier warrant (proposed paragraph 34F(4)(aa)).

Offences

2.16 The Bill creates a number of new offences punishable by a maximum penalty of five years' imprisonment:

- failing to appear before a prescribed authority as required by a warrant;
- 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).

2.17 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)).

Safeguards and accountability measures

2.18 The Bill includes various safeguards on the exercise of the new powers.

Humane treatment

2.19 The Bill provides that a person being detained under a warrant must be treated with humanity and not subjected to cruel, inhuman or degrading treatment (proposed section 34J).

Right to legal representative

2.20 The warrant may specify that a person is permitted to contact an 'approved lawyer' or someone whom with whom the person has 'a particular legal or familial relationship' (proposed subsection 34D(4)).

2.21 Where the warrant specifies that a person is to be taken into custody immediately and brought before a prescribed authority, the Minister **must** ensure that the warrant permits the person to contact an 'approved lawyer' at any time during custody or detention (proposed subsection 34C(3B)). This requirement does not apply, however, in the first 48 hours of detention if the Minister is satisfied on reasonable grounds that the person is at least 18 years old, it is likely that a terrorism offence is being committed or about to be committed and may have serious consequences, and it is 'appropriate in all the circumstances' that the person not be permitted to contact a legal adviser (proposed subsection 34C(3C)).

2.22 'Approved lawyers' must be appointed by the Minister (proposed section 34AA). Conditions of such appointment are that the lawyer must have been enrolled for at least five years and have consented to being approved, and the Minister must have considered a security assessment of the lawyer and any other material the Minister considers relevant.

2.23 Proposed section 34U governs the involvement of lawyers. It provides for access to a legal adviser, whether or not the legal adviser is an approved lawyer, and states:

- 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;

- 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 authority must direct that the person may contact an approved lawyer other than the legal adviser;
- 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.

Young people

2.24 There is a special regime for questioning young people 14 years of age and over (proposed section 34NA). Warrants cannot be issued in relation to a child who is under the age of 14.

2.25 For those young people between the ages of 14 and 18, a higher threshold applies. A warrant may be issued only if the Minister is satisfied on reasonable grounds that:

- the person is at least 14 and is likely to commit, is committing or has committed a terrorism offence;
- the draft warrant permits the person to contact a parent or guardian, or another approved person, and an approved lawyer; and
- the draft warrant authorises ASIO to question the person before a prescribed authority only in the presence of a parent or guardian or other approved person, and only for continuous periods of up to two hours (proposed subsection 34NA(4)).

2.26 Proposed section 34V allows the prescribed authority to order the removal of the parent, guardian or other approved person from the questioning if the prescribed authority considers that the third person's conduct is 'unduly disrupting questioning'. In such a case, the prescribed authority must tell the detained young person of his or her right to have another person present, and must direct that the questioning is not to proceed until a suitable person is present.

Accountability mechanisms

2.27 The Bill includes various other accountability mechanisms:

- The Director-General must ensure that video recordings are made of the proceedings before the prescribed authority or any other matter that the prescribed authority directs (proposed section 34K). These recordings must be provided to the IGIS (proposed section 34Q).
- Detained persons have the right to complain to the IGIS (about ASIO) or the Ombudsman (about the AFP). On request, the person detained is to be provided with 'facilities' to communicate with the IGIS or the Ombudsman (proposed subsection 34F(9)).

- ASIO must give a copy of any warrant and a statement containing details of any detention to the IGIS (proposed section 34Q). The Minister will also receive a report from ASIO on the extent to which each warrant has assisted ASIO in carrying out its functions (proposed section 34P).
- The IGIS may advise the prescribed authority of any concerns it has about an illegal act or impropriety committed by ASIO. As noted above, the prescribed authority is empowered to suspend questioning until satisfied that the IGIS's concerns have been addressed.
- It is an offence punishable by a maximum of two years imprisonment for an official exercising powers under a warrant to fail to comply with the safeguards in the Bill (proposed section 34NB).

Amendments to the Bill following the PJCAAD's report

2.28 The PJCAAD was concerned about the lack of limitations on various aspects of the proposed powers and accountability for their use. Their concerns focussed on the lack of a limit on the maximum period of detention; the detention of children; the lack of legal representation for people being questioned; and the inadequacy of the accountability and review mechanisms.

2.29 The Government accepted most of the PJCAAD's recommendations in amendments that were subsequently passed by the House of Representatives. The key recommendations which were only partially accepted or rejected were:

- Recommendation 6 that people detained should have access to legal representation: this recommendation was partially accepted, in that the Bill provides for access to a security-cleared lawyer, except where the Minister considers on specified grounds that it is appropriate that access is denied in the first 48 hours;
- Recommendation 10 that the provisions should not apply to children under 18: the Government amendments provide that no child under 14 may be detained and questioned under the Bill; that a warrant may only be issued for a young person between 14 and 18 if he or she is a suspect in relation to a terrorism offence; and that the young person may only be questioned in the presence of a parent, guardian or other representative and for no more than two hours without a break;
- Recommendation 12 that the Bill should include a three-year sunset clause: there is no sunset clause, but the Bill provides that the PJCAAD is to review the operation, effectiveness and implications of the Bill as soon as possible after three years from the date of assent to the legislation;
- Recommendation 14 that the IGIS should be given power to suspend questioning on the basis of non-compliance with the law or impropriety: this recommendation was not accepted, but the Bill provides that the IGIS may inform the Director-General and the prescribed authority of any concerns about impropriety or illegality, and the prescribed authority must consider those concerns and may defer questioning until the concerns are addressed.

Chapter 3

EXTENSION OF ASIO'S POWERS

Introduction

3.1 The underlying rationale of this legislation is to enable ASIO to initiate and participate in a questioning and detention process in response to a perception that current powers are insufficient to address the current or potential terrorist threat to Australia. In his Second Reading Speech on the Bill, the Attorney-General said:

> The horrific and tragic events of September 11 marked a fundamental shift in the international security environment.
>
> That day showed us that no country is safe from the devastation that can be inflicted by terrorism.
>
> . . .
>
> Importantly, we have introduced a range of new terrorism offences
>
> In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences.[1]

3.2 This Chapter explores the purposes of the Bill and the need for the proposed questioning and detention powers. While the Government clearly believes these powers to be essential, there is debate in the community as to whether these measures are necessary or proportionate to the threat.

Overview

Main purpose

3.3 The main purpose behind the proposed powers is to facilitate the collection of intelligence to prevent acts of terrorism. The Attorney-General expressed the view that '[i]n order to prevent terrorist attacks, it is crucial that we are able to question would-be perpetrators of terrorist offences or those who may have knowledge of planned terrorist attacks'.[2] The Attorney-General's Department elaborated on this issue by pointing to weaknesses in the preventive capacity of the criminal justice system:

> In the new environment in which we have found ourselves in the area of terrorism, it became clear after September 11 that a policy by agencies … to

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1 *House of Representatives Hansard*, 21 March 2002, p. 1930.

2 *House of Representatives Hansard*, 23 September 2002, p. 7038.

> deal with terrorism based on prosecuting and punishing would-be terrorists no longer held much of a deterrent for would-be terrorists.[3]

3.4 Similarly, Victoria Police indicated that they 'support any initiative to enhance law enforcement agencies' abilities to combat terrorism'.[4] The Victoria Police Association also argued that State police forces 'ought to be provided with the same powers and authorities to reduce the incidents of terror' as available to ASIO or AFP.[5]

3.5 On the other hand, Mr Chris Maxwell QC suggested, on behalf of Liberty Victoria, that the argument in favour of the proposed measures had not been made out:

> We have not heard the Attorney or the Director-General of ASIO say, 'Look, we have discovered a significant gap in our intelligence collection abilities because we do not have this generic power,' whatever it might be.[6]

Dual purposes

3.6 While the primary focus is on prevention of terrorist acts, the proposed regime would seem to have another focus on prosecuting terrorist offences. These 'dual purposes' were stated by the Attorney-General in his Second Reading Speech:

> In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, *preferably before they perpetrate their crimes*, it is necessary to enhance the powers of ASIO to investigate terrorism offences. The amendments contained in this bill empower ASIO to seek a warrant which allows the detention and questioning of persons who may have information that may assist in *preventing terrorist attacks* or in *prosecuting those who have committed terrorism offences*.[7]

3.7 He also noted that the powers were necessary '[i]n order to ensure that any perpetrators of these serious offences are discovered and prosecuted'.[8]

3.8 In evidence the Attorney-General's Department indicated that it took the view that the measures were 'about intelligence collection and not law enforcement, before the event rather than after the event'[9] and that criminal prosecution 'is not the primary purpose of the legislation' but perhaps an 'incidental purpose".[10] Moreover, in an operational sense the 'concept' or intention behind the Bill was 'to put the power more towards the intelligence end of the spectrum rather than towards the law enforcement

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3 *Hansard*, 12 November 2002, p. 2.

4 Victoria Police, *Submission 241*, p. 1

5 Victoria Police Association, *Submission 97*, p. 1.

6 *Hansard*, 22 November 2002, p. 199.

7 Daryl Williams MP, Australian Security Intelligence Legislation Amendment (Terrorism) Bill 2002, Second Reading Speech, *House of Representatives Hansard*, 21 March 2002, p. 1935 (emphasis added).

8 Ibid.

9 *Hansard*, 12 November 2002, p. 3.

10 *Hansard*, 12 November 2002, p. 24.

end of the spectrum' on the basis that 'the closer you move the power to the law enforcement end of the spectrum the less preventive the power will be'.[11]

3.9 A number of submissions suggested that these purposes were incompatible. For example, Dr Greg Carne argued that intelligence collection and criminal investigation were 'disparate and irreconcilable objectives'.[12] The AFPA pointed to the primacy of prevention above prosecution and that '[p]revention must come above all else'.[13] Moreover, they argued, intelligence would only serve a useful purpose *before* rather than *after* the commission of a terrorist offence: '[i]f intelligence occurs after the event it is not timely and, therefore, it is not intelligence'.[14]

Utility?

3.10 The need for anti-terrorism laws may be widely accepted. For example, Professor George Williams stated: '[m]y starting point is that we do need new laws to deal with terrorism in Australia. Our existing legal structure is inadequate.'[15] While there may be general support, a concern for the inquiry is whether the particular measures are necessary and proportionate to the threat of terrorism in Australia.

3.11 The Prime Minister recently acknowledged that '[i]ntelligence is a very inexact science' and that better resources do not always correlate with a better prevention capacity. Despite the 'massive paraphernalia and the enormous resources [in the United States] … its intelligence wasn't able to anticipate [the September 11 attacks in the United States]'.[16] Significantly for the present context, the Director-General of ASIO indicated that 'nothing in this Bill is likely to have assisted with the prevention of the attack on 11 September on the World Trade Centre'.[17] He also seemed to indicate that nothing in the Bill would have significantly altered the approach to counter terrorism since 11 September.[18]

3.12 Another concern was that the proposed measures might be a substitute for operational inefficiencies in the intelligence community or criminal justice system.

3.13 Victoria Police observed that '[t]here appears to be adequate signals intelligence but a lack of human intelligence gathering capability'.[19] Professor George

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11 *Hansard*, 18 November 2002, p. 107.

12 *Submission 24*, p. 19.

13 *Submission 144*, p. 4.

14 *Submission 144*, p. 6.

15 *Hansard*, 13 November 2002, p. 57.

16 The Hon. John Howard MP, Transcript of Interview, *Sunday*, October 20 2002.

17 International Commission of Jurists (Australian Section), *Submission 237*, p. 8.

18 'If what is in this bill had been law on 11 September, there would have been two to three occasions since 11 September where … we would have sought consideration as to whether it would have been possible to act under the legislation and for someone to be questioned': *Hansard*, 12 November 2002, p. 12.

19 *Submission 241*, p. 2

Williams pointed to weaknesses in intelligence collation rather than collection, noting that '[r]ecent debate in the United State has questioned whether the problem facing intelligence services is one of analysis of information rather than information gathering'.[20] AFPA pointed to weaknesses in the coordination of intelligence and law enforcement agencies, arguing that '[p]otential enhancements in Australia's counter terrorist capability stand to be made by movement toward more central management and outcome accountability for both organizations [ASIO and AFP]'.[21]

3.14 The Catholic Commission for Justice, Development and Peace suggested that:

> The [United Kingdom] Government has justified [the duty to disclose] by stating that the normal safeguards are too stringent to permit successful prosecutions leading to imprisonment for criminal offences. The … Home Secretary stated that the authorities cannot secure the imprisonment of "suspected terrorists" by prosecuting them [for] crimes because of "the strict rules on the admissibility of evidence in the criminal justice system of the United Kingdom and the high standard of proof required".[22]

3.15 It is difficult to make further assessments in the absence of operational knowledge. However, if the arguments are valid, they may undermine the case in favour of the Bill. Liberty Victoria argued that '[t]he community cannot be expected to support such proposals when the intelligence agencies … are seemingly incapable of using *existing* intelligence as the basis for effective preventive action'.[23]

Intelligence

Significance

3.16 The 1979 Hope Royal Commission *Protective Security Review* pointed to four purposes behind anti-terrorism legislation: **intelligence** 'including threat assessments relating to terrorism and domestic violence'; **prevention** 'to deny potential terrorists the means and opportunity to achieve their purpose and to defend the likely targets of their attacks'; **crisis management** '[involving] law enforcement and other executive action in the event of a terrorist incident'; and **investigation** or, in more explicit terms, 'criminal investigation, detection, apprehension and prosecution'.[24]

3.17 The *Protective Security Review* argued that '[i]ntelligence is the first line of defence against terrorism'.[25] Similarly, a SAC-PAV review in 1993 asserted that '[a] sound intelligence process, with highly trained analysts, is fundamental to crisis

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20 *Submission 22*, p. 6.

21 *Submission 144*, p. 5.

22 Catholic Commission for Justice, Development and Peace (Melbourne), *submission 136*, p. 9.

23 Liberty Victoria, *Submission 242*, p. 3.

24 Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 3 and pp. 33–34.

25 Ibid, p. 63.

management'[26] and the 1996 British *Inquiry into Legislation against Terrorism* commented that it was 'the single most important weapon in fighting terrorism'.[27] While these statements are perhaps obvious, the first was made along with a warning that 'this truism will be taken so much for granted that it will be merely paid lip service and more attention given to secondary and more visible lines of defence'.[28]

Definition

3.18 Intelligence is rarely, if ever, defined in legislation. It might be assumed to mean 'processed information' 'in the sense that a lot of different items of knowledge have been put together, tested against each other for credibility and a judgment made on the balance as to the truth'.[29] In other words, it may be information which has been tested for credibility and assessed for relevance against some known standards. Arguably, it *might* be equated with 'prima facie' or 'logically probative' evidence.

3.19 Intelligence is not defined in the Bill. Instead, the Bill refers to a composite expression, 'intelligence that is important in relation to a terrorism offence'.[30] These '*terrorism offences*' may be *primary* or *secondary* offences. They include terrorist acts[31] *and* other more remote acts such as providing or receiving training[32] and the collection or making of documents;[33] and, in relation to terrorist organisations, direction,[34] membership,[35] recruitment,[36] financial coordination[37] and support.[38]

Terrorism

Definition

3.20 Many definitions have been proposed domestically and internationally to describe terrorism but no comprehensive working definition has emerged. Within these definitions there are competing characterisations of terrorism. 'Terrorism' is

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26 Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994, p. 26.

27 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996, Vol. 1, p. 8.

28 Protective Security Review, loc. cit., p. 69.

29 Royal Commission on Intelligence and Security, *Third Report: Abridged Findings and Recommendations*, April 1977, pp 1-2.

30 Proposed paragraphs 34C(3)(a) and 34D(1)(b).

31 *Criminal Code*, section 101.1.

32 *Criminal Code*, section 101.2.

33 *Criminal Code*, section 101.5.

34 *Criminal Code*, section 102.2.

35 *Criminal Code*, section 102.3.

36 *Criminal Code*, section 102.4.

37 *Criminal Code*, section 102.6.

38 *Criminal Code*, section 102.7.

subjective. It is a label which is 'both political and perjorative'.[39] This is reflected in the adage: 'one person's terrorist is another person's freedom fighter'. Moreover, 'terrorism' may be characterised in terms of *national security* or *crime*.

3.21 Defence analysts may tend to view terrorism as 'irregular', 'non-conventional' or 'asymmetric' warfare. In general terms, 'terrorism' is an act of violence intended to influence the government or intimidate or coerce the public. Similarly, in classical terms, 'war' is 'an act of violence intended to compel our opponent to fulfil our will'.[40]

3.22 From their perspective, lawyers tend to view terrorism as a criminal act, distinguished perhaps by its seriousness, motivation and intention. Mr Chris Maxwell QC argued, on behalf of Liberty Victoria, that 'what terrorists do is criminal activity':

> It is murder, criminal damage, conspiracy to do … those things, causing grievous bodily harm, conspiracy to commit grievous bodily harm and so on. What differentiates it from any other criminal activity is the motivation. Whereas a murder committed in domestic circumstances is committed out of anger or jealousy, a murder committed by a terrorist is committed for, let us assume, some fanatical objective. But it is, first and last, murder.[41]

3.23 In the Bill, terrorism is both a threat to national security and an offence.

3.24 The Bill would incorporate, or reincorporate,[42] these elements into the definition of 'security' in the *Australian Security Intelligence Organisation Act* 1979.

3.25 The 'four core elements' above are incorporated into the definition of terrorism in the *Criminal Code*. A 'terrorist act' is an act or threat involving serious harm to a person or serious damage to property; or danger to another's life or creating a serious risk to public health or safety; or serious interference with, disruption or destruction of an electronic system. This act or threat must be done or made with the intention of

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39 Elizabeth Chadwick, 'Terrorism and the law: Historical contexts, contemporary dilemmas, and the end(s) of democracy', *Crime, Law and Social Change*, Vol. 26(4), 1996/97, pp. 329–350, pp. 335–336.

40 Carl von Clausewitz, *On War*, Translated by Colonel J.J. Graham and published by N. Trübner, London, 1873.

41 *Hansard*, 22 November 2002, p. 196.

42 Terrorism was once included in a list of matters incorporated by the definition of 'security' to mean 'acts of violence for the purpose of achieving a political objective in Australia or in a foreign country'; 'training, planning, preparations or other activities for the purposes of [such acts or] violent subversion in a foreign country' and offences related to internationally protected persons or aviation (ie, offences under the *Crimes (Internationally Protected Persons) Act* 1976, *Crimes (Hijacking of Aircraft) Act* 1972 or *Crimes (Protection of Aircraft) Act* 1973). It was deleted in 1986 and merged with 'subversion', to form a wider expression 'politically motivated violence'. The new definition covered 'terrorism and related activities of the kind covered by the present definition' including 'threats of or acts causing unlawful harm to achieve a political end': Lionel Bowen, MP, Australian Security Intelligence Organisation Amendment Bill, Second Reading Speech, *House of Representatives Hansard*, 22 May 1986, p. 3707.

'advancing a political, religious or ideological cause'; and coercing or intimidating a country or a part of a country; or intimidating the public or a section of the public.[43]

Significance

3.26 The characterisation of terrorism as crime has significance for the Bill.

3.27 The distinction between crime and warfare has constitutional significance. For example, Professor Williams said that the defence power would not support coercive laws 'in circumstances where there is not an explicit defence threat to Australia beyond something that might be regarded as subversive or asymmetrical, as this is'.[44]

3.28 It also has significance in terms of the policy behind the proposed measures. One submission argued that '[c]riminal activity associated with terrorism should not be treated differently from other criminal activity on the basis of political, ideological or religious motivation'.[45] Mr Chris Maxwell QC suggested that to regard terrorism 'as some special, different species of behaviour' was a 'serious mischaracterisation'.[46] He argued that the 'terminological point' was important because 'when it continues to be referred to as something special and different, that creates a presumption in favour of it requiring something special and different by way of powers and legislation'.[47]

3.29 The Committee considers that the 'terminological point' has been overtaken by the passage of the *Security Legislation Amendment (Terrorist) Act* 2002. In his summary of Second Reading Debate, the Attorney General made the practical point that '[t]he way that terrorist networks are organised, and the destruction that acts of terrorism can cause, distinguish terrorism from other types of crime'.[48] So, it has been said, '[t]he reason for making explicit the terrorist element where it exists is, quite simply, that this is how it is seen by the public. Murder in the course of a terrorist activity is thought of as a more serious offence than 'ordinary' murder'.[49] To the government and the wider community 'terrorist crime is seen as an attack on society as a whole, and our democratic institutions. It is akin to an act of war'.[50]

3.30 A related concern may be the precedent effect on other areas of criminal law. ICJ (Australia) drew the Committee's attention to the possibility of 'statute creep':

> [T]he history of law making allows us to imagine the very real possibility that future parliaments will be asked by future governments to extend the

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43 *Criminal Code*, subsection 101.1(1).

44 *Hansard*, 13 November 2002, p. 70.

45 Network Opposing War and Racism (Adelaide), *Submission 12*, p. 5.

46 *Hansard*, 22 November 2002, p. 196.

47 *Hansard*, 22 November 2002, p. 198.

48 *House of Representatives Hansard*, 23 September 2002, p. 7038.

49 Lord Lloyd of Berwick, op. cit., Vol. 1, p. 28.

50 Ibid., p. xi.

> time for which detention may continue and reduce the administrative difficulties which the purported safeguards included in the bill … allow.[51]

3.31 FCLC (Victoria) referred to the possible sideways migration of the measures: '[t]he creation of a parallel process of questioning within the criminal law is a dangerous precedent which over time could migrate to other offences'.[52] Amnesty International also expressed concern that the detention regime could create 'a shadow criminal justice system without the safeguards of the existing formal legal system'.[53]

An anchor for other measures

3.32 Perhaps the real significance of the characterisation of terrorism as crime is that offences provide a basis for other measures such as incidental offences, or preventive powers. As the Attorney-General's Department has acknowledged, terrorist offences, and their prosecution, may be unlikely to deter would be terrorists. However, it might be argued that a primary terrorist offence (eg, *a terrorist act*) really provides a foundation for the enactment of a secondary terrorist offence (eg, *membership of a terrorist organisation*). Moreover, it might be argued that both sets of offences really provide the anchor for preventive powers that relate to intelligence gathering and law enforcement (eg, *search warrants* for ASIO and/or AFP).

3.33 Thus, the significance of terrorist offences is not that they criminalise terrorist acts, but that they provide the anchor for other measures, such as those in the Bill.

3.34 On the other hand labelling an act as 'terrorism' may in fact harm investigation and prosecution processes, especially in the context of extraterritorial jurisdiction, or negotiating extradition arrangements and mutual assistance, which rely on shared concepts of criminality. This may have been a factor in the introduction of a series of basic extraterritorial offences against Australians[54] and the announcement of the removal of the political offence exception from existing extradition arrangements.[55]

Intelligence v prosecution

3.35 A threshold issue for the inquiry has been the need to distinguish between the objectives of intelligence collection and criminal investigation. Superficially, the differences between these objectives are clear. Intelligence measures are both proactive and reactive in that they are ongoing and so precede and follow terrorist acts. However, investigative measures are reactive in that they only follow terrorist acts. In other words, the former aims at prevention of terrorist acts whereas the latter aims at prosecution of terrorist offences.

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51 International Commission of Jurists (Australian Section), *Submission 237*, p. 10.

52 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 8.

53 Amnesty International, *Submission 136*, p. 14.

54 *Criminal Code Amendment (Offences Against Australians) Act* 2002.

55 Attorney-General, 'No Safe Havens for Terrorists', *Media Release No. 133/02*, 22 November 2002.

3.36 In reality, there may be overlap or blurring between the concepts of intelligence collection and criminal investigation and the objectives of prevention and prosecution. In submissions and evidence various distinctions were offered. The most obvious distinctions were expressed in terms of *function*, *subject matter* and *outcome*.

Function

3.37 The differences may relate to different functions of relevant agencies. Intelligence agencies deal with prevention whereas law enforcement agencies deal with prosecution. So, for example, the Director General of ASIO commented that, in his view, the 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]'.[56]

3.38 By contrast the AFPA argued that the AFP had a strong focus on prevention:

> [T]here seems to be the perception … that the [AFP] is about investigating criminal activity whereas ASIO are preventing activities occurring. That may have been the view back in 1949 but clearly the AFP is very much into prevention as a preference to detection and investigation. The ideal situation would be for us to prevent crime from occurring.[57]

3.39 The truth, which seems to be acknowledged by all parties, is that there is some overlap, or blurring of the boundaries between intelligence collection and criminal investigation. Police forces do gather intelligence, particularly in relation to organised crime, and intelligence services do share information for the purposes of criminal investigation. Moreover, police forces are engaged in preventive measures and intelligence services do assist indirectly in prosecutions by the sharing of intelligence.

Subject matter

3.40 Arguably, there is a fine line between criminal intelligence and security intelligence. The AFP Commissioner stated that, as a practical matter, '[i]t is not unusual for criminal intelligence to be of relevance to security intelligence and vice versa'.[58] The AFPA proposed 'that the distinction between criminal intelligence and national security intelligence be ignored in view of the significant blurring of these definitions in recent years and their failed application to the existing environment'.[59]

3.41 The blurring of subject matter is actually inherent in the Bill.

3.42 The definition of 'security' relies on the terrorism offences. Under the Bill, the definition of 'politically motivated violence' would be amended to include 'acts that

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56 *Hansard*, 12 November 2002, p. 5.

57 *Hansard*, 18 November 2002, p. 135.

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

59 *Submission 144*, p. 2.

are terrorism offences'.[60] These include '[any] offence against Part 5.3 of the *Criminal Code*'.[61] Thus, the general ASIO mandate would extend to intelligence on *primary* terrorist offences (eg, an act or threat involving serious harm with the intention of advancing a religious objective and of coercing or intimidating a government) and *secondary* terrorist offences (eg, membership of a terrorist organisation).

3.43 Through the definition of 'security', the focus on 'terrorism offences' is tied to the nature and terms of the ordinary warrants under the ASIO Act. For example, an ordinary ASIO search warrant may be issued where there are reasonable grounds: for believing that it will assist with intelligence 'that is *important in relation to security*'.[62] Moreover, the focus of the Bill on 'terrorism offences' is tied even more directly to the nature and terms of the proposed questioning and detention powers. A questioning warrant would require, among other things, reasonable grounds for believing that it will assist with intelligence 'that is *important in relation to a terrorism offence*'.[63]

3.44 It may be difficult to maintain a distinction between intelligence and law enforcement when the grounds for the intelligence gathering tools rely on offences. The Attorney-General's Department commented that the reliance on these offences 'does not detract from the purpose of gathering that information, however. That is, in order to gain knowledge of potential terrorist activities and prevent terrorist attacks'.[64]

Outcome

3.45 In reality, the objectives of intelligence collection and criminal investigation may only diverge at the point when a choice is made as to the intended outcome.

3.46 Ultimately, the measures serve dual purposes of prevention and prosecution. As the Queensland Police Service noted, intelligence collection under a questioning warrant 'encapsulates both a preventive and responsive approach to terrorism'.[65] The basic issue, to return to the position offered by the Attorney-General's Department, is that the *primary* purpose is intelligence collection, but that there is an incidental or *secondary* purpose relating to law enforcement and criminal prosecution.

3.47 In answers to questions on notice the Attorney-General's Department said:

> [T]he gathering of information for the purposes of intelligence is a separate activity to the gathering of information for the purposes of a prosecution. There may be instances where the same information is sought for both purposes, although often the information of use to intelligence agencies will be very different from the information of use to law enforcement agencies as part of a prosecution. It would be more appropriate to view the different

60 Schedule 1, item 4.

61 Schedule 1, item 4.

62 *Australian Intelligence Security Organisation Act* 1979, subsection 25(2).

63 Paragraph 34C(3)(a).

64 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 6.

65 Queensland Police Service, *Submission 205*, p. 1.

> objectives as elements of a continuum ranging from the prevention of terrorist activity at one end of the scale to the prosecution of individual terrorists at the other. On this view, while the objectives are distinct and require separate consideration, they are not irreconcilable.[66]

3.48 The Committee understands that these dual purposes will be mediated in a procedural sense by the establishment of an oversight committee within the Joint Counterterrorism Intelligence Coordination Unit that would 'determine when an intelligence matter becomes a criminal investigation'. This is discussed in Chapter 8. The Committee also understands that the effect of the dual purposes may be mitigated in a legal sense by the limitations on the use that may be made of compelled statements in subsequent criminal prosecutions. This is discussed in Chapter 6.

3.49 The present issue is that the focus on outcomes informs the choices that will be made. The point was clearly made by the AFP Commissioner in evidence:

> [W]e have to look at the outcome we are looking for. 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 outcome is quite different. The consequences of what they say to an ASIO questioner are quite different from those if questioned by the police. That is where the issue of civil liberties comes in. If we are to have an outcome from an AFP interview and somebody is to be arrested, charged and prosecuted that is quite different and it is quite appropriate to involve access to lawyers, as … under the existing legislation if questioned by the AFP.[67]

Conclusions

3.50 The attention of the Committee was drawn to a wide range of concerns, most of which were documented previously by the Parliamentary Joint Committee on ASIO, ASIS and DSD and, to a lesser degree, the Senate Legal and Constitutional (Legislation) Committee. The Committee is not in a position to ignore those concerns.

3.51 Many of the concerns spring in part from the overlapping objectives behind the legislation with respect to intelligence collection and criminal investigation. Accepting that terrorism is a threat to national security and a serious criminal offence, it may be impossible to fully distinguish these concepts except at the point when a choice is made as to the intended outcome of the questioning and/or detention process.

3.52 A broader concern relates to the necessity for this legislation. While the Committee has heard various objections as to the necessity for this legislation, there are occasions when the will of the elected government to address perceived weaknesses in intelligence collection tools must be respected. The Committee is not in

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66 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 5.

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

a position to second guess the Executive as to the potential terrorist threat to Australia or the need for this legislation. However, the Parliament does have a responsibility to review and adjust Executive proposals to ensure that they are acceptable to the community, meet international obligations and are legally sound.

Chapter 4

CONSTITUTIONAL BASES

Introduction

4.1 One of the concerns that was raised during both previous inquiries on the Bill, by the Senate Legal and Constitutional Legislation Committee and the PJCAAD, was the constitutionality of the proposed Bill.

4.2 Constitutional questions about legislation are complex and are ultimately only resolved when the High Court tests provisions in the context of a legal challenge. As Professor George Williams noted in evidence before the Committee, 'this is a very difficult issue to address the committee on because of the complete lack of information, as far as I have seen it, about the justified basis of this legislation'.[1]

4.3 Two fundamental constitutional questions that arose in the context of the Committee's consideration of this Bill are the constitutional basis or bases for the proposed measures and their consistency with constitutional limitations:

> In terms of analysing the constitutional issues, they fall into two categories. You obviously, firstly, have to have a head of power in the Constitution to justify the legislation. … But … there is still a secondary issue … that is, whether it breaches some other limitation in the Constitution, firstly, relating to incompatibility having a judge perform an office or a function that is non-judicial that actually undermines integrity in the judges and, secondly, and of far more significance, … there is a very real and quite powerful argument that detention in these circumstances breaches the separation of powers.[2]

4.4 The 'head of power' issue is addressed in this Chapter. The other issues are dealt with separately in the context of the Chapters on Warrants and Detention.

4.5 The 'head of power' issue has clearly concerned the Government for some time. In 2001, the Prime Minister noted that '[o]ne difficulty the Commonwealth has in effectively fighting transnational crime and terrorism is that these crimes may not be strictly federal offences'. It was 'not absolutely certain that the Commonwealth has the necessary power, complete constitutional power … to deal in the way that it might think appropriate for a terrorist attack on a particular part of Australia'.[3]

4.6 The Committee sought information from the Attorney-General's Department about the constitutionality of the bill, receiving only limited information.

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1 *Hansard*, 13 November 2002, p. 58.

2 *Hansard*, 13 November 2002, p. 59.

3 The Hon. John Howard, MP, 'A Safer More Secure Australia', *Media Release*, 30 October 2001.

4.7 In evidence, the Attorney-General's Department indicated that, in accordance with the Attorney-General's view, the questioning and detention powers would be supported by the creation of terrorism offences in the *Criminal Code*, 'the creation of offences in the ASIO Bill' and 'upon the incidental powers of the Commonwealth'.[4] In turn, the terrorism offences would be supported by the defence power, the external affairs power and the 'implied incidental powers of nation protecting'.[5] Moreover, it was said that 'if there are in fact any gaps that might appear, they would be able to be underpinned by [the reference of powers from the States to the Commonwealth]'.[6]

4.8 Perhaps the most useful statement of the possible sources of the Commonwealth's power arises from a letter sent by Mr Keith Holland to the Senate Legal and Constitutional Legislation Committee during that Committee's inquiry into this Bill. Mr Holland stated that the measures primarily rely on the terrorist offences that were created by the *Security Legislation Amendment (Terrorism) Act* 2002:

> The creation of these terrorist offences is supported by a number of powers within the Constitution. These include the external affairs power, the defence power, in addition to the implied power to protect the Commonwealth or national institutions. The powers of investigation and detention proposed in the ASIO Bill can generally be supported by the powers supporting the creation of the offences to which the powers relate, together with the Commonwealth's incidental power (s51(xxxix)).[7]

4.9 Section 51 of the Constitution allows the Commonwealth to make laws with respect to defence or 'the control of forces to execute and maintain the laws of the Commonwealth',[8] 'external affairs'[9] and 'matters incidental to the execution of any power vested by this Constitution in Parliament'.[10] Section 51(xxxvii) allows the States to refer powers to the Commonwealth. Section 61 provides that executive power 'extends to the execution and maintenance of this Constitution'. It is generally accepted that it also includes the Commonwealth's prerogatives,[11] one of which relates

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

5 *Hansard*, 12 November 2002, p. 11.

6 *Hansard*, 12 November 2002, p. 11.

7 Keith Holland, 12 June 2002.

8 Section 51(vi).

9 Section 51(xxix).

10 Section 51(xxxix).

11 *Barton v. Commonwealth* (1974) 131 CLR 477.

to the defence of the realm,[12] and a range of (largely unexplored) powers derived from the 'character and status of the Commonwealth as a national government'.[13]

4.10 This chapter considers the main heads of legislative power that are relevant to the Bill:

- the defence power;
- the external affairs power;
- the implied self-protection power; and
- the implied incidental power.

4.11 The chapter then discusses some key issues, and the referral of powers from the States to the Commonwealth. More specific constitutional issues in relation to warrants for detention and questioning are considered separately in Chapters 5, 6 and 7.

The defence power

4.12 Professor George Williams expressed the view that '[I]f the legislation is valid, it is likely to be primarily on the basis that it falls under the defence power'.[14]

4.13 The defence power relates to 'the naval and military defence of the Commonwealth and of the several States and the control of the forces to execute and maintain the laws of the Commonwealth'. It is a purposive power that will only support a law that is 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth [etc.] [against external threats]'.

4.14 There are some important things to note about the first limb of the defence power. As Professor Williams acknowledged, it can 'wax and wane according to both international and domestic aspects, including terrorism'.[15] Also, it has a primary and secondary aspect. The former deals directly with military and defence issues while the latter deals measures that are conducive to successful defence of the nation.

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12 *Hampden's Case (the Case of Ship Money)* (1637) 3 St. Tr. 826 at p 976; *In re a Petition of Right* [1915] 3 KB 649 at p 659; *Attorney General v. De Keyser's Royal Hotel Ltd* [1920] AC 508; *Burmah Oil Co. (Burma Trading) Ltd v. Lord Advocate* [1965] AC 75; *Attorney-General v. Nissan* [1968] 1 QB 286.

13 *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338, per Mason J at p 379. It permits the Commonwealth to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation': *Davis v. The Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at p 111. See generally Dr Max Spry, 'The Executive Power of the Commonwealth: its scope and limits', *Research Paper No. 28 1995-96*, at http://www.aph.gov.au/library/pubs/rp/1995-96/96rp28.htm.

14 *Hansard*, 13 November 2002, p. 59.

15 *Hansard*, 13 November 2002, pp. 69-70.

4.15 It is this constitutional grey area surrounding the secondary aspect which clouds the question of how far, in its desire to counter and prevent terrorism, the Commonwealth today could use the defence power to regulate domestic areas and activities beyond the strictly military. To a large extent this depends on whether the current international situation amounts to an external threat to Australia's defence.

4.16 Professor Williams compared the international situation surrounding the Bill with the situation surrounding the *Communist Party Dissolution Act* 1950, suggesting that the 'parallels are quite striking between the issue then and the issue today':[16]

> [In the *Communist Party Case*] [t]he High Court found that, even though Australia was then at the time of the decision engaged in a war in Korea, there was nothing that amounted to a war against communism that could justify legislation of that kind. In the context of Australia contemplating joining a war in Iraq, I think it is equally possible that the High Court would not find there is a war against terrorism of a sufficient magnitude that threatens the integrity of Australia that could justify [this] legislation.[17]

4.17 The other relevant point to emerge from the *Communist Party Case* is that in trying to enliven the secondary aspect of the defence power, the Commonwealth normally cannot resort to bringing evidence in front of the Court to substantiate a claim regarding the existence of an external threat or national emergency. The Court's assessment will be based on what is called 'judicial notice', which means the information within the ordinary knowledge of judges sitting on the case:

> The High Court clearly decided in 1951 in the *Communist Party Case* that this parliament cannot recite itself into power by putting before the court a threat to the security of the nation. The parliament and the government must articulate a constitutional basis for its legislation; otherwise that is a clear reason why the legislation by itself would be unconstitutional.[18]

4.18 The second limb of section 51(vi) may also come into consideration. It has been argued that the expression 'execution and maintenance of the laws of the Commonwealth' may extend 'to the preservation of general law and order so far as such order may be disturbed by general disobedience to the laws of the Commonwealth'.[19] This view would regard section 51(vi) as adding to the Commonwealth's array of powers to prevent, investigate and punish terrorism.

4.19 The Attorney-General's Department may be taken to have argued primarily in favour of this second part of section 51(vi). In answers to questions on notice, they acknowledged that '[t]he limits of the defence power in relation to internal or domestic

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

17 *Hansard*, 13 November 2002, p. 59.

18 Professor George Williams, *Hansard*, 13 November 2002, p. 58.

19 'Current Topics: Legal and constitutional problems of protective security arrangements in Australia', *Australian Law Journal*, Vol. 52, 1978, p. 298.

threats to security are not entirely clear'.[20] But, they said there were 'cogent arguments' to support the use of the second limb 'to deal with a range of internal security threats, including terrorism'. They cited the *Protective Security Review* for the proposition that this limb 'may be an important source of legislative power for the Commonwealth in law and order matters generally, and countering terrorism in particular'.[21]

The external affairs power

4.20 As noted above, the Attorney-General's Department indicated that it thought the legislation was supported by this power. However, Professor Williams said:

> I do not think the external affairs power is likely to support the legislation. I am not aware of a relevant international treaty. I do not think links with other external events are likely to justify coercive powers of this kind.[22]

4.21 As a general proposition the external affairs power will support a law regulating persons, places and matters which are physically external to Australia. Moreover, it will support a law that implements an international treaty or convention. When a law purports to give domestic effect to an international instrument, the primary question to be asked is whether it has selected means that are 'reasonably capable of being considered appropriate and adapted to implementing the treaty'.[23]

4.22 However, the power may not be confined to the implementation of treaties or treaty obligations. It is thought to support measures that address matters of international concern, at least where that concern is reasonably concrete.[24] It probably extends also to measures that implement recommendations of international agencies and may extend to measures that pursue agreed international objectives.[25]

4.23 In response to Professor Williams, the Attorney-General's Department argued that 'Australia's obligations to implement Resolution 1373 … is sufficient'.[26]

4.24 UN Security Council Resolution 1373 includes terms that may be construed as 'decisions' under Chapter VII of the *Charter of the United Nations* which are formally binding. Key provisions include 'decisions' that 'all States shall … prevent and suppress the financing of terrorist acts [and] [c]riminalize the wilful provision or

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20 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 1.

21 Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 32.

22 *Hansard*, 13 November 2002, p. 59.

23 *Victoria v. Commonwealth* (1996) 187 CLR 416 per Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ at p. 487. See also at p. 488.

24 *Koowarta v. Bjelke-Petersen* (1982) 153 CLR 168 per Murphy J at p. 242; *Polyukovich v. Commonwealth* (1991) 172 CLR 501 per Brennan J at pp. 560-562 and Toohey J at pp. 657-658.

25 See generally, *R v. Burgess, Ex Parte Henry* (1936) 55 CLR 608 per McTiernan J at p. 687; *Commonwealth v. Tasmania* (1983) 158 CLR 1 per Deane J at pp. 258-259 and Murphy J at pp. 171-172.

26 Attorney-General's Department, 'Answers to questions on notice', 21 November 2002, p. 1.

collection … of funds by their nationals or in their territories with the intention that the funds should be used … in order to carry out terrorist acts' and that all States:

> Ensure that any person who participates in the financing, planning, preparation or perpetration of terrorist acts or in supporting terrorist acts is *brought to justice* and ensure that … such terrorist acts are established as *serious criminal offences* in domestic laws and regulations and that the punishment duly reflects the seriousness of such terrorist acts.[27]

4.25 One difficulty in relying on Resolution 1373 is that while the obligations it imposes are binding they may be uncertain. Moreover the obligations it creates may not contemplate the measures proposed in the Bill. Aside from 'criminalising' the financing of terrorist organisations, creating 'serious offences' for terrorist acts and 'bringing the perpetrators to justice', there may be few other obligations on Australia.

4.26 In addition, any underlying 'international concern' may be qualified. Amnesty International endorsed an 'affirmation' made by the UN Commission on Human Rights in 2000 and 2001 that 'all measures to counter terrorism must be in strict conformity with international law, including international human rights standards'.[28] It urged that anti-terrorism laws should be 'guided by human rights principles contained in international law'.[29] It also argued that anti-terrorism measures must 'be necessary for public safety or public order … and serve a legitimate purpose';[30] that any restrictive laws use precise criteria and 'not confer unfettered discretion on those charged with their execution';[31] that measures be proportionate[32] and appropriate[33] or 'the least intrusive instrument amongst those which might achieve that protective function'.[34]

4.27 Similar 'affirmations' were made by other UN bodies. The UN Committee Against Torture reminded states considering anti-terrorist laws of the 'non-derogable nature of most of the obligations undertaken by them in ratifying the [Torture] Convention'.[35] The High Commissioner for Human Rights also urged States 'to refrain from any excessive steps, which would violate fundamental freedoms and

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27 Resolution 1373, para 1(a) and 1(b) and para 2(e).

28 Amnesty International, *Submission 136*, p. 4.

29 UN Doc E/C/N.4/2002/18 (27 February 2002), para 1.

30 Ibid, para 4(b)

31 Ibid, para 3.

32 Ibid, para 4(f).

33 Ibid, para 4(g).

34 Ibid.

35 Statement of the Committee against Torture, CAT/C/XXVII/Misc.7., 22 November 2001.

undermine legitimate dissent'[36] and criticised the detentions at Guantanamo Bay, Cuba.[37]

The implied incidental power

4.28 As the Attorney-General's Department has noted, support may also be found from the incidental powers that are implied within each of the powers in section 51.

4.29 These implied incidental powers essentially support every federal criminal law. The Commonwealth does not have legislative power over 'criminal activity'. But, within limits, the Parliament can make laws which create criminal offences, and provide for their investigation, prosecution and punishment.

4.30 In general, offences must either fall directly within, or be incidental to the exercise of, a head of constitutional power. A law relying on an incidental power must be *reasonably necessary* for the effective operation of a wider regime. It is not essential to show that the law is *necessary* to effect a legitimate purpose, but a law may be invalid if it exceeds rather than expands the main power. Key concepts are reasonableness and proportionality. 'In short, and generally speaking, Commonwealth criminal law is ancillary to the performance of the responsibility of the Commonwealth to protect itself, its *Constitution*, its institutions and services and to enforce its own laws.'[38]

The implied self-protection power

4.31 The last, although perhaps not least, of the powers cited in support of the Bill was the 'implied power to protect the Commonwealth or national institutions'.

4.32 The High Court has said that the Commonwealth has an 'inherent right of self-protection',[39] a right to prevent 'intentional excitement of disaffection against the Sovereign and Government'[40] and a legislative power to preserve its institutions which was seen to 'follow almost necessarily from their existence'.[41] Thus, it has the power 'to protect its own existence and the unhindered play of its legitimate activities'[42]

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36 Joint statement by Mary Robinson, UN High Commissioner for Human Rights, Walter Schwimmer, Secretary General of the Council of Europe, and Ambassador Gérard Stoudmann, Director of the OSCE Office for Democratic Institutions and Human Rights, 29 November 2001.

37 Statement of High Commissioner for Human Rights on Detention of Taliban and Al Qaida Prisoners at US Base in Guantanamo Bay, Cuba, 16 January 2002.

38 Sir Garfield Barwick, Crimes Bill 1960, Second Reading Speech, *House of Representatives Hansard*, 8 September 1960, pp. 1020–1021.

39 *R v. Kidman* (1915) 20 CLR 425 per Isaacs J at p. 440.

40 *Burns v. Ransley* (1949) 79 CLR 101 per Latham CJ at p. 110.

41 Ibid per Dixon J at p. 116.

42 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Dixon J at p. 188.

which might be found in a mosaic of powers,[43] or in 'an essential and inescapable implication which must be involved in the legal constitution of any polity'.[44]

4.33 The 'implied incidental powers of nation protecting' may also fall within the (largely unexplored) implied nationhood power. This power has been characterised as being incidental to the operation of the executive power in section 61. It has also been characterised as an implied power that is deduced from the 'character and status of the Commonwealth as a national government'.[45] Broadly, it permits the Commonwealth to 'engage in enterprises and activities peculiarly adapted to the government of a nation and which cannot otherwise be carried on for the benefit of the nation'.[46]

Observations

4.34 One difficulty in relying on the defence power or the 'implied incidental powers of nation protecting' is that the proposed questioning and detention powers may not have a sufficient connection with the subject matter of the main power:

> While the Commonwealth has power over "defence" and in relation to matters affecting the "nationhood" of Australia, it could be argued that there is insufficient nexus between legislation detaining persons who may have relevant information concerning terrorism and the "defence" or "nationhood" of Australia so as to serve as a basis for the legislation.[47]

4.35 The issue may be complicated by the fact that the proposed measures rely on other measures, such as the primary and secondary offences in the *Criminal Code*, that may themselves stretch the limits of the implied incidental power discussed above.

4.36 Dr Carne pointed to the fact that all of these heads of power 'are purposive in nature or have a purposive aspect'.[48] The defence power will only support a law that is 'reasonably capable of being regarded as being appropriate and adapted' to 'the defence of the Commonwealth [etc.]'. The external affairs power will support a law that is, among other things, 'reasonably capable of being considered appropriate and adapted to implementing the treaty'. The implied incidental power will support a law that is reasonably necessary for the effective operation of another law.

4.37 These purposive aspects translate into a requirement for proportionality:

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43 The precise constitutional bases of the 'inherent right of self-protection' are discussed in Elizabeth Ward, 'Call Out the Troops: an examination of the legal basis for Australian Defence Force involvement in 'non-defence' matters', *Research Paper No. 8 1997-98*, at http://www.aph.gov.au/library/pubs/rp/1997-98/98rp08.htm [5/7/00]

44 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1 per Fullagar J at p. 260.

45 *Victoria v. The Commonwealth and Hayden* (1975) 134 CLR 338 per Mason J at p. 379.

46 *Davis v. The Commonwealth* (1988) 166 CLR 79 per Mason CJ, Deane and Gaudron JJ at p. 111. See generally Dr Max Spry, 'The Executive Power of the Commonwealth: its scope and limits', *Research Paper No. 28 1995-96*, at http://www.aph.gov.au/library/pubs/rp/1995-96/96rp28.htm.

47 Public Interest Advocacy Centre, *Submission 52*, p. 5.

48 *Submission 24*, p. 6.

> [T]he relevant test developed by the High Court … is to ask whether the legislation in question is reasonably capable [of] being considered appropriate and adapted to an identified constitutional purpose under the relevant head of power. In other words, [it] applies a proportionality test to these powers to assess the constitutionality of the relevant law.[49]

4.38 While of the view that the Committee was entitled to a fuller answer to its questioning of what head of power the Government might use for this Bill, Dr Gavan Griffith QC did not discuss this issue at length, beyond acknowledging the possibility of this being brought into question in a constitutional challenge to the Bill:

> On the question of power, there seems to be - as I have listed - many express powers under paragraph 2.1 of my submission. There are so many powers that one would have to go through the full panoply. It might well be a case here that even nationhood would be something that could at last have legs. I think it is difficult to be dogmatic about this, other than to say that there could be an issue of attaching a power. It may be that the greater difficulty is to say you have gone too far, for some reason. It might be to do with, as Senator Kirk pointed out, the constitutional rights under chapter 3; it may be with respect to some other aspect - the issue of detention without invoking criminal charges. On the general aspect of power, I would have thought that, with the rag-bag of powers—running to the incidental power, the nationhood power, the executive power—there is a real possibility of making out power. I mentioned influx of criminals, even. That is an untested power but, surprisingly, it was pleaded by my predecessor against me in a case involving a refugee to Australia in *Salemi* in 1981. It is difficult to be dogmatic about it, other than to say that there are issues there.[50]

The referral of powers from the States to the Commonwealth

4.39 Section 51(xxxvii) of the Constitution provides that the Commonwealth Parliament may make laws with respect to: '[m]atters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law'. It is not necessary for all States to refer a matter to the Commonwealth. If only some States make a reference, the Commonwealth law can apply only in those States. Once the law is passed, it may be 'adopted' by the Parliaments of other States and so come into effect there as well.

4.40 At the Leader's Summit on Terrorism and Multi-Jurisdictional Crime in April 2002, the Prime Minister and State and Territory Leaders negotiated an *Agreement on Terrorism and Multi-Jurisdictional Crime*. In April 2002 it was announced that part of the agreement involved a referral of powers by the States to the Commonwealth under section 51(xxxvii) of the Constitution 'so that the Commonwealth can legislate *across the board* in relation to terrorism'. In reality, this was an 'in principle' agreement which required further consultation on the form of the referral. On 8 November 2002 the

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49 *Submission 24*, p. 6.

50 *Hansard*, 22 November 2002, p. 154.

Attorney-General announced that the Standing Committee of Attorneys-General had reached an agreement on the form of the referral to the Commonwealth.

Conclusion

4.41 The Government clearly considers it has a sufficient head of power for the legislation. While some submissions argue against this proposition, the case can also be made in favour of it. However, regardless of these broad 'head of power' issues, there may be other issues that arise out of express or implied constitutional limitations.

4.42 As suggested in the introduction, the submissions and evidence indicated that the most obvious constitutional limitations related to the incompatibility of the power to issue warrants with the exercise of judicial power and the possible inconsistency of the proposed detention powers with the requirement for separation of powers.

4.43 Other issues that were raised but not pressed before the Committee related to the potential for the proposed measures to breach other express or implied limitations, for example with respect to freedom of religion or freedom of speech or association.

Chapter 5

WARRANTS

The Bill

5.1 An 'Issuing Authority' is a person who is appointed by the Attorney-General.[1] The Attorney-General may appoint a Federal Magistrate or a Judge by consent.[2] The regulations may also declare 'persons in a specified class' to be Issuing Authorities.[3]

5.2 An Issuing Authority may issue a questioning and/or detention warrant if the Director-General has requested the warrant in accordance with the process in the Bill and the Issuing Authority is satisfied there are reasonable grounds for believing that:

- the warrant will *substantially assist* the collection of intelligence that is *important* in relation to a terrorism offence; and
- the warrant, *in the context of a series of previous warrants*, does not result in a person being detained for a continuous period of more than 168 hours (7 days).[4]

5.3 The Director-General must obtain the Attorney-General's consent.[5] He or she must give the Attorney-General a draft request that includes the draft warrant, statement of supporting facts and other grounds, and a statement regarding any previous requests for warrants in relation to the subject person.[6]

5.4 The Attorney-General *may* consent if he or she is satisfied that:

- there are 'reasonable grounds for believing that the warrant will *substantially assist* the collection of intelligence that is *important* in relation to a terrorism offence';[7] and
- 'relying on other methods of collecting that intelligence would be ineffective';[8] and
- if the warrant authorises detention, etc., there are 'reasonable grounds for believing that, if the person is not *immediately* taken into custody and detained' he or she may alert a person involved in a terrorist offence, may fail to appear

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1 Proposed section 34AB.

2 Proposed subsections 34AB(1) and (2).

3 Proposed subsection 34AB(3).

4 Proposed subsection 34D(1).

5 Proposed paragraph 34D(1)(a) with proposed section 34C(4).

6 Proposed subsection 34C(2).

7 Proposed paragraph 34C(3)(a).

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

before the Prescribed Authority or may destroy, damage or alter evidence described in the warrant.[9]

5.5 The Attorney-General may make changes to the draft request.[10]

5.6 There are essentially two kinds of warrants: *questioning warrants* and *detention warrants.* A questioning warrant must require a person to attend before a Prescribed Authority immediately after notification or at a time specified in the warrant. A detention warrant must authorise a person to be 'taken into custody immediately' by a police officer and brought before a Prescribed Authority immediately for questioning[11] and then detained under arrangements made by the officer 'for a specified period of *not more than 48 hours*' commencing from the time the person is brought before the Prescribed Authority.[12]

5.7 A questioning warrant can effectively be turned into a detention warrant by the Prescribed Authority with the approval of the Attorney-General if it 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 or may destroy, damage or alter evidence described in the warrant.[13] A detention warrant can be issued after a person has been released from earlier detention.[14]

5.8 Once served with a warrant, it is an offence to fail to appear before a Prescribed Authority;[15] or to provide information;[16] or to produce records or things requested in accordance with the warrant.[17] It is also an offence to provide false or misleading information in answer to questions before the Prescribed Authority.[18] All of these offences are subject to imprisonment for a maximum of 5 years.

Serial warrants

5.9 Clearly, multiple detention warrants can be issued.[19] While each is subject to a limit of detention for *no more than 48 hours*, multiple warrants can be issued with the result that a person may be detained for a longer period, subject to two caveats:

- no warrant, in the context of a series of previous warrants, may result in the person being detained for a continuous period of more than 168 hours; and

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

10 Proposed subsection 34C(3).

11 Proposed section 34DA.

12 Proposed subsection 34D(2).

13 Proposed section 34F(3).

14 Proposed section 34F(7).

15 Proposed subsection 34G(1).

16 Proposed subsections 34G(3) and (4).

17 Proposed subsection 34G(6) and (7).

18 Proposed subsection 34G(5).

19 For example, see proposed subsection 34C(1A).

- a warrant that may result in the person being detained for a continuous period of more than 96 hours may only be issued by an Issuing Authority who is a judge or a member of a class specified in regulations for the purposes of section 34AB.[20]

5.10 With ASIO and the Attorney-General's Department, the Committee examined the prospect of serial or rolling warrants in which a person is released and detained to refresh the detention period. The 'serial warrants' issue seemed to arise in relation to:

- 48 hour detention periods, permitting serial incommunicado detention, and
- 168 hour detention periods, permitting indefinite detention for questioning.

5.11 ASIO's legal counsel suggested that the practice might constitute an 'abuse of process' and therefore sustain a ground of judicial review.[21] However, the issue remains that the practice is still possible. This is complicated by the fact that, while an 'abuse of process' ground may be open, it may be a difficult case to argue, given the scope, purpose and object of the legislation. A legislative regime that deals with national security and operates as a last resort preventive device might be one that does not admit rigid boundaries from which to measure concepts such as 'abuse of process' or 'improper purpose'.

5.12 On this issue the Attorney-General's Department emphasised the possible need to have access to witnesses at some future time following an initial period of questioning:

> How would you draft a piece of legislation or a provision that would pick up a situation where a person is actually detained for a period of only, say, 48 hours, under the first warrant, but you gain no information from that individual and therefore that person is released? If in six months time you get further intelligence that indicates that this individual might be able to assist and you then call them in, a six-month time gap has elapsed.[22]

5.13 While respecting this need, the Committee took the view that there may be a need to place limits on the ability of ASIO and the AFP to obtain 'serial warrants'.

5.14 Both ASIO and the Attorney-General's Department emphasised that the availability of further information from other sources would determine how soon a further warrant would be needed in the case of a person who had been released and that they would not be 'in the business of dragging citizens back in every so often to keep them in for seven days to try to wear them down'.[23]

5.15 The Attorney-General's Department made the following comment:

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20 Proposed section 34C(5).

21 *Hansard*, 12 November 2002, p. 18.

22 Ibid, p. 19.

23 Ibid.

> What I was putting was that it might well be that you do not get anything the first time around, but then you might get more information that you can then put to the person if you bring them in, to say, 'Okay, you said you didn't know this, but what about this?' The difficulty would be in having a time period that would not prevent you from doing that further down the track.[24]

5.16 Similarly, ASIO found it very difficult:

> to envisage circumstances in which you could define a particular period of grace in which a person released should be, say, free to stay at large pending the gathering of a new warrant. Given that a new warrant on detention is designed for urgent circumstances, it seems to me that imposing that sort of prohibition would only have effect in those very, very rare circumstances when you most need access to the person without such a prohibition.[25]

5.17 'Thinking laterally', the Director-General of ASIO suggested in evidence that one possible additional safeguard in respect of serial warrants might be that 'if someone were to be detained a second time within X period of time, their right of access to a lawyer would be from the beginning of their period of detention'.[26]

5.18 The Committee agrees that there is a large difference between serial warrants, involving, for example, continuous periods of detention which do not allow for access to the Federal Court, and broken periods of detention over six months where further information or evidence arises in order to sustain a fresh application for a warrant.

Silence

5.19 One of the issues raised in evidence was the effect of a person's silence before the Prescribed Authority. (It should be noted that there is no right to silence under the Bill, but a person might, nonetheless, defy this provision). When asked what would happen if a witness simply refused to answer, ASIO suggested that the grounds for the warrant would cease to exist:

> [I]f [ASIO] became convinced that there was no way that the person would provide the information that was being sought and that with it was entirely fruitless to have the warrant, then the Director-General would have an obligation to inform the minister and the issuing authority that the ground upon which the warrant existed had ceased to exist, and take steps necessary to ensure that further action under the warrant was discontinued. If it was a clear case in which there was no basis upon which further action under the warrant would assist the organisation in collecting intelligence that is important in relation to a terrorist offence, that particular provision in section 34R requiring discontinuation of action would take place.[27]

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24 *Hansard*, 12 November 2002, p. 19.

25 *Hansard*, 18 November 2002, p. 127.

26 Ibid, p. 127.

27 *Hansard*, 12 November 2002, p. 31.

5.20 The corollary may be that continued detention and questioning may be beyond the scope, purpose and object of the legislation. The conclusion may be even stronger in relation to the issuing of subsequent warrants in these circumstances.

5.21 Silence before the Prescribed Authority may also have wider effects. It may lead to the making of adverse inferences in subsequent prosecutions that are discussed in Chapter 6. It may also alter the characterisation of detention in respect of the constitutional limits relating to non-punitive detention that are discussed in Chapter 7.

Suspects v non-suspects

5.22 Many submissions objected to the issuing of warrants for the detention and questioning of non-suspects. FCLC (Victoria) argued 'it would be inconsistent if a person detained on criminal charges had more beneficial rights than someone who had not been charged'.[28]

5.23 On the other hand it might be argued that fewer rights need be accorded to persons if the information obtained from their examination is not be used against them in criminal proceedings. The Attorney-General has commented that the detainees in Guantanamo Bay 'have been the subject of interviews for the purposes of intelligence gathering *and* law enforcement. It's appropriate that any interviews they give not be used against them in criminal proceedings if they're not accorded appropriate rights'.[29] The Attorney-General's Department noted that the 'broader threshold' that existed in the Bill, vis-à-vis the law enforcement regimes in the United Kingdom and Canada, was based on the fact that the process targeted non-suspects: 'the person you are looking at is not someone you would [have] expected to put in jail and punish'.[30] In effect, it would seem, fewer 'appropriate rights', or a 'broader threshold' may be permissible in relation to non-suspects or persons who are subject to a lower risk of criminal prosecution.

5.24 The issue is not clarified by the fact that the detention and questioning regime is limited to a purpose that relates to *terrorism offences* and not *acts of terrorism*. These '*terrorism offences*' may be *primary* or *secondary* offences. They include terrorist acts and other more remote acts such as providing or receiving training and the collection or making of documents; and, in relation to terrorist organisations, direction, membership, recruitment, financial coordination and support.[31]

5.25 In a very real sense, there is a wide discretion, in issuing a warrant, to select from suspects and non-suspects who may have a remote proximity to terrorist acts. One approach is to limit the regime to suspects. Dr Gavan Griffith QC suggested:

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28 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 20.

29 The Hon. Daryl Williams, 'Second Class Citizens: One Year on from September 11', Transcript of Interview, *Sunday*, 25 August 2002.

30 *Hansard*, 12 November 2002, p. 4.

31 *Criminal Code*, sections 101.1-101.7.

> [I]t would seem more appropriate that the scheme of the Act should be limited to those who have been suspected of having some involvement with respect to terrorism or a terrorist offence, rather than relying on the goodwill and judgment of the Director-General of ASIO and the relevant Minister.[32]

5.26 Another approach is to limit the regime to deal with primary offences. In his recommendation of a 'non disclosure offence' modelled on United Kingdom law, Dr Greg Carne focused on the notion of an 'imminent terrorist attack', where a 'terrorist attack' would be defined as a 'widespread or systematic use or threat of the use of serious force or application of serious harm in the commission of a terrorist act'.[33] This would confine the regime to the primary terrorist offence in the *Criminal Code*.[34]

Changing purposes or outcomes

5.27 One of the issues that arose in evidence was the prospect that the questioning and detention process could be consciously made to serve a law enforcement purpose.

5.28 The purposes of the process were discussed in some detail in Chapter 3. The tentative conclusion was that the objectives of intelligence collection and criminal investigation only diverge when a choice is made as to what outcome is intended. As noted in that discussion, a proposed oversight committee would be responsible to 'determine when an intelligence matter becomes a criminal investigation':

> If it came to a situation where a decision needed to be made to continue or a decision needed to be made in terms of the best outcome, we would need to decide whether we disrupt the organisation through security intelligence or through a criminal prosecution. That decision is made by the [proposed counterterrorism information oversight committee].[35]

5.29 The issue for the present discussion is whether those choices may be made during the questioning process rather than at the outset. The concern is that agencies could cooperate so as to use the Prescribed Authority process to obtain information for a criminal prosecution that was otherwise unavailable.

5.30 However, ASIO rejected this possibility in responding to the following question on notice:

> Is it possible, within the one process, for ASIO to stop questioning before incriminating statements have been made, and the AFP to start questioning for the purposes of gathering evidence for prosecution? Could this be done intentionally and cooperatively?

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32 Dr Gavan Griffith QC, *Submission 235*, p. 7.

33 *Submission 24*, p. 12.

34 *Criminal Code*, section 101.1.

35 *Hansard*, 14 November 2002, pp. 75-76.

5.31 It stated:

> No. A person could only be questioned pursuant to the new ASIO warrant for the purposes for which that warrant was issued (ie., the collection of intelligence by ASIO that is important in relation to a terrorism offence). AFP questioning of persons for the purpose of gathering evidence for prosecution is governed by a discrete statutory regime under Part 1C of the *Crimes Act 1914*. That Part imposes obligations on investigating police officials in respect to persons arrested for Commonwealth offences, and in respect of persons being questioned as suspects in relation to Commonwealth offences. The AFP would not be authorised under the proposed ASIO warrants to ask questions for the purpose of gathering evidence foe prosecution, and it would not be possible to have the basis of the questioning altered for this purpose within the one process of the ASIO warrant.[36]

Constitutional issues

5.32 One of the key concerns for the Committee is the possible constitutional issues arising from the conferral of the power to issue warrants on judicial officers.

5.33 As originally introduced, the Bill gave the power to issue warrants, and to preside over questioning, to a single Prescribed Authority. The provisions gave the Attorney-General the power to authorise federal judges in that role.

5.34 Following the PJCAAD report Government Amendments split the dual powers under the Bill:

> The judges are not exercising the power of the prescribed authority under the legislation as it has been drafted. Resulting from a discussion of this issue in the PJC, it was decided to divide up what was originally one power. Under the original bill, the prescribed authority was also the authority that issued the warrant and . . . it was decided to divide it up so that the issuing of the warrant would be done by a judge or a federal magistrate but the actual prescribed authority would be a member of the Administrative Appeals Tribunal, not a chapter III court. Therefore, it would not raise the problems that arise in respect of [*Grollo v. Palmer*].[37]

Judges as *personae designatae*

5.35 The prime function of an Issuing Authority is to mediate the relationship between the state and the individual. For example, in issuing a criminal search warrant, the relevant authority must be satisfied that the requesting agency has

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36 ASIO, 'Answers to questions on notice', 22 November 2002, p. 5.

37 *Hansard*, 12 November 2002, p. 24 (Mr Holland, Attorney-General's Department)

provided concrete information.[38] Moreover, he or she must balance *at arms length* the competing public and private interests. He or she must 'stand between the police and the citizen' and give 'real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen'.[39]

5.36 Mr Bret Walker SC emphasised the importance of the Issuing Authority for warrants maintaining a strictly impartial role:

> Warrant issuing … must be impartial or it is rotten. There is nothing worse than a warrant-issuing authority that sees himself or herself as a rubber stamp, and those that do are behaving disgracefully. It is an impartial role.[40]

5.37 In the criminal justice system, the role of issuing authority is given to judges as *personae designatae*, that is, in their personal rather than their judicial capacity. The argument in favour of judges, as opposed to tribunal members or other administrators, is that they are, by their role and tenure, well suited to this task. In evidence before the PJCAAD, the Law Council of Australia put the argument this way:

> [T]he powers proposed to be granted to ASIO pursuant to [questioning] warrants … are so far reaching, including the power to request detention of persons for 48 hours and longer, that the issuing of warrants should only be capable of being authorised by a Chapter III judge. The common law has long recognised the role of the judiciary in the authorisation of the issuing of warrants. Such a role fits within the established principle of the performance of such function by judges as *personae designatae*.[41]

5.38 Similarly, in evidence to this Committee Dr Gavan Griffith QC argued that the proposed questioning and detention warrants involved a heavy responsibility: '[i]t is the sort of responsibility that someone with judicial experience should exercise'.[42] He referred also to a concession that was made in *Grollo v. Palmer* in support of conferring a role to issue telephone intercept warrants on judges:

> [I]t is … because of the intrusive and clandestine nature of interception warrants and the necessity to use them in today's continuing battle against

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38 For example, a search warrant may be issued if a Justice of the Peace 'is satisfied by information' (*Crimes Act 1914*, old s 10), 'satisfied by information upon oath' (*Crimes Act 1958* (Vic), s 465) or if it appears 'on a complaint made on oath' (*Criminal Code 1913* (WA), s 711) that there is reasonable ground for suspecting the existence of property connected with an offence, etc.

39 *Parker v. Churchill* (1985) 9 FCR 316 per Burchett J at p. 322, quoted with approval by the High Court in *George v. Rockett* (1990) 93 ALR 483.

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

41 Law Council of Australia, *submission 147* to the Parliamentary Joint Committee on ASIO, ASIS and DSD, quoted by the *Advisory Report on the ASIO Legislation Amendment (Terrorism) Bill 2002*, 5 June 2002, p. 16.

42 *Hansard*, 22 November 2002, p. 156.

> serious crime that some impartial authority, accustomed to the dispassionate assessment of evidence and sensitive to the common law's protection of privacy and property …., be authorised to control the official interception of communications. In other words, the professional experience and cast of mind of a Judge is a desirable guarantee that the appropriate balance will be kept between the law enforcement agencies on the one hand and criminal suspects or suspected sources of information about crime on the other.[43]

Separation of powers

5.39 A key issue for the present inquiry regarding warrants is the separation of powers requirement implicit in Chapter III of the Constitution and discussed in the *Boilermakers' Case*.[44] Basically, Chapter III prohibits the conferral of executive power on the Judiciary and, vice versa, the conferral of judicial power on the Executive.

5.40 However, the issue of a warrant is an exercise of administrative power rather than judicial power. This proposition is widely accepted in relation to listening device and telecommunications interception warrants.[45] In part it is based on the fact that such decisions do not involve such things as the adjudication of the rights of parties,[46] or the identification and enforcement of rights in accordance with legal principles.[47]

5.41 It appears that the issue of a warrant is not necessarily inconsistent with the exercise of judicial power. It appears, not least from the decision of the High Court in *Grollo v. Palmer*, that the conferral of a power on a judge to issue warrants will be consistent with the *Boilermakers* principle if it is given to the judge as an individual, it is received by consent and it is not incompatible with the judge's performance of his or her judicial functions or the proper discharge by the judiciary of its responsibilities as an institution.[48] In evidence to the Committee, the Attorney-General's Department seemed to suggest that there was 'only one factor' affecting the conferral of power on judges which was that the judge exercise the power voluntarily.[49] However, other submissions and evidence suggested that the key concept was compatibility, or more specifically, the need to ensure that the conferral did not undermine judicial integrity.

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43 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at p. 367.

44 *R v. Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

45 *Hilton v. Wells* (1985) 157 CLR 57; *Coco v. The Queen* (1994) 179 CLR 427; *Grollo v. Palmer* (1995) 184 CLR 348. The High Court has also held that federal judges can issue telecommunications interception warrants.

46 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.

47 *Queen Victoria Memorial Hospital v. Thornton* (1953) 87 CLR 144; *R v Gallagher; Ex parte Aberdare Collieries Pty Ltd* (1963) 37 ALJR 40 at 43.

48 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at pp. 360–365.

49 *Hansard*, 12 November 2002, p. 24.

Testing incompatibility

5.42 Examples of incompatibility would include the conferral of an overwhelming non-judicial workload, the conferral of functions which *of their nature* compromise or impair judicial integrity or undermine public confidence in the integrity of the judge or the judiciary.[50] Another example may be the conferral of an unduly confined administrative discretion. Dr Griffith indicated that six judges in *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs*[51] 'broadened the scope for recognition of matters of constitutional incompatibility to the holding of judicial office to the function of reporting to the Minister'.[52] In that case, the basic issue was that a judge, in preparing a report under heritage legislation, was so confined by ministerial direction and control as to be deprived of a free and open discretion. This, combined with other factors, made it incompatible with the exercise of judicial function.

5.43 It was argued that the power to issue a warrant, actually or potentially involving detention and with limitations on the Issuing Authority's discretion to vary the terms of the warrant, may undermine public confidence in the integrity of the judiciary. The majority in *Grollo v. Palmer* indicated that a live issue in respect of compatibility was 'whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch'.[53] This statement was borrowed from a decision of the United States Supreme Court, *Mistretta v. United States*. In *Mistretta* the court reacted against a perception that the court could be 'borrowed by the political branches [the Parliament or the Executive] to cloak their work in the neutral colours of judicial action'.[54]

5.44 Dr Gavan Griffith QC suggested that '[i]t would seem on this structure of legislation that [there is] almost nothing for a Federal Court judge to do other than sign a warrant. You are not able to vary its terms'.[55] Moreover, he suggested, while there was a basic discretion to reject the warrant, there might be 'no reason not to sign if the forms are in order'. In his view 'there is no scope for the exercise of effective discretion'.[56] Dr Griffith also offered the opinion that:

> It seems repugnant to the status of impartial judicial office for government investigating authorities to have unpublicised access to a Judge in his chambers in Court premises to present privately information to a Judge making administrative decisions affecting the liberty of persons.[57]

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50 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at pp. 360–365.

51 *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

52 *Submission 235*, pp. 2-3.

53 *Grollo v. Palmer* (1995) 184 CLR 348, per Brennan CJ and Deane, Dawson and Toohey JJ, at p. 365, quoting from *Mistretta v. United States* 488 (1989) US 361 at 404.

54 488 U.S. 361, 407 (1989).

55 *Hansard*, 22 November 2002, p. 149.

56 Ibid.

57 *Submission 235*, p. 3.

5.45 In addition, he raised the possibility that an Issuing Authority would be exposed to the possibility of 'being summoned and cross-examined as a witness in proceedings, even to the point of attack on credit in that judge's own court'. He concluded that the practice 'seems unacceptable as a matter of constitutional practice'.[58]

5.46 A similar position was taken by Dr Stephen Donaghue,[59] Professor George Williams[60] and the Federation of Community Legal Centres (Victoria).[61] On the other hand, the Law Council of Australia referred to the suggestion in its submission to the inquiry by the PJC that a Chapter III judge should authorise the issue of a warrant for compulsory questioning and detention.[62]

5.47 The legal adviser to ASIO suggested that the potential for conflict might be less likely to arise under the Bill because the purpose behind the warrant was intelligence gathering rather than prosecution:

> unlike, for example, law-enforcement TI warrants, the particular purpose of this warrant is to assist in the collection of intelligence, as opposed to facilitating the collection of evidence for the purposes of prosecution … So the issue of conflict is less likely to arise in the first instance.[63]

5.48 In his submission Dr Griffith raised the prospect that the majority of the High Court may have applied the incompatibility test wrongly in *Grollo v. Palmer*. In his submission he expressed the view that the line of authority supporting that case[64] was based on 'fragile and impermanent reasoning'.[65] In addition, he commented:

> I regard it as likely that the High Court … would come to find that the designation … of judges … as an issuing authority would be unconstitutional for the reasons convincingly stated by McHugh J in his sole dissenting judgment in *Grollo v. Palmer*.[66]

5.49 In *Grollo v. Palmer*, McHugh J seemed to question the underlying basis of the doctrine. He referred to a comment by Mason and Deane JJ in *Hilton v. Wells*:

> To the intelligent observer, unversed in what Dixon J. accurately described – and emphatically rejected – as "distinctions without differences", it would come as a surprise to learn that a judge, who is appointed to carry out a

58 Ibid, p .3.

59 *Submission 61*, p. 7.

60 *Submission 22*, p. 6.

61 *Submission 243*, pp. 30-32.

62 *Submission 299*, p. 8.

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

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

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

66 Ibid, pp. 1-2.

> function by reference to his judicial office and who carries it out in his court with the assistance of its staff, services and facilities, is not acting as a judge at all, but as a private individual. Such an observer might well think, with some degree of justification, that it is all an elaborate charade.[67]

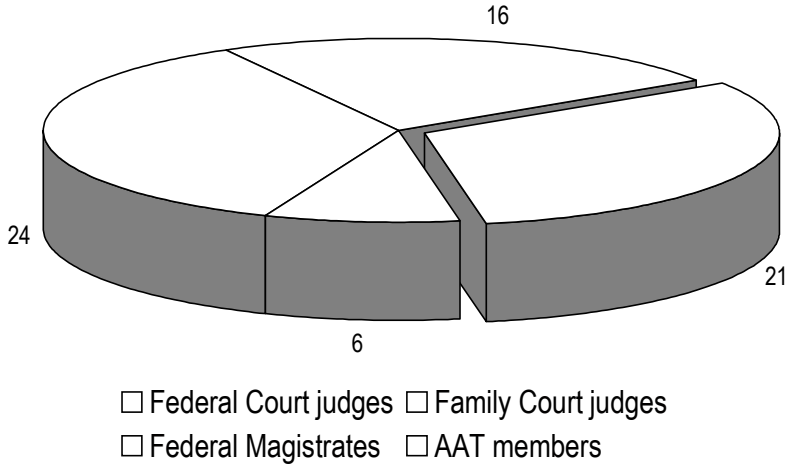
5.50 In Dr Griffith's view, the *persona designata* notion that a judge could exercise executive power in his or her personal capacity was 'not one that is likely for much longer to be apparent to, and accepted by, the majority of the High Court'.[68] He also suggested that the majority in *Grollo v. Palmer* had, perhaps, been somewhat indulgent toward the Government 'in accepting that it may be appropriate, to restore public confidence or to maintain public confidence in these matters, to have a Federal Court judge in effect supervising [the issuing of telephone intercept warrants]'.[69]

Judicial officers and their consents

5.51 Clearly, one of the fundamental criteria identified in *Grollo v. Palmer* is that a judge must consent to the conferral of the power to issue questioning and detention warrants. An issue of practical concern is whether any federal or state judges would be willing to consent, given the nature of the warrants and the possibility of later review.

5.52 In evidence and submissions, reference was made to the fact that a number of federal judicial officers had refused to consent to the conferral of a power to issue warrants under the *Telecommunications (Interception) Act* 1979. In answers to questions on notice, the Attorney-General's Department provided statistics for the numbers of Federal Court and Family Court Judges and Federal Magistrates that were currently appointed as 'eligible judges' under that Act.[70] (See graph below)

Eligible judges and nominated AAT members
(as at 13 November 2002)



67 *Hilton v. Wells* (1985) 157 CLR 57 at p. 84.

68 Dr Gavan Griffith QC, *Submission 235*, p. 3.

69 *Hansard*, 22 November 2002, p. 149.

5.53 In particular, Dr Griffith suggested, '[i]t is to be doubted that any federal judicial officer, acting advisedly, would volunteer to expose himself or herself to such risks by volunteering to act in a non-judicial capacity as an issuing authority'.[71] Given the numbers of 'eligible judges' under the existing telecommunications intercept warrant arrangements, this argument must be based on the particular aspects of the questioning and detention warrants. For its part, the Attorney-General's Department was ambivalent, and therefore unconvincing, about the prospect of judges consenting to the conferral of the power to issue these warrants. The Department simply made the observation: '[i]t will be interesting to see how many judges take up the offer'.[72]

A tribunal?

5.54 While it is a difficult issue to predict, the evidence and submissions suggest a live debate on *Grollo v. Palmer* and the issue of incompatibility.

5.55 Mr Bret Walker SC, on behalf of the Law Council of Australia, declined to comment, except to say 'I have no doubt that what the law is at the moment is to be found in the majority not the minority [in *Grollo v. Palmer*]'.[73] He did say:

> That being said, there are powerful reasons … why, constitutionally or not, serving judges, particularly in courts who will have the job of judicial review of the lawfulness of conduct under any such law, should really not be getting into this game. Whether there is a *persona designata* doctrine in Australia or not does not matter for the purpose of the merits that we would take. The merit we would take is that judges should not be involved in matters which are so closely allied with the executive and that retired judges have [a number of] virtues that you might like to consider.[74]

5.56 Dr Gavan Griffith QC put forward a more elaborate proposal:

> 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, for example someone like Gordon Samuels who was head of the [*Commission of Inquiry into ASIS*].[75]

5.57 Philip Boulten, on behalf of the Criminal Defence Lawyers Association said:

> I have given endorsement … to Gavan Griffith's suggestion that there should be no currently serving magistrates or judges given the power to issue these warrants, or to preside at the questioning.[76]

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

71 Dr Gavan Griffith QC, *Submission 235*, p. 3.

72 *Hansard*, 12 November 2002, p. 25.

73 *Hansard*, 26 November 2002, p. 230.

74 Ibid.

75 *Hansard*, 22 November 2002, pp. 149-150.

76 *Hansard*, 26 November 2002, p. 231.

5.58 Similarly, Dr Stephen Donaghue, in considering other models, suggested that appointing a retired judge would increase public confidence in the warrants process.[77] The Victorian Bar thought the idea 'had a tremendous amount to commend it'.[78]

5.59 The proposal relating to retired judges is considered more fully in Chapter 8.

77 *Submission 61*, p. 8.

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

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?
>
> 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.

Chapter 7

DETENTION

A central issue

7.1 The proposed power to detain people for questioning, particularly those who are not suspects, emerged as one of the most controversial issues during this inquiry, attracting comment from the vast majority of submissions and witnesses.

7.2 The features of the Bill relating to detention that have emerged as significant are as follows:

- a person, being either a suspect or a non-suspect, who may have information that may assist in preventing terrorist attacks or prosecuting those who have committed terrorist offences, may be taken into custody and brought before a Prescribed Authority for questioning;
- the person may be detained incommunicado for up to 48 hours;
- the period of detention may be extended up to a maximum of 168 hours through the process of the Director General of ASIO applying for successive warrants.

7.3 Once in detention, the person loses the right to silence and the privilege against self incrimination, as described in the previous chapter. Effectively, this means that a person who is not suspected of committing an offence but who is detained under the provisions of this Bill is subjected to severe criminal penalties which include custodial sentences, should they decline to cooperate. They also have restricted access to independent legal advice.

7.4 The detention provisions do contain a number of safeguards and accountability provisions, as described elsewhere in this report. It is also true that proponents of the Bill contend that it is intended to facilitate the gathering of intelligence in order to prevent terrorist acts, not for the purposes of prosecuting the person detained. Nonetheless, the detention provisions are considerably more severe than apply even to persons charged under the criminal code with serious offences, and persons who would be detained under this Bill have fewer rights and protections. As such, the detention provisions have aroused disquiet among many people.

7.5 Mr Jacob Fajgenbaum QC, giving evidence on behalf of the Victorian Bar, articulated the feelings of many in the legal and wider communities:

> The Bar has taken the position that it opposes the scheme of the legislation for the compulsory detention and isolation of people not suspected of complicity in any criminal behaviour or terrorist behaviour simply on the basis that they may be able to provide information in relation to terrorism offences … The extraordinary powers which the bill proposes to be given to the government are unknown in any other Western democracy. No other

> Western democracy has responded as we have to the scourge of terrorism. None, including the United States, the United Kingdom or Canada, has responded in a similar fashion. The Bar takes the view that the bill threatens an invasion of human rights otherwise held sacred in this society.[1]

Purpose

7.6 A key concern is the purpose of detention. Dr Stephen Donaghue said:

> I would suggest that it is necessary to answer a fundamental question before it is possible to sensibly consider alternative models, and that question is this: what is the purpose of detention under the existing bill? Until that purpose can be very precisely identified, it is not possible to make a judgment as to when you need to detain someone and when you do not.[2]

Competing purposes

7.7 In theory, the purpose of detention is limited to the prevention of acts that may prejudice the task of collecting intelligence. The Bill allows the Attorney-General to authorise detention if there are reasonable grounds for believing that, if the person is not immediately taken into custody and 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.[3] The Prescribed Authority may authorise detention during the questioning process on similar bases.[4]

7.8 In practice, detention might be authorised for broader purposes. For example, it could be authorised in order to directly facilitate the collection of intelligence, the prosecution of detainees, or the prevention of possible acts or further acts of terrorism. Within these broad purposes, there is the possibility that detention might be authorised for more untoward purposes. For example, it might be authorised for the unstated purpose of coercing a person to provide answers or the prosecution of a person who might more properly be considered as a suspect in the criminal justice system. These broader purposes were raised in evidence and submissions that are discussed below.

Other issues

7.9 The discussion of purpose imports a discussion of a range of broader issues. The first issue is the competition between the objectives of intelligence collection and criminal investigation that was discussed in Chapter 3. As indicated, the need to distinguish between these objectives has been a threshold issue for the inquiry. Failure to do so may suggest that the purpose of detention is connected with criminal prosecution. The second issue is the competition in respect of suspects and non-suspects that was discussed in Chapter 5. As noted, there is a wide discretion to select

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1 *Hansard*, 22 November 2002, p. 158.

2 Ibid, p. 168.

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

4 Proposed subsection 34F(3).

from suspects and non-suspects who may have a remote proximity to terrorist acts. This is complicated by the fact that there are not only primary but *secondary* offences.

7.10 These issues are also complicated by the offence of failing to appear before the Prescribed Authority. The existence of this offence, and the choice as to whether a person will be charged, may have an effect in facilitating the questioning process.

Constitutional issues

7.11 The discussion of purpose is critical to the discussion of constitutional bases. As noted in Chapter 4, Dr Greg Carne observed in his submission that the various heads of power that have been put forward in support of the proposed measures 'are purposive in nature or have a purposive aspect' and '[t]he purpose of the relevant law "must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth": *Stenhouse v. Coleman* (1944) 69 CLR 457':[5]

> Accordingly, the relevant test … as to constitutionality is to ask whether the legislation in question is reasonably capable of being considered appropriate and adapted to an identified constitutional purpose under the relevant head of power. In other words the High Court applies a proportionality test to these powers to assess the constitutionality of the relevant law.[6]

7.12 The nature and purpose of detention will impact upon 'heads of power' issues:

> Some sections of the bill, eg 34F(8) 'A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention' may fail the test of being reasonably capable of being considered appropriate and adapted to a relevant identified constitutional purpose.[7]

7.13 The broad proportionality point was reiterated by Phillip Boulten on behalf of the Criminal Defence Lawyers Association:

> In considering what its response should be to the terrorist phenomenon, parliament should act with proportionality and it should introduce measures that are truly proportionate to the threat that country faces that are not arbitrary and that are likely to achieve their purpose. The provision for detention of people for up to 48 hours with the capability of rolling the detention over … is neither proportionate to the threat and nor is it likely to achieve the purpose for which the parliament thinks it should be imposed.[8]

7.14 These issues may also impact on other constitutional issues or limitations.

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5 *Submission 24*, p. 6.

6 Ibid.

7 Ibid.

8 *Hansard*, 26 November 2002, p. 227.

7.15 Professor George Williams argued that the detention provisions under the Bill may be inconsistent with the requirement for separation of powers in Chapter III of the Constitution. In support, he quoted Brennan, Deane and Dawson JJ in *Lim's Case* who said that 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[9] At the same time, he did acknowledge that administrative detention might not offend this principle if it can be characterised as not being penal or punitive. He quoted Gummow J in *Kruger's Case*, '[t]he categories of non-punitive, involuntary detention are not closed'.[10] He noted that one such category relates to defence or national security.

7.16 In summary, Professor Williams made the following statement:

> It is not possible to say with confidence whether the High Court would find that the Constitution has been infringed. However, the arguments for invalidity are sufficiently strong that a High Court challenge is probable in the event of a detention (assuming … that there is knowledge of the detention).[11]

Lim's Case

7.17 In *Lim's Case*, Brennan, Deane and Dawson JJ indicated that *ordinarily* '[t]o make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison'.[12]

7.18 In this respect, the judges referred to a long standing common law tradition or rule that can be traced to a frequently cited passage from *Blackstone's Commentaries*:

> The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment … To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*.[13]

7.19 The kernel of this rule is really a fundamental observation about *habeas corpus*: 'it is unreasonable to send a prisoner, and not to signify withal the crimes

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9 Blackstone, quoted by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 28.

10 *Kruger v Commonwealth* (1997) 190 CLR 1 at p. 162.

11 *Submission 22*, p. 6.

12 *Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 28.

13 William Blackstone, *Commentaries on the Laws of England*, First Edition, Dawsons, 1765, Vol. 1, pp. 132-133.

alleged against him'.[14] This observation is based on a comment in *Coke's Institutes* that 'no man ought to be imprisoned, but for some cause: and … that cause must be showed: *for otherwise how can the Court take order therein according to law*?'.[15]

Exceptions

7.20 Behind these comments lie a number of live concerns which are particularly relevant to the subject matter of this inquiry. It is significant that, before making the 'fundamental observation' quoted above, Blackstone expressly referred to the dangers of arbitrary detention, the exigencies of national security, the balance between liberty and security and the role of the judiciary as a fetter on executive power:

> Of great importance to the public is the preservation of this personal liberty … to bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny … But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. *And yet sometimes, when the state is in real danger, even this may be a necessary measure*. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient.[16]

7.21 In this passage, Blackstone referred to the practice in the Roman Senate of creating a magistrate of absolute authority in times of emergency. He observed that 'this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever'.[17]

7.22 The same theme was reflected in a comment made by former Liberal Prime Minister Sir Robert Menzies that was quoted by the Australian Section of the International Commission of Jurists:

> The greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and lose its own liberty in the process.[18]

Defence and national security

7.23 Clearly, there may be an exception to the rule 'when the state is in real danger'. As noted, Professor George Williams refers to a defence or national security exception. In the *Communist Party Case* Dixon J made the following observation:

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14 Ibid.

15 Edward Coke, *The Second Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts*, Sixth Edition, London, 1681, p. 53.

16 Blackstone, op. cit., pp. 131-132.

17 Ibid.

18 Sir Robert Menzies, *House of Representatives Hansard*, 1 September 1939, in *submission 237*, p. 2.

> [I]t is futile to deny that when the country is heavily engaged in an armed conflict … the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and defence of the Commonwealth.[19]

7.24 The difficulty is to show that the potential terrorist threat in Australia is a sufficient threat to national security that it enlivens this aspect of the defence power. There may also be a significant difference between 'hostilities' and 'threats to national security' so as to enliven the defence exception. As PIAC noted, while the majority in *Lim's Case* recognised the exception in relation to defence, the court 'did not recognise an exceptional category of "detention for national security" purposes.'[20]

Non-punitive detention

7.25 In addition to an exception in favour of defence or national security, there may be a wider set of exceptions that relate to non-punitive detention. A key passage from Brennan, Deane and Dawson JJ's judgment in *Lim's Case* relates to this issue:

> Involuntary detention in cases of mental illness or infectious disease can … legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, … the citizens of this country enjoy, at least in times of peace … a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.[21]

7.26 Clearly, detention for the purpose of mental health or quarantine purposes may not offend Chapter III. Also, as was noted above, Gummow J said in *Kruger's Case* that '[t]he categories of non-punitive, involuntary detention are not closed'.[22]

Proportionality

7.27 The expression 'non-punitive detention' may be a euphemism for a broader concept. *Lim's Case* may even suggest that administrative detention is permissible if it is connected with a head of legislative power and is reasonably necessary for the purpose of its exercise. In the context of the mandatory detention of asylum seekers Brennan, Deane and Dawson JJ held that, in order to be non-punitive, it had to be 'limited to what is *reasonably capable of being seen as necessary* for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered' otherwise it will be 'of a punitive nature and contravene Ch.III's insistence

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19 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, per Dixon J at p. 195, citing *Lloyd v. Wallach* (1915) 20 CLR 299; *Ex parte Walsh* (1942) ALR 359; *Little v. Commonwealth* (1949).

20 Public Interest and Advocacy Centre, *submission 52*, p. 5.

21 *Chu Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at p. 28.

22 *Kruger v Commonwealth* (1997) 190 CLR 1, at p. 162.

that the judicial power of the Commonwealth be vested exclusively in the courts'.[23] McHugh J said that a law permitting detention cannot be characterised as punitive 'if the purpose of the imprisonment is to achieve some legitimate non-punitive object'.[24]

7.28 In this context 'punitive' might be considered a term of art. The question is not whether the administrative detention arrangements are harsh or degrading, or whether they resemble criminal incarceration, but whether they are connected with a head of legislative power and whether they are reasonably capable of being seen as necessary for the purpose of pursuing a legitimate objective. This appears to be a *purposive* test involving questions of *proportionality* that exist in other constitutional areas.

Protective detention

7.29 One of the objectives surrounding detention may be the prevention of terrorist acts *themselves*. In October 2001 the Attorney-General stated the draft proposed measures would '*only* be authorised where the [Prescribed Authority] was satisfied it was *necessary in order to protect the public* from politically motivated violence'.[25] Since then there seem to have been no references to protective or preventive detention.

7.30 In *Kruger's Case* Gaudron J suggested that the exceptions in *Lim's Case* were 'neither clear nor within precise and confined categories', but that they may suggest a wider set of exceptions based on concerns for the welfare of the community:

> the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating…to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.[26]

7.31 As with reasonable necessity, any test based on the need to protect the community would seem to be a *purposive* test involving questions of *proportionality*.

Preventive detention

7.32 One concern is the extent to which protective detention might be characterised as preventive detention.

7.33 The notion of preventive detention is contrary to common law standards. For example, the common law does not accept excessive periods of detention for the sole

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23 *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ, at p 33.

24 *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per McHugh J, at pp 71–72.

25 The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001 (emphasis added).

26 *Kruger v Commonwealth* (1997) 190 CLR 1, at p. 110.

purpose of protecting the community from repeat offenders.[27] Indeed, imprisonment is generally considered as a last resort and a court will generally strive to impose the minimum sentence necessary to protect the community. Moreover, while community protection is a primary consideration in sentencing, it will be weighed against the personal characteristics and circumstances of the offence and the offender.[28]

7.34 It may be that preventive detention is, itself, inconsistent with the separation of powers requirement. The issue arose before the High Court in a different context in *Kable's Case*. The Court held that state legislation, which empowered state judges to order preventive detention of Gregory Kable, conferred powers that were inconsistent with the exercise by those judges of federal judicial power. While the New South Wales Parliament had the authority to 'make general laws for preventive detention when those laws operate in accordance with the ordinary judicial processes of the … courts', it did not have the authority to 'remove the ordinary protections inherent in the judicial process'. McHugh J suggested that the state legislation did so by 'stating that its object is the preventive detention of the appellant' and, among other things, by 'removing the need to prove guilt beyond reasonable doubt' and 'by providing for proof by materials that may not satisfy the rules of evidence'.[29]

Other standards?

7.35 There may be other ways of approaching issues surrounding administrative detention. Detention *might* be characterised as judicial rather than administrative based on some other features, such as its purpose or the particular powers available.

7.36 There may even be other ways of testing permissibility that do not rely on a characterisation of detention as being punitive or non-punitive or even judicial *per se*.

7.37 Dr Carne suggested that the constitutional limits might be inherent in the legislative powers conferred by section 51 rather than the separation of powers in Chapter III.[30] In *Kruger's Case* Gaudron J suggested that 'the power to authorise detention in custody is not exclusively judicial in character',[31] citing the possible exceptions relating to 'the welfare of the individual or that of the community'. Thus, a law with respect to various topics—*defence*, *quarantine*, *aliens*, *influx of criminals* and perhaps even *race*—might validly authorise detention. But, beyond these heads of power 'a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power'.[32]

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27 *Veen v. R* per Mason J at p. 468 per Jacobs J at pp. 482-3; *Veen v. R* (No 2) at 473; *Chester v. R* (1988) 165 CLR 611, at 618.

28 *Lowe v. R* (1984) 154 CLR 606 at p. 612.

29 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, per McHugh J at p. 122.

30 *Submission 24*, p. 8.

31 *Kruger v Commonwealth* (1997) 190 CLR 1, per Gaudron J at p. 111.

32 Ibid, at p. 110.

7.38 While this approach explains the exceptions relating to defence and contempt of Parliament, it is not sufficiently explored to provide guidance for the present Bill.

Referral of powers from the States

7.39 The earlier discussion on constitutional bases described the referral of powers from the States to the Commonwealth under section 51(xxxvii). The Committee's attention was drawn to the fact that this would not resolve the constitutional problems associated with *Lim's Case* and *Kable's Case*. Professor Williams indicated that any scarcity of legislative power could be resolved by referral of powers from the States. In his view 'any arguments as to invalidity there would clearly disappear if, indeed, there is a referral of matters relating to terrorism to the Commonwealth parliament'.[33]

7.40 Professor Williams, however, hastened to add: 'there is still a secondary issue that cannot be removed by any referral' relating to *Lim's Case* and *Grollo v. Palmer*. Similarly, Dr. Carne pointed out that, in *Kable's Case*, the issue of incompatibility with federal judicial power arose in relation to 'state preventive detention legislation enacted by the NSW Parliament under the authority of the NSW Constitution'.[34] On this basis, no referral of power would seem to be capable of resolving this issue.

International law issues

7.41 Detention, and the limits of executive and judicial power, is covered in various international instruments. For example, the *ICCPR*[35] prohibits arbitrary detention.[36] Moreover, international law recognises that detention may be arbitrary notwithstanding that it is lawful as the concept of arbitrary detention includes 'elements of inappropriateness, injustice and lack of predictability'. The Human Rights Committee has stated that detention 'must not only be lawful but *reasonable* in all the circumstances' and 'must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.[37]

7.42 Also, the *International Covenant on Civil and Political Rights* contains an express caveat that, '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', a State Party may take measures derogating from their obligations under the Covenant 'to the extent strictly required by the exigencies of the situation' and provided they are 'not inconsistent with their other obligations under international law and do not involve discrimination

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33 *Hansard*, 13 November 2002, p. 59.

34 *Submission 24*, p. 9.

35 The ICCPR was adopted by the UN General Assembly in 1966 and came into operation in 1976. Australia signed it on 18 December 1972 and ratified it on 13 August 1980. Australia signed the First Optional Protocol on 25 September 1991 with effect on 1 December 1991.

36 Article 9(1).

37 *Alphen v. The Netherlands* (1990) Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).

solely on the ground of race, colour, sex, language, religion or social origin'.[38] Any derogation must be made in accordance with a prescribed notification procedure.[39]

Application of these issues

7.43 Many submissions and witnesses focused on the purpose of detention. The issues they raise go partly to the constitutional bases of the proposed measures, in terms of the 'head of power' issues and the 'constitutional immunity' in *Lim's Case*. Other issues relate to the manner in which the proposed powers may be exercised, and go more to grounds of judicial review, such as abuse of power or improper purpose. The following discussion commences with issues that may relate to constitutional bases and finishes with issues that relate more to judicial review grounds, or policy arguments relating to the possible limitations that might be applied to the regime.

Non-punitive detention

7.44 A number of comments in submissions and evidence addressed the limits of non-punitive detention. The Attorney-General's Department expressed the view that:

> [G]iven the nature of this particular detention, given that the person is not being detained to be punished, given that the purpose of this detention is to seek from them any intelligence information that they may have in relation to a terrorist act, given the checks and balances that are available in this case … and given that the Prescribed Authority tells the person at the very beginning of their detention that they have the right to have recourse to the Federal Court, it is not seen as offending the principle [in *Lim's Case*].'[40]

7.45 Alongside the general intelligence collection purpose, the checks and balances and the caution regarding judicial review, there may be other mitigating factors in the mix, such as time limits. Thus, while Dr Gavan Griffith QC noted in his submission that the detention powers may be 'beyond the reach permissible by the recognised exceptions', he said 'I see some difficulty in applying the *Lim* argument, given the constraints on the operation of the scheme limited to an investigation process of seven days'.[41] In evidence he thought it was 'most likely' that the seven day detention would be 'admitted as one of the new categories of the sort that Justice Gummow touched upon [*Kruger's Case*]'.[42] His conclusion was that the *Lim* argument was 'a tenable one' but he said: '[m]y own view is that I doubt very much that the High Court would hold this provision invalid, but it would be an interesting case to argue either side'.[43]

7.46 However, there were divergent views, even on the narrow issue of punishment. FCLC (Victoria) argued that the power to detain persons for the statutory

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38 Article 4(1).

39 Article 4(3).

40 *Hansard*, 12 November 2002, p. 16.

41 Mr Gavan Griffith QC, *Submission 235*, p. 6.

42 *Hansard*, 22 November 2002, p. 151.

43 Ibid.

purposes in proposed subsections 34C(3) and 34F(3) was punitive by its very nature. They argued that the power to detain related to the particular conduct of the detainee and was punitive by virtue of this relationship. Moreover, it was punitive whether or not the detention related to past or future conduct. They suggested that the 'quarantine' objectives 'stamp that power to detain as a punitive power in that the detention is ordered in response to particular anticipated conduct of the person detained … [it] is analogous to punishment inflicted on persons convicted of attempting crimes'.[44]

7.47 Another issue was the consequences arising from silence before the Prescribed Authority. This issue was discussed in Chapter 5 in relation to the validity of the warrant. This comment was made by the legal adviser to ASIO:

> [I]f [ASIO] became convinced that there was no way that the person would provide the information that was being sought and that with it was entirely fruitless to have the warrant, then the Director-General would have an obligation to inform the minister and the issuing authority that the ground upon which the warrant existed had ceased to exist, and take steps necessary to ensure that further action under the warrant was discontinued.[45]

7.48 Mr Jacob Fajgenbaum applied similar reasoning to the validity of detention:

> [I]f somebody has been detained under the current proposal and refuses to answer questions, any continued detention of that person might be seen to be punitive, in the absence of that person having been otherwise arrested for failure to cooperate as he might be obliged to cooperate. Any continued detention of such a person without such arrest would definitely be punitive and would be simply detention in order to try to compel or force somebody to answer questions, and to punish him for not doing so.[46]

7.49 On the other hand, Dr Stephen Donaghue pointed to the fact that detention in these circumstances might serve a legitimate purpose of preventing interference with the intelligence collection process. His views on this issue are discussed below.

Proportionality

7.50 As noted above, the test of 'reasonable necessity' focuses more closely on the purpose behind the proposed detention powers. As noted, this seems to require an examination of proportionality, or whether detention is reasonably capable of being considered appropriate and adapted to the object of intelligence collection. The purposes behind the proposed powers are discussed below in relation to the general objective of preventing prejudice to investigations and in relation to the possible purpose of coercing persons to answer questions or provide documents.

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44 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 27.

45 *Hansard*, 12 November 2002, p. 31.

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

Intelligence collection

7.51 Clearly detention has an indirect purpose in facilitating intelligence collection. For example, it may allow time for questions to be developed, issues to be explored and connections drawn among the various links in the evidential chain. Detention may also have a more direct purpose in facilitating questioning, although this was queried by Dr Donaghue:

> It is not at all clear to me how detention facilitates evidence gathering. Why is it that somebody who is in detention is more likely to answer questions that are asked of them than somebody who is not? No other … questioning regime that operates in Australia takes people into detention in order to encourage them to answer questions and there just does not seem to me to be any logical connection between the detention aspect of the regime and the suggestion that what is sought here is to have people answer questions.[47]

7.52 Similarly, Mr Greg Connellan, on behalf of the Victorian Bar, said if a person is:

> … prepared to divulge the information they have, then they may well have been prepared to do it without being brought to task under this legislation, without the threat of five years in jail. If they are reluctant to disclose the information, then no matter what sort of threat you hang over their head, short of torturing it out of them, they are not going to give it up. If these people are so close to the action of people who are so fanatical that they can kill hundreds of people and thousands of people in single events, they are not going to readily give that information up, I would not have thought.[48]

7.53 This was also reflected in comments by Mr Phillip Boulten to the effect that 'detention over and above the need for questioning is unnecessary':

> In the submission of the [Criminal Defence Lawyers] Association, detention for that purpose will neither be effective nor proportionate to the threat. It will not be effective because, if people are held after the period for, say, another day or two after the questioning concludes, or if there is a rollover for four days, five days, six days or seven days, then those who are connected to that person—their family, their friends and their terrorist contacts if they have any—will be alerted to the fact that they have gone missing in action. There will be no effective way of curtailing the terrorists' knowledge that the person is likely to be in the custody of ASIO. The mere fact of their detention will act as a signal to terrorists. What is more, at some stage—whether it be after the first warrant expires or after a rollover warrant subsequently issued expires—they will have to be released. What is the difference if they are actively disseminating the fact of their detention 41 hours or 49 hours after their arrest, or whether or not they are actively disseminating it 12 or 13 hours after their arrest? In some circumstances—

47 Ibid, pp. 168-169.

48 Ibid, p. 205.

> where, say, there is great urgency and sensitivity involved in the purpose for the detention—it might make a difference, but rarely will it be so.[49]

7.54 Moreover, the Committee's attention was drawn to the possibility that detention may be used to coerce an otherwise silent detainee to provide answers. In seeking a connection between questioning and detention Dr Stephen Donaghue said:

> If there is a connection, it seems to me that the connection lies in the fact that, if you are detained involuntarily and nobody is told where you are and that detention gets longer and longer, the pressure on the witness to talk as a way of bringing their ordeal to an end increases. So it might be that by the time you get to day five you have not told your family where you are, you have lost your job, you are starting to think, 'I need to end this detention,' and the only way you can see to do that is to answer the question.[50]

7.55 The AFPA appeared to suggest that detention, particularly if extended, might serve a greater purpose in encouraging cooperation than the threat of prosecution for failure to answer questions. They argued that '[i]ncarceration until information is provided in accordance with the questioning warrant is seen as more practical'.[51] Similarly, FCLC (Victoria) argued that prosecution for failure to answer would be 'the last resort'. 'In most circumstances,' they argued, 'authorities will resort to other means to cajole or coerce the detained person to disclose relevant information. It is very likely that one of the means relied upon will be further periods of detention.'[52]

7.56 As Dr Donaghue noted, pressure on a detainee might arise out of the impact of their detention on third parties. ICJ (Australia) pointed to the reverse possibility that detention of third parties might pressure a person to provide information: 'the holding of the whole family of a wanted terrorist who may be suspected of knowing his whereabouts and whose detention may be an intimidation to the wanted person'.[53]

7.57 When asked about the possibility of extending a warrant on the basis that a detainee 'might say something in the end', the Director-General suggested that '[i]t would in part depend on a judgment made about the criticality of the time factor'.[54] However, the legal adviser to ASIO did concede, as noted in Chapter 5, that a person's silence might tend to undermine the validity of the warrant:

> [I]f [ASIO] became convinced that there was no way that the person would provide the information that was being sought and that with it was entirely fruitless to have the warrant, then the Director-General would have an obligation to inform the minister and the issuing authority that the ground

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49 *Hansard*, 26 November 2002, p. 228.

50 *Hansard*, 22 November 2002, p. 169.

51 *Submission 144*, p. 11.

52 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 28.

53 International Commission of Jurists (Australian Section), *Submission 237*, p. 8

54 *Hansard*, 12 November 2002, p. 28.

> upon which the warrant existed had ceased to exist, and take steps necessary to ensure that further action under the warrant was discontinued.[55]

7.58 Dr Stephen Donaghue queried whether this would in fact be the case:

> The department's suggestion to the committee, I think on the first day of hearings, that if someone made it clear right from the outset, 'I am not going to cooperate, I am going to refuse to answer your questions,' they commit an offence under this regime. If ASIO then said, 'We wouldn't renew the warrant, we wouldn't keep them in detention for seven days', that does not make sense. If what they are trying to do is stop the investigation from being prejudiced, they need to keep them in detention anyway.[56]

Prejudice to intelligence collection

7.59 One of the stated purposes of detention is to prevent any prejudicial acts, such as alerting another person or destroying, damaging or altering evidence. While preventive detention may be constitutionally suspect, detention for the purpose of avoiding prejudice to criminal investigations may be permissible. For example, there is a power to detain in the criminal justice system that is based on the same considerations that ground the power in the Bill: that the person under questioning may alert a person involved in an offence, may fail to appear before the relevant authority or may destroy, damage or alter evidence described in the warrant.

7.60 The latter purpose may not be particularly relevant to detention under the Bill. In this respect, the Association of Criminal Defence Lawyers argued that:

> Fears that people might destroy records are unlikely to arise in practice because a detention warrant would normally be executed simultaneously with a search warrant empowering ASIO to seize relevant documents.[57]

7.61 The former purpose may be closer to the ultimate purpose of detention:

> [T]here are a number of clauses in the bill that make it clear it has nothing to do with intelligence gathering; it is has to do with not having your investigation spoilt by having questioned a suspect who then goes and tells their terrorist accomplices that you are onto them and that the investigation is prejudiced in that way. If that is correct … you might need to detain someone whether or not they are answering your questions.[58]

7.62 However, this purpose was not without its critics. Mr Bret Walker SC, on behalf of the Law Council of Australia rejected what he described as 'prophylactic detention' as 'a nonsense', describing it as a 'quite disturbing elision and confusion of

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55 Ibid, p. 31.

56 *Hansard*, 22 November 2002, p. 169.

57 Association of Criminal Defence Lawyers, *Submission 236*, p. 2.

58 Dr Stephen Donaghue, *Hansard*, 22 November 2002, p. 169.

concept advanced by ASIO, maybe by the AFP and certainly by the government'.[59] He argued that it tended to 'confuse the notion of non-suspects being questioned with the notion that somebody suspected of being a conspirator … should be charged'.[60]

7.63 Moreover, this purpose may have its own limitations. The Committee's attention was drawn to the limited role that detention might have in relation to preventing prejudicial acts, or indeed in relation to preventing terrorist acts, by virtue of the uncertainty surrounding the timeframes of terrorist cells. The AFPA observed that 'terrorism is an intended and planned crime'.[61] The Prime Minister has acknowledged that '[i]ntelligence is a very inexact science'.[62]

7.64 Mr Lex Lasry, on behalf of the Victorian Bar, raised concerns as to whether it was possible to control prejudicial acts by an arbitrary period of detention:

> For example, let us assume the information is that the terrorist act—whatever it is—is not going to occur for some weeks and that an investigation is going on in relation to something which is three or four weeks away. If a person is brought in to be compulsorily questioned, do you keep them for three or four weeks? Overnight is one thing, but holding someone for seven days will not necessarily solve that problem.[63]

7.65 As Mr Bret Walker SC argued, this applied a fortiori to terrorist acts:

> We do not have a concept of detention in order to prevent crime and, in relation to terrorist offences in particular, one can see why, in principle, we would never have it and it is for this reason: terrorist offences are not committed according to a prearranged and pre-announced timetable nor, if they do have timetables, does anyone have any right to believe that they cannot be rearranged. Therefore, if you are serious about prophylactic detention, you must be talking about indefinite duration, and that is monstrous. Nobody is seriously talking about that.[64]

7.66 Dr Donaghue said there were other ways to address problems relating to prejudice:

> There are lots of other ways you could achieve that objective, including, for example, making it an offence for anyone to talk about the fact that an interview has taken place between the questioning agent and the witness, and there are models for that in the NCA Act as it currently sits.[65]

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59 *Hansard*, 22 November 2002, p. 247.

60 Ibid.

61 *Submission 144*, p. 5.

62 The Hon. John Howard MP, Transcript of Interview, *Sunday*, October 20 2002.

63 Mr Lex Lasry, *Hansard*, 22 November 2002, p. 162.

64 *Hansard*, 22 November 2002, p. 247.

65 Ibid, p. 169.

Alternative model

7.67 Dr Donaghue pointed to an alternative approach to detention:

> [Y]ou need to find a way of detaining people who you really need to detain and not detaining people who you do not. The way I suggest … that that should be done is to bring someone in, using the coercive power, very similar to the current model, and to ask them questions. If they answer your questions satisfactorily and provide you with the information you need, you have achieved your objective under the bill. They seem to be cooperating with you, so in that circumstance there may be no reason to suspect that this is the sort of person who is going to go and alert their terrorist associates to your investigation. You do something like the NCA model again: you tell them, 'It is very important that you not speak to anyone that you have been here.' You make it a serious offence if they do speak to anyone about having been there and you have achieved the objective of the regime.[66]

7.68 This approach would adopt the methods used in other commissions of inquiry relating to provisions of arrest and detention for procedural offences, and, indeed, for more substantive offences, that arise in evidence:

> If … they do not answer your questions or they lie to you, or in the course of questioning you form the view that they are legitimately suspected of a terrorist offence, on all of those occasions you can detain them for the criminal offence that they have committed. That … is important because there is no constitutional problem with that. It is easy to detain someone in connection with a criminal offence; the problem with this current bill is that it authorises the detention regime without that connection.[67]

7.69 Moreover, this approach would take advantage of the unhindered power to continue questioning that is built into the 'commission of inquiry' model:

> If, at the end of day one, they have refused to answer your questions or have lied, and you then arrest them and put them in detention, you can still question them thereafter—not in relation to the offence you have charged them with but any other offence. If you have charged them with an offence against the Royal Commissions Act or the equivalent, you can still question them about the terrorist offence you are interested in but you do not need to renew it every 48 hours, because they are in detention anyway.[68]

7.70 The approach would involve an initial questioning period of around 8 hours, with a capacity to consider and review the need for detention, based on the existence of either of the procedural or substantive offences that were discussed above:

> In the model that I propose, for the sake of argument, you have eight hours to question them and to get a feel for whether they are themselves

66 Ibid, pp. 169-170.

67 Ibid, pp. 169-170.

68 Ibid, p.173.

> involved—in which case, you can arrest them at the end of that time—or whether they are cooperating with you by giving you full and truthful answers. If they can convince you of those things for eight hours, I would have thought the risk of their absconding would be reasonably low—you have had a pretty good chance to check them out. I would let them go at the end of the day and bring them back the next morning for more questioning if you need to under a royal commission type model. If they are a great liar, I suppose they get through their eight hours, you let them go and then they run off. That is a risk, but it is a matter of balancing these things.[69]

7.71 Dr Gavan Griffith described this as a 'step by step approach' which, he considered was 'logically compelling'. As he suggested, '[o]ne could have an initial interrogation provided for and then review the position as it emerges':

> For example, if a person comes and gives frank evidence, it may be appropriate then to allow that person to finish their evidence and leave or to leave and come back the next day and complete it. If a person comes and refuses to give evidence, then one can deal with the person as being in breach of the statutory obligation to answer the questions and arrest the person on the ground that they have committed an offence and deal with the person on that basis—that they apparently have committed an offence and will be charged with it. If you have someone who apparently lies, then you could also arrest them and deal with them because they would be in breach of the provisions of the act. If you have someone who is a particularly good liar, you have to deal with that difficulty in any event.[70]

7.72 The issue of prophylactic detention, to address acts that may prejudice the task of collecting intelligence, would be dealt with by disclosure offences:[71]

> You do something like the NCA model again: you tell them, 'It is very important that you not speak to anyone that you have been here.' You make it a serious offence if they do speak to anyone about having been there and you have achieved the objective of the regime.[72]

Commissions of inquiry

7.73 Clearly, this approach relies on aspects of the commission of inquiry model.

Detention for interrogation

7.74 A general common law rule is that a person who has been arrested should be brought before a judge as soon as is reasonably practicable.[73] The underlying philosophy is that 'the law enforcement processes should be transferred as quickly as

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69 Ibid, p.175.

70 Ibid, p. 150.

71 *Submission 61*, pp. 8-9.

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

73 *R v. Williams* (1986) 161 CLR 278.

possible from the committed police stage of the criminal process to the uncommitted judicial stage'.[74] Its corollary is that there is no power to detain for interrogation.[75]

7.75 However, the practice of detention for interrogation may have a close parallel in respect of royal commission and commissions of inquiry. The *Royal Commissions Act* 1902 provides for the arrest under warrant of a person for failure to attend in answer to a summons. The warrant 'shall authorize the apprehension of the witness and the witness being *brought before the Commission*, and … *detention in custody for that purpose* until … released by order of the [Commission].[76] It is unclear whether the commission may continue to question a witness who has been arrested. But there would seem to be little point in bringing the witness before it for any other purpose.

7.76 Provisions for arrest of witnesses for failure to appear exist in the *National Crime Authority Act* 1984,[77] *Independent Commission Against Corruption Act* 1988 (NSW),[78] *Crime and Misconduct Act* 2001 (Qld).[79] The NCA provisions expressly permit detention for the purpose of ensuring attendance before the NCA.

Disclosure offences

7.77 Some powers under the *National Crime Authority Act* 1984 aim to prevent acts that are prejudicial to an investigative hearing. At the first instance, a summons to appear or notice to produce a document may prohibit disclosure of its contents in certain circumstances.[80] Ordinarily, it is an offence to disclose, subject to various exceptions, for example it is not an offence to disclose to a lawyer or a legal aid officer for the purpose of obtaining legal advice, representation or assistance.[81]

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74 John Bishop, *Criminal Procedure*, Second Edition, Butterworths, Sydney, 1998, p. 137.

75 *R v. Williams* (1986) 161 CLR 278; *R v. Lemsatef* [1977] 1 WLR 812 at 816; *R v. Banner* [1970] VR 240 at 249; *Kenlin v. Gardiner* [1967] 2 QB 510; *Rice v. Connelly* [1966] 2 QB 414; *Bales v. Parmeter* (1935) 35 SR (NSW) 182 at 199-190 'arrest and imprisonment cannot be justified merely for the purpose of asking questions' (per Jordan CJ at p. 188); *Ex parte Evers; Re Leary* (1945) 62 WN (NSW) 146; *R v. Clune* [1982] VR 1 at 10-11 and 17-19; *R v. Blundell* [1968] NZLR 341.

76 *Royal Commissions Act* 1902, section 6B(2).

77 *National Crime Authority Act* 1984, section 31.

78 *Independent Commission Against Corruption Act* 1988, section 36.

79 *Crime and Misconduct Act* 2001, sections 168-169.

80 *National Crime Authority Act* 1984, section 29A.

81 Ibid, section 29B.

Practical issues

7.78 Beyond questions of consistency or inconsistency with the constitution or international law, a range of practical issues were raised in submission and evidence to the Committee.

Thresholds

7.79 One of the issues raised in submissions was the low threshold for detention. '[T]aking the minimum position' the Victorian Bar noted the threshold was the existence of 'reasonable grounds for believing that the person concerned might alter a 'record or thing' that they may be requested to produce under the warrant'.[82] Moreover, the 'record or thing' involved may not even constitute admissible evidence. Another 'minimum position' would be that there are reasonable grounds for believing that a person may alert another person who is involved in a secondary offence. As noted previously, this might be no more than membership of a terrorist organisation.

Mechanics

7.80 Various concerns in the inquiry related to practical aspects of the regime. One issue was where the questioning would be undertaken. In evidence the Attorney-General's Department stated they were 'absolutely certain … that it will not be held at ASIO's place'.[83] Likewise, the Director-General of ASIO indicated that 'there was no intention of anyone being questioned on ASIO's premises, and if there was any concern on that point, then of course the legislation could be explicit on that'.[84]

7.81 A related issue was where the detention would be effected. Aside from brief comments, for example that '[t]he police would do that',[85] the Committee did not receive detailed evidence or submissions on this topic except to suggest that these issues would be resolved by protocols. This is considered more fully in Chapter 9.

7.82 Related to many of these issues are concerns as to lines of accountability. The South Australian Police pointed to uncertainty regarding cooperative arrangements for arrest and detention, complaints and avenues of accountability and the liability of State officers under Commonwealth law. A specific concern was that the proposed legislation did not 'provide for any specific indemnity from civil liability for police officers or other officials acting in good faith whilst performing their duties pursuant to the Bill'. Their assumption was that 'State police exercising authority under Commonwealth provisions would be indemnified by State provisions'.[86]

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82 Victorian Bar, *Submission 307*, p. 2.

83 *Hansard*, 12 November 2002, p. 37.

84 Ibid, p. 37.

85 Director General of ASIO, *Hansard*, 12 November 2002, p. 37.

86 *Submission 131*.

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

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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

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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]

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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]

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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

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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.

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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

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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.

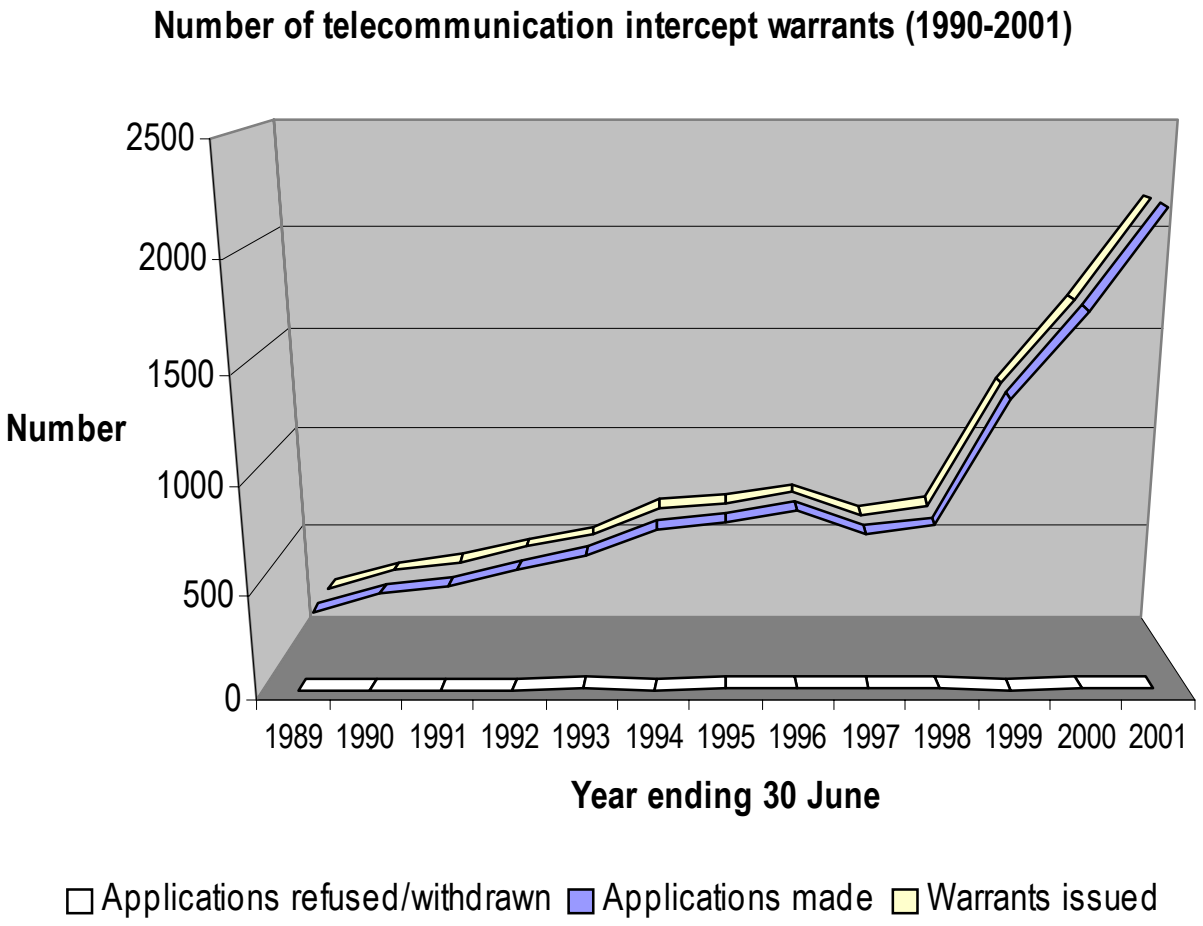
shouldn't simply be transferred to another agency, such as the [AFP] as a compromise to avoid the problem of transforming ASIO into a secret police'.[55]

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.

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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

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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]

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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]

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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.

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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]

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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]

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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.

Chapter 9

PROTOCOLS AND SAFEGUARDS

9.1 One of the key concerns of the PJCAAD was the inadequacy of the accountability and review mechanisms in the original Bill.[1] The amended Bill provides for the development of a written statement of procedures, to be tabled in Parliament, for the exercise of powers under a warrant. It also contains various statutory safeguards, such as mandatory video recording of questioning; a mandatory explanation of the right to complain and to seek judicial review; and criminal offences where an official does not comply.

9.2 This chapter discusses the following issues:

- written protocols;
- current safeguards in the Bill;
- enforcement of safeguards;
- the role of the IGIS;
- judicial review;
- annual reporting; and
- a sunset clause.

9.3 Certain additional safeguards applying to young people are set out in Chapter 10. The right of access to legal advice is also dealt with separately in Chapter 6.

Written protocols

9.4 One of the issues about which the PCJAAD expressed concern was the absence of guidelines as to the operation of the custody, detention and questioning regime, for example, what arrangements would be made when a person was taken into custody, where the person would be detained, and when breaks in questioning would be required.[2] The original Bill made no provision for such matters.

9.5 The Government amendments to the Bill inserted new provisions to deal with this concern. Before the Minister consents to the Director-General's request for the issue of a warrant, the Minister must be satisfied, amongst other matters, that various measures in relation to a written statement of procedures to be followed in the exercise of authority under warrants have been taken (proposed paragraph 34C(3)(ba)).

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1 PJCAAD *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002, May 2002, p. viii.

2 PJCAAD, pp. 36-39.

9.6 Proposed section 34C(3A) sets out the measures (the 'adopting acts') that must be taken:

- The Director-General must consult the IGIS, the AFP Commissioner and the President of the AAT before making the statement;
- The Minister must approve the statement;
- The statement must be presented to each House of Parliament; and
- The PJCAAD must be briefed (in writing or orally), either before or after presentation to Parliament.

9.7 This provision reflects the PJCAAD's recommendation.[3]

9.8 It is unclear, either from the Bill, the Explanatory Memorandum or evidence during this inquiry, exactly what the protocols would cover. Matters such as the place and conditions of custody and detention, breaks in questioning, administrative procedures and the responsibilities of various agencies (such as the involvement of State or Territory police) might foreseably be included.

9.9 Some submissions suggested that the Bill should not be passed until the protocols were available for parliamentary debate.[4] When asked by the Committee what work had been done on developing protocols, an ASIO representative stated that there had been some 'preliminary consideration':

> We have had a look at what sorts of procedures are applicable under other detention regimes — for example, AFP and immigration — but … we thought that it might be a bit premature to try to start nailing down agreements with other agencies. Because the process envisaged would involve AAT, AFP, the Inspector-General and ultimately, if I recall, the PJC, we thought it would not be appropriate to try to spell all of that out pending the consideration of the legislation by the parliament.[5]

9.10 ASIO envisaged that the protocols 'would cover all aspects regarding the detention of the person under the regime, whether by federal police or by State police'.[6]

9.11 The Federation of Community Legal Centres (Victoria) Inc argued that any protocols for any form of detention should be in legislation:

> Obviously they would have to cover a whole range of things: where someone could be detained, the conditions of detention, how long they could be questioned for, periods of time in which they should not be questioned, and so on and so forth. The point is that currently we have quite

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3 PJCAAD, Recommendation 7.

4 For example, the Women's International League for Peace and Freedom *Submission 35*, p. 5; Ms Ruth Russell *Submission 13*, p. 4.

5 *Hansard*, 18 November 2002, p. 122.

6 *Hansard*, 18 November 2002, p. 122.

> extensive protocols in the Crimes Act, whether it is at a state or federal level, with regard to these matters. AT the very least, we should have that in legislation that is aimed at questioning people who are not suspected of any crime. We do not think it is enough that the government say, 'We'll come up with these protocols,' or that they are even promulgated by regulation.[7]

9.12 The Law Council considered that while some matters were of sufficient importance to require them to be included in the legislation, it would be excessive to place others in the statute, and they could be more appropriately dealt with by regulation. Mr Walker told the Committee:

> One obvious halfway point is regulation — a disallowable instrument. I think having toilet breaks in a statute is, frankly, overbeating the pudding. On the other hand, leaving everything to what I call non-binding protocols, which may be very important in terms of avoiding anything in the nature of civil torture, may be a little light-on. One obvious thing in the middle is that some things ought to be in terms of non-binding protocols—the kinds of thing that police forces already have. Some things, like strip-search — the physical invasion of the body — need to be in legislation. A whole lot of things in the middle might be ideal in a regulation.[8]

9.13 Dr Carne suggested that the federal Human Rights Commissioner should play a central role in drafting the protocols 'to ensure independent expertise necessary to meet Australia's international law obligations'.[9] In particular, Dr Carne was concerned about compliance with the ICCPR, whose language is reflected in certain provisions such as the provision requiring 'humane treatment' (discussed further below).

9.14 The Committee notes that under proposed section 34C(3A), the only person who must approve the statement is the Minister. All other parties need only be consulted. In the case of Parliament, the statement must be tabled but it is not a disallowable instrument, as regulations are. If regulations were made as part of the Bill, Parliamentary debate on these issues would be greatly assisted.

Current safeguards in the Bill

9.15 As noted above, there is concern that much detail has been omitted from the Bill, potentially for inclusion in the proposed written protocols. However, various statutory obligations on the Prescribed Authority and other officers involved in the process have been included. This section discusses those provisions:

- the proposed duties of the Prescribed Authority;
- obligations in relation to searches; and
- other accountability mechanisms, including the duties of the IGIS.

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7 *Hansard*, 22 November 2002, p. 222. The concern about regulations was that while regulations could be disallowed, there was no ability to amend them.

8 *Hansard*, 26 November 2002, p. 259.

9 *Submission 24*, p. 18.

9.16 The mechanisms for enforcing those safeguards, including the creation of criminal offences for breach of various provisions, are discussed in the next section.

Duties of the Prescribed Authority

9.17 As discussed in Chapter 6, the Prescribed Authority has a key role in the questioning process and is potentially one of the most important safeguards. While the Prescribed Authority's role is not clearly outlined in the Bill, certain statutory duties have been imposed.

9.18 When a person first appears for questioning under the warrant, the Prescribed Authority must inform him or her of certain matters, including:

- the effect of the warrant and the length of time it is in force;
- the legal consequences of non-compliance with the warrant;
- the right to make a complaint to the IGIS (about ASIO) and the Ombudsman (about the AFP);
- the right to seek a remedy from a federal court relating to the warrant or the person's treatment under it; and
- whether there is any limit on the person contacting other people and, if the warrant permits contact with identified people at specified times, who those people are and what the specified times are (proposed section 34E).

9.19 If the Prescribed Authority believes on reasonable grounds that the person detained is unable to communicate with reasonable fluency in English, interpreting services must be provided before any questioning can take place (proposed section 34H).[10]

9.20 Where the IGIS is concerned about 'impropriety or illegality' in the exercise of powers in the questioning process, he or she may inform the Prescribed Authority, who must consider those concerns. The Prescribed Authority may then give a direction deferring questioning of the person or the exercise of another power, until the Prescribed Authority is satisfied that the IGIS's concerns have been addressed (proposed section 34HA).

Searches of detained persons

9.21 A detained person may be searched by a police officer, either in an ordinary search or, subject to certain conditions, a strip search (proposed section 34L).

9.22 The Bill sets out various rules governing the conduct of strip searches (proposed section 34M). A strip search:

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10 This provision is similar to section 23N of the *Crimes Act* 1914, which deals with questioning of people arrested for Commonwealth offences.

- must be conducted in a private area by a police officer of the same gender as the detained person;
- must not be conducted in the view of a person of the opposite gender (unless that other person is a medical practitioner), or a person whose presence is not necessary;
- must not involve a search of the person's body cavities; and
- must not involve either the removal of more garments or more visual inspection than the police officer believes on reasonable grounds are necessary to determine whether the person has a seizable item (defined in section 4 as anything that could present a danger or be used to assist an escape from lawful custody).

9.23 If any of the person's garments are seized during the search, he or she must be provided with adequate clothing. The Committee notes that the strip search provisions in this Bill are very similar to the general rules for strip searches of arrested people under the *Crimes Act* 1914.

9.24 The Crimes Act provisions provide for a third type of search, a frisk search, which is a search conducted by running the hands quickly over the person's outer garments and examining anything worn or carried that is conveniently removed.[11] The Bill's provisions relating to people who are detained for questioning do not cover frisk searches, but such searches may be authorised in relation to raids on premises under proposed section 25(4A)) of the Bill, as is discussed below.

9.25 Proposed section 25(4A) enables the Minister when issuing warrants (such as search warrants) under existing provisions of the ASIO Act to authorise ordinary searches or frisk searches of people at or near the premises being searched, if the Minister considers it appropriate in the circumstances. This power would arise where there is reasonable cause to believe that the person has relevant records or things on his or her person.

9.26 While the Bill requires strip searches to be conducted by an officer of the same gender, there is no such requirement in relation to ordinary or frisk searches. The lack of such a requirement is contrasted with both ordinary searches and frisk searches of people arrested under the Crimes Act, which requires that, if practicable, such searches must be conducted by a person of the same gender as the person being searched.[12]

Concerns expressed during the inquiry

9.27 The omission of the requirement in the Bill that an officer of the same gender should conduct ordinary and frisk searches where practicable caused some concern during the Committee's hearings, particularly amongst representatives of the Muslim community. Mr Mohammed Kadous suggested that it would be consistent with the Crimes Act and beneficial to the Muslim community if a similar requirement in

11 Defined in *Crimes Act* 1914, section 3.

12 *Crimes Act* 1914, section 3ZR.

relation to ordinary and frisk searches was inserted in the Bill.[13] The Director-General of Security told the Committee that the issue could be clarified if necessary, since there were usually both male and female officers present in such situations.[14]

9.28 Mr Kadous also told the Committee that touching of the portion of the body between the navel and the knee during a strip search would be unacceptable to Islam, and requested that if strip searches were to be allowed, provision should be made for the needs of the Muslim community.[15] In response, the Director-General argued that if there were no such exemptions in existing strip-search laws, it was difficult to see the logical basis for such exemptions in this context.[16]

9.29 The Committee also notes that there appears to be another provision of the Crimes Act that has not been reproduced in the Bill. The Bill's strip search provisions, in preventing their conduct in the presence or view of a person of the opposite gender to the person being searched, do not make an exception for a parent, guardian or other person who is acceptable to the person being searched. Such a person must be present when a young person is strip searched (proposed paragraph 34M(1)(f)). By contrast, under the equivalent provisions in the Crimes Act, a person such as a parent or guardian who is of the opposite gender to the person being searched may be present if the person has no objection.[17] This would seem to be a sensible way to avoid an additional person having to be called in if the young person's parent or guardian who is present is not of the same gender as the young person and there is no objection to their presence during the strip search. It is unclear why an equivalent provision was not included in this Bill.

Other accountability mechanisms

9.30 The Bill includes various other safeguards for detained persons:

- The Director-General must ensure that video recordings are made of the proceedings before the Prescribed Authority or any other matter that the Prescribed Authority directs (proposed section 34K). These recordings must be provided to the IGIS (proposed section 34Q).
- Detained persons have the right to complain to the IGIS (about ASIO) or the Ombudsman (about the AFP), as noted above. On request, the person detained must be provided with 'facilities' to communicate with the IGIS or the Ombudsman (proposed subsection 34F(9)).

9.31 In addition, several accountability mechanisms are built into the process:

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13 *Hansard*, 26 November 2002, p. 264.

14 Ibid, p. 279.

15 Ibid, pp. 264, 265; *Submission 153*, p. 7.

16 *Hansard*, 26 November 2002, p. 279.

17 *Crimes Act* 1914, subsection 3ZI(4).

- The Director-General must also give a copy of any warrant and a statement containing details of any detention to the IGIS (proposed section 34Q). The Minister will also receive a report from ASIO on the extent to which each warrant has assisted ASIO in carrying out its functions (proposed section 34P).
- The IGIS may advise the Prescribed Authority of any concerns he or she has about an illegal act or impropriety committed by ASIO. As noted above, the Prescribed Authority is empowered to suspend questioning until satisfied that the IGIS's concerns have been addressed.

9.32 The IGIS's role is discussed in more detail later in this chapter.

Enforcement of safeguards

9.33 Following the PJCAAD's recommendation,[18] the Bill was amended to create various criminal offences for non-compliance with safeguards. It is an offence for an official exercising powers under a warrant to fail to comply with certain safeguards in the Bill (proposed section 34NB). These provisions will apply principally to police officers and ASIO officers, but potentially could also apply to other persons directed by the Prescribed Authority to take particular action.

9.34 The offences are:

- knowingly contravening a condition or restriction in a warrant;
- knowingly contravening the requirement that a police officer who takes a person into custody must make arrangements to bring the person immediately before the Prescribed Authority;
- knowingly contravening a direction of a Prescribed Authority;
- knowingly contravening the requirements to treat a person with humanity and respect for human dignity (discussed in more detail below), to give a detained person facilities to make a complaint and to provide an interpreter as necessary; and
- knowingly conducting a search or strip search in contravention of the Act.

9.35 Each offence is punishable by a maximum of two years' imprisonment.

9.36 During this inquiry questions were raised as to whether those provisions are enforceable in practice, particularly where they refer to vaguely worded standards. In particular, questions were raised about the 'humane treatment' provision.

9.37 The Bill provides that a person specified in a warrant must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment by anyone exercising authority under the warrant or enforcing the direction of a Prescribed Authority (proposed section 34J). This provision is almost identical to an existing provision of the *Crimes Act* 1914

18 PJCAAD Recommendation 9.

concerning the treatment of people under arrest, and is based on the language of the ICCPR.[19] Section 23Q of the *Crimes Act* 1914 states that a person who is under arrest must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment. However, there is no criminal offence for failure to comply with that provision.

9.38 The Public Interest Advocacy Centre argued that there was no clear mechanism for enforcing this provision.[20] The Centre stated that the obligation was not criminalised in the same way as the offences relating to failure to provide information, and that there was not necessarily a civil cause of action and right to damages for breach of the duty.

9.39 More generally, Dr Carne criticised the offences on the basis that the requirement of knowledge on the part of the officer set 'too high a standard of culpability', and that it would 'encourage laxity in implementing systems of procedural safeguards', with consequent difficulty in investigating and prosecuting offences. He suggested that graded offences with requirements of intention, recklessness and negligence, similar to those in the *Security Legislation Amendment (Terrorism) Act 2002*, should be adopted.[21]

9.40 Dr Carne also suggested that the Prescribed Authority should be personally liable for contravention of certain safeguards.[22]

9.41 The Women's International League for Peace and Freedom argued that the safeguards could not protect against inhumane or abusive treatment of detainees, stating:

> With such a long detention period (7 days), the way is left open for forms of intimidation to be employed against detainees.[23]

9.42 By contrast, the Australian Federal Police Association strongly opposed the imposition of criminal penalties on police officers who failed to comply with the Bill, arguing that it was unnecessary and already provided for in other legislation.[24] The Association argued that AFP officers were already subject to 'internal scrutiny and

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19 Article 7 provides that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, while Article 10 provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

20 *Submission 52*, p. 10.

21 *Submission 24*, p. 19.

22 *Submission 24*, p. 20, referring to proposed section 34NB(4) which creates offences of contravening the safeguards relating to provision of an interpreter, facilities for making a complaint and the 'humane treatment' provision.

23 *Submission 35*, p. 4. The Victorian Council of Social Services (VCOSS) (*Submission 81*, p. 6) also argued that video recording and the attendance of a Prescribed Authority did not give sufficient independence and accountability to the process. VCOSS called for an independent monitor during the detention and questioning process.

24 *Submission 144*, p. 12; *Hansard*, 18 November 2002, p. 134.

possible disciplinary or dismissal action', and that current criminal offences of false imprisonment, assault and deprivation of liberty 'adequately constitute an effective legislative framework'.[25]

The accountability of ASIO compared with that of police

9.43 Another concern raised during this inquiry was whether ASIO officers would be sufficiently accountable for the exercise of their powers, particularly in comparison to police. (The roles and functions of ASIO and the AFP are discussed in more detail in Chapter 8, together with suggestions about their respective roles in the proposed questioning and detention regime.)

9.44 Organisations such as the Law Council of Australia,[26] the Australian Federal Police Association,[27] the Association of Criminal Defence Lawyers,[28] the Public Interest Advocacy Centre,[29] the New South Wales Council for Civil Liberties[30] and individuals such as Dr Carne[31] suggested that the grant of powers to ASIO, a body which specialises in covert operations, would result in less transparency in the process than if such powers resided with police. For example, Mr Jon Hunt-Sharman, National President of the Australian Federal Police Association, told the Committee:

> In the bill a lot of power has been given to ASIO that would somewhat cross over traditional law enforcement powers. That has been a problem that ASIO itself has identified over the years. It is moving to more coercive powers and is moving in the area of detention, questioning and so forth, and yet really it has not been equipped with the same accountability and integrity regime that is currently before the Australian Federal Police …[32]

9.45 A particular concern was that the identity of ASIO officers is protected by statute.[33] In response, the Director-General of Security described the allegation that this would make ASIO officers unaccountable as 'one of the biggest furphies' that critics of the Bill had raised:

> There is ample precedent in Australian law for the identity of individuals before the court, either witnesses or people being prosecuted, to be protected. That happens in different criminal cases now on a basis determined by the court. Legal action can be taken against ASIO officers

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25 *Submission 144*, pp. 11-12.

26 *Submission 299*, p. 21.

27 *Hansard*, 18 November 2002, pp. 137, 138.

28 *Submission 236*, p. 3.

29 *Submission 52*, p. 11.

30 *Submission 132*, p. 1

31 *Submission 24*, p. 20.

32 *Hansard*, 18 November 2002, p. 133.

33 ASIO Act, section 92, which requires the consent of the Minister or Director-General for publication of identity. A penalty of one year's imprisonment applies to contravention of this provision.

> now in terms of common law and the like. The ASIO legislation prevents the public identification of an ASIO officer without approval. A lot of our decisions now are appealable to the AAT. For instance, the security assessments we make in respect of individuals are appealable to the AAT. Decisions taken over the last 12 months in respect of the small number of passport cancellations are appealable to the AAT. In those cases, ASIO officers appear before the AAT and give evidence. There are provisions to safeguard their identity, in the same way as ASIO officers are not excluded from court proceedings now. For instance, were criminal proceedings or court cases to be launched in respect of recent operations, there would be nothing to prevent ASIO officers appearing in court with the appropriate safeguards.[34]

9.46 More generally, however, the Australian Federal Police Association told the Committee that there were 'very real differences' in the levels of accountability that apply to ASIO and to AFP. They pointed to the fact that ASIO officers work under the auspices of the *Public Service Act* 1999 'with the single probity/accountability addition of the oversight of [IGIS]',[35] arguing:

> IGIS may choose to investigate a complaint against an intelligence operative, then again, IGIS may not. The IGIS, in investigating a compliant, does not have the legislative tools that the AFP professional standards framework provides, for example, an AFP member faces a potential term of imprisonment if he/she fails to provide information upon lawful direction under the provisions of the AFP Complaints Act.[36]

9.47 While the Director-General of Security acknowledged that ASIO is subject to different accountability arrangements from police, he said it was 'absolutely misleading and just plain wrong to suggest that, because the accountability arrangements are different, they are any less'.[37] The Attorney-General's Department also argued:

> Given the status of the [IGIS's] role, relating to a specialist area of security and intelligence, I think his involvement in this should add a degree of confidence.[38]

9.48 In response, AFPA maintained that similar lines of accountability were required for similar functions, suggesting:

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34 *Hansard*, 18 November 2002, p. 121.

35 The Committee notes that the ASIO Act (s. 91) also provides that ASIO officers are to be treated as Commonwealth officers for the purposes of the *Crimes Act* 1914, as well as providing for parliamentary review and reporting by ASIO to the PJCAAD (Part VA).

36 *Submission 144*, p. 8.

37 *Hansard*, 12 November 2002, p. 35.

38 Ibid.

> Once ASIO starts to have a more operational perspective rather than an advising perspective, maybe in those areas there needs to be more accountability and transparency in that process.[39]

9.49 The Federation of Community Legal Centres (Victoria) also expressed concern about differences in accountability that apply to the AFP and ASIO, using as an example the existing processes for issuing warrants:

> The warrant regime governing ASIO compares unfavourably with that governing the AFP, for instance, the former does not require the issuing authority to consider the gravity of the conduct being investigated or the use of alternative, less-intrusive, investigatory methods.[40]

The Inspector-General of Intelligence and Security

9.50 One of the key safeguards in the proposed questioning regime is the IGIS, who:

- must be given copies of any request to the Minister for a warrant as soon as practicable, as well as a copy of the warrant issued;
- must be given a copy of any video recording of the questioning process or any other matter ordered by the Prescribed Authority to be video recorded;
- may receive oral or written complaints about ASIO from people who are being detained or questioned; and
- may inform the Prescribed Authority of concerns about 'impropriety or illegality' in the exercise of powers in the questioning process. Although there is no express statement about the IGIS's presence during questioning, this provision implies that the IGIS may be present. The Prescribed Authority must consider those concerns and may suspend questioning until the concerns have been addressed.

9.51 Several of these responsibilities were inserted into the Bill in response to the PJCAAD's recommendations.[41] A key part of the recommendation that was not adopted was that the IGIS should have the power to suspend questioning.

9.52 The IGIS was established following a recommendation of the second Hope Royal Commission for an office to monitor ASIO and ASIS's 'compliance with the law, the propriety of its actions and the appropriateness and effectiveness of its internal procedures',[42] as well as looking into complaints. It was intended to 'protect the rights of Australian citizens and residents against possible errors or excesses by the intelligence and security agencies and to guard against breaches of Australian law'.

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39 *Hansard*, 18 November 2002, p. 134.

40 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 12.

41 See PJCAAD Recommendations 14 and 15.

42 Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 93.

It was not meant to 'check on the general effectiveness and appropriateness of the agencies' operations'.[43]

9.53 The IGIS has power to inquire into the compliance of ASIO, ASIS and DSD with the law, ministerial directions or guidelines, or human rights and the propriety of particular activities undertaken by them. In particular, the functions of IGIS include to monitor, at the request of the Minister, by its own motion or in response to a complaint:

- compliance with Australian law and with ministerial directions and guidelines;
- the propriety of particular activities;
- effectiveness and appropriateness of procedures; and
- any act or practice that may be inconsistent with any human right, that may constitute discrimination, or that may be unlawful under the *Racial Discrimination Act* 1975 or the *Sex Discrimination Act* 1984, being an act or practice referred by the Human Rights and Equal Opportunity Commission (HREOC).[44]

9.54 The Federation of Community Legal Centres (Vic) told the Committee that the Bill's provisions for complaints to the IGIS and the Ombudsman were inadequate:

> Such a process is unlikely to be prompt, does not allow a complaint to be made directly to the court, is not independent and constitutes a quasi-judicial process [that is inconsistent with Art. 9(3) and 9(4) of the ICCPR].[45]

9.55 Australian Lawyers for Human Rights argued that the legislation governing HREOC, under which the Commission may investigate any act or practice that may be in contravention of human rights, should be amended. ASIO's activities are currently exempted from the legislation, and Ms Kate Eastman argued:

> While [the HREOC process] does not provide any judicial type of remedy to an individual who is complaining about a breach of human rights, it does build in some transparency and an independent watchdog to look over these issues … Our concern is that, when the HREOC legislation was first enacted

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43 Ibid, p. 95.

44 *Inspector-General of Intelligence and Security Act* 1986, paragraph 8(1)(a). The Director-General also has certain responsibilities under the ASIO Act. He or she must take all reasonable steps to ensure that nothing is done beyond what is 'necessary for the purposes of the discharge of its functions' and that the organisation is 'kept free from any influences or considerations not relevant to its functions' (ASIO Act, section 20). The Director-General must also take steps to ensure that nothing is done that might support a suggestion that the organisation is 'concerned to further or protect the interests of any particular section of the community' or is concerned 'with any matters other than the discharge of its functions'. Although there is no requirement for 'proper performance' of the organisation, such a limitation could probably be implied into the role and function of the Director-General (*Church of Scientology v. Woodward* (1983) 154 CLR 25 per Mason J at p. 58).

45 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 19.

> and these [exemption] provisions were there, the functions of ASIO were a little bit different from what are proposed by this current bill.[46]

9.56 On a separate issue, Mr Gustav Lanyi noted that the IGIS had submitted to the PJCAAD's inquiry that conducting 'real time' inspections in relation to warrants was particularly desirable given the nature of the powers and the public interest in been assured that their exercise was responsible.[47] As noted above, the Bill provides for the IGIS to be given details of the warrant as soon as practicable when the Director-General seeks the Minister's consent, and allows the IGIS to inform the Prescribed Authority of concerns about 'impropriety or illegality'.

Judicial review

9.57 Another safeguard is the possibility of judicial review by the courts. As noted above, the Prescribed Authority is required to inform the person being questioned of his or her right to seek a remedy from a federal court (proposed section 34E).

9.58 A judicial review application could be made before the Federal Court, under the statutory grounds in the *Administrative Decisions (Judicial Review) Act* 1977, or the common law grounds recognised in section 39B of the *Judiciary Act* 1903. Arguably, a writ for habeas corpus, or an application for 'relief in the nature of habeas corpus',[48] might also be considered by a Federal Court judge, so as to supervise detention. Conceivably, an application could also be made the High Court.[49]

9.59 While there may be various avenues for judicial review, several factors tend to limit its practical value:

- limitations arising from the nature of the discretion;
- limitations relating to national security sensitivities; and
- practical considerations relating to evidence, time and the role of the legal representatives and/or approved lawyers under the Bill.

The discretion

9.60 The warrant is based largely on a ministerial opinion that, among other things, 'there are reasonable grounds for believing that issuing the warrant to be requested

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46 *Hansard*, 26 November 2002, p. 240. HREOC's functions are set out in the *Human Rights and Equal Opportunity Commission Act* 1986, subsection 11(1). Subsections (3) and(4) exempt the acts and practices of ASIO, ASIS, DSD, the Defence Intelligence Organisation and the Office of National Assessments and provide that HREOC must refer complaints to the IGIS.

47 *Submission 151*, p. 4.

48 This expression was used by North J in *Victorian Council for Civil Liberties Incorporated v. MIMIA* [2001] FCA 1297 at [4]. On appeal, Beaumont J rejected the notion that the Federal Court was vested with any jurisdiction to issue a writ of habeas corpus: *Ruddock v. Vadarlis* [2001] FCA 1329 at [101].

49 In respect of the entrenched judicial review writs in section 75(v) of the Constitution.

will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.[50]

9.61 Where an Act refers to 'reasonable cause to believe', or 'reasonable grounds', a court will not treat it as an objective fact to be determined by the court itself. It will determine whether any reasonable grounds exist and whether an opinion was 'formed by a reasonable man who correctly understands the meaning of the law under which he acts'.[51]

National security considerations

9.62 It has been said that executive power 'is almost unlimited where national security is concerned'.[52] Thus, while national security agencies may be subject to judicial review,[53] where an opinion is based on national security considerations, the scope of judicial review may be confined to allegations of bad faith or unreasonableness.[54] It *may* be insufficient to demonstrate that the decision maker failed to take into account relevant considerations, took into account irrelevant considerations or applied policy inflexibly.[55] Opinions based on national security involve wide policy considerations and '[w]hen such a breadth of considerations is involved only something amounting to lack of *bona fides* could justify curial [judicial] intervention in decisions made in the exercise of the power'.[56]

9.63 The International Commission of Jurists (Australia) drew the Committee's attention to various cases where courts showed some deference to decisions involving detention during wartime.[57] For example, in *Lloyd v. Wallach* Griffiths CJ said, having examined the wider context of the statute:

> *having regard to the nature and object of the power conferred* upon the Minister *and the circumstances under which it is to be exercised*, I think that

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50 Proposed paragraph 34C(3)(a).

51 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.

52 Professor Tony Blackshield, 'The Siege of Bowral – The legal issues', *Pacific Defence Reporter*, March 1978, p. 7.

53 This judicial review would be an action taken under section 39B of the *Judiciary Act* 1901 and section 75 of the Constitution rather than the *Administrative Decisions (Judicial Review) Act* 1977. This is because ASIO is exempt from AD(JR) actions: *Administrative Decisions (Judicial Review) Act* 1977, Schedule 1, paragraph (d).

54 In *Leisure and Entertainment Pty Ltd v. Willis* No. QG 204 of 1995 FED No. 1/96, Spender J commented, in relation to an opinion by the Treasurer based on national interest considerations, that an applicant must demonstrate 'that the opinion were not genuinely entertained or that the opinion was wholly unreasonable'

55 *Administrative Decisions (Judicial Review) Act* 1977, paragraphs 5(1)(e) & s.5(2)(a), 5(2)(b), and 5(2)(f).

56 *Murphyores Incorporated Pty. Ltd. v. The Commonwealth (1976)* 136 CLR 1 per Stephen J at 14.

57 International Commission of Jurists (Australian Section), *Submission 237*.

> his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it.[58]

9.64 Similarly, Isaacs J argued that, in these circumstances, a minister 'is presumed to act not arbitrarily nor capriciously, but to inform his mind in any manner he thinks proper'.[59] Of course the measure of deference will be affected by statutory language. Thus, in *Church of Scientology v. Woodward* the High Court was prepared to examine the actions of ASIO for their consistency with the ASIO Act. The Act prohibits ASIO from obtaining, correlating, evaluating or communicating intelligence unless it is 'relevant to security'. While a minority held that the question of relevance was not justiciable, on a similar basis as the earlier cases,[60] the majority held that:

> It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence is "for purposes relevant to security". Courts constantly determine issues of relevance and questions of relevance.

9.65 The majority judges formed the view that '[i]ntelligence is relevant to security if it can reasonably be considered to have a *real connexion* with that topic, judged in the light of what is known to ASIO at the relevant time'. However, while this was a test that the courts could apply, they acknowledged it was a test that:

> … presents a formidable hurdle to a plaintiff and not only because a successful claim for [public interest immunity] may exclude from consideration the very material on which the plaintiff hopes to base his argument – that there is no real connexion between the intelligence sought and the topic.[61]

9.66 Thus, while official actions based on national interest or national security considerations may be subject to judicial review, it may be difficult for a plaintiff to succeed unless there is some tangible evidence of bad faith or some basis for concluding that the relevant conduct, decision or opinion was 'manifestly

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58 *Lloyd v. Wallach* (1915) 20 CLR 299, per Griffiths CJ at p. 304.

59 *Lloyd v. Wallach* (1915) 20 CLR 299, per Isaacs J at p. 308. This view influenced the decision in *Ex parte Walsh* (1942) The Argus Law Reports 359 and was rearticulated by Dixon J in *Little v. Commonwealth* (1947) 75 CLR 94, at p. 103, where he said: 'I do not think that the order is examinable upon any ground affecting the Minister's opinion short of bad faith'

60 Two judges said that, in the absence of bad faith or infringement of personal rights, such a question was not justiciable. They said that the issue of relevance either could not be assessed in isolation from other information that was or *could become* available to ASIO or was beyond the expertise of judges. They also said that scrutiny of ASIO operations was dealt with exclusively in the ASIO Act and, in any event, judicial proceedings would be frustrated by claims of secrecy or public interest immunity.

61 *Church of Scientology v. Woodward* (1982) 154 CLR 25 at pp. 59-61.

unreasonable' or 'so devoid of any plausible justification' that no reasonable person could have come to it in the circumstances.[62]

Other difficulties

9.67 Another obvious difficulty with judicial review in this context is the possible absence of any reasons for decision. As one submission noted:

> There is no requirement under the bill that persons be given access to information regarding the basis upon which they were detained or required for questioning. This limits the detainee's ability to seek judicial review.[63]

9.68 There may also be a problem with access to other evidence. A basic principle of evidence is that courts answer questions of admissibility and weight. Thus it is said that in relation to confidential information 'no obligation of confidence, of itself, entitles the person who owes the duty to refuse to answer a question or to produce a document in the course of legal proceedings'.[64] However, courts will consider claims based on a range of privileges and immunities which are themselves based on public interest considerations.

9.69 Questions of privilege and immunity often involve some form of deference by courts to the other arms of government. Thus, while the courts reserve the right to determine claims of public interest immunity, where national security considerations arise very considerable weight is given to the view of what national security requires, as expressed by the responsible Minister.[65]

Practical issues

9.70 The Committee heard evidence that, despite access to judicial review being allowed in the Act, in practice it may be extremely difficult. One issue was the timeliness of challenging the legality of detention. One submission argued:

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62 *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223. See also *Prasad v. Minister for Immigration and Ethnic Affairs* (1984-1985) 6 FCR 155 per Wilcox J at p. 169.

63 Amnesty International *Submission 136*, p. 18.

64 *Baker v. Campbell* (1983) 153 CLR 52, citing *D. v. N.S.P.C.C.* (1978) AC 171, at pp. 218, 230, 237-239, 242; *Smorgon v. Australia and New Zealand Banking Group Ltd*. (1976) 134 CLR 475, at pp. 487-489; *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd*. (1979) 143 CLR 499, at p. 521.

65 This is not to say that the opinion of the executive will always be conclusive. Thus, while issues of national interest 'will seldom be wholly within the competence of a court to evaluate' (*Alister and Others v. The Queen* (1984) 154 CLR 404 per Wilson and Dawson JJ at p. 435) and the public interest in national security will seldom yield to the public interest in the administration of justice (*Reg. v. Lewes Justices; Ex parte Home Secretary* (1973) AC 388, at p. 407, cited by Brennan J in *Church of Scientology v. Woodward* (1983) 154 CLR 25 at p. 75), it is clear that a court will determine whether national security is threatened and will not be bound by any other opinion 'as to what constitutes security or what is relevant to it' (*Church of Scientology v. Woodward*, Ibid).

> Proposed amendments to the bill regarding access to courts of law to determine the legality of the detention of individuals do not allow time for them to challenge their detention. This is a requirement of Article 9(4) of the ICCPR and 24 hours is certainly insufficient.[66]

9.71 Concern was also expressed in submissions and evidence about the process for appointment of approved lawyers and the power to exclude or delay access to legal representation, especially in the first 48 hours of detention.

9.72 There may be little scope to challenge the appointment of approved lawyers, since the discretion is based on a security assessment and 'any other matter that the Minister considers is relevant'. The concern was that this would give 'an absolute discretion' that might not be reviewable: 'at a minimum, there must arise an apprehension of bias by the Government'.[67] Dr Carne suggested that the decision would be 'effectively unreviewable because of national security evidentiary considerations and AAT and judicial reticence in national security matters'.[68] On this basis, he argued that the process 'has the potential to undermine the integrity, appropriate expertise and independence of the system of a panel of approved lawyers, necessary to safeguard the interests of the detainee'.[69]

9.73 Likewise, there may be little scope to challenge a decision to delay access to legal representation. One submission argued that 'the Minister's decision, by its nature … will not be able to be challenged before a court and the Bill makes no allowance for such decisions being challenged in any manner'.[70]

9.74 As mentioned in Chapter 6, the Committee's attention was also drawn to the impact that a delay in access to legal representation might have on access to judicial review. Amnesty International Australia argued that preventing full access to legal representation 'will also have an effect upon the persons' ability and right to challenge their detention and limit access to existing legal rights such as those provided for in habeas corpus actions'.[71] Dr Carne argued that '[t]he lack of entitlement to an approved lawyer … during the first 48 hours effectively nullifies the right to seek judicial review before the Federal Court'.[72]

9.75 Finally, the Committee also heard suggestions that the issue of a warrant for detention should be subject not only to judicial review, but that there should be an

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66 Ms Nancy Murphy, *Submission 10*, p. 1.

67 Mr Leigh Plater *Submission 70*, p. 1.

68 *Submission 24*, p. 14.

69 Ibid.

70 Mr Leigh Plater *Submission 70*, p. 2.

71 *Submission 136*, p. 19.

72 *Submission 24*, p. 16.

expanded merits review of such decisions by an independent statutory body such as the AAT, with legal representation.[73]

Funding for lawyers

9.76 Dr Gavan Griffith QC argued that 'to give any content to the duties and rights under clause 34E' (the provision requiring the Prescribed Authority to tell the person being questioned of his or her rights, including the right to seek a judicial review remedy), certain changes were needed. They included:

- paying for an approved lawyer where the person 'has no apparent means'; and
- providing funding, if requested by the approved lawyer, for an application to the Federal Court for review.[74]

9.77 It is clear that informing someone of his or her rights to judicial review, and more generally to have access to a legal adviser, will be of little benefit where the person has no money to pursue those options. The Committee was advised by the Attorney-General's Department that, when the Government's response to the PJCAAD's report was first announced, the Attorney-General had issued a press release which included the statement that the costs for approved lawyers would be met by the Commonwealth through, potentially, a legal aid style program so that those people who were required to have a lawyer approved by the Commonwealth would not be put to the cost of acquiring that lawyer.[75] However, there is no statement to that effect in the Bill.

Annual reporting

9.78 Section 94 of the ASIO Act currently requires the Director-General to give the Minister an annual report on ASIO's activities. A copy must also be given to the Leader of the Opposition. The Minister may delete sections from the report as he or she considers necessary to avoid prejudice to security, defence, Australia's international affairs or individual privacy, and the Leader of the Opposition must treat those sections as secret.

9.79 The Bill adds new requirements for annual reports, following the PJCAAD's recommendation.[76] Proposed section 94(1A) specifies that the annual report must include a statement of the total number of requests for warrants and the total number of warrants issued, broken down into the number requiring appearance for questioning and the number authorising a person to be taken into custody. There is also a provision requiring the Director-General to provide a written report to the Minister on the extent to which action taken under a warrant has assisted ASIO in carrying out its functions (proposed section 34P). Such reports, however, go no further than the Minister.

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73 Australian Lawyers for Human Rights *Submission 177*, p. 8.

74 *Submission 235*, p. 9.

75 *Hansard*, 26 November 2002, p. 275.

76 PJCAAD Recommendation 11.

9.80 Mr Gustav Lanyi argued that the provisions relating to annual reports were inadequate in allowing an assessment of the use of the powers under the Bill and whether fundamental human rights were being respected in individual cases.[77]

9.81 During this inquiry, the Director-General of Security reiterated a concession made to the PJCAAD in relation to the reporting of statistics on the new powers:

> As I mentioned … before another committee, if the parliament considered that it would help in the public trust and confidence, there would not be an issue in providing details of the number of warrants that were exercised under this legislation in our classified annual report to the parliament.[78]

9.82 There would seem to be merit in requiring ASIO to provide further details on the use of warrants: the total number of hours of questioning, plus the hours and number of warrants for questioning heard before each Prescribed Authority.

A sunset clause

9.83 The PJCAAD recommended a sunset clause of three years, stating that in combination with public reporting on the number of warrants sought and granted it was the 'most powerful accountability mechanism that the Committee can recommend'.[79] The PJCAAD commented:

> It is simple in design but sends a confidence boosting message to the Australian public that the Australian Government will need to account and argue the case for the continuation of these powerful laws.[80]

9.84 This recommendation was not adopted by the Government, the Attorney-General stating:

> International experts on terrorism agree that one thing we know about terrorist is that they are patient … The armoury we build against terrorism must, therefore, be both strong and enduring. Of course, as the threat environment evolves, we will need to review the appropriateness of our tools in the fight against terrorism.[81]

9.85 Instead of a sunset clause, the Government proposed that, three years after it commenced, the legislation would be reviewed by the Parliamentary Joint Committee on ASIO, ASIS and DSD.

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77 *Submission 151.*

78 *Hansard*, 12 November 2002, p. 33.

79 PJCAAD, p. 59 and Recommendation 12.

80 Ibid.

81 Hon Daryl Williams MP, *House of Representatives Hansard*, 23 September 2002, p. 7039.

9.86 The insertion of a sunset clause was supported by Australian Lawyers for Human Rights,[82] Dr Gavan Griffith QC[83] and the Law Council of Australia.[84] Mr Bret Walker SC, President of the New South Wales Bar Association, argued:

> … if it is a law which leads to contest, which leads to controversy and which is revealed in practice to need finetuning or perhaps more than that, a sunset clause ensures that there will be an ordered non-emergency, non-scrambled occasion when the pros and cons can properly be debated and where they should be debated - in parliament and in committees such as this with delegates from the parliament. For those reasons, a sunset clause is, in my view, unexceptionable and remarkable in this debate only for this political factor: why would one resist it?[85]

9.87 The Committee notes that in the United Kingdom there has been a longstanding practice of giving anti-terrorist legislation a limited life span, subject to parliamentary review and extension.[86] Significantly, the current legislation is permanent.[87] However, the most recent legislative amendments have a novel and innovative sunset clause mechanism. Under the Anti-Terrorism, Crime and Security Act 2001 (UK), the Secretary of State must appoint a committee to conduct a review of the Act within two years. The report may specify particular provisions which, without parliamentary intervention, would cease to have effect within 6 months.[88]

9.88 A sunset clause in legislation can be used as a guarantee of parliamentary scrutiny and opportunity to review. It can help to ensure that the survival of the legislation is made to depend upon a continuing demonstrated threat of terrorism.

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82 *Submission 177*, p. 8.

83 *Submission 235*, p. 10.

84 *Submission 299*, p. 25. Mr Gustav Lanyi (*Submission 151*, p. 3) and Ms Ruth Russell (*Submission 13*, p. 4) also supported a sunset clause.

85 *Hansard*, 26 November 2002, p. 250.

86 Prevention of Violence (Temporary Provisions) Act of 1939–1954 and Prevention of Terrorism (Temporary Provisions) Acts of 1974–1989.

87 Terrorism Act 2000 (UK).

88 Anti-Terrorism, Crime and Security Act 2001 (UK), sections 122 and 123. As Australian Lawyers for Human Rights noted (*Submission 177*, p. 8), there is a separate sunset clause in section 29 of the Act relating to provisions for certifying that a person is a terrorist. These provisions expire 15 months after commencement, unless the Secretary of State orders their revival, following approval in Parliament. In any case, the provisions may not last beyond November 2006.

Chapter 10

CHILDREN

10.1 This chapter considers the application of the proposed detention and questioning regime to children.

The proposal

10.2 The original Bill had no age limits, meaning that children could be detained and questioned in the same way as adults. The only restriction was in relation to strip searches, which could not be carried out on children under the age of ten.

10.3 The PJCAAD described the inclusion of children in the Bill's regime as a 'major concern', particularly in that it allowed detention of a child without the parents' knowledge.[1] The PJCAAD recommended that the Bill be amended to ensure that it did not apply to people under the age of 18.[2]

10.4 The PJCAAD's recommendation was only partially accepted by the Government. Amendments subsequently passed by the House of Representatives mean that warrants cannot be issued in relation to a child who is under the age of 14. For those young people between 14 and 18 years of age, a higher threshold test and certain special conditions apply.

10.5 The key difference is that, unlike adults who may be detained without being suspected of involvement in any terrorism offence, a young person must be a suspect.

Grounds for issue of a warrant

10.6 The Bill provides that a warrant to detain or question a young person may be issued only if the Minister is satisfied on reasonable grounds that:

- the person is at least 14 and is likely to commit, is committing or has committed a terrorism offence (proposed subsection 34NA(4));
- the draft warrant permits the person to contact a parent or guardian, or another acceptable person (as set out in the Bill), and an approved lawyer; and
- the draft warrant authorises ASIO to question the person before a Prescribed Authority only in the presence of a parent or guardian or other approved person, and only for continuous periods of up to two hours (proposed subsections 34NA(4) and (6)). The general provisions on extension of warrants and the maximum limit of seven days' detention apply.

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1 PJCAAD p. 51.

2 Recommendation 10.

10.7 A representative from the Attorney-General's Department explained that the lower limit of 14 years of age was considered appropriate because it corresponded to the age of criminal responsibility:

> Children [of that age] can be charged with an offence and be considered to have sufficient maturity to know right from wrong and therefore be criminally culpable.[3]

10.8 The Committee notes that this age limit is reflected in the general principles of criminal responsibility in the *Criminal Code*.[4]

10.9 As noted above, a young person who is questioned must be a suspect in relation to a terrorism offence. A representative from the Attorney-General's Department explained that the Government had 'taken on board' the concerns expressed about children during the previous parliamentary committee inquiries. The aim of the provision was to impose a higher threshold for application of the regime without changing the purpose of detention and questioning:

> The fundamental focus of the legislation has not changed with respect to [children]. It is still with the intention of seeking intelligence that they might have ... However, it was recognised that, given they were children, the threshold at which they would be asked to come in would be raised. So only if they were suspected of an offence or engaged in an offence would they be called in. Again, it would not be for the purpose of adducing evidence for a prosecution of them for offences; it would still be with the intention of getting the intelligence.[5]

10.10 However, Dr Carne suggested that the regime for young people:

> … highlights the conceptual confusion underpinning the bill: it openly combines the disparate and irreconcilable objectives of intelligence gathering, preventative detention and criminal investigation.[6]

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3 *Hansard*, 13 November 2002, p. 42. The Committee notes that no explanation for the age limit was included in the Revised Explanatory Memorandum for the Bill, or the Supplementary Explanatory Memorandum that accompanied the Schedule of Government Amendments.

4 Criminal Code, Division 7, ss 7.1 and 7.2, which specify that a child under 10 is not criminally responsible for an offence, while a child between 10 and 14 years of age can only be criminally responsible if the prosecution proves that the child knew his or her conduct was wrong. At age 14, the general principles of criminal responsibility apply.

5 *Hansard*, 13 November 2002, p. 39.

6 *Submission 24*, p. 19.

Presence of third parties

10.11 Like adults, young people have the right of access to legal advisers, as discussed in Chapter 6. However, the capacity to prohibit access to a lawyer in the first 48 hours of detention does not apply to young people.[7]

10.12 While a parent, guardian or other approved person must be present during questioning, proposed section 34V allows the Prescribed Authority to order the removal of that person if the Prescribed Authority considers that the third person's conduct is 'unduly disrupting questioning'. In such a case, the Prescribed Authority must tell the detained young person of his or her right to have another person present, and must direct that the questioning is not to proceed until a suitable person is present.

Evidence to the Committee

10.13 The Committee heard various concerns from a range of groups about the provisions relating to young people. The Public Interest Advocacy Centre argued that no justification had been offered for authorising the detention and questioning of children beyond what the current law allows (that is, the questioning of suspects prior to charge), nor did the proposed regime safeguard their interests while in detention.[8] VCOSS[9] and Australian Lawyers for Human Rights[10] also expressed concern about detention of children and the Law Council of Australia,[11] the Law Institute of Victoria[12] and the Criminal Defence Lawyers Association (NSW)[13] opposed the Bill's application to children under 18.

10.14 Mr Philip Boulten, Convenor of the Criminal Defence Lawyers Association (NSW) explained why the Association strongly opposed the application of the proposed regime to children:

> Children suspected of criminal acts would normally be the subject of criminal investigations in any event. They would be given an interview by investigating police officers under normal police station conditions. If such interviews were preceded by long periods of questioning and/or detention under the provisions of the proposed bill, then the provisions that currently exist in order to protect vulnerable people, such as children, in the course of a criminal investigation would be seriously undermined … The whole

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7 The requirement that a warrant authorising a person to be taken into custody immediately must permit him or her to contact an approved lawyer at any time (proposed subsection 34C(3B)) may only not apply if the Minister is satisfied, amongst other things, that the person is at least 18 years of age (proposed subsection 34C(3C)).

8 *Submission 52*, pp. 8-9.

9 *Submission 81*, p. 5.

10 *Hansard*, 26 November 2002, p. 236.

11 *Submission 299,* p. 24.

12 *Hansard*, 22 November 2002, p. 211.

13 *Submission 236*, p. 4.

> reason criminal investigations concerning children have special safeguards is to avoid them being broken down by the sometimes oppressive conditions that can exist even in normal criminal investigations. If children, even suspects were exposed to the provisions of the proposed legislation, then it would make a mockery of the provisions that are meant to protect children in the criminal justice system.[14]

10.15 Under the *Crimes Act* 1914, a child who is arrested in relation to a criminal offence may only be questioned for half the time that an adult may be held for questioning, that is, two hours for children compared with four hours for adults.[15]

10.16 The Public Interest Advocacy Centre argued that it was 'not evident' that the Bill had taken into account specific obligations under the Convention on the Rights of the Child (CROC).[16] Article 37 of CROC provides that detention should only be used as a last resort and for the shortest appropriate period of time. Australian Lawyers for Human Rights[17] and the Law Institute of Victoria[18] also referred to a potential breach of Article 37 of CROC. Australian Lawyers for Human Rights argued that the Bill provided only for the presence of a parent or guardian during questioning, not during the period of detention.[19]

10.17 The Law Institute of Victoria also argued that the Bill was in potential breach of other articles of CROC, namely:

- Article 2.2 provides that a child must not be discriminated against on the basis of the expressed opinions of the parents;
- Article 3.1 provides that in all actions concerning children, the best interests of the child shall be a primary consideration;
- Article 19.1 provides that the State must take all appropriate measures to protect the child from all forms of injury or abuse;
- Article 36 provides that the State shall protect children against all forms of exploitation prejudicial to any aspect of the child's welfare; and
- Article 40 provides that a child is to be presumed innocent until proven guilty.[20]

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14 *Hansard*, 26 November 2002, pp. 229-230.

15 *Crimes Act* 1914, s.23C(4). The provisions refer to an 'investigation period', which disregards periods during which questioning is delayed or suspended for a range of reasons. Extension of the investigation period may be sought for a further period of two hours (s. 23D).

16 *Submission 52*, p. 8.

17 *Submission 177*, pp. 5-6.

18 *Submission 294*, p. 4.

19 *Submission 177*, pp. 6-7.

20 *Submission 294*, p. 4. Similar arguments were expressed by the Federation of Community Legal Centres (Vic) Inc *Submission 243*, p. 24.

10.18 In response, a representative from the Attorney-General's Department stated that the Department was satisfied that the Bill was consistent with Australia's international obligations.[21]

10.19 The Law Institute of Victoria commented that the Bill failed to provide guidance as to what account should be taken of a young person's age. For example, while a two hour limit on each questioning period was imposed, there was no limitation on the number of times a young person may be questioned.[22] The Institute argued that the special vulnerability of children requires certain additional safeguards that the current Bill does not include:

- they should be allowed to speak with their lawyer in confidence;
- there should be an upper limit (less than 7 days) on their maximum period of detention, given that under the *Crimes Act* 1914 children may be detained for only half the time that an adult may be detained; and
- there should be additional safeguards on strip searches (discussed below).[23]

10.20 The Law Institute of Victoria also argued that the reverse onus of proof (that the person being questioned does not have the information sought, as discussed in more detail in Chapter 6) will fall 'unduly harshly' on young people 'who generally are likely to have poorer communication skills and less experience in dealing with authority than adults in the same situation'.[24]

10.21 Representatives from the Victorian Bar told the Committee that they were opposed to young people being detained for up to seven days for the purpose of gathering intelligence.[25] While if young people were not held in custody the proposed questioning regime would be 'less offensive', 'great care' would need to be taken if compulsory questioning were allowed, given the immaturity of young people.

10.22 Under the Bill the Prescribed Authority must be satisfied of particular grounds before detention can be extended (proposed subsection 34F(3)). Those grounds are that the person may alert another person involved in a terrorism offence that the offence is being investigated; that evidence may be destroyed; or that the person may not reappear for questioning. None of these reasons would seem to be particularly persuasive in the case of young people. If the purpose is to prevent alerting others, young people may not be held incommunicado under any circumstances: access to both a parent, guardian or approved person and a legal adviser must be given. If the purpose is to stop the destruction of evidence, then other powers, including the power to issue a search warrant, are already available. If the real purpose of extending detention is to overcome the person's reluctance to provide information, the danger of

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21 *Hansard*, 12 November 2002, p. 8. No elaboration was given on this point.

22 *Submission 294*, p. 2.

23 *Submission 294*, pp. 1-3.

24 *Submission 294*, p. 2.

25 *Hansard*, 22 November 2002, pp. 166-167.

coercion is far greater for young people, and it is more likely that either the questioning would be stopped by the IGIS or Prescribed Authority, or that the evidence received in this way would be tainted. Consequently the arguments against detention for up to seven days appear stronger in the case of young people, given their acknowledged vulnerabilities.

10.23 Another concern arises about the desirability of targeting young people about the activities of their parents or other older family members. There is evidence that anti-terrorist laws that compel the disclosure of information in the United Kingdom have been used predominantly against family members. In the report, *Inquiry into Legislation Against Terrorism*, Lord Lloyd of Berwick identified criticisms of the general duty to give information about the commission or possible commission of terrorist offences under the Prevention of Terrorism (Temporary Provisions) Acts 1974–1989. He observed that 'prosecutions are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties'.[26] The question must be raised whether the danger of coercing young people in such circumstances might taint the evidence that is extracted from them.

Searches

10.24 Like other detainees, a young person may be subjected to an ordinary search or strip search if a police officer suspects on reasonable grounds that the person has a seizable item on his or her person (proposed section 34L). However, there are some additional safeguards on strip searches of young people.

10.25 A young person may only be strip searched on the order of a Prescribed Authority. The search must be conducted in the presence of a parent, guardian or someone else who can represent the person's interests and is, as far as is practicable in the circumstances, acceptable to him or her (proposed paragraph 34M(1)(f)).

10.26 The Law Institute of Victoria noted that there were no guidelines as to what the Prescribed Authority must consider before ordering a strip search, and contrasted this silence with provisions under the *Crimes Act* 1914 concerning children who have been arrested for an offence.[27] In such cases, a magistrate who orders a strip search must have regard to the seriousness of the offence for which the child has been arrested, the child's age or any disability, and such other matters as the magistrate sees fit.[28]

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26 Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996, Vol. 1, p. 94.

27 *Submission 294*, p. 2. This point was also raised by the Federation of Community Legal Centres (Vic) Inc *Submission 243*, p. 24.

28 *Crimes Act* 1914, subsection 3ZI(2).

Summary

10.27 The Committee notes that the application of the proposed questioning and detention regime to young people, limited to those between the ages of 14 and 18 who are suspects in relation to terrorism offences, has come about through Government amendments introduced in response to the PJCAAD's recommendations. During public hearings, ASIO and the Attorney-General's Department emphasised that the lower age limit of 14 years reflects the age of criminal responsibility, and stressed that the purpose of questioning young people under this regime would be to gather intelligence, not to gather evidence for a prosecution. However, the Committee is concerned that the regime now proposed, in focussing only on young people who are suspects, contradicts the stated purpose of the Bill in gathering intelligence.

10.28 The Committee is also concerned about the possible targeting of young people to gather intelligence, particularly where questioning relates to the activities of parents or other family members. While the proposed regime contains some safeguards that recognise the special vulnerability of young people, including the mandatory presence of a parent, guardian or other acceptable person during questioning as well as access to legal representation, those safeguards do not overcome all the concerns that have been raised, particularly in relation to children as young as 14. For a person aged 17, the concerns will be less. However, some limit needs to be drawn, and the Committee considers that 14 is too young. The Committee notes also that where a young person is a suspect in relation to a terrorist offence, current provisions of the *Crimes Act* 1914 provide for questioning following arrest for a maximum period of two hours, only half that of an adult.

10.29 The Committee notes that the PJCAAD recommended that the Bill not apply to anyone under the age of 18 years, and endorses its recommendation.

Chapter 11

THE COMMITTEE'S CONCLUSIONS

11.1 The key change proposed by the Bill is that ASIO will be empowered to seek a warrant to detain and question people for up to 48 hours for the purposes of investigating terrorism offences: such people need not be suspects in relation to those offences. The Bill also allows extension of the period of detention in certain circumstances for up to seven days.

11.2 These proposed changes caused considerable controversy during the inquiry. For the reasons set out in this report, the Committee considers that, while the threat of terrorism justifies compulsory questioning powers, such powers must be limited, subject to proper checks and balances and accountable to the Parliament and the public insofar as the nature of the intelligence permits. Consequently the Committee recommends certain amendments to the Bill as essential for its passage.

Prescribed Authority

11.3 A key role in the Bill is that of the Prescribed Authority, before whom questioning must take place. The 'Prescribed Authority' is currently defined as a senior legal member of the AAT - 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).

11.4 The Committee heard evidence of concerns about the appointment of AAT members to this critical role, as set out in Chapter 8. Former Solicitor-General Dr Gavan Griffith QC, Dr Stephen Donaghue and representatives of the Victorian Bar supported the allocation of these critical responsibilities to a judge. This would have two benefits: the appointment of a judge would increase public confidence in the questioning and detention process, and a judge would be better placed to ensure that questioning was appropriate.

11.5 Because of possible concerns about constitutional implications, the Committee considers that retired judges would be preferable. The Committee also favours the Law Council of Australia's suggestion that ten years' experience as a judge of a superior court should be required. Although these requirements will narrow the pool of suitable appointees, ASIO gave evidence that the powers in the Bill would be used sparingly. The Committee notes also that the Minister must be satisfied, amongst other things, that relying on other methods of collecting the intelligence would be ineffective.

11.6 The Committee recommends that a pool of suitable people should be appointed by the Attorney-General for a maximum period of three years.

Recommendation 1

The Committee recommends that proposed section 34B should be amended to provide for the appointment by the Attorney-General as a Prescribed Authority of a number of retired federal or state judges, with at least 10 years' experience on a superior court, and that the appointments should be for a maximum period of three years.

The issue of warrants

11.7 The current threshold for the issue of a warrant for questioning is that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence (proposed section 34D). The warrant is to be sought by the Director-General of ASIO following the Minister's consent.

11.8 The Committee supports that test. However, the Committee considers that the definition of Issuing Authority (defined in proposed section 34AB as a federal magistrate or judge appointed by the Minister, or a member of a specified class declared by way of regulation) requires amendment.

11.9 The High Court's decision in *Grollo v. Palmer* indicates that the power to issue warrants may be conferred on a judge provided it is given to the judge as an individual, it is received by consent and the function is not incompatible with the performance by the judge of his or her judicial functions or the proper discharge of the judiciary of its responsibilities as an institution. Since a judge must consent, an important practical concern is whether any federal or state judges would be willing to consent, given the nature of the warrants and the possibility of later review. The Committee considered the evidence of Dr Gavan Griffith QC about the experience in relation to issuing telecommunication intercept warrants to be particularly compelling. He noted that most Federal Court judges had advised the Government in 1997 that they would no longer issue such warrants, partly because they considered the function to be administrative rather than judicial, and partly because they 'increasingly found themselves as a respondent in issued applications of their own court'.[1]

11.10 Dr Griffith expressed doubt over whether any federal judicial officer, 'acting advisedly', would volunteer to accept the conferral of power to issue the warrant proposed in this Bill. There appeared to be some acceptance of this doubt in the Attorney-General's Department's acknowledgement that it would be 'interesting' to see how many judges agreed to issue warrants. Consequently, the issue of warrants might fall to the members of a 'specified class' declared in regulations.

11.11 Dr Griffith called for an 'impartial authority' constituted by retired federal or other judges to issue warrants, on the basis that it would maintain public confidence.

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1 *Submission 25*, p. 3.

11.12 The Committee agrees with this suggestion and considers that the Issuing Authority should be a retired federal or state judge, with the same conditions as apply to the proposed Prescribed Authority. There should be no capacity to prescribe a class of issuing authorities by regulation.

Recommendation 2

The Committee recommends that the definition of Issuing Authority in proposed section 34AB should be amended to refer to a retired federal or state judge appointed by the Minister, as for the Prescribed Authority. The Attorney-General should not be able to appoint persons as 'members of a class prescribed by regulations'.

11.13 The Committee is also concerned to ensure that the Issuing Authority and the Prescribed Authority who supervises the questioning are different people although drawn from the same pool.

Recommendation 3

The Committee recommends that a Prescribed Authority that has issued a warrant should not be permitted to supervise questioning under the same warrant.

Questioning

11.14 During this inquiry, one of the proposals was that the AFP rather than ASIO should conduct questioning. Various areas of incompatibility were raised, with respect to their relative expertise in subject matter, experience in dealing with evidence, lines of accountability and extraterritorial operation. Ultimately, however, it was noted that, in practice, whichever agency was responsible for questioning, ASIO would be likely to have an active presence and play a primary role in determining its course.

11.15 The Committee considers that ASIO should conduct the questioning, and therefore recommends no change to the provisions of the Bill. However, the Committee considers that additional information on the extent of use of the questioning regime should be reported, as is discussed further below.

11.16 With regard to the role of the AFP, the Committee considers that the AFP should execute the questioning warrants, including if necessary conveying a person to the place of questioning. The AFP should be responsible for all the logistical aspects of questioning, such as providing a suitable venue, managing the time of questioning periods, ensuring access to legal and medical advice, provision of meals and refreshments, and any complaints except those relating specifically to the questioning itself.

Time limits for questioning

11.17 Apart from a provision specifying that a young person may not be questioned without a break for more than two hours, 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.

11.18 The Law Council of Australia was one of several groups which argued that questioning should occur in accordance with well recognised criminal investigation procedures. The Law Council supported the model in the *Crimes Act* 1914 concerning the questioning of people who have been arrested for federal offences. That regime allows for an initial period of four hours of questioning with an eight hour extension available by warrant.

11.19 The questioning period in the Crimes Act (defined as an 'investigation period') excludes periods during which questioning is suspended or delayed for various defined 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. As the Criminal Defence Lawyers Association (NSW) noted, this regime gives the investigating authorities quite substantial periods of time in which to hold someone, but it is far less than the 168 hours envisaged under this Bill.

11.20 The Committee considers that the Crimes Act model is appropriate, particularly in light of the fact that many of the people who will be held under these provisions will not be held on suspicion of having committed any criminal offence. To allow such people to be held for far longer periods and with fewer safeguards than apply to people suspected of often very serious offences is not acceptable.

Recommendation 4

The Committee recommends that the maximum time allowable for questioning under the warrant should be modelled on the questioning periods and down-time set out in sections 23C and 23D of the *Crimes Act* 1914. The provisions relating to maximum times allowable are to be provided for in legislation.

Recommendation 5

The Committee recommends that an extension of time for questioning under the original warrant should be given by the Prescribed Authority where it is satisfied that there are reasonable grounds to believe further questioning is likely to yield relevant intelligence, with the questioning regime modelled on the provisions of the *Crimes Act* 1914.

11.21 The Committee considers that further warrants should not be allowed to be issued for the same person for a seven day period after the initial questioning. However, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of that person, a second warrant can be issued for that person, for a maximum period modelled on the *Crimes Act* 1914.

Recommendation 6

The Committee further recommends that, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of a person, a second warrant can be issued for that person, for questioning for a maximum period modelled on the provisions of the *Crimes Act* 1914.

11.22 The Committee considers that a person who has been the subject of two consecutive warrants could not in any circumstances be further questioned under this regime for a seven day period after the completion of the second questioning and then only if the threshold test and processes that apply to the second warrant are repeated and met.

Recommendation 7

The Committee recommends that where a person has been the subject of two consecutive warrants, no further warrants are permitted for the next seven days after the completion of questioning, and then only if the threshold test and processes that apply to the second warrant are met.

The majority of the Committee considers that the Bill must also include a provision ensuring that once questioning has finished, a person is free to leave.

Recommendation 8

The majority of the Committee recommends that the Bill include a provision ensuring that once questioning has finished, a person is free to leave.

Government Senators support this recommendation subject to the proviso that it would not apply where the Prescribed Authority otherwise directs, in accordance with proposed section 34F(3) (that the Prescribed Authority is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, or may destroy, damage or alter a thing the person has been requested to provide under the warrant) and it is likely that a terrorism offence that may have serious consequences is being committed, or is about to be committed.

Legal representation

11.23 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.

11.24 Because of the compulsory nature of questioning, the criminal penalties for failure to comply and the possibility of detention without charge under this regime, the majority of the Committee considers that the right to legal representation is essential.

11.25 The Bill recognises possible access to a legal adviser by providing that the warrant may specify people who may be contacted, and that where the warrant authorises detention or where the person is a child, this access must be provided. However, the right to legal advice is not absolute: access may be prevented in the first 48 hours of detention if the Minister is satisfied on reasonable grounds that 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' that the person not be permitted to contact a legal adviser (proposed subsection 34C(3C)).

11.26 The majority of the Committee considers that access to a legal adviser should be a right throughout the detention and questioning process. Moreover, consultations should be private: the provision which requires that contact between lawyer and client is able to be monitored (proposed subsection 34U(2)) should be removed. 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* (see Chapter 6)

Recommendation 9

The majority of the Committee recommends that proposed subsection 34U(2) should be amended to recognise that, while visual monitoring of a person's contact with his or her legal adviser may be permissible, the communications between a person and his or her legal adviser must be confidential.

Government Senators support the recommendation subject to an exception where the Prescribed Authority is satisfied based on advice from ASIO that confidential communication may prejudice public safety.

11.27 The Committee also heard concerns during this inquiry that communications between legal advisers and their clients may not be privileged, in other words, the legal adviser may be compelled to answer questions about his or her advice to clients. The Committee notes the assurance by an ASIO representative that this effect is not intended and that 'normally' abrogation of the privilege would need either to be explicit or necessarily implied in order to give effect to the legislation. However, given the importance of this issue, the Committee considers that the Bill should expressly address it.

Recommendation 10

The Committee recommends that the Bill should expressly provide that legal professional privilege is not affected.

11.28 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.

11.29 The Association of Criminal Defence Lawyers Association (NSW) argued that people being questioned under this regime should be able to choose their own lawyers, while acknowledging that a power of veto may be appropriate in certain circumstances. It was suggested that the NSW Crime Commission model, whereby the Commission has a power to veto a lawyer if there was a real risk that the investigation would be jeopardised by that lawyer's attendance at the proceedings, would be appropriate.[2] This proposal was supported by the Law Council of Australia. The Committee notes Mr Walker SC's concerns that '[t]he profession fears that, under the pretext of approving lawyers, there will be a determined effort to remove all lawyers generically'.[3]

11.30 The Committee notes advice from the Director-General of ASIO about how long security assessments would take:

> It depends what sort of check you are doing. If you are doing an electronic check, that could be a matter of minutes. If you are doing more substantive checks, it can take longer. Sometimes it depends on the information that people will be accessing. So I am not in a position to give a set time.[4]

11.31 The Committee notes also that legal advisers will be subject to an offence of disclosure of information about the detention or questioning while the person is in detention, and that they are also subject to a professional misconduct regime. These are important safeguards.

Recommendation 11

The majority of the Committee recommends that proposed section 34AA concerning approved lawyers should not proceed. Instead, the Prescribed Authority should be given the power to refuse to permit a particular legal adviser to be present on the application of ASIO if the Prescribed Authority believes on reasonable grounds that the particular person represents a security risk and that to allow representation by that person may prejudice public safety.

Government Senators support this recommendation insofar as it allows for a person to choose his or her own lawyer. However, in cases where the person's first nominated legal adviser has been refused permission to be present,

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

3 *Hansard*, 26 November 2002, p. 253.

4 *Hansard*, 13 November 2002, p. 54.

Government Senators consider that the person being questioned should have access to an approved lawyer if he or she wishes.

11.32 In cases where the Prescribed Authority has refused to permit a particular legal adviser to be present, there should be provision for the person to be able to choose another legal adviser. The Committee is aware of the potential for either party to abuse this process in order to frustrate fair questioning, either by consecutive nominations of inappropriate legal advisers or alternatively by repeatedly opposing nominations of individual legal advisers. To that end, the Committee considers that the Prescribed Authority should have the power in such cases to order that questioning should proceed, as is recommended below.

Recommendation 12

The Committee recommends that where the Prescribed Authority has refused to permit a particular legal adviser to be present, the person being questioned or detained should be able to choose another legal adviser.

11.33 The Committee also notes the Law Council's suggestion that while urgent circumstances might require that the commencement of questioning is not delayed, this should not require access to legal representation to be denied for a particular period - merely that the legal adviser would be told that questioning was commencing immediately. In Mr Walker's words, emergency does not mean no lawyers: 'it can only mean no waiting for lawyers'. As Dr Carne pointed out, the delay in access to a lawyer would also affect other safeguards under the Bill, and would effectively nullify the right to seek judicial review in such cases.

11.34 The Victorian Bar pointed out that there was a model in section 464C of the *Crimes Act* 1958 (Vic). 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.

Recommendation 13

The Committee recommends that access to a legal adviser should not be barred under the terms of a warrant, but that if the Prescribed Authority is satisfied on the application of ASIO that there is a real and immediate threat to public safety, the Prescribed Authority should be empowered to order that questioning commence without waiting for the attendance of a legal adviser. Once a legal adviser arrives, he or she should have immediate access to the person being questioned. The Prescribed Authority should also have the power to order that questioning should proceed where he or she is satisfied that consecutive nominations of legal advisers constitute an attempt to frustrate the questioning process.

Recommendation 14

The Committee recommends that denial of access to a legal adviser who has arrived after questioning has commenced should be listed as an offence in the Bill.

Use of evidence

11.35 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 unless the person can prove that s/he does not have the information, 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.

11.36 The Bill provides that 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 (in other words, there is a *use immunity* in relation to the information gained). 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.

11.37 Consequently, 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 or State police where it appears to relate to an indictable offence. The Committee considers that these provisions represent an appropriate balance between the public interest in obtaining important intelligence about terrorist offences and the public interest in being able to prosecute those who are the principal offenders. The Committee notes also that the derivative use immunity has been abrogated in Australia in other legislation dealing with commissions of inquiry, and considers there is no compelling reason why the provisions should be different in these circumstances.

11.38 While some submissions argued that the removal of the right to silence was unacceptable, others noted that precedent existed in Australia in the *Royal Commissions Act* 1902 and the *National Crime Authority Act* 1984.

11.39 The reversed onus of proof (that is, that the person must raise evidence to show that he or she does not have the information or thing that is sought) was also opposed by several groups, including the Federation of Community Legal Centres (Victoria) and Amnesty International. The majority of the Committee does not support the reversal of the onus of proof and recommends that this provision not proceed.

Recommendation 15

The majority of the Committee recommends that proposed section 34G should be amended to remove the evidential burden placed on the person who is appearing for questioning under a warrant to show that he or she does not have the information sought or possession or control of the relevant record or thing.

Senator Scullion dissents from this recommendation.

11.40 However the Committee recommends no changes to the provisions relating to the removal of the right to silence and the use immunity.

Protocols and safeguards

11.41 Chapter 9 sets out the various safeguards that are currently in the Bill. They include mandatory videorecording of proceedings before the Prescribed Authority; provision of interpreting services where appropriate; the giving of information about the right, and the provision of facilities, to make a complaint to the IGIS or Ombudsman; and regulation of searches and strip searches.

11.42 The Committee endorses all those safeguards, but believes that certain additional safeguards are required. The Committee is also concerned that important matters are not left to a written statement of procedures that, while tabled in Parliament, does not have sufficient accountability.

Additional safeguards during questioning

11.43 The Committee considers that the person being questioned has a right to know the function of all parties who are present during questioning.

11.44 While the Prescribed Authority has obligations under the Bill to inform the person about certain matters, including the right to make a complaint and to seek judicial review, the Committee considers that the Bill should also specify that such information should be given both orally and in writing, with translation into an appropriate language if necessary. In addition to the power in proposed section 34H of the Prescribed Authority to order that an interpreter be provided in appropriate cases, the Committee considers that a person who is being questioned should also be able to request an interpreter.

Recommendation 16

The Committee recommends that the Prescribed Authority be required to inform the person being questioned of the function of all parties who are present during questioning.

Recommendation 17

The Committee recommends that information required to be given under proposed section 34E, as well as the person's right to request an interpreter, should be given both orally and in writing, with translation into the person's first language where appropriate.

Recommendation 18

The Committee recommends that proposed section 34H be amended to provide that an interpreter is also to be provided on request by the person being questioned.

11.45 The Committee also considers that a right to legal advice is not effective if a person lacks the funds to pay for the attendance of a lawyer. Consequently the Committee recommends that a person being questioned should have access to legal aid funding if they do not have adequate means, and that funding should be available for an action for judicial review in the Federal court.

11.46 The Committee notes advice received from ASIO's legal counsel regarding the provision of funding for legal costs:

> In terms of providing access to lawyers and funds for lawyers, when the government's response to the parliamentary joint committee was first announced, the Attorney-General released a press release with a precis of the types of government amendments which would be moved in the House and which were ultimately passed. That included a precis of the approved lawyer process and all those sorts of issues. Included in that release was the statement that the costs for approved lawyers would be met by the Commonwealth through, potentially, a legal aid style program so that those people who are required to have a lawyer that is approved by the Commonwealth will not be put to the cost of acquiring that lawyer.[5]

Recommendation 19

The Committee recommends that a person being questioned should have access to legal aid funding as appropriate.

11.47 The Bill also seems to allow for the IGIS to be present during the questioning process, given that he or she will have the power to inform the Prescribed Authority of any concerns about 'impropriety or illegality' in the exercise of powers in the questioning process (proposed section 34HA). The Committee considers that the Bill should make explicit the IGIS's right to attend during the questioning process.

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5 *Hansard*, 26 November 2002, p. 275.

Recommendation 20

The Committee recommends that the Bill should make explicit the IGIS's right to attend during the questioning process.

11.48 As discussed in Chapter 9, representatives of the Muslim community were particularly concerned about the search provisions in the Bill. They recommended that the Bill should include a requirement similar to that applying to arrested persons under the *Crimes Act* 1914 that, as far as practicable, ordinary searches and frisk searches should be conducted by an officer of the same gender as the person being searched. The Committee endorses this suggestion.

Recommendation 21

The Committee recommends that the Bill should include a requirement that ordinary searches and frisk searches, as far as practicable, should be conducted by an officer of the same gender as the person being searched.

11.49 The Committee also notes that, in response to the PJCAAD's concerns, the Bill was amended to create various criminal offences for non-compliance with safeguards. Proposed section 34NB creates various offences where an official exercising powers under a warrant fails to comply with certain safeguards in the Bill, including knowingly contravening a condition or restriction in a warrant or a direction of a Prescribed Authority, or knowingly conducting a search or strip search in contravention of the Bill. These offences will apply principally to police officers and ASIO officers. Each offence is punishable by a maximum of two years' imprisonment.

11.50 During this inquiry questions were raised as to whether those provisions are enforceable in practice, particularly where they refer to vaguely worded standards. In particular, questions were raised about the 'humane treatment' provision under proposed section 34J. Some submissions argued that the requirement that the offences be committed 'knowingly' imposed too high a standard. On the other hand, the Committee heard concerns from the Australian Federal Police Association that the offences were unnecessary and were already provided for in other legislation that deals with complaints and disciplinary procedures against police, as well as in existing criminal laws.

11.51 The Committee considers that the criminal offences should remain as drafted in the Bill.

Written protocols

11.52 Before any warrant may be issued, the Bill requires that a written statement of procedures to be followed in the exercise of authority under warrants has been adopted (proposed paragraph 34C(3)(ba)). This provision was inserted to address the PJCAAD's concern about the absence of guidelines as to the operation of the custody, detention and questioning regime, for example, what arrangements would be made

when a person was taken into custody, where the person would be detained, and when breaks in questioning would be required.[6]

11.53 While agreeing with the proposition that the powers must not be able to be used until the procedures have been finalised and approved by external parties, the Committee does not consider that the provisions are sufficiently rigorous. Under proposed section 34C(3A), the only person who need approve the statement is the Minister. All other parties (the IGIS, the AFP Commissioner and the President of the AAT) need only be consulted. In the case of Parliament, there is a requirement that the PJCAAD be 'briefed' and the statement tabled, rather than it being a disallowable instrument.

11.54 It is also unclear, either from the Bill, the Explanatory Memorandum or evidence during this inquiry, exactly what the written statement would cover. ASIO and the Attorney-General's Department told the Committee that only preliminary work had been done on the protocols pending the outcome of this inquiry. The Committee considers that matters such as the place and conditions of custody and detention, including overnight detention, security arrangements, the time limits on questioning, including required breaks in questioning and the responsibilities of various agencies (such as the involvement of State or Territory police) should be included.

11.55 The Committee also considers that because of the importance of the issues to be covered, they should not be by way of a 'written statement', but should be given legislative force. While the details will be too comprehensive to include in the Act, the Committee considers that they warrant inclusion in regulations. If time permits and given the Committee's recommendations for further amendments to the Bill, the protocols should ideally be developed for passage with the Bill.

11.56 If not, the Committee recommends that the regulations must be made prior to the Minister giving consent to a request for a warrant. The Committee prefers that the legislation does not commence until the detail of the proposed regulations is known.

Recommendation 22

The Committee recommends that:

(i) reference to adoption of a written statement of procedures in proposed paragraph 34C(3)(ba) and proposed subsection 34(3A) should be amended to require such procedures to be included in regulations;

(ii) those regulations must be made prior to the Minister giving consent to a request for a warrant; and

(iii) powers under the warrants must be exercised in accordance with those regulations.

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6 PJCAAD, pp. 36-39.

Recommendation 23

The Committee recommends that the regulations should include but not be limited to specifying the place and conditions of custody and detention, including overnight detention, security arrangements, the time limits on questioning, including required breaks in questioning, and further guidelines on searches, consistent with current policing protocols.

11.57 The Committee heard significant concerns during this inquiry that while ASIO officers are subject to a complaints process through the IGIS, they are not subject to the same accountability processes, including a disciplinary regime, that apply to police officers. The Committee considers that the importance of these powers warrants the development of additional disciplinary procedures.

Recommendation 24

The Committee recommends that ASIO develop and implement separate disciplinary procedures in relation to officers who conduct questioning.

Annual reporting

11.58 The Bill adds new requirements to the information that the Director-General must report annually, following the PJCAAD's recommendation.[7] Proposed section 94(1A) specifies that the annual report is to include a statement of the total number of requests for warrants and the total number of warrants issued, broken down into the number requiring appearance for questioning and the number authorising a person to be taken into custody.

11.59 There is also a provision requiring the Director-General to provide a written report to the Minister on the extent to which action taken under a warrant has assisted ASIO in carrying out its functions (proposed section 34P). Such reports, however, go no further than the Minister.

11.60 The Committee welcomes the additional reporting requirements in the Bill, but considers that there would be merit in requiring ASIO to provide further details on the use of warrants: the total number of hours of questioning, plus the hours and number of warrants for questioning heard before each Prescribed Authority. While protecting information about the details of individual cases, this additional requirement would provide more meaningful information about the use of the powers.

11.61 The Committee notes that the Director-General of Security had commented in relation to additional reporting requirements:

> As I have mentioned before, this is a power that, I believe, could be used very rarely. I have said on the record that there have been probably two or three occasions since September 11 where there have been situations in

7 PJCAAD Recommendation 11.

> which, had it been law prior to September 11, we would have pursued the issued to see whether it was possible to enact the power. We understand the particular interest and accountability arrangements here, and for that reason, unlike our other warrants, we would not see an issue with the number of warrants issued and like being in our public annual report.[8]

Recommendation 25

The Committee recommends that proposed subsection 94(1A) should be amended to require the report to include information about the total number of hours of questioning under warrants, the hours of questioning and length of detention in respect of each person questioned, and number of warrants for questioning heard before each Prescribed Authority.

Sunset clause

11.62 The Committee notes that the Bill contains provision for a review of the operation of the legislation, to commence as soon as possible after three years of operation.

11.63 A review of the Bill is important in order to ascertain the extent of the use of the powers, to identify any problems with their use and to propose appropriate amendment. However, the Committee considers, as did the PJCAAD, that such important and extensive powers should be subject to a sunset clause. If a review finds that the circumstances at that time justify the continued availability of such powers and that the powers have been exercised appropriately, its recommendations will be brought to Parliament which may then reconsider the matter.

Recommendation 26

The majority of the Committee recommends the insertion of a sunset clause of three years from the date of commencement of the legislation.

Senator Scullion dissents from this recommendation.

Children

11.64 As discussed in Chapter 10, particular concerns were expressed about the application of the detention and questioning regime to children. The Committee notes that the application of the proposed questioning and detention regime to young people, limited to those between the ages of 14 and 18 who are suspects in relation to terrorism offences, has come about through Government amendments introduced in response to the PJCAAD's recommendations. During public hearings, ASIO and the Attorney-General's Department emphasised that the lower age limit of 14 years reflects the age of criminal responsibility, and stressed that the purpose of questioning young people under this regime would be to gather intelligence, not to gather evidence

8 *Hansard*, 18 November 2002, p. 115.

for a prosecution. However, the Committee is concerned that the regime now proposed, in focussing only on young people who are suspects, contradicts the stated purpose of the Bill in gathering intelligence.

11.65 The Committee is concerned about the possible targeting of young people to gather intelligence, particularly where questioning relates to the activities of parents or other family members. While the proposed regime contains some safeguards that recognise the special vulnerability of young people, including the mandatory presence of a parent, guardian or other acceptable person during questioning as well as access to legal representation, those safeguards do not overcome all the concerns that have been raised, particularly in relation to children as young as 14. For a person aged 17, the concerns will be less. However, some limit needs to be drawn, and the Committee considers that 14 is too young. The Committee notes also that where a young person is a suspect in relation to a terrorist offence, current provisions of the *Crimes Act* 1914 provide for questioning following arrest for a maximum period of two hours, only half that of an adult.

Recommendation 27

The majority of the Committee recommends that the Bill not apply to anyone under the age of 18 years.

Senator Scullion dissents from this recommendation and supports the existing provisions in the Bill as they apply to young people.

Senator the Hon Nick Bolkus
Chair

Additional Comments and points of Dissent
By Senator Brian Greig
on behalf of the Australian Democrats

1.1 While acknowledging the many changes and amendments made to this Bill, and the many strong recommendations from the Senate Committee, the Australian Democrats remain opposed to it. We consider it still represents a disproportionate, badly targeted and possibly unconstitutional response to the threat of terrorism in Australia.

1.2 This Bill undermines a number of fundamental rights and freedoms that have long been accepted as central tenets of our democratic system and essential to the effective rule of law.

1.3 The Government's responsibility is to protect, not only the safety of Australian people, but also their welfare. One should not be at the expense of another and the Government must be careful to get the balance right.

1.4 The Democrats believe that this Bill gets the balance wrong.

1.5 Whether or not Australia's existing anti-terrorism arrangements are sufficient is a matter for the Government to clearly demonstrate to the Australian public. The Government bears the burden of proof to establish that there is need for new legislation, particularly when the proposed legislation represents a radical departure from existing arrangements, as this Bill does.

1.6 As the NSW Council for Civil Liberties said in its submission to the Committee:

> [I]f there is a need to limit or remove fundamental civil liberties then the burden of proof must be on the government to demonstrate to the people of Australia that these powers are both required and will actually work.[1]

1.7 The Government has failed to discharge this burden.

1.8 Even if the Government were to establish the need for legislative change, it would then need to demonstrate that the proposed legislation constitutes a proportionate response to the threat of terrorism.

1.9 This accords with the position adopted by the General Assembly in Resolution 56/160 on 'Human Rights and Terrorism', the Preamble of which acknowledges 'that all measures to counter terrorism must be in strict conformity with the relevant provisions of international law, including international human rights standards'.

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1 NSW Council of Civil Liberties, *Submission 132*, p. 1.

1.10 The Democrats do not accept that the draconian measures proposed by this Bill represent a proportionate response to the threat of terrorism. In this respect, we note the unique features of this Bill – such as the power to detain non-suspects – which have not been considered necessary in comparable countries, such as the United Kingdom and the United States.

The Right to Silence and Privilege Against Self-Incrimination:

1.11 There is no right to silence or privilege against self-incrimination for persons detained under this legislation. A person will be compelled to provide the information sought by ASIO or face 5 years imprisonment.

1.12 Strict liability attaches to this offence and the person being detained bears the burden of proof to establish that they do not have the information sought.

1.13 This provision directly contravenes a person's right to be presumed innocent until proven guilty. It will require innocent Australians to discharge a burden of proof in order to escape a penalty of 5 years imprisonment. The Democrats support the Committee's recommendation that this evidential burden of proof be removed.

1.14 The right to be presumed innocent is a non-derogable right enshrined in Australian common law, as well as Article 14(2) of the *International Covenant on Civil and Political Rights*, and Article 11 of the *Universal Declaration of Human Rights*.

1.15 The Democrats oppose the abrogation of the right to silence in circumstances where no use immunity, including derivative use immunity, applies to the information provided. Although use immunity applies to information provided during the course of questioning under the Bill, derivative use immunity does not.

1.16 Given that the primary purpose of this Bill is to facilitate the collection of intelligence relating to terrorism, the Democrats believe that derivative use immunity should apply to information obtained pursuant to its provisions.

1.17 If, however, questioning conducted under this legislation is intended to be used for the dual purpose of criminal prosecutions, then the right to silence must apply and detained persons must have full and free access to a legal practitioner of their choice.

Legal Representation:

1.18 The Democrats welcome the amendments made to the Bill regarding access to legal representation, however we consider they do not go far enough.

1.19 The right to legal representation under this Bill remains severely limited. Firstly, subsection 34C(3C) provides that a person does not have a right to contact a lawyer during the first 48 hours of detention in certain circumstances.

1.20 Secondly, a person detained for questioning does not have the right to a lawyer of his or her choice. He or she will only have access to a lawyer approved by the Attorney-General pursuant to section 34AA.

1.21 In determining whether to approve a lawyer for the purposes of the Act, the Attorney-General must take into account any material which he or she considers is relevant. This broad provision incorporates a very subjective assessment into the approval process.

1.22 Thirdly, the Bill makes no provision for access to a lawyer in circumstances where the detained person lacks sufficient funds to engage one. The right to legal assistance without charge for those who lack the means to pay is enshrined in Article 14(3)(d) of the *International Covenant on Civil and Political Rights*, and Principle 6 of the *United Nations Basic Principles on the Role of Lawyers.*

1.23 Given the severity of the penalties which attach to non-compliance under the Bill, the right to legal representation irrespective of a detained person's ability to pay is essential. The Democrats fully support the Committee's recommendation that Legal Aid be available to detainees.

1.24 Fourthly, a lawyer may be removed by the prescribed authority if he or she is 'unduly disrupting the questioning'. This is an entirely subjective test and opens the way for prescribed authorities to adopt a broad interpretation when determining whether conduct is 'unduly disrupting'.

1.25 It is particularly disturbing, given that subsection 34U(4) provides that the lawyer may neither intervene during questioning, nor address the prescribed authority, except to request clarification of an ambiguous question. In this context, it is foreseeable that a lawyer might be removed for simply acting within the parameters of what would usually be considered appropriate legal representation.

1.26 Fifthly, proposed subsection 34U provides that a lawyer commits an offence if he or she communicates information relating to the questioning to a third person other than a prescribed authority, a person exercising authority under a warrant, the Inspector-General of Intelligence and Security, or the Ombudsman.

1.27 This provision may prevent a lawyer from challenging the validity of the detention in a court of law.

1.28 Article 9.4 of the *International Covenant on Civil and Political Rights* provides that:

> Anyone who is deprived of their liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

1.29 This Article enshrines in international law the ancient common law doctrine of *habeas corpus.* As a fundamental principle of the common law, the right of a

detained person to be brought before a judge is enforceable by Australian courts. However, any lawyer who sought to pursue such an action at common law would risk a 2 year imprisonment.

1.30 The right to legal representation is further rendered hollow by the fact that the Bill enables confidential communications between the detained person and his or her lawyer to be monitored. The right to confidential communications between legal practitioners and their clients is a fundamental principle of the common law and essential to the effective rule of law. It is also recognised in Principle 22 of the United Nations Basic Principles on the Role of Lawyers.

1.31 It is essential that persons detained under this legislation have the opportunity to communicate privately with their legal practitioner. The Democrats support the Committee's recommendation that while visual monitoring of a person's contact with his or her legal adviser may be permissible, the communications between a person and his or her legal adviser must be confidential.

Detention of Non-Suspects:

1.32 The Democrats find it particularly disturbing that this legislation applies to all Australians whether or not they are charged with, or suspected of, terrorist activity. This makes the radical deviation from well-accepted human rights and civil liberties even more unjustifiable.

1.33 It is significant that comparable jurisdictions have not considered it necessary to adopt this approach. In particular, neither the United States nor the United Kingdom have made any provision for the detention of non-suspects in their comprehensive legislative regimes.

1.34 The Democrats agree that there are compelling arguments for applying special considerations to groups such as legal and medical practitioners, and possibly journalists. On this basis, we support the Committee's recommendation that the Bill be amended to provide that legal professional privilege is not affected.

1.35 The Democrats believe, however, that rather than introducing limits on the application of the Bill to specific groups, a more preferable approach would be to limit its application to those suspected of direct involvement in terrorism offences.

1.36 Like Amnesty International, the Democrats oppose the detention of a person unless the person is charged with a recognisable criminal offence or action is being taken to deport the person to another country where:

> the person would not risk being subjected to an unfair trial, the death penalty, torture or other cruel, inhuman or degrading treatment or punishment, or other serious human rights abuses by state or non-state actors.[2]

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2 Amnesty International, *Submission 136*, p. 6.

1.37 It is arguable that the detention of non-suspects under this legislation would contravene Article 9 of the *International Covenant on Civil and Political Rights*, which prohibits arbitrary detention.

1.38 The application of this Bill to non-suspects is one of the primary reasons underlying the Democrats opposition to it. Even if the Bill were to be radically improved in order to address human rights and civil liberties concerns, its application to non-suspects would remain fatal to our support.

Children:

1.39 The Democrats are deeply concerned that this Bill enables the detention and questioning of children. We welcome the proposed amendments preventing the questioning of minors below the age of 14, however minors between the ages of 14 and 18 may still be questioned.

1.40 We note the provisions of Article 37 of the *Convention on the Rights of the Child*, ratified by Australia in 1991, which states that:

> 'No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort for the shortest period of time. '

1.41 The Democrats are also concerned that the Bill permits the strip-searching of minors over the age of 14 years. We believe that any power to strip search a minor under this legislation should, at a minimum, be made consistent with the requirements of s34ZI(2) of the *Crimes Act* 1914 (Cth), whereby the authorisation of a Magistrate must be obtained before a minor is strip searched.

1.42 Notably, the PJC recommended in its Advisory Report on the Bill, that the Bill should not apply to persons under the age of 18 years. The Democrats concur with that recommendation and are disappointed to see that it has not been acted upon by the Government. We are pleased that this Committee has now echoed that recommendation.

Constitutionality:

1.43 There are a number of grounds upon which the constitutionality of this Bill might be questioned, particularly with respect to its implications for the separation of powers.

1.44 Firstly, it is arguable that the Bill invests Federal Magistrates and Judges with powers which are inconsistent with their judicial functions, contrary to the High Court's decision in *Grollo v Palmer*.[3]

1.45 Given its radical departure from fundamental principles of the common law, such as legal professional privilege, it is possible that a Court would find that the

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3 (1995) 184 CLR 348.

regime established by the Bill is not only inconsistent with, but repugnant to, the judicial power of Chapter III judges. The Democrats concur with Professor William's argument that the involvement of judges in this process has the potential to 'undermine public confidence in the judicial system'.[4]

1.46 Another basis on which the Bill potentially breaches the separation of powers is that it invests the Executive with the power to detain individuals who have not been charged with an offence. This is potentially inconsistent with the High Court's decision in *Chu Keng Lim v Minister for Immigration, Local Government and Ethnic Affairs*[5].

1.47 Furthermore, it would be open for a Court to question the power of the Commonwealth to enact such legislation. Although there are clearly a number of heads of power (including the Defence power, External Affairs power and the Executive power) upon which the Commonwealth might rely to pass anti-terrorism legislation, it must also ensure that the legislation is reasonably capable of being considered as appropriate and adapted to an identified constitutional purpose under one or more of these powers.

1.48 As stated above, the Democrats believe this legislation represents a disproportionate response to the threat of terrorism and this may be a relevant consideration for a Court in determining the constitutionality of the legislation.

1.49 The Democrats are concerned by the constitutional ambiguities associated with this Bill. Clearly, it is undesirable from a policy and administrative perspective for the Government to pursue a legislative regime, aspects of which may subsequently be declared to be invalid.

Absence of a Bill of Rights:

1.50 The Australian Democrats are disappointed that this Bill is being considered in the absence of an Australian Bill of Rights.

1.51 The Democrats have previously introduced a Private Member's Bill – the Parliamentary Charter of Rights and Freedoms Bill 2001 – which sought to establish a charter of rights or freedoms, facilitated by the Human Rights Commission.

1.52 This Bill was intended as the first step towards ultimately achieving an Australian Bill of Rights by way of a Constitutional referendum.

1.53 As the ASIO Bill so clearly demonstrates, Australians do not have any guarantee that their rights and liberties will be respected by the Government of the day. Those rights and liberties are not inalienable and may be overridden by clear legislative intent.

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4 Professor George Williams, *Submission 22*, p. 6

5 (1992) 176 CLR 1.

1.54 Australia is now the only remaining common law country which lacks a Bill of Rights. There is no reason to justify Australians being exposed to potential derogations of their fundamental human rights and freedoms, when the citizens of other common law countries are not.

1.55 The Democrats will continue to advocate for an Australian Charter of Rights and Freedoms.

Accountability of ASIO:

1.56 This Bill seeks to vest police powers in an intelligence agency.

1.57 The Democrats are deeply concerned about the accountability implications of such an arrangement.

1.58 The powers vested in ASIO by this Bill are wide-ranging and coercive. As the Law Council of Australia states, it is imperative that such powers 'only be exercised under Executive authority and under proper accountability mechanisms'.[6]

1.59 A recent finding by American judges reinforces the need for such accountability. It was found that the United States Justice Department supplied false information with respect to more than 75 applications for search warrants and telecommunications intercepts relating to terrorist suspects.[7]

1.60 In order to guard against similar misuse of powers under this Bill, it is essential that rigorous accountability mechanisms be put in place. However, the level of accountability required would be inconsistent with the intelligence functions of ASIO. As argued by Professor Williams, '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'.[8]

1.61 The Democrats note with interest suggestions it would be more appropriate to invest such powers in the Australian Federal Police ('AFP') or, alternatively, the Australian Crime Commission ('ACC'). We are sympathetic to such arguments, particularly given the rigorous accountability regime which already exists in relation to AFP officers. However, we believe that simply transferring these powers to the AFP, or the ACC, would fail to address the many other concerns associated with this Bill.

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6 Law Council of Australia, *Submission 299*, p. 3.

7 T Kelly, 'Court Reveals FBI Deceit', *Sun Herald*, 25 August 2002.

8 Professor George Williams, 'One Year On: Australia's legal response to September 11', (2002) 27(5) *Alternative Law Journal* 212.

Sunset Clause:

1.62 Given that this Bill represents a radical departure from fundamental rights and freedoms within Australia, and this departure is said to be necessary in order to address the present threat of terrorism, there is a strong argument in favour of incorporating a sunset clause into the Bill.

1.63 In this respect, Australia should take guidance from the *Guidelines of the Committee of Ministers of the Council of Europe on Human Rights and the Fight Against Terrorism.* Article 15 of those Guidelines provides that any derogation from the observance and protection of human rights in an attempt to address the threat of terrorism should be limited 'to the extent strictly required by the exigencies of the situation, as well as within the limits and under the conditions fixed by international law'.

1.64 In contrast, this Bill will permanently abrogate a number of fundamental rights and freedoms and the Government has failed to demonstrate that such measures are required at all, even on a temporary basis.

1.65 The Democrats support the Committee's recommendation that a sunset clause be incorporated into the Bill.

Conclusion:

1.66 With specific reference to Article 6 of General Assembly Resolution 56/160, the Democrats hold the view that this Bill is neither 'necessary' nor 'effective', nor does it accord with 'the relevant provisions of international law, including international human rights standards'.

1.67 We concur with Professor George Williams that, despite the substantial amendments which have been made to the Bill, it 'remains rotten at its core'.

1.68 Accordingly, the Democrats support the call of the many individuals and organisations that have urged the Parliament to oppose this Bill.

Senator Brian Greig

Australian Greens Minority Report

> *No freemen shall be taken or imprisoned or disseised or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land.*
>
> Magna Carta 1215

> The greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and lose its own liberty in the process.
>
> Sir Robert Menzies, 7 September 1939

1.1 The *ASIO Legislation Amendment (Terrorism) Bill 2002* should not be supported, nor should the proposed powers be provided elsewhere. The existing powers and processes of the criminal justice system can be used to address the problem of terrorist crimes.

1.2 The *ASIO Legislation Amendment (Terrorism) Bill 2002* would enable ASIO to detain people for questioning

- incommunicado;
- in the absence of any suspicion of involvement in criminal activity;
- purely to seek "information that is or may be relevant to intelligence; [1]

1.3 If someone fails to answer questions they can receive terms of imprisonment of up to five years. The right to silence, a bedrock of our criminal law would be overturned.

1.4 ASIO would move from a spy agency to become a secret police. The long standing prohibition against arbitrary arrest - that is, the requirement that only those reasonably suspected of crimes should able to be detained would be overturned.[2] Indeed the bill seeks to enforce a harsher detention and questioning regime than exists for suspects under existing criminal law.

1.5 In seeking such significant and far reaching changes to fundamental civil and political rights the onus is on the government to justify such changes.

1.6 However, the government, ASIO and the AFP have failed to make a case for why such a fundamental change is necessary. Changes that even the US and Britain have not enacted.

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1 Liberty Victoria, *Submission 242*, p.3

2 Article 9, *International Covenant on Civil and Political Rights*. G.A. Res. 2200A (XXI)

1.7 Further, while international human rights law does allow limited derogation from certain rights, this is only when the whole of the nation is threatened and then only in a circumscribed manner.[3]

1.8 We are not in that situation.

1.9 While terrorist crimes are horrible and appalling they do not constitute a threat to the whole nation's existence. The Attorney General has not revised his advice that no specific threat of terrorism exists in Australia.

1.10 What the Government has proposed is far-reaching and unlimited in time. The range of people who could be detained is extensive and could include journalists, doctors and financial workers as well as neighbours, friends and colleagues of anyone about whom ASIO says it needs to collect information.

1.11 The scope of these powers is substantially widened by the extraterritorial character of the definition of terrorist act recently enacted[4], anyone remotely connected to any form of political violence in any place in the world could be potentially targeted. We heard concerning evidence in the Committee from Damien Lawson, spokesperson for the Federation of Community Legal Centres (Vic) Inc. that;

> Any offence anywhere in the world that falls within the scope of that legislation could be the basis on which ASIO could seek a warrant to hold someone merely to seek information. An obvious example would be a supporter of West Papuan independence in Australia who may have information about the activities of the OPM. Such a person could potentially be subject to this type of warrant and questioning regime. Similarly, anyone from a Kurdish background who may have information about the activities of the Kurdish independence movement may be subject to it—and so on.

1.12 ASIO, the Australian Federal Police and state and territory police already have extensive powers to investigate and prosecute criminal offences, including terrorism. They are able to tap phones, faxes and email; search homes and premises, open mail and collect extensive financial and private information.

1.13 Anyone reasonably suspected of involvement in terrorist offences can be arrested, questioned and detained until trial. Given the broad nature of terrorist offences recently enacted this would include anyone remotely connected to any planned terrorist acts.

1.14 The existing criminal law and processes can deal with terrorist crimes, without destroying fundamental civil and political rights and ultimately threatening democracy.

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3 Article 4, *International Covenant on Civil and Political Rights*, G.A. Res. 2200A (XXI)

4 See Schedule 1, section 3 *Security Legislation Amendment (Terrorism) Act* 2002.

1.15 Almost all of the 404 submissions to the committee concur with this view and opposed the proposed bill.

1.16 This reflects concerns expressed to and by two previous parliamentary committees that have examined these matters.[5]

1.17 Submissions have come from unions, religious, student, environment and community organisations opposing the bill. Several prominent legal groups and legal practitioners have also opposed these powers.[6]

1.18 Many ordinary Australian's have expressed their abhorrence at what has been proposed. Individuals expressed to the Committee their astonishment that the Australian parliament is even considering the strip searching of children, the removal of a right to a lawyer, the removal of the right to silence, the reversal of the burden of proof and the detention of innocent people.

1.19 It is clear that civil society does not want these laws.

1.20 While the recommendations contained in the majority report are significant improvements and should be supported they do not and cannot address the central problem of the *ASIO Legislation Amendment Bill 2002*, which is the unprecedented creation of the power to deprive innocents of their liberty. This problem will remain whether or not the power remains with ASIO or is given to the AFP or another body.

1.21 The existing powers and processes of the criminal justice system have for some time been able to be used to address the problem of terrorist crimes. Recently, the Government and Opposition have significantly extended the capacity of law enforcement and intelligence agencies to deal with terrorism through the establishment of the Australian Crime Commission. The coercive questioning regime powers given to the ACC would be able to achieve many of the purposes articulated by the government and ASIO for this legislation.

1.22 The *ASIO Legislation Amendment (Terrorism) Bill 2002* is unnecessary and dangerous. While the recommendations contained in the body of this Committee's report can improve aspects of the governments proposal, the core premise that innocent people can be detained and compelled to answer questions make the bill unsupportable in any form.

Senator Kerry Nettle

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5 See Senate Legal and Constitutional (Legislation) Committee, *Inquiry into the Security Legislation Amendment (Terrorism) Bill 2002 [No.2]*, May 2002 and Related Bills; Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002*, June 2002.

6 Ibid, also list of submissions contained in this report.

APPENDIX 1

ORGANISATIONS AND INDIVIDUALS THAT PROVIDED THE COMMITTEE WITH SUBMISSIONS

1. Mr Bill Leslie
2. Mr Chris Connors
3. Ms Jan Pukallus
4. Mr Michael Birch
5. Mr Peter Clancy
6. Mr Warren Wheeler
7. Nimbin HEMP Incorporated
8. Mr Alexander and Mrs Betty Reid
9. Mr Stephen McVie
10. Ms Nancy Murphy
11. Ms Val Schier
12. Network Opposing War and Racism (NOWAR) Adelaide
13. Ms Ruth E Russell
14. Mr Scott Sledge
15. Ms Rosie Wagstaff
16. Mr John Anderson
17. Australian Civil Liberties Union
18. Mr Mike Murphy
19. Ms Roma Duff
20. Ms Claudia Smith
21. P and G Bertoli
22. Professor George Williams
23. Mr Michael Vaughan

24. Dr Greg Carne

24A. Dr Greg Carne

24B. Dr Greg Carne

25. Dr Lola Hill

26. Ms Marion Donaldson

27. Dr Joe Rich

28. Ms Julia Bannister

29. Mr Adam Johnston

30. United Nations Association of Australia

31. Ms Ellen Granger

32. Mrs Vera Raymer

33. Mr Harry Johnson

34. Mr Russell Marks

35. Women's International League for Peace and Freedom

36. Mr Robert Varney

37. Ms Anne Glaum

38. B A Lewis

39. Mr Denis Hay

40. Ms Sue Finucane

41. Dr Peter Burns

42. Mr Roland Lubett

43. Intentionally left blank

44. H R Gilham

45. Mr Rhys McGuckin

46. Mr Richard Watkins

47. Ms Lorraine McKenzie

48. Mr Robert and Mrs Caroline Larner

49. Mr John Seed
50. Mr Gavin Greenoak
51. Mr David Lovejoy
52. Dr Patricia Ranald and Dr Annemarie Devereux, Public Interest Advocacy Centre
53. Mr Peter Astridge
54. Mr W Love
55. Mr Bob Ifield
56. Mr Terry Iturbide
57. Dr Bill Anderson
58. Ms Monica Nugent
59. Ms Ruth Lawrence
60. Mr Graeme Reid
61. Dr Stephen Donaghue
62. Ms Frances Long
63. Mr Jeremy Beck
64. Mr Dennis Pukallus
65. Ms Samala Hogg
66. Mr Christopher Guy
67. Mr Axel Cremer
68. Mr David Smith
69. Mr Ian McLeod
70. Mr Leigh Plater
71. Ms Anne Lawler
72. Mr S T Lawler
73. Ms Judy Pine
74. Mr David Foster
75. Just Peace, People for Peace through Justice

76. Ms Betty Broadbent

77. Ms Penny Craswell

78. Intentionally left blank

79. Mr Stephen Ward

80. Mr William an Mrs Judith Harris

81. Victorian Council of Social Service

82. Mrs E Henricksen

83. Mr Oliver Carter

84. G & D Harriott

85. Mr James and Mrs Karen Thomson

86. Mr Terry Schulze

87. Mrs Jean McClung

88. Mr Aiden Ricketts

89. Mr Adam Walfenden

90. Mr Andrew Bailey

91. Mrs Mary Welch

92. W R Ingrey

93. K M Morris

94. Mr John Philpott

95. Mr Jim Hazzard

96. Mr Ken and Mrs Barbara Bathurst

97. The Police Association Victoria

98. Lesbian and Gay Solidarity, Melbourne

99. Mrs June Ayres

100. Ms Clare Moynihan

101. Mr Scott Jordan

102. Mr Jeremy Wright

103. Mr Michael Csikos
104. Mr Bill Green
105. Mr Peter Hunter
106. Mr Daniel Henderson
107. Ms Therese Laverty
108. Mr Wayne Young
109. Ms Carmel Flint
110. Ms Rin Healy
111. Mr Marcel Maeder
112. Ms Rebecca Smith
113. Ms Steph Lockett
114. Mr Matthew and Mrs Niko Campbell-Ellis
115. Ms Judith Morton
116. Ms Emma Hardley
117. Mr David Nicastro
118. Ms Anna Carney
119. Ms Kate Mitchell
120. Mr Joe Bryant
121. Mr Kevin Hodges
122. National Union of Students NSW Branch
123. Mr Julius Kramer
124. Mr Casey O'Keefe
125. Ms Elizabeth Thompson
126. Ms Anna Bloemhard
127. Ms Kay Dimmock
128. Ms Jennifer Morton
129. Mr Alan Griffiths

130. National Social Responsibility and Justice and the Justice and International Mission Unit, Uniting Church in Australia

131. South Australian Police

132. New South Wales Council for Civil Liberties Inc.

133. Australian Labor Party

134. SEARCH Foundation

135. Islamic Council of Victoria

136. Amnesty International Australia

137. Citizens Electoral Council of Australia

138. Australian Pensioners' and Superannuants' League Queensland Inc.

139. Catholic Commission for Justice, Development and Peace Melbourne

140. People for Nuclear Disarmament (NSW) Inc.

141. New South Wales Young Lawyers Human Rights Committee

142. John Fairfax Holdings Ltd

142A. John Fairfax Holdings Ltd

143. Australian Catholic Social Justice Council

144. Australian Federal Police Association

145. Mr Tim Battin, National Tertiary Education Industry Union

146. Mr Ernest Kitto

147. Mr Matthew Smith

148. Ms Megan James

149. Mr Bob Reed

150. Dr Jude McCulloch, Deakin University

151. Mr Gustav Lanyi

152. Ms Heidi van Schaik

153. Mr Mohammed Waleed Kadous and Ms Agnes H Chong

154. Mr Ernest Stanfield

155. Ms Joan Stanfield

156. Mr Rex Warren
157. Mr John Rolls
158. Ms Janine Chugg
159. Nadim Joukhadar
160. Mr Lesley Gruit
161. Mr Walter Holt
162. Mr Saul Moss
163. Mr Brian Whelan
164. Mr Ken Joblin
165. Ms Naomi Hodgson
166. Mr John Wisby
167. Mr rank Brown
168. Ms Susie Russell
169. Mr Garth Luke
170. Mr John Porter
171. Ms Gillian Blair
172. Mr Paul de Burgh-Day
173. Aloka Reeves
174. Mr Ken Helsby
175. East Timor Association (NSW)
176. Ms Gabriel Bulut
177. Australian Lawyers for Human Rights
178. Mr Tony Towler
179. CONFIDENTIAL
180. Mr Robert Kooyman and Ms Madeleine Faught
181. Mr Damien and Mrs Jill Hynes
182. Mr W ‘Vance’ Avenell

183. Mr Phill Parsons

184. Mr David and Mrs Betty Dyer

185. Mr Bob and Mrs Elaine Phillips

186. Ms Robyn Green

187. Mr Stewart and Mrs Elizabeth Miller

188. Mr Don Pike

189. Ms Sandra Ferguson and Dr Richard Mochelle

190. Merrick Elderton

191. Ms Diane Jeffs

192. Ms Margaret Paterson

193. D J Williamson

194. Ms Zelma Boyd

195. Mr Terry Boath

196. Mr Laurence Hagerty

197. Mr Graeme Muldoon

198. Mr Andrew Reed

199. Mr Darren Hartnett

200. Ms Gayle Cue

201. Ms Fran Robbins

202. Firas Naji

203. Ms Marnya Flanagan

204. Mr Peter Bundock

205. Queensland Police Service

206. Mr Peter Phipps

207. Ms Kylie Wilkinson

208. Mr Alberto Estenaga

209. Mr Daniel Berg

210. Mr Damian Eckersley

211. Mr Dan Waters

212. Mr Les Harden

213. S Likar

214. Mr Filip Lika

215. Mr Don Hunter

216. Mr Joshua Gilovitz

217. Ms Nikita Robertson

218. Ms Glenda Lindsay

219. J Moynihan

220. Ms Sue Shaw

221. Mr Kenneth MacDonald

222. Mr William Clancy

223. Ms Yvonne Hartman

224. Mr Martin Oliver

225. Ms Samantha Trenoweth

226. Mr Will Callahan

227. Ms Amanda Macri

228. Ms Carol McCaffery

229. Mr Cris Geri

230. Ms Robin Davis

231. Mr Gary Latcham

232. Mr Simon Hall

233. Ms Trudy Campbell

234. Mr Ali Roude, Islamic Council of NSW

234A. Mr Ali Roude, Islamic Council of NSW

235. Mr Gavan Griffith QC

236. Association of Criminal Defence Lawyers

237. Australian Section, International Commission of Jurists

238. The Australian Federation of Islamic Councils Inc

239. Ms Miryana Baran

240. Mr Marcus Wigan

241. Victorian Police

242. Victorian Council for Civil Liberties

243. Federation of Community Legal Centres (Vic) Inc

244. Rally for Peace and Nuclear Disarmament

245. Mr Robert Traill

246. Canberra Islamic Centre

247. Mr Paul Sharpless

248. Mr Peter Friis

249. Mr Noel Strafford

250. Mr Sean Darbyshire

251. R Gordon

252. Miss Margaret Hogan

253. Mr Duncan Mills

254. Medical Association for Prevention of War

255. Ms Beverley Walters

256. Mr Jim Arnold

257. Ms Sylvia Wisby

258. Ms Betty Daly-King

258A. Ms Betty Daly-King

259. Ms Margaret Bearlin

260. Mr Seamus McDwyer

261. Mr Lindon Litchfield

262. Mr Phillip Cole
263. Mr Graeme Batterbury
264. Ms Bronwyn Holm
265. Ms Debbie Sloan
266. Mr Colin Cook
267. Mr Bill Von Trapp
268. Mr George Sranko
269. Mr Leith Maddock
270. Mr Arnold Rowlands
271. Mr Jonathon Wyss
272. Ms Brenda Roy
273. Mr Bill Fisher
274. Mr Colin Robertson
275. Mr Dudley Leggett
276. Ms Christine Gleeson
277. Ms Marilyn Cash
278. Mr John Fanale
279. Dr Jim Saleam
280. Australian Wellness Centre for Health and Longevity
281. Ms Anne Deane
282. Mr Allan Kingston
283. J Denver
284. Ms Vicki Harvey
285. Mr Rob and Mrs Amanda Becher
286. Ms Ruth Flower
287. T C Chao
288. Mr Christopher Flower

289. Mr Doug and Mrs Helen Harrison
290. Mr Terry Dwyer
291. Mr Richard Seeto
292. Mr Arthur Christensen
293. Ms Judy Blyth
294. Law Institute of Victoria
295. Mr Jonathan Roffe
296. Ms Alexandra Whitlock
297. Mr Peter Brien
298. W E Game
299. Law Council of Australia
300. Confidential
301. Mr Neil Young
302. Ms Dianna Caffee
303. Mr Ken Looke
304. Ruzenka Kajim
305. Mr Michael Mounteney
306. Mr Barry Saunders
307. The Victorian Bar Association
308. Mr Rik McGloin
309. H and H Andrews
310. J M Scott
311. Ms Hannah Levy
312. Mr Ben Hargraves
313. Ms Adela Metenkanycz
314. Mr Ron Wessell
315. Mr Bill Green

316. Mr Frances Amaroux
317. Mr Damian Cooper
318. Mr Wayne Evans
319. Mr Toby Chucaz
320. Ms Sue Bushell
321. Ms Veronika Ihlenfeldt
322. Mr Emanuele Gelsi
323. Mr Ian Hacon
324. Mr Ilan Lewis
325. Mr Daniel Jimenez
326. Mr Ian Rabig
327. Mr Maarten van Yzendoorn
328. Ms Sue Quarm
329. Ms Sarah Di Giglio
330. Mr Rodney Sims
331. Mr Jim Selwood
332. Ms Catherine O'Sullivan
333. Mr John Lane
334. Ms Toni Talbot
335. Ms Christie Hannan
336. Confidential
337. Ms Tessalie Parker
338. Ms Anastasia Guise
339. Ms Dianne Shoobridge
340. Mr George Phillipos
341. Ms Ingrid Crosser
342. Mr Michael Frazer

343. Ms Wendy Scurr

344. Mr Mal Eldridge

345. Mr Malvin and Mrs Sylvia Holland

346. Mr Donovan Simpson-Neilands

347. Mr David Stow

348. Ms Elisa Barwick

349. Ms Sarah Champness

350. Mr Brad Littleton

351. Ms Dianna Robbins

352. Mr Glynn Kennedy

353. Ms Jasmine Fraser

354. J Pink

355. Ms Angela Griffiths

356. D J Auchterlonie

357. Mr Bruce Duncan

358. Ms Anne Crawford

359. Huda Ibrahim

360. Ms Yvonne Evans

361. Mr Jay Lawrence

362. Mr Michael Clunes

363. Ms Anne Hodgson

364. Dr Iqbal Khan

365. Mr Christpoher MacFarlane

366. Imraan Bergman

367. Mr Howard Crane

368. Nic Faulkner

369. Mr Ronald Wolff and Ms Wendy Grace

370. S L Davies
371. Siti Abdul Malek
372. Mr Peter Faulkner
373. Mr Carl Pannuzzo
374. Ms Alanna Purcell
375. Ms Lorraine Phillips
376. Ms Barbara Little
377. Mr Robert Allan
378. Mr Peter Keil
379. Ms Natalia Chmielewski
380. Mr Stephen Gibson
381. Dr David and Ms Megan Baker
382. Mr Simon Mullumby
383. Ms Yvonne Muller
384. Mr Mick Bowen
385. R Page
386. Mr Stewart Mulligan
387. V S Grieger
388. Ms Rebecca Healy
389. Mr G H Schorel-Hlavka
390. Mr David Miller
391. Fayyaz Raja
392. L E Thomas
393. Ms Lorraine Thomas
394. Ms Anne Goddard
395. Rockefeller Foundation
396. Pastor Geoff Webber, Presbyterian Church of Australia

397. Mr Stuart McConville

398. Mr Peter Crook

399. Western Australia Police Service

400. Mr Tom Bertuleit

401. Mrs J Bourke

402. Mr Richard Newport

403. Ms Rosie Holmes

404. Ms Valerie Staddon

405. ABC, Commercial Television Australia and SBS

406. Ms Anne Linsten

407. The Woman's Centre

408. Illawarra Legal Centre Inc.

409. Northern Rivers Community Legal Centre

410. Mr Peter Collard

411. Office of the Commissioner for Children

412. Ms Jane Chesher

413. Ms Michele Drouart

414. Ms Karen Nelson

415. Mr Gregory Shaw

416. Mr Charles Smith

417. Ms Judith Thamm

418. Ms Clare Walton

419. Mr Nick Wilson

420. Mr Robert Fairlie

421. Ms Sue Arnold

422. Mr David Ifield

423. Mr Andrew O'Keefe

424. Progressive Labour Party

425. Mr Paul Hayes

426. Mr Matthew Sharpe

427. Mr Nathaniel Combs

428. Ms Liz Olle

429. Ms Hannah Fraser

430. Mr Tony Mullen

431. Mr John Revington

432. Mr Bill Walton

433. Mr George Brownbill

434. D Dawson

435. R Fraser and Family

APPENDIX 2

WITNESSES WHO APPEARED BEFORE THE COMMITTEE

Canberra, Tuesday 12 November 2002

Attorney-General's Department
Mr Richard Glenn, Acting Principal Legal Officer, Security Law and Justice Branch
Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch

Australian Security Intelligence Organisation
Mr Steven Marshall, Legal Adviser
Mr Dennis Richardson, Director-General of Security

Canberra, Wednesday 13 November 2002

Attorney-General's Department
Mr Richard Glenn, Acting Principal Legal Officer, Security Law and Justice Branch
Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch

Australian Security Intelligence Organisation
Mr Steven Marshall, Legal Adviser
Mr Dennis Richardson, Director-General of Security

Professor George Williams (private capacity)

Canberra, Thursday 14 November 2002

Australian Federal Police
Commissioner Michael Keelty, Commissioner

Dr Greg Carne (private capacity)

Canberra, Monday 18 November 2002

Attorney-General's Department
Mr Richard Glenn, Acting Principal Legal Officer, Security Law and Justice Branch
Mr Keith Holland, Assistant Secretary, Security Law and Justice Branch
Mr Geoff McDonald, Assistant Secretary, Criminal Law Branch

Australian Federal Police Association
Mr Jonathan Hunt-Sharman, National President
Mr Craig Shannon, Principal Industrial Officer
Mr James Torr, Project Manager

Australian Security Intelligence Organisation
Mr Steven Marshall, Legal Adviser
Mr Dennis Richardson, Director-General of Security

Melbourne, Friday 22 November 2002

Victorian Bar
Mr Lex Lasry QC
Mr Jacob Fajgenbaum QC, Chairman, Human Rights Committee

Federation of Community Legal Centres (Vic) Inc.
Ms Kate Allan, Member, Human Rights Working Group
Mr Damian Lawson, Spokesperson

Islamic Council of Victoria
Mr Asad Ansari, Member
Mr Bilal Cleland, Human Rights Coordinator

John Fairfax Holdings Ltd
Mr Michael Gawenda, Associate Publisher and Editor, The Age
Mr Bruce Wolpe, Manager, Corporate Affairs

Law Institute of Victoria
Ms Claire Mahon, Member, Young Lawyers' Section, Law Reform Committee
Ms Yvette Nash, Co-Chair, Young Lawyers' Law Reform Committee
Ms Karyn Palmer, Co-Chair, Young Lawyers' Law Reform Committee
Mr Erskine Rodan, Councillor

Liberty Victoria
Mr Gregory Connellan, President
Mr Christopher Maxwell QC, Immediate Past President

Dr Stephen Donaghue (private capacity)

Dr Gavan Griffith QC (private capacity)

Sydney, Tuesday 26 November 2002

Attorney-General's Department
Mr Richard Glenn, Acting Principal Legal Officer, Security Law and Justice Branch

Australian Federation of Islamic Councils Inc.
Mr Amjad Mehboob, Chief Executive Officer

Australian Lawyers for Human Rights
Mr Simeon Beckett, Committee Member
Ms Katherine Eastman, Member, Executive Committee
Mr Simon Rice, President

Australian Security Intelligence Organisation
Mr Steven Marshall, Legal Adviser
Mr Dennis Richardson, Director-General of Security

Criminal Defence Lawyers Association (NSW)
Mr Phillip Boulten, Convenor

International Commission of Jurists
Justice John Dowd, President, Australian Section

Islamic Council of New South Wales
Mr Ali Roude, Chairman

Law Council of Australia
Ms Christine Harvey, Deputy Secretary-General
Mr Stephen Southwood, Treasurer
Mr Bret Walker SC, Member and President of New South Wales Bar Association

Mr Stephen Hopper (private capacity)

Mr Mohammed Kadous (private capacity)