4 April 2005

The Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
Canberra ACT 2600

By Post and Email (PJCAADC@aph.gov.au, Margaret.Swieringa.Reps@aph.gov.au)

Dear Secretary

Review of Division 3 Part III of the ASIO Act 1979 - Questioning and Detention Powers

The Law Institute of Victoria (***LIV***) appreciates the opportunity to provide a submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD in its review of Division 3 Part III of the *ASIO Act 1979* (Cth).

We attach our submission, prepared with the assistance of a Working Party comprising members from the LIV's Administrative Law & Human Rights and Criminal Law Sections, for your review and consideration. Please note that an extension of time was sought and granted until 4 April 2005.

The LIV would welcome the opportunity to provide further submissions in relation to the issues raised our submission, should these be required. We would also be willing to provide further comments at a public hearing.

If you would like to discuss any of the matters raised in the submission, please contact me or Jo Kummrow, Advocacy and Practice Solicitor – Administrative Law & Human Rights Section on 03 9607 9385 or jkummrow@liv.asn.au

Yours sincerely

V.E. Strong

Victoria Strong
President
Law Institute of Victoria

Attach.

Submission

Administrative Law & Human Rights Section

To: Committee Secretary, Parliamentary Joint Committee on ASIO, ASIS and DSD

Submission: Review of Division 3 Part III of the *ASIO Act 1979* - Questioning and Detention Powers

A submission from: Administrative Law and Human Rights Section of the Law Institute of Victoria

Date: 24 March 2005 (Extension granted)

Queries regarding this submission should be directed to:

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1. LIV submission and terms of reference

The Law Institute of Victoria (*LIV*) is pleased to make this submission to the Parliamentary Joint Committee on ASIO, ASIS and DSD (*PJCAAD*) on the operation, effectiveness and implications of Division 3 Part III of the *Australian Security Intelligence Organisation Act 1979* (Cth) (*ASIO Act*). Provisions under Division 3 Part III enable Australian Security Intelligence Organisation (*ASIO*) to obtain questioning and detention warrants in relation to persons believed to have information about terrorist offences.

In providing this submission, the LIV is responding to a public invitation issued by the PJCAAD on 17 January 2005, which advised that when the *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth) was agreed, it contained a three year sunset clause. This sunset clause has made it necessary for the PJCAAD to hold an inquiry into the operation, effectiveness and implications of:

(i) Division 3 Part III of the ASIO Act; and
(ii) the amendments made by the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* (Cth), except item 24 of Schedule 1 to that Act (which included Division 3 Part III in the ASIO Act: and
(iii) to report the Committee's comments and recommendations to each House of Parliament and to the responsible Minister.

This submission has been prepared by a joint working party comprising members of the LIV's Administrative Law and Human Rights Section.

2. Overview

The LIV does not support increasing ASIO's special powers under the ASIO Act. Further, it recommends that the Committee consider the continuing need for these powers given that only three people have been questioned since the ASIO amendments were enacted. We suggest that other methods of inquiry, as currently used in the criminal investigative system, provide an adequate process for seeking information from persons suspected of involvement with terrorism offences.

The LIV has concerns about the breadth of ASIO's special powers to detain and question a person in relation to a terrorism offence. We note that ASIO's powers to detain and question are not limited to those suspected of involvement in terrorist activities or links to terrorist organisations. This means that any person with information relating to terrorism activities could be the subject of a detention and questioning warrant sought by ASIO. An example would be a journalist who has acquired information about a person or organisation involved, or suspected of being involved, in a terrorism offence through the course of their work. We submit that use of ASIO's powers to detain and question may not be reasonable in such circumstances given the nature of detention and questioning provisions under the legislation.

The LIV also holds concerns about the marginalised role of lawyers prior to and during the detention and questioning process and, in particular, the removal of a person's right to silence. This is a fundamental principle of the justice system in Australia. Ultimately, the LIV does not support the creation of two 'justice systems' under which a person will be

answerable for a criminal offence under one system and a person will be answerable for a terrorist offence under another system. While we appreciate the serious nature of national security and potential terrorism threats, the LIV strongly suggests that a balance needs to be struck between reducing an individual's legal rights and liberties and the protection of the broader community from perceived terrorist threats. We recommend that a number of changes should be made to the legislation to ensure that a better balance is reached.

3. Background

On the 21 March 2002 the House of Representatives referred the Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 (*Bill*) to the PJCAAD. The purpose of the Bill was to amend the ASIO Act to expand the special powers available to ASIO.

Specifically, the Bill proposed:

(a) including the definition of 'terrorism offence' in the ASIO Act;
(b) permitting personal searches to be authorised in conjunction with warrants; and
(c) providing a power to detain, search and question persons before a prescribed authority.

The Bill was also referred to the Senate Legal and Constitutional Legislation Committee for inquiry and report along with five other so-called 'anti-terrorism' Bills. After the adoption of certain amendments, the Bill was passed by both Houses of Parliament and the *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003* (Cth) received assented on 22 July 2003.

The amendments to the ASIO Act enable ASIO to:

(a) obtain a warrant from an 'issuing authority' for the questioning of an adult when there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence in relation to a terrorism offence;
(b) detain a person under a warrant if there are reasonable grounds for believing that the person may alert someone involved in a terrorism offence, may not appear before the prescribed authority or may destroy or damage evidence;
(c) obtain a warrant from an 'issuing authority' for the questioning and detention of a child aged between 16 and 18 years, but only if it is likely that the child will commit, or has committed, a terrorism offence;
(d) detain a person the subject of a warrant for up to 168 hours (one week);
(e) question a person the subject of a warrant for a total of 24 hours after which they must be released unless an interpreter has been used, in which case the person can be questioned for up to 48 hours; and
(f) question a person the subject of a warrant in the presence of a 'prescribed authority' for blocks of up to eight hours for adults and two hours for children.

Division 3 Part III also provides that:

(a) 'Prescribed authorities' will initially be drawn from the ranks of former superior court judges. If there are insufficient former judges, then serving superior court judges can

be appointed. If there are insufficient serving judges then a President or Deputy President of the AAT can be appointed, so long as that person holds legal qualifications.

(b) A protocol setting out standards, which must be adhered to when questioning and detention occur, must be issued by the Director-General of Security after consulting with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police. The Minister must approve the protocol. It must also be presented to each House of Parliament and the Committee must be briefed, either orally or in writing (either before or after the presentation of the statement to each House of Parliament).

A Background Paper (December 2004), which was provided by the PJCAAD, states the following issues that the Committee may wish to examine as part of the current review:

(a) how the legislation has operated since its enactment;
(b) what persons have been subjected to ASIO's special powers and what was achieved through their questioning;
(c) what problems, if any, have been encountered in the use of the legislation;
(d) what aspects of the legislation have not been used;
(e) what broader issues relating to the use of questioning and detention powers may need further consideration;
(f) what, if any, further legislative changes may need to be made; and
(g) what complaints, if any, have been made in relation to this legislation.

4. Lack of publicly available information for this review

As referred to below, persons affected by the legislation are unable to comment or provide information about the operation of ASIO's powers because of the secrecy provisions under the ASIO Act. This means that information sourced to prepare this submission is drawn from ASIO reports and is extremely limited in scope. The LIV suggests that there is an absence of publicly available information from ASIO and independent sources.

We note that two versions of ASIO's annual report are produced. The first version is classified and contains an account of ASIO's performance over the previous year, including sensitive reporting on security risks and details of investigations that cannot be released publicly. That report is provided to the Attorney General, the Prime Minister, members of the National Security Committee of Cabinet and the Leader of the Opposition. While the LIV appreciates the sensitive nature of some of this information, this lack of information also limits the capacity of organisations, such as the LIV, to provide informed comment on the operation, effectiveness and implications of ASIO's questioning and detention powers. The LIV also suggests that it limits the PJCAAD's ability to conduct an effective review. Accordingly, future additional information should be provided to assist stakeholders and organisations in the review process.

5. Issuing of warrants under section 34D

Section 34D provides that an issuing authority may issue a warrant under this section relating to a person if:

(a) the Director-General has requested it in accordance with subsection 34C(4); and
(b) the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.

The LIV submits the following points for consideration by the PJCAAD in relation to what we suggest are less effective restraints on the issue of warrants under section 34D:

(a) There appears to be no requirement that the issuing authority be satisfied that relying on means, other than a warrant for collecting intelligence, would be ineffective. This decision is made between the Director General and the Attorney General under section 34C prior to seeking the issue of a warrant. We also submit that this applies to the issue of detention in that the issuing authority should be required to consider if any other options other than detention are available and as effective.
(b) While the grounds for issuing a warrant are reasonably limited, they do not have to be made out to the issuing authority.
(c) While additional warrants may only be issued if the issuing authority is satisfied that it is justified by information additional to or materially different from that known the Director General, it may be difficult to confirm the manner in which ASIO operates and the information it has provided.

Further, the LIV suggests that it may possible for ASIO to make an informal request to a person for questioning without, or prior to, seeking a warrant. In such circumstances, a person may feel intimidated and reluctant to deny the request in fear of a more formal questioning process. The LIV submits that a person's rights may be further reduced under such 'informal' questioning, including the absence of a lawyer or legal advice prior to questioning. The LIV notes that no figures are provided in ASIO's annual report in relation to such informal questioning and further suggests that all questioning of suspects or informants, whether under a warrant or not, are reported in ASIO's annual report to Government and the public.

6. Detention powers

The LIV notes that in relation to section 34F(3) of the ASIO Act:

(a) an Authority can be given, among other things, for the detention of a person at any time when that person is before a prescribed authority for questioning under a warrant; and
(b) the Prescribed Authority must have reasonable grounds for believing, that if the person is not detained, he or she may alert another person that a terrorism offence is being investigated (section 34F(3)(a)), may not appear before the prescribed authority (section 34F(3)(b)) or destroy evidence (section 34F(3)(c)).

6.1 The purpose of detention under section 34F

The LIV recommends the PJCAAD examine and consider the purpose of detention under section 34F in light of detention under the criminal justice system and in view of preventative or administrative detention models.

The purpose of detention under section 34F is to prevent the commission of terrorist acts by another person other than the person being held in detention. The LIV submits that Division 3 Part III of the ASIO Act eschews all of the typical features of the criminal justice system through the practice of detention of persons under section 34F.

Nothing under Division 3 Part III, in relation to warrants for questioning (sections 34C and 34D), nor for detention of a person held for questioning under warrant (section 34F), requires specific involvement of the detainee in any criminal offence. He or she is not suspected of having committed a specific offence, nor of being involved in the planning of an offence.

Under the criminal justice system, deprivation of personal liberty characteristically occurs as a precautionary measure to ensure that the administration of criminal justice is not frustrated or obstructed by those who may become subject to its processes. A person is typically arrested and detained on reasonable suspicion that they have committed a criminal offence. The offence in question usually refers to a criminal act, but can also be based on an intention to commit a crime. An intention to commit an offence will only amount to a crime if it is either an 'attempt', where the intention is furthered by overt acts of preparation, or a 'conspiracy', where the intention of one person is converted into an agreement with others to perform an unlawful act. In a typical case, a person is detained in custody until a trial takes place to pass judgment on their suspected criminal conduct.

A person may also be detained for the purpose of police interrogation. Although in a typical case, there are strict controls under the supervision of judicial authority. Police questioning is usually always based on a reasonable belief that the suspect has committed a criminal offence.

Within a reasonable time, a criminal trial then occurs to judge whether the person is guilty of the alleged offence. Consequent on conviction, the offender can be subject to further imprisonment as a punitive measure. Typically, detention continues for a specified sentence, and on expiry of that term, the offender is released. The objective of criminal law is to punish convicted offenders.

In all cases, the Courts are generally empowered to judicially determine whether a person should be deprived of their liberty in accordance with grounds enumerated in national legislation or international instrument.

The *Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* by the Parliamentary Joint Committee on ASIO, ASIS and DSD (*Advisory Report*) indicates that during hearings, ASIO commented that in: "some circumstances, the proposed amendments could prove crucial in actually preventing a terrorist attack".

That the purpose of detention under section 34F could be characterised as preventive detention is also stated in the report of the Senate Legal and Constitutional References Committee Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters (*References Committee Report*). Paragraph 7.4 of this Report states:

> *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 attacks, not for the purposes of prosecuting the person detained.*

Further, paragraph 7.32 also states: "One concern is the extent to which protective detention might be characterised as preventive detention."

Preventive detention is not linked with the specific involvement of an individual in a criminal offence. The decision to detain a person as a preventive measure is, without exception, made by the Executive arm of Government. For that reason, 'preventive detention' is often referred to as 'administrative detention', or 'executive detention'.[1]

Preventive detention is usually justified on the ground that the person poses a threat to 'public safety or public security'. The accusation that the detainee is a threat to State usually refers to some imprecise activities, allegedly prejudicial to the public interest, in which, it is claimed, the detainee is likely to become involved unless detained.

An example of where preventive detention is used to arrest and detain a person considered a threat to State security is as an 'anti-terrorism response', a principal focus of Division 3 Part III of the ASIO Act. Anti-terrorism is often called 'counter-terrorism' and refers to the response taken to terrorism and to the practices, tactics and strategies governments, militaries and other groups adopt to fight terrorism.

Unlike imprisonment in criminal law, preventive detention has a precautionary rather than punitive object. The Advisory Report similarly makes this point at paragraph 3.13: "the provision for detention appears to be a precautionary measure."

The LIV suggests that a person in preventive detention is likely to feel their detention is unjust, as they have not done anything wrong. Preventive detention can take many different forms.

Under the ASIO Act, detention is used to facilitate the gathering of intelligence under warrants for questioning to prevent a future possible terrorist attack. It does not have the purpose of prosecuting the person detained, and is not necessarily based on an intention to charge the detained person with a criminal offence.

Preventive detention can also be used to detain a person to prevent him or her from committing a criminal offence in the future. As stated by Gross[2]:

> *Administrative detention, sometimes known as preventive detention, refers to a situation where a person is held without trial. The central purpose of such confinement is to prevent the detainee from committing offences in the future. Detention is based on the danger to*

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1 For example, a 1983 study by the International Commission of Jurists refers to 'administrative detention' as the deprivation of a person's liberty, whether by order of the Head of State or of any executive authority, civil or military, for the purposes of safeguarding national security or public order, or other similar purposes, without that person being charged or brought to trial.

2 Gross, E., (2001) 'Human Rights Terrorism and the Problem of Administrative Detention in Israel: Does a Democracy have the right to hold Terrorists as bargaining chips' *Arizonia Journal of International and Comparative Law* 18(3), 721

> *state or public security posed by a particular person against whom the government issues a detention order. In other words, if the detainee were released, he would likely threaten the security of the state and the ordinary course of life.*

Preventive detention can also be found as a disciplinary measure taken by the Executive, of foreigners seeking asylum or political refugees, of those who are extremely poor or socially maladjusted, of the mentally ill and minors.

At paragraph 7.33, the Reference Committee Report states: "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 purpose of protecting the community from repeat offenders."

The LIV suggests that the reference to "protecting the community from repeat offenders" is entirely different and distinct from the purpose of preventive detention under the ASIO Act. Detention of a person for the purpose of protecting the community from repeat offenders, in fact, refers to detention of recidivists. In these circumstances, a convicted offender may be subjected to continued and, in some cases, indefinite detention. For recidivists, a Court may order further imprisonment on the basis that the person is likely to re-offend on release from prison. Recidivism is similar to preventive detention in that both are based on a prediction of future criminal conduct, but different in that the detention of recidivists is based on a previous conviction for a criminal offence.

6.2 The legality of detention under section 34F

The LIV notes that preventive detention is not prohibited under the arbitrary arrest and detention provisions of the international human rights instruments and that the authoritative international institutions have refused, on several occasions, to condemn the practice in unequivocal terms.

The protection of all personal liberty and security, in fact, governs the lawfulness of preventive detention under international covenant. Typically, this protection is framed in terms of a prohibition on arbitrary arrest and detention.

For example, Article 9(1) ICCPR protects the right of liberty and security of the person. It is similarly worded to the general provision of the *Universal Declaration of Human Rights 1948* and states:

> *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.*

In its General Comments on Article 9 of the *International Covenant on Civil and Political Rights 1966* (*ICCPR*), the Human Rights Committee clearly contemplated preventive detention as a legitimate deprivation of liberty. It states:

> *Also if so-called preventive detention is used, for reasons of public security, it must be controlled by these same provisions ie. it must not be arbitrary, and must be based on grounds and procedures established by law (para. 1) ….*

That Article 9(1) can be enlivened in cases of preventive detention has also been confirmed by the Human Rights Committee in *Campora Schweizer v Uruguay*, in which it was stated:

> *According to Article 9(1) of the Covenant, no one shall be subjected to arbitrary arrest or detention. Although administrative detention may not be objectionable in circumstances where the person concerned constitutes a clear and serious threat to society which cannot be contained in any other manner, the Committee emphasises that the guarantees enshrined in the following paragraphs of article 9 fully apply in such instances.*

In that case the detainee was held under 'prompt security measures', on executive order, and without criminal charge. The Court held that the detainee's imprisonment violated Article 9(3) and (4) since he was not brought before a judge and could not take proceedings to challenge his arrest and detention.

The legality of preventive detention is therefore governed by the protection of personal liberty and security in the major international and regional instruments. This protection is typically framed in terms of a prohibition on arbitrary arrest and detention.

In international law, it is widely accepted that the prohibition on arbitrary arrest and detention should be given a wide interpretation. An arrest and detention will be 'arbitrary' if it occurs under the provisions of a law that do not accord with the principles of justice, or if that law has a purpose which is incompatible with the right to liberty and security of the person.

For example, in *Van Alphen v The Netherlands*, the Human Rights Committee considered the meaning of 'arbitrary' in Article 9(1). In this case the applicant was detained from 5 December 1983 to 9 February 1984 (over nine weeks) without criminal charge or trial. The Committee confirmed that:

> *'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances.*

A similar result was found by the Human Rights Committee in *A v Australia* where it was held:

> *the notion of 'arbitrariness' must not be equated with 'against the law' but [should be] interpreted more broadly to include such elements as inappropriateness and injustice.*

In *C v Australia*, the Human Rights Committee indicated that in relation to asylum seekers, all applications to enter or remain in Australia must be thoroughly considered on a case-by-case basis. The Committee held that there was a reasonable suspicion that if such persons were not detained, but rather released into the community, there would be a strong incentive for them to disappear. As such the policy of detaining unauthorised arrivals is reasonable, proportionate and necessary in all of the circumstances. As such, the provisions under which the author was detained … were not arbitrary, as they were justifiable and proportionate on the grounds outlined above.

The LIV submits that the above decisions confirm that the question to be asked in relation to arbitrary detention is whether the detention was appropriate, justifiable and proportionate to the reasons for the detention.

When applied to preventive detention, the prohibition on arbitrary arrest and detention requires detention to conform to the principles of justice. It must not include elements of inappropriateness, injustice and lack of predictability (*Van Alphen v The Netherlands*).

6.3 Arbitrary detention and section 34F

Section 34F of the ASIO Act permits detention when 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 (section 34F(3)(a)). Belief under this section necessarily relates to what the detainee would do if released.

We LIV notes that detention of a person on a prediction as to future behaviour is not unprecedented in law. Examples include, assessment as to whether a person charged with a criminal offence should be granted bail. Predictions as to a detainee's future conduct also occurs in relation to prevent recidivism among convicted criminals. Predictions as to the likely future behaviour of a detainee is used as a rule of evidence in a criminal trial for 'similar fact evidence', and in sentencing to determine the prediction as to the appropriate punishment to impose based on the convicted person's probable future conduct.

The LIV submits that the fact detention under section 34F relates to an assessment as to a detainee's future conduct, in itself, does not amount to arbitrary arrest and detention in law.

A further indicator suggesting that the power of detention itself is not arbitrary under section 34F is the fact that the ASIO Act imposes a standard of reasonable grounds for believing under subsection 34F(3). Under subsection 34F(3), a person can only detained on a reasonable belief that person would alert another to the investigation, would not appear for further questioning or would destroy, damage or alter evidence.

The limitation that applies before a person can be detained under section 34F is therefore based on an objective test of whether a reasonable person in the position of the Prescribed Authority would believe that the person detained would alert another to the investigation, would not appear for further questioning or would destroy, damage or alter evidence.

The prohibition on arbitrary arrest and detention in international human rights law prevents an executive authority from randomly selecting any person for preventive detention on the basis of mere speculation or for any other arbitrary reason. The LIV suggests that the fact that the ASIO Act includes an objective standard in detention orders under section 34F negates the suggestion that the detention is arbitrary on that ground.

Preventive detention is not 'arbitrary' under section 34F ASIO Act for the reason that it is based on a reasonable belief that must satisfy an objective observer as to the likely future conduct of the detainee if released.

Preventive detention shifts the use of incarceration from punishment for past criminal offences to the prevention of a future violation. Preventive detention does not have the aim

of rehabilitation, but rather the protection of society. In these circumstances, a person in preventive detention is likely to feel incarceration is of no use, unfair and unjust.

Other non-tangible effects of a person incarcerated would generally include loss of social standing and prejudice from society after release, loss of self-confidence, loss of employment, and limited access to family, daily involvement with hardened criminals and in prison life.

Accordingly, the LIV submits that the severe consequences of preventive detention of a person not charged with a criminal offence clearly require a strict test for the determination of detention directions under section 34F. Further, the current drafting of section 34F is clearly inadequate and must be changed.

The difficulty with section 34F, as currently drafted, is that no specific list of determinants are provided to define the reasonable belief the Prescribed Authority must hold. For preventive detention as provided for under section 34F, the LIV submits that clear and convincing evidence must be presented that reasonable grounds exist that the particular person is likely to do one of the factors listed in section 34F(3)(a) to (c).

Providing a list of factors in forming a reasonable belief as to potential future conduct is normal practice in other areas of preventive detention, for example, bail applications, recidivism and detention of the mentally ill. The principal considerations for preventive detention should include:

(a) criminal record – the commission, type, frequency, duration of time of past criminal offences;
(b) previous criminal associations – evidence as to known connections with other criminals (or terrorists), family connections, financial support;
(c) a statistical analysis of the person in preventive detention, including mental state, character, physical condition, age, employment, education, race and others; and
(d) clinical predictions of an expert as to his or her assessment of the likelihood of the detainee falling within the concerns of section 34F(3)(a) to (c).

Finally, the LIV suggests that preventive detention of itself offends any prohibition on arbitrary arrest and detention simply because there is no criminal charge or trial.

6.4 Length of detention

The purpose of detention under section 34F is to prevent the commission of terrorist acts by another person other than the person held in detention. Detention for 168 hours is a precautionary measure to prevent a person from passing on information about an ASIO investigation to another person suspected of planning a terrorist offence, to prevent the destruction or alteration of records that may be important to an investigation or to continue questioning if it is considered the person will not continue to appear before the prescribed authority.

The LIV suggests that detention under section 34F of the ASIO Act would be considered reasonable if only for a short period of time. Section 34HC provides that a person may not be detained under Division 3 Part 3 of the ASIO Act for a continuous period of more than 168 hours.

If a person is arrested and detained without criminal charge, after a certain period of time, detention will offend the prohibition on arbitrary arrest and detention. As preventive detention is used to prevent future terrorist conduct, no charge can, in fact, exist. That is, the objective of detention is to protect society from terrorism (and therefore acquiring the status of 'preventive'), detention occurs before any offence has even occurred.

As pointed out in the Advisory Report by the Parliamentary Joint Committee on ASIO, ASIS and DSD (May 2002), section 34F(7) allows for requests to be made for successive warrants, which may result in detention for an indefinite period of time. The LIV notes that detention for an indefinite duration is 'arbitrary' and unlawful under international law. The LIV suggests that detention for 168 hours may, or may not, be 'arbitrary' depending on whether it is consistent with the purposes of the ASIO Act.

The LIV submits that given detention is for up to 168 hours, the purposes listed in section 34F would not be achieved by detention of a person subject to a detention direction. In particular, given that authority of questioning under section 34HB is limited to a total of 16 hours, there does not appear to be any compelling reason for the continued detention of a person for 168 hours.

Further, the LIV is critical of the absence of a provision under the ASIO Act for a person or their legal representative to apply to the Prescribed Authority to cease questioning or prevent a warrant being extended.

6.5 Secrecy of detention

The LIV notes the strict secrecy provisions surrounding persons kept in detention for periods up to 168 hours (one week) and for two years subsequent to their release from detention. The implications are that a person held in detention may only communicate their experience to their lawyer or certain other authorities and not to their spouse, close family members and friends.

The LIV suggests that this does not only impact upon the coercive power of ASIO to detain and question persons, but may also reduce public scrutiny and transparency of its actions and processes.

The LIV submits that if no charge is laid against a person in relation to possible terrorist offences being investigated by ASIO, the agency's powers should not be extend to imposing a two-year secrecy ban. Accordingly, we recommend that this period of time be removed or, at very least, reduced to six months or no more than one year in certain circumstances where related investigations may be continuing.

6.6 Right to silence

The ASIO Act removes the privilege against self incrimination and provides for a penalty of up to five years imprisonment for failing to give any information. This means that persons being detained and questioned by ASIO have no right to silence.

The LIV strongly supports the right to silence as a fundamental element principle of the justice system, which should also extend to circumstances involving persons involved in, or

suspected of being involved in, terrorist offences or possessing possible information about a terrorist offence. Accordingly, this right should be provided under the legislation.

The LIV would also like to express concern about the inability of a person taken into custody or detained to contact anyone unless permitted by the Prescribed Authority or they are making a complaint about their detention. We submit that it is unreasonable to hold incommunicado a person, who is not charged of any offence.

6.7 Right to legal representation

The right of legal representation is a core aspect of the justice system. The LIV understands that where a person is being questioned under the ASIO Act, there is no requirement that ASIO permit the person to obtain legal advice or to have a lawyer present at all times during questioning. This means that where a person is permitted to contact a lawyer, ASIO may still question the person prior to the lawyer arriving and before they have a chance to obtain legal advice.

Further, where a person's lawyer is found to be disruptive during questioning, ASIO may require them to be removed and a new lawyer appointed. The LIV is concerned that legal representation sought by a person being questioned will be severely limited and constrained to a passive role. Combined with the right to silence and the seriousness of issues on which the person may be questioned, the LIV submits that it is critical persons undergoing questioning have unfettered access to legal advice prior to and throughout the questioning process.

We also note that ASIO can prevent a person from using their lawyer of choice if the prescribed authority considers that lawyer to be a security risk. The LIV submits that this is an unreasonable provision and should be removed.

The LIV further submits that:

(a) no person should be questioned without prior independent legal advice and a lawyer should be present at all times during questioning;
(b) all persons detained and questioned under the ASIO Act should be accorded the right to silence;
(c) lawyers and their clients should be accorded the opportunity to speak in private without being subjected to audio monitoring to preserve the fundamental right of legal professional privilege; and
(d) lawyers and their clients should also be provided with access to all documents referred to during questioning of their client.

6.8 Protocol

The Protocol, which sets out standards that must be adhered to when questioning and detention occur, is issued by the Director-General of Security after consulting with the Inspector-General of Intelligence and Security and the Commissioner of the Australian Federal Police.

The LIV suggests that the Protocol is not easily located as it is currently annexed to the Director-General of Security Annual Report 2003-2004 (refer page 81). The LIV

recommends that the Protocol be entrenched in the ASIO Act so that it can be referred to easily and is legally enforceable.

6.9 Judicial review

The LIV also has concerns that section 34F is arbitrary for providing insufficient safeguards for judicial review.

Recognising that preventive detention powers under section 34F are not, in themselves, an arbitrary deprivation of liberty, does not mean that all persons subject to detention can be detained without limitation.

Preventive detention without procedural safeguards is a restriction of freedom that can facilitate the most serious human rights abuses. In international human rights law, safeguards that apply to preventive detention include the right to be informed of the reasons for the detention, and the right to be brought before a judge or other judicial officer.

In cases of preventive detention where detention is ordered by the Executive and a decision rests solely with administrative or ministerial authority alone, the LIV submits the most important right is for a person to be able to challenge the lawfulness of their detention. That the detention is Executive in nature is indicated in section 34F(2), which states that the Prescribed Authority is only to give a direction that:

(a) is consistent with the warrant; or
(b) has been approved in writing by the Minister.

The principle of judicial control over detention stems from, and is analogous to, the English remedy of *habeas corpus*, which enables a person arrested or detained to challenge the validity of his detention before court, and obtain release if the detention is unlawful. The availability of judicial control ensures that persons who are arrested and detained are given the right to judicial review of the lawfulness of the measure to which they are subjected. The right operates by means of judicial decree ordering the appropriate authorities to bring the detained person before a judge so that the lawfulness of the detention may be determined and, if appropriate, to secure the release of the detainee.

The writ of *habeas corpus* is given effect by Article 9(4) ICCPR, which states:

> *Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.*

That Article 9(4) ICCPR applies to all cases of arrest and detention, including preventive detention, has been confirmed by the Human Rights Committee;

> *The important guarantee laid down in paragraph 4, i.e. the right to control by a court of the legality of the detention, applies to all persons deprived of their liberty by arrest or detention.*

The Human Rights Committee has also confirmed that Article 9(4) applies to detention by Executive order. In *Vuolanne v Finland*, the Human Rights Committee stated:

> *Whenever a decision depriving a person of his liberty is taken by an administrative body or authority, there is no doubt that Article 9, paragraph 4, obliges the State Party concerned to make available to the person detained the right of recourse to a court of law.*

Enabling judicial review of Executive discretion circumscribes administrative action, and the possibility of abuse. The result is that preventive detention by Executive order is permissible under international instrument provided the detainee is brought promptly before the judiciary.

The LIV has serious concerns about the current drafting of Division 3 Part III of the ASIO Act, in that it is insufficient to fulfil Australia's obligations in international law. Accordingly, the LIV submits that it is imperative that Division 3 Part III be drafted to clearly provide a right to judicial review as to the lawfulness of detention.

Section 34E(1)(f) only requires a Prescribed Authority to inform a person held for questioning under warrant of "the fact that the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant" (section 34E(1)(f)).

Section 34E(3) further provides that:

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

To review detention, a person can only rely on the prerogative writ of *habeas corpus*. Therefore, the LIV submits that this specific and actionable right should be incorporated into the ASIO Act, rather than implied from the information provision in section 34E(3). We also suggest that the ASIO Act should clearly state that a right to review the lawfulness of detention in the Federal Court applies to both a warrant for questioning and a direction for detention made under section 34F. This would require a court to determine the lawfulness of detention, that is, whether reasonable grounds did exist to believe the detained person would do one of the acts listed in section 34F(3)(a)-(c).

The LIV notes that section 236A(7)(2) in the *US Patriot Act* provides a specific and actionable right to *habeas corpus*. It provides that an individual in preventive detention can appeal any action or decision by filing a *habeas corpus* petition.

The need to have an actionable right to review the lawfulness of detention is particularly pertinent with the ASIO Act. This is due to the fact that the *Administrative Decisions (Judicial Review) Act 1977* (Cth) expressly excludes the ASIO Act from judicial review.

The LIV submits that the fact that detention is incommunicado necessarily results in the ineffectiveness of judicial review by way of *habeas corpus* under section 34F(8). This section provides:

> *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 (section 34F(8)).*

Presumably the rationale for incommunicado detention is based on the reasons for detention as specified in section 34F(3)(a) – to prevent the detained person from alerting a person involved in a terrorism offence that the offence is being investigated.

Habeas corpus is dependent on application by the detained person. A person in incommunicado detention would obviously not be able to exercise this right, even if did exist pursuant to the ASIO Act.

Given the importance of judicial review as to the lawfulness of detention, the fact that a person in detention under the ASIO Act is, in effect, incapable of lodging and application for *habeas corpus*, it is submitted this should be remedied to enable the ASIO Act to accord with the prohibition against arbitrary arrest and detention in international law.