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Australian Security Intelligence Organisation
Legislation Amendment (Terrorism) Bill 2002

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

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No. 128 2001-02

Australian Security Intelligence Organisation Legislation
Amendment (Terrorism) Bill 2002

Nathan Hancock
Law and Bills Digest Group
1 May 2002

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Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

Date Introduced: 21 March 2002

House: House of Representatives

Portfolio: Attorney-General

Commencement: Most provisions commence upon Royal Assent, or the later of either the day after it is given or the commencement of certain proposed terrorism offences. The commencement of some provisions is contingent on whether other elements of the anti-terrorist package of legislation commence first.

Purpose

To amend the *Australian Security Intelligence Organisation Act 1979* to improve ability of the Australian Security Intelligence Organisation (ASIO) to deal with terrorism by:

- re-incorporating terrorism within the definition of 'politically motivated violence';
- permitting personal searches to be authorised in conjunction with search warrants; and
- providing a power to detain, search and question persons before a prescribed authority.

Background

The Action and Proposed Action

Between September 2001 and February 2002 the Government announced a range of measures to improve its capacity to identify, prevent and respond to threats or possible threats of international terrorism in Australia. In particular, on October 2 2001, the Government announced proposed amendments to legislation to permit, under warrant, the formal questioning by ASIO of people 'who may have information that may be relevant to ASIO's investigations into politically motivated violence' and the arrest by State or Federal police of people 'in order to protect the public from politically motivated violence'.¹

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The Bills

This Bill is part of a package of counter-terrorism legislation introduced by the Howard Government on 12 March 2002. The other Bills in the package are the Security Legislation Amendment (Terrorism) Bill 2002 [No.2]² (the Terrorism Bill), the Suppression of the Financing of Terrorism Bill 2002 (the Terrorist Financing Bill), and the Border Security Legislation Amendment Bill 2002. Other components of the anti-terrorism package are the *Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002* (the Anti-Hoax Act), and the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 (the Bombing Bill). The Government has also introduced a Telecommunications Interception Legislation Amendment Bill 2002 which enables interception warrants to be granted to investigate 'an offence constituted by conduct involving an act or acts or terrorism'.³ The present Bill was introduced on 21 March 2001. It has been referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD for report by 3 May 2002. This Bill, along with the other five Bills⁴ has also been referred to the Senate Legal and Constitutional Legislation Committee for report by the same date.

Terrorism and the Law in Australia

This digest is written against the backdrop of a larger research project by the Department of the Parliamentary Library dealing with the broad proposals announced by the Government in anticipation of the legislation introduced along with this Bill. *Terrorism and the Law in Australia* was presented in two parts. The first part, [Legislation, Commentary and Constraints](#), described proposals announced in anticipation of legislation introduced in 2002 in the context of existing arrangements. It gave a framework and criteria for evaluation of those laws and some more detailed analysis for parliamentary consideration. The second part, [Supporting Materials](#), comprised a series of documents on specific issues related to legislative and administrative arrangements.

Some of the material below is drawn from the *Terrorism and the Law in Australia* project.

In blunt terms, by default or design, there are no specific anti-terrorism laws in Australia. Even the word 'terrorism' is seldom used to describe terrorist acts or activities. But there is a wide and almost comprehensive range of laws that may be applicable in anticipation of, and response to, international terrorism that directly or indirectly affects Australia. Moreover, there are laws that deal with 'politically motivated violence', 'treason', 'unlawful associations', 'foreign incursions', 'national security', and 'organised crime'. The links among these general and specific laws, and the wider question of legislative preparedness, are canvassed in the *Legislation, Commentary and Constraints* Research Paper. For present purposes it is worth noting that there are strong intersections among 'treason', 'politically motivated violence', 'unlawful associations' and 'foreign incursions'.

In enacting specific anti-terrorism laws a cautious and considered approach must be taken. If there was a thesis in the *Terrorism and the Law in Australia* project it was that there are dangers in *underestimating* our legislative and administrative preparedness and that there are difficulties in striking an appropriate balance between safety and liberty. The question

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of preparedness and the difficulty of balancing safety and liberty are considered in the *Legislation, Commentary and Constraints* Paper. Comparative approaches in the United Kingdom and United States are canvassed in the *Supporting Materials* Paper. In summary, while precedents are useful, we will need our own views regarding the terrorist threat in Australia and whether the measures in question are necessary, sufficient and proportionate.

The Legislative Package

Without doubt, this Bill forms part of a broader legislative package that is 'designed to strengthen Australia's counter-terrorism capabilities'.⁵ In order to explain the provisions in this Bill it is useful, but not necessary, to consider its relationship with the other Bills.

Subject Matter

Anti-terrorist legislation usually deals with at least four topics: intelligence, prevention, crisis management and investigation (which includes laws dealing with law enforcement agencies and methods, offences and international cooperation). As indicated, Australia already has laws dealing with all of these topics and has, by its own assertion, already dealt legislatively with crisis management and international cooperation. Amendments on these topics are canvassed in the legislative package as follows:

Intelligence	
• <i>questioning</i>	ASIO Legislation Amendment (Terrorism) Bill 2002
• <i>intercepts</i>	Telecommunications Interception Legislation Amendment Bill 2002
• <i>financial</i>	Suppression of the Financing of Terrorism Bill 2002
Prevention	
• <i>border control</i>	Border Security Legislation Amendment Bill 2002
• <i>proscription</i>	Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]
• <i>proscription</i>	Suppression of the Financing of Terrorism Bill 2002
Offences	
• <i>general</i>	Security Legislation Amendment (Terrorism) Bill 2002 [No. 2]
• <i>financial</i>	Suppression of the Financing of Terrorism Bill 2002
• <i>bombing</i>	Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002
• <i>hoaxes</i>	<i>Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002</i>

As indicated, there are strong intersections among 'treason', 'politically motivated violence' 'unlawful associations' and 'foreign incursions'. The offence of treason and the proscription and offence provisions dealing with unlawful associations appear in the *Crimes Act 1914*. The expression 'politically motivated violence' relates to an aspect of 'security' which defines the functional responsibilities of ASIO. It appears in the *Australian Security*

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Intelligence Organisation Act 1979. The expression 'foreign incursion' appears in the *Crimes (Foreign Incursions and Recruitment) Act 1978*.

The legislative package updates and aligns these concepts to take account of the threat *or possible threat* of international terrorism in Australia. Key bills on these topics are:

Concepts

- | | |
|--|--|
| • <i>treason, terrorism & foreign incursions</i> | Security Legislation Amendment (Terrorism) Bill 2002 [No. 2] |
| • <i>politically motivated violence</i> | ASIO Legislation Amendment (Terrorism) Bill 2002 |

Provisions and Commencement Dates

The Terrorism Bill and Terrorist Financing Bill deal with a new Chapter of the *Criminal Code*: '**Chapter 5—The integrity and security of the Commonwealth**'. This Chapter is also dealt with by the Criminal Code Amendment (Espionage and Related Offences) Bill 2002. If all the bills were enacted, it would cover espionage, 'unlawful soundings', treason, terrorism, terrorist financing, proscription of terrorist organisations and related offences.

It is also worth noting the other amendments that would result from the passage of the Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002 and the Criminal Code Amendment (Anti-hoax and Other Measures) Act 2002. The amendments to the *Criminal Code* made by these Bills are indicated in italics in the following table.

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Proposed new anti-terrorist provisions in the *Criminal Code*

Chapter 4	The integrity and security of the international community and foreign governments
•
• <i>Division 72</i>	<i>International terrorist activities using explosive or lethal devices</i>
Chapter 5	The integrity and security of the Commonwealth
Part 5.1	Treason
• <i>Division 80</i>	<i>Treason</i>
Part 5.2	Offences relating to espionage and similar activities
• <i>Division 90</i>	<i>Preliminary</i>
• <i>Division 91</i>	<i>Offences relating to espionage and similar activities</i>
• <i>Division 92</i>	<i>Offence relating to soundings</i>
• <i>Division 93</i>	<i>Prosecutions and hearings</i>
• <i>Division 94</i>	<i>Forfeiture</i>
Part 5.3	Terrorism
• <i>Division 100</i>	<i>Preliminary</i>
• <i>Division 101</i>	<i>Terrorism</i>
• <i>Division 102</i>	<i>Proscribed Organisations</i>
• <i>Division 103</i>	<i>Financing Terrorism</i>
...	...
Chapter 10	National Infrastructure
• <i>Division 471</i>	<i>Postal Offences</i>
—
— <i>Section 471.10</i>	<i>Hoaxes—explosives and dangerous substances</i>

The commencement dates relating to the provisions in this Bill are contingent upon the commencement *Division 72* in **Chapter 4** and/or the commencement of **Part 5.3**.

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Which Bill is Significant?

It is difficult to assess which will be the most significant aspect of the legislative package.

The Terrorism Bill deals with specific terrorist offences and proscription of terrorist organisations. The Terrorist Financing Bill deals with controls over terrorist entities and assets, by way of a terrorist financing offence, controls over financial institutions and finance specific listing or proscription mechanisms. This Bill deals with questioning and detention of persons for terrorist intelligence gathering purposes. The Anti-Hoax Act and Bombing Bill both relate to commitments made during the General Election.

The real issue is the extent to which each bill 'strengthens our counter-terrorism capabilities'. As we will see, it may be that 'there is no legislative "fix" or panacea against terrorism'.⁶ And while we lack a comprehensive proscription regime, we already have various provisions under which people may be prosecuted for acts of terrorism. Clearly, there is a focus on criminalising terrorist acts and destroying terrorist organisations and networks. But, it could be argued that the focus on proscription and specific terrorist offences, as opposed to effective intelligence and law enforcement powers and effective financing identification and control mechanisms, is misplaced. Most, if not all, of the acts covered by the specific terrorist offences are already covered under the ordinary criminal law. While proscription may harm terrorist organisations and networks, it is a dangerous mechanism that may drive the activities of these and other entities further underground.⁷ By contrast, improvements in intelligence and law enforcement capabilities and in global cooperation and control over terrorist financing may have a far greater impact on terrorism and terrorist organisations, domestically and internationally. Either way it is necessary to consider whether the particular measures are necessary, sufficient and proportionate.

Main Provisions

Schedule 1 amends the *Australian Security Intelligence Organisation Act 1979*.

Items 1–14 contain definitions relevant to two matters:

- re-incorporating terrorism within the definition of 'politically motivated violence'; and
- providing a power to detain, search and question persons before a prescribed authority.

Items 15–20 effectively empower persons *other than officers of ASIO*, to communicate intelligence on behalf of ASIO, subject to the existing conditions. Under these conditions the person must act 'within the limits of authority conferred ... by the Director-General [of ASIO]'.⁸ Failure to do so is an offence which is subject to imprisonment for 2 years.⁹

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The Significance of Intelligence

The Significance of Intelligence

The *Protective Security Review* stated that '[i]ntelligence is the first line of defence against terrorism'.¹⁰ Similarly, the 1993 Honan and Thompson review asserted that '[a] sound intelligence process, with highly trained analysts, is fundamental to crisis management'¹¹ and the 1996 British *Inquiry into Legislation against Terrorism* commented that intelligence was 'the single most important weapon in fighting terrorism'.¹² While these statements are perhaps obvious, the *Protective Security Review* statement 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'.¹³

The Australian Intelligence Community

The Australian Intelligence Community comprises: the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Signals Directorate (DSD), Office of National Assessments (ONA), Defence Intelligence Organisation (DIO), and the Defence Imagery and Geospatial Organisation (DIGO).

Broadly, ASIO, ASIS and DSD collect intelligence which is analysed by ONA, DIO and DIGO. ASIS collects intelligence outside Australia whereas ASIO collects intelligence inside Australia. ASIS collects human intelligence while DSD collects signals or communications intelligence. While ASIS collects and analyses intelligence, ASIO may also advise government(s) regarding security threats and take action to address those threats. DSD also advises government(s) regarding security of electronic information. ONA exists under the auspices of the Department of the Prime Minister and Cabinet, ASIO under the Attorney-General's Portfolio, ASIS under the Department of Foreign Affairs and Trade Portfolio whereas DSD, DIO and DIGO come under the control of the Department of Defence (DoD). Generally, the activities of these agencies are subject to scrutiny by the Inspector-General of Intelligence and Security (IGIS).

Until recently, the Australian Intelligence Community was largely ignored by statute. Thus, for seven years after its foundation in 1949, ASIO existed as a purely executive organisation until it was placed on a statutory footing in 1956.¹⁴ Similarly, for nearly fifty years after it was established in 1952, ASIS existed pursuant to an executive order until it was given statutory clothing by the *Intelligence Services Act 2001*.¹⁵

ASIO

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'.¹⁶ Another is to supply security assessments to Commonwealth agencies. Security assessments contain advice about whether a 'prescribed administrative action' should be taken regarding an individual on security grounds, such as denying them entry to Australia or access to sensitive information. ASIO may

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communicate intelligence to appropriate persons or authorities¹⁷ and provide advice to Ministers, authorities and other prescribed persons.¹⁸ Specifically, it may communicate intelligence to State authorities in response to a proposed 'prescribed administrative action' in that State that would affect security for the purposes of the Commonwealth.¹⁹ The Minister may not override the opinion of the Director-General 'concerning the nature of the advice that should be given'.²⁰ 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.²¹ 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 taxation²² or financial transactions.²³

It is worth noting that, unlike State and Federal Police, ASIO is not a law enforcement body. It is primarily an intelligence gathering agency. Much of what ASIO would want to do is covert and is not captured by the standard rules applying to warrants in relation to law enforcement bodies. As will be seen, ASIO does have certain powers, such as powers to conduct physical searches and powers relating to telephone interceptions, listening devices, tracking devices, and computer access which are governed by warrants. However, it is important to recognise that in exercising these powers, ASIO does not perform a law enforcement role or maintain a direct working relationship the criminal justice system.

IGIS

Following the Second Hope Royal Commission, the Hawke Government created the office of the Inspector-General of Intelligence and Security (IGIS). Hope had recommended that it primarily monitor ASIO's 'compliance with the law, the propriety of its actions and the appropriateness and effectiveness of its internal procedures',²⁴ and, secondarily, look into complaints. The IGIS 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'. It was *not* meant to 'check on the general effectiveness and appropriateness of the agencies' operations'.²⁵

The *Inspector-General of Intelligence and Security Act 1986* gives the IGIS 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. But, the IGIS may not do so without ministerial approval except to the extent that Australians are affected or Australian laws may be violated.²⁶

The Definition of Terrorism

The *Terrorism and the Law in Australia* project focused heavily on definitional issues. The issues were further canvassed in *Bills Digest no. 126, 2001–02* on the Terrorism Bill. The issue for present purposes is the connection between terrorism and the ASIO mandate.

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Terrorism and 'Politically Motivated Violence'

As we have seen there are few, if any, statutes that deal specifically with terrorism.

Significantly, 'terrorism' once appeared in the *Australian Security Intelligence Organisation Act 1979*. It was included in a list of matters incorporated by the definition of 'security' (see below). It was defined 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.²⁷

In 1986, following the Second Hope Royal Commission,²⁸ 'terrorism' was deleted from the Act, and merged with 'subversion', to form a wider expression 'politically motivated violence'. The definition was not intended to exclude any matters originally covered. It would cover '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'.²⁹ Thus, 'politically motivated violence' is defined to mean acts that include or may include acts or threats of violence or harm for the purpose of influencing domestic or foreign governments or overthrowing or destroying a domestic government or constitutional system. It also includes offences related to foreign incursions, hostages, ships and fixed platforms and aviation and offences related to internationally protected persons.³⁰

Following the Honan and Thompson review in 1993,³¹ the broader expression was incorporated into the National Anti Terrorist Plan (NATP) *alongside* the older, narrower expression 'in recognition that many of the preventative measures applicable to countering terrorism are also appropriate against other forms of politically motivated violence'.³² So, 'terrorism' is defined in the NATP as 'an extreme form of politically motivated violence'.³³

The Bill

Under the new provisions the definition of 'politically motivated violence' would extend to 'acts that are terrorist offences' within the meaning of *proposed Division 72* and/or **Part 5.3** of the *Criminal Code*, depending upon the commencement dates of the relevant Bills.

Questioning

Item 24 inserts new *Division 3* which deals with questioning and detention powers.

In announcing the measures contained in this Bill, the Attorney-General stated that:

[T]he Director-General of Security will be able to seek a *warrant* from a federal magistrate, or a legal member of the [AAT], that would require a person to appear before a prescribed authority (such as a federal magistrate or a legal member of the Administrative Appeals Tribunal), to provide information or to produce documents or things. These reforms would allow ASIO, before a prescribed authority, to question

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people *not themselves suspected of terrorist activity*, but who may have information that may be relevant to ASIO's investigations into politically motivated violence.³⁴

A Duty to Disclosure

In Australia, there are few examples of a mandatory *duty* to inform. Historically, the common law contained an offence of misprision of felony which was committed where a person knew that an offence had been committed but failed reasonably to disclose this to the relevant authorities.³⁵ These offences have generally been abolished and replaced with statutory offences.³⁶ But, these offences relate to knowledge of past offences rather than mere suspicion of possible future offences. The only other example seems to be in relation to treason. It is an offence for a person who knows that another person *intends* to commit treason not to provide information to a constable or take preventative measures.³⁷

A Power to Compel Disclosure

Ordinarily, a duty to provide information will arise in response to a summons or subpoena as an inherent or statutory incident of judicial or quasi-judicial power. This approach is taken in various contexts: royal commissions, the Australian Securities and Investments Commission (ASIC), the New South Wales Crime Commission (NSWCC), and the Independent Commission Against Corruption (ICAC). The *Royal Commissions Act 1902* gives Royal Commissions the power to compel witnesses, backed by a power to punish witnesses for contempt. The *Australian Securities and Investments Commission Act 2001* gives ASIC the ability to compel witnesses, backed by criminal penalties for failure to comply. Thus, witnesses in inquiry hearings may be compelled to produce documents or answer questions.³⁸ In respect of ICAC, witnesses may only be compelled to produce documents in their custody or control. The National Crime Authority (NCA) is a relevant example in the present context. 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 hearing³⁹ or to produce a document⁴⁰ that is relevant to a special investigation. In its view these powers 'set the NCA apart from traditional police services, and are essential if the community is to be protected from the impact of complex national organised crime'.⁴¹

A duty to provide information may also arise in response to a request or production notice as a statutory incident of executive power. This is how information is compulsorily obtained in a variety of contexts: customs,⁴² taxation,⁴³ civil aviation safety,⁴⁴ consumer protection,⁴⁵ companies and securities regulation,⁴⁶ therapeutic goods,⁴⁷ social security,⁴⁸ workplace relations,⁴⁹ national security,⁵⁰ and immigration.⁵¹ A relevant example in the present context is the power of the Attorney-General, under the *Crimes Act 1914*, to 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 the money, property, payments or transactions of an unlawful association.⁵²

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Privilege, Etc.

Ordinarily, there are various ways to avoid an executive duty to provide information. The most obvious avenues are based on relevance, reasonable excuse and self-incrimination.

Relevance

Where an investigatory body is confined by terms of reference, in theory, any coercive powers will be subject to a requirement of relevance. Thus, a witness will be able to maintain a right to silence in respect of questions that are not relevant to the terms of reference of the inquiry. In practice it may be difficult to establish that a particular line of inquiry is not and could not become a relevant line of inquiry for the purposes of the terms of reference. Donaghue cites various thresholds for establishing relevance.⁵³

Reasonable Excuse

Under most relevant statutes, witnesses must answer questions and produce documents unless they have a 'reasonable excuse'. This clearly incorporates excuses based on physical or practical difficulties. In limited cases it incorporates excuses based on the standard legal privileges and immunities, such as the privilege against self-incrimination.

It is worth noting that there was a reasonable excuse provision in the *National Crime Authority Act 1984* but that it was recently repealed by the *National Crime Authority Legislation Amendment Act 2001*. At least two reasons were given by the Government. First, the ability of witnesses to claim the excuse constituted an '[inappropriate] challenge [to] the legitimate and essential role of the Authority in investigating serious and organised crime'. Second, a person who was prosecuted for failure to answer a question or produce a document would be able to avail themselves of the other defences in the *Criminal Code*.⁵⁴

Privilege against Self-Incrimination

One of the most significant issues in administrative and judicial or quasi-judicial inquiries relates to the privilege against self-incrimination. It is also a significant issue in this Bill. The privilege against self-incrimination protects an accused who is required 'to produce documents which tend to implicate that person in the commission of the offence charged'.⁵⁵ It extends to protect a person from revealing anything which may lead to the discovery of adverse evidence not in the person's possession or power.⁵⁶ It has been said that it is a human right 'based on the desire to protect personal freedom and human dignity'.⁵⁷ It has also been said that it is a significant element in the accusatorial system of justice. It follows from the propositions that 'the prosecution must prove the guilt of the prisoner'⁵⁸ and that 'an accused is not bound to incriminate himself'.⁵⁹ A middle ground seems to be the proposition that the privilege provides for a 'fair state-individual balance' in the conduct of criminal proceedings. To some extent the reason for the privilege may also be based on the public interest in the administration of justice.⁶⁰

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Legal Professional Privilege

Legal professional privilege protects a range of confidential communications made between lawyers and clients.⁶¹ Traditionally, it protects communications in the context of actual or anticipated legal proceedings. It also protects other communications between lawyers and clients, provided they pass 'as professional communications in a professional capacity'.⁶² Moreover it may protect communications between lawyers and third parties, 'but only when they are prepared for, or in contemplation of, existing or anticipated litigation, or for the purpose of ... obtaining evidence with reference to such litigation'.⁶³

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'.⁶⁴ The modern rationale is its 'tendency to broaden the operation of the rule of law as well as to enhance the individual's capacity to secure its protection'.⁶⁵ It is essentially the need to ensure that there is a freedom and candour of communication between lawyer and client.⁶⁶

Administrative Inquiries

Generally, privileges apply to administrative and judicial inquiries.

Thus, it has been said that the privilege against self-incrimination is 'too fundamental a bulwark of liberty to be categorised simply as a rule of evidence applicable to judicial or quasi-judicial proceedings'⁶⁷ and must therefore be applicable to non-judicial proceedings.⁶⁸ It was originally considered that legal professional privilege was confined to judicial or quasi-judicial proceedings.⁶⁹ But, the privilege is more than a rule of evidence or procedure and is part of the substantive common law.⁷⁰ On this basis, it has the power to affect disclosure outside the judicial or quasi-judicial sphere. However, while it may extend to extra-judicial proceedings, its content varies according to the nature of the document for which protection is sought and the context in which production is sought.⁷¹

Similarly, it was originally considered that legal professional privilege was confined to judicial or quasi-judicial proceedings.⁷² However, it is clear that the privilege is more than a rule of evidence or procedure and is part of the substantive common law.⁷³ Thus, it has the power to affect disclosure outside the judicial or quasi-judicial sphere. However, while it may extend to extra-judicial proceedings, its content varies according to the nature of the document for which protection is sought and the context in which production is sought.⁷⁴

However, it is equally clear that both privileges may be confined or abrogated by statute.⁷⁵ While neither privilege can be abrogated except by a clear statutory intention evidenced by express words or necessary implication,⁷⁶ some Acts have clearly and effectively done so.

- *Royal Commissions*: it is unreasonable not to answer a question or produce a document where that 'might tend to incriminate a person' unless the matter in question relates to an offence for which the person has been charged but which has not been finalised.⁷⁷
- *ASIC*: it is unreasonable not to answer a question or produce a document where that 'might tend to incriminate the person *or* make the person liable to a penalty' *even if*

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charges are pending.⁷⁸ A 'penalty' includes any penalty arising out of criminal or civil proceedings, if the burden imposed is truly intended to punish the person rather than to prevent some threat to the public interest.⁷⁹

- *ICAC*,⁸⁰ *NSWCC*⁸¹ and *NCA*⁸²: a witness who is summoned to attend or appear is not excused from answering questions on the basis that the answers may, or may tend to, incriminate the witness

Use of Compelled Evidence (Use and Derivative Use Immunities)

One might expect that where a privilege is abrogated, any evidence that a witness is compelled to give would be protected in subsequent proceedings. This might extend to proceedings relating to that evidence (*use immunity*) or to evidence or other material which is derived from the answers or documents given (*derivative use immunity*). This would respect both the public interest in disclosure at Royal Commissions and the public interest in the administration of justice and protection of human rights in the courts.

Historically, evidence given to a Royal Commission was presumed to be admissible in subsequent legal proceedings.⁸³ However, it may be more accurate to say that the issue turns upon construction of the relevant statute.⁸⁴ The difficulty is that 'Australian statutes ... rarely express guidance in relation to the admissibility of compelled evidence'.⁸⁵ Moreover, while some statutes expressly deal with *inadmissibility* it is often incorrectly assumed that the statutory abrogation of a privilege necessarily implies that the evidence obtained by the Royal Commission is *not* admissible in subsequent proceedings.⁸⁶

The Royal Commission Act and related Acts deal with compelled evidence as follows:

- *Royal Commissions*: evidence is *not* admissible *against that witness* 'in any civil or criminal proceedings in any court of the Commonwealth, of a State or of a Territory'.⁸⁷ (In this context 'civil or criminal proceedings' includes administrative proceedings.⁸⁸)
- *ASIC*,⁸⁹ *ICAC*,⁹⁰ *NSWCC*⁹¹ and *NCA*⁹²: evidence *is* admissible, subject to some exceptions, in 'a proceeding' against the witness. It is admissible notwithstanding that the witness is absent.⁹³

It is worth noting that the *National Crime Authority Act 1984* once contained not only a *use immunity*, but also a *derivative use immunity* that protected a witness from being prosecuted on the bases of 'any information, document or thing obtained as a direct or indirect consequence of the answer or the production of the [primary evidence]'.⁹⁴ The extension of the immunity apparently reflected 'a legislative intention that the NCA should not use its coercive powers against the main suspects under investigation'.⁹⁵ Broadly, the argument in favour of this approach is that an investigatory team is able to gather a wide range of evidence and develop a broad picture to further their investigation. The argument against the approach is that it may hinder an investigatory team and focus their attention on peripheral players in the hope that evidence can be obtained further upstream.⁹⁶

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These arguments reflect a fundamental policy tension underlying all such inquiries:

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. Because the role of a royal commission is to get to the truth of a matter, the priority of a royal commissioner will almost always be to obtain information rather than to take into account the need for a conviction at some later date.⁹⁷

It is also worth noting that the derivative use immunity was repealed by the *National Crime Authority Legislation Amendment Act 2001* on the basis that '[t]he Authority is unique in nature and has a critical role in the fight against serious and organised crime':

the public interest in the Authority having full and effective investigatory powers, and to enable, in any subsequent court proceedings, the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material.⁹⁸

Legal Representation

In a criminal trial, there is generally a right to legal representation. It has been said that representation is a usual component of a person's right to receive a 'fair trial according to law' which is itself a 'fundamental element of our criminal justice system'.⁹⁹ Implicitly, this forms the basis of an argument for public legal aid in serious criminal proceedings. However, it is significant that the common law originally did not guarantee a person's right to be legally represented whether privately or publicly. Indeed, an accused person was not permitted to be represented *as of right* until passage of *The Trials for Felony Act 1836*.¹⁰⁰

In an administrative or judicial inquiry, a right to legal representation may be implied by natural justice or it may be expressed in statute. As a matter of administrative law, it may arise as an incident of broader procedural fairness obligations. The obligation to accord procedural fairness, or 'due process', is described as 'a common law duty to act fairly... in the making of administrative decisions that affect rights, interests and legitimate expectations'.¹⁰¹ It may require an inquiry to allow legal representation 'if this is the only way in which fairness can be attained, as where, for example, a matter is particularly serious and complex or a witness is incapable of representing himself or herself'.¹⁰²

The Royal Commission Act and related Acts deals with the right as follows:

- *Royal Commissions*: lawyers must seek leave to appear,¹⁰³ and, typically, 'leave will be granted when there is a risk that a royal commission may make adverse findings about a person, whether or not that person is called as a witness'.¹⁰⁴
- *ASIC*: any person at an examination¹⁰⁵ or hearing¹⁰⁶ may be represented *as of right*, but a party to a panel proceeding may only be represented by leave of the panel.¹⁰⁷

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- *ICAC*: a person giving evidence must be given a *reasonable opportunity* to be represented, but all other persons at hearings may only be represented *by leave*.¹⁰⁸
- *NSWCC*: a person giving evidence may be represented *as of right*, but all other persons at hearings may only be represented *by leave*.¹⁰⁹
- *NCA*: a person giving evidence may be represented *as of right*, but all other persons at hearings may only be represented *by leave*.¹¹⁰

ASIO's Role and ASIO Warrants

The *Australian Security Intelligence Organisation Act 1979* provides for various warrants, including search warrants,¹¹¹ computer access warrants,¹¹² listening device warrants,¹¹³ and tracking device warrants that may relate either to persons¹¹⁴ or objects.¹¹⁵ All of these warrants may be issued by the Attorney-General on similar grounds. For example, the Attorney General must not issue a search warrant unless satisfied that there are:

reasonable grounds for believing that access by [ASIO] to records or other things on ... the subject premises ... *will substantially assist* the collection of intelligence ... in respect of a matter (the *security matter*) that is *important in relation to security*.¹¹⁶

A search warrant must specify the subject premises.¹¹⁷ It may also specify a range of activities *in relation to those premises*, including entering, searching, and inspecting the premises and removing and retaining records or other things on those premises.¹¹⁸

As noted, ASIO is not a law enforcement body. It does not perform a law enforcement role or maintain a direct working relationship the criminal justice system. Much of what ASIO would want to do is covert and will not place it in direct contact with the subject persons.

It is worth noting that statistics on warrants or applications for warrants do not seem to be reported. The *ASIO Report to Parliament 2000-2001* states that '[t]he number of warrants varies over time, in response to the changing security environment'.¹¹⁹ The *IGIS Annual Report 2000-2001* is also silent about the number of warrants applied for or issued. It notes that because warrants generally relate to covert surveillance '[f]or security reasons it is difficult to report these cases in detail'.¹²⁰ It is worth noting that the Government has refused in the past to give details regarding the number of telephone intercepts undertaken by ASIO on the basis that '[i]t has been the policy of successive Australian governments not to comment on operational intelligence matters'.¹²¹

The Bill

Questioning Warrants

Proposed section 34D provides that a 'prescribed authority' may issue warrants that either:

- require a person to appear before a 'prescribed authority' 'for questioning; or

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- authorise a person to be
 - 'immediately taken into custody' by a police officer,
 - brought before a 'prescribed authority' for questioning; and
 - detained under police arrangements for a period *not exceeding 48 hours*; **and**
- specify *all* of the people whom the person may contact while in custody or detention.

Those warrants must also authorise ASIO, subject to any conditions or restrictions, to:

- question the person before the prescribed authority in relation to information, records or things that are '*important* in relation to a *terrorism offence*'; and
- make copies and/or transcripts of anything produced under questioning.

Warrants may be in force for up to 28 days (**proposed paragraph 34D(6)(b)**).

Prescribed Authority

A 'prescribed authority' is a person who is prescribed in writing by the Attorney-General (**proposed section 34B**). The Attorney-General may prescribe a Federal Magistrate (by consent), a Deputy President of the Administrative Appeals Tribunal or a member¹²² of the Administrative Appeals Tribunal who is been enrolled as a legal practitioner in a superior court for at least 5 years (**proposed subsection 34B(2) and (3)**). In the performance of their duties under the new provisions, 'prescribed authorities' have the same protections and immunities as Justices of the High Court of Australia (**proposed subsection 34B(4)**).

Process

Warrants may be issued by a prescribed authority if:

- the Director-General has requested the warrant in accordance with the Act; and
- the prescribed 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' (**proposed subsection 34D(1)**).

Ordinarily, the Director-General may not make a request without the Attorney-General's consent (**proposed paragraph 34D(1)(a) with proposed section 34C(4)**). However, in some circumstances (see 'detention' below), the Director-General may make a request directly to a prescribed authority, provided it is a Deputy President of the AAT (**proposed paragraph 34D(1)(a) with proposed section 34C(5)**).

The Director-General must give the Attorney-General a draft request that includes the draft warrant, statement of supporting facts and other grounds, and a statement regarding

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any previous requests for questioning warrants in relation to that subject person (**proposed subsection 34C(2)**).

The Attorney-General *may* consent if:

- the Attorney-General 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' (**proposed paragraph 34C(3)(a)**), and
- the Attorney-General is satisfied that 'relying on other methods of collecting intelligence would be ineffective' (**proposed paragraph 34C(3)(b)**), and
- the Attorney-General is satisfied that, 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 before the prescribed authority or may destroy, damage or alter evidence described in the warrant (**proposed paragraph 34C(3)(c)**).

The Attorney-General may give consent subject to changes being made to the draft request (**proposed subsection 34C(4)(a)**).

Offences

It is an offence to:

- fail to appear before a prescribed authority (**proposed subsection 34G(1)**);
- fail to provide information requested in accordance with the warrant, if the person has the information (**proposed subsections 34G(3) and (4)**);
- fail to produce records or things requested in accordance with the warrant, if the person has possession or control of them (**proposed subsection 34G(6) and (7)**); and
- provide false or misleading information in answers made to a prescribed authority (**proposed subsection 34G(5)**)

All offences are subject to imprisonment for 5 years.

Self-Incrimination

The privilege of self-incrimination does not apply in relation to the key offences above. That is, a person may not refuse to give information, or produce records or things 'on the ground that [it] might tend to incriminate the person or make the person liable to pay a penalty' (**proposed subsection 34G(8)**). However, there is a (criminal but not civil) 'use immunity'. That is, answers given and documents produced in response to requests before the prescribed authority are not admissible in criminal proceedings 'other than proceedings for an offence [above] or a terrorism offence' (**proposed subsection 34G(9)**).

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Overseas Comparison

In the United Kingdom, United States and Canada, the apparent need to compel people to disclose information regarding terrorism has been dealt with in one of three ways. In the United Kingdom, it has been dealt with by way of a duty to disclose relevant information. In the United States it has been dealt with by way of prosecutions by military tribunals. In Canada, it has been dealt with by way of judicial proceedings similar to those in the Bill.

United Kingdom

The *Prevention of Terrorism (Temporary Provisions) Acts 1974–1989* imposed an unusual duty on all persons to give police information relating to the commission or possible commission of terrorist offences. In the report, *Inquiry into Legislation Against Terrorism*, Lord Lloyd of Berwick identified two criticisms of this unusual duty to give information. First, while citizens have a moral obligation to assist the police, he argued that 'the state should be reluctant to transform this into a legal duty'. Second, while the duty is expressed generally he observed 'prosecutions are most often used against members of the families of suspected terrorists, putting them in an impossible position of conflicting loyalties'.¹²³ A Home Office Circular apparently defended the duty on the basis that it is seldom used.¹²⁴ In his report Lord Lloyd of Berwick commented: 'I do not regard it as satisfactory to create a wider-ranging offence, and then circumscribe it by a Home Office Circular'.¹²⁵

The duty to give information is carried through into the *Terrorism Act 2000* in two forms. There is a specific obligation to disclose information regarding possible offences which a person acquires in the course of a trade, profession, business or employment.¹²⁶ There is also a general obligation 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, subject to a defence of reasonable excuse.¹²⁷

It is worth noting that the specific obligation relating to trades and professions, etc. is subject to an exception in relation to legal professional privilege.¹²⁸ Arguably, the same result would be achieved by the reasonable excuse defence which attaches to the general obligation, however, significantly, the privilege may not be claimable as of right.

United States

On 18 September 2001, President George W. Bush announced in a [Use of Military Force Joint Resolution](#) that those responsible for the September 11 2001 attacks would be tried before a military tribunal.¹²⁹ On 13 November, he signed a [Military Order](#) authorising non-citizens suspected of terrorism to be 'detained and ... tried for violations of the laws of war and other applicable laws by military tribunals'.¹³⁰ The order provided for mandatory detention of persons, identified by presidential decree, who were or had been members of *al Qa'ida*, who had engaged in acts of international terrorism,¹³¹ or who had knowingly harboured such a person.¹³² 'When tried', these persons would be tried by a military commission 'for any and all offenses triable by military commission'.¹³³

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Under the order, rules of evidence and procedure are to be determined by the Secretary of Defence. As a minimum they would have to provide for 'a full and fair trial'¹³⁴ and the admissibility of evidence having 'probative value to a reasonable person'.¹³⁵ This is subject to two significant limitations. First, the military commission is the trier of 'both fact and law'.¹³⁶ Second, the order confers 'exclusive jurisdiction' on the commission with respect to the offences and contained clauses prohibiting appeals or judicial review arising out of the trial¹³⁷ or the actions against government agencies.¹³⁸

On March 21 2002 the Secretary of Defence announced the [Procedures for Trials by Military Commissions](#), pursuant to the [Military Order](#) of 13 November 2001.¹³⁹ Among other things, those procedures require such things as the presumption of innocence,¹⁴⁰ that convictions be based on members being 'convinced beyond reasonable doubt'.¹⁴¹ Moreover, detainees have rights to legal representation,¹⁴² to silence,¹⁴³ and to call,¹⁴⁴ and cross examine,¹⁴⁵ witnesses.

It has also been argued that the military commissions would be confined by guarantees implied by the *Uniform Code of Military Justice*. 'Absent exigencies of war',¹⁴⁶ these include, privilege against self-incrimination (*both in pre-trial and trial procedure*)¹⁴⁷ and the rights to legal representation¹⁴⁸ and to obtain witnesses.¹⁴⁹ Whether these guarantees apply in the aftermath of the September 11 or apply so as to qualify the operation of the [Military Order](#) or the [Procedures for Trials by Military Commissions](#) may be unclear.

Canada

The *Anti-Terrorism Act 2002* (CA) provides for 'investigative hearings'. A provincial court judge may order a person to appear before the court for questioning and to 'remain in attendance until excused'.¹⁵⁰ He or she may issue warrants for the arrest of persons who avoid compliance with any such orders,¹⁵¹ and as indicated, may order the detention of persons in order to prevent the commission of terrorist acts and to allow recognizances.¹⁵² Orders may be made on application by the police if the judge is satisfied that there are reasonable grounds to believe that a terrorism offence has been or will be committed and that information regarding the offence or the whereabouts of an offender is likely to be obtained, provided reasonable attempts have already been made to get this information.¹⁵³ The police must obtain the Attorney-General's consent before making an application.¹⁵⁴ Generally, a person must answer any question put to them in investigative hearing. However, a person may refuse to provide information if it is 'protected by *any* law relating to non-disclosure of information or to privilege', subject to a ruling by the judge.¹⁵⁵ A person may not refuse to provide information on the ground that it would incriminate them, however fairly wide use and derivative use immunities apply to the evidence.¹⁵⁶ A person also has the right to retain and instruct a lawyer at any stage in the proceedings.¹⁵⁷

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A Comment on the Duty to Disclosure

It is worth noting that duties to disclosure have been criticised and a number of reviews have recommended that they be abolished. Arguments against the 'misprision of felony' offence in New South Wales and disclosure offence in the United Kingdom have included:

- the duty may come into conflict with other aspects of criminal procedure;¹⁵⁸
- the duty enables pressure to be brought to bear by the police;¹⁵⁹
- the community is largely unaware of the existence of the duties and offences;
- the offences may wrongly capture professionals, journalists and family members;¹⁶⁰
- the offences may not affect the behaviour of people in these relationships; and
- the offences have been seldom used, suggesting that they have not been useful.¹⁶¹

These arguments may be strongest in relation to family members. Anecdotally, it seems that these duties are most often enforced against family members of suspects.¹⁶² Yet, these are the people for whom there may be the least justification or likelihood of success.

The majority of Commissioners consider that it is not appropriate for the law to impose an obligation on people to report information about serious offences which they know or believe their family members or close friends may have committed. However, the minority view is that in certain situations, the legal obligation to report information or beliefs ... should extend to family members of the principal offender. It is also necessary to accept the reality of the strength of these relationships and thus the difficulty of enforcing a duty of disclosure in this context.¹⁶³

Significantly, the New South Wales Law Reform Commission and Lord Lloyd of Berwick could not see any way to fix the problems associated with the duty to disclose. They both recommended that the relevant duties of disclosure and offences **be abolished**.¹⁶⁴

Detention

In his announcement relating to the measures in this Bill, the Attorney-General said:

The legislation would also authorise the ... Police, acting in conjunction with ASIO, to *arrest* a person and bring that person before the prescribed authority. Such action would only be authorised where the magistrate or tribunal member was satisfied it was *necessary in order to protect the public from politically motivated violence*.¹⁶⁵

Overseas Precedents

Detention for the purpose of questioning and, to some extent, for the purpose of protecting the public, has been canvassed in anti-terrorist laws in the United Kingdom, the United

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States and Canada. It is worth noting that, at least in the United Kingdom and Canada, these laws relate to law enforcement rather than intelligence action. In both regimes there must be reasonable suspicion that a terrorist offence has been or is likely to be committed. In effect, detention is instigated by the police and not by intelligence agencies.

United Kingdom

Among other things, the *Prevention of Terrorism (Temporary Provisions) Acts 1974–1989* permitted the arrest and detention of any persons whom the police reasonably suspected were 'concerned in the commission, preparation or instigation of acts of terrorism'.¹⁶⁶ These persons could be detained for 48 hours and the Secretary of State could extend this by a further 5 days.¹⁶⁷ Such detention was always reviewable by a writ of habeas corpus (a legal action which compels authorities to bring someone in custody before a court to determine the lawfulness of their detention). But, despite the large number of detentions ordered,¹⁶⁸ habeas corpus writs were rarely sought or issued. Moreover, given the short duration of detention, such action was practically unavailable in most cases.¹⁶⁹

These provisions were largely reincorporated without change into the *Terrorism Act 2000*. However, there were some significant changes. For example, it introduced safeguards, by transferring the power to extend detention from the Secretary of State to the Judiciary. Thus, a judicial authority could only extend detention if satisfied that the further detention of the person is reasonably necessary to obtain or preserve relevant evidence and that the relevant investigation is being conducted diligently and expeditiously.¹⁷⁰ The provisions were subsequently expanded by the *Anti-Terrorism, Crime and Security Act 2001*. This Act introduces a general obligation to disclose information which a person 'knows or believes might be of material assistance in preventing the commission ... of an act of terrorism or in securing the apprehension, prosecution or conviction of a [terrorist]'.¹⁷¹

United States

The relevant legislation in the United States is the *USA PATRIOT Act of 2001*.¹⁷² The Act provides for the mandatory detention of any alien whom the Attorney-General has reasonable grounds to believe is an 'inadmissible alien' or 'is engaged in any other activity that endangers the national security of the United States'.¹⁷³ The Attorney-General must review the situation every six months, but aliens may continue to be detained if their release will threaten national security or the safety of the community or any person.¹⁷⁴ An 'inadmissible alien' was defined to include persons who have incited or engaged in terrorist activity¹⁷⁵ and members or representatives of a foreign terrorist organisation.¹⁷⁶ The Act extends the definition to cover persons who use a position of prominence to endorse or espouse terrorism, or belong to a group that endorses terrorism, in a way that 'undermines United States efforts to reduce or eliminate terrorist activities'. It broadens the definition of 'engaging in terrorist activity' to include incitement, preparation, information gathering, planning and soliciting funds or members for terrorist activities or organisations.¹⁷⁷

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The Act provides decisions by the Attorney-General may only be reviewed by a writ of habeas corpus.¹⁷⁸ Thus, there is no administrative review, although it has been said that the habeas corpus review grounds closely parallel some of the judicial review grounds.¹⁷⁹

Canada

The relevant legislation in Canada is the *Anti-Terrorism Act 2002* (CA). The Act permits arrest and detention of any person where the police believe on reasonable grounds that a terrorist act will be carried out and where they suspect on reasonable grounds that detention is necessary to prevent this occurring.¹⁸⁰ These persons can be detained for 24 hours to allow them to be brought before a judge.¹⁸¹ The power to arrest and detain exists in the context of broader judicial powers relating to arrest and detention, with the primary focus being on orders by way of 'recognizance with conditions'. Thus, a judge may, on the basis of an 'information' laid by the police, cause a person to appear before the court,¹⁸² and may extend the detention above for a further 48 hours,¹⁸³ in order to order that the person 'enter into a recognizance to keep the peace and be of good behaviour'.¹⁸⁴

Detention Principles

In principle, domestic and international law are antagonistic to arbitrary detention or the detention of persons without legal authority, without charge or without review.

Traditionally, '[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'.¹⁸⁵ In either case, detention would be subject to the supervisory jurisdiction of the courts, a fact which is implicit in the constitutional separation of powers requirement. So, it has been said that, with limited exception, 'the citizens of this country enjoy, *at least in times of peace*, a constitutional immunity from being imprisoned ... except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth'.¹⁸⁶

In the absence of judicial power, the Constitution only permits administrative detention which is connected with a head of legislative power and which is reasonably necessary for the purpose of its exercise. Thus the mandatory detention of asylum seekers has been held to be a valid exercise of the aliens power provided it is not punitive or is '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'.¹⁸⁷ The caveat in italics above raises the question as to whether the detention of persons in times of hostilities or threats to national security may be a valid exercise of the defence power.

Detention, and the limits of executive and judicial power, is covered in various international instruments. For example, the *International Covenant on Civil and Political Rights*¹⁸⁸ prohibits arbitrary detention.¹⁸⁹ 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

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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.'¹⁹⁰

The Bill

Authority to Detain

As noted above, a prescribed authority may authorise a person to be detained. A questioning warrant must either require a person to attend before a prescribed authority or authorise a person to be 'immediately taken into custody' by a police officer and, following hearing before the prescribed authority, detained under arrangements made by the officer 'for a specified period of *not more than 48 hours*' (**proposed subsection 34D(2)**).

It would seem that successive warrants can be issued and, while each is subject to a limit of detention for *no more than 48 hours*, they could permit indefinite detention. Moreover, once a person has been detained continuously under a warrant for *more than 48 hours*, the Director-General may make a unilateral request to a prescribed authority, without seeking or obtaining the Attorney-General's consent, if the prescribed authority is a Deputy President of the AAT (**proposed paragraph 34D(1)(a)** with **proposed section 34C(5)**).

A prescribed authority may issue directions for a person to be detained, further detained, to appear for questioning, or be released from detention (**proposed subsection 34F(1)**). Detention can only be required where the prescribed authority is satisfied that there are 'reasonable grounds for believing' that, if the person is released, 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)**). Also, a direction cannot 'result in a person being detained' for *more than 48 hours* 'after the person first appears before a prescribed authority' (**proposed subsection 34F(4)**).

Significantly, a direction may only be issued by the prescribed authority '*when a person appears before [it] for questioning*' (**proposed subsection 34F(1)**). So, the prescribed authority has no power to end detention while a person is in detention but not appearing for questioning. He or she must rely on directions made during previous appearances regarding subsequent opportunities to review and reconsider detention. Moreover, directions must either be consistent with the warrant or, if inconsistent, approved in writing by the Attorney-General (**proposed subsection 34F(2)**). It is unclear how this restriction works. Clearly, the prescribed authority is not able to permit a detainee to contact a person who is not specified in the warrant (see **proposed subsection 34D(4)**). In theory, it *should* be able to order that a detainee be released before the end of the period specified in the warrant if it is not satisfied that continued detention and questioning will substantially assist the collection of intelligence (see **proposed paragraph 34D(1)(b)**). But, can the prescribed authority 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?

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The successive warrants issue is more important than the prescribed authority discretion. The Director-General may request successive warrants, which *may* result in detention for an indefinite period. But a prescribed authority may only issue directions against a given warrant and they cannot result in detention for *more than 48 hours*. *In theory*, successive warrants may permit a prescribed authority to issue successive directions resulting in indefinite detention. The provisions are silent on this question, although it is clear that, where a person is *released*, the making of a direction does not limit the issuing of further warrants and detention whether by warrant or by direction (**proposed subsection 34F(7)**).

Communications while in Detention

As noted, if a questioning warrant authorises detention, it must specify *all* of the people whom the person may contact while in custody or detention (**proposed subparagraph 34D(2)(b)(ii)**). Once a person is taken into custody or placed in detention they may only contact those persons specified in the warrant or prescribed authority's direction (**proposed subsection 34F(9)**). However, while in custody, they may make oral or written complaints to the Ombudsman or IGIS and must be given 'facilities' in order to do so (**proposed paragraph 34F(9)(b) and (c)**).

Legal Representation

No express provision is made for legal representation. However, the warrant may specify that the person may contact their legal adviser (**proposed subsection 34D(4)**). A direction issued by a prescribed authority may also specify this (**proposed paragraph 34F(1)(d)**) provided it is consistent with the warrant or is approved (**proposed subsection 34(2)**).

Humane Treatment

In executing a warrant or direction, or in exercising a power to enforce a warrant or direction, a person must be 'treated with humanity and with respect for human dignity and must not be subjected to cruel, inhuman or degrading treatment' (**proposed section 34J**).

Personal Searches

Item 23 deals with personal searches in conjunction with search warrants.

Item 24 deals with personal searches in conjunction with the new questioning provisions.

Search Warrants

Traditionally, the common law has sought to prescribe narrow powers of entry, search and seizure. Originally, search warrants were permitted for stolen goods, had to be issued by judges and had to describe what was to be searched and seized and/or the related offence. Recognising the need to balance individual privacy with public interest in law and order, these powers have been extended to allow police officers to seize other property they

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discover by chance which they reasonably believe reveal other offences.¹⁹¹ Otherwise the common law 'was, and remains, hostile to any greater degree of generality'.¹⁹²

These powers have been extended by statute. First, there have been piecemeal extensions to cover particular classes of offences. Second, there have been extensions which largely codify the common law rules relating to search warrants. Third, there have been measures which provide for 'general warrants' which may be unlimited with respect to place, time or the offences to which they relate or, while partially limited, may be issued not by a judicial officer but by an administrative officer.¹⁹³ 'General warrants' have been widely criticised on the basis that they lack certainty¹⁹⁴ and suffer from a lack of independent scrutiny.¹⁹⁵

In addition, the common law permits entry, search and seizure in the absence of a warrant, pursuant to making an arrest. As above, these powers have been extended by statute. Various Acts provide for the exercise of these powers based on 'reasonable suspicion'. Typically they deal with emergencies or dangerous situations. As with 'general warrants' 'warrantless searches' have been criticised for the absence of independent scrutiny: 'a warrantless power of search and seizure represents a relatively discretionary mode of authorisation, legal control and review of which are substantially diminished'.¹⁹⁶

Clearly, the general position is that search warrants require concrete information.¹⁹⁷ Moreover in issuing a search warrant a justice must balance at arms length the competing interests in light of this information. 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'.¹⁹⁸

Personal Searches

As above, the common law is generally antagonistic to personal search powers on the basis that they are 'an affront to dignity and privacy of the individual'.¹⁹⁹ However, it will permit 'ordinary searches' of individuals following arrest if there are reasonable grounds for believing that they have a weapon or carry any implement which might be used for escape or that they possess evidence which is material to the offence or other offences.²⁰⁰ It is unclear if it would permit such searches in the absence of any criminal offence.²⁰¹

Also as above, these powers have been extended by statute. For example, personal search powers are found in the *Crimes Act 1914*, *Customs Act 1901*, and *Migration Act 1958*. Moreover, strip search powers are found in the *Crimes Act 1914*, the *Customs Act 1091* and the *International War Crimes Tribunal Act 1995*.²⁰² Some other Commonwealth statutes give authorised regulatory officers the power to carry out ordinary searches and frisk searches—for example, the *Environment Protection and Biodiversity Conservation Act 1999*²⁰³ and the *Wildlife Protection (Regulation of Imports and Exports) Act 1982*²⁰⁴—but explicitly prohibit them from carrying out strip searches.

A number of types of personal search are provided for in Commonwealth statutes.²⁰⁵ In ascending level of intrusiveness, these are ordinary searches, frisk searches (also known as pat down searches), strip searches (also known as external searches) and internal searches

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(also known as body cavity searches). In general, the greater the level of intrusiveness the greater the amount of protection afforded the person who is to be searched.

- *ordinary search* a search of a person or items in their possession which may include requiring the person to remove outer garments and then examining those garments.²⁰⁶
- *frisk search* a search of the person that involves running hands over their outer garments and examining anything worn or carried that is easily and voluntarily removed.²⁰⁷
- *strip search* a search of a person or items in their possession which may include requiring the person to remove all or some of their clothing and examining the person's body and garments.²⁰⁸ The expression 'external search' is used in the *Customs Act 1901* for a search of the body of, or anything worn or possessed by a person.²⁰⁹
- *internal search* an internal/external examination of the person's body to determine whether the person is internally concealing a substance or thing, and includes the recovery of any substance or thing suspected on reasonable grounds to be so concealed.²¹⁰

Ordinarily, strip searches are subject to conditions that relate to threshold issues or preconditions that must exist before authorisation can be sought; who can apply for, authorise and conduct a strip search; the protections afforded to minors aged between 10 and 18 years; the provision of searches by consent; and record keeping requirements.

For example, under the *Crimes Act 1914* a strip search:

- is exercisable by a constable, at a police station, after a person has been arrested;²¹¹
- must be authorised by someone of the rank of superintendent or higher;²¹²
- must be documented in terms of the decision to authorise or refuse and its reasons;²¹³
- may, in some circumstances, be conducted with the consent of the arrested person²¹⁴
- may only be carried out upon a juvenile or incapable person if they have been arrested *and* charged, or if a magistrate orders the search; and²¹⁵
- is subject to protections relating to questioning such as requirements for cautioning, rights of communication, and provision of interview friends²¹⁶ and interpreters.²¹⁷

ASIO Act

In relation to foreign intelligence, the Attorney General may, at the request of the Director General, issue a warrant in relation to premises, a *person*, a computer or thing authorising ASIO to any of the things ordinarily permissible in relation to search warrants, computer access warrants, listening and tracking devices and postal or delivery service articles.²¹⁸

There would seem to be an ambiguity in the operation of this provision. On one view, it may only permit ASIO to do the things in relation to premises, a *person*, a computer or thing that are ordinarily permissible in relation to the subject premises, *person*, computer

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or thing. That is, ASIO may do the things ordinarily permissible under a search warrant *but only in relation to specified premises*. On another view, it may permit ASIO to do *any* of the things permitted in relation to *any* of the things identified. That is, ASIO may do the things ordinarily permissible under a search warrant in relation to a specified person, such as searching for and removing records or other things relevant to the security matter.

Overseas Comparison

It is worth noting the search warrant grounds relating to intelligence agencies in other jurisdictions. A warrant may be issued under the *Intelligence Services Act 1994* (UK) if the Secretary of State 'thinks it necessary for the action to be taken on the ground that it is likely to be of substantial value in assisting' the relevant agencies in the performance of their functions. Similarly, under the Government Communications Security Bureau Bill (2001) (NZ) an interception warrant may only be issued if it is 'essential for the protection or advancement of 1 or more of the [relevant objectives]', that the value of the information 'justifies the particular interception' and is 'not likely to be obtained by other means'.

The Bill

Personal Searches

Proposed subsection 25(4A) allows the Attorney-General, in issuing a search warrant over subject premises, to authorise 'ordinary' or 'frisk' searches of any person who is 'at or near the subject premises' when the warrant is executed, if there is 'reasonable cause to believe' that those persons possess 'any records or things relevant to the security matter'. He or she may authorise the inspection, copying, etc of any record or other thing found 'that appears to be relevant to the collection of intelligence by [ASIO]' under the Act.

Proposed subsection 25(4B) provides that this may not involve strip or internal searches.

Questioning Warrants and Prescribed Authority's Directions

Proposed section 34L permits a police officer to conduct ordinary and frisk searches of persons detained pursuant to a questioning warrant or prescribed authority direction. A frisk search may be conducted if the police officer suspects on reasonable grounds that the person carries a 'seizable item' and it is necessary to conduct a strip search to recover it, *if the prescribed authority approves* (**proposed subsection 34L(2)**). He or she may use 'such force as is necessary and reasonable in the circumstances' (**proposed subsection 34L(7)**) and may seize any 'seizable item' or item '*relevant to collection of intelligence that is important in relation to a terrorism offence*' (**proposed subsection 34L(8)**).

The expression 'seizable item' does not seem to be defined in the Bill or the Act.

Proposed section 34M contains rules governing the conduct of the strip search.

Crimes Act

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The power in **proposed section 34L**, and the rules in **proposed section 34M** closely resemble the power and rules in section 3ZH and 3ZI of the *Crimes Act 1914*. Obvious differences are that under the latter statute searches are performed by police officers, under the control of senior police officers and (where relevant) magistrates, and are directed at the gathering of 'seizable items' and other 'evidential material' in relation to offences. Under the *Crimes Act 1914* a 'seizable item' is 'anything that would present a danger to a person or that could be used to assist a person to escape from lawful custody'.²¹⁹

Children

Significantly, the *Crimes Act 1914* provisions deal expressly with searches of minors. Strip searches may not be conducted on children under 10 years.²²⁰ Between 10 and 18 years strip searches may not be conducted unless the person has been arrested and charged or in accordance with a magistrate's order and unless the person has a parent, guardian or other suitable adult who is able to capable of representing the person's interests.²²¹

The rules in **proposed section 34M** effectively duplicate these provisions in relation to questioning and detention. Strip searches may not be conducted on children under 10 years. Between 10 and 18 years strip searches may not be conducted unless in accordance with a prescribed authority's order and unless the person has a parent, guardian or other suitable adult who is able to capable of representing the person's interests.²²²

While it seems inconceivable that minors would be suspects for terrorist offences or targets for questioning warrants, the Bill clearly contemplates their questioning and detention. As noted there has already been a live debate in relation to family members of terrorist suspects who fell within the ambit of anti-terrorist laws in the United Kingdom.²²³

Role of the Prescribed Authority

The prescribed authority has a limited role in the issuing of questioning warrants. Clearly, they must be satisfied as to the reasonable grounds (**proposed paragraph 34DF(1)(b)**). But, while the Attorney-General may make changes to the warrant (**proposed subsection 34D(3)**), the prescribed authority *cannot*. The warrant it ultimately issues must be '*in the same terms as the draft warrant given to [it]*' (**proposed subsections 34D(2) and (5)**).

Once a warrant is issued, the prescribed authority *may* not have a significantly larger role. The prescribed authority, before whom the person *first* appears for questioning, must explain the effect of the warrant and the consequences of any failure to comply (**proposed section 34E**). So, in later appearances, there may be no duty to make any explanation or warning. It must also inform the person of their right to make a complaint to the IGIS in relation to ASIO or the Ombudsman in relation to the AFP (**proposed paragraph 34E(1)(e)**). As indicated, it has a discretion in ordering and terminating detention (**proposed section 34F**), but only as approved by the Attorney-General under the warrant or separate written approval (**proposed subsection 34F(2)**). It *may* have authority to

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control the conduct of questioning by ASIO but the Bill is largely silent on this issue. It states, in the context of the authorisation in the warrant, that ASIO must be authorised to question a person before a prescribed authority 'subject to any restrictions or conditions' (**proposed paragraph 34D(5)(a)**). It does not state how these are established or enforced.

There may be constitutional issues arising from the conferral of power on judicial officers to both issue warrants and preside over questioning at the return of warrants. In a recent newspaper article Dr. Greg Carne of the Faculty of Law, University of Tasmania stated that '[t]he obligations on that person during detention make it likely that the power to issue the warrant and be present at the interrogation will be constitutionally challenged.²²⁴ One obvious avenue of challenge is one based on the separation of powers requirement or the principle in the *Boilermakers' Case*.²²⁵ The argument *may* work in at least in respect of Federal Magistrates, the issuing of questioning warrants may be viewed as an exercise of executive power that is incompatible with their role as members of the Judiciary.

Generally, it is assumed that the issue of a warrant is not an exercise of judicial power. This proposition is widely accepted in relation to listening device and telecommunications interception warrants.²²⁶ In part it is based on the fact that such decisions do not involve such things as the adjudication of the rights of parties,²²⁷ or the identification and enforcement of rights in accordance with legal principles.²²⁸

It is also assumed that the issue of a warrant is not inconsistent with the exercise of judicial power. 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 performance by the judge of their judicial functions or the proper discharge of the judiciary of its responsibilities as an institution.²²⁹ Ultimately, it was accepted by the majority in *Grollo v. Palmer*, the issue remains 'whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch'.²³⁰ 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.²³¹ Another example may be the conferral of an unduly confined administrative discretion. In *Wilson v. Minister for Aboriginal and Torres Strait Islander Affairs* the High Court held that a judge, in preparing a report under heritage protection 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.

It may be possible to argue that the power to issue a questioning warrant, with the consequent detention powers and the limitations on prescribed authority's discretion to vary the terms of the warrant or, potentially, to control questioning and detention, may undermine public confidence in the judiciary. It is perhaps significant that, in acknowledging that the ultimate inquiry relates to judicial integrity, the majority in *Grollo v. Palmer* quoted from *Mistretta v. United States*. In that case a United States court reacted against a perception that it could be 'borrowed by the [Parliament or Executive] to cloak their work in the neutral colors of judicial action'.²³² In the Bills Digest on the Security

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Legislation Amendment (Terrorism) Bill 2002 [No. 2] it was suggested that a judicial review court, reacting against its limited ability to review the bases behind proscription declarations, might be tempted to make a similar comment. The temptation may be even stronger given the limited power to vary questioning warrants.

Reporting Requirements

The Director-General of ASIO must provide a written report to the Attorney-General for each questioning warrant. However, the report need only discuss 'the extent to which the action taken under the warrant has assisted [ASIO] in carrying out its functions' (**proposed section 34P**). The same requirement applies to other warrants issued by ASIO.²³³ Also he or she must, as soon as practicable, provide a report to the IGIS (**proposed section 34Q**).

There is no requirement to report to Parliament or to table reports to the Attorney-General.

Concluding Comments

The Bill seeks to introduce an unusual combination of powers in order to address the threat or potential threat of international terrorism in Australia. It essentially gives a law enforcement function (questioning) to an intelligence agency (ASIO) and gives a criminal justice function (detention) to non-judicial persons (members of the AAT). In so doing, it removes, or permits the suspension of, what are standard procedural guarantees as to the rights of an accused (privilege against self-incrimination, right to legal representation).

This unusual combination of powers overlaps with the ordinary criminal justice system. Notwithstanding the power to question and detain persons for the purposes of intelligence gathering, a parallel regime of questioning and detention will operate under the criminal justice system, based on reasonable suspicion regarding the commission of an offence. However, as implied above, there are substantial differences in relation to the bodies that exercise law enforcement and criminal justice functions and the procedural guarantees.

The overlap is the result of competing policy tensions. Terrorism has been seen as a 'disease in search of a cure',²³⁴ or a condition for which there is no legislative "fix" or panacea.²³⁵ It is understandable therefore that preventative intelligence should be seen as the 'first line of defence'²³⁶ or the 'single most important weapon in fighting terrorism'.²³⁷ However, terrorism has also been seen as 'an attack on society as a whole, and our democratic institutions'.²³⁸ So it is understandable that deterrence and punishment should be seen as primary objectives that 'duly reflect[s] the seriousness of such terrorist acts'.²³⁹

Ordinarily, this competition would result in compromise. An emphasis on intelligence would mean a concession in relation to prosecution. This would involve a compulsion to answer questions with a protection in the form of 'use' or 'derivative use immunity'. And

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an emphasis on prosecution would mean a concession in relation to intelligence. This would involve a right to silence and to legal representation, whatever the consequences.

However, this compromise seems to be increasingly weighted in favour of prosecution, as the recent amendments to the *National Crime Authority Act 1984* suggest. While the Act implicitly emphasised intelligence, requiring the NCA in effect to focus on *non-suspects*, the removal of derivative use immunities on the basis of a 'public interest' in investigation and conviction has combined intelligence and prosecution functions, enabling the NCA to focus freely on suspects and non-suspects in order to fight 'serious and organised crime'.

While there may be a specific need for intelligence in relation to international terrorism, the core issue is proportionality and the appropriate balance between safety and liberty. It may be reasonable to ask whether certain procedural safeguards cannot be maintained without threatening the intelligence gathering process. Areas of interest might be the need to demonstrate reasonable suspicion in relation to the commission of terrorist offences, a 'use' and 'derivative use immunity' in relation to questioning of non-suspects, a prohibition on the use of non-judicial officers as prescribed authorities, an expansion or clarification of the role of prescribed authorities and a publicly funded right to legal representation.

The absence of at least *some* of these protections raises various questions for Parliament. Obviously, there are general questions as to whether the measures are necessary, sufficient and proportionate. However, there are also questions of substance regarding the *purpose* of these measures. In blunt terms, if the full weight of the criminal justice system were brought to bear on terrorism, the only contribution that these measures would make would be the *immediate* detention of *non-suspects* who *might* have information that is 'important in relation to a terrorism offence'. If the NCA (or ACC) was permitted to apply special powers to terrorism offences, it would be limited to *immediate* detention of *non-suspects*.

Ultimately, it might be argued, their real contribution is to permit preventative detention. As indicated above, in announcing these measures, the Attorney-General indicated that detention would '*only* be authorised where the [prescribed authority] was satisfied it was *necessary in order to protect the public* from politically motivated violence'.²⁴⁰ Since that statement there seem to have been no references to protective or preventative detention. This may be because the notion of preventative detention is arguably 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.²⁴¹ 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,²⁴² it will be weighed against the personal characteristics and circumstances of the offence and the offender.²⁴³

Significantly, it may be possible to argue that preventative detention is inconsistent with the separation of powers requirement or the principle in the *Boilermakers' Case*. In *Kable v. Director of Public Prosecutions (NSW)* the High Court held that state legislation, which empowered state judges to order preventative detention of Gregory Kable, conferred

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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 preventative 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 stated that the state legislation did so:

[B]y stating that its object is the preventative detention of the appellant, by removing the need to prove guilt beyond reasonable doubt, by providing for proof by materials that may not satisfy the rules of evidence and by declaring the proceedings to be civil proceedings although the Court is not asked to determine ... rights and liabilities.²⁴⁴

Similarly, while the Federal Parliament may have the authority to make general laws for administrative detention and, indeed, preventative detention, it may be necessary, at least if the powers are to be exercised by judges, that certain 'ordinary protections' are provided. The alternative, that the powers are given solely to members of the AAT, may resolve this problem, but may create its own problems given the nature of the measures in this Bill.

Endnotes

1. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001.
2. Introduced on 13 March 2002. The original Bill [the Security Legislation Amendment (Terrorism) Bill 2002], which was introduced on 12 March 2002, was withdrawn on 13 March 2002 and the [No.2] Bill was substituted. The reason was that the Office of Parliamentary Counsel had drawn the Government's attention to a discrepancy between the title of the original Bill and the title referred to in the notice of presentation given by the Attorney-General. This discrepancy meant that the Bill's introduction was inconsistent with House of Representatives' Standing Orders. The withdrawal and re-introduction were designed to address this problem. See Mr Peter Slipper MP, House of Representatives, *Hansard*, 13 March 2002, pp.1138–9.
3. See **item 7, Schedule 1**, Telecommunications Interception Legislation Amendment Bill 2002.
4. As stated above, the Anti-hoax Bill has received Royal Assent.
5. Peter Slipper, MP, Security Legislation Amendment (Terrorism) Bill 2002 [No. 2], Second Reading Speech, House of Representatives, *Debates*, 13 March 2002, p. 1041.
6. Lord Lloyd of Berwick, *Inquiry into Legislation Against Terrorism*, Cm 3420, October 1996, Vol. 2, p. 58.
7. Proscription may make intelligence gathering and law enforcement tasks more difficult, at least in part because it tends to put distance between law enforcement agencies and informants: Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 29 (emphasis added) and p. 30 and Vol. 2, p. 57; Clive Walker, *The Prevention of Terrorism in British Law*, Manchester University Press, Manchester, 1986, p. 50.

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- 8 *Australian Security Intelligence Organisation Act 1979*, subsection 18(1).
- 9 *Ibid.*, subsection 18(2).
10. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 63.
11. Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994, p. 26.
12. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 8.
13. Protective Security Review, *loc. cit.*, p. 69.
14. Sean Brennan, 'Australian Security Intelligence Organisation Legislation Amendment Bill 1999', [Bills Digest No. 172, 1998-99](#).
15. Nathan Hancock, 'Intelligence Services Bill 2001', [Bills Digest No. 11, 2001-02](#).
- 16 *Australian Security Intelligence Organisation Act 1979*, paragraph 17(1)(a).
- 17 *Ibid.*, paragraph 17(1)(b).
- 18 *Ibid.*, paragraph 17(1)(c).
19. *Ibid.*, section 40. This is subject to a restriction that, in effect, intelligence is only to be communicated to a State authority in response to, and not in anticipation of, proposed administrative action. Thus, intelligence is not to be communicated if it is likely or intended to be used by the authority in considering the administrative action: subsection 40(2).
- 20 *Ibid.*, subsection 8(4).
- 21 *Ibid.*, subsection 8(5).
22. 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.
23. A similar discretion is afforded to the Director of AUSTRAC: *Financial Transaction Reports 1988*, section 27AA.
24. Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 93.
25. *Ibid.*, p. 95.
- 26 *Inspector-General of Intelligence and Security Act 1986*, subsection 8(4).
27. That is, offences under the *Crimes (Internationally Protected Persons) Act 1976*, *Crimes (Hijacking of Aircraft) Act 1972* or *Crimes (Protection of Aircraft) Act 1973*.
- 28 In 1974 the Whitlam Government appointed Justice Robert Hope to conduct a royal commission into the structure of security and intelligence services, the nature and scope of the intelligence required and the machinery for ministerial control, direction and coordination of the security services. The Hope Royal Commission delivered eight reports, four of which were tabled in Parliament on 5 May 1977 and 25 October 1977. In 1983 the Hawke Government appointed Justice Hope to conduct a second royal commission into the intelligence services. The inquiry was to examine progress in implementing recommendations

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- of previous royal commissions; arrangements for developing policies, assessing priorities and coordinating activities among the organisations; ministerial and parliamentary accountability; complaints procedures; financial oversight and the agencies' compliance with the law.
29. Lionel Bowen, MP, Australian Security Intelligence Organisation Amendment Bill, Second Reading Speech, House of Representatives, *Debates*, 22 May 1986, p. 3707.
 30. *Australian Security Intelligence Organisation Act 1979*, section 4, definition of 'politically motivated violence', paragraphs (a), (b), (c) and (d). Some of these are covered in *Crimes (Foreign Incursions and Recruitment) Act 1978*, the *Crimes (Hostages) Act 1989*, Division 1 of Part 2, or Part 3, of the *Crimes (Ships and Fixed Platforms) Act 1992* and Division 1 or 4 of Part 2 of the *Crimes (Aviation) Act 1991*.
 31. Frank Honan and Alan Thompson, *Report of the 1993 SAC-PAV Review*, Canberra, 1994.
 32. Lindsay Hansch, 'Australia's National Anti-Terrorist Plan—Crisis and Response Arrangements', in Alan Thompson (ed.), *Terrorism and the 2000 Olympics*, Australian Defence Studies Centre, Canberra, 1996, p. 97.
 33. Protective Security Coordination Centre, [National Anti-Terrorist Plan \(NATP\) – Key Points](#).
 34. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001 (emphasis added).
 35. *R v. Stone* [1981] VR 737.
 36. For example, *Crimes Act 1900* (NSW), section 316 inserted by the *Crimes (Public Justice) Amendment Act 1990*.
 37. *Crimes Act 1914*, paragraph 24(2)(b).
 38. *Royal Commissions Act 1902*, subsection 2(1); *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).
 39. *National Crime Authority Act 1984*, section 28.
 40. *Ibid.*, section 29.
 41. National Crime Authority, ['Why are hearings so important?'](#).
 42. *Customs Act 1901*, sections 64AE & 214B; *Fisheries Management Act 1991*, section 84; *Torres Strait Fisheries Act 1984*, section 42.
 43. *Income Tax Assessment Act 1997*, section 900–175.
 44. *Civil Aviation (Carrier's Liability) Act 1959*, section 41C.
 45. *Trade Practices Act 1974*, section 155 (general), section 65Q (documents held by organisations supplying dangerous goods), section 75AY (documents relating to price monitoring), section 46 (documents relating to misuse of market power); *Prices Surveillance Act 1983*, section 32.
 46. *Australian Securities and Investment Commission Act 1989*, sections 30–33. See also *Insurance Acquisitions and Takeovers Act 1991*, section 73.

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- 47 *Therapeutic Goods Act 1989*, section 40 (holders of therapeutic goods licences).
- 48 *Social Security (Administration) Act 1999*, Part 5, Div 1; *Veterans Entitlements Act 1986*, section 128 (general), sections 54AA & 54F (recipients); *Health Insurance Act 1973*, section 89B; *Farm Household Support Act 1992*, section 54; *Child Support (Registration and Collection) Act 1988*, section 120; *Child Support (Assessment) Act 1989*, section 161.
- 49 *Workplace Relations Act 1996*, sections 83BH, 86, 280B.
- 50 *National Crime Authority Act 1984*, section 29; *Inspector General of Intelligence and Security Act 1986*, section 18.
- 51 *Migration Act 1958*, section 18 (documents relating to unlawful non-citizens), sections 306D–F (documents held by migration agents).
- 52 *Crimes Act 1914*, section 30AB.
53. The thresholds are whether an inquiry is 'going off on a frolic of their own', whether there is 'a real as distinct from a fanciful possibility' that the line of questioning will be relevant, or whether the inquiry is seeking to establish relevance in a 'bona fide' manner: Stephen Donaghue, *Royal Commissions and Permanent Commissions of Inquiry*, Butterworths, Sydney, 2001, p. 46.
- 54 National Crime Authority Legislation Amendment Bill 2001, *Explanatory Memorandum*, p. 4.
- 55 *Environmental Protection Authority v. Caltex Refining Co. Pty. Ltd.* (1993) 118 ALR 392.
- 56 *Hamilton v. Oades* (1989) 166 CLR 486 at pp. 503, 508.
- 57 *Rochfort v. Trade Practices Commission* (1982) 153 CLR 134 per Murphy J at p. 150.
- 58 *Woolmington v. Director of Public Prosecutions* [1935] AC 462, per Viscount Sankey LJ at p. 481.
- 59 *R v. Macfarlane; Ex parte O'Flanagan and O'Kelly* (1923) 32 CLR 518 per Isaacs J at pp. 549–550.
- 60 '[I]t is important for the proper administration of justice, not only that would-be witnesses are ... protected from the risk of any incrimination or penalty as they give their evidence. It is thought that without such protections witnesses might be loath to come forward to give evidence and, although reliance on the privilege will sometimes obstruct the course of justice in the case in which it is claimed, and may militate against the discovery of crimes which ought, in the public interest, to be traced, this is probably sufficient justification for protecting a witness from exposing himself to the peril of criminal proceedings': Byrne & Heydon, *Cross on Evidence*, 4th Australian Edition, Butterworths, Sydney, 1991, p. 687.
- 61 *Grant v Downs* (1976) 135 CLR 374; *Baker v Campbell* (1983) 153 CLR 52
- 62 *Baker v Campbell* (1983) 153 CLR 52, per Dawson J at p. 128.
- 63 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.
- 64 *Baker v Campbell* (1983) 153 CLR 52, per Dawson J at p. 128.

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- 65 *Waterford v Commonwealth* (1986-1987) 163 CLR 54, per Brennan at p. 74, referring to *Sankey v Whitlam* (1978) 142 CLR at pp. 39, 58-59, 95-96.
- 66 *Baker v Campbell* (1983) 153 CLR 52, per Dawson J at p. 128.
- 67 *Pyneboard Pty Ltd v. Trade Practices Commission* (1983) 152 CLR 328 at p. 340.
- 68 *Sorby v. Commonwealth* (1983) 152 CLR 281 at p. 309; *Pyneboard Pty Ltd v. Trade Practices Commission*, op. cit., at p. 341; *Controlled Consultants Pty Ltd v. CAC* (1985) 156 CLR 385, at p. 389.
- 69 *Parry-Jones v. Law Society* [1969] 1 CH 1; *Brayley v. Wilton* [1976] 2 NSWLR 495; *Crowley v. Murphy* (1981) 34 ALR 496; *O'Reilly v. Commissioners of the State Bank of Victoria* (1982) 153 CLR 1.
- 70 *Baker v. Campbell* (1983) 153 CLR 52.
- 71 *Egan v. Chadwick* [1999] NSWCA 176, reported in 46 NSWLR 563.
- 72 *Parry-Jones v Law Society* [1969] 1 CH 1; *Brayley v Wilton* [1976] 2 NSWLR 495; *Crowley v Murphy* (1981) 34 ALR 496; *O'Reilly v Commissioners of the State Bank of Victoria* (1982) 153 CLR 1.
- 73 *Baker v Campbell* (1983) 153 CLR 52.
- 74 *Egan v Chadwick* [1999] NSWCA 176, reported in 46 NSWLR 563.
- 75 Donaghue, op. cit., pp. 94–97 and pp. 106–108; Suzanne McNicol, *The Law of Privilege*, Law Book Company, 1992, pp. 241–273.
- 76 'Although the matter is not free from doubt, it appears that a statute that imposes an unqualified obligation to answer all relevant questions [without a reasonable excuse immunity], together with a prohibition on the direct use of any evidence obtained against the witness, will be construed as abrogating the privilege. This result is said to follow because the presence of the use immunity is 'consistent only with a legislative intention to abrogate the privilege': Donaghue, op. cit., p. 96, citing *Sorby v. Commonwealth* (1983) 152 CLR 281 at p. 311. Self incrimination: *Hamilton v. Oades* (1989) 166 CLR 486; *Sorby v. Commonwealth* (1983) 152 CLR 281; *Police Service Board v. Morris* (1985) 156 CLR 397; *Commission Against Corruption (NSW) v. Yuill* (1991) 172 CLR 319. Legal professional privilege: *Baker v. Campbell* (1983) 153 CLR 52; *Balog v. ICAC* (1990) 169 CLR 625; *Re Compass Airlines Pty Ltd* (1992) 109 ALR 119.
- 77 *Royal Commissions Act 1902*, section 6A.
- 78 *Australian Securities and Investments Commission Act 2001*, section 68.
- 79 *Australian Securities Commission v. Kippe* (1996) 137 ALR 423, per Von Doussa, Cooper and Tamberlin JJ at pp. 430–431. In that case, the Federal Court rejected an argument that a power to issue a 'banning order' under the *Australian Securities Commission Act 1989* was a provision for the imposition of a penalty: 'The immediate and direct legal effect intended by a banning order is not to impose a penalty or punishment on the person concerned, but to be preventative in that it removes a perceived threat to the public interest and to public confidence in the securities and futures industry by removing a that person from participation therein', at p. 431.

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80. *Independent Commission Against Corruption Act 1988*, subsection 37(2).
81. *New South Wales Crime Commission Act 1985*, subsection 18B(1)
82. The privilege against self-incrimination is not expressly abrogated by the *National Crime Authority Act 1984*. However, given the obligation to answer questions, coupled with the absence of a reasonable excuse provision and the presence of a 'use immunity' it may be that the privilege would be abrogated by necessary implication (see endnote 76 above).
83. *R v. Scott* (1856) 169 ER 909; *R v. Coote* (1873) LR 4 PC 599.
84. *Commissioners of Customs and Excise v. Harz* [1967] 1 AC 760.
85. Donaghue, op. cit., p. 202.
86. Ibid., p. 203.
87. *Royal Commissions Act 1902*, section 6DD. This is not to say that the statements or documents may not be used for limited purposes. For example, a statement *might* be admissible as a prior inconsistent statement provided it is used solely for the purpose of attacking the credibility of the witness rather than proving an incriminating fact: See Donaghue, op. cit., pp. 212–213 discussing the Canadian case of *R v. Kuldip* (1990) 61 CCC (3d) 385.
88. *Hartmann v. Commissioner of Police* (1997) 91 A Crim R 141, at p. 147.
89. *Australian Securities and Investments Commission Act 2001*, section 76.
90. *Independent Commission Against Corruption Act 1988*, subsection 37(3).
91. *New South Wales Crime Commission Act 1985*, subsection 18B(2).
92. *National Crime Authority Act 1984*, paragraph 30(4)(c). The use immunity only arises if the person claims the privilege against self incrimination in relation to the answer, document or thing.
93. Ibid., section 77.
94. *National Crime Authority Act 1984-2000*, subsections 30(5) (offence against Commonwealth or Territory law) and 30(7) (offence against State law).
95. Donaghue, op. cit., p. 233. This view was reflected in evidence before the NCA Committee: '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': Ms Betty King QC, former member of the NCA in evidence to the Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, p. 119.
96. 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.
97. Joint Committee on the National Crime Authority, *Third Evaluation of the National Crime Authority*, April 1998, p. 115.

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- 98 National Crime Authority Legislation Amendment Bill 2001, *Explanatory Memorandum*, p. 8.
- 99 *Dietrich v. The Queen* (1992) 177 CLR 292.
- 100 (Imp) ((10) 6 and 7 Wm IV c.114).
101. *Kioa v. West* (1985) 159 CLR 550 per Mason J at 584.
- 102 Donaghue, op. cit., p. 184, citing *R v. Board of Appeal; Ex parte Kay* (1916) 22 CLR 183; *R v. Commissioner of Police; Ex parte Edwards* (1977) 17 ALR 445; *R v. Visiting Justices of Yalata Labour Prison; Ex parte Robinson* (1981) 28 SASR 276.
- 103 *Royal Commissions Act 1902*, section 6FA.
- 104 Donaghue, op. cit., p. 185.
- 105 *Australian Securities and Investments Commission Act 2001*, section 23.
- 106 *Ibid*, subsection 59(8).
- 107 *Ibid*, section 194.
108. *Independent Commission Against Corruption Act 1988*, subsection 37(3).
109. *New South Wales Crime Commission Act 1985*, subsection 13(4).
- 110 *National Crime Authority Act 1984*, subsection 25(4).
- 111 *Australian Security Intelligence Organisation Act 1979*, section 25.
- 112 *Ibid.*, section 25A.
- 113 *Ibid.*, section 26.
- 114 *Ibid.*, section 26B.
- 115 *Ibid.*, section 26C.
- 116 *Ibid.*, subsection 25(2).
- 117 *Ibid.*, subsection 25(3).
- 118 *Ibid.*, subsection 25(4).
119. Australian Security Intelligence Organisation, *Report to Parliament 2000-2001*, p. 35 at <http://www.asio.gov.au/Publications/Content/AnnualReport00-01/pdf/Ar00-01.pdf>.
120. Inspector General of Intelligence and Security, *Annual Report 2000-2001*, paragraph 81 at http://www.igis.gov.au/fs_igis_ar.html.
121. Senator Amanda Vanstone, Answer to a Question on Notice: Telecommunications Interception, Senate, *Debates*, 29.10.97, p. 8278.
- 122 It would seem that the Minister cannot prescribe a part-time member unless they are a senior member. This is suggested by the fact that **proposed subsection 34B(1)** expressly mentions full-time and part-time *senior* members but does not distinguish between full-time and part-time *ordinary* members. The *expressio unius est exclusio alterius* rule is that express mention

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of one thing (part-time senior member) implies the exclusion of the other (part-time ordinary member).

123. Lord Lloyd of Berwick, op. cit., Vol. 1, p. 94.
124. The Home Office Circular states that its use 'can only be justified in extreme cases where the withholding of information might lead to death, serious injury or the escape of a terrorist offender': Sally Broadbridge, [The Anti-Terrorism, Crime and Security Bill: Parts I, II, VIII, IX & XIII Property, Security & Crime](#), *Research Paper No. 01/99*, p. 56.
125. Lord Lloyd of Berwick, op. cit., Vol. 1, p. 94.
126. Terrorism Act 2000, section 19.
127. Ibid, section 38B.
128. Ibid, subsection 19(5).
129. President George W. Bush, [Use of Military Force Joint Resolution](#), 18 September 2001.
130. Exercising his power under the Constitution as Commander in Chief of the Armed Forces, and pursuant to the [Use of Military Force Joint Resolution](#) and his powers to prescribe court martial rules (10 U.S.C. 821 and 836): President George W. Bush, [Military Order](#), 13 November 2001, Federal Register Vol. 66 No. 222.
131. [Military Order](#), section 2.
132. It did not adopt a statutory definition of 'international terrorism'. Instead it referred to '[acts of] international terrorism ... that have caused, threaten to cause, or have as their aim to cause, injury to or adverse effects on the United States, its citizens, national security, foreign policy, or economy': [Military Order](#), section 2.
133. [Military Order](#), subsection 4(a).
134. Ibid, subsection 4(c)(2).
135. Ibid, subsection 4(c)(3).
136. Ibid, subsection 4(c)(2).
137. Ibid, paragraph 7(b)(2).
138. Ibid, subsection 7(c).
139. United States. Department of Defence, [Procedures for Trials by Military Commissions of Certain Non-United States Citizens in the War Against Terrorism](#), March 21 2002.
140. [Procedures for Trials by Military Commissions](#), paragraph 5(B).
141. Ibid, paragraph 5(C).
142. Ibid, paragraph 5(D).
143. Ibid, paragraph 5(F).
144. Ibid, paragraph 5(H).
145. Ibid, paragraph 5(I).

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- 146 Statement of Laurence H. Tribe Tyler Professor of Constitutional Law Harvard Law School Before the Senate Judiciary Committee December 4, 2001.
- 147 10 U.S.C. 831.
- 148 10 U.S.C. 827.
- 149 10 U.S.C. 846.
- 150 Anti-Terrorism Act (CA), section 4, inserting subsection 83.28(5) into the Criminal Code.
- 151 Ibid., inserting section 83.29 into the Criminal Code.
- 152 Ibid., inserting subsection 83.3(8) into the Criminal Code.
- 153 Ibid., inserting subparagraph 83.28(4)(b)(iii) into the Criminal Code.
- 154 Ibid., inserting subsection 83.28(3) into the Criminal Code.
- 155 Ibid., inserting subsection 83.28(8) into the Criminal Code.
- 156 Ibid., inserting subsection 83.28(10) into the Criminal Code. There are two exceptions for the protection in subsection 83.28(10) relating to prosecutions for evidence which is misleading or contradictory (sections 132 and 136 of the Criminal Code).
- 157 Ibid, inserting subsection 83.28(11) into the Criminal Code.
- 158 For example, in one of the reviews of the United Kingdom legislation, it was noted that the duty to disclose conflicts with common law rules regarding the making of self-incriminating statements. The common law rule was that 'once a person has made a self-incriminating statement he may not be asked any further questions, except by way of clarification'. This obviously conflicted with an ongoing duty to provide information 'even if it relates to what "any other person" has done': Viscount Colville of Culross QC, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions Act 1984)*, 1987, Cm. 264, p. 50.
- 159 Viscount Colville of Culross QC, op. cit., p. 50; Lord Jellicoe, *Review of the Operation of the Prevention of Terrorism (Temporary Provisions Act 1976)*, 1983, Cmnd. 8803, para 231.
- 160 New South Wales. Law Reform Commission, 'Review of Section 316 of the *Crimes Act 1900* (NSW)', [Report No. 93](#), 1999, [Chapter 3](#), paras. 3.18–3.48.
- 161 New South Wales. Law Reform Commission, op. cit., paras. 2.9–2.12; Walker, op. cit., p. 106; Lord Lloyd of Berwick, op. cit., Vol. 1, p. 93.
- 162 New South Wales. Law Reform Commission, op. cit., para 3.14; Lord Lloyd of Berwick, op. cit., Vol. 1, p. 94.
- 163 New South Wales. Law Reform Commission, op. cit., para. 3.46.
- 164 Ibid, recommendation 1; Lord Lloyd of Berwick, op. cit., Vol. 1, p. 94.
165. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001 (emphasis added).
166. Prevention of Terrorism (Temporary Provisions) Act 1974, subsection 7(1). A 'related offence' is one related to membership, etc. of a proscribed organisation or an offence related to an exclusion order.

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167. Ibid, subsection 7(2).
168. Between 1974 and 1990 6932 persons were detained under the Prevention of Terrorism (Temporary Provisions) Act 1974 (UK). Of those 6000 were released without further action, most within 48 hours: David Clark and Gerard McCoy, *The Most Fundamental Legal Right: Habeas Corpus in the Commonwealth*, Clarendon Press, Oxford, 2000, p.59.
169. 'One consequence of these short incarcerations is that habeas corpus is generally not available – not as a matter of law, but as a matter of practice – because the courts generally adjourn ex parte applications in order to notify the Crown. By the time this has been done the period of detention has passed and it is trite law that since the legality of the detention is to be determined at the time of the reading of the return, a person released by that time will have no case for the issuance of the writ': *ibid.*
170. Terrorism Act 2000, Schedule 8, clause 32.
171. Section 115 introduced section 38A to the Terrorism Act 2000.
172. Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001.
173. [Pub. L. 107-56](#), section 412.
174. *Ibid.*
175. 8 U.S.C. 1182(a)(3)(B).
176. 8 U.S.C. 1182.
177. [Pub. L. 107-56](#), section 411, amending 8 U.S.C. 1182(a)(3).
178. [ibid.](#), section 412.
179. *R v. Secretary of State for Home Department; Ex parte Khawaja* [1984] AC 74 at p. 111, where Scarman LJ said 'judicial review ... is available only by leave of the court. The writ of habeas corpus issues as of right. But the difference arises not in the law's substance but from the nature of the remedy appropriate to the case [the fact that the party has to show that detention is unlawful] effectually puts habeas corpus in like case with the other form of judicial review'. Thus, a decision authorising detention will be reviewed for compliance with statutory conditions which regulate the power to detain (*R v. Secretary of State for Home Department; Ex parte Khawaja* [1984] AC 74, per Scarman LJ at pp. 110-112; *R v. Governor of Brixton Prison; Ex parte Ashan* [1969] 2 AB 222, cited in *Truong v. Manager, Immigration Detention Centre, Port Hedland* (1993) 31 ALD 729, per Malcolm CJ and Seaman J, at p. 731); for compliance with procedural fairness obligations (*Re Minister for Immigration and Multicultural Affairs; Ex parte Ervin* (unreported, HCA, Brennan CJ, 11 July 1997)) and, potentially, for apprehended bias (*Re WE Adcock* (1890) 24 SALR 3, per Boucaut J). See generally David Clark and Gerrard McCoy, *Habeas Corpus: Australia, New Zealand and the South Pacific*, The Federation Press, Sydney, 2000, pp. 147–171.
180. Anti-Terrorism Act (CA), section 4, inserting section 83.3(4) into the *Criminal Code*.
181. *Ibid*, inserting subsection 83.3(6) into the *Criminal Code*.
182. *Ibid*, inserting subsection 83.3(3) into the *Criminal Code*.

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- 183 Ibid, inserting subparagraph 83.3(7)(b)(ii) into the *Criminal Code*.
- 184 Ibid, inserting subsection 83.3(8) into the *Criminal Code*.
185. 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.
186. *Chu Keong Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 per Brennan, Deane and Dawson JJ at pp. 28–29 (emphasis added).
187. Ibid., at p. 33.
188. 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.
- 189 Article 9(1).
190. *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).
- 191 *Chic Fashions v. Jones* [1968] 1 All ER 229; *Ghani v. Jones* [1970] 1 QB 693; *Reynolds v. Commissioner of Police of the Metropolis* [1985] 2 WLR 93. In Australia see generally *Parker v. Churchill* (1985) 63 ALR 326.
- 192 Australian Law Reform Commission, *Criminal Investigation: An interim report*, AGPS, Canberra, 1975, Chapter 7, Keith Tronc, Cliff Crawford and Doug Smith, *Search and Seizure in Australia and New Zealand*, Law Book Company, Sydney, 1996, Chapter 1.
- 193 For example, Commissioner of Police.
- 194 ALRC, op. cit, para 191–192; Tronc, et al, op. cit, pp. 58–62.
- 195 'There is no requirement...that before the powers are exercised an independent judicial mind should consider the circumstances of the *particular case*, weighing the public interest as against that of the individual...Nor is there any effective way in which any of the powers once exercised can be the subject of *ex post facto* judicial review': ALRC, op cit, para 192.
- 196 Canadian Law Reform Commission, *Report on Search and Seizure*, 1984, p. 10 quoted in Tronc, et al, op. cit, p. 48.
- 197 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.
- 198 *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.
- 199 *Lindley v. Rutter* [1981] QB 128, per Donaldson LJ, at p. 135.
- 200 Tronc, et al, op. cit, p. 28. This principle has been clear since cases of *Bessell v. Wislon* (1853) 17 JP 52; *Reg. v. Naylor* [1979] Crim LR 532; and *Lindley v. Rutter* [1981] QB 128.

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- 201 '[I]f a person should [not] be charged with an offence ... [but] a warrant issued against him not charging him with any crime, but merely to make him appear in person, the act of searching him is contrary to law. It is said that the search here was justified, because the person in custody might have some instrument about him with which he might make away with or injure himself, or the [person] before whom he was brought. This does not appear to be a satisfactory reason': *Lindley v. Rutter* [1981] QB 128 per Donaldson LJ at p. 133 quoting from Campbell LJ in *Bessell v. Wislon* (1853) 17 JP 52 at p. 52.
- 202 The International War Crimes Tribunal Act enables a police officer to carry out a strip search after a person has been arrested or brought to a police station under warrant. The circumstances in which a strip search is permitted and the rules under which it must be conducted are set out in sections 71 and 72 of the Act.
- 203 Sections 413 and 427.
- 204 Sections 4, 64A and 64N.
- 205 See generally, Jennifer Norberry and Nathan Hancock, 'Migration Legislation Amendment (Immigration Detainees) Bill 2001', [Bills Digest No. 131, 2000-01](#).
- 206 *Crimes Act 1914*, section 3C.
- 207 *Ibid.*, section 3C.
- 208 *Ibid.*, section 3C.
- 209 While the relevant provisions in the Customs Act do not refer to a person being required to remove some or all of their clothing, the power to conduct an external search is said to be equivalent to a power to strip search.
- 210 *Customs Act 1901*, section 4.
- 211 *Ibid.*, subsection 3ZH(1).
- 212 *Ibid.*, paragraph 3ZH(2)(c).
- 213 *Ibid.*, subsection 3ZH(6).
- 214 *Crimes Act 1914*, subsection 3ZH(3).
- 215 *Crimes Act 1914*, subparagraph 3ZI(1)(f)(i).
- 216 An interview friend is defined by *Butterworths Encyclopaedic Legal Dictionary* as 'a relative or person chosen by or provided to a suspect for the purposes of being present during the course of an interrogation by police or other investigating officials.'
- 217 See Part 1C.
- 218 *Australian Security Intelligence Organisation Act 1979*, subsection 27A(1).
- 219 *Crimes Act 1914*, section 3C.
- 220 *Ibid.*, paragraph 3ZI(1)(e).
- 221 *Ibid.*, paragraph 3ZI(1)(f).
- 222 *Ibid.*

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223. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 94.
- 224 Greg Carne, 'Serious flaws in Bills to counter terror', *The Canberra Times*, 15 April 2002.
- 225 *R v. Kirby Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
- 226 *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.
- 227 *Huddart, Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 357.
- 228 *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.
- 229 *Grollo v. Palmer* (1995) 184 CLR 348 per Brennan CJ and Deane, Dawson and Toohey JJ at pp. 360–365.
- 230 *Ibid.*, at p. 365, quoting from *Mistretta v. United States* 488 (1989) US 361 at 404.
- 231 *Ibid.*
- 232 488 U.S. 361, 407 (1989).
- 233 *Australian Security Intelligence Organisation 1979*, section 34.
- 234 Tom Sherman, '[Terrorism – A Disease in Search of a Cure](#)', Mayo Lecture delivered at James Cook University, Townsville on 9 November 2001.
235. Lord Lloyd of Berwick, *op. cit.*, Vol. 2, p. 58.
236. *Ibid.*, p. 63.
237. Lord Lloyd of Berwick, *op. cit.*, Vol. 1, p. 8.
238. *Ibid.*, p. xi.
239. Resolution 1373, para 1(a), 1(b) and 2(e).
240. The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001 (emphasis added).
241. *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.
242. See generally *Halsbury's Laws of Australia*, 'Title 130 – Criminal Law' [130-17000].
243. *Lowe v. R* (1984) 154 CLR 606 at 612. See generally *Halsbury's Laws of Australia*, 'Title 130 – Criminal Law' [130-17025].
- 244 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, per McHugh J at p. 122.

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