Australian Government
Attorney-General's Department

Security and Critical
Infrastructure Division

04/1113

22 June 2005

Ms Margaret Swieringa
Secretary
Parliamentary Joint Committee on ASIO, ASIS and DSD
Parliament House
CANBERRA ACT 2600

Dear Ms Swieringa

Review of ASIO's questioning and detention powers

I am writing to provide further information to the Committee about issues raised in submissions and in the Committee's public hearings on the review of ASIO's terrorism-related questioning and detention powers.

Constitutional issues

A number of submissions and some of the witnesses have raised issues concerning the constitutionality of the legislation, and the Committee has expressed a desire to obtain further details of the Government's legal advice on this issue.

I note that, at the request of the relevant committees, some details were provided in letters of 8 May 2002 and 12 June 2002 to this Committee and the Senate Legal and Constitutional Legislation Committee respectively (copies of those letters are at **Attachment A**).

The constitutional issues were considered at length when the legislation was being enacted. The Government was confident at that time that the provisions were constitutionally valid, and advice confirmed that was the case. Nothing has changed to alter this view. In forming this opinion, the Department has consulted with the Chief General Counsel of the Australian Government Solicitor, who has read the relevant submissions and the transcripts for the relevant witnesses.

The Chief General Counsel has concluded that, while there is room for argument, the submissions fail to pay adequate regard to the immigration detention cases recently decided by the High Court and the specific safeguards built into the regime.

Those recent decisions confirm that detention for a non-punitive purpose will not offend Chapter III of the Constitution. ASIO's detention powers, while defined by reference to terrorism offences, are

conferred for non-punitive purposes, including protecting the community by obtaining critical information about terrorist related activity. This is activity that causes serious consequences (s 100.1(2)) of the Criminal Code) and requires other special characteristics as well (s 100.1(1)). Protection against offences of this nature can require exceptional protective measures. The powers are not conferred for purposes of criminal prosecution and punishment. Hence, legal advice rejects the suggestion that the detention powers are inconsistent with Chapter III of the Constitution based on the separation of powers doctrine. This issue was dealt with in the earlier letters. It remains our view that the detention authorised under the legislation is not punitive in nature.

Some submissions have pointed to a longer period of detention under a warrant (seven days instead of the previous 48 hours) and further terrorism offences to which the powers are linked as a reason for now questioning the constitutional validity. According to our advice, these factors do not change the conclusion about the constitutionality of the legislation. The factors mentioned in the earlier letters are still applicable, including:

- the intelligence gathering purpose of the regime
- the relatively short and clearly limited period of detention under a warrant
- the requirements for, and safeguards surrounding, the obtaining of detention warrants and warrants for further periods of detention
- the rights and protections accorded to detained persons, and
- the obligation to desist action under a warrant when the grounds on which it was issued have ceased to exist.

These aspects relate to the need for proportionality. This requires that detention will only be valid if the detention regime is reasonably appropriate and adapted to achieving a purpose within power. In applying this test, a whole range of factors are relevant. According to our advice, the legislation is on strong constitutional ground, taking into account all the relevant circumstances and the fact that the existing legislation contains significant safeguards designed to ensure detention only occurs for a period reasonably necessary to ensure the effectiveness of the intelligence gathering regime.

In particular, the regime requires that safeguards be complied with at all stages. These requirements include judicially reviewable standards of satisfaction at critical stages involving decisions to detain or continue detention and any decision to limit the ability to communicate. On this basis, the Chief General Counsel considers the regime is proportionate and supported by relevant heads of legislative power, which are outlined in the letter of 12 June 2002.

In addition, the Chief General Counsel does not consider validity is dependent on ‘degree of risk’, such as may arise more directly with certain measures based principally on the defence power. The need for proportionality is reflected rather in the fact that the regime is confined to obtaining information about terrorist activity (which, by definition, involves extraordinary activity) and by the various limitations and safeguards that form an integral part of the legislation.

Secrecy provisions – concerns about breadth and suggested alternative model

Concern has been expressed in a number of oral and written submissions about the breadth of the secrecy offences and a different model to restrict information disclosure has been suggested along

the lines of that used in the Australian Crime Commission (ACC) regime[1]. This model would involve conferring an independent person with the ability to make a determination that strict restrictions be applied on a case-by-case basis rather than what has been referred to as a blanket restriction on disclosure. This determination would be similar in nature to a 'suppression order' made by a court. There are differing views about the appropriate person to make such a determination, with some suggesting that it should be the prescribed authority and others suggesting that it should be the issuing authority.

In a fast moving and complex security situation involving terrorist networks, there is a need to ensure that ASIO investigations into those networks are not compromised. Of particular importance in this context are persons who hold relevant information but who may not necessarily be involved with the terrorist network. These types of investigations may easily be compromised if a person alerts others regarding matters ASIO has questioned them about, even though those persons may not actually be involved in a potential terrorism offence or indeed may not be fully aware of the significance and potential reach of the information.

An investigation may also be compromised where an organisation, including the media, publishes information about that investigation. In dealing with threats from terrorism, it is not sufficient to rely upon the good sense or the responsibility of individual journalists or other decision-makers to get it right every time. They cannot be expected to be able to make fine judgements as to the extent to which information relating to investigations into terrorism may compromise the investigations, or otherwise threaten security. It is worth remembering that the degree of damage to the security of Australians caused by a disclosure of sensitive information does not depend on the motives of the discloser. An inadvertent disclosure, or one made with the best intentions, could cause the same level of damage as one made with malevolent intent.

Accordingly, it is necessary to ensure that there is a strong, effective and workable regime to protect genuinely sensitive information from unauthorised disclosure. We believe the current regime in the *Australian Security Intelligence Organisation Act 1979* (ASIO Act) meets this test. The question is whether the model suggested by Mr Tham and others would meet the objectives in a more effective way. Our view is that it would not.

A regime to prevent disclosure that is similar to the ACC model is not feasible in the context of ASIO's questioning proceedings. It would require ASIO to make an assessment, and then the independent party to make a determination, as to what information may or may not be disclosed at each step of the process. This would be unworkable in practice. ASIO would need to ask, at each relevant point, that information about the warrant, or about the information disclosed under the warrant, be prevented from disclosure. This would require additional procedural time while a person is being questioned (if it is the prescribed authority making the determination), or a break in questioning to go back to the issuing authority, who is a current serving federal judge or magistrate and may not be immediately available (if it is the issuing authority making the determination). It would add a further layer of administrative complexity to achieve the same outcome as at present under the secrecy provisions. In addition, it would detract from the objective of the regime, which is to get important information about terrorism offences as quickly as possible but in a way that involves the person being questioned or held for no longer than is necessary. Reliance on such case-by-case determination about non-disclosure, rather than the existence of strong secrecy

[1] See Mr Joo-Cheong Tham and Mr Stephen Sempill, submission number 35, at page 23, and Mr Tham, transcript, 7 June 2005 hearing, at page 15. Mr Tham's view was endorsed by Professor George Williams, transcript, 20 May 2005 hearing, at pages 35-6.

offences, may also lead to ASIO being more inclined to seek to detain a person where they assess there is a risk of disclosure.

In these circumstances, such an alternative model should only be considered if the current regime is clearly demonstrated to be deficient. We do not accept the proposition that the current secrecy provisions are so broad as to amount to a complete blanket over disclosure or reporting of ASIO's activities. In our view, the proponents of an alternative model have not considered the provisions as a whole but have instead focused on the perceived breadth of particular provisions in isolation.

A close examination of the current provisions reveals that they are responsibly framed and balanced. First, the objectives of the provisions need to be considered. The secrecy provisions are designed to achieve the objective of protecting the effectiveness of intelligence gathering operations in relation to terrorism offences. By their very nature, such investigations will always involve sensitive information that could cause grave damage if disclosed.

The first offence (s 34VAA(1)), which operates only while a warrant is in force (up to 28 days), prevents a person from disclosing information without authorisation where the information relates to the warrant, the questioning or detention of a person under the warrant, or operational information. It is clear that disclosure of this kind of information while a warrant is in force could have significant implications for the integrity of the questioning process under the warrant, it could compromise related investigations, and it could also conceivably place the person questioned in danger.

The second offence (s 34VAA(2)), which operates for two years after a warrant ceases to be in force, prevents a person from disclosing operational information without authorisation where that information has been obtained as a direct or indirect result of a warrant being issued or executed. This offence is designed to protect ASIO's sources and holdings of intelligence and its methods of operations. It is necessary to protect against the disclosure of this kind of information after a warrant ceases to be in force because of the potential to seriously affect ongoing or related investigations. The release of this kind of information could jeopardise terrorism investigations and seriously impact on ASIO's ability to perform its job.

There have been some suggestions that the two year period in this context is unreasonable. The serious security interests would suggest that a longer period may be safer. Indeed a longer period was considered when the legislation was being drafted, and consideration was given to the ACC regime where restrictions on disclosure apply by default for *five* years unless specifically cancelled.[2] It is also worth noting that at least one proposal put forward during debate on the new questioning and detention powers suggested secrecy provisions that would apply indefinitely. However, in recognition of the competing interests and the need for a balanced approach, agreement was reached on the two year period which was considered to be no longer than what was really needed to meet the objectives of adequately protecting terrorism-related investigations.

There have also been suggestions that 'operational information' in this context is too broad. The term 'operational information' used in the secrecy provisions covers information ASIO has or had, a source of information or ASIO's operational capabilities, methods or plans. While this may appear broad on its face, it must be read in context with the other elements of the offence. In order to commit an offence for the disclosure of operational information, a person must have obtained the information as a direct or indirect result of a warrant being issued, or as a result of anything

[2] Subsection 29B(5) of the *Australian Crime Commission Act 2002*.

authorised under the ASIO Act in connection with the warrant. A close examination of the elements of the secrecy offences also shows that a successful prosecution could not be brought against a person who discloses information in truly innocent circumstances and is not culpable for any deliberate or reckless disclosure.

We note there has been some concern expressed about the maximum penalty of five years imprisonment in these provisions. The five year penalty is consistent with the other offences in section 34G of the ASIO Act. These include where a person fails to attend for questioning or provides information that is false or misleading. Given the seriousness of passing on operational information, which may compromise an investigation, it is appropriate that the penalty be consistent to ensure the provisions are an effective deterrent.

Referring to the current provisions as a complete blanket over the information ignores the reality. The offences do not apply for an indefinite time period but instead have time limits that are reasonable and appropriate. In addition, there is a 'permitted disclosures' regime (s 34VAA(5)) which enables a range of disclosures to be made.

These permitted disclosures ensure that the rights of a subject of a warrant are maintained while appropriately protecting sensitive information. It is through these provisions that warrant subjects are able to make disclosures if appropriate in certain circumstances, including for the purpose of making complaints about their treatment or in seeking legal advice.

Some concern has been expressed about detained persons not being able to inform their employer or family members. However, these provisions are flexible enough to allow such contact in appropriate circumstances. As the then Director-General of Security, Mr Dennis Richardson has stated[3], there are cases where it is against the objectives of the legislation for the employer or other people to be advised. But in cases where a warrant subject has good reasons for contacting their employer or another person and there are no genuine security concerns about such contact, the current provisions would allow such a disclosure to be permitted (for example, by the prescribed authority or the Director-General of Security). It is also worth noting that we understand that, to date, ASIO has been flexible (where possible) in working around subjects' work commitments and other obligations. Mr Richardson has also made the comment that it is not in ASIO's interests for people to lose their jobs.[4] The current regime does allow for some flexibility, and with the Inspector-General of Intelligence and Security (IGIS) oversight and other safeguards we would expect ASIO to continue to be flexible where appropriate and feasible within national security constraints.

There have been some discussions about the impact of the current secrecy provisions on the freedom of the press. However, when asked directly whether the secrecy provisions have "chilled the debate", the Australian Press Council and other media representatives were not able to point to any instances where information obtained by journalists was not able to be published due to the secrecy provisions.[5]

The Brigitte investigation and surrounding publicity in 2003 illustrates the need for strong and broad secrecy provisions. News articles released at that time demonstrated the propensity of the

[3] Transcript, 19 May 2005 hearing, at page 18.
[4] Transcript, 19 May 2005 hearing, at page 19.
[5] Transcript, 6 June 2005 hearing, at page 6.

media to put many sensitive details about the investigation into the public arena.[6] Some of the information was attributed as being sourced from another country. This itself raises issues about the potential effectiveness of a suppression order type of regime, where it would be very difficult to frame appropriate limits to such an order. By contrast, the current secrecy offences have adequate geographical coverage (s 34VAA(4)) in recognition of the fact that unauthorised disclosures outside Australia can lead to further communications that may compromise terrorist investigations in Australia. We note that since the secrecy provisions were enacted in December 2003, there seems to have been a reduction in the amount and detail of information published about ASIO questioning proceedings and investigations.

In our view comparisons to the ACC non-disclosure regime are flawed. The ACC regime is used to investigate criminal matters with the intention that persons involved in offences be prosecuted. This is different to the complex intelligence environment where the intention is to collect information that may be relevant to a terrorism offence. Much, if not all, of the information in this context will be potentially sensitive, and it could therefore be expected that ASIO would seek suppression orders on a continual and regular basis. This would clearly be impractical and distracting for the investigating officials who need to be focused on the substance of the investigation and assessing the extent to which there is a danger to the Australian community.

A case-by-case examination brings further difficulties in the intelligence context. Quite often, one piece of information may appear innocuous by itself. However, if it is disclosed and combined with other information, it may compromise investigations and have a serious impact on national security. This impact may not be readily apparent to a decision-maker who is unfamiliar with the complete investigation or the entire security context.

For these reasons, we are strongly opposed to an alternative non-disclosure regime. The current secrecy regime was framed with all of these considerations in mind and it was a response to genuine concerns about the integrity and effectiveness of the regime. We believe it is a strong, effective and workable regime to protect genuinely sensitive information from unauthorised disclosure. It includes appropriate preventive and deterrent mechanisms, while also maintaining the rights of subjects and accommodating legitimate exceptions – which may include those in the public interest – through the system of permitted disclosures.

Automatic provision of legal aid

A number of submissions and witnesses did not seem to understand that there is already a financial assistance regime in place to cover the subjects of questioning and detention warrants, and it has been utilised in all questioning cases to date without any problems.

This Department's first submission to the Committee (4 April 2005) set out the basis for the financial assistance that is available through this Department (not legal aid commissions) for subjects of questioning or detention warrants. Despite this information being clearly stated on the public record, it appears that some persons giving evidence at the public hearings were confused about the funding mechanism for persons to be legally represented during questioning proceedings. For instance, Mr Simon Moglia, Associate Public Defender of Victoria Legal Aid, appeared to confuse funding provided by the Commonwealth to the States and Territories for legal aid purposes

[6] See, for example, Deborah Snow, "Deep Cover Down Under", *The Sydney Morning Herald*, 1 November 2003 and Charles Miranda, "Sleeper with a mission of hate", *The Daily Telegraph*, 1 November 2003.

generally with the Special Circumstances Scheme of financial assistance, which specifically covers persons questioned or detained under the ASIO Act.[7]

In addition, some submissions raised the possibility of an automatic provision of legal aid.[8] The IGIS also suggested in the public hearings that a capped provision of legal aid be implemented.[9]

On 12 September 2003, the former Attorney-General, Mr Daryl Williams AM QC, agreed that a person who is the subject of a warrant issued under the ASIO Act may be eligible for financial assistance, and that the applicant's financial circumstances would not be a relevant consideration in deciding whether to make a grant for those purposes. The Special Circumstances Scheme of financial assistance administered by the Legal Assistance Branch of this Department was considered the appropriate vehicle to deliver the assistance. Other bodies, such as Victoria Legal Aid, are not involved in the granting of such applications. Similarly, legal aid funding issues are not relevant to the grant of assistance under this scheme.

The Special Circumstances Scheme is an administrative (non-statutory) scheme for financial assistance. It provides for financial assistance to be authorised where the matter in question is not covered by an existing statutory or non-statutory scheme, and there are special circumstances in the particular case that lead to the conclusion that the Commonwealth should make a payment.

Persons subject to a warrant for detention or a warrant for questioning are **automatically eligible** to apply for financial assistance for the legal costs and related expenses associated with compliance with the warrant under the Special Circumstances Scheme. Assistance is available to cover reasonable legal costs and related expenses that have been properly incurred, payable at 80% of the Federal Court Scale set out in the Federal Court Rules. Junior counsel's fees are paid up to a maximum of $1,600 per day (excluding GST), depending on the experience of counsel. The costs of counsel are allowed in circumstances where the delegate is satisfied that a solicitor is unable to adequately represent the interests of the client.

Most legal assistance schemes are discretionary and require an assessment of the applicant's means and the merits of the relevant proceedings. As mentioned above, 'means' are expressly disregarded in the case of an application from a person who is the subject of a warrant issued under the ASIO Act. As warrants issued under the ASIO Act are for the purposes of intelligence gathering rather than being connected to any legal proceedings, the assessment of 'merit' is not a relevant factor for an application from such a person. In addition, the ambit of the Special Circumstances Scheme is quite extensive. Accordingly, as noted in the public hearings of the Committee, in practice all persons seeking financial assistance have been granted appropriate assistance.

The fact that a grant of financial assistance remains discretionary (rather than becoming an automatic right) is central to maintaining a level of control and oversight to the level of expenditure under the limited appropriation that is available for the operation of the Special Circumstances Scheme. In practice, maintaining the present system does not present any practical adverse effect for persons who are the subject of an ASIO warrant, while providing an important level of control over the expenditure of public money. Accordingly there is no compelling argument for adopting the proposal for the automatic provision of legal aid.

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[7] Transcript, 7 June 2005, at pages 35-36 and 38-39, and submission number 47, at page 4. See also, HREOC, submission number 85, at page 23.

[8] See, for example, HREOC, transcript, 20 May 2005 hearing, at page 14; and submission numbers 55, 67, 74, and 85.

[9] Transcript, 20 May 2005 hearing, at page 3.

Witness expenses

The issue of witness expenses was raised by the Committee in the public hearings on 19 and 20 May 2005. In particular, Mr Carnell suggested in his written submission and in his oral testimony that the Committee consider whether reasonable expenses should be paid to persons required to attend for questioning in some instances. Mr Carnell justified his suggestion by reference to a person who has difficulty arranging to take paid leave from work. We note that there are also out of pocket expenses for people who are self-employed or who have child raising responsibilities.

The issue involves consideration of two types of expenses. There are expenses that a person would incur that could be described as conduct money, such as travel, accommodation or sustenance costs incurred in complying with a warrant. In addition there are costs a person may incur in the form of reimbursement for lost wages, income from self employment, or child care expenses which are more in the nature of compensation.

At present there is no mechanism by which a person can claim either type of expenses. Payment of such expenses has no apparent connection with the rationale underlying a scheme for financial assistance as schemes of financial assistance, such as the Special Circumstances Scheme, are directed toward promoting access to legal advice and access to justice more generally.

Our understanding is that the payment of these kinds of expenses is generally done in other regimes by the responsible operational agency, if such a payment is in fact made.

Quite apart from practical considerations, arguments can be made at a general level for responsibility for compensation-type payments to rest with the relevant operational agency. If such an agency were not to be required to compensate people appropriately, it could be seen as removing an incentive for the agency to minimise the potential disruption of the person's income earning activities.

An example I noted in the public hearings was that of the ACC, which currently may dispense such funds in its regime. This is in accordance with section 26 of the ACC Act, which provides that a witness appearing before an examiner shall be paid by the Commonwealth in respect of the expenses of his or attendance.

The amount payable is an amount which may be prescribed in regulations or as the Chief Executive Officer of the ACC determines. Regulation 5 and Schedule 2 of the *Australian Crime Commission Regulations 2002* provide for persons questioned as a witness to be paid an amount set out in Schedule 2 of the High Court Rules. Relevantly, witness expenses are provided for at item 50 of the Rules at a rate of $93.20 per day. I note that it is the ACC that pays various witness expenses in accordance with that provision. I understand that in practice witness expenses are not often paid as the ACC requires that a person demonstrate that costs have been incurred as a result of being questioned and assesses those costs against its own internal policy procedures.

Mr Carnell suggested in the public hearings that this Department would be well placed to administer a scheme to provide for conduct money and compensation, and that perhaps only "modesty" on my part prevented me putting that forward.[10] In fact, I made it clear that it is the

[10] Transcript, 20 May 2005 hearing, at page 3.

usual practice for the operational agency to dispense such funds unless the organisation can point to practical problems why it could not facilitate such payments.[11] Mr Richardson did not raise any objection on security grounds to payment of witness expenses being made. Mr Richardson stated that:

> Certainly, we would not have any issue from a security perspective. Indeed, it is in [ASIO's] security interests not to have people unfairly dismissed from jobs, as that can have other consequences for us.[12]

Mr Richardson raised an alternative suggestion that it could be the prescribed authority who decides on the payment of witness expenses.[13] Our view is that such a regime may create practical difficulties, and it does not easily sit with the nature of the prescribed authority's role.

It is the role of the prescribed authority to supervise the questioning of the subject of a warrant, inform the person of their rights, and ensure the terms of the warrant, the ASIO Act and the Protocol are complied with. This overseeing function of the prescribed authority does not involve contact beyond the scope of the questioning proceedings with the person questioned to ensure the position is independent. It would not be desirable to blur that role. In addition, a person would need to demonstrate to the prescribed authority during the questioning proceedings that the person has in fact incurred costs amounting to conduct money or that compensation is required. This would not be an appropriate use of time when a person is questioned.

If it is decided that a witness expense-type scheme should be adopted, it is important that any such scheme operate in a simple and straightforward manner and in a way that does not require major deliberation. A system similar to that operating in the court environment, which involves flat rates when a person can demonstrate that they are out of pocket, would be appropriate.

In deciding the threshold question as to whether a witness expense-type scheme is appropriate, the Committee may wish to consider the appropriateness of compensating persons who are unwilling to cooperate with ASIO officers in their investigations. If persons were compensated to attend questioning proceedings under a warrant, there is a question about what happens to the effectiveness of interviews that are conducted with persons who cooperate with ASIO officers, as these persons generally do not receive any compensation for their time. This could possibly result in persons being less cooperative during an interview as those persons would be paid to attend questioning proceedings under a warrant.

The Committee may also wish to consider the merits of paying compensation to persons questioned. For instance, there may theoretically be some merit in the argument that a person who holds relevant intelligence, and who has a bona fide reason for not disclosing that information voluntarily, should be compensated for their time away from their job or their out-of-pocket expenses. However, this suggestion needs to be balanced against the case where a person is paid compensation for lost time when that person is involved in planning a terrorism offence.

The Department does not see any merit in the proposal that witness expenses in the nature of compensation for lost time or wages should be paid. Contrary to the IGIS's view expressed at the public hearing that there is no policy argument against some sort of scheme,[14] and that the

[11] Transcript, 19 May 2005 hearing, at pages 18-19.
[12] Transcript, 19 May 2005 hearing, at page 19.
[13] Transcript, 19 May 2005 hearing, at page 19.
[14] Transcript, 20 May 2005 hearing, at page 3.

Department is the appropriate body to dispense such compensation, the Department does consider there to be a downside. If there is to be a scheme, the Department is of the view that it should only be flat rate witness expenses that should be covered (such as the flat rate for witness expenses set out in the High Court scale used by the ACC regime and in court proceedings) and that ASIO should administer any such scheme.

Sunset provision / review mechanisms

There has been considerable discussion about whether there is an ongoing need for some form of sunset provision and the possibility of other review mechanisms.

As noted in our 4 April 2005 submission, our view is that the current national security and counter-terrorism environment justifies the continued need for the powers and that the sunset clause should be removed. This view was endorsed by the then Director-General of Security at the 19 May 2005 hearing.

As explained at that hearing, the Department is also concerned about the inflexible nature of sunset clauses when they coincide with a time of national crisis. A sunset clause based review is resource intensive and could distract resources from protecting the Australian community to the review and urgent re-enactment of vital legislation to avoid the lapsing – due to an automatic sunset provision – of the legislation at a crucial time. In addition, we are also concerned that the consideration of the legislation could occur in a potentially emotion-charged environment, and that the inflexibility of a specific date could be significant in the minds of those who might be seeking to breach these laws. Our view is that if there is to be a review mechanism, it would be preferable to have a review process which would allow the legislation to be carefully considered in the absence of arbitrary time pressures that come with a sunset provision.

A number of different options have been suggested, including retaining a sunset provision but extending the time period to six or nine years[15], or removing the sunset provision and instead having various reporting and review requirements, such as an annual report to the parliamentary committee combined with more extensive parliamentary committee reviews on a regular basis (for example, every two or three years)[16].

An alternative suggested by Mr Duncan Kerr[17] would involve the parliamentary committee being able to disallow the legislation where it produced an unfavourable report on the legislation at one of its regular (every three to five years) reviews. The Committee could produce such a report if it was no longer satisfied that the legislation was being used appropriately or that it was still necessary.

We disagree with this proposal. Apart from the practical difficulty of formulating a workable and acceptable provision to give effect to the proposal, we do not consider it appropriate from a constitutional point of view for a parliamentary committee to effectively be able to disallow an Act of Parliament. Conferring such a power on a parliamentary committee would effectively usurp the role of Parliament in an unprecedented and unjustifiable way.

[15] Mr Carnell, transcript, 20 May 2005 hearing, at page 2. Mr Carnell suggested that the Committee could conduct mid-point reviews every three years within these periods.
[16] Mr Richardson, transcript, 19 May 2005 hearing, at page 4.
[17] Transcript, 19 May 2005 hearing, at page 12.

Consequently, if it were a choice between a sunset clause and the alternative suggested by Mr Kerr, the Department would prefer the greater certainty of a sunset clause. However, given the impact of such a clause, the Department would prefer that any sunset clause involve a much more substantial period of time than the current clause.

It would still be our preference to have no sunset clause, and instead rely on ongoing reviews (for example, by this committee) and reports to Parliament. There are clearly different views on the timing of any such reviews. On this front, we note that ASIO has referred to the possibility of a review every three years,[18] but the Committee may consider that a longer period is appropriate. Any of these options would be preferable to the arbitrary time limit imposed by a sunset provision.

There is really no magic in a sunset clause. If there is any concern about the operation of the legislation (which may become evident through parliamentary committee reviews, reports or inquiries by the IGIS, or through other means), or if it becomes clear that the powers are no longer required (for example, through continual parliamentary committee reports that the powers have not been used and appear to be no longer necessary), then the Parliament can change or remove the legislation. This would achieve the objective of changing or removing the powers if the threat environment changes and the powers are no longer needed[19], but (as the then Director-General of Security noted[20]) without the artificiality and difficulties that may be caused by an arbitrary time limit imposed by a sunset provision.

Application only to 'serious terrorism offences'

A number of submissions and witnesses have expressed concern about the breadth of the terrorism offences for which a questioning and detention warrant can be sought, and there have been some suggestions that the warrants should apply only to 'more serious' terrorism offences.[21] As the Committee has rightly pointed out, there is an issue as to how to define a 'serious terrorism offence'.[22]

When the Committee has asked relevant witnesses how they would define a serious terrorism offence, many have conceded that it is a difficult issue. Most have expressed concern about the association offence. For instance, the HREOC representative and Mr Emerton noted the association offence as being of particular concern because it may extend to non-suspects and expressed concern at the breadth of the offences.[23] A representative from the National Association of Community Legal Centres also referred to the association offence and noted the potential application to non-suspects, but also even suggested that training with a terrorist organisation may not be

[18] Transcript, 19 May 2005 hearing, at page 4. Mr Richardson also suggested an annual reporting mechanism to the Committee would be a feasible option.
[19] For example, Mr Kerr, 19 May 2005 transcript, at page 12.
[20] Transcript, 19 May 2005 hearing, at page 12.
[21] See, for example, HREOC, transcript, 20 May 2005 hearing, at page 14, and submission number 85, at pages 16-18.
[22] Transcript, 20 May 2005 hearing, at page 16, and transcript, 7 June 2005 hearing, at pages 26-27.
[23] HREOC, transcript, 20 May 2005 hearing, at page 16, and Mr Emerton, transcript, 7 June 2005 hearing, at pages 26-29.

sufficiently serious.[24] Others preferred to answer the question by suggesting there should be some element of an imminent or immediate threat.[25]

Concerns about the Act targeting non-suspects in this context miss the point about the intention of ASIO's questioning and detention regime. As noted by the Acting Chair in response to HREOC's comment:

> But that is the purpose of the Act. A person does not necessarily have to be a suspect. The Act covers someone who may have or could provide information as to potential terrorist threats.[26]

It is also worth remembering that warrants would not have to be issued for people who volunteer information. The warrant process is designed to elicit information from those who are uncooperative and those who are not willing to help prevent terrorism offences.

As to whether certain offences are or are not 'serious terrorism offences', our view is that there is no such thing as a non-serious terrorism offence. All have high penalties and have consequences that relate to the violent activities of terrorists. The offence that has the lowest penalty (the association offence[27]) is still an indictable offence. The prosecution has to prove that a person intentionally associated with a person who is a member or who promotes or directs the activities of a listed terrorist organisation, where that association provides support that would help the terrorist organisation to continue to exist or to expand. A person who has an association of this nature could be a rich source of information, possibly in the preliminary planning stages, which could lead to the prevention of the sorts of attacks which are at the very heart of this legislation.

In some cases, the difference between a person associating with a terrorist organisation and, for instance, a person who is a member of[28] or providing support to[29] a terrorist organisation may only be marginal. Often a person who can provide relevant information about an association offence may also be able to provide relevant information about other terrorism offences. There might also be situations where such a person may, if not detained, alert a person involved in a terrorism offence about an investigation.

Apart from the difficulties of adequately defining a 'more serious terrorism offence', limiting the questioning and detention regime to such offences could undermine the effectiveness of the regime and cause operational and practical difficulties. Like the Acting Chair, we remain "unconvinced that you can separate the more serious terrorism offences from other offences"[30] for the purposes of the ASIO questioning and detention powers.

We are also not convinced that the threshold for issuing a warrant should be changed to rely on a concept like an imminent or immediate threat. Again, such suggestions miss the point of the

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[24] Transcript, 6 June 2005 hearing, at pages 32 and 33.
[25] For example, Public Interest Advocacy Centre, transcript, 6 June 2005 hearing, at pages 65 and 66 and submission number 90; Mr Emerton, transcript, 7 June 2005 at page 27; Mr Tham and Mr Sempill, submission number 35, and Mr Tham, transcript, 7 June 2005 at page 15; HREOC, transcript, 20 May 2005 hearing, at page 14.
[26] Senator Ferguson, transcript, 20 May 2005 hearing, at page 16.
[27] Section 102.8 of the Criminal Code. The maximum penalty is 3 years imprisonment
[28] Section 102.3 of the Criminal Code. The maximum penalty is 10 years imprisonment.
[29] Section 102.7 of the Criminal Code. The maximum penalty is 15 or 25 years imprisonment.
[30] Senator Ferguson, transcript, 20 May 2005 hearing, at page 22.

regime. As Mr Kerr has noted,[31] ASIO needs to use the powers not just when it knows there is an imminent threat but also where it has reached a point where its capacity to penetrate has been foiled.

There could be real practical difficulties with the tests that have been proposed as alternatives. It is our view that nobody has been able to articulate or demonstrate real problems with the current test, nor have they been able to propose a satisfactory and workable alternative.

International comparisons

Some submissions and witnesses have tried to make the argument that ASIO's questioning and detention regime is more severe than the regimes in like-minded countries. In particular, the argument has focused on the detention of "non-suspects".

As we and ASIO noted in the public hearings, it is necessary to examine the whole suite of legislation that is in place and the surrounding circumstances, not just particular provisions in isolation. Given that comparisons have been made with the United States, United Kingdom and Canada, it is worth further exploring their legislative provisions and case law to shed light on what can be done in those countries.

United States

It has been argued that the United States does not have equivalent ASIO detention powers. But our response is that the United States Government was able to put more than 1,200 people in custody in the United States following September 11, using both their material witness provisions and immigration laws to detain aliens suspected of having possible ties to terrorism.[32] These people were detained while their potential links to terrorism were investigated.

The United States Code[33] allows for the arrest and detention of persons whose testimony is material in a criminal proceeding where it is shown that it is impractical to secure the presence of that person by subpoena. There is no requirement for a person arrested and detained under this provision to be charged with a criminal offence, and therefore this provision can be used for both suspects and non-suspects who may have information or testimony relevant to a terrorism offence. The US Attorney General has publicly supported the use of the material witness provisions as vital to preventing, disrupting or delaying terrorism. Section 3144 does not specifically include any safeguards for the individuals detained. The section states that "release of a material witness may be delayed for a reasonable period of time until the deposition of the witness can be taken pursuant to the Federal Rules of Criminal Procedure."

In the recent US case of *Rumsfeld v Padilla*[34] a US citizen was apprehended in May 2002 within the United States by federal agents supposedly executing a material witness warrant issued by the United States District Court for the Southern District of New York, in connection with a grand jury

[31] Transcript, 20 May 2005 hearing, at page 17.
[32] 'The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks', Office of the Inspector General, June 2003, viewed 07/06/2005, <http://www.usdoj.gov/oig/special/0306/chapter1.htm>.
[33] Title 18, Section 3144.
[34] *Donald H. Rumsfeld, Secretary of Defense, Petitioner v. Jose Padilla and Donna R Newman as next friend of Jose Padilla*, No. 03-1027, Supreme Court Of The United States , 124 S. Ct. 2711; 159 L. Ed. 2d 513; 2004 U.S. LEXIS 4759; 72 U.S.L.W. 4584; 2004 Fla. L. Weekly Fed. S 466, April 28, 2004.

investigation into the September 11 attacks. The individual, through his appointed counsel, moved to vacate the warrant. This motion was still pending on 9 June 2002, when the President issued to the Secretary of Defense an order that (1) designated the individual as an "enemy combatant", (2) directed the Secretary to detain the individual in military custody, (3) invoked the Authorization for the Use of Military Force and the President's authority (under the Federal Constitution's Art II, § 2, cl 1) as "Commander in Chief", and (4) asserted that the individual was closely associated with an international terrorist organisation with which the United States was at war. That same day, the individual was taken into custody by Department of Defense officials and transported to a United States Navy brig in South Carolina, where the individual remained in detention. Meanwhile, the Federal Government notified the District Court ex parte concerning these developments, and asked the court to vacate the material witness warrant (which the court did).

Also, on 11 June 2002, the individual's counsel filed, in the District Court on the individual's purported behalf, a federal habeas corpus petition. The Federal Government moved to dismiss or to transfer the case. It was held by the Supreme Court that the habeas corpus petition had been improperly filed, so the case was determined on a technical point rather than the substantive issues. However, the fact remained that the individual was initially detained pursuant to the material witness provision for approximately one month, prior to his designation as an enemy combatant.

In *Clark v Martinez*[35], two petitioner aliens, who had been ordered removed but were detained beyond the 90 day removal period, filed habeas corpus petitions challenging their continued detention. In that case, the Court noted that Congress had recently enacted the "Patriot Act" (Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001). The Patriot Act expressly authorised continued detention for a period of six months beyond the removal period (and renewable indefinitely) of any alien whose removal is not reasonably foreseeable and who presents a national security threat or has been involved in terrorist activities.[36]

United Kingdom

It has also been suggested that our detention regime is harsher than that in the United Kingdom. But this suggestion ignores the fact that in the United Kingdom there is a power to detain for up to seven days. That power resides with the police.[37] The decision making for that detention is at a lower level than the decision making in Australia.

In the case of foreign nationals detained in Britain, detention is, practically speaking, potentially indefinite. The recent House of Lords decision[38] found that the powers of the Home Secretary to detain without charge or try non-deportable foreign nationals as 'suspected international terrorists' and a 'national security risk' were discriminatory (in that they only related to foreign nationals and were not proportionate as a response to the terrorism threat). Despite the opinion, it appears that a

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[35] *A. Neil Clark, Field Office Director, Seattle, Washington, Immigration And Customs Enforcement, Et Al., Petitioners V. Sergio Suarez Martinez Daniel Benitez, Petitioner v. Michael Rozos, Field Office Director, Miami, Florida, Immigration And Customs Enforcement,* (No. 03-878), (No. 03-7434), SUPREME COURT OF THE UNITED STATES 125 S. Ct. 716; 160 L. Ed. 2d 734; 2005 U.S. LEXIS 627; 73 U.S.L.W. 4100; 18 Fla. L. Weekly Fed. S 55, October 13, 2004, argued January 12, 2005, Decided

[36] Section 412(a), Patriot Act 2001 (*Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2001*).

[37] Section 41, *Terrorism Act 2000* (UK).

[38] *A and others v Secretary of State for the Home Department; X and another v Secretary of State for the Home Department* (Court of Appeal (Civil Division) [2004] UKHL 56.

number of foreign nationals detained under the *Anti-Terrorism Crime and Security Act 2001* (UK) remained in detention following the opinion.

Additionally, the Home Secretary Charles Clarke, announced a new system of 'control orders' in the *Prevention of Terrorism Bill*, which came into effect in March 2005. These control orders would apply to any suspected terrorist, irrespective of nationality or, for most controls, of the nature of the terrorist activity, whether domestic or international terrorist activity. The control orders would enable the Government to place conditions or controls constraining the ability of those subject to the orders, to engage in terrorist-related activities. The controls would include restricting the movement and association or other communication with named individuals, the imposition of curfews and/or tagging, restrictions on access to telecommunications, the internet and other technology or a requirement to remain at particular premises. Breach of the control orders would be a criminal offence, with imprisonment as a penalty. There will be annual review of the powers, and the Secretary of State will report to Parliament on the number of control orders made.

Canada

In relation to Canada, the suggestion that non-suspects cannot be detained is also a generalisation. In addition, the Canadian regime has been suggested as a model that could be applied in Australia. To dispel these views, we have analysed aspects of the Canadian regime and drawn comparisons to the ASIO Act. The comparisons demonstrate that the ASIO Act is a more rigorous legislative vehicle with a greater level of accountability, and that it is more suited to the purposes for which the provisions were enacted in Australia.

The Canadian Criminal Code (Part II.1) gives judges the power to issue orders for the gathering of information, requiring a person to attend before the judge to answer questions in relation to a terrorism offence. A person so ordered may be arrested if he or she fails to attend (ss 83.28 – 83.29). The Code also gives peace officers the power to lay an information before a judge if the officer believes on reasonable grounds that a terrorist activity will be carried out. These provisions enable detention, within specified circumstances, of non-suspects.

The first mechanism by which a non-suspect can be required to provide information or be detained is under an order by a judge. A judge may issue an order for the gathering of information if the Attorney-General consented to the order (s 83.28). The judge must be satisfied that there are reasonable grounds to believe that a terrorism offence has been committed and information concerning the offence, or information that may reveal the whereabouts of a person suspected of having committed the offence, is likely to be obtained (s 83.28(4)(a)). Additionally, the order may be issued where there are reasonable grounds to believe that a terrorism offence will be committed and a person has direct material information that relates to such an offence or that may reveal the whereabouts of an individual who may commit such an offence, and reasonable attempts have been made to obtain the information from the person (s 83.28(4)(b)).

A person subject to these provisions must attend before the judge and "remain in attendance until excused by the presiding judge". The order may also include "any other terms or conditions the judge considers desirable…" (s 83.28(5)). A person who fails to appear in response to an order for the gathering of information, or whom a judge is satisfied is evading service of the order or is about to abscond, may be arrested (s 83.29(1)) and must be brought before the court "without delay". In order to ensure compliance with the order, the court may order that the person be detained in custody.

The Canadian Code provides another mechanism by which a person can be detained. It allows a peace officer to lay an information before a judge if the officer believes on reasonable grounds that a terrorist activity will be carried out, and suspects on reasonable grounds that the imposition of a recognizance with conditions on a person, or the arrest of a person, is necessary to prevent the carrying out of the terrorist activity (s 83.3). Additionally, the officer may arrest a person without a warrant in certain circumstances. For instance, the arrest may take place where it is impractical to lay an information before a court to seek a warrant due to exigent circumstances and the peace officer "…suspects on reasonable grounds that the detention of the person in custody is necessary in order to prevent a terrorist activity" (s 83.3(4)). A person detained in these circumstances must be brought before a judge within 24 hours, or as soon as possible after this time if a judge is not available, or released (s 83.3(6)). An extension of the detention (a further 48 hours) is possible if the judge considers detention to be justified on certain grounds (including for the protection or safety of the public) and the judge decides to adjourn a matter for hearing (s 83.3(7)). At the hearing, a judge may commit the person to prison for up to 12 months if the person fails or refuses to enter into a recognizance to keep the peace and be of good behaviour, and comply with any other reasonable conditions prescribed in the recognizance.

The rights of a person detained are not set out in any detail in the Canadian Criminal Code. By way of comparison, the ASIO Act specifies stringent safeguards that officials must comply with or be subjected to a criminal offence. The ASIO Act also makes it clear that children under the age of 16 must not be detained and sets out a special regime for the questioning of young people between the ages of 16 and 18. It also includes a clear upper limit on detention, by clearly specifying that a person cannot be detained for more than 168 hours.

The Canadian legislation does not specifically provide for any accountability agencies to play a role if a person has a complaint about how they are treated. Under section 34HAB of the ASIO Act, the IGIS has a right to attend the questioning and/or taking into detention of a person. If the IGIS is concerned about impropriety or illegality in connection with the questioning or detention, the IGIS may inform the prescribed authority of his or her concern. The prescribed authority must consider the IGIS's concern and may give a direction deferring questioning (s 34HA).

It has been suggested[39] that the Canadian threshold for detention is "significantly higher" than the Australian threshold. This is because, among other things, paragraph 34C(3)(c) of the ASIO Act is expressed in terms of "may alert a person involved in a terrorism offence", "may not appear before a prescribed authority", or "may destroy" a record or thing.

We consider this to be an unreasonably adverse comparison with the Australian legislation. The criteria for detention must be read as a whole, together with the procedural steps involved in seeking and obtaining a questioning and detention warrant. Under the ASIO legislation, this is a rigorous assessment, including that: [40]

- the Director-General of Security, the Attorney-General, and the issuing authority are all satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence

[39] HREOC, transcript, 20 May 2005 hearing, at page 19.
[40] Subsections 34C(3), 34D(1), and section 34HB of the ASIO Act.

    - after the first 8 hours, the prescribed authority must continue to be satisfied of the same criteria, and that the questioning is being conducted properly, for questioning under the warrant:
        - to proceed from that point onwards, and
        - to be extended at the end of each subsequent 8 hour block of questioning
- the Director-General and the Attorney-General must also be satisfied that relying on other methods of collecting the intelligence would be ineffective, and
- that if the person is not immediately taken into custody and detained, the person:
    - may alert a person involved in a terrorism offence that the offence is being investigated
    - may not appear before the prescribed authority, or
    - may destroy, damage or alter a record or thing the person may be requested in accordance with the warrant to produce.

In comparison, the Canadian legislation has relatively few criteria to be satisfied for the issuing of an order for the gathering of information. The Canadian model does not require the Attorney-General to be satisfied of any criteria (only to provide consent). The judge is required to be satisfied that relevant information is likely to be obtained as a result of the order (where there are reasonable grounds to believe that a terrorism offence has been committed) or that a person has direct and material information (where there are reasonable grounds to believe that a terrorism offence will be committed). A person may be detained under the Canadian legislation if a judge is satisfied that they are evading service of the order, are about to abscond, or failed to attend the questioning as required by the order (s 83.29) or if a peace officer or judge suspects on reasonable grounds that detention is necessary to prevent a terrorist activity (s 83.3).

Although both regimes require the Attorney-General to consent to the issue of a warrant, the ASIO Act sets out specific requirements for the Director-General, the Attorney-General and the issuing authority which must be satisfied before the warrant can be issued. Requiring the prescribed authority to be satisfied of certain things in order to permit questioning or detention to continue (that it will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that questioning has been conducted properly and without delay) adds another safeguard and ensures that ASIO must ask questions that fall within the criteria upon which the warrant was issued.

Mr Lenehan suggested[41] that the Canadian power to detain is really an ancillary power to the questioning power, and only arises if a judge is satisfied that the person is evading service or may not attend. We do not agree with this assessment. The provisions relating to the laying of an information and subsequent powers of arrest, release and recognizance contained in section 83.3 of the Canadian Code are separate and, in our opinion, additional to the powers relating to the gathering of information. They are directed at detention in order to prevent terrorist activity. Effectively therefore, there are two avenues available to law enforcement officers in Canada. The first avenue is to apply for an order requiring the attendance of a person for questioning. The second is the laying of an information – the power to order a person to appear before a judge and powers of detention in order to prevent terrorist activity. In comparison, detention under the ASIO Act is ancillary to questioning.

[41] HREOC, transcript, 20 May 2005 hearing, at page 21.

In the Canadian case of *Re Application under s 83.28 of the Criminal Code*[42], the majority of the Appeals Court held that section 83.28 (order for the gathering of information) is constitutionally valid and applies retrospectively "…because it effects only procedural change and does not create or impinge upon substantive rights"[43]. In that case, the Crown brought an ex parte application seeking an order that the appellant attend for examination under section 83.28, in connection with the trial of terrorist suspects accused of arranging the explosion of Air India flight 182 (and the attempted explosion of Air India flight 301) in June 1985. The appellant was a potential witness at the trial (but was not one of the accused). The original order under section 83.28 (which was upheld on appeal) was granted subject to a number of conditions, including that the hearing was to be conducted *in camera* and that notice of the hearing was not to be given to the accused in the Air India trial, to the press or the public.

Canada's Annual Reports Concerning Investigative Hearings and Recognizance with Conditions, for the years 24 December 2002 to 23 December 2003 and 24 December 2003 to 23 December 2004, state that since the commencement of operation of the relevant provisions, there have been no applications for information orders or arrest warrants (under ss83.28 and 83.29), nor have there been any cases initiated under section 83.3 (the laying of information, arrest without warrant and release on recognizance). However, as stated above, we are aware of at least one case (*Re Application under section 83.28 of the Criminal Code*) which concerned section 83.28.

International comparisons

It is true that the detail of the legislation is different in different countries. This is not unusual, and it alone is not sufficient to say that the Australian legislation is therefore deficient or inadequate. In comparing legislation from different countries, it is important to take account of the context in which that legislation has arisen, its objectives and how the legislation is used in practice. It is not simply a question of comparing two sets of statutory tests and making an assessment as to which one contains more or less rigorous safeguards than the other. In developing Division 3 of Part III of the ASIO Act, other countries' legislation was taken into account but our legislation has been framed in a way to suit our environment and the purpose of intelligence-gathering in that environment.

The Australian legislation is specific and transparent, and has significant built-in accountability mechanisms and safeguards. While detention is available, it is clear that it can only be used in circumstances that truly require it. There is no rush to detention, and this is why the detention provisions have not been used to date. The emphasis is on what is needed for questioning and for the collection of intelligence, and the legislation is designed to avoid detaining a person any longer than is necessary (through requiring the prescribed authority to be satisfied of legislative criteria for permitting the continuing of questioning or detention within the statutory upper limits). The practical experience to date has shown that the Australian Government's policy objectives have been achieved by the legislation in its current form.

[42] 2004 SCC 42, <http://www.canlii.org.ca/cas/scc/2004/2004scc42.html>
[43] *Re Application under s83.28 of the Criminal Code*, 2004 SCC 42, <http://www.canlii.org.ca/cas/scc/2004/2004scc42.html>, at page 3.

Use of prescribed authorities

In referring to three categories for prescribed authority appointments in the hearing on 19 May 2005[44], Senator Ray mentioned former federal judges, retired state judges and AAT members. My answer was intended to clarify that the three categories are in fact former federal and state judges, current state judges and AAT members.

As stated in the Attorney-General's Department submission of 4 April 2005 (at page 13), prescribed authorities may be appointed from three tiers of classes[45]. The first tier covers former judges of a federal court or State or Territory Supreme or District Court. If there are insufficient numbers of people in this category available to perform the role, then appointments may be made from the second tier, being current judges of a State or Territory Supreme or District Court. If there are insufficient numbers in these two categories, then the President or Deputy President of the AAT may also be appointed. To date, only people in the first tier (former federal and State/Territory judges) have been appointed as prescribed authorities, following their consent to perform this role.

In light of the fact that to date appointments have been made only from the first category, there has been a suggestion that the AAT option should now be removed.[46] We do not agree with this suggestion.

The Act was framed to allow appointments from different groups in a priority order, with feasible options in the event that there were insufficient numbers in the first or second groups. Just because there has not been a need to go to the second category for appointments to date does not mean there will never be such a need. The need for prescribed authorities depends upon the numbers of warrants issued, the jurisdictions in which they are issued, and the availability of eligible and willing appointees. In these circumstances, it is not possible to guarantee that there will always be sufficient numbers in each jurisdiction.

In overseeing the questioning of persons who may have information relevant to a terrorism offence, prescribed authorities perform a role that is vital to national security. A relatively low number of prescribed authorities in any jurisdiction may give rise to real problems if, for example, a security situation arises that requires multiple questioning warrants to be executed in that jurisdiction, particularly if this is at short notice. While there is always the capacity to fly in prescribed authorities from other jurisdictions, it is obviously preferable to have a sufficient number of prescribed authorities appointed in relevant jurisdictions to ensure that they will be available when required.

Appointments in the first category are dependent on former judges' personal circumstances (including age, health and likely availability at short notice) and their consent to perform the role. Appointments in the second category again require consent and the impact on performance of existing duties as serving judges may be a relevant factor. It is worth noting that since we lodged our first submission with this Committee (April 2005), one prescribed authority has passed away and three prescribed authorities have decided to withdraw their consent and have resigned from the position because of personal circumstances. In these circumstances, and in light of the significance of the prescribed authority's role, it is preferable to have as many options as possible. We are

[44] Transcript, 19 May 2005 hearing, at page 25.
[45] Section 34B, ASIO Act.
[46] Transcript, 20 May 2005 hearing, at page 33.

therefore strongly of the view that section 34B, which sets out three categories from which prescribed authorities may be appointed, should remain in its current form.

Involvement of State and Territory Ombudsmen / Complaint Authorities

There have been suggestions, including from the Commonwealth Ombudsman[47] and the IGIS[48], that the legislation could be improved by specifically acknowledging and facilitating the role of State and Territory Ombudsmen and police complaint authorities.

We have no difficulties with this suggestion. There is a role for State and Territory police under the ASIO legislation. The current legislation is flexible enough to enable complaints to be made to the appropriate bodies about the actions of State and Territory police. However, it is logical that State and Territory Ombudsmen (or relevant police complaint bodies) should be treated in the same way as the complaint bodies at the federal level. Currently, the legislation makes it clear that a person questioned or detained may make a complaint to the Commonwealth Ombudsman concerning the conduct of an officer of the Australian Federal Police, or to the IGIS concerning the conduct of an ASIO officer. These rights are expressly covered in the legislation. The prescribed authority is required to make all warrant subjects aware of their rights in this regard, and any persons detaining the subjects are required to provide facilities for contacting the Ombudsman or IGIS.

We have no objection to amending the legislation as suggested by the Commonwealth Ombudsman and the IGIS, so that State and Territory police complaint bodies are treated in the same way. There is no policy reason against a person being informed of their right to complain to the IGIS, Commonwealth Ombudsman and, if State or Territory police have been used, the appropriate authority for receiving complaints against police in that State or Territory (amendment to section 34E(1)(e)), and requiring facilities to be made available for such complaints (amendment to section 34F(9)).

Why is the issuing authority not required to be satisfied of the 'last resort' ground?

Some submissions and witnesses have been critical of the fact that the Act does not expressly require an issuing authority (unlike the Attorney-General) to be satisfied that relying on other methods of collecting the intelligence would be ineffective before issuing the warrant.

As noted in our evidence before the Committee[49], and by Senator Ray in response to a number of other witnesses, this is deliberate and justifiable.

There is a greater safeguard in this situation than some have suggested. The issuing authority is required to be satisfied that the warrant has been requested by the Director-General in the prescribed manner. This entails being satisfied that the Director-General had made the request in the appropriate manner, and had satisfied the legislative requirements. In practice, the issuing authority is provided with the same draft warrant material as the Attorney-General. Accordingly, if it is clear from the documentation that ASIO has not, or has clearly not adequately, addressed the issue about the use of and reliance on other methods of intelligence collection, it would be open to the issuing authority to refuse to issue the warrant.

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[47] Professor McMillan, transcript, 19 May 2005 hearing, at page 38.
[48] Mr Carnell, transcript, 20 May 2005 hearing, at page 5.
[49] Transcript, 19 May 2005 hearing, at page 25.

However, it would be inappropriate to explicitly require the issuing authority to be satisfied that relying on other methods of collecting the intelligence would be ineffective. This is because issuing authorities (or indeed anyone other than the Attorney-General) would not be in a position to make this assessment. Unlike the Attorney-General, they would not be briefed on or be fully across the whole of the security apparatus to know whether the criterion can be met. The Attorney-General, who has portfolio responsibility for ASIO and issues all ASIO's special powers warrants, is best placed to make a judgment about ASIO's reliance on, and the value of, other intelligence collection methods.

Application to non-suspects

A number of witnesses expressed concern about the application of these provisions, particularly the detention provisions, to what they termed 'non-suspects'. For example, Professor Williams argued that while a questioning regime is entirely appropriate, there is no need for detention (particularly detention of non-suspects, and particularly comparing it to other countries' detention capacities).[50]

It is interesting to note that Professor Williams says he was prepared to support the regime when it was enacted, but he has now changed his mind on the necessity for and appropriateness of the detention regime.[51] As we have pointed out in the analysis of like-minded jurisdictions above, the need to be able to detain non-suspects is also evident in countries other than our own. In addition, Mr Richardson mentioned some compelling examples to the Committee in a closed hearing where 'non-suspects' were critical in assessing the extent of the threat to the Australian community as well as in making assessments about the terrorist-related activities of individuals.

In criticising our view that this legislation is not about 'suspects' and 'non-suspects', the National Association of Community Legal Centres points out that there is in fact a distinction between suspects and non-suspects in relation to persons between the ages of 16 and 18.[52] The extra requirements relating to young persons (including that the Attorney-General has to be satisfied on reasonable grounds that it is likely that the person will commit, is committing or has committed a terrorism offence) were part of a compromise package. This compromise recognised that it was appropriate for the regime to apply to persons younger than 18 years of age, but at the same time acknowledged the special circumstances of young people. In our view, the inclusion of this extra requirement that a person between 16 and 18 need be a suspect could impair the effectiveness of the regime. This is because it has been demonstrated that people who some prefer to label as 'non-suspects' can be critical in providing significant information in assessing the extent of terrorism threats.

While we appreciate that many lawyers are operating in a criminal justice paradigm, and prefer to differentiate clearly between suspects and non-suspects, the fact is that the ASIO questioning and detention regime is simply not a criminal justice regime. As we and others have made clear on a number of occasions, the purpose of the ASIO legislation (that of intelligence gathering) is completely different.

[50] Transcript, 20 May 2005 hearing, at pages 27-29, 34-35, and 37.
[51] Transcript, 20 May 2005 hearing, at page 39.
[52] Transcript, 6 June 2005 hearing, at page 30.

Human rights obligations

Many submissions and witnesses have referred to international human rights obligations and suggested that our legislation is deficient in this regard. There does not appear to have been anything new on this issue raised in the hearings, and our view remains as set out in our opening statement to the Committee on 19 May 2005.[53]

Community fear

It has been suggested that the legislation has contributed to an atmosphere of fear amongst the Muslim community.[54] Some witnesses have suggested that some people have not attended information forums because of fear and the root of the problem is that only organisations that claim a connection to Islam have been listed as terrorist organisations.[55]

Concerns about fear and the 'public language' which contributes to it was an important issue addressed in the report of Dr William Jonas AM, the then Acting Race Discrimination Commissioner, in his 2004 'Ismae – Listen' report on national consultations on eliminating prejudice against Arab and Muslim Australians (at page 155). He suggests the responsibility lies not only with the government spokespersons but also the media and other public figures to ensure accurate and appropriate comment is made to ensure stereotyping and untruths are not disseminated. The Department suggests that, while lack of relevance to individual circumstances is a more likely factor in non-attendance at forums, if fear is a factor for some, it is more likely that misinformation about the legislation rather than its actual impact is the cause of the problem. It is a fact that only a small number of people have been questioned under the powers.

In recognition of the importance of accurate information concerning Australia's terrorism laws, this Department provided comments on the Australian Muslim Civil Rights Advocacy Network (AMCRAN) booklet *Terrorism Laws: ASIO, the Police and You*. We understand that AMCRAN regarded our comments as constructive and will incorporate most of these comments into the second edition of the booklet, which was foreshadowed at the public hearings.[56] The Department looks forward to further engagement with community groups and is willing to assist to ensure accurate information is disseminated.

While it is true that the terrorist organisations whose membership is banned in this country all claim connections to Islam, this has occurred because of the nature of the terrorist threat in our country, which is much to do with Australia's geography and linkages to other countries. It should be noted that each proscription is based on a detailed assessment by ASIO of potential danger to Australia and its interests. Considerations for listing of organisations in Europe or North America are obviously different. The US has a very significant geographical connection to problems with organisations originating from many parts of the world including Latin America; Europe with organisations originating from within its own boundaries as well as North Africa and the Middle East. It is not only false, but very unhelpful for all the reasons listed by Dr Jonas in his report, to be suggesting that the policy on this issue is directed against Islam.

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[53] Transcript, 19 May 2005, at page 5.
[54] See, for example, transcript, 7 June 2005 hearing, at page 50.
[55] See, for example, transcript, 7 June 2005 hearing, at pages 52-54.
[56] National Association of Community Legal Centres, transcript, 6 June 2005 hearing, at page 38.

General comments

As a general comment, we note that in criticising the legislation and the way it has been used, some witnesses have referred to non-specific anecdotal examples. This should be contrasted with the very specific examples and concrete information provided by ASIO in confidential briefings about how the regime is actually working.

We also note that it has been suggested[57] that the fundamentals of terrorism have not changed, and that there has always been some kind of threat. In some respects, while many of the instruments of terrorism have been used in the past, there is no question that the wave of terrorism in recent years has extended its reach to countries where there has been very little activity in the past. Australia is one of those countries and that is one of the reasons we now have these laws.

We hope this additional information assists the Committee, and we would of course be happy to provide any further information or assistance to the Committee on any particular issues.

Yours sincerely

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[57] Public Interest Advocacy Centre, transcript, 6 June 2005 hearing, at pages 72 – 73.