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PARLIAMENTARY JOINT COMMITTEE ON ASIO, ASIS AND DSD

Reference: Review of the ASIO Legislation Amendment (Terrorism) Bill 2002

TUESDAY, 30 APRIL 2002

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JOINT COMMITTEE ON ASIO, ASIS AND DSD

Tuesday, 30 April 2002

Members: Mr Jull *(Chair)*, Senators Calvert, Sandy Macdonald and Robert Ray and Mr Beazley, Mr McArthur and Mr Leo McLeay

Senators and members in attendance: Senators Sandy Macdonald and Robert Ray and Mr Beazley, Mr Jull and Mr Leo McLeay

Terms of reference for the inquiry:

Review of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002

WITNESSES

Committee met at 2.04 p.m.

ABBOTT, Mr Anthony Norman, President, Law Council of Australia

HARVEY, Ms Christine Susan, Deputy Secretary-General, Law Council of Australia

ROZENES, Mr Michael, Joint Chairman, Criminal Law Committee, Law Council of Australia

CHAIR—I declare open the hearing of the parliamentary Joint Committee on ASIO, ASIS and DSD and welcome witnesses and members of the public. The committee has been requested by the House of Representatives to inquire into and report on the proposed legislative reforms in the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002. The purpose of the bill is to amend the ASIO Act 1979 to expand the special powers available to ASIO to deal with terrorism. The amendments contained in the bill will empower ASIO to seek a warrant which allows for the detention and questioning of persons who may have information that may assist in preventing terrorist attacks or in prosecuting those who have committed terrorism offences. The warrants may provide for custody and detention incommunicado for a period of up to 48 hours under the first warrant.

The majority of evidence to this inquiry has raised several criticisms about the bill which include the definition of a terrorist act being too broad and maybe capturing legitimate political protests; the possibility that persons may be held incommunicado for up to six days or more; a person will be refused the right to silence; and a person may not fail to give information or produce a record or thing on the grounds that it may incriminate them. These and other issues will be examined by the committee in the course of the public hearings over the next three days.

The committee will report its preliminary findings to the parliament on 3 May 2002. Today the committee will take evidence from the Law Council of Australia, the Inspector-General of Intelligence and Security, the Attorney-General's Department, the Australian Security Intelligence Organisation, and Mr George Brownbill. The committee will continue its public hearings in Sydney tomorrow and Melbourne on Thursday.

Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of parliament. I now invite you to make some introductory remarks before we proceed to the questions?

Mr Abbott—Firstly, thank you for the invitation to appear here. The Law Council regards this bill as raising very serious issues and is pleased to have the opportunity to attend. We have lodged with you a submission—only yesterday, I am afraid—but I hope that members have it. I propose to summarise it before we deal with questions. The Law Council and all lawyers are, of course, as concerned as anyone else with dealing with the threat of terrorism, properly defined, but this bill offends, or raises, fundamental human rights and civil liberty concerns which are important—or ought to be important—to all Australians, and we say they are some of the things which define Australia. We ought not to give those up without a very good case. Those two important civil rights are, firstly, the right not to be held in custody without charge and,

secondly, the right not to cooperate with the police in terms of answering questions. They are rights which define this society and other civil societies.

We say that the government ought to make publicly a strong case for this legislation, and to date we have not seen that. We have called upon the government to do so, and maybe your committee will hear that case. We say that until that case is made this legislation ought not to pass. Like other submissions we have said in our submission that the link to terrorism events as defined under part 5.3 of the Crimes Act—or proposed part 5.3—gives this bill an unacceptably wide range of powers. Clearly, no-one would have much objection to measures taken to prevent true terrorist activities by Al-Qaeda or other obvious targets. But, as we have indicated in our submission to the other committee—which is in the bundle—there are a number of concerns as to the unacceptably wide definition of a terrorism offence not just demonstrations or many demonstrations but firearms training, giving money to causes and emailing to ministers by way of political protest.

We say that the thrust of this legislation is also not limited to what the public might think ought to be the true thrust, namely the prevention of terrorist activity. It certainly takes up detection, law enforcement and obtaining information about terrorism activity, bearing in mind the potentially wide definition of that phrase. We say that the authority that is empowered to issue the warrant ought to be a chapter III judge—a federal magistrate perhaps. It ought to be a chapter III judge because it is important that this warrant, which has the ability to impose a significant fetter on people's liberty, is issued by an official who understands the import of what is involved.

We say, at paragraph 12, that we have some concerns about the process of administrative selection of those prescribed authorities who have the ability to issue the warrant. We say that we have some concerns about the constitutionality of the bill under the defence power or the external affairs power. We say—and this is not in the submission—that it is strange that, although the Attorney-General has to consider a number of things—such as whether other methods of obtaining information are going to be effective or not and whether the person who is the subject of the warrant may abscond or not attend—these are not matters which the prescribed authority has to consider under section 34D(1).

We are obviously concerned that, if a person does receive a warrant, he or she is compelled to attend and does not have the right to any legal representation when he or she is being questioned. That is a traditional right/protection/comfort which citizens in other countries in other jurisdictions have. We see no reason why a citizen who is subject to the potentially frightening prospect of having to give evidence against their neighbour or someone like that should not have the right to legal representation. This is particularly so when the evidence that he or she gives can be used against him or her in a prosecution for a terrorism offence at least, and so doubly there is the need for legal representation. That is our submission. I have just summarised it. We are happy to answer questions.

CHAIR—I will start by getting down to basics. You were critical of the definition of a terrorist act. How would you define it?

Mr Abbott—In our submission we say the one essential element is that there must be the intention to intimidate or coerce. That is missing from the definition. We say that it ought not to

be sufficient that the act involved damage to property, that really what is involved should only be damage to a person—serious personal injury—and they seem to be the elements. The act also talks about advancing a political, ideological or religious cause, and that is part of the definition too, but what is missing is the intent to intimidate or coerce.

Mr BEAZLEY—You don't have a problem with the broader definition of terrorism; you want to get some sort of element of intent into the process as opposed to an ideological or political background of a terrorist organisation or actor?

Mr Abbott—That seems to be the commonly accepted definition of terrorism and what the public understands, I think, by 'terrorism'.

CHAIR—I suppose we are in extraordinary times; we have not faced this situation before. Are there any circumstances in which somebody can be taken in for initial questioning without safeguards? It would concern me, if you picked up somebody and he had the right to contact lawyers and the rest of it, that the word would soon get around and maybe you could in fact damage an operation against a terrorist cell.

Mr Rozenes—There are many criminal law issues that arise when undercover operations are in place, and there is a risk that people, if exposed to public scrutiny in the court system or through lawyers, will blow operations and sometimes people's lives are at stake. It is not something that we have stumbled across for the first time in this area. The important issue that we put forward is that you have got to see these powers in the context of some legitimate framework, and the legitimate framework we have is that at every level, when one looks at powers such as these, one looks to see if, firstly, they are concomitant with the general law that we have in this country, where there are international obligations and where there are human rights requirements. All of these call for supervision of administrative detention by some form of judicial conduct. There is no supervision of this administrative detention by anybody, and nor can there be as long as the person taken into administrative detention has no access to the outside world.

If you have a concern about a lawyer being a possible breach of security requirements, there are ways in which that can be overcome. But the fundamental right must be that a person taken into custody by administrative action and not supervised by judicial process has access to legal advice and can take certain steps, whatever they may be, to secure some form of justice. This legislation does not permit that. It is a gross departure from every standard that currently governs the way in which we legislate for criminal and other conduct.

Senator ROBERT RAY—There are three criteria that have to be met before a warrant is issued—three by A-G but only one by the prescribed authority. But I think you are saying that the prescribed authority does not get to consider whether there are other collection methods available. I would contend that, if that were the case, we have a real security problem, because in fact prescribed authorities should not really know what the full range of security alternatives is.

Mr Abbott—Yes, I understand the point. It is one of a number of concerns that we have about the lack of safeguards, and I suppose it is not the most important safeguard.

Senator ROBERT RAY—The A-G and the prescribed authority have one common criterion they have to judge this on. Could we get into a position where the A-G is constantly sending a request to a prescribed authority and the prescribed authority is knocking it back, therefore reflecting very badly on the A-G's judgment? I would have thought it would have been better to have a lesser criterion on the A-G and a higher one on the prescribed authority so that at least you could have an explanation if they constantly disagree.

Mr Abbott—Part of our submission is that there is the potential for misuse of this extraordinary system. Because the procedures are wide, the Attorney only has to form an opinion about certain things. The prescribed authority has to consider only one aspect. The width of the activity potentially caught or as to which the Attorney or the Director-General could form an opinion about whether intelligence information would be useful or important is very broad, as we have said in our submission. While I am sure no-one would intend it, the procedure could be misused. It could be used against stereotypes. There could be errors of judgment, and the safeguards generally are not there if there are.

Senator ROBERT RAY—Let us get to the prescribed authority. Is it a sound principle to have at least half a potential prescribed authority being AAT members who are on short-term tenure reappointable? Doesn't that leave those AAT members in a position where they could—I am not saying they would—be thinking of their future reappointment when they make decisions on a request for a warrant?

Mr Rozenes—Absolutely. We are firm in our submission that this should be a chapter III judge.

Senator ROBERT RAY—What is the case now?

Mr Abbott—Life tenure—70 years tenure.

Senator ROBERT RAY—Why can't it just be a Federal Court judge?

Mr Rozenes—A federal magistrate—

Senator ROBERT RAY—Why not a federal judge or even a magistrate? I know that the Federal Court judges have got rid of a lot of warrants, but they are administrative ones. These are not administrative warrants.

Mr Rozenes—There is an argument about that, I think, Senator. It may be that it is an administrative function because it is probably administrative detention. In the normal criminal justice process, the only way a person can be detained is essentially immediately prior to a court appearance or by order of the court. They are judicially controlled detentions. Any person arrested on suspicion of a crime must be brought as soon as practicable before a court so that that person's detention in custody becomes a matter for court supervision. This is one of these rare instances—and they are very rare indeed—where there is no court involvement and the detention is by way of administrative order, so there is an argument as to whether or not this is judicial function or administrative function. It is probably administrative function.

Senator ROBERT RAY—Each of the prescribed authorities, as I read the act, is acting as an individual rather than a court—

Mr Rozenes—Persona designatae. That is right.

Senator ROBERT RAY—Do you prefer just Federal Court, or are you satisfied with Federal Court and Federal Magistrates Court?

Mr Rozenes—I think it is difficult to distinguish between the two of them now because of the recent creation of the office of federal magistrate. We of course would prefer it to be a judicial office. That would be a judge.

Senator ROBERT RAY—Can you point to any other legislation, be it a royal commission act or something else, that protects against self-incrimination, which we could look at incorporating it into the ASIO Act?

Mr Rozenes—ASIC, the tax office, royal commission power, the NCA—almost every investigative agency—have by legislation the ability to override the privilege against self-incrimination. In each of those instances, though, the answers given pursuant to that compulsion cannot be used in evidence against the person giving the answers, other than on a charge usually of perjury, under that particular legislation.

Senator ROBERT RAY—In terms of this act, 'the mandatory duty to inform'—God forbid, but let us say you get called before it—means that legal privilege no longer applies. You have to answer, don't you? You have to violate your own oath of office to comply with this act?

Mr Rozenes—Yes. I have to answer or face a penalty of up to five years imprisonment.

Senator ROBERT RAY—Is that the same for journalists?

Mr Rozenes—The same for journalists.

Mr Abbott—Everybody. Priests.

Mr Rozenes—The person making the decision about whether or not he should violate the privilege that he holds or put in his neighbour or someone who might dispose of his whole family for doing so has to make a judgment about that issue without having any advice.

Senator ROBERT RAY—Do you know of any other Commonwealth legislation that would enforce disclosure by lawyers, doctors, journalists or priests who have certain privileges?

Mr Rozenes—There is certain legislation that deals with legal professional privilege and cases in which that privilege may be lost. For example, if a lawyer gives advice to a person and that advice is used for the purpose of committing a criminal offence, notwithstanding that it is privileged communication, the privilege is lost and the lawyer is compelled to answer questions.

Senator ROBERT RAY—You—and I think most people—perceive a weakness in this legislation: the lack of legal representation. The rationale for that is, of course, if you are a terrorist, you are going to ring your local lawyer to come in and that is going to tip everyone off. What about the alternative? Mr Rozenes might best be able to answer this. For instance, would you be willing to go into a pool of lawyers that can be contacted to represent someone whom you do not know who is called before a prescribed authority?

Mr Rozenes—I am sure that is appropriate, and I am sure there will be plenty of people who will be prepared to do it. You may not have the lawyer of your choice, but at least you will have legal advice.

Mr LEO McLEAY—Someone will know that you have been collected.

Mr Rozenes—Someone will know that you have been collected. Someone may be capable of being present whilst you are being interviewed. Someone may, if they think the agency has gone too far, seek judicial redress. Yes.

Senator ROBERT RAY—In the situation where the Director-General gets permission of the Attorney-General to go to a prescribed authority and they get the 48-hours detention, do you think it is appropriate that the same prescribed authority that has been sitting in and listening to the entire case should grant an extension—

Mr Rozenes—No.

Senator ROBERT RAY—or should they have to go to another prescribed authority and argue their case there?

Mr Rozenes—Off the cuff? No, it probably should be a second authority. But the problem with this issue is that whether it is the same authority or a second authority if they are told the same sorts of things as the first authority was they might extend the period indefinitely. Then we have a person in custody without legal advice when all our obligations under international law say that in that circumstance when you take a person into custody that person is entitled first and foremost to legal representation and secondly to be brought before a court as soon as practicable. This legislation permits someone to be held for days, if not weeks, without access to legal advice. It is an extraordinary proposition.

Mr LEO McLEAY—Your reading of this act: how long do you believe a person could be held by a prescribed authority?

Mr Rozenes—I heard the chairman say up to six days but I did not read that.

Mr LEO McLEAY—I want to know what your reading of it is.

Mr Rozenes—I thought it was indefinite.

Mr Abbott—I thought it was indefinite too. I agree.

Senator ROBERT RAY—But it is true that you have to go to a higher level beyond 96 hours.

Mr Rozenes—Correct.

Mr BEAZLEY—Just on the question of self-incrimination: if there was protection on the issue of self-incrimination how much would it modify your attitude, say, to the character of the prescribed authority? Is an official as vulnerable, perhaps, as an administrative tribunal member? How much would that go to your concerns about legal representation?

Mr Rozenes—It is certainly an issue. It does not absolve the requirement for legal representation because the advice a person may want to have is, 'What are my options? If I say what I know or what I believe then the person who I name may or may not be capable of killing all of my family. I'd like to know whether there's some protection available to me. Is there some system that I can get my family into?' They are the usual sorts of things that people need to be informed of—not by the authority that has an interest in having the person speak but by an independent person, usually a lawyer, who can say, 'These are the choices; these are the options. You can make an informed choice as to whether you want to go to jail for five years or speak.' That surely cannot be left to the very agency that is interested in having this person provide information.

Mr BEAZLEY—In some ways this is a very difficult threshold issue for the committee to get to grips with but we have to. To what extent is this a new legal process, culminating in a charge against an individual, and to what extent is it an extension of ASIO's intelligence gathering powers? I think the minds of the people who operate our security intelligence organisations are seeing this as an extension of their intelligence gathering powers and an ability to get information in a timely way, as opposed to necessarily providing the basis on which against a particular individual charges may emerge. In an environment in which you are going to get a piece of intelligence out of an intercept or something like that that indicates a knowledge of a terrible event like September 11, either in a preliminary or in an ex post facto way, how do you actually get in with the sufficient timely information to prevent something from happening or somebody from leaving the country or whatever? The people who are the targets, in many cases, are unlikely to emerge as people against whom charges would ultimately be laid. They would be people in communication with such people. The way in which the commentaries on this legislation—and in many ways the presentation of them—go on is as though a totally new judicial and legal process is being implemented, as opposed to an extension of something that is going on anyway. So if you actually had self-incrimination removed, I am not sure how much else would be terribly necessary in terms of disrupting the procedures to get the officers having a chat with someone.

Mr Rozenes—But the self-incrimination issue is not at the cutting edge of this argument, I do not think. I agree with what you are saying. Really, what is happening here is an investigative exercise. It is not an attempt to find evidence against the suspect. It is aimed at, as we see it, people who are not suspects but who are people who know. They are just witnesses. It is never intended that they will be charged or convicted of any criminal offence, necessarily. They are going to provide evidence against other people. This is a novel proposition: that you can take a person—he or she not the subject of a charge or the subject of suspicion—have their liberty removed, put them into indefinite custody, not have them have the ability of being advised by

lawyers as to whether they should speak or not speak and not have the process of their incarceration the subject of judicial control. It is unprecedented.

Senator ROBERT RAY—Do you think the insistence on videotaping all the proceedings is a good or a bad thing?

Mr Rozenes—It is a safeguard. In our submission we refer to the Canadian model—not that we put forward this as an alternative because there are many criticisms of the Canadian model as well, but at least the Canadian model recognises the fact that there ought to be judicial supervision of the process, which we do not have; there ought to be legal advice available to the detainee, which we do not have; and there ought to be a privilege against self-incrimination when you have someone having answers compelled from them, which we do not have. They are three fundamental rules of law that we have always subscribed to in this country and which—if you look at the international treaties that we are party to—we call for to be present in legislation of this kind.

Senator ROBERT RAY—I am not sure if I have misread the legislation, but is it the case that the 48-hour clock starts from when the detained person appears before the prescribed authority? Is it possible you could be detained for a week before appearing before a prescribed authority for the questioning? I am just not sure if that is defined in the bill, or if that is a worry.

Mr Rozenes—I am not sure either.

Senator ROBERT RAY—All right. We have got others to follow up later today; they will be able to tell us.

Senator SANDY MACDONALD—You mentioned that you felt the role of the prescribed authority is more administrative than judicial. Is it appropriate to have a Federal Court judge purely making decisions that are administrative? Is that something that happens under normal circumstances?

Mr Rozenes—I think that is a problem.

Senator SANDY MACDONALD—It is a problem? But you have got no problems for magistrates?

Mr Rozenes—I think that is why they created the federal magistracy; the Federal Court judges were not happy about issuing warrants which were essentially administrative in nature.

Senator ROBERT RAY—Yes, but the warrants you are talking about there are almost inevitably standardised phone intercepts. Detaining someone without legal representation for 48 hours at a minimum, with no self-incrimination rules, is much higher up in the food chain.

Mr Rozenes—It is a quantum leap, we would argue.

Senator ROBERT RAY—Which does require mature legal judgment, I would have thought.

Mr Rozenes—The first one is concerned with the invasion of privacy, in the case of intercepts, and the invasion of property, in the case of search warrants. This is about detaining a person in custody. It is a fairly substantive leap.

Senator SANDY MACDONALD—And it is probably unlikely to occur very often.

Mr Rozenes—We would hope not.

Senator SANDY MACDONALD—The right to remain silent: has that been abrogated or removed anywhere else in our legal system?

Mr Rozenes—The right to remain silent has been abrogated in a number of federal and state statutes but, as I said before, never to my knowledge in circumstances where the answers that you end up giving can be used against you. Every royal commission abrogates the right to silence in the sense that it abrogates the privilege against self-incrimination, notwithstanding the fact that you are compelled to answer, and you may thereby incriminate yourself, nevertheless you are obliged to do so. The saving grace is that the evidence you give cannot be used against you.

Senator SANDY MACDONALD—And you have legal advice.

Mr Rozenes—And you have legal advice. You can make a choice about whether or not you want to go to jail for not answering questions or you want to answer questions and face the consequences, which cannot be criminal prosecution but might be others. But each of those are informed decisions that are made by people who have access to legal advice.

Mr Abbott—These questionings are usually in public too; in the companies and National Crime Authority settings.

Mr LEO McLEAY—Would you have no objections to this legislation if, in effect, the person got an indemnity for trading off their right to remain silent?

Mr Rozenes—I do not think that is the answer to it.

Mr LEO McLEAY—It is the answer in royal commissions; why is it not the answer here?

Mr Rozenes—It is not usually the answer in royal commissions; sometimes they are indemnified. But the question here is whether or not they are themselves the subject of any criminal concerns. As we understand this legislation, it is not aimed at people who themselves are terrorists or likely to be terrorists but at people who know something about them.

Mr LEO McLEAY—But isn't the parallel there that royal commissions are set up to get answers that the normal justice system cannot get and they are given the coercive powers to do that? What people seem to be concerned about regarding terrorism is that you need some coercive powers to get the answers to some of these questions about terrorism. Is it a reasonable trade-off to have the coercive power but not be able to be prosecuted?

Mr Rozenes—Can I make this distinction for you. There is no royal commission or any other agency that conducts its investigative process in secret and without the ability of being viewed by the public and supervised by the courts.

Mr LEO McLEAY—That is not true: there are many royal commissions held in camera.

CHAIR—ICAC does—the corruption commission does.

Senator ROBERT RAY—You are proving your case by mentioning those.

Mr Rozenes—The fact that the royal commissioner is sitting—the fact that he is making inquiries known—means you can go to the courts and stop him from making inquiries. You can go to the courts and stop ICAC and you can go to the court and stop the NCA. You can object to the process and you can have legal advice about how to go about doing that. Here you cannot do anything. All of those other agencies and bodies are subject to the rule of law and are subject and open to supervision by the courts. This agency is not.

Mr LEO McLEAY—This is not an agency, is it? Could I ask you about section 34M, which are the rules for strip searches. Subsection 34M(1)(e) says:

(1) A strip search under section 34L: ...

(e) must not be conducted on a person who is under 10 ...

Do you know of any other statute that allows you to strip search children?

Mr Rozenes—I would like to think about that. I imagine customs legislation may have powers for the strip searching of minors; there would be controlled circumstances I would imagine where that could be done. It would have to involve parents, guardians or friends or something.

Senator SANDY MACDONALD—By reading subclause (e) am I right in assuming that the bill does not rule out the potential of child detention?

Mr Rozenes—No, it does not.

Senator ROBERT RAY—But the Crimes Act always allows you to have an interview friend present. This does not, does it?

Mr Rozenes—No.

Mr LEO McLEAY—In the next section it suggests that maybe there needs to be someone there, but it is a person who is appointed by the prescribed authority one would think rather than by the person themselves. I have not seen a piece of legislation before that allows you to strip search 11-year-old kids.

Senator ROBERT RAY—Ten-year-old kids.

Mr LEO McLEAY—Yes, if they are under 10, they cannot. But, if you reach 10, they can strip search you. Have you come across anything like that?

Mr Rozenes—No. Before we leave that, can I just say that we will have a look at that because we really did not consider this as one of the matters that we would be asked questions about. We will have a look at that and put something in writing to you.

Mr BEAZLEY—I would like to go back to an issue we were discussing earlier on—and that is the 48-hour renewable detention. Under the British act it is 48 hours and then a judicial authority might extend it a further five days. In the US it is detention for a period of seven days and then possibly for six months from that point onwards. You have here what seems to me two imponderable sets of circumstances. You have got a person you might want to bring in and question, from whom you might get some information, and you may want a return visit with that particular person two or three weeks down the track. On the other hand, you may have a person in your hands who is somebody very likely to commit an act. I have perhaps overstated the extent to which it was purely intelligence gathering. Absolutely everybody was going to be innocent of particular offences. Some of the people hauled in—quite conceivably people just off a plane—may have some very malicious intentions in mind.

What sorts of safeguards do you think you could build in to prevent the situation that so many submissions say is highly undesirable—that is, basically keeping people in detention without charges, without any set of rights extended to them for an indefinite period of time, which is a possibility under this legislation? What safeguards do you think you could put into it to allow ASIO a legitimate capacity to come back to a person of very direct interest to them without actually having themselves come up against an impenetrable barrier of having already had their 48-hour chop?

Mr Rozenes—I suspect that there are two sides to this. One is the desirability of having people in some form of administrative detention for a week, a month or six months if necessary, and that is a very substantive issue. We have illegal migrants in administrative detention for long periods of time until such time as it is determined whether or not they are qualified to enter. But it is a public issue and they have rights, and their rights are capable of being exercised, and there are courts that are capable of supervising them.

Senator ROBERT RAY—All right. Let us assume someone has been taken in for 48 hours and they appear before the federal magistrate. Are there any rules governing how long that interview can go for? As I read it, you could probably interview for 48 hours straight—if the prescribed authority would permit it, which I doubt. In police interviews, don't you have interview times and limits?

Mr Rozenes—There are. There are time limits in almost every jurisdiction if not in every jurisdiction now in Australia before which a person must be brought before a court, and, when they are brought before the court and if their inquiries are incomplete, application can be made to the court to extend their time and custody for a further period of time. But they are usually in there for five or six hours or thereabouts. I do not know of any jurisdiction that has greater than five or six hours.

Senator ROBERT RAY—I think this is an oversight in the legislation rather than deliberate, but it seems to me you could interview someone for 48 hours straight without anything in the legislation currently inhibiting that. I do believe no federal magistrate or AAT member would allow it because they would not want to be sitting there for 48 hours. It might be a case for some sorts of rules.

Mr Rozenes—I am just looking at our submission. We had reference to the international covenants that deal with this issue. Bear with me a second. When you look at paragraph 29 of our submission, you will see that we there refer to article 9 of the International Covenant on Civil and Political Rights. The relevant paragraphs are extracted on page 18 of our submission. You will see that paragraph 4 provides that any person who is deprived of liberty by arrest or detention shall be entitled to take proceedings before a court, in order that the court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 9, which that falls into, has been picked up by the United Nations Human Rights Committee. Looking at the last paragraph on that page referring to the concept of preventative detention, it says that:

> ... for reasons of public security, it must be controlled by these same provisions, i.e. it must not be arbitrary, and must be based on the grounds and procedures established by law (para. 1), information of the reasons must be given (para. 2) and court control of the detention must be available (para. 4) as well as compensation in the case of a breach (para. 5).

We simply say that they are fundamental obligations that any community has when it authorises by its law administrative detention of persons not charged with criminal offences, and it is then up to the courts to supervise how long a person can be held, how long the questioning can take and whether or not it is tantamount to torture—and I do not mean torture in the vile sense that we understand it to be but torture in the sense of people being held incommunicado for long periods of time without access to friends, support systems, legal advice and the like.

Senator ROBERT RAY—There is a qualifier: 34J says that anyone held has to be treated humanely. I note there is no definition at the front of what humanely means.

Mr Rozenes—No.

Senator ROBERT RAY—So there is at least that defence.

Mr Rozenes—But that is why the Human Rights Committee's recommendation says to ensure that that is so you have to have the supervision of the outside court.

Senator ROBERT RAY—Yes, I see.

Mr Rozenes—If I take you to paragraph 37 of our submission you will see that point made there—paragraph 11 says:

> ... To guarantee the effective protection of detained persons ... [p]rovisions should ... be made against incommunicado detention. ... The protection of the detainee also requires that prompt and regular access be given to doctors and lawyers and, under appropriate supervision when the investigation so requires, to family members.

It is the very issue, Senator, that you have just raised.

Senator ROBERT RAY—This is a bridge too far for me. I believe that these people should have legal representation—they should not be able to incriminate themselves—but I do not think they should be able to ring up the local sleazy lawyer around the road that they have been conspiring with in terrorist acts to tip them off. Not all people are as reputable as the people sitting in front of the committee.

Mr Rozenes—I do not disagree with that proposition. It is not beyond the wit of the people who framed this legislation to provide an objective, impartial and trustworthy panel of lawyers who can give advice to people in these circumstances. It cannot be too hard.

Senator ROBERT RAY—That seems a good, measured course.

CHAIR—Thank you very much for appearing before the committee today.

[2.47 p.m.]

BLICK, Mr William James, Inspector-General of Intelligence and Security, Office of the Inspector-General of Intelligence and Security

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House of the Senate. Giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Blick—Not very many. My main interest in the production of this legislation has been to ensure that the powers of the Inspector-General of Intelligence and Security, which are those of a standing royal commission in relation to ASIO, were not set aside by the legislation, which could have happened had it not been drafted in such a fashion. I had input to the legislation along those lines. There are clauses, as you would have seen, in the bill that provide preservation of the powers of the Inspector-General and specifically provide access to the Inspector-General for people who are in detention under these provisions.

CHAIR—On that point, could you explain your functions as you see them in the bill. Are you happy that it has gone as far as it possibly could?

Mr Blick—There are things in the bill that preserve the functions I have of taking complaints about ASIO from people who are affected by actions of ASIO. If you turn to section 34E you will see that people who are taken into custody under these arrangements have the right under 34E(1)(e) that they have to be told of their right to complain orally or in writing to me about any aspect of their treatment by ASIO and they have to be provided with facilities under section 34F(9) to make an oral complaint to me. That is slightly wider than the current provision in my own legislation. Under my legislation they have to be provided with the facilities to make written complaints to the Inspector-General.

The other substantially relevant section is 34T, which is right at the end of the bill, and that says:

This Division does not affect a function or power of the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986*.

The relevance of that provision to me is that it continues my capacity to make inquiries into ASIO's activities and it continues the capacity of the Inspector-General to inspect ASIO's activities. This would mean that I could attend these interrogations and assure myself that they were being conducted with propriety.

Senator SANDY MACDONALD—Would it be your intention to attend under 34E?

Mr Blick—I have not reached a final view on that but my preliminary view would be that at least in the first few instances I would seriously consider attending.

Senator ROBERT RAY—But that is the most you can do, isn't it? Section 34E means that you can be notified of something but you do not have any capacity, do you, in the short term—in the 48 hours—to do anything?

Mr Blick—As I have said, my initial intention would be to attend those interrogations. It would also be my intention, between now and when this legislation comes into operation, to discuss with the Director-General of Security procedures that would enable me to do that.

Senator ROBERT RAY—If I was detained and they said, 'Look, you can contact the Inspector-General of Intelligence and Security and complain,' and then I said, 'Well, what can he do about it?' and they said, 'Well, he might turn up,' I'd say, 'Big thrill!' This is not a criticism of you. It sort of leads you halfway to having a safeguard but what does the safeguard do other than what you would normally do in the long term—review all this?

Mr Blick—This is true, but it is a real-time review. It is a constraint against improper exercise of ASIO's powers, which is what the Inspector-General function is.

Senator SANDY MACDONALD—Given the fact that you could appear, and your intention is that you probably would appear, what would your feeling be about the required appearance?

Mr Blick—Do you mean the legislation requiring my appearance?

Senator SANDY MACDONALD—The legislation would require you to be there.

Mr Blick—If you look at the way my normal powers are exercised, they are discretionary. I am not required to conduct an inquiry simply because somebody complains to me. I do not think it would be appropriate to require an appearance on every occasion in a case like this but, if that were the way the act were framed, obviously one would comply with it.

Senator ROBERT RAY—In the end, if you have not attended, you or your staff would probably be required to look at the videotape, wouldn't you?

Mr Blick—We are required under the legislation to receive a copy of the videotape. We are also required to receive copies of the other documents that are relevant to it. Another thing I should have mentioned is that, irrespective of the conduct of the interrogations, we would review, in the normal course of our operations, the preparation of documentation for the Attorney-General to ensure that ASIO was putting a case to the Attorney-General that was properly defensible.

Senator ROBERT RAY—That has not been made clear anywhere. The Attorney-General has to take three criteria into account.

Mr Blick—Yes.

Senator ROBERT RAY—One of those—which I disagree with because I think it puts pressure on the Attorney-General—is put in the same terms as the prescribed authority. The

prescribed authority is not in a position to judge the other two criteria—I accept that—but are you entitled to look at those criteria and satisfy yourself that they were valid?

Mr Blick—Yes, and that is what we would be doing in the normal course of events, as we do with warrants and other operational material that is put forward.

Senator ROBERT RAY—So you will look at whether there are other collection methods—and because of your scope you will know that; that is already there—and then you will assess whether there was a real risk of disclosure.

Mr Blick—That is true.

Senator ROBERT RAY—I do not agree with all that is in the bill but, if you intend to do that, it is a good safeguard.

Mr BEAZLEY—I would like to follow up on that very commendable intention on your part. Would those very commendable intentions or the sense of pressure upon you that has obviously been exercised by your own view about the proprieties in this be amended in any way if the bill were to be changed, for example, to protect the person detained against selfincrimination or to give them some form of legal representation? Do you in some sense see yourself as a substitute for what are normal protections for people who find themselves in custody?

Mr Blick—Not at all. We would still undertake those processes anyway.

Senator ROBERT RAY—But let us say that a complaint has been received and you turn up to observe: basically you cannot intervene to say or do anything for that period of 48 hours or 96 hours or whatever, can you?

Mr Blick—No, I do not think that is the case at all. The act that I operate under provides a great deal of flexibility for me to act by way, certainly, of recommendations. If I were of the view during any period of time that ASIO was acting in a manner that was lacking propriety I could make observations and recommendations on the spot.

Senator ROBERT RAY—Can I give you an example? For instance, let us say that a prescribed authority has granted the warrant, the person is brought before it and you attend—be there a complaint or otherwise, you have attended—and the questioning starts going away from what you regard as matters relevant to terrorism and towards certain incidents of lollies being handed out at the local cinema. How exactly could you intervene? Would you have to go then and ring the Director-General and say, 'This interview is not going correctly,' or could you address the prescribed authority directly?

Mr Blick—Well, the prescribed authority, as I understand it, is not the person doing the questioning; it is the ASIO person, in the case of ASIO.

Senator ROBERT RAY—I thought the prescribed authority was a federal magistrate or the AAT member sitting there as ASIO interviews the person.

Mr Blick—That is correct.

Senator ROBERT RAY—I am asking if you have any standing at that point, because you are the one person that can be notified and brought in to say, 'Hold on; you are going beyond the ASIO Act. Questions as to this person's other criminal behaviour have nothing to do with terrorism.'

Mr Blick—I have no less standing in relation to that than I do in relation to any other ASIO activity and—

Senator ROBERT RAY—Yes, but you see the question is whether you have standing before ASIO or standing before the prescribed authority. Do you see what I mean?

Mr Blick—I see what you mean, but this legislation says that it does not affect my powers or functions. I do not see that it can affect my powers or functions, therefore, in relation to any action that ASIO may be taking.

Senator ROBERT RAY—We are ships passing in the night here.

Mr Blick—I understand what you are saying, but—

Senator ROBERT RAY—Having commendably put in the legislation either a complaint process to you or you using your own initiative to turn up, I really need to know from you whether there is any way you can intervene in the process when it goes off the rails. That is question 1. Question 2 is: can you do that directly to the interviewer and prescribed authority, or do you actually have to go back to the Director-General and say, 'You should pull people into line here because we are going off track'?

Mr Blick—We are talking about things that have not happened yet, and so I have to speak by reference to existing activities. In the case of an existing activity of ASIO or of one of the other intelligence and security agencies which I was observing at the time and with which I disagreed, I would immediately make that known to the person who was conducting the activity—if I had them in front of me—and I would as soon as possible make known to the head of the organisation that that was my opinion.

Senator ROBERT RAY—Let me put one last proposition to you. Let us say that someone is taken before a prescribed authority in Perth and you are in Canberra: the person wants to make a verbal complaint and say, 'I really think you should be present.' How does that operate, given time zones and travel and everything else?

Mr Blick—There are logistical issues here, obviously, and we would have to deal with them at the time. It might be that one could not get there before the beginning of an interrogation. Again, I would be wanting to discuss these matters about practicalities with the Director-General.

Mr LEO McLEAY—I am not quite sure whether your involvement in this process is much of a safeguard. It might be a safeguard after the fact in that you can say that something which should not have been done was done, but I do not know how you can help someone or facilitate

something in the process. If a person were taken into custody before one of these prescribed authorities and they said, 'I want to make a complaint to the Inspector-General of Intelligence and Security,' do you think that that should stop the clock and that the authority should cease interrogating that person until after they have made their complaint to you? Or would that be reported to you some time later and, once again, after the fact, you may find that they have done the wrong thing but by then it is too late?

Mr Blick—As I said, the legislation provides that they have to be provided with facilities to make an oral complaint with to me. That is in fairly general terms, but I see that as requiring that they be provided there and then with the ability to phone me up and talk to me.

Mr LEO McLEAY—If, in the middle of one of these proceedings, a person said, 'I want to make a complaint to the Inspector-General of Intelligence and Security,' do you think that the authority should let them phone you up then and there and that the process should stop until they have phoned you?

Mr Blick—Yes. My interpretation of this is that the legislation requires them to be provided with those facilities. I would not have thought that it was proper to say, 'We will provide you with them in 48 hours time when we have got over this process,' if they have a complaint that they want to make there and then.

Mr LEO McLEAY—Just take us through this process then. The person has rung you and, as Senator Ray has said, they may have been in Perth. How do you see your authority proceeding if you think that this process is going off the rails after what the person has told you? Do you see yourself having the ability to tell the prescribed authority that they should not continue the process?

Mr Blick—I would need to take legal advice on that issue anyway, so it would be a bit silly for me to speculate in this forum.

Senator ROBERT RAY—More to the point, you could tell the ASIO officer present rather than the prescribed authority, couldn't you?

Mr Blick—Yes. I do not think that there is any question about my capacity to say to the ASIO officer that I have reservations about the conduct of the process and about my ability to be in immediate touch with the Director-General and inform him of my views. Under my legislation, as I have said, all I have is a recommendatory power. I do not have compulsive powers; I cannot stop a particular action of an intelligence or security agency by requiring that they stop. But recommendations can be very persuasive and have been so far in the exercise of the powers under this act. I should also mention, of course, that there is a public reporting power for the inspector-general and that in itself is a very persuasive sanction.

Senator ROBERT RAY—Can I ask you about the videotapes?

Mr Blick—Yes.

Senator ROBERT RAY—Are you the only one to get the videotape of the interview? ASIO keeps a copy, obviously.

Mr Blick—As far as I can recall but, again, I am not 100 per cent sure.

Senator ROBERT RAY—Whilst the videotape is a good protection as to what has occurred, can it be adduced in further judicial proceedings?

Mr Blick—You probably should ask someone else that question.

Senator ROBERT RAY—Yes, probably. But your copy cannot be taken off you for that use, can it?

Mr Blick—No, not at all. Indeed, I can use it however I think fit if I am conducting an inquiry. It would be open to me, for the sake of argument, to discuss the contents of the videotape with a lawyer to reach views about the legality of the conduct of the inquiry.

Senator ROBERT RAY—I want to ask about your resources. We have been over this over a number of years but, given the fact that there are now seven or eight pieces of security legislation in front of us—several of which mention your organisation—are you going to have sufficient resources? I know you were not overresourced and that you had a bit of excess capacity—you could do other inquiries, as we have discussed before—but will you need to expand at all to meet some of the requirements not just of this bill but across the board?

Mr Blick—I think for the foreseeable future things are probably pretty right. But any individual exercise can cause quite a large resource impact on a small organisation, and so far governments have been very happy to provide extra resources quickly if necessary for that kind of activity.

Mr LEO McLEAY—I want to go back to the complaint. As you can see, section 34K(1) provides that the Director-General must ensure that a video recording is made of a person's appearance before a prescribed authority for questioning under a warrant and any other matter or thing that the prescribed authority directs is to be videorecorded—so he is required to do that. But section 2 provides that, if they are going to make a complaint to you, it is only if practical that a video recording should be provided. Often things do not tend to be practical. Do you think, if it is necessary for a recording to be done of the appearance of a person before a prescribed authority, that it should also be necessary that a video recording should be made of the complaint to you that the person has?

Mr Blick—The rest of that section qualifies that by saying when he or she 'is not appearing before a prescribed authority' for questioning under the warrant.

Senator ROBERT RAY—So this is presumably when they are immediately detained?

Mr Blick—Or when they have a break in proceedings and they decide to prepare a complaint. I presume that is the intention of the legislation.

Mr LEO McLEAY—You might clarify this for me then. Reading section 2, it seems to say to me that if practical a video recording should be taken when they are not before a prescribed authority; when they are before a prescribed authority, a video will be done. When they are not before a prescribed authority—maybe they are in a cell or somewhere else and they say, 'I want

to ring Mr Blick. Where's the telephone?'—it is only if practical that the officials have to take a video. Wouldn't that be so?

Mr Blick—Yes.

Mr LEO McLEAY—Shouldn't they be required to put their complaint on video?

Mr Blick—It may not be an oral complaint. The person may be writing something at a desk and they may choose to do that at a time when there is not a videorecording outfit around. That is my interpretation of it. The legislation requires three things in relation to complaints. One is that people be told of their right to make a complaint. The second is that they be provided with facilities to make an oral complaint, and the third, which is in my own act, is that they be provided with facilities to make a written complaint. My assumption of the intention of this—and other people may confirm this—is that there may be occasions when somebody decides that they will use the facilities to make a written complaint but they are doing it in private while perhaps there is a break in proceedings and then it is just not practicable for the video to be made. Indeed, one could question the usability of a video of somebody writing a letter.

Senator ROBERT RAY—One of the problems may be that the more rights you give, the more potential you give for time-wasting. But maybe the solution to this one is that, where a video is not taken of their complaint, ASIO has to give a full explanation as to why not, to deter ASIO from using this as a device not to video. That might be the middle ground where you cover both angles.

Mr Blick—There could also be, frankly, occasions when the complainant does not want a video made of a telephone discussion with the Inspector-General. There may be matters that they wish to discuss that they would rather have confidential between the Inspector-General and themselves.

Mr LEO McLEAY—Mr Blick, I wish to ask you a question about 34M, which provides for strip-searching of 10-year-old children. Are there any other pieces of legislation that you operate under where 10-year-old children can be strip-searched without anyone being there? It says a medical practitioner may be present.

Mr Blick—I cannot answer that question off the top of my head. The legislation that I am primarily responsible for looking at is the ASIO Act and the new legislation, the Intelligence Services Act.

Senator ROBERT RAY—So you can answer it, can't you, and say no?

Mr Blick—I beg your pardon?

Senator ROBERT RAY—You can answer it because you are familiar with those pieces of legislation. You were not asked 'any legislation' but 'any legislation under your control'.

Mr LEO McLEAY—Any legislation that you act under.

Mr Blick—I am not aware of any provisions of that kind.

Mr LEO McLEAY—Thank you.

Senator SANDY MACDONALD—You said in your opening statement that you were consulted with the drafting of the legislation. Were there any suggestions that you made to your oversight functions that were not included or that you are not completely happy with?

Mr Blick—No. Indeed, the provisions that are in here in relation to my functions are precisely those that I sought. I say precisely: in fact, they went slightly beyond what I asked for.

CHAIR—So you are quite happy with your position?

Mr Blick—Yes.

CHAIR—There being no further questions, can I thank you very much indeed, Mr Blick, for giving of your time this afternoon.

[3.12 p.m.]

ALDERSON, Mr Karl John Richard, Principal Legal Officer, Criminal Law Branch, Attorney-General's Department

ATWOOD, Mr John, Acting Assistant Secretary, Public International Law, Attorney-General's Department

HOLLAND, Mr Keith, Assistant Secretary, Attorney-General's Department

McINTOSH, Ms Susan Mary, Principal Legal Officer, Law and Justice Branch, Attorney-General's Department

MARSHALL, Mr Steven, Legal Adviser, Australian Security Intelligence Organisation

RICHARDSON, Mr Dennis, Director-General, Australian Security Intelligence Organisation

CHAIR—Welcome. Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as a contempt of the parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Richardson—Yes, if possible. I would like to offer some general comments about the key elements of the bill and in particular the context in which the legislation has been prepared. I would like to focus on the proposed provisions for questioning persons under warrant. They are clearly the most significant proposals contained in the bill and have generated the most public comment. The operation of those provisions will largely depend upon the enactment of terrorism offences under other bills which form part of the overall counter-terrorism legislation package. As you know, the other bills are currently the subject of a separate inquiry by the Senate Legal and Constitutional Legislation Committee. As I have said in evidence before that committee, I think the proposed legislation is necessary if we are to have an effective legislative framework to assist in combating terrorism and in particular to assist in preventing acts of terrorism.

In some circumstances, the proposed amendments could prove crucial in actually preventing a terrorist attack. As the Attorney-General noted in his second reading speech, the proposed measures are 'extraordinary'. They have, understandably, given rise to a lot of public comment and to some genuine concerns and criticism. I understand that any changes to the ASIO Act, as proposed, cannot and should not be agreed lightly, and must in terms of community confidence and trust, be properly monitored and accountable. Consistent with the legislative package as a whole, the proposed amendments to the ASIO Act are directed squarely at those whose targets of choice are innocent civilians and who seek to deny the most basic of human rights—that is, the right to life itself.

ASIO currently has access to a number of special powers under both the ASIO Act and the Telecommunications Interception Act. These powers, which are exercised pursuant to warrants issued by the Attorney-General, authorise the interception of communications, the searching of premises, access to computers, the use of listening and tracking devices and the inspection of postal articles. The powers are governed by strict warrant procedures and are subject to a number of accountability safeguards.

Under guidelines issued by the Attorney-General and tabled in the parliament, the use by ASIO of intrusive investigative methods must be determined by reference to the gravity and immediacy of the threat to security. Where there is little intelligence to indicate that a grave threat exists, the guidelines state that the degree of intrusion into individual privacy should be minimal. However, there may be circumstances where the use of covert methods of intelligence collection is simply inadequate to meet the assessed threat. In particular, there may be circumstances where it is clear that a person within Australia possesses information which is critical to preventing a threatened terrorist act but is unwilling to disclose that information to the relevant authorities.

There are currently no legal powers conferred on any Australian agency to require the disclosure of such information in such circumstances—in other words, in circumstances where, as a result of an existing warrant, ASIO were to obtain material strongly indicating that an individual had knowledge of a planned terrorist act or was involved in such planning but the indicators were not sufficient to make an arrest and to prosecute any inquiries could be met with silence or a refusal to answer questions, even if lives were at risk. The proposed new warrant regime is intended to fill this gap.

I recognise that there are legitimate concerns about the potential scope of such a regime; however, the provisions include safeguards designed to prevent abuse. The procedures in the new legislation provide a three-stage approval process for the issuing of a warrant to authorised questioning. First, a warrant may only be requested by the Director-General of Security. This power is not subject to delegation. Second, the Director-General may only seek a warrant if the Attorney-General consents to this. Before giving such consent, the Attorney-General must be satisfied that there are reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorist offence and that relying on other methods of collecting the intelligence would be ineffective. Thus, the Director-General would need to satisfy the Attorney-General that the intelligence sought is not available through other measures, including use of the other warrant powers conferred on ASIO. In some, the warrants are intended to be a measure of last resort.

The third stage involves consideration of the request by a prescribed authority, namely, a federal magistrate or a senior legal member of the AAT. This differs from other ASIO warrants in that an independent official must agree to the request before the warrant to authorise questioning is issued. The prescribed authority may not issue a warrant unless he or she is also satisfied that there are reasonable grounds to believe that it would substantially assist in the collection of intelligence that is important in relation to a terrorist offence. The provisions make clear that the warrant to be signed by the prescribed authority must be in the same terms as the draft warrant approved by the Attorney-General. This is designed to ensure that the terms of any warrant meet with the approval of both the Attorney-General and the prescribed authority. If the

prescribed authority considered that the terms of the warrant were inappropriate, he or she would have the discretion to refuse to issue it.

If the request seeks authority to have a person taken into immediate custody, the Attorney-General must first be satisfied that this is justified on one of three specified grounds. These are: where another person involved in a terrorist offence may be alerted to the investigation, where the person sought may fail to appear before the prescribed authority or where the person may alter or destroy a record or thing which he or she may be requested to produce. The provisions are designed to ensure that detention powers may only be exercised if there is a real risk that the purpose of the warrant would otherwise be frustrated.

The provisions can enable incommunicado detention of persons depending upon the terms of the warrant agreed by the Attorney-General and the prescribed authority. However, the legislation provides that any person detained has a right to communicate with the Inspector-General and the Commonwealth Ombudsman, whichever is appropriate. The legislation stipulates that the facilities must be available to the detained person for such communication.

The legislation also includes provisions to ensure that action taken under the warrant is accountable. The Director-General is required to ensure that video records are made of any appearance before the prescribed authority and any other matter or thing that the prescribed authority directs is to be recorded. It also requires that the Inspector-General be informed of actions relating to the new powers—and I will not go over that which you have already spoken to the Inspector-General about. These accountability measures are in addition to those already in the ASIO Act. Section 17A of the act makes clear that the act shall not limit the right of persons to engage in lawful advocacy, protest or dissent. Section 20 of the act imposes a duty on the Director-General to take all reasonable steps to ensure that ASIO's work is limited to what is necessary for the purpose of the discharge of its functions. Section 21 of the act requires the Director-General to consult regularly with the Leader of the Opposition in the House of Representatives. Section 94 of the act requires that a copy of ASIO's classified annual report be provided to the Leader of the Opposition. Such a report would, of course, include details regarding the issuing of any warrants under the new powers. Finally, I note that the Attorney-General has advised the parliament that this committee will be asked to review the new powers and provide a report on their operation 12 months after their commencement.

Turning to some other concerns that have been raised, I note concerns that the proposed amendments will radically change the nature of ASIO by giving it police powers. I do not agree with this assessment. Under the legislation the responsibility for taking persons into custody or detaining them would be confined to police officers. ASIO does not have any law enforcement powers and the proposed new provisions would not change this. ASIO's functions are directed towards the collection of intelligence that is relevant to security. This includes collecting intelligence in order to protect Australians and Australian interests and the interests of other countries from acts of politically motivated violence such as terrorism.

From a practical perspective, it will be ASIO that will, nine times out of 10, have the intelligence indicating that a person has critical information about an act of terrorism. In such circumstances I believe that it is consistent with the interests of transparency and accountability for the proposed warrant arrangements to reside with ASIO.

In terms of principle, the new powers are intended as an enhancement of ASIO's existing intelligence collection powers. I did make comments before the Senate Legal and Constitutional Committee about the current threat environment. I am in your hands as to whether you wish me to repeat that for the record. I do not know what the protocol is; I am entirely in your hands.

Senator ROBERT RAY—I watched you on Webcast in Melbourne so I do not need to hear it.

Mr Richardson—The only point that I will make very briefly is that, in considering the general threat environment, it is I believe important to recognise that we have a responsibility not only in respect of Australia's own interests but in respect of the interests of other countries in Australia. We also have a responsibility to seek to ensure that those very few people in Australia with links to terrorist networks such as Al-Qaeda do not conduct or assist in the conduct of terrorist acts in other countries. Like drug trafficking, terrorism is transnational and does not respect international borders. That is really all I want to add about the threat environment that I did not put on the record to the Senate committee. I am in your hands now for questions.

CHAIR—Mr Holland, do you wish to make a statement?

Mr Holland—No, thank you.

CHAIR—Mr Richardson, can I say that I was pleased to hear you say—and I think you have nailed it—that the fact is that ASIO is not a police force. From reading the 140-odd submissions, there would seem to be almost a perception in the community that, if we did not already have a secret police service, this was going to be it. There have been absolutely no changes in terms of the physical operation of ASIO?

Mr Richardson—No.

CHAIR—When this new legislation was being put together, was it purely an Australian operation or did you call on similar legislation around the world, and, if so, which countries specifically did you look at?

Mr Richardson—I stand to be corrected by my colleagues from the Attorney-General's Department, but the initiative for this solely resided within Australia, obviously motivated by the events on 11 September. In preparing the legislation we did have regard to legislation in the UK, Canada, the US and—although I am not sure—New Zealand. Certainly we did with Canada, the US and the UK.

CHAIR—Yet there have been some quite major differences, as we have heard during the hearing so far, in terms of the provision of legal advice and the rest of it. Can you give us an indication as to why you did not go along that line, the traditional line?

Mr Richardson—What do you mean by 'traditional line'?

CHAIR—The criticism has been that the people who may be detained under this have not got access to legal advice. Was there any specific reason as to why you took that line?

Mr Richardson—I think what is proposed is different to Canada. I do not know whether the differences in respect of the UK are that great. I will hand over to A-G's on that one.

Ms McIntosh—I suppose it is fair to say that the framework that has been developed for Australia has to fit in with our other frameworks, so reference was had to what other countries were doing but there was no slavish following of those models. In the example that you gave of access to legal representation, the issue there was the concern in ensuring—as I think Mr Richardson mentioned earlier—that people who may be involved in terrorist activity could not contact people who may then alert others to the fact that there was an investigation going on, so in that sense legal representation was considered as part of the general issue of communication with other people.

Senator SANDY MACDONALD—My understanding of the UK legislation is that they are entitled to contact one person but it does not necessarily have to be a lawyer.

Ms McIntosh—I would be happy to check that. I have some information that may help me there.

Senator ROBERT RAY—I agree with the chairman that we are not welcoming Australia's first J. Edgar Hoover to the table, that is good. I think you made a compelling case, so I am not going to pursue that. I came across this well-known quote the other day:

> Australia had no way to be certain terrorists or people with terrorist links were not among asylum seekers trying to enter the country by boat from Indonesia.

Has there been any occasion over the last nine months that the powers to be conferred in this proposed legislation would have been invoked to detain or question any asylum seeker seeking residence in Australia?

Mr Richardson—No.

Senator ROBERT RAY—Was any thought ever given to putting a sunset clause in this legislation? In any view, it confers extraordinary powers—and later we will debate whether they are correct or incorrect. Was any thought given to having a sunset clause in this legislation?

Mr Holland—The proposal that the Attorney put forward during the debate in the House that this legislation would be reviewed by this committee after 12 months was an alternative to that. This legislation was not developed in isolation; in fact, the initial stages of development focused on terrorism offences and a terrorist bill and this was one of the elements that grew out of the consideration of that bill. That bill was based upon looking at a new approach to dealing with terrorism focusing on prevention rather than prosecution after the event. So in those circumstances it was foreseen that the prevention activities would continue indefinitely.

Senator ROBERT RAY—Until the Attorney announced that inquiry in the House, I do not know what consultation there was, and I do not particularly care. When does the clock start on the 12 months—from proclamation?

Mr Holland—I would assume from when the legislation comes into effect.

Senator ROBERT RAY—Now I admit to being a bit baffled when I read all the commencement clauses, it seemed to crisscross. Mr Holland, I am sure you will be able to succinctly explain the commencement clauses and their effect to me now.

Mr Holland—I will ask Mr Alderson to deal with that issue, Senator.

Mr Alderson—The reason for the complicated provisions is that there is a package before parliament of terrorism bills.

Senator ROBERT RAY—Yes, that I understand.

Mr Alderson—Essentially, the complication comes from dealing with those being enacted in any order so that the scheme can be effective whether this goes first, second, third, fourth or fifth. The key factor here is that the powers rely on the existence of a terrorism offence and so the underlying rule is that, if the powers come in first, they sit there and wait until there is a terrorism offence or terrorism offences to operate on and, if the terrorism offences are already in place, this will commence on royal assent.

Senator ROBERT RAY—What is the effect on this legislation if the terrorist powers never come in?

Ms McIntosh—These powers will never operate. These powers are dependent on there being terrorism offences.

Senator ROBERT RAY—As defined in another act rather than within this one?

Ms McIntosh—Yes.

Senator ROBERT RAY—There is mention in this act of proscribed organisations once, I think. Is that at all vital to the operation of this act?

Mr Alderson—The proscribed organisations provisions have been included among the terrorism provisions and have been put forward as a key part of that terrorism package.

Senator ROBERT RAY—I understand that.

Mr Richardson—No. The answer to that question is no, Senator.

Senator ROBERT RAY—You see, if you are doing that on what the parliament will pass, proscribed organisations is the highest hurdle anyone is going to have to jump. If it hits the fence, is that going to affect your legislation?

Mr Richardson—No.

Senator ROBERT RAY—Thank you for that. With reference to 34B(2), has any testing been done with the federal magistrates as to whether they want to participate in this scheme?

Yes, you are conferring that power on them, but has there been any discussion with magistrates or their representatives as to whether they want to be involved in this particular area?

Mr Holland—There have been preliminary discussions with the Chief Magistrate, I understand. There have certainly been discussions with the AAT. The decision has been taken that, until the legislation is in place and we see the outcome of it, there is not much point in going into lengthy discussions about how this will operate. So yes, there have been preliminary discussions but no great in-depth discussions.

Senator ROBERT RAY—What I am trying to get to is this: are they happy little vegemites about it, or is there angst about it? I want just that general view. I am not going into detail.

Mr Holland—I am not in a position to answer that question. Certainly there has not been conveyed to me any deep-seated concern about the operation of this legislation involving the magistrates—primarily because it is optional; they do not have to say yes, for the reasons that have been mentioned earlier. In terms of the members of the AAT, again it is optional for them; they do not have to say yes. So whether or not a particular magistrate or AAT member has some concern, I am not aware.

Senator ROBERT RAY—I will come back to the issue of those two agencies in a minute.

Mr LEO McLEAY—Did I hear correctly that you said that the AAT people can opt out if they wish to?

Mr Holland—Under the warranting regime that we have now for TI, people are not forced to become an issuing authority. In other words, it is by invitation and they can say yes or no, and it does not matter whether it is a magistrate or whether it is the AAT member.

Mr LEO McLEAY—Clause 34B(2) provides that a magistrate has an option to be part of this or to not be part of this. Unless the magistrate has agreed in writing and the consent is enforced, the magistrate is out of the scheme. But 34B(3) talks about the AAT people and just says that the minister must not appoint a person under this paragraph unless the person is a deputy president or is an enrolled legal practitioner. It does not say that they have the chance to opt out, as magistrates do.

Mr Holland—First of all, in relation to the magistrates, the detail of that provision is to take account of the fact that they are then seen as a chapter III court and therefore, under the Constitution, it cannot be a condition of their appointment; it cannot be enforced upon them to perform an administrative function. In terms of the AAT, it is not necessary to spell all of that out. There is not that wall between what they can and cannot do. But the fact that the legislation is silent on that issue does not mean that they have to do the job. The legislation is not requiring a deputy president or any member of the AAT to be a prescribed authority; it is not saying that, and that is not the intention. So, if an AAT member says, 'I don't want to be part of this'—

Mr LEO McLEAY—Maybe you should make that a bit clearer than it is at present. If you read this, it is absolutely silent. It says that the minister must not appoint a person unless the person is a deputy president; so on a reading of this the minister could appoint Deputy President A and that deputy president would have no say in it.

Mr Holland—The purpose of that particular clause is to indicate the level of expertise of the person who will be exercising the authority. That was the main focus of that particular provision: to ensure that only those with legal qualifications and, in cases where a deputy president is required to do it, then it would be at that level. But it does not say that every deputy president of the AAT and every member with a legal background must be a prescribed authority. It does not say that.

Senator ROBERT RAY—I have great difficulty in accepting this as an administrative decision, especially as you require the AAT member to have five years legal experience. Maybe just on an administrative decision, we could trust anyone on the AAT. I think the description of the issuing of a warrant in these circumstances to detain someone without legal representation, without the right to protect themselves against self-incrimination, is not just an administrative act. I think you admit that in your legislation by whom you allow to do it. By putting the rest of the AAT aside, you are saying that it is not just an administrative decision.

Mr Holland—The intention of this legislation is that the person who will be exercising this authority will be administering an administrative procedure: it is administering a warrant. They are exercising the same sort of power, a warrant issuing power, that is exercised by the members of the AAT and the federal magistracy now in relation to telecommunications interception.

Mr BEAZLEY—Yes; they do not sit and listen to the telephone call, but they do sit and listen to the questioning.

Mr Holland—This is true.

Mr BEAZLEY—Why didn't you try it on the Federal Court?

Mr Holland—Because in the past the Federal Court have made it clear that they would not be comfortable in dealing with these matters. So, in relation to TI warrants, for example, we had to introduce legislation that gave that power to the members of the AAT because the Federal Court decided that they would not exercise that.

Senator ROBERT RAY—We agree with that. But I reckon that Federal Court judges would be keen as mustard to deal with something as complex and as sensitive as this. Also, if there are not a lot of cases, you are not going to clog up the Federal Court. Given their legal experience and everything else, I just think they are the ideal people to be dealing with this sort of an issue, given the sensitivity surrounding it.

Mr Holland—I accept your point. In relation to Mr McLeay's question, I certainly did not consult the Federal Court. I doubt that members of the civil law branch in the department did, but I cannot say whether the Attorney-General or his office consulted the Chief Justice or any other judge of the Federal Court.

Senator SANDY MACDONALD—Could I put weight to that argument too? Under 34B(4) you are giving the prescribed authority, in his or her duties under the division, the same protection and immunity as a justice of the High Court. You are giving a lot of protections to the prescribed authority and not many protections to the person who is being investigated. It is a rather unusual view.

Mr LEO McLEAY—But isn't this a sleight-of-hand to make these AAT people look like they are mini-judges so that it looks more respectable?

Mr Holland—No, not at all. Perhaps I can say that one of the factors in choosing the AAT members was that they are likely to be the same members who issue telecommunication interception warrants. There clearly would be some advantage in having those people who are familiar with and experienced in the sorts of procedures, the sorts of checks and balances and the need to take into account other considerations, like the right to privacy and so forth, playing a role in this area.

Senator ROBERT RAY—When they issue those telephone interception warrants under their legislation—and I do not know the answer to this; maybe I should not ask it—do they have the same protections and immunities of a justice of the High Court?

Mr Holland—I will have to take that on notice.

Mr Alderson—No. Really I guess that the framework provisions are standard provisions that appear in the TI Act, the AFP Act and Customs Act as listening device provisions, and the Crimes Act as controlled operations provisions. I think it is essentially that, in terms of not discouraging good AAT members from performing this role, those protections are put in place.

Senator ROBERT RAY—I am satisfied with that. I just wanted to know whether it applied to other acts, and you have answered that.

Mr LEO McLEAY—But would you not say that there is a quantitative difference between issuing a warrant to intercept someone's telephone and issuing a warrant to detain someone for an indefinite period?

Mr Holland—Yes.

Senator ROBERT RAY—Let us put it in the extreme: picking up a 10-year-old, strip searching them and questioning them for 48 hours flat out. There is a quantitative difference between doing that and listening into someone else—

Mr LEO McLEAY—And they do not even listen into the telephone conversation; they just let someone else do it.

Mr Holland—That is correct.

Mr LEO McLEAY—Shouldn't it require a higher level of scrutiny to do this than the level of scrutiny necessary to issue a telephone intercept warrant?

Mr Holland—Do you mean that it should be a judge and not a member of the AAT?

Mr LEO McLEAY—I think it should be a judge or a judicial officer rather than a member of the AAT.

Senator ROBERT RAY—With tenure.

Mr BEAZLEY—With tenure.

Mr LEO McLEAY—An independent person.

Mr Holland—That does take into account the magistrates. That is what I am saying: the problem we have is that there is no indication that the judges of the Federal Court would be prepared to do this.

Senator ROBERT RAY—We can get you plenty of volunteers, if they do not want to do it.

Mr BEAZLEY—Can I just take this a point further? We are worrying this like a dog with a bone for a very simple reason. That is, I think there are very many members of the committee that do not see this in the same context as telephone interceptions; we see this as a substantial increment to ASIO's intelligence gathering powers of a type not of an equivalence elsewhere pretty well anywhere in Commonwealth legislation. Those of us who are somewhat disposed to thinking it is not unreasonable nevertheless are very interested in the checks and balances. It does seem to me that the Administrative Appeals Tribunal is insufficiently clothed in terms of its membership with the sorts of checks and balances authority would like to see. Its starting point is—at least I would like to see it being—that the government does not reappoint this bloke to anything basically and he has his job for life. Is there some concern on your part that there would be insufficient numbers in the magistracy? You do not know about the Federal Court, because nobody has talked to them. But in relation to the magistracy, is your concern that there would be insufficient numbers and the events would be so frequent that it would be impossible to rely on the Federal Magistrates Court?

Mr Holland—No, that was not a consideration at all. I think primarily the consideration was, as I said before, we had a pool of people who are used to working in this area and, therefore, it seemed appropriate that those people be the pool from which we draw.

Mr LEO McLEAY—But, without casting any aspersions on the people who are in that pool, someone aged 30 with five years of legal experience and who is a member of the AAT with six months to go to their reappointment date is probably a lot less independent than a person who is a Federal Court judge with tenure or a Federal Court Magistrate with tenure, aren't they?

Mr Holland—I think there are a lot of factors that would weigh upon the mind of anybody who is going to be asked to do this. I cannot say whether or not a member of the AAT would take that into account. I would hope that they would not, but I can understand why other people might think that that might be something they would take into account. But I would like to think that those who are called upon to play a part in what truly is an extraordinary use of power would think carefully about what they were doing and do it with bona fides.

Senator ROBERT RAY—But even if they did and Mr McLeay's case fell over, you have to have the perception. These are AAT people are being reappointed or promoted by the executive; they may even become federal magistrates or whatever else. The perception relates to their degree of independence towards the end of their term. The Attorney-General himself has said, 'For this person, a warrant should be issued.' So that 30-year-old or 40-year-old has to replicate

that judgment on the same criteria. Admittedly, the Attorney-General has considered two others, but that is irrelevant at this stage. If I am waiting to be promoted, I am not going to say that the Attorney-General is wrong. By the way, which department appoints AAT members?

Mr Holland—The process for the appointment is carried out by the Attorney-General's Department.

Senator ROBERT RAY—Again, I know there are Chinese walls and I know there is probably no problem, but there is a perception problem.

Mr Holland—I take your point.

Mr LEO McLEAY—With this extraordinary power, the perception problem is important. We have never given people power to detain people, to compel them to answer questions, to self-incriminate themselves or get five years in jail. You can get five years for answering the questions or five years for not answering the questions; take your pick, but it is off to jail. The perception that that is going to be dealt with fairly is a very important perception.

Mr Holland—Indeed.

CHAIR—But there is other legislation where those provisions about answering questions are covered.

Ms McIntosh—Yes, that is right; there is a range of legislation. I can run through some of those examples, if you are interested.

Senator ROBERT RAY—Yes, especially those where you do not have legal representation and you do not have the right not to self-incriminate. Is that a long list?

Ms McIntosh—I have a list of where there is an offence for failing to answer questions. That includes the National Crime Authority Act, Taxation Administration Act, Education Services for Overseas Students Act, Ozone Protection Act, Census and Statistics Act, Quarantine Act, Migration Act and Motor Vehicle Standards Act.

Senator ROBERT RAY—ASIC?

Ms McIntosh—ASIC is not on my list, but this is intended to be indicative.

Senator ROBERT RAY—Yes, fair enough.

CHAIR—Can I go on to another area that seems to have come through on the submissions that we have—that the definition of a terrorist act is far too broad and consequently you may be able to run off into all sorts of other areas such as political demonstrations, Woomeras and the rest of it. You would not agree with that assessment, I suppose?

Ms McIntosh—That has been a significant concern of the other committee which is primarily looking at the terrorism bills. I suppose the most obvious way to answer that is to say

that there is an exception for lawful advocacy, dissent or protest and there is an exception for industrial action. The 'lawful' qualifier does not appear before the words 'industrial action'.

Mr Alderson—Further to that, as a key part of that definition of a terrorist act, there are those limbs of 'serious harm to a person' and 'serious damage to property', which are not only in there but would be read in the context of this being a terrorism offence. Before the other committee there have been various suggestions of upturning a pot plant coming within that definition and so forth; whereas we are really focussing on the other side that is about the political, religious and ideological cause and perhaps not focussing so much on the 'serious property damage' or 'serious harm' limits in the definition.

Mr LEO McLEAY—If I give money to aid for Ireland and it is seen to be channelling money to the IRA, is that a terrorist act under the definition?

Mr Alderson—The key question there is your level of knowledge. If there is the proven connection with terrorist activity but you had absolutely no idea, then, as a defence to the various offences, you can demonstrate that you lacked recklessness as to the terrorist connection. So if you had no idea then the offence would not be proven against you. On the other hand, if you were aware of the terrorist connection and provided the financing, then, depending on the facts, you would come within the offence and that is intentional.

Mr LEO McLEAY—But isn't there some provision in this that provides that ignorance is not a defence?

Mr Alderson—The way it works under that offence is that the starting point is absolute liability but then there is a defence that, if you can show you were not reckless as to that terrorist connection and you can prove that defence on the balance of probabilities, you do not come within the offence.

Mr LEO McLEAY—So I just cannot say, 'Well, I didn't know.' I have to go further than that, haven't I?

Mr Alderson—You have to go further than that—that is correct.

Mr LEO McLEAY—But if I did not know, how can I go further than that?

Senator ROBERT RAY—You have to prove that you are ignorant.

Mr LEO McLEAY—I should have proved that I was ignorant. Some would say that is easy in my case.

Mr Alderson—As happens with other criminal charges when there is a question about someone's level of fault, there are the circumstances you can point to: that you had no connection with the IRA and people in the general community did not know that this named organisation was in fact connected to the terrorist organisation. So you would point to the surrounding circumstances as evidence of your mental state at the time.

Senator ROBERT RAY—Just getting back to the bill: 34C(2) says that the Director-General must give ample grounds to the Attorney-General as to why the warrant is required—which is appropriate. Director-General, do you think our interpretation in the discussion of IGIS was right: that he is about the only one who can bring a judgment to bear on whether you have provided sufficient grounds?

Mr Richardson—That the Inspector-General is the only one?

Senator ROBERT RAY—Yes. Is he about the only one in all the system of checks and balances who can actually test you on that?

Mr Richardson—Certainly, in terms of the way the system works, that judgment is tested right through—

Senator ROBERT RAY—I am coming to that in a minute. But as for the actual reasons you give the A-G, are you not required in the act to have ample grounds?

Mr Richardson—Yes.

Senator ROBERT RAY—On the 'ample-ness', if you like: it is only the Inspector-General in any of the systems of checks and balances who can check that?

Mr Richardson—I think that is right.

Senator ROBERT RAY—I mean, I am not complaining about that.

Mr Richardson—No, I think that is right.

Senator ROBERT RAY—What about when the Attorney-General makes a decision on three grounds, one of which goes on to the federal magistrate or AAT—I will come back to that—and the other two grounds are if there are alternative collection agencies and if there is a risk of disclosure if the person is not detained? Is the I-G the only person who can check those judgments? What I am really asking is: can the Inspector-General actually second-guess and check the judgments of the Attorney-General in regard to these matters?

Mr Richardson—I am not a lawyer, but I would think the Inspector-General could, if there was a complaint made to him, challenge that judgment.

Senator ROBERT RAY—I think we would both accept—at least I hope we would—that a prescribed authority could not make judgments on those other two criteria. They are just not in the position of knowledge, entry level or anything—

Mr Richardson—That is right.

Senator ROBERT RAY—to be able to make that judgment, which is fine by me. It is just that I think you always have to have some checking mechanism. You might like to take that one

on notice: whether on those two criteria the Inspector-General can check on the judgment exercised by the Attorney-General.

Mr Richardson—All right.

Senator ROBERT RAY—I am not necessarily very good at reading legislation, but this legislation allows you to detain someone from 48 hours. It appears to me that the 48 hours starts from when the person appears before a prescribed authority and the questioning starts. How long before that can you seek the order and detain the person before bringing them in for questioning? It may be clear to you in the act; it is not clear to me.

Ms McIntosh—There is a provision that says that a warrant remains in force for 28 days. The purpose of that is to allow for the warrant to be issued and then for the person, for example, to be found. The warrant would stay active for that 28-day period. But the warrant would only allow a period of detention for up to 48 hours.

Senator ROBERT RAY—Detention.

Mr BEAZLEY—So, in fact, it does not actually start from the point at which the questioning starts; it starts from the point of the person actually being picked up?

Ms McIntosh—No, from the point that the person is brought before the prescribed authority for questioning.

Senator ROBERT RAY—All the commonsense of that is terrific, but we might worry about someone being picked up and kept for 21 days before being pulled before a prescribed authority and questioned. You need the 28 days, I accept that: you have to find the person and do all that. But, having done all that, where in this act stops you just holding them for 21 days before you pull them before the prescribed authority?

Ms McIntosh—If the warrant does authorise the person to be taken into custody and detained, they have to be brought immediately before a prescribed authority.

Senator ROBERT RAY—I am sorry; where is that in the act? You are probably right.

Ms McIntosh—That is here.

Mr Holland—That is at 34D(2)(a).

Senator ROBERT RAY—What does ‘immediately’ mean?

Ms McIntosh—It would mean that, as soon as they were picked up by the police, they would be taken straight to the prescribed authority. That may take a number of hours, depending on where the person is picked up.

Senator ROBERT RAY—I assume the right to complain to the Ombudsman, because there would be police involved, is there as a protection against abuse here.

Mr Holland—Yes, that is right.

Mr Richardson—Whether the intention of the act has been expressed in the way it ought to be is another matter; but certainly the intention is that anyone detained would be taken immediately before a prescribed authority.

Senator ROBERT RAY—But it does not actually say that here. What it says here is 'authorised a specified person to be immediately taken into custody by a police officer'—

Mr Richardson—Brought before a prescribed authority.

Senator ROBERT RAY—Then 'brought before'; it does not say 'immediately brought before a prescribed authority'. That is why I worry about this.

Mr Richardson—I am agreeing with you. I am saying that I know what the intention is, and it may be that there is a gap there. Certainly it is not the intention that someone be picked up and kept somewhere for 21 days before being taken before a prescribed authority.

Senator ROBERT RAY—I just think a one-word technical amendment could get us around that pretty quickly.

Mr Richardson—Yes.

Mr Marshall—I think there is an inadvertent omission there. It could be made clearer in the legislation.

Senator ROBERT RAY—Can I go to the common requirement with regard to detention and questioning? The common criteria I am referring to is that the A-G jumps the hurdle and says, 'Yes, you've passed,' and then you take that to the prescribed authority and it is given a tick and the person is detained. Tell me if you do not understand this question: I worry about that hurdle being exactly the same—the same size, the same requirement. If prescribed authorities on six occasions in a row do not issue a warrant, that is a horrible damnation on the judgment of the Attorney-General—and, in turn, on you, Director, for putting it up. It is always better in these cases to have you jump a slightly lesser hurdle than the prescribed authority should in these cases. I do not know whether it is possible to devise it in that way; but it is a concern to me that, if six warrants are knocked over in a row, it does not say much for the judgment of our DG and A-G.

Mr Richardson—I think that was put in for protection; it was put in as a protective measure.

Senator ROBERT RAY—I am now also worrying about protecting DG's and A-G's as well as people detained.

Mr Richardson—Yes.

Senator ROBERT RAY—Can we go to the guts of this legal representative matter? The rationale is that, having been detained, you cannot ring up your local lawyer because that person

could well then get on the mobile and ring Afghanistan, and the whole thing will be blown. Why can't we have an independent panel of legal representations? These can be people you can security clear. You could have a panel of 10 or 20 around Australia. It could be called on to come and represent this person. There is not a lot of preparation time involved. They would know the rights of the person. They could sit in and legally represent them without anyone being tipped off. I cannot understand why this cannot be done. Can you explain why it cannot be done or whether it has been entertained?

Mr Richardson—It has not been entertained. I am not aware of that suggestion having been put on the table.

Senator ROBERT RAY—I do not really expect you to respond as to the weaknesses of that suggestion; but, if you can think of any, you might let me know.

Mr Richardson—Sure.

Senator ROBERT RAY—I do not want to use the word a 'pool' of legal representation, because it is too analogous with another thing that goes in pools. There are just so many senior counsels et cetera who do pro bono work and would be interested in these sorts of cases who would never think of passing on information.

Mr BEAZLEY—I am interested in pursuing this a little because you have examined widely in terms of looking at legislation introduced in other countries. During the course of the last election campaign, I drew some attention to the British legislation and it being not a bad idea to take a bit of a look at how it operated. I realise that you do not have the same situation in the Federal Police of having a special branch and ASIO is not an exact equivalent of MI5 and the rest of it, and so I do not want to take those points too far. But the British have been dealing with a terrorist threat of considerable magnitude, and they still do. That is a terrorist threat of far greater magnitude than that conceivably confronted by us in the current environment. They have trailed their coats even more extensively than we have in that regard, and they have a proximity to the sources of terrorism which put them under threat. Nevertheless, they do permit a legal representation for a person detained under their provisions. Given the great experience that the British have in dealing with these terrorist problems, why didn't you feel that in our particular circumstances we ought to do the same or include elements like that?

Ms McIntosh—It is not a personal feeling one way or the other. What is included in this legislation is the obligation on the prescribed authority to explain the warrant and to explain the implications of not answering questions and that kind of thing. The reason that that has been included is to make sure that the person is aware of their rights, including the right to communicate with the Inspector-General and the Ombudsman in the case of an issue in relation to the Federal Police. I really cannot say anything more about it than that.

Mr Holland—Clearly the drafting of this legislation, or the initial thinking that surrounded it, was much closer to September 11 than the UK legislation. Certainly the argument that was put was the possibility of compromising—being able to get information that would prevent a terrorist attack. 'The moment that you open the door, what guarantees do you have that it is not going to go further?' That was an argument that was put fairly strongly at the time.

Mr BEAZLEY—I think there is a lot of strength in that, particularly given the way in which ASIO appears to want to operate this. But this goes back to the point that was made by Senator Ray about the possibility of properly cleared lawyers as a check and balance to this. Don't you think that in those circumstances somebody detained would have more trust in the lawyer than what they think they would get from the Inspector-General of Intelligence and Security and perhaps the magistrate? At least there would be a person there who could be a potential friend. I guess if one of these folk were picked up and questioned, and they were told that the Inspector-General of Intelligence was there to look after their interests it is quite conceivable that they may have a different view of the meaning of that person's title from what we would have. Their understanding of that may be that not only are they being questioned but that the extreme high boss is about to come in and have a look at them he'll protect them so don't worry! While it inspires enormous personal confidence in me, I do not anticipate being picked up under this—not immediately, anyway. I think there is some merit in your taking this away and perhaps at some other time coming back with a proposition as to what such a panel would look like and what checks you would want placed on such a panel were it to exist.

Mr Holland—Point taken, Mr Beazley.

Senator ROBERT RAY—Can I ask you about self-incrimination? I understand the reason for compelling the giving of evidence. Can the evidence you gather there only be used in regard to terrorist offences?

Mr Alderson—It can only be used directly in relation to terrorism offences.

Senator ROBERT RAY—So if you ask someone, 'Where were you on so-and-so day?' 'Oh, I was committing a robbery'—and this is all on videotape—'down at So-and-so Street and I took so-and-so,' that can't be used against the person?

Mr Alderson—The way it works is that it cannot be used directly against the person. If that information were, under proper channels, to be passed to a law enforcement agency and independently verified and corroborated, then the corroborating evidence could be used against the person.

Mr LEO McLEAY—So it could be a good tip off.

Mr Alderson—Yes.

Senator ROBERT RAY—We talked before about that list of NCA and all the others. To what extent do they have rules in terms of self-incrimination? Are any of them transferable in these circumstances under this legislation?

Mr Alderson—Subject to what my colleagues may add, I guess there are two sides of the equation. The first is allowing its use for terrorism, and that is different from the usual approach that has been taken in Commonwealth legislation. It is premised on the basis that terrorism offences are so serious that to prevent evidence going in on a technical procedural ground would be a matter of grave concern to the community. So that is different from the usual approach.

The second part, which is consistent with the usual approach, is that used for other offences. If you revealed, in the context of terrorism, that there was a murder, you would not prosecute that under the terrorism offence. You would prosecute it is a murder offence even though it is all connected. The rule that you can verify and corroborate that, and use the corroborating evidence against the person, is consistent with the approach that is taken in the National Crime Authority Act, in the ASIC Act, in the royal commissions legislation and so forth.

Mr LEO McLEAY—The objective of this legislation, going back to first principles, is to assist in the prevention of terrorism and to apprehend terrorists. I would have thought that if the people that you pull in under this knew that they had an indemnity, then they are more likely to help you than if they say—well, they probably do not know as no-one is allowed to tell them, but if they had read this they would know—'Well, I may as well cop the five years for not talking than give these people any information anyway.' If the objective is to get information out of these people to help in the pursuit of terrorists, aren't you better off making it easier for them to help you by giving them the indemnity up-front?

Mr Richardson—There is certainly that argument from a practical perspective. However, you do get involved in legal principles and legal policy that go beyond the practicality.

Senator ROBERT RAY—Can I take you to 34G(6) where it says:

A person who is before a prescribed authority for questioning under a warrant must not fail to produce any record or thing that the person is requested in accordance with the warrant to produce.

Does that override the Parliamentary Privileges Act 1987 and resolutions carried by both chambers?

Mr Richardson—My understanding is that it does not.

Mr Alderson—Based on the principles the court applies to those fundamental privileges—legal professional, parliamentary and self-incrimination—you need to clearly remove it with each of those three otherwise the court will read it back in. This legislation clearly removes the self-incrimination but does not make any reference to parliamentary privilege or legal professional privilege and so a court would read it back in.

Senator ROBERT RAY—The legal professional privilege is interesting. If you, in fact, detained a lawyer on the basis that their client had told them things, this act would not force them to divulge?

Mr Alderson—Our assessment is that is correct, that a court would read the legal professional privilege.

Senator ROBERT RAY—That would apply to a doctor or psychiatrist that the terrorist has gone to see?

Mr Alderson—No. The reasons those categories are different is simply because of the categories that the courts have, themselves, accepted the privilege exists in, which is limited to those.

Senator ROBERT RAY—A priest, or only in the confessional?

Mr Alderson—No. I think the categories the courts have accepted are legal and parliamentary.

Senator ROBERT RAY—What about journalists? You know a journalist has interviewed the terrorist and you know all the information they got. Are you really going to take them on and detain them and make them divulge their sources?

Mr Alderson—My understanding of the underlying legal rules is that, again, it is parliament hearings and legal that are the categories accepted by the courts. Whether other categories of person would be someone who would be in practice questioned is another matter.

Mr LEO McLEAY—But these are not courts, these are prescribed authorities, AAT members.

Mr Alderson—To prosecute someone for not answering though, you would have to prosecute them in a court and then the person would say, 'Well the reason I didn't answer was because I had this privilege.'

Mr BEAZLEY—Just to get something absolutely clear, and it is back one point from where Robert is at the moment, on the self-incrimination issue. Do you believe that if this act contained provisions associated with the people you are questioning, and gave them immunity from incriminating themselves, it would diminish your capacity to gather intelligence from them? If this act contained provisions within it which said that any information given to you by any person detained in relation to this would not incriminate that person in a legal sense, do you believe that that would diminish the information that you would be likely to obtain from that person?

Mr Richardson—No.

Senator ROBERT RAY—So you are not giving that person immunity?

Mr Alderson—Yes.

Senator ROBERT RAY—You are giving them immunity from the information that you received through that process? Like the point that you made before, Mr Alderson, you may be able to gather all that evidence against them in another aspect and then prosecute. We do not object to that.

Mr Richardson—Sure, that is right.

Senator ROBERT RAY—Clause 34J requires you to treat detainees humanely. Obviously you are not going to get any asylum seekers in front of you, otherwise there would be some problems. Can I ask why there is no penalty if you treat them inhumanely? I cannot find a penalty for breach of 34J.

Ms McIntosh—The bill does not include any penalties for non-compliance with provisions such as that.

Senator ROBERT RAY—This is a provision that says, 'We would like you to be good.'

Ms McIntosh—It is a statement that people will be treated with humanity. If it was the case that somebody was to step outside of that then that would be an issue that I am sure the IGIS would have an interest in.

Mr LEO McLEAY—What does 'humanely' mean?

Mr Alderson—There are two things I would add to that. One, it is rare in legislation to provide criminal penalties for officers going outside the legislation, but one of the key safeguards that overlays this is that, when you put in a legal rule like this, if officers go outside that and can be shown to be negligent, legal action could be taken against the officer, the agency and the Commonwealth.

Senator SANDY MACDONALD—Surely legal action could be taken against the legal officer whether this particular clause was in there or not.

Mr Richardson—I exaggerate to make the point: if that clause was not there and someone was taken in and tortured before a prescribed authority and everyone was party to it, there is a whole range of laws that they have broken.

Senator ROBERT RAY—Yes, but the more logical use of this term 'humanely' goes back to the point we made before. Just for how long could you interview a person without a break?

Mr Richardson—Sleep deprivation and all of that.

Senator ROBERT RAY—Without a definition at the front of the bill, I go to Mr McLeay's point: I do not know what 'humanely' means.

Mr Richardson—It was put in as a safeguard.

Senator ROBERT RAY—We know it was put in as a safeguard, but is it a meaningless safeguard if there is no definition?

Mr Atwood—It may be possible to add that this provision derives in part from provisions of a number of international conventions that deal with human rights, including the International Covenant on Civil and Political Rights, the convention against torture and the Convention on the Rights of the Child. The question of what is or is not humane will depend to some extent on the context. The decisions of the various committees that look at those conventions bear that out. It is a term which has some underlying accepted meaning. One, as Rodney mentioned, for example, is that a person not be subjected to torture, and another is that if they are in detention they not be deprived of basic human needs such as access to light, food and sleep. It is one of those concepts which it is not possible to define exhaustively but it does have accepted meanings in the context of international law.

Senator ROBERT RAY—It seems you can define inhumanity but not humanity. I take the point.

Mr BEAZLEY—So you would say that this clause in itself without any further qualification would protect somebody from being questioned for 24 or 48 hours straight—that some point in time in an interrogation like that would see the Inspector-General obliged to say, 'This questioning is now taking place in a context that the act does not permit.'

Mr Atwood—I would agree with that. The difficulty is in determining precisely or indeed generally where that point in time would be, but that is correct.

Mr Holland—Could I just refer Mr Beazley to 34F where it talks about the directions that the prescribed authority can give. One of those relates to any arrangements for the person's detention, which clearly would give the prescribed authority the power at any stage during that interviewing to say, 'This far and no further; we will take a break here; go and have dinner,' or something like that.

Senator ROBERT RAY—Which raises another question in terms of extension. I must say I do not have the answer to this. You have gone to a prescribed authority. They have said, 'Yes, here is the warrant. Bring the person in.' You question them before that prescribed authority. The 48 hours are up. You want an extension. Is it proper procedure that you go to that same prescribed authority for the extension or should you be forced to go to a separate prescribed authority for the extension? We know what happens after 96 hours but, at this intermediate point, who is best placed? I can see arguments both ways: that the prescribed authority that has been sitting in on the interviews over a 48-hour period would know the facts of the case and whether they are close to resolution; on the other hand, they can get captured by the process. So should there be a decision one way or the other?

Mr Holland—There was a line call, I have to say. Yes, there were considerations given as to how many extensions you could have. It was considered that, on the balance of probabilities, it was best to let the initial prescribed authority continue for the second warrant period but it had to then move outside of that.

Mr BEAZLEY—I suppose you would say, in relation to the prescribed authority—before we get down to an extension of that—that the fact that the same prescribed authority has to sit there during the questioning would probably make it inimical for him to be the subject of a 48-hour marathon by ASIO. He would be exhausted well beyond that of the person being interrogated, in all probability.

Senator ROBERT RAY—But you can bet that a Federal Court judge would intervene a bit earlier and a bit more reasonably.

Mr LEO McLEAY—I want to pick you up on another point on this same issue. Section 34F(7) seems to provide that you could get into a sort of rotating warrant argument where you can then go off to another prescribed person, get another warrant under another issue and hold the person for longer. Firstly, what is there to prevent someone from doing that? Secondly, is there an absolute length of time for which a person can be held under these myriad provisions or can they be held indefinitely in some instances by using this and other sections?

Mr Holland—Indefinitely. The questions you raised about what could prevent that and what would enter into that to cause them to draw back from that would clearly be the fact that you have to get a new warrant. The people who are involved in the process have to check again as to whether all of the factors that they had initially considered, and taking them into account again, would warrant the issuing of another warrant. But, in theory, yes, it can be done indefinitely.

Mr LEO McLEAY—If you go to a prescribed person other than the person who first holds the person, do you have to tell them the history or do you just front up and ask for another warrant?

Mr Holland—No, you have to tell them the history; that is in the legislation.

Mr Marshall—Section 34C(2) requires that the Director-General's draft request include a statement of the particulars and outcomes for all previous requests for the issue of a warrant pertaining to that person.

Mr LEO McLEAY—But if you could get compliant prescribed persons or a compliant prescribed person, you could hold a person indefinitely.

Ms McIntosh—There is a provision which requires that for the issue of a warrant subsequent to the issuing of the original warrant—a warrant that would have the effect of a person being held for more than 96 hours; so that would effectively be the third warrant—the prescribed person must be a Deputy President of the AAT. In that case the prescribed authority who issues the warrant is possibly up a rung, if you like, from the earlier person who issued the warrant.

Mr LEO McLEAY—But it is still a person who has to be reappointed by the Attorney-General.

Senator ROBERT RAY—This is the point—in this third step—where a Federal Court judge must be involved, I have to say; it really is a safeguard.

Mr Holland—I accept your point, Senator. When we were drafting that provision we did actually think about the next step up. We came to the conclusion, on the basis of what I said earlier, that you could not have in this legislation—in fact, you cannot have in any legislation—something that would say, for example, that it has to be the Chief Justice of the Federal Court, because there is only one and that is just not possible.

Senator ROBERT RAY—Yes.

Mr BEAZLEY—Supposing that you go up to the 96 hours and then you want to reissue it, how many times is the Attorney-General directly involved in this process?

Ms McIntosh—Every time—for every warrant, the Attorney-General needs to be involved.

Mr BEAZLEY—So if you are acting to hold someone indefinitely, you would basically be activating the Attorney-General every two days. Is that effectively how that would work?

Mr Holland—Yes.

Mr Richardson—That is right.

Mr BEAZLEY—In practical terms, were this to happen, the probability is that the Attorney-General would call the Leader of the Opposition and say, 'This is what we are doing.' What would be your view of actually writing into the legislation that, by the time you came to the 96-hour proposition, there would be an automatic obligation to inform the Leader of the Opposition and brief him as to what was actually happening?

Mr Richardson—That would not be an issue. From where I sit, that does not pose an issue.

Mr LEO McLEAY—How about making it public?

Senator ROBERT RAY—No, you do not get the rider again to do that.

Senator SANDY MACDONALD—In your opening statement you talked about examples of when the Director-General briefs the Leader of the Opposition; specifically, the confidential annual report. Is there anything else?

Mr Richardson—The act simply states that the Director-General is to 'consult regularly' I think the word is 'with the Leader of the Opposition in the House of Representatives'. The other reference to the Leader of the Opposition in the ASIO Act relates to the classified annual report.

Mr LEO McLEAY—Going back to the public integrity of this thing, conspiracy theorists may think you issue a thousand of these warrants a year, while the reality might be that you issue none. There would be a benefit to you for you to either put in your annual report, as you do with telephone interceptions, that there has been X number of warrants issued this year, which would put some integrity into the process for the public, or for the joint committee to be told when a warrant was issued and when the person was released so that there was at least some other public or semipublic brake on the system.

Mr Richardson—From where I sit there are no particular issues with those suggestions. We do not publicly disclose, as you know, the number of warrants generally. The previous joint parliamentary committee on ASIO had an inquiry in which that was part of the inquiry and it accepted the reasons for that. However, I would accept in terms of logic that, if this proposed legislation is enacted by the parliament, clearly the secret part of it relates to someone being brought in and questioned. After that is completed—or when an annual report comes around or whatever—the confidentiality of whether you had detained one person or two people or no people during the course of that year I would have thought would have dissipated.

Mr BEAZLEY—If you look at all the submissions of the groups that have come in and the extent to which the bill has to a degree been demonised—and I think there are legitimate grounds for complaints about lots of aspects of the bill—one of the things that is going to be a bit of a sticking point is the indefinite detention without any sort of habeas corpus provision applying to. This in practical terms of looks unlikely: to activate an Attorney-General every 48 hours for a year or so is sooner or later going to get out and somebody is going to look really absurd that that should be happening. You have got the lift-up to a deputy president in the act.

My colleague, Senator Ray, says this is a point where a federal judge must come in, but I think Senator Ray would be of the view that a federal judge should come in a great deal earlier than this.

Senator ROBERT RAY—True.

Mr BEAZLEY—Therefore, the legislation may well come forward ultimately in a form where we are looking for federal judges and magistrates in the first instance as opposed to any other instance. Can you think any way that would give a reasonable capacity here—I think it is not so important to keep a person there for a lengthy period of time, but it is highly conceivable that any person dragged in on that basis once would have to be dragged in a couple of times, if not immediately—to put in an extra check and balance that would allow people some sense of this not being something that will be applied capriciously, with people going down for a period of time. Perhaps after a period of time there is a capacity for somebody to intervene and want this bloke to be produced in public, or something like that. I do not think that is a good way to go necessarily. When you went through your consideration of this legislation, you must have thought of ways in which you might deal with the problem.

Mr Holland—I do not know whether that did happen. I think that what was primarily behind this provision was the operational aspect of how the agency thought that it would do its work and how best to ensure that somebody who might be in a position to pass out information that then could result in either a terrorist attack happening or letting people know that they are in custody, so you need to watch out. That played a very big role in determining what this provision looked like.

Mr LEO McLEAY—No-one would think that anyone has any real intention of ever holding someone indefinitely, even if you could get some crazy Attorney-General to agree to that. Can't there be, as Mr Beazley said, to keep some public integrity in this, a provision that if you want to detain a person longer than, say, the 96 hours, you have to apply to an open court to do it?

Senator ROBERT RAY—I can think of the reason why you would not: to protect that person. If the rest of the terrorists think that person is spilling the beans on them, going to an open court is a death sentence on the person.

Mr BEAZLEY—It could become a useful threat!

Mr LEO McLEAY—Is there some judicial mechanism or protective mechanism? On one side, people are saying to us—and you agree—this is a pretty substantial new power that is being given to a security organisation. The public have faith in those things if they are convinced that they are not going to be used capriciously and that if somehow or another it were me who ended up getting caught up in it, I would have some sort of redress. It seems to me that, the more confidence building measures you can put in the legislation, the more likely you will get community support for it. If you blandly say that under this legislation you could hold someone indefinitely, then that is a bit of a worrying thought. There should be some way that that person or the friends of that person can get the matter reviewed.

Mr Richardson—That is sought to be addressed in the current bill by having the differential level in the approval of the renewal after 96 hours. Quite obviously, it is a matter for judgment whether it is at the appropriate level of approval.

Mr BEAZLEY—I imagine your concern is that, once these provisions become known, a person who is picked up may decide to sit this out for 48 hours, then disappear and think that that is the end of the matter for them and that there are no further worries. So, if you just left it with the 48 hours, that would be a problem. On the other hand, if you said that you could keep them for 96 hours but no longer, that is 96 hours they would sit out. You could put in a provision saying, 'A person so detained could not be held for longer than 96 hours but could be brought back again in two weeks time.' If you put a specific time limit on it saying, 'In two weeks time he will be brought back in again' and suddenly you have an emergent situation on your hands, that gives you a problem: you would be hogtied because you could not pick up the person in that period of time. We are obviously not going to resolve this thing this evening, but we will have to resolve it before it goes to the Senate or it will be a substantial problem.

Senator ROBERT RAY—The longer the detention goes on the more it would occur to most of us that you are detaining them under 34C(3), which is not reviewable by a prescribed authority. But probably once you have interviewed them for 96 hours the main reason you would still want to keep them incommunicado would be that there were still unresolved issues in terms of them performing and preventing. But you cannot argue that before the prescribed authority at the moment. It may well be that at the 96-hour point that comes in as a second criterion to strengthen the act. It may be that what you have recommended to the Attorney-General and the Director-General has been accepted in the first 48 hours and the second 48 hours. But it may be the second criterion the A-G has looked at—that the prescribed authority is not inclined to look at or is not allowed to look at—that becomes more important at this point. That might be the reason you want to detain them, not to get more information out of them. You might give that a bit of thought too.

Mr BEAZLEY—There is just one more thing and it goes to the American act. In the case of the American act the special detention provisions, as I understand them, apply only to aliens. There does not seem to be any particularly strong legislation to deal with citizens. Is this a product of an assessment on the American part when you looked at their act—and this is a post-September 11 act—and is that because they have no confidence that under their constitutional arrangements they could put in place anything like this for an American citizen? Or is it because they have made an assessment that their principal problem is how to pick up aliens and be able to have a period of time in which they can question them at length and give themselves, therefore, a capacity to talk to them for that six-month period? This part of their act is so vastly different from ours and the British. Again, exponentially their threat of terrorism is that much higher in the current circumstances than it is for the British or for us. What do you think has been the underpinning of their thinking on that? Did any of it influence you?

Ms McIntosh—I do not know the answer to that question, I am sorry. I am just aware that the Patriot Act includes only those principles for aliens—

Senator ROBERT RAY—I do—aliens do not vote.

Ms McIntosh—I think you are probably right. But we would be happy to take that on notice if we can find anything justifying that distinction and come back to the committee on that.

Mr Holland—In some discussions I had with some of my American colleagues at a meeting earlier on this year I have the feeling that constitutional issue that you just referred to is the one that they raised. It prevented them doing anything in relation to their own citizens, yes.

Senator ROBERT RAY—The right to a medical practitioner in strip searches: who appoints the medical practitioner? Obviously the person detained does not otherwise there is another tip-off route. How does that come about?

Mr Alderson—Senator, because that is left open there would just be the prescribed authority, and the officer doing the questioning could confer if it were appropriate with the person. Could I take the opportunity to quickly mention that there was a significant misapprehension by the Law Council on these provisions in suggesting that they were novel and unprecedented. In fact the provisions in this bill are a direct replica of the Crimes Act provisions applicable to police. The rules and safeguards in there, which are also replicated in the Customs Act and, I believe, the Migration Act, are a standard set of powers that have been worked out. These have been here since 1994 as that powers/safeguard balance for strip search.

Senator ROBERT RAY—Does that include children?

Mr Alderson—Yes.

Senator ROBERT RAY—Those other two acts?

Mr Alderson—Yes.

Senator ROBERT RAY—People have got a right to an interpreter. How do you recruit? We would not want ASIO's interpreters in there, obviously. How do you get an independent interpreter that is security cleared to be able to fulfil this function?

Mr Richardson—First of all, you would need to make a decision on whether the interpreter needed to be cleared or not. If you did need a security cleared interpreter, you would be limited to those who were security cleared. They would work for ASIO, DSD or elsewhere—someone in Immigration could be security cleared, I do not know. That would be the issue you would be faced with.

Senator ROBERT RAY—It is an issue you are going to be faced with, isn't it?

Mr Richardson—Yes.

Senator ROBERT RAY—If someone demands an interpreter, you cannot pull someone off the street presumably, because you would be worried about having them in the loop.

Mr Richardson—Yes.

Senator ROBERT RAY—There is no way you, Director-General, can obtain a warrant without it going through the A-G. Is that right?

Mr Richardson—That is right.

Senator ROBERT RAY—Whereas you can in telephone intercepts et cetera. So there is a greater requirement here.

Mr Richardson—The greater requirement here is the prescribed authority.

Senator ROBERT RAY—Yes. Mr Holland maybe able to help me. Does the definition of 'Attorney-General' mean just the Attorney-General or would that also be the minister for justice? They are both sworn into the Attorney General's Department.

Mr Alderson—Under the Acts Interpretation Act there is a general provision that the ministers administering a portfolio can act for each other. Obviously, how that is used in practice depends on the arrangements within the government and between those ministers.

Senator ROBERT RAY—I did not raise that at all cynically. It is just that with the Attorney-General in Western Australia, sometimes having two potential people to be able to act is a lot more efficient. My second last question: what is the rationale for items 15 to 19, where we move from officer to people, with regard to the right to communicate intelligence on behalf of ASIO. I do not think this is to do with terrorism particularly, but you have cleaned up a few things in this act—quite properly—and I would just like to know what that is about.

Mr Marshall—The relevant provisions in the ASIO and TI legislation currently provide that the authority of the organisation to communicate intelligence is limited to officers who are authorised by the Director-General of Security. On occasions that might give rise to difficulties where, in particular, we have officials from other agencies who might be seconded to assist ASIO in certain matters. The person could be a linguist or an officer from the Department of Defence in a certain counter-terrorist situation. The reason for that provision being put there is to ensure that if somebody who was not actually an ASIO officer but was acting under the authority of ASIO powers had information which needed to be urgently communicated to others—for example, police or other authorities—then it could be done without the need to go through an ASIO officer in each instance. So it is basically a tidy up provision. It is not designed specifically for counter-terrorist purposes. It was a gap identified in the act previously.

Mr LEO McLEAY—Can I ask about section 34M, which has been raised. Can you tell me why there is a provision in here to allow you to strip search 10-year-old children?

Mr Richardson—I think it is a straight take from the Crimes Act.

Mr Alderson—Yes, and there was some discussion of this while you were out of the room, Mr McLeay. This is a replica of the Crimes Act provisions in sections 3ZH and 3ZI, dealing with the strip search. The same rules apply as to police in the Crimes Act. The key thing is that the power can only be accessed if there are reasonable grounds to suspect a person has an object that could be a danger to a person or assist their escape. So in practice the situation where a 10-year-old would have such an item would be extremely limited. Nonetheless, if they did—and

there are real circumstances where a 12-year-old may have a gun or something like that—rather than artificially say, 'You can never do anything about it,' the provision lays down a mechanism so that you can talk to the prescribed authority, meet the safeguards and remove that item.

Mr LEO McLEAY—This is a replication of legislation—

Mr Alderson—Yes, sections 3ZH and 3ZI of the Crimes Act.

Mr Richardson—We thought it was important to have a search provision. We did not specifically request that 10-year-olds or 11-year-olds be included. Our interest was in the search provision and I think the Attorney-General's Department simply took what was currently in the Crimes Act, the Customs Act and several other acts and brought it across.

CHAIR—A number of allegations have been made in some of the submissions that we have had. Do any of the provisions of this bill breach Australia's international obligations under the International Covenant on Civil and Political Rights?

Mr Atwood—No.

CHAIR—My other question regards the constitutionality of this bill. It has been alleged in a number of submissions that the whole thing may be unconstitutional, or at least that great chunks of it may be unconstitutional. Has this all been checked out?

Mr Holland—Yes, it has.

Senator SANDY MACDONALD—I suggest that you briefly put on the public record your arguments about its constitutionality, because I think that has been raised in a number of the submissions. Can you do that?

Mr Holland—Can we do that in writing?

CHAIR—Sure. It might be helpful.

Mr Holland—Just to make it very clear.

Mr LEO McLEAY—A number of the submissions talk about ASIO becoming another policing power. You have addressed that in your earlier remarks, but for the record are ASIO officers armed and will there be any provisions in this legislation to allow them to be armed?

Mr Richardson—The answer to both questions is no.

CHAIR—May I thank you all very much indeed for giving so willingly of your time this afternoon. It was a long session.

[4.48 p.m.]

BROWNBILL, Mr George Metcalfe (Private capacity)

CHAIR—Welcome to the inquiry. Would you please state the capacity in which you appear before the committee?

Mr Brownbill—I appear before the committee as a private citizen, but for the reason that I was, a long time ago, secretary to the Royal Commission on Intelligence and Security.

CHAIR—Although the committee does not require you to give evidence under oath, I should advise you that the hearings are legal proceedings of the parliament and warrant the same respect as proceedings of the House or the Senate. The giving of false or misleading evidence is a serious matter and may be regarded as contempt of parliament. Do you wish to make some introductory remarks before we proceed to questions?

Mr Brownbill—Thank you. What I have written to the secretary of your committee is fairly self-explanatory. I am here to suggest to you that quite a long time ago now the Whitlam government was confronted with a crisis in relation to the intelligence and security services. They appointed the late Mr Justice Hope to look at the whole range of those services, in particular to seek a balance between civil liberties on the one hand and the security of the state on the other. In the course of that inquiry, in which I was privileged to assist His Honour, the entire gamut of the intelligence services was examined and in respect of each of them—which have now become household names, but were not then known—His Honour laid down fundamental principles. Those fundamental principles were laid down then, as I can still vividly recall, because the intelligence and security services of Australia in the mid-seventies were not all that they should have been. Successive governments' attitudes to and dealings with them were not all they could have been either. His Honour's reports were necessarily veiled, delicate and subtle about these matters. But, as time has passed, it is reasonable to say that those great principles have informed the further development of our security intelligence services in ways which I believe are appropriate in a civil society and in a liberal democracy—in particular, the relationship between the government and the opposition and the relationship about lawfulness and propriety, which are all set out in His late Honour's fourth report.

One of the great principles that was adumbrated and which the government and the opposition in 1977 accepted was the principle that ASIO should not become and should not have the appearance of becoming a secret political police. I am not competent to judge whether the processes that are contained in the present bill breach international conventions or to answer all the other questions which the previous witnesses were being asked. I personally have seen enough of the operations of—to use a trite phrase—the enemies of the state not to have any great difficulty with the concepts of temporary incarceration of persons who would do harm to Australia and Australia's international friends or with the fairly robust questioning of those persons. That does not disturb me as much as some others might. I do not know whether His late Honour might be stirring in his grave to hear me say that, but I have no particular problems with the concept that the enemies of the state are secretive, do not observe the principles of

liberal democracy and seek to do us harm, and that measures which are not normally thought to be appropriate ought to be taken to deal with them.

I am not here to suggest to you that the processes in broad that this bill envisages ought not be followed, but I am here to say that it is a breach of what I think is an important principle that has existed for the last quarter century in the polity of Australia, and it should not continue in this legislation. If people are to be arrested, whether by special warrant, by the fiat of the prescribed person or by whatever process you want to devise, then the appropriate people to make those arrests, take people into custody, guard them and generally deal with them are the police. There is, in my view, no reason why the Australian Federal Police or the police of the states of Australia, suitably deputed and delegated, should not be capable of doing all the things which are proposed to be done and of facilitating the questioning of such persons as are apprehended because they are assumed to be, suspected of being or thought to be terrorists. I would not have any problem with the same principle applying in respect of persons suspected of espionage or of counterintelligence activities, for that matter.

So I am here only to say that we are moving away from an important principle and I do not think there is any warrant for it. I have seen nothing in the published papers that I have had access to that even recognises this departure, still less argues for the merits of it. That is all I would like to say.

CHAIR—Any questions?

Mr BEAZLEY—Thanks for your presentation and thanks for your service over the years to this country, which has been very substantial.

Mr Brownbill—Thank you, Sir.

Mr BEAZLEY—Trying to get to terms with what you have just said to us, would this act be acceptable to you if it extended the powers of the Federal Police force and if ASIO was involved in any questioning of a person detained by the Federal Police for these reasons?

Mr Brownbill—In the broad, I would say yes. I say in the broad because I have not attempted to analyse the processes and procedures in the way the committee was doing with the previous witnesses—how many times do you detain people, how soon do you get a different judge to look at the issue and so forth. I would not presume to have the answers about that, because that is not what I have come here to talk about. But in the broad I believe there ought to be a process which is available to the Security Intelligence Organisation for the apprehension of persons about whom it has reasonable grounds to wish to act.

We need to understand that, for the last 25 years—and thanks to His late Honour's endeavours in many respects—the processes which ASIO follows in finding out intelligence and in reporting it are codified in a way that was not the case. You gentlemen would know that the sources of intelligence available to ASIO are carefully assessed. There are various processes by which that intelligence is gathered and people like the Director-General of Security, who holds a statutory office and is an eminent person, are not going to proceed to these matters lightly. They are not going to ask for a warrant because somebody has an Arabic name or because, as happened in a case which the royal commission examined, someone turns out to

have a nephew who was in the Public Service and who was seen going into a house where a meeting of the Communist Party was taking place. That sort of thing, I trust, is no longer standard practice in ASIO nor in any of the other intelligence authorities. So, yes.

Senator ROBERT RAY—But it was standard practice in special branches of police in the states—

Mr Brownbill—I am aware of that, Senator.

Senator ROBERT RAY—and investing the Australian Federal police back into this area to become a quasi-special branch may be far less desirable than leaving these proposed powers with ASIO. I must admit I am a bit biased against special branches because I do not think they performed in a way that really recognised civil liberties.

Mr Brownbill—The special branches of the state police were the subject of appendix 4-N, which was not published by the government at the time of the royal commission's report. I think it is fair to say that there were many trenchant criticisms of the special branch processes. Since then there has been the Salisbury incident in South Australia and, as I understand it, there has been significant improvement in codification of state police processes. I think the Australian Federal Police has to be, to use your words, a quasi-special branch. I am not quite sure what you mean by that, but I think part of a federal police service is about enforcing those laws which we wish we did not have to have on the statute books: antiterrorism laws and security laws. I do not believe you can escape from that.

Mr BEAZLEY—From your knowledge of the Federal Police as they structurally exist at the moment, do you think that they are in a position to exercise this sort of authority? Do they have in their possession sufficient knowledge, or do you expect some sort of process whereby knowledge is transferred from ASIO to the Federal Police who, even if they do not have a branch dealing with terrorism issues, would then be in a position to act on it?

Mr Brownbill—I have no reason to believe that the police are other than professional police. I have no reason to believe that they do not act side by side with ASIO, as they have done since the 1950s in relation to matters of espionage. Where arrests have been required to be made the operations have, to my knowledge, always been joint. I do not see that this matter is anything but an extension of those processes. There might, of course, as is always the case with new tasks given to institutions, be some need for training. I do not doubt that.

Senator ROBERT RAY—But at the moment if ASIO wanted to have someone prosecuted for espionage they would involve the Australian Federal Police; they would be the enforcement arm. What is the difference here? The Australian Federal Police still detain the person and bring them before a prescribed authority, and then ASIO question them.

Mr Brownbill—I consider that you are crossing a line that is desirable not to be crossed.

Senator ROBERT RAY—I concede we are crossing the line. I never worry about crossing the line unless it has adverse consequences. At the moment I do not see this as any attempt to turn ASIO into an FBI-type organisation. If it were I would be strongly opposed to that, but I do not see that in these circumstances. Anyway, we can agree to differ.

CHAIR—There being no further questions, thank you very much indeed, Mr Brownbill, for being with us this afternoon. We appreciate that.

Resolved:

That this committee authorises publication, including publication on the parliamentary database of the proof transcript of the evidence given before it at public hearing this day.

Committee adjourned at 5.04 p.m.