

# Chapter 3

## EXTENSION OF ASIO'S POWERS

### Introduction

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

The horrific and tragic events of September 11 marked a fundamental shift in the international security environment.

That day showed us that no country is safe from the devastation that can be inflicted by terrorism.

...

Importantly, we have introduced a range of new terrorism offences

In order to ensure that any perpetrators of these serious offences are discovered and prosecuted, preferably before they perpetrate their crimes, it is necessary to enhance the powers of ASIO to investigate terrorism offences.<sup>1</sup>

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

### Overview

#### *Main purpose*

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

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

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

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

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

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

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

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

### ***Dual purposes***

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

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

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

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

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

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

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

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

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

8 *Ibid.*

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

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

end of the spectrum' on the basis that 'the closer you move the power to the law enforcement end of the spectrum the less preventive the power will be'.<sup>11</sup>

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

### *Utility?*

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

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

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

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

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

12 *Submission 24*, p. 19.

13 *Submission 144*, p. 4.

14 *Submission 144*, p. 6.

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

16 The Hon. John Howard MP, [Transcript of Interview](#), *Sunday*, October 20 2002.

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

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

19 *Submission 241*, p. 2

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

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

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

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

## Intelligence

### *Significance*

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

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

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20 *Submission 22*, p. 6.

21 *Submission 144*, p. 5.

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

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

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

25 *Ibid.*, p. 63.

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

## ***Definition***

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

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

## **Terrorism**

### ***Definition***

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

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

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

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

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

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

31 *Criminal Code*, section 101.1.

32 *Criminal Code*, section 101.2.

33 *Criminal Code*, section 101.5.

34 *Criminal Code*, section 102.2.

35 *Criminal Code*, section 102.3.

36 *Criminal Code*, section 102.4.

37 *Criminal Code*, section 102.6.

38 *Criminal Code*, section 102.7.

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

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

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

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

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

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

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

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

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

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

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

'advancing a political, religious or ideological cause'; and coercing or intimidating a country or a part of a country; or intimidating the public or a section of the public.<sup>43</sup>

### ***Significance***

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

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

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

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

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

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

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

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

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

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

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

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

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

50 *Ibid.*, p. xi.

time for which detention may continue and reduce the administrative difficulties which the purported safeguards included in the bill ... allow.<sup>51</sup>

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

### ***An anchor for other measures***

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

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

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

### **Intelligence v prosecution**

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

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

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

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

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

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



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

### ***Function***

3.37 The differences may relate to different functions of relevant agencies. Intelligence agencies deal with prevention whereas law enforcement agencies deal with prosecution. So, for example, the Director General of ASIO commented that, in his view, the AFP 'is focused on law enforcement and the collection of information directly related to its law enforcement investigations' whereas ASIO is 'more at the preventive end of the spectrum, consistent with the wording in the [ASIO Act]'.<sup>56</sup>

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

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

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

### ***Subject matter***

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

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

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

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

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

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

59 *Submission 144*, p. 2.

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

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

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

## ***Outcome***

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

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

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

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

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60 Schedule 1, item 4.

61 Schedule 1, item 4.

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

63 Paragraph 34C(3)(a).

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

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

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

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

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

[W]e have to look at the outcome we are looking for. The consequences of the AFP interviewing somebody under caution are that more likely than not if they made self-incriminatory remarks they would be charged and prosecuted. As I understand it, the purpose of ASIO having access to the powers to make somebody make self-incriminatory remarks is to discover the whole framework or picture of the issue that they are dealing with. The outcome is quite different. The consequences of what they say to an ASIO questioner are quite different from those if questioned by the police. That is where the issue of civil liberties comes in. If we are to have an outcome from an AFP interview and somebody is to be arrested, charged and prosecuted that is quite different and it is quite appropriate to involve access to lawyers, as ... under the existing legislation if questioned by the AFP.<sup>67</sup>

## ***Conclusions***

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

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

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

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

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

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