Chapter 9

PROTOCOLS AND SAFEGUARDS

9.1 One of the key concerns of the PJCAAD was the inadequacy of the accountability and review mechanisms in the original Bill.[1] The amended Bill provides for the development of a written statement of procedures, to be tabled in Parliament, for the exercise of powers under a warrant. It also contains various statutory safeguards, such as mandatory video recording of questioning; a mandatory explanation of the right to complain and to seek judicial review; and criminal offences where an official does not comply.

9.2 This chapter discusses the following issues:

- written protocols;
- current safeguards in the Bill;
- enforcement of safeguards;
- the role of the IGIS;
- judicial review;
- annual reporting; and
- a sunset clause.

9.3 Certain additional safeguards applying to young people are set out in Chapter 10. The right of access to legal advice is also dealt with separately in Chapter 6.

Written protocols

9.4 One of the issues about which the PCJAAD expressed concern was the absence of guidelines as to the operation of the custody, detention and questioning regime, for example, what arrangements would be made when a person was taken into custody, where the person would be detained, and when breaks in questioning would be required.[2] The original Bill made no provision for such matters.

9.5 The Government amendments to the Bill inserted new provisions to deal with this concern. Before the Minister consents to the Director-General's request for the issue of a warrant, the Minister must be satisfied, amongst other matters, that various measures in relation to a written statement of procedures to be followed in the exercise of authority under warrants have been taken (proposed paragraph 34C(3)(ba)).

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1 PJCAAD *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill* 2002, May 2002, p. viii.

2 PJCAAD, pp. 36-39.

9.6 Proposed section 34C(3A) sets out the measures (the 'adopting acts') that must be taken:

- The Director-General must consult the IGIS, the AFP Commissioner and the President of the AAT before making the statement;
- The Minister must approve the statement;
- The statement must be presented to each House of Parliament; and
- The PJCAAD must be briefed (in writing or orally), either before or after presentation to Parliament.

9.7 This provision reflects the PJCAAD's recommendation.[3]

9.8 It is unclear, either from the Bill, the Explanatory Memorandum or evidence during this inquiry, exactly what the protocols would cover. Matters such as the place and conditions of custody and detention, breaks in questioning, administrative procedures and the responsibilities of various agencies (such as the involvement of State or Territory police) might foreseably be included.

9.9 Some submissions suggested that the Bill should not be passed until the protocols were available for parliamentary debate.[4] When asked by the Committee what work had been done on developing protocols, an ASIO representative stated that there had been some 'preliminary consideration':

> We have had a look at what sorts of procedures are applicable under other detention regimes — for example, AFP and immigration — but … we thought that it might be a bit premature to try to start nailing down agreements with other agencies. Because the process envisaged would involve AAT, AFP, the Inspector-General and ultimately, if I recall, the PJC, we thought it would not be appropriate to try to spell all of that out pending the consideration of the legislation by the parliament.[5]

9.10 ASIO envisaged that the protocols 'would cover all aspects regarding the detention of the person under the regime, whether by federal police or by State police'.[6]

9.11 The Federation of Community Legal Centres (Victoria) Inc argued that any protocols for any form of detention should be in legislation:

> Obviously they would have to cover a whole range of things: where someone could be detained, the conditions of detention, how long they could be questioned for, periods of time in which they should not be questioned, and so on and so forth. The point is that currently we have quite

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3 PJCAAD, Recommendation 7.

4 For example, the Women's International League for Peace and Freedom *Submission 35*, p. 5; Ms Ruth Russell *Submission 13*, p. 4.

5 *Hansard*, 18 November 2002, p. 122.

6 *Hansard*, 18 November 2002, p. 122.

> extensive protocols in the Crimes Act, whether it is at a state or federal level, with regard to these matters. AT the very least, we should have that in legislation that is aimed at questioning people who are not suspected of any crime. We do not think it is enough that the government say, 'We'll come up with these protocols,' or that they are even promulgated by regulation.[7]

9.12 The Law Council considered that while some matters were of sufficient importance to require them to be included in the legislation, it would be excessive to place others in the statute, and they could be more appropriately dealt with by regulation. Mr Walker told the Committee:

> One obvious halfway point is regulation — a disallowable instrument. I think having toilet breaks in a statute is, frankly, overbeating the pudding. On the other hand, leaving everything to what I call non-binding protocols, which may be very important in terms of avoiding anything in the nature of civil torture, may be a little light-on. One obvious thing in the middle is that some things ought to be in terms of non-binding protocols—the kinds of thing that police forces already have. Some things, like strip-search — the physical invasion of the body — need to be in legislation. A whole lot of things in the middle might be ideal in a regulation.[8]

9.13 Dr Carne suggested that the federal Human Rights Commissioner should play a central role in drafting the protocols 'to ensure independent expertise necessary to meet Australia's international law obligations'.[9] In particular, Dr Carne was concerned about compliance with the ICCPR, whose language is reflected in certain provisions such as the provision requiring 'humane treatment' (discussed further below).

9.14 The Committee notes that under proposed section 34C(3A), the only person who must approve the statement is the Minister. All other parties need only be consulted. In the case of Parliament, the statement must be tabled but it is not a disallowable instrument, as regulations are. If regulations were made as part of the Bill, Parliamentary debate on these issues would be greatly assisted.

Current safeguards in the Bill

9.15 As noted above, there is concern that much detail has been omitted from the Bill, potentially for inclusion in the proposed written protocols. However, various statutory obligations on the Prescribed Authority and other officers involved in the process have been included. This section discusses those provisions:

- the proposed duties of the Prescribed Authority;
- obligations in relation to searches; and
- other accountability mechanisms, including the duties of the IGIS.

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7 *Hansard*, 22 November 2002, p. 222. The concern about regulations was that while regulations could be disallowed, there was no ability to amend them.

8 *Hansard*, 26 November 2002, p. 259.

9 *Submission 24*, p. 18.

9.16 The mechanisms for enforcing those safeguards, including the creation of criminal offences for breach of various provisions, are discussed in the next section.

Duties of the Prescribed Authority

9.17 As discussed in Chapter 6, the Prescribed Authority has a key role in the questioning process and is potentially one of the most important safeguards. While the Prescribed Authority's role is not clearly outlined in the Bill, certain statutory duties have been imposed.

9.18 When a person first appears for questioning under the warrant, the Prescribed Authority must inform him or her of certain matters, including:

- the effect of the warrant and the length of time it is in force;
- the legal consequences of non-compliance with the warrant;
- the right to make a complaint to the IGIS (about ASIO) and the Ombudsman (about the AFP);
- the right to seek a remedy from a federal court relating to the warrant or the person's treatment under it; and
- whether there is any limit on the person contacting other people and, if the warrant permits contact with identified people at specified times, who those people are and what the specified times are (proposed section 34E).

9.19 If the Prescribed Authority believes on reasonable grounds that the person detained is unable to communicate with reasonable fluency in English, interpreting services must be provided before any questioning can take place (proposed section 34H).[10]

9.20 Where the IGIS is concerned about 'impropriety or illegality' in the exercise of powers in the questioning process, he or she may inform the Prescribed Authority, who must consider those concerns. The Prescribed Authority may then give a direction deferring questioning of the person or the exercise of another power, until the Prescribed Authority is satisfied that the IGIS's concerns have been addressed (proposed section 34HA).

Searches of detained persons

9.21 A detained person may be searched by a police officer, either in an ordinary search or, subject to certain conditions, a strip search (proposed section 34L).

9.22 The Bill sets out various rules governing the conduct of strip searches (proposed section 34M). A strip search:

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10 This provision is similar to section 23N of the *Crimes Act* 1914, which deals with questioning of people arrested for Commonwealth offences.

- must be conducted in a private area by a police officer of the same gender as the detained person;
- must not be conducted in the view of a person of the opposite gender (unless that other person is a medical practitioner), or a person whose presence is not necessary;
- must not involve a search of the person's body cavities; and
- must not involve either the removal of more garments or more visual inspection than the police officer believes on reasonable grounds are necessary to determine whether the person has a seizable item (defined in section 4 as anything that could present a danger or be used to assist an escape from lawful custody).

9.23 If any of the person's garments are seized during the search, he or she must be provided with adequate clothing. The Committee notes that the strip search provisions in this Bill are very similar to the general rules for strip searches of arrested people under the *Crimes Act* 1914.

9.24 The Crimes Act provisions provide for a third type of search, a frisk search, which is a search conducted by running the hands quickly over the person's outer garments and examining anything worn or carried that is conveniently removed.[11] The Bill's provisions relating to people who are detained for questioning do not cover frisk searches, but such searches may be authorised in relation to raids on premises under proposed section 25(4A)) of the Bill, as is discussed below.

9.25 Proposed section 25(4A) enables the Minister when issuing warrants (such as search warrants) under existing provisions of the ASIO Act to authorise ordinary searches or frisk searches of people at or near the premises being searched, if the Minister considers it appropriate in the circumstances. This power would arise where there is reasonable cause to believe that the person has relevant records or things on his or her person.

9.26 While the Bill requires strip searches to be conducted by an officer of the same gender, there is no such requirement in relation to ordinary or frisk searches. The lack of such a requirement is contrasted with both ordinary searches and frisk searches of people arrested under the Crimes Act, which requires that, if practicable, such searches must be conducted by a person of the same gender as the person being searched.[12]

Concerns expressed during the inquiry

9.27 The omission of the requirement in the Bill that an officer of the same gender should conduct ordinary and frisk searches where practicable caused some concern during the Committee's hearings, particularly amongst representatives of the Muslim community. Mr Mohammed Kadous suggested that it would be consistent with the Crimes Act and beneficial to the Muslim community if a similar requirement in

11 Defined in *Crimes Act* 1914, section 3.

12 *Crimes Act* 1914, section 3ZR.

relation to ordinary and frisk searches was inserted in the Bill.[13] The Director-General of Security told the Committee that the issue could be clarified if necessary, since there were usually both male and female officers present in such situations.[14]

9.28 Mr Kadous also told the Committee that touching of the portion of the body between the navel and the knee during a strip search would be unacceptable to Islam, and requested that if strip searches were to be allowed, provision should be made for the needs of the Muslim community.[15] In response, the Director-General argued that if there were no such exemptions in existing strip-search laws, it was difficult to see the logical basis for such exemptions in this context.[16]

9.29 The Committee also notes that there appears to be another provision of the Crimes Act that has not been reproduced in the Bill. The Bill's strip search provisions, in preventing their conduct in the presence or view of a person of the opposite gender to the person being searched, do not make an exception for a parent, guardian or other person who is acceptable to the person being searched. Such a person must be present when a young person is strip searched (proposed paragraph 34M(1)(f)). By contrast, under the equivalent provisions in the Crimes Act, a person such as a parent or guardian who is of the opposite gender to the person being searched may be present if the person has no objection.[17] This would seem to be a sensible way to avoid an additional person having to be called in if the young person's parent or guardian who is present is not of the same gender as the young person and there is no objection to their presence during the strip search. It is unclear why an equivalent provision was not included in this Bill.

Other accountability mechanisms

9.30 The Bill includes various other safeguards for detained persons:

- The Director-General must ensure that video recordings are made of the proceedings before the Prescribed Authority or any other matter that the Prescribed Authority directs (proposed section 34K). These recordings must be provided to the IGIS (proposed section 34Q).
- Detained persons have the right to complain to the IGIS (about ASIO) or the Ombudsman (about the AFP), as noted above. On request, the person detained must be provided with 'facilities' to communicate with the IGIS or the Ombudsman (proposed subsection 34F(9)).

9.31 In addition, several accountability mechanisms are built into the process:

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13 *Hansard*, 26 November 2002, p. 264.

14 Ibid, p. 279.

15 Ibid, pp. 264, 265; *Submission 153*, p. 7.

16 *Hansard*, 26 November 2002, p. 279.

17 *Crimes Act* 1914, subsection 3ZI(4).

- The Director-General must also give a copy of any warrant and a statement containing details of any detention to the IGIS (proposed section 34Q). The Minister will also receive a report from ASIO on the extent to which each warrant has assisted ASIO in carrying out its functions (proposed section 34P).
- The IGIS may advise the Prescribed Authority of any concerns he or she has about an illegal act or impropriety committed by ASIO. As noted above, the Prescribed Authority is empowered to suspend questioning until satisfied that the IGIS's concerns have been addressed.

9.32 The IGIS's role is discussed in more detail later in this chapter.

Enforcement of safeguards

9.33 Following the PJCAAD's recommendation,[18] the Bill was amended to create various criminal offences for non-compliance with safeguards. It is an offence for an official exercising powers under a warrant to fail to comply with certain safeguards in the Bill (proposed section 34NB). These provisions will apply principally to police officers and ASIO officers, but potentially could also apply to other persons directed by the Prescribed Authority to take particular action.

9.34 The offences are:

- knowingly contravening a condition or restriction in a warrant;
- knowingly contravening the requirement that a police officer who takes a person into custody must make arrangements to bring the person immediately before the Prescribed Authority;
- knowingly contravening a direction of a Prescribed Authority;
- knowingly contravening the requirements to treat a person with humanity and respect for human dignity (discussed in more detail below), to give a detained person facilities to make a complaint and to provide an interpreter as necessary; and
- knowingly conducting a search or strip search in contravention of the Act.

9.35 Each offence is punishable by a maximum of two years' imprisonment.

9.36 During this inquiry questions were raised as to whether those provisions are enforceable in practice, particularly where they refer to vaguely worded standards. In particular, questions were raised about the 'humane treatment' provision.

9.37 The Bill provides that a person specified in a warrant must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment by anyone exercising authority under the warrant or enforcing the direction of a Prescribed Authority (proposed section 34J). This provision is almost identical to an existing provision of the *Crimes Act* 1914

18 PJCAAD Recommendation 9.

concerning the treatment of people under arrest, and is based on the language of the ICCPR.[19] Section 23Q of the *Crimes Act* 1914 states that a person who is under arrest must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment. However, there is no criminal offence for failure to comply with that provision.

9.38 The Public Interest Advocacy Centre argued that there was no clear mechanism for enforcing this provision.[20] The Centre stated that the obligation was not criminalised in the same way as the offences relating to failure to provide information, and that there was not necessarily a civil cause of action and right to damages for breach of the duty.

9.39 More generally, Dr Carne criticised the offences on the basis that the requirement of knowledge on the part of the officer set 'too high a standard of culpability', and that it would 'encourage laxity in implementing systems of procedural safeguards', with consequent difficulty in investigating and prosecuting offences. He suggested that graded offences with requirements of intention, recklessness and negligence, similar to those in the *Security Legislation Amendment (Terrorism) Act 2002*, should be adopted.[21]

9.40 Dr Carne also suggested that the Prescribed Authority should be personally liable for contravention of certain safeguards.[22]

9.41 The Women's International League for Peace and Freedom argued that the safeguards could not protect against inhumane or abusive treatment of detainees, stating:

> With such a long detention period (7 days), the way is left open for forms of intimidation to be employed against detainees.[23]

9.42 By contrast, the Australian Federal Police Association strongly opposed the imposition of criminal penalties on police officers who failed to comply with the Bill, arguing that it was unnecessary and already provided for in other legislation.[24] The Association argued that AFP officers were already subject to 'internal scrutiny and

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19 Article 7 provides that no-one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment, while Article 10 provides that all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.

20 *Submission 52*, p. 10.

21 *Submission 24*, p. 19.

22 *Submission 24*, p. 20, referring to proposed section 34NB(4) which creates offences of contravening the safeguards relating to provision of an interpreter, facilities for making a complaint and the 'humane treatment' provision.

23 *Submission 35*, p. 4. The Victorian Council of Social Services (VCOSS) (*Submission 81*, p. 6) also argued that video recording and the attendance of a Prescribed Authority did not give sufficient independence and accountability to the process. VCOSS called for an independent monitor during the detention and questioning process.

24 *Submission 144*, p. 12; *Hansard*, 18 November 2002, p. 134.

possible disciplinary or dismissal action', and that current criminal offences of false imprisonment, assault and deprivation of liberty 'adequately constitute an effective legislative framework'.[25]

The accountability of ASIO compared with that of police

9.43 Another concern raised during this inquiry was whether ASIO officers would be sufficiently accountable for the exercise of their powers, particularly in comparison to police. (The roles and functions of ASIO and the AFP are discussed in more detail in Chapter 8, together with suggestions about their respective roles in the proposed questioning and detention regime.)

9.44 Organisations such as the Law Council of Australia,[26] the Australian Federal Police Association,[27] the Association of Criminal Defence Lawyers,[28] the Public Interest Advocacy Centre,[29] the New South Wales Council for Civil Liberties[30] and individuals such as Dr Carne[31] suggested that the grant of powers to ASIO, a body which specialises in covert operations, would result in less transparency in the process than if such powers resided with police. For example, Mr Jon Hunt-Sharman, National President of the Australian Federal Police Association, told the Committee:

> In the bill a lot of power has been given to ASIO that would somewhat cross over traditional law enforcement powers. That has been a problem that ASIO itself has identified over the years. It is moving to more coercive powers and is moving in the area of detention, questioning and so forth, and yet really it has not been equipped with the same accountability and integrity regime that is currently before the Australian Federal Police …[32]

9.45 A particular concern was that the identity of ASIO officers is protected by statute.[33] In response, the Director-General of Security described the allegation that this would make ASIO officers unaccountable as 'one of the biggest furphies' that critics of the Bill had raised:

> There is ample precedent in Australian law for the identity of individuals before the court, either witnesses or people being prosecuted, to be protected. That happens in different criminal cases now on a basis determined by the court. Legal action can be taken against ASIO officers

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25 *Submission 144*, pp. 11-12.

26 *Submission 299*, p. 21.

27 *Hansard*, 18 November 2002, pp. 137, 138.

28 *Submission 236*, p. 3.

29 *Submission 52*, p. 11.

30 *Submission 132*, p. 1

31 *Submission 24*, p. 20.

32 *Hansard*, 18 November 2002, p. 133.

33 ASIO Act, section 92, which requires the consent of the Minister or Director-General for publication of identity. A penalty of one year's imprisonment applies to contravention of this provision.

> now in terms of common law and the like. The ASIO legislation prevents the public identification of an ASIO officer without approval. A lot of our decisions now are appealable to the AAT. For instance, the security assessments we make in respect of individuals are appealable to the AAT. Decisions taken over the last 12 months in respect of the small number of passport cancellations are appealable to the AAT. In those cases, ASIO officers appear before the AAT and give evidence. There are provisions to safeguard their identity, in the same way as ASIO officers are not excluded from court proceedings now. For instance, were criminal proceedings or court cases to be launched in respect of recent operations, there would be nothing to prevent ASIO officers appearing in court with the appropriate safeguards.[34]

9.46 More generally, however, the Australian Federal Police Association told the Committee that there were 'very real differences' in the levels of accountability that apply to ASIO and to AFP. They pointed to the fact that ASIO officers work under the auspices of the *Public Service Act* 1999 'with the single probity/accountability addition of the oversight of [IGIS]',[35] arguing:

> IGIS may choose to investigate a complaint against an intelligence operative, then again, IGIS may not. The IGIS, in investigating a compliant, does not have the legislative tools that the AFP professional standards framework provides, for example, an AFP member faces a potential term of imprisonment if he/she fails to provide information upon lawful direction under the provisions of the AFP Complaints Act.[36]

9.47 While the Director-General of Security acknowledged that ASIO is subject to different accountability arrangements from police, he said it was 'absolutely misleading and just plain wrong to suggest that, because the accountability arrangements are different, they are any less'.[37] The Attorney-General's Department also argued:

> Given the status of the [IGIS's] role, relating to a specialist area of security and intelligence, I think his involvement in this should add a degree of confidence.[38]

9.48 In response, AFPA maintained that similar lines of accountability were required for similar functions, suggesting:

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34 *Hansard*, 18 November 2002, p. 121.

35 The Committee notes that the ASIO Act (s. 91) also provides that ASIO officers are to be treated as Commonwealth officers for the purposes of the *Crimes Act* 1914, as well as providing for parliamentary review and reporting by ASIO to the PJCAAD (Part VA).

36 *Submission 144*, p. 8.

37 *Hansard*, 12 November 2002, p. 35.

38 Ibid.

> Once ASIO starts to have a more operational perspective rather than an advising perspective, maybe in those areas there needs to be more accountability and transparency in that process.[39]

9.49 The Federation of Community Legal Centres (Victoria) also expressed concern about differences in accountability that apply to the AFP and ASIO, using as an example the existing processes for issuing warrants:

> The warrant regime governing ASIO compares unfavourably with that governing the AFP, for instance, the former does not require the issuing authority to consider the gravity of the conduct being investigated or the use of alternative, less-intrusive, investigatory methods.[40]

The Inspector-General of Intelligence and Security

9.50 One of the key safeguards in the proposed questioning regime is the IGIS, who:

- must be given copies of any request to the Minister for a warrant as soon as practicable, as well as a copy of the warrant issued;
- must be given a copy of any video recording of the questioning process or any other matter ordered by the Prescribed Authority to be video recorded;
- may receive oral or written complaints about ASIO from people who are being detained or questioned; and
- may inform the Prescribed Authority of concerns about 'impropriety or illegality' in the exercise of powers in the questioning process. Although there is no express statement about the IGIS's presence during questioning, this provision implies that the IGIS may be present. The Prescribed Authority must consider those concerns and may suspend questioning until the concerns have been addressed.

9.51 Several of these responsibilities were inserted into the Bill in response to the PJCAAD's recommendations.[41] A key part of the recommendation that was not adopted was that the IGIS should have the power to suspend questioning.

9.52 The IGIS was established following a recommendation of the second Hope Royal Commission for an office to monitor ASIO and ASIS's 'compliance with the law, the propriety of its actions and the appropriateness and effectiveness of its internal procedures',[42] as well as looking into complaints. It was intended to 'protect the rights of Australian citizens and residents against possible errors or excesses by the intelligence and security agencies and to guard against breaches of Australian law'.

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39 *Hansard*, 18 November 2002, p. 134.

40 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 12.

41 See PJCAAD Recommendations 14 and 15.

42 Protective Security Review, *Report (Unclassified Version)*, AGPS, Canberra, 1979, p. 93.

It was not meant to 'check on the general effectiveness and appropriateness of the agencies' operations'.[43]

9.53 The IGIS has power to inquire into the compliance of ASIO, ASIS and DSD with the law, ministerial directions or guidelines, or human rights and the propriety of particular activities undertaken by them. In particular, the functions of IGIS include to monitor, at the request of the Minister, by its own motion or in response to a complaint:

- compliance with Australian law and with ministerial directions and guidelines;
- the propriety of particular activities;
- effectiveness and appropriateness of procedures; and
- any act or practice that may be inconsistent with any human right, that may constitute discrimination, or that may be unlawful under the *Racial Discrimination Act* 1975 or the *Sex Discrimination Act* 1984, being an act or practice referred by the Human Rights and Equal Opportunity Commission (HREOC).[44]

9.54 The Federation of Community Legal Centres (Vic) told the Committee that the Bill's provisions for complaints to the IGIS and the Ombudsman were inadequate:

> Such a process is unlikely to be prompt, does not allow a complaint to be made directly to the court, is not independent and constitutes a quasi-judicial process [that is inconsistent with Art. 9(3) and 9(4) of the ICCPR].[45]

9.55 Australian Lawyers for Human Rights argued that the legislation governing HREOC, under which the Commission may investigate any act or practice that may be in contravention of human rights, should be amended. ASIO's activities are currently exempted from the legislation, and Ms Kate Eastman argued:

> While [the HREOC process] does not provide any judicial type of remedy to an individual who is complaining about a breach of human rights, it does build in some transparency and an independent watchdog to look over these issues … Our concern is that, when the HREOC legislation was first enacted

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43 Ibid, p. 95.

44 *Inspector-General of Intelligence and Security Act* 1986, paragraph 8(1)(a). The Director-General also has certain responsibilities under the ASIO Act. He or she must take all reasonable steps to ensure that nothing is done beyond what is 'necessary for the purposes of the discharge of its functions' and that the organisation is 'kept free from any influences or considerations not relevant to its functions' (ASIO Act, section 20). The Director-General must also take steps to ensure that nothing is done that might support a suggestion that the organisation is 'concerned to further or protect the interests of any particular section of the community' or is concerned 'with any matters other than the discharge of its functions'. Although there is no requirement for 'proper performance' of the organisation, such a limitation could probably be implied into the role and function of the Director-General (*Church of Scientology v. Woodward* (1983) 154 CLR 25 per Mason J at p. 58).

45 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 19.

> and these [exemption] provisions were there, the functions of ASIO were a little bit different from what are proposed by this current bill.[46]

9.56 On a separate issue, Mr Gustav Lanyi noted that the IGIS had submitted to the PJCAAD's inquiry that conducting 'real time' inspections in relation to warrants was particularly desirable given the nature of the powers and the public interest in been assured that their exercise was responsible.[47] As noted above, the Bill provides for the IGIS to be given details of the warrant as soon as practicable when the Director-General seeks the Minister's consent, and allows the IGIS to inform the Prescribed Authority of concerns about 'impropriety or illegality'.

Judicial review

9.57 Another safeguard is the possibility of judicial review by the courts. As noted above, the Prescribed Authority is required to inform the person being questioned of his or her right to seek a remedy from a federal court (proposed section 34E).

9.58 A judicial review application could be made before the Federal Court, under the statutory grounds in the *Administrative Decisions (Judicial Review) Act* 1977, or the common law grounds recognised in section 39B of the *Judiciary Act* 1903. Arguably, a writ for habeas corpus, or an application for 'relief in the nature of habeas corpus',[48] might also be considered by a Federal Court judge, so as to supervise detention. Conceivably, an application could also be made the High Court.[49]

9.59 While there may be various avenues for judicial review, several factors tend to limit its practical value:

- limitations arising from the nature of the discretion;
- limitations relating to national security sensitivities; and
- practical considerations relating to evidence, time and the role of the legal representatives and/or approved lawyers under the Bill.

The discretion

9.60 The warrant is based largely on a ministerial opinion that, among other things, 'there are reasonable grounds for believing that issuing the warrant to be requested

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46 *Hansard*, 26 November 2002, p. 240. HREOC's functions are set out in the *Human Rights and Equal Opportunity Commission Act* 1986, subsection 11(1). Subsections (3) and(4) exempt the acts and practices of ASIO, ASIS, DSD, the Defence Intelligence Organisation and the Office of National Assessments and provide that HREOC must refer complaints to the IGIS.

47 *Submission 151*, p. 4.

48 This expression was used by North J in *Victorian Council for Civil Liberties Incorporated v. MIMIA* [2001] FCA 1297 at [4]. On appeal, Beaumont J rejected the notion that the Federal Court was vested with any jurisdiction to issue a writ of habeas corpus: *Ruddock v. Vadarlis* [2001] FCA 1329 at [101].

49 In respect of the entrenched judicial review writs in section 75(v) of the Constitution.

will substantially assist the collection of intelligence that is important in relation to a terrorism offence'.[50]

9.61 Where an Act refers to 'reasonable cause to believe', or 'reasonable grounds', a court will not treat it as an objective fact to be determined by the court itself. It will determine whether any reasonable grounds exist and whether an opinion was 'formed by a reasonable man who correctly understands the meaning of the law under which he acts'.[51]

National security considerations

9.62 It has been said that executive power 'is almost unlimited where national security is concerned'.[52] Thus, while national security agencies may be subject to judicial review,[53] where an opinion is based on national security considerations, the scope of judicial review may be confined to allegations of bad faith or unreasonableness.[54] It *may* be insufficient to demonstrate that the decision maker failed to take into account relevant considerations, took into account irrelevant considerations or applied policy inflexibly.[55] Opinions based on national security involve wide policy considerations and '[w]hen such a breadth of considerations is involved only something amounting to lack of *bona fides* could justify curial [judicial] intervention in decisions made in the exercise of the power'.[56]

9.63 The International Commission of Jurists (Australia) drew the Committee's attention to various cases where courts showed some deference to decisions involving detention during wartime.[57] For example, in *Lloyd v. Wallach* Griffiths CJ said, having examined the wider context of the statute:

> *having regard to the nature and object of the power conferred* upon the Minister *and the circumstances under which it is to be exercised*, I think that

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50 Proposed paragraph 34C(3)(a).

51 *R v. Connell; Ex parte The Hetton Bellbird Collieries* (1944) 69 CLR 407 per Latham CJ at p. 430.

52 Professor Tony Blackshield, 'The Siege of Bowral – The legal issues', *Pacific Defence Reporter*, March 1978, p. 7.

53 This judicial review would be an action taken under section 39B of the *Judiciary Act* 1901 and section 75 of the Constitution rather than the *Administrative Decisions (Judicial Review) Act* 1977. This is because ASIO is exempt from AD(JR) actions: *Administrative Decisions (Judicial Review) Act* 1977, Schedule 1, paragraph (d).

54 In *Leisure and Entertainment Pty Ltd v. Willis* No. QG 204 of 1995 FED No. 1/96, Spender J commented, in relation to an opinion by the Treasurer based on national interest considerations, that an applicant must demonstrate 'that the opinion were not genuinely entertained or that the opinion was wholly unreasonable'

55 *Administrative Decisions (Judicial Review) Act* 1977, paragraphs 5(1)(e) & s.5(2)(a), 5(2)(b), and 5(2)(f).

56 *Murphyores Incorporated Pty. Ltd. v. The Commonwealth (1976)* 136 CLR 1 per Stephen J at 14.

57 International Commission of Jurists (Australian Section), *Submission 237*.

> his belief is the sole condition of his authority, and that he is the sole judge of the sufficiency of the materials on which he forms it.[58]

9.64 Similarly, Isaacs J argued that, in these circumstances, a minister 'is presumed to act not arbitrarily nor capriciously, but to inform his mind in any manner he thinks proper'.[59] Of course the measure of deference will be affected by statutory language. Thus, in *Church of Scientology v. Woodward* the High Court was prepared to examine the actions of ASIO for their consistency with the ASIO Act. The Act prohibits ASIO from obtaining, correlating, evaluating or communicating intelligence unless it is 'relevant to security'. While a minority held that the question of relevance was not justiciable, on a similar basis as the earlier cases,[60] the majority held that:

> It is one thing to say that security intelligence is not readily susceptible of judicial evaluation and assessment. It is another thing to say that the courts cannot determine whether intelligence is "relevant to security" and whether a communication of intelligence is "for purposes relevant to security". Courts constantly determine issues of relevance and questions of relevance.

9.65 The majority judges formed the view that '[i]ntelligence is relevant to security if it can reasonably be considered to have a *real connexion* with that topic, judged in the light of what is known to ASIO at the relevant time'. However, while this was a test that the courts could apply, they acknowledged it was a test that:

> … presents a formidable hurdle to a plaintiff and not only because a successful claim for [public interest immunity] may exclude from consideration the very material on which the plaintiff hopes to base his argument – that there is no real connexion between the intelligence sought and the topic.[61]

9.66 Thus, while official actions based on national interest or national security considerations may be subject to judicial review, it may be difficult for a plaintiff to succeed unless there is some tangible evidence of bad faith or some basis for concluding that the relevant conduct, decision or opinion was 'manifestly

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58 *Lloyd v. Wallach* (1915) 20 CLR 299, per Griffiths CJ at p. 304.

59 *Lloyd v. Wallach* (1915) 20 CLR 299, per Isaacs J at p. 308. This view influenced the decision in *Ex parte Walsh* (1942) The Argus Law Reports 359 and was rearticulated by Dixon J in *Little v. Commonwealth* (1947) 75 CLR 94, at p. 103, where he said: 'I do not think that the order is examinable upon any ground affecting the Minister's opinion short of bad faith'

60 Two judges said that, in the absence of bad faith or infringement of personal rights, such a question was not justiciable. They said that the issue of relevance either could not be assessed in isolation from other information that was or *could become* available to ASIO or was beyond the expertise of judges. They also said that scrutiny of ASIO operations was dealt with exclusively in the ASIO Act and, in any event, judicial proceedings would be frustrated by claims of secrecy or public interest immunity.

61 *Church of Scientology v. Woodward* (1982) 154 CLR 25 at pp. 59-61.

unreasonable' or 'so devoid of any plausible justification' that no reasonable person could have come to it in the circumstances.[62]

Other difficulties

9.67 Another obvious difficulty with judicial review in this context is the possible absence of any reasons for decision. As one submission noted:

> There is no requirement under the bill that persons be given access to information regarding the basis upon which they were detained or required for questioning. This limits the detainee's ability to seek judicial review.[63]

9.68 There may also be a problem with access to other evidence. A basic principle of evidence is that courts answer questions of admissibility and weight. Thus it is said that in relation to confidential information 'no obligation of confidence, of itself, entitles the person who owes the duty to refuse to answer a question or to produce a document in the course of legal proceedings'.[64] However, courts will consider claims based on a range of privileges and immunities which are themselves based on public interest considerations.

9.69 Questions of privilege and immunity often involve some form of deference by courts to the other arms of government. Thus, while the courts reserve the right to determine claims of public interest immunity, where national security considerations arise very considerable weight is given to the view of what national security requires, as expressed by the responsible Minister.[65]

Practical issues

9.70 The Committee heard evidence that, despite access to judicial review being allowed in the Act, in practice it may be extremely difficult. One issue was the timeliness of challenging the legality of detention. One submission argued:

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62 *Associated Provincial Picture Houses v. Wednesbury Corporation* (1948) 1 KB 223. See also *Prasad v. Minister for Immigration and Ethnic Affairs* (1984-1985) 6 FCR 155 per Wilcox J at p. 169.

63 Amnesty International *Submission 136*, p. 18.

64 *Baker v. Campbell* (1983) 153 CLR 52, citing *D. v. N.S.P.C.C.* (1978) AC 171, at pp. 218, 230, 237-239, 242; *Smorgon v. Australia and New Zealand Banking Group Ltd*. (1976) 134 CLR 475, at pp. 487-489; *Federal Commissioner of Taxation v. Australia and New Zealand Banking Group Ltd*. (1979) 143 CLR 499, at p. 521.

65 This is not to say that the opinion of the executive will always be conclusive. Thus, while issues of national interest 'will seldom be wholly within the competence of a court to evaluate' (*Alister and Others v. The Queen* (1984) 154 CLR 404 per Wilson and Dawson JJ at p. 435) and the public interest in national security will seldom yield to the public interest in the administration of justice (*Reg. v. Lewes Justices; Ex parte Home Secretary* (1973) AC 388, at p. 407, cited by Brennan J in *Church of Scientology v. Woodward* (1983) 154 CLR 25 at p. 75), it is clear that a court will determine whether national security is threatened and will not be bound by any other opinion 'as to what constitutes security or what is relevant to it' (*Church of Scientology v. Woodward*, Ibid).

> Proposed amendments to the bill regarding access to courts of law to determine the legality of the detention of individuals do not allow time for them to challenge their detention. This is a requirement of Article 9(4) of the ICCPR and 24 hours is certainly insufficient.[66]

9.71 Concern was also expressed in submissions and evidence about the process for appointment of approved lawyers and the power to exclude or delay access to legal representation, especially in the first 48 hours of detention.

9.72 There may be little scope to challenge the appointment of approved lawyers, since the discretion is based on a security assessment and 'any other matter that the Minister considers is relevant'. The concern was that this would give 'an absolute discretion' that might not be reviewable: 'at a minimum, there must arise an apprehension of bias by the Government'.[67] Dr Carne suggested that the decision would be 'effectively unreviewable because of national security evidentiary considerations and AAT and judicial reticence in national security matters'.[68] On this basis, he argued that the process 'has the potential to undermine the integrity, appropriate expertise and independence of the system of a panel of approved lawyers, necessary to safeguard the interests of the detainee'.[69]

9.73 Likewise, there may be little scope to challenge a decision to delay access to legal representation. One submission argued that 'the Minister's decision, by its nature … will not be able to be challenged before a court and the Bill makes no allowance for such decisions being challenged in any manner'.[70]

9.74 As mentioned in Chapter 6, the Committee's attention was also drawn to the impact that a delay in access to legal representation might have on access to judicial review. Amnesty International Australia argued that preventing full access to legal representation 'will also have an effect upon the persons' ability and right to challenge their detention and limit access to existing legal rights such as those provided for in habeas corpus actions'.[71] Dr Carne argued that '[t]he lack of entitlement to an approved lawyer … during the first 48 hours effectively nullifies the right to seek judicial review before the Federal Court'.[72]

9.75 Finally, the Committee also heard suggestions that the issue of a warrant for detention should be subject not only to judicial review, but that there should be an

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66 Ms Nancy Murphy, *Submission 10*, p. 1.

67 Mr Leigh Plater *Submission 70*, p. 1.

68 *Submission 24*, p. 14.

69 Ibid.

70 Mr Leigh Plater *Submission 70*, p. 2.

71 *Submission 136*, p. 19.

72 *Submission 24*, p. 16.

expanded merits review of such decisions by an independent statutory body such as the AAT, with legal representation.[73]

Funding for lawyers

9.76 Dr Gavan Griffith QC argued that 'to give any content to the duties and rights under clause 34E' (the provision requiring the Prescribed Authority to tell the person being questioned of his or her rights, including the right to seek a judicial review remedy), certain changes were needed. They included:

- paying for an approved lawyer where the person 'has no apparent means'; and
- providing funding, if requested by the approved lawyer, for an application to the Federal Court for review.[74]

9.77 It is clear that informing someone of his or her rights to judicial review, and more generally to have access to a legal adviser, will be of little benefit where the person has no money to pursue those options. The Committee was advised by the Attorney-General's Department that, when the Government's response to the PJCAAD's report was first announced, the Attorney-General had issued a press release which included the statement that the costs for approved lawyers would be met by the Commonwealth through, potentially, a legal aid style program so that those people who were required to have a lawyer approved by the Commonwealth would not be put to the cost of acquiring that lawyer.[75] However, there is no statement to that effect in the Bill.

Annual reporting

9.78 Section 94 of the ASIO Act currently requires the Director-General to give the Minister an annual report on ASIO's activities. A copy must also be given to the Leader of the Opposition. The Minister may delete sections from the report as he or she considers necessary to avoid prejudice to security, defence, Australia's international affairs or individual privacy, and the Leader of the Opposition must treat those sections as secret.

9.79 The Bill adds new requirements for annual reports, following the PJCAAD's recommendation.[76] Proposed section 94(1A) specifies that the annual report must include a statement of the total number of requests for warrants and the total number of warrants issued, broken down into the number requiring appearance for questioning and the number authorising a person to be taken into custody. There is also a provision requiring the Director-General to provide a written report to the Minister on the extent to which action taken under a warrant has assisted ASIO in carrying out its functions (proposed section 34P). Such reports, however, go no further than the Minister.

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73 Australian Lawyers for Human Rights *Submission 177*, p. 8.

74 *Submission 235*, p. 9.

75 *Hansard*, 26 November 2002, p. 275.

76 PJCAAD Recommendation 11.

9.80 Mr Gustav Lanyi argued that the provisions relating to annual reports were inadequate in allowing an assessment of the use of the powers under the Bill and whether fundamental human rights were being respected in individual cases.[77]

9.81 During this inquiry, the Director-General of Security reiterated a concession made to the PJCAAD in relation to the reporting of statistics on the new powers:

> As I mentioned … before another committee, if the parliament considered that it would help in the public trust and confidence, there would not be an issue in providing details of the number of warrants that were exercised under this legislation in our classified annual report to the parliament.[78]

9.82 There would seem to be merit in requiring ASIO to provide further details on the use of warrants: the total number of hours of questioning, plus the hours and number of warrants for questioning heard before each Prescribed Authority.

A sunset clause

9.83 The PJCAAD recommended a sunset clause of three years, stating that in combination with public reporting on the number of warrants sought and granted it was the 'most powerful accountability mechanism that the Committee can recommend'.[79] The PJCAAD commented:

> It is simple in design but sends a confidence boosting message to the Australian public that the Australian Government will need to account and argue the case for the continuation of these powerful laws.[80]

9.84 This recommendation was not adopted by the Government, the Attorney-General stating:

> International experts on terrorism agree that one thing we know about terrorist is that they are patient … The armoury we build against terrorism must, therefore, be both strong and enduring. Of course, as the threat environment evolves, we will need to review the appropriateness of our tools in the fight against terrorism.[81]

9.85 Instead of a sunset clause, the Government proposed that, three years after it commenced, the legislation would be reviewed by the Parliamentary Joint Committee on ASIO, ASIS and DSD.

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77 *Submission 151.*

78 *Hansard*, 12 November 2002, p. 33.

79 PJCAAD, p. 59 and Recommendation 12.

80 Ibid.

81 Hon Daryl Williams MP, *House of Representatives Hansard*, 23 September 2002, p. 7039.

9.86 The insertion of a sunset clause was supported by Australian Lawyers for Human Rights,[82] Dr Gavan Griffith QC[83] and the Law Council of Australia.[84] Mr Bret Walker SC, President of the New South Wales Bar Association, argued:

> … if it is a law which leads to contest, which leads to controversy and which is revealed in practice to need finetuning or perhaps more than that, a sunset clause ensures that there will be an ordered non-emergency, non-scrambled occasion when the pros and cons can properly be debated and where they should be debated - in parliament and in committees such as this with delegates from the parliament. For those reasons, a sunset clause is, in my view, unexceptionable and remarkable in this debate only for this political factor: why would one resist it?[85]

9.87 The Committee notes that in the United Kingdom there has been a longstanding practice of giving anti-terrorist legislation a limited life span, subject to parliamentary review and extension.[86] Significantly, the current legislation is permanent.[87] However, the most recent legislative amendments have a novel and innovative sunset clause mechanism. Under the Anti-Terrorism, Crime and Security Act 2001 (UK), the Secretary of State must appoint a committee to conduct a review of the Act within two years. The report may specify particular provisions which, without parliamentary intervention, would cease to have effect within 6 months.[88]

9.88 A sunset clause in legislation can be used as a guarantee of parliamentary scrutiny and opportunity to review. It can help to ensure that the survival of the legislation is made to depend upon a continuing demonstrated threat of terrorism.

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82 *Submission 177*, p. 8.

83 *Submission 235*, p. 10.

84 *Submission 299*, p. 25. Mr Gustav Lanyi (*Submission 151*, p. 3) and Ms Ruth Russell (*Submission 13*, p. 4) also supported a sunset clause.

85 *Hansard*, 26 November 2002, p. 250.

86 Prevention of Violence (Temporary Provisions) Act of 1939–1954 and Prevention of Terrorism (Temporary Provisions) Acts of 1974–1989.

87 Terrorism Act 2000 (UK).

88 Anti-Terrorism, Crime and Security Act 2001 (UK), sections 122 and 123. As Australian Lawyers for Human Rights noted (*Submission 177*, p. 8), there is a separate sunset clause in section 29 of the Act relating to provisions for certifying that a person is a terrorist. These provisions expire 15 months after commencement, unless the Secretary of State orders their revival, following approval in Parliament. In any case, the provisions may not last beyond November 2006.