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Abstract
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TERRORISM AND NATIONAL SECURITY INTELLIGENCE LAWS: ASSESSING AUSTRALIAN REFORMS

Gregory Rose* and Diana Nestorovska#

The Australian legal definition of terrorism and a brief history of terrorism in Australia set the context for national security intelligence laws. Recent national reforms are surveyed and critically examined here. It is concluded that they do not duplicate other powers and are subject to respectable, although not impeccable, safeguards. Some provisions need to be clarified to delimit their scope and others could be hampered in operation by the uncertainty of constitutionally implied limits.

1 INTRODUCTION

A wide array of law reforms to strengthen Australian counter-terrorism capabilities were introduced at Commonwealth level in 2002 and are being supplemented continuously. These capabilities and their respective enabling laws can be divided into two categories: (a) those concerned with the proscription of terrorism, and which are located within the substantive criminal laws concerning law enforcement and punishment after the commission of terrorist crimes; and (b) national security laws, which gear a range of relevant public management sectors towards the prevention of terrorist crimes. National security[1] enabling laws can be sub-grouped into those concerning pro-active threat mitigation by means of intelligence networks, border controls and financial flow monitoring, and those that address responses after a terrorist incident by means of crisis management.[2]

The security intelligence gathering aspects of the recent Australian reforms were politically controversial and much has been written attacking them as threats to

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1 The *Australian Security Intelligence Organisation Act 1979* (Cth) (*'ASIO Act'*) s 4 defines 'security' as '(a) the protection of, and of the people of, the Commonwealth and the several States and Territories from: (i) espionage; (ii) sabotage; (iii) politically motivated violence; (iv) promotion of communal violence; (v) attacks on Australia's defence system; or (vi) acts of foreign interference; whether directed from, or committed within Australia or not; and (b) the carrying out of Australia's responsibilities to any foreign country in relation to a matter mentioned in any of the subparagraphs of paragraph (a).' The term 'politically motivated violence' has been defined to include 'terrorism offences' (s 4). Thus, laws on intelligence networks, border and financial controls which serve, *inter alia*, the purpose of detecting and preventing any of these defined activities, and specifically, terrorism, can be regarded as national security laws.

2 The framework for this analysis of national security laws is adapted from Nathan Hancock, 'Terrorism and Law in Australia: Legislation, Commentary and Constraints', Department of the Parliamentary Library, Information and Research Services, Research Paper No 12 2001-02, 9-22.

Australian civil liberties.[3] Liberal democracies such as Australia eschew unnecessary constraints on freedom.[4] However, the legal powers necessary for a democratic society's security intelligence agencies are a matter that can only be properly determined through its representative democratic processes.[5] In Australia, Parliaments form the central machinery for those processes and federal parliamentary consideration of the security intelligence powers introduced by the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* ('*ASIO Terrorism Act*') has certainly been 'robust'.[6] Its deliberations were enriched by an opposition dominated Upper House. Extensive contributions were provided by independent specialists and from civil society through submissions to parliamentary committees.[7]

The tendency of Australian jurists has been to critique the new counter-terrorism legislation for imposing unnecessary constraints by applying a rights-based approach, using international law human rights standards. Williams, for example, suggests that counter-terrorism legislation 'can be justified where it is proportionate to the threat faced and where any diminution of the rule of law or human rights principles is no more than is "strictly required by the exigencies of the situation".'[8]

However, whether constraints on liberty are necessary (in the public policy sense of that term) is a question that can be approached using legal theoretical

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3 See, eg, the special issues of the *University of New South Wales Law Journal* (2004) 27(2); and also articles by Michael Head, 'Counter-Terrorism Laws: A Threat to Political Freedom, Civil Liberties and Constitutional Rights' (2002) 26 *Melbourne University Law Review* 666; Michael Head, 'Counter-Terrorism Laws Threaten Fundamental Democratic Rights' (2002) 27(3) *Alternative Law Journal* 121; and George Williams, 'One year on: Australia's legal response to September 11' (2002) 27(5) *Alternative Law Journal* 212, to name but a few.

4 The classic liberal philosopher is John Stuart Mill: 'There is a limit to the legitimate interference of collective opinion with individual independence: and to find that limit, and maintain it against encroachment, is as indispensable to a good condition of human affairs, as protection against political despotism.' See: John Stuart Mill, 'On Liberty' in John M Robson (ed), *Collected Works of John Stuart Mill* (1977) 220.

5 The issue of whether such powers can be given is discussed in n 116 below.

6 To use Hocking's term in Jenny Hocking, 'National Security and Democratic Rights: Australian Terror Laws' (2004) 16(1) *The Sydney Papers* 92. See also discussion in 'Parliamentary and Judicial Review' below p151.

7 See, eg, Parliamentary Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* (2002) and Senate Legal and Constitutional Committee, Parliament of Australia, *Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 and related matters* (2002).

8 George Williams, 'National Security, Terrorism and Bills of Rights' (2003) 8(2) *Australian Journal of Human Rights* 269. This approach seems to draw inspiration from Dworkin's work on the 'best theory' of political morality: see Ronald Dworkin, *Taking Rights Seriously* (1977).

frameworks[9] other than a rights-based framework; and rights-based frameworks themselves are contestable.[10] Mooted juridical approaches contribute value to the public policy debate but cannot predetermine its outcome.

It is the not the authors' intention here to debate the meanings of liberty and security, to evaluate public policy choices or even to defend the national security intelligence reforms. This article seeks, as far as is possible, to examine the reforms from less value-laden perspectives. Thus, it studies them with a technical legal eye, analysing the relative strengths and weaknesses of the reforms in terms of whether they are duplicative and obscure, or utile and clear.

First, the definition of terrorism that is utilised in Australian legislation is considered and then Australia's experience with terrorism is summarised. The substantive criminal laws have been assessed in detail elsewhere and are merely noted here to set the legal context. The new national security intelligence laws are then examined and tested for clarity and for necessity, as defined below. The conclusion drawn is that the national security intelligence law reforms are utile but that some provisions need to be clarified to define their scope and improve their workability.

2 ESTABLISHING THE CONCEPTUAL FRAMEWORK

2.1 Terrorism

The controversy that usually surrounds counter-terrorism laws largely concerns the conceptual definition of their core subject matter: terrorism. There is as yet

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9 For example, a utilitarian framework might be adopted. ('An action may be said to be conformable to the principle of utility … when the tendency it has to augment the happiness of the community is greater than any it has to diminish it.': Jeremy Bentham, 'An introduction to the principles of morals and legislation' in John Bowring (ed), *The Works of Jeremy Bentham* (1943) vol I, 1).

10 Controversy as to the content of rights is familiar. For example, Williams adds that constraints on liberty in counter-terrorism legislation should be temporary and limited by a sunset clause (Williams, above n 8). The suggestion reflects Article 4 of the *International Covenant of Civil and Political Rights* 1966 ('*ICCPR*'), 999 UNTS 171 (entered into force 23 March 1976) and Article 15 of the *European Convention on Human Rights* 1950 ('*ECHR*'), 213 UNTS 221 (entered into force 3 September 1953). The conventions distinguish between core and non-core obligations and permit parties to derogate from their non-core obligations in times of public emergency. Neither permits derogation at any time from certain core obligations (see *ICCPR*, Articles 6-8, 11, 15-16 and 18 and *ECHR*, Articles 2, 3, 4 and 7). Yet there are also other formulations of human rights principles. For example, the Canadian Charter of Rights and Freedoms in the *Constitution Act 1982*, being schedule B to the *Canada Act 1982* (UK) c 11, s 1 and the *New Zealand Bill of Rights Act 1990* (NZ), s 5 do not distinguish between core and non-core rights and provide that rights are subject to any 'reasonable limits' prescribed by law. In this way, Canadian and New Zealand laws can limit prescribed rights in ongoing circumstances that are not restricted to public emergencies. Which is the better articulation for Australian public morality?

no general definition of terrorism agreed under the laws of the United Nations,[11] although it is apparent that one is finally emerging, as we have demonstrated elsewhere.[12] A definition in Australian law is necessary to provide a clear reference for the triggering of the various law enforcement, security intelligence, incident prevention and emergency powers concerned. Therefore, rather than the emerging international legal definition, the focus here is on the established Australian definition. That definition is set out below.[13]

In Australia, the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) amended the federal *Criminal Code Act 1995* (Cth), to define a terrorist act and make it an offence.[14] It is composed of two basic components: serious acts of violence and the context of political conflict. For example, a serious violent crime such as kidnapping becomes a terrorist act if committed with the intent to exert pressure for gains in a political conflict. In the amended *Criminal Code*, 'terrorist act' means any action or threat of action that falls into subsection (2) of section 100.1, but does not fall under subsection (3). An act falls within subsection (2) if the action or the threat of action would cause death or serious physical harm to a person or serious damage to property, endanger another person's life, create a serious health or safety risk to the public or seriously interfere with, disrupt or destroy an electronic system. The political context is set by requiring that the act also must be done with the intention of advancing a political, religious or ideological cause as well as with the intention of coercing or intimidating the Government of the Commonwealth or a State, or intimidating sections of the public. Subsection (3) includes a safeguard for civil liberties. It expressly excludes advocacy, protest, dissent or industrial action from the operation of the Act, so long as such action is not intended to cause serious harm or death to a person, endanger another person's life or create a serious health or safety risk to the public.[15]

The substantive new criminal laws relating to terrorism were set out in amendments to the *Criminal Code.* They include offences which relate to: acts preparatory to terrorism;[16] murder or injury of Australians overseas;[17] using

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11 See Rosalyn Higgins, 'The General International Law of Terrorism' in Rosalyn Higgins and Maurice Flory (eds), *Terrorism and International Law* (1997) 14-19.

12 See Gregory Rose and Diana Nestorovska, 'Towards an ASEAN Counter-Terrorism Treaty' (2005) 9 *Singapore Yearbook of International Law* 157, 158-166.

13 The authors' contribution to analysis of the Australian definition is forthcoming in a companion article: 'Terrorism and Criminal Law - Assessing Australian Reforms'.

14 *Criminal Code Act 1995* (Cth) s 101.1. *The Terrorism (Police Powers) Act 2002* (NSW), *Terrorism (Emergency Powers) Act 2003* (NT), *Police Powers and Responsibilities Act 2000* (Qld), *Emergency Management Act 2004* (SA) and *Terrorism (Community Protection) Act 2003* (Vic) all adopt the Commonwealth definition of terrorist act.

15 *Criminal Code Act 1995* (Cth) s 101.1(3).

16 Sections 101.2, 101.3, 101.4, 101.5 and 101.6, inserted into the *Criminal Code Act 1995* (Cth) by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) Schedule 1.

postal services to make threats, hoaxes or send dangerous articles;[18] and misusing telecommunications systems to make threats.[19] A legal mechanism was adopted within the *Criminal Code* to blacklist terrorist organisations and to criminalise directing, recruiting, funding, training, supporting or associating with terrorist organisations.[20] In addition, terrorist bombing and financing activities were criminalised in accordance with recently ratified international conventions.[21] Other amendments concerning participation in foreign incursions, in espionage;[22] treason;[23] and treachery[24] were adopted harmonising definitions of those crimes with the new terrorist crimes.

2.2 Security Intelligence

National security law reforms complement the substantive criminal laws. Whereas criminal laws are typically administered by the police, prosecutors and courts, national security laws are administered by a more fragmented array of governmental agencies in fields such as intelligence gathering, border control, transport, industry, civil defence and foreign affairs. National security laws support activities in all these fields, although those analysed here concern only security intelligence. Security intelligence is taken here to mean data assembled, sometimes covertly, and analysed by government agencies to deliver information about intended terrorist acts in advance of their commission.[25] In

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17 Division 104, inserted into the *Criminal Code Act 1995* (Cth) by the *Criminal Code Amendment (Offences Against Australians) Act 2002* Schedule 1.

18 Sections 471.10 and 471.14, inserted into Part 10.5 (Postal Offences) of the *Criminal Code Act 1995* (Cth) by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* Schedule 1; and ss 471.11, 471.12, 471.13 and 471.15, inserted into Part 10.5 (Postal Offences) of the *Criminal Code Act 1995* (Cth) by the *Criminal Code Amendment (Anti-Hoax and Other Measures) Act 2002* Schedule 2.

19 Sections 474.14, 474.15 and 474.16, inserted into the *Criminal Code Act 1995* (Cth) by the *Crimes Legislation Amendment (Telecommunications Offences and Other Measures) (No 2) Act 2004* Schedule 1.

20 Division 102, inserted into the *Criminal Code Act 1995* (Cth) by the *Security Legislation Amendment (Terrorism) Act 2002* (Cth) Schedule 1, and variously amended by the *Anti-Terrorism Act (No 2) 2004*, *Criminal Code Amendment (Terrorist Organisations) Act 2004*, *Anti-Terrorism Act 2003*, *Criminal Code Amendment (Hizballah) Act 2003* and *Criminal Code Amendment (HAMAS and Lashkar-e-Tayyiba) Act 2003*.

21 These are the *International Convention for the Suppression of Terrorist Bombings*, opened for signature 15 December 1997, [2002] ATS 17 (entered into force 23 May 2001) and the *International Convention for the Suppression of the Financing of Terrorism*, opened for signature 9 December 1999, [2002] ATS 23 (entered into force 1 April 2002). The international obligations under these conventions were inserted into the *Criminal Code Act 1995* (Cth) by the *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002* and the *Suppression of the Financing of Terrorism Act 2002*.

22 Section 91.1, inserted into the *Criminal Code Act 1995* (Cth) by the *Criminal Code Amendment (Espionage and Related Matters) Act 2002* Schedule 1.

23 *Criminal Code Act 1995* (Cth) s 80.1.

24 *Crimes Act 1914* (Cth) s 24AA.

25 The term 'security' for the purposes of the *Australian Security Intelligence Organisation Act 1979* (Cth) was defined above in n 1.

contrast, again, criminal investigations are usually conducted by police and related law enforcement agencies to gather information concerning terrorist acts after the proscribed acts have been committed or during their preparation.

2.3 Analytical Method

The new national security intelligence laws are critically examined here to evaluate whether they conform to criteria for necessity and clarity, as set out below. This is undertaken as an essentially technical exercise. It does not pretend to investigate the deeper policy questions concerning whether the new counter-terrorism measures are necessary for national security.

To assess the necessity of the newly adopted provisions, this paper compares the new provisions to others already present within the broader framework of Commonwealth law. The humble purpose of this connection is to assess whether the new laws are duplicative, or overlap substantially and inconsistently with existing laws. To assess their clarity, analysis is undertaken of whether they are specific, certain, readily understood and practicable. Where the new provisions are found lacking in either respect, suggestions are offered for their improvement.

The constitutionality of the national security law amendments has a bearing upon whether they are certain and workable. Their support by a constitutional head of power has been addressed elsewhere and is not discussed here.[26] However, whether the amendments contravene express and implied rights within the Constitution is explored. Much of the controversy surrounding the *Australian Security Intelligence Organisation Act 1979* (Cth) '*ASIO Act*' might stem from the fact that Australia, unlike some other Western nations, does not have a constitutional Bill of Rights against which to judge the *ASIO Act* provisions.[27] Instead, the *ASIO Act* has been assessed during its various stages against the provisions of international human rights instruments, such as the *International Covenant on Civil and Political Rights* ('*ICCPR*').[28] Nevertheless,

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26 Carne considers the Constitutional heads of power which could support the ASIO amendments: Greg Carne, 'Detaining Questions or Compromising Constitutionality? The *ASIO Legislation Amendment (Terrorism) Act 2003* (Cth)' (2004) 27(2) *University of New South Wales Law Journal* 524, 528. From 531 he discusses the following powers: defence; external affairs; executive power, express incidental power; and 'the implied power to protect the polity'.

27 Williams, above n 8, 269. See also George Williams, *The Case for an Australian Bill of Rights: Freedom in the War on Terror* 2004.

28 For example, see Christopher Michaelsen, 'International Human Rights on Trial – The United Kingdom's and Australia's Legal Response to 9/11' (2003) 25 *Sydney Law Review* 275. Relevant provisions in the *ICCPR* include those against arbitrary arrest or detention (art 9), protection from self-incrimination (art 14(3)(g)), the presumption of innocence (art 14(2)) and the treatment of detainees (arts 7 and 10). Ultimately, if the ASIO amendments are inconsistent with the *ICCPR*, the international legal issue is whether the derogations can

the suggestion that the *ICCPR* provides guidance in Australian constitutional interpretation is dubious.[29] More pertinent to Australian legal interpretation are the express and implied rights within the Australian Constitution, as recognised in the jurisprudence of the Australian High Court.

3 TERRORISM: THE AUSTRALIAN EXPERIENCE

Unlike countries such as the United Kingdom, Australia has had relatively limited experience with terrorism on its own soil, the Hilton bombing having the highest profile. On 13 February 1978, a bomb exploded outside the Hilton Hotel in Sydney, where the first Commonwealth Heads of Government Meeting ('CHOGM') was scheduled to take place later that day. It killed three people and injured several others. The Prime Minister at the time, Malcolm Fraser, took an unprecedented decision to call out the armed forces to protect the leaders for the remainder of CHOGM. This was the first time since 1901 that the Commonwealth Government deployed military personnel to maintain order against a domestic threat during peacetime.[30]

Although the Hilton bombing was the only attack on Australian soil that posed a sufficient threat to national security for the Government to take military action, it was not Australia's only encounter with terrorism. One year prior to the Hilton bombing, the Indian High Commissioner was wounded when he and his wife were kidnapped at gunpoint.[31] In 1972, a Yugoslav Travel Agency was bombed in Sydney, injuring 16 people.[32] In 1980, a group known as the Justice Commandos of the Armenian Genocide assassinated the Turkish Consul-General and his bodyguard.[33] There was a subsequent attack against Turkish interests in Australia in 1986, when the Turkish Consulate-General was bombed.[34] Israeli-related interests have also been the subjects of violent attacks: in 1982, two bombs were detonated in the building of the Israeli Consulate-General and the Jewish Hakoah Club.[35]

Most of these acts of violence were aimed at institutions with an international context. In the early 1980s, however, several acts of violence were directed

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be justified under Article 4 of the said convention, which permits them temporarily in times of public emergency.

29 Hilary Charlesworth et al, 'Deep Anxieties: Australia and the International Legal Order' (2003) 25 *Sydney Law Review* 424. In *Al-Kateb v Godwin* (2002) 208 ALR 124, McHugh J described the suggestion as 'heretical': 140.

30 Tom Molomby, *Spies, Bombs & the Path of Bliss* (2000) 9.

31 Jenny Hocking, *Terror Laws: ASIO, Counter-Terrorism and the Threat to Democracy* (2004) 131.

32 Ibid 125.

33 *Significant Events in ASIO's History* Australian Security Intelligence Organisation <http://www.asio.gov.au/About/Timeline/Content/main.htm> at 5 May 2005.

34 Ibid.

35 Ibid.

against an Australian institution: the Family Court. These included the shooting of one judge in 1980 and the death of another judge's wife in an explosion in 1984. Despite repeated targeting of the Family Court, there was consensus that the culprit was a disgruntled father seeking revenge over a decision that went against him, rather than a tactic in political conflict.[36] For some writers, however, the nature of the violence was clear: 'When an attack upon an individual or institution is understood to be the expression of a demand on the community, such violence is terrorism.'[37]

The Australian Security and Intelligence Organisation ('ASIO') has also noted incidents of politically motivated violence in Australia during the 1990s, all of which had terrorist overtones.[38] For example, in 1992, the Iranian Embassy in Canberra was vandalised and its staff assaulted by Mujahideen e-Khalq supporters. In 1995, following France's decision to resume nuclear testing in the Pacific, protesters set the honorary French Consulate in Perth on fire. In 1999, protesters from the pro-Kurdistan Workers Party occupied the Greek Consulate-General in Sydney following the arrest of Kurdish leader Abdullah Ocalan.

In the aftermath of the Hilton bombing, the former London Metropolitan Police Commissioner, Sir Robert Mark, was commissioned to advise the Commonwealth on policing resources and protective security.[39] Amongst other things, Sir Robert recommended the creation of an anti-terrorist squad within the Australian Police Force as well as the amalgamation of the Commonwealth and Australian Capital Territory Police Forces.[40] At the same time, Justice Hope was commissioned to review protective security powers and arrangements.[41] He concluded that intelligence gathering and law enforcement authorities had adequate powers under existing legislation.[42] Irregularities in the conviction for murder in 1990 of a man said to be the 'mastermind' behind the Hilton bombing led to his pardon two years later amid suspicions of the culpability of the New South Wales Police 'Special Branch' for the blast.[43]

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36 Tracey Taylor, 'Australian terrorism: Traditions of Violence and the Family Court Bombings' (1992) 8 *Australian Journal of Law and Society* 15.

37 Ibid 15-16.

38 *Significant Events in ASIO's History*, Australian Security Intelligence Organisation <http://www.asio.gov.au/About/Timeline/Content/main.htm> at 5 May 2005.

39 Nathan Hancock, 'Terrorism and the Law in Australia: Supporting Material', Department of the Parliamentary Library, Information and Research Services, Research Paper No 13 2001-02, 28.

40 Ibid. The latter recommendation was implemented by the *Australian Federal Police Force Act 1979*.

41 Above n 39, 28-29.

42 Ibid 29.

43 The NSW Police Special Branch was responsible for criminal intelligence gathering. It has been alleged that, in collusion with ASIO, it sought to stage a bombing to demonstrate that secret intelligence services served an imperative security need at a time when their powers

Concerns over their conduct in the matter generated fierce suspicion and antagonism towards intelligence agencies that still endures in some circles.[44]

That was over 20 years ago, before terrorism matured into its 'modern' phase.[45] Australia was unprepared for the slaughter on 12 October 2002 of 88 of its nationals by the Islamic Jihad bombing in the Sari Club in Kuta, Bali.[46] One hundred Australians were murdered in terrorist acts during the first four years of the new millennium and at least one attack in Australia, or against Australian interests overseas, occurred or was disrupted or aborted, in each year.[47] In 2005, ASIO estimated that up to 80 people in Australia have trained or have close links with terrorist groups, but that only 10% of them could be charged with offences occurring after the entry into force of new counter-terror criminal laws.[48] Five are currently facing charges.[49]

4 ASIO'S SECURITY INTELLIGENCE ROLE

The Australian security intelligence community includes information collection and information analysis organisations. ASIO, the Australian Secret Intelligence Service ('ASIS') and the Defence Signals Directorate ('DSD')

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were under serious political attack. Three members of Ananda Marga, a religious revolutionary sect, were convicted in a related matter in 1979 but pardoned in 1985. The three included Tim Anderson, the alleged 'mastermind' later pardoned again. It is still unknown who was responsible for the blast. See generally Molomby, above n 30; Head (MULR), above n 3, 670 and E Magner, 'Is a Terrorist entitled to the Protection of the Law of Evidence?' (1988) 11(3) *Sydney Law Review* 537, 567.

44 Head, above n 3.

45 The term 'modern terrorism' and its international dimension is discussed in Patrick Brogan, *World Conflicts* (3rd ed, 1998) 555.

46 There was one Australian killed in the terrorist attack on the Sbarro Restaurant in Jerusalem on 9 August 2001, 10 in the World Trade Centre attacks on 11 September 2001, 88 in the Bali attacks on 12 October 2002, one in the Jakarta Marriott bombing on 5 August 2003 and one in the London bombing on 7 July 2005. On Australia's unpreparedness for the Bali attacks and the response of law enforcement agencies, see Mick Keelty, 'The new landscape of law enforcement' (2003) 80 *Platypus Magazine* 14-15; Tom Allard, 'Two nations caught tragically unprepared: Terrorism strikes home', *Sydney Morning Herald* (Sydney), 14 October 2002, 6; Michael Carlton, 'Unaware, unready for a foreign world's rage', *Sydney Morning Herald* (Sydney), 19 October 2002, 50.

47 On the number of potential attacks on Australia that have been disrupted, see comments by Denis Richardson, *Director-General's Address, LAWASIA Conference 2005, Gold Coast, Wednesday 23 March 2005*, Australian Security Intelligence Organisation, <http://www.asio.gov.au/Media/Contents/lawasia_conference.htm> at 5 August 2005. The Australian Federal Police Commissioner, Mick Keelty, has also recently backed the claim of a former ASIO agent that there are about 60 suspected Islamic extremists in Australia: 'Keelty backs agent: extremists are here', *Sydney Morning Herald* (Sydney), 3 August 2005. On the number of Australians killed since 2000, see above n 46.

48 Patrick Walters and Greg Roberts, 'Dozens' of Aussies with terror links', *The Australian* (Sydney), 24 March 2005.

49 Ibid.

collect information.[50] The Office of National Assessments ('ONA'), Defence Intelligence Organisation ('DIO') and the Defence Imagery and Geospatial Organisation ('DIGO') analyse data collected by ASIO, ASIS and DSD.[51] The Australian Crime Commission ('ACC') is unusual for its hybrid intelligence gathering and law enforcement characteristics but its purposes are more closely related to crime prevention than security protection.[52]

Under the National Counter-Terrorism Policy ('NCTP'), ASIO is made responsible for the gathering of intelligence about terrorist threats to Australia.[53] ASIO also advises the Government regarding security threats through threat assessments of specific events, facilities, sectors or individuals.[54] ASIO's purpose, powers and functions are outlined under the *ASIO Act*.[55] Prior to 2003, ASIO already had powers to enter and search premises, conduct personal searches, access computers, attach listening and tracking devices and intercept telephones and mail.[56] These powers continue and, in issuing search warrants, the Minister must be satisfied that

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50 Noted in Parliament of the Commonwealth of Australia, Bills Digest No 128 2001-02, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002* Australian Parliamentary Website <http://www.aph.gov.au/library/pubs/bd/2001-02/02bd128.htm> at 19 May 2004. For a discussion on the history of Australian intelligence agencies, see Frank Cain, 'Australian Intelligence Organisations and the Law: A Brief History' (2004) 27 *University of New South Wales Law Journal* 296, 317. Cain traces the development of Australian intelligence agencies from World War I and argues that through its expansion of powers to fight the 'war on terror', ASIO has effectively become a secret police force, which selectively provides the Government with intelligence that favours its political aims.

51 Parliament of the Commonwealth of Australia, Bills Digest No 128 2001-02, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

52 Its main purpose is to 'enhance Australian law enforcement's capacity to counter serious and organised criminal activity' through the provision of intelligence, collaborative partnerships and information sharing. See Australian Crime Commission Website <http://www.crimecommission.gov.au/content/about/acc-profile.pdf> at 3 August 2005.

53 National Cournter-Terrorism Committee, *National Counter-Terrorism Plan* (*'NCTP'*) (2003) Commonwealth Attorney-General's Department <http://www.ag.gov.au/agd/www/NationalSecurityHome.nsf/Page/RWPCD8501294925DA06CA256D42001C1A4C?OpenDocument > at 30 November 2004. More information on the NTCP appears under 'Prevention', 3:1.

54 Ibid items 14 and 18.

55 The Australian Secret Intelligence Service ('ASIS'), though it existed under an executive order from 1952, was given a statutory framework under the *Intelligence Services Act 2001*. See Parliament of the Commonwealth of Australia, Bills Digest No 11 2001-2002, Intelligence Services Amendment Bill 2001, Australian Parliamentary Website, <http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=BILLSDGS&ID=4637 > at 30 November 2004.

56 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 25(4), 25(4A)(a), 25A(1), 26(1)(c), 26A(2) and 27; *Telecommunications (Interception) Act 1979* (Cth) Pt III and Parliament of the Commonwealth of Australia, Bills Digest No 128 2001-02, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

> 'there are reasonable grounds for believing that access by [ASIO] to records or other things on particular premises (the subject premises) will substantially assist the collection of intelligence in accordance with this Act in respect of a matter (the security matter) that is important in relation to security.'[57]

However, because intelligence gathering from other than open sources is often achieved through covert operations, ASIO never had the power to interview suspected persons, which was left to the law enforcement agencies.[58]

In 2003, ASIO's powers were enhanced by the *ASIO Terrorism Act*, which added Division III to Part III of the original Act. The definition of politically motivated violence in the *ASIO Act* was expanded to include terrorism offences.[59] Further, ASIO was given the power to detain and question terrorist suspects, and non-suspects, who may have information on terrorist activities.[60]

The Australian Security Intelligence Organisation Amendment (Terrorism) Bill 2002 ('ASIO Terrorism Bill') was first introduced into the House of Representatives on 21 March 2002. It was controversial and the Bill's passage attracted enormous scrutiny during months of federal parliamentary wrangling.[61] One commentator described the original Bill as 'a law that would

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57 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 25(2). The tests for other warrants are couched in similar terms: computer access warrants (s 25A); listening devices warrants (s 26(3)); tracking device warrants (s 26B(2)); postal interception warrants (s 27(2)) and delivery service interception warrants (s 27AA(2)). There are also special warrants to obtain foreign intelligence within Australia: see ss 17(1)(e), 27A and 27B.

58 Parliament of the Commonwealth of Australia, Bills Digest No 128 2001-02, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

59 *Australian Security and Intelligence Organisation Act 1979* (Cth), s 4. Similarly, the *Telecommunications Interception Legislation Amendment Act 2002* (Cth) amended the *Telecommunications (Interception) Amendment Act 1979* (Cth) to include terrorist acts in the class of serious offences for which interception warrants may be issued. The *Telecommunications (Interception) Amendment Act 2004* (Cth) broadens the definition of 'class 1 offence' to include the terrorist offences listed in the *Commonwealth Criminal Code Act 1995*, ss 72, 101, 102 and 103: s 5(1)(cb). It also permits the recording of communications to ASIO public lines without the need for a warrant: see s 6(3) and Parliament of the Commonwealth of Australia, Bills Digest No 111 2003-04, Telecommunications (Interception) Amendment Bill 2004, Australian Parliamentary Website <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd111.htm> at 12 February 2005. The *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* excludes 'stored communications', such as filed email, from the scope of the *Telecommunications (Interception) Amendment Act 1979* (Cth) for a period of 12 months pending inquiries into the feasibility of a new regulatory regime for such communications: see Parliament of the Commonwealth of Australia, Bills Digest No 37, 2004-05, *Telecommunications (Interception) Amendment (Stored Communications) Act 2004* Australian Parliamentary Website <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd037.htm> at 12 February 2005.

60 See below, 'Warrants to detain', 11.

61 For example, see Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 7, and Senate Legal and Constitutional Committee, above n 7. There were 434 submissions reported in the Senate Legal and Constitutional Committee inquiry into the Australian

not be out of place in the dictatorships such as General Pinochet's Chile.'[62] It was passed one year later than other components of the 2002 counter-terrorism legal reform package. Much of the controversy stemmed from the original Bill's provisions relating to powers to detain and search children above the age of 10 and restricting persons questioned or detained from contacting family members or lawyers.[63]

The Bill was finally passed by both Houses with amendments, receiving the Royal Assent on 22 July 2003.[64] Since the passage of the *ASIO Terrorism Act*, the *ASIO Act* has been amended several more times to bolster federal governmental counter-terrorism powers.[65] The most significant expansion of powers among these amendments was the *Australian Security Intelligence Organisation Legislation Amendment Act 2004* (*'ASIO Amendment Act 2004'*). It allows ASIO to undertake security assessments in relation to prescribed administrative actions. These include actions relating to whether a person should have access: to national security information; to places where access is controlled on national security grounds; or regarding a person's ability to perform an activity related to a thing.[66] The motivating purpose of these amendments was to enhance ASIO's ability to carry out security assessments in

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Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 <http://www.aph.gov.au/Senate/committee/legcon_ctte/completed_inquiries/2002-04/asio_2/report/contents.htm> at 8 November 2005 and 167 submissions reported in the Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 <http://www.aph.gov.au/house/committee/pjcaad/terrorbill2002/terrorindex.htm> at 8 November 2005).

62 Williams, above n 3, 215.

63 Ibid. See also Parliament of the Commonwealth of Australia, Bills Digest No 128 2001-02, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.

64 Apart from the debate on whether the *Australian Security Intelligence Organisation Amendment (Terrorism) Act 2003* was necessary, the controversy surrounded the provisions relating to the detention and search of children above 10 years of age and detention incommunicado without access to legal representation: see Head (ALJ), above n 3, 121-126. The original provisions allow for access to legal advice provided certain criteria are met and invalidate warrants for children below 16 years of age: see below, 'Warrants to Detain', 11.

65 The significant amendments are set out in the *Australian Security Intelligence Organisation Legislation Amendment Act 2003*, *Anti-Terrorism Act (No 3) 2004* and *Australian Security Intelligence Organisation Legislation Amendment Act 2004*. Other minor amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth) were made by *Communication Legislation Amendment Act (No 1) 2004* (which gives the Australian Communications Authority the power to refuse a carrier licence on national security grounds) and *Australian Passports (Transnationals and Consequentials) Act 2005* (Cth) (which makes consequential amendments to the *Australian Security Intelligence Organisation Act 1979* (Cth), replacing references to the old *Passports Act 1938* with references to the new *Australian Passports Act 2005*).

66 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 35(a), 39(2).

relation to the importation, use and storage of ammonium nitrate.[67] On 24 June 2004, the Council of Australian Government ('COAG') agreed that the States and Territories should introduce a licensing system for ammonium nitrate products with more than 45% nitrate content.[68] This slightly broadened base for gathering security intelligence on a recently perceived security threat - the mishandling of ammonium nitrate - is clear and straightforward and it aroused none of the controversy that surrounded ASIO's new powers to detain for questioning as set out in the *ASIO Terrorism Act*.[69] In the following pages, those detention powers, secrecy provisions concerning detentions and avenues for administrative and judicial review of detentions are examined and are analysed for their necessity and clarity.

4.1 Warrants to Detain

The *ASIO Terrorism Act* introduced powers to detain and question. A person may be detained for questioning for up to 168 hours (seven days) continuously[70] by a prescribed authority (ie an independent legal expert, described below) upon issue of a warrant by an issuing authority (ie a judicial officer, described below). Special rules apply for minors between the ages of 16 and 18[71] and warrants are ineffective for children under 16 years of age.[72] The Director-General of ASIO must first seek the Attorney-General's consent to request the issue of a warrant.[73] The Attorney-General may consent if he or she is satisfied, amongst other things, that there are reasonable grounds for believing that issuing the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[74] An issuing authority may then issue a warrant to question a person if the Director-General of ASIO has requested such a

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67 Parliament of the Commonwealth of Australia, Bills Digest No 45 2004-05, Australian Security Intelligence Organisation Amendment Bill 2004, Australian Parliamentary Website <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd045.htm> at 12 February 2005.

68 *Principles for the Regulation of Ammonium Nitrate* (2004) Council of Australian Governments <http://www.coag.gov.au/meetings/250604/attachments_d.pdf> at 11 February 2005.

69 For more information on this amendment, see Parliament of the Commonwealth of Australia, Bills Digest No 45 2004-05, Australian Security Intelligence Organisation Amendment Bill 2004, Australian Parliamentary Website <http://www.aph.gov.au/library/pubs/bd/2004-05/05bd045.htm> at 10 August 2005.

70 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34HC.

71 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34NA(4)-(7).

72 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34NA(1).

73 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34C(1) and 34D.

74 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34C(3). The other things considered are whether relying on other intelligence collecting methods would be ineffective, that the procedures in sub-s (3A) have been followed and that if the warrant requires the immediate detention of the person, there are reasonable grounds for believing that the person may alert another person about the investigation, fail to appear before the prescribed authority or otherwise destroy any evidence.

warrant in accordance with the Act[75] and the issuing authority is satisfied that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence.[76] Importantly, the detainee need not be a suspect to be the subject of a warrant.[77] Where a person fails to appear before a prescribing authority or fails to produce any document, object or thing as required once a warrant has been issued, the person may be prosecuted[78] and the onus of proof falls upon defendants to prove their innocence.[79]

These powers to detain and question are extraordinarily wide, particularly as they apply to minors over 16 years old.[80] There were no such detention and questioning powers prior to enactment of the *ASIO Terrorism Act*. Although the *Crimes Act 1914* was amended in 2002 to include provisions concerning investigation of arrested terror suspects, including investigative detention periods, its provisions do not concern information collection from non-suspects.[81] The quality of information sought for security intelligence is different from criminal evidence, as indicated by the constraint against any information concerning an accused criminal suspect gathered through the use of an ASIO questioning warrant being used as evidence in court against that suspect.[82] Thus, detention for information gathering entails different purposes, different qualities of information and different procedures.

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75 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34C(4).

76 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34D(1).

77 The wording of ss 34(3)(c) and 34D(1)(b) only require the Director-General to be satisfied that the person will assist in the collection of intelligence.

78 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34G(3) and (6).

79 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34G(4) and (7).

80 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34NA. Concern over recruitment of minors into terrorist activities in Australia has centred on support for 'the jihad stream' in the Sydney-based Islamic Youth Movement, see: *General Information About Nida`ul Islam Magazine* Nida'ul – The Call of Islam <http://www.islam.org.au/general/aboutus.htm> at March 2004.

81 *Crimes Act 1914* (Cth) ss 23CB, 23DA. The *Anti-Terrorism Act 2004* (Cth) amended the *Crimes Act 1914* (Cth) to increase from eight to 20 hours the maximum fixed investigation period for terrorism offences and to reasonably suspend or delay investigations to enable authorities to make inquiries in overseas locations in different time zones. Procedural safeguards such as the right to remain silent, contact a legal practitioner and the tape recording of admissions as a precondition to admissibility still apply: ss 23G, 23N and 23S.

82 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34G(9). Nevertheless, it might be possible that a court would accept police evidence obtained subsequent to security intelligence questioning as an indirect result of the information obtained from that process. See A Palmer, 'Investigating and Prosecuting Terrorism: The Counter-Terrorism Legislation and the Law of Evidence' (2004) 27(2) *University of New South Wales Law Journal* 373, 386-7. Palmer argues that s 34G(9) of the *Australian Security Intelligence Organisation Act 1979* (Cth) offers 'use immunity' rather than 'derivative use immunity.' The latter would allow the use of derivative evidence that is obtained as an indirect result of the interrogation process. Parliament of the Commonwealth of Australia, Bills Digest No 128 2001-02, Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 notes that a derivative use immunity was in place for investigations

Warrant issuing authorities are magistrates and superior court judges appointed by the Attorney-General (although they can refuse the appointment).[83] It has been argued that vesting judges with the role of issuing authorities is incompatible with their judicial functions, which are separated from executive functions under the federal Constitutional doctrine of separation of powers.[84] In relation to issuing authorities, it was held in *Grollo v Palmer* that the executive role of judges as issuers of interception warrants under the *Telecommunications (Interception) Act 1959* (Cth) was compatible with the exercise of their judicial functions.[85] The majority considered that interception warrants should only be issued by authorities such as judges because the authorization of intrusions into privacy requires impartial evaluation.[86] A similar argument applies in the case of ASIO questioning warrants. The pertinent issue is whether a judge's role as either an issuing or prescribed authority would prejudice the capacity of the individual judge, or of the judiciary as an institution, to discharge effectively the responsibilities of exercising the judicial power of the Commonwealth.[87] Yet, the reasoning in the *Grollo* decision was narrowly divided and the majority of the High Court seems since to have shifted towards a more restrictive position on the constitutionality of judicial exercise of Executive powers.[88] Thus, it is nevertheless arguable, in principle, that the role of federal judges as issuing authorities is unconstitutional and renders the issuing procedure uncertain and unworkable. However, the precedent of *Grollo*, which is precisely on point, is likely to be determinative.

Prescribed authorities, who may detain and question a person who is the subject of a warrant,[89] are to include, in order of preference: retired federal superior court judges who have served for at least five years,[90] current State and Territory

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under the *National Crime Authority Act 1984* but that this was removed by the *National Crime Authority Legislation Amendment Act 2001* because 'the public interest in the Authority having full and effective investigatory powers, and … the use against the person of incriminating material derived from the evidence given to the Authority, outweigh the merits of affording full protection to self-incriminatory material' (citing the National Crime Authority Legislation Amendment Bill 2001, Explanatory Memorandum, 8). It can be analogously argued that the serious nature of terrorism would also outweigh fully protecting self-incriminatory material.

83 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34AB(1), 34AB(2).

84 The doctrine that federal courts may not exercise non-judicial powers was set out in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 271-2 (Dixon CJ, McTiernan, Fullager and Kitto JJ).

85 (1995) 184 CLR 348 (Brennan CJ, Deane, Dawson and Toohey JJ; McHugh J dissenting).

86 Ibid 367.

87 Ibid 365.

88 In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, the High Court considered whether the particular administrative task (in this case production of an investigative report) was 'compatible' with the judicial role otherwise performed by judges.

89 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F(1)(a).

90 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34B(1).

superior court judges who have served for five years or, failing that, the President or a Deputy President of the Administrative Appeals Tribunal who has been enrolled as a High Court or Supreme Court legal practitioner for at least five years.[91] The appointee must consent.[92] To exercise this power, the prescribed authority must be satisfied that there are reasonable grounds for believing that, if the person is not detained, he or she may undermine the investigation.[93] This condition imposes a safety check, additional to the exercise of judgment by the issuing authority. The requirement of approval by both an issuing authority and a prescribed authority appears sufficient to ensure that detentions are premised on sound reasons.

The constitutional separation of federal executive and judicial powers underlies the specification of persons who are not federal judges as prescribed authorities. Nevertheless, the appointment of State Supreme Court judges could still be problematic, given that such judges may exercise federal judicial powers.[94] In the *Kable Case*, the High Court held that New South Wales legislation to permit the NSW Supreme Court to detain a named person was invalid because it conferred non-judicial powers on the NSW State Supreme Court.[95] The powers of State Supreme Courts were considered to be part of an integrated judicial system for the exercise of both State and federal judicial power[96] within the context of Chapter III of the Constitution.[97] As the Constitution institutes a separation between Commonwealth judicial and executive powers, and does not distinguish between the status of State Courts vested with federal jurisdiction and the High Court of Australia, it followed that no executive function could be vested in State Supreme Courts that would 'be of a nature that might lead an ordinary reasonable member of the public to conclude that the court was not independent of the executive government of the State.'[98] Consequently, executive functions vested in State judges are potentially vulnerable to the same tests for compatibility as if vested in federal judges. However, because prescribed authorities need not be judges and *Grollo* is analogously applicable to those that are, the provision governing prescribed authorities is certainly workable.

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91 *Australian Security Intelligence Organisation Act 1979* (Cth) ss 34B(2), (3).

92 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34B(4).

93 *Australian Security Intelligence Organisation Act 1979* (Cth) s 34F(3).

94 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51.

95 Ibid.

96 Ibid 102-103 (Gaudron J); 114 (McHugh J).

97 In particular, section 71(iii) of the *Constitution* provides that the Commonwealth Parliament may vest State Courts with federal jurisdiction.

98 *Kable v Director of Public Prosecutions* (NSW) (1996) 189 CLR 51, 116 (McHugh J).

4.2 Detention Safeguards

Beyond the prudent exercise of judgment by issuing and prescribed authorities, a series of safeguards against abuse of power are built into the detention and questioning procedure. These concern the provision of independent legal advice, translation services, minimum standards of treatment, complaints procedures, recording of questioning and reporting on each detention, as set out below. The Attorney-General's Department has also produced a Protocol to guide the section 34D warrant process.[99] The Protocol specifies details regarding the proscribed use of force, minimum facilities and accommodation and proper manner of questioning and conditions.[100]

A person who is the subject of a warrant may contact a lawyer of his or her choice.[101] However, that right is limited, notably where the prescribed authority is satisfied, on the basis of circumstances relating to that lawyer, that certain communications may be made or destroyed as a consequence.[102] Similarly, a person may be questioned in the absence of the lawyer of his or her choice. However, it is unclear what circumstances a prescribed authority may take into account in determining whether questioning should proceed without a lawyer. The Section 34D Protocol is silent on this issue.[103] Further, client-lawyer contact must be made in such a way as to be monitored by a person exercising authority under the warrant, although the prescribed authority must provide the lawyer reasonable opportunity during breaks in questioning to advise the detainee.[104] The lawyer may be removed for unduly disrupting questioning but

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99 The Section 34D Warrant Protocol was tabled before Parliament on 12 August 2003: Attorney-General, Daryl Williams AM QC MP, 'ASIO Protocol to Guide Warrant Process' (Press Release, 12 August 2003) available from Attorney-General's Website <http://www.ag.gov.au/agd/www/attorneygeneralhome.nsf/Page/Media_Releases_2003_August_2003_ASIO_Protocol_to_guide_warrant_process_(12_August_2003)> at 5 August 2005. *Australian Security Intelligence Organisation Act 1979* (Cth) s 34C(3A)(a)(i) requires the Inspector-General of Intelligence to be consulted in developing a written statement of procedures to be followed in the exercise of ASIO's detention powers under s 34D of the same Act. The Protocol is printed in the 2003-04 IGIS Annual Report, Annex 2: *Annex 2 – Section 34D Warrant Protocol* Inspector-General of Intelligence and Security <http://www.igis.gov.au/annuals/03-04/annex2.cfm> at 2 August 2005.

100 S34D Warrant Protocol, above n 99.

101 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34C(3B), 34D(2)(b)(ii), (4).

102 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34TA(2). Presumably, 'circumstances' concern whether the lawyer is known to be related or partisan. However, 'circumstances' might intend to refer to a lawyer's security clearance: see Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 7, recommendation 6.

103 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34TB(1). A note to s 34TB specifies that a prescribed authority must be present during questioning even if a lawyer is not: see Section 34D Warrant Protocol, above n 99. This issue should be clarified in the present review of Part III Division III or in the Protocol.

104 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34U(2), (3).

the detainee has the right to contact another lawyer if this occurs.[105] Additionally, the lawyer is entitled to a copy of the warrant but not necessarily any other document.[106] It should be noted that the common law right to legal representation[107] applies to criminal procedures but not to intelligence operations such as ASIO detention warrants. The latter is an administrative proceeding, in relation to which representation is a legal requirement only in limited circumstances.[108]

A prescribed authority must defer questioning if an interpreter is requested and required by the detainee.[109] The interpreter must be provided unless the prescribed authority believes that the detainee has 'adequate knowledge' of English or can communicate with 'reasonable fluency.'[110] The *ASIO Legislation Amendment Act 2003 ('ASIO Amendment Act 2003')* extended the total questioning period to 48 hours if an interpreter is present at any time during a person's interrogation.[111] The rationale for the automatically extended questioning period might be that at least double the time is required when translation is used and that 48 hours provides a cap on the time extension. Nevertheless, the necessity of automatically doubling time is questionable.[112] The *Crimes Act* also provides for the use of interpreters during the questioning of a suspect by police but not for the automatic doubling of interrogation

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105 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34U(5), (6). It appears that a lawyer can only interject to say that something is not clear, as acknowledged by the Law Council of Australia: see Joint Committee on ASIO, ASIS and DSD, Parliament of Australia, *Review of ASIO's Questioning and Detention Powers: Discussion* (2005), available from the Australian Parliamentary Website <http://parlinfoweb.aph.gov.au/piweb//view_document.aspx?TABLE=COMMJNT&ID=69499> at 2 August 2005. Again, the Protocol does not address this issue: see Section 34D Warrant Protocol, above n 99. By implication, any lawyerly question that falls outside this narrow category can be seen as undue interruption. Whether lawyers can challenge the prescribed authority regarding the 'continuation of questioning' is the subject of on-going discussion between ASIO, the Inspector-General of Intelligence Services and the Attorney-General's Department: 2003-2004 IGIS Annual Report, above n 99, 129-130.

106 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34U(2A).

107 *Dietrich v R* (1992) 177 CLR 292.

108 *Krstic v Australian Telecommunications Commission* (1988) 20 FCR 486.

109 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34HAA(3), (4), 34H(3), (4).

110 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34HAA(2).

111 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34HB(11).

112 It has even been suggested that this may breach the *ICCPR*, Article 26 of which provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, although this interpretation seems to over-extend Article 26. See Cynthia Banham, 'ASIO grillings will breach civil rights, warns expert', *Sydney Morning Herald* (Sydney), 27 November 2003 and corresponding comments in Parliament of the Commonwealth of Australia, Bills Digest No 68 2003-04, Australian Security and Intelligence Organisation Legislation Amendment Bill 2003, Australian Parliamentary Website <http://www.aph.gov.au/library/pubs/bd/2003-04/04bd068.htm> at 29 November 2004.

time.[113] Rather, various times are to be disregarded in calculating the investigation period.[114] While obtaining an interpreter may be a time consuming process, the 48-hour investigation period could be unnecessary. A potential solution could be to adopt an approach similar to that under the *Crimes Act*,[115] where, for example, any time taken to arrange for interpreters is added onto the end of the investigation period.

It has also been asserted that the *ASIO Terrorism Act* may be unconstitutional because it enables the executive arm of the Federal Government to detain people without conviction for an offence, thus usurping a function of the judiciary.[116] The constitutional basis for detention powers differs for aliens and Australian citizens. The High Court of Australia has determined that, when detained persons are aliens, the Executive's power to detain is incidental to Parliament's legislative powers over aliens[117] and, when exercised with *bona fides* for the purposes of expulsion or deportation, is non-punitive in nature and does not involve an exercise of the judicial power.[118] In relation to citizens, the constitutional legitimacy of using executive power to detain depends upon whether detention is reasonably necessary to fulfill a non-punitive purpose.[119] The categories of non-punitive purposes are not closed,[120] although they are approached with a strong legal presumption that legislation does not intend to curtail fundamental freedoms such as personal liberty.[121] To rebut the presumption, there must be 'a clear expression of an unmistakable and an unambiguous intention to abrogate or curtail a fundamental freedom.'[122] It seems likely that the courts would find the unambiguous intention to detain as articulated in the *ASIO Terrorism Act* is sufficient to rebut the presumption and

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113 Parliament of the Commonwealth of Australia, Bills Digest No 68 2003-04, Australian Security and Intelligence Organisation Legislation Amendment Bill 2003.

114 Parliament of the Commonwealth of Australia, Bills Digest No 68 2003-04, Australian Security and Intelligence Organisation Legislation Amendment Bill 2003. See also *Crimes Act 1914* (Cth) s 23CB.

115 *Crimes Act 1914* (Cth) s 23CB.

116 Williams above n 3, 215. This article was written before the 2003 amendments so many of the provisions which Williams discusses have been modified. However, his argument that the amendments are constitutionally suspect because they breach the separation of powers doctrine would still be relevant to the *ASIO Act* in its present form.

117 Section 51(xix) of the *Constitution* gives the Commonwealth the power to legislate with respect to aliens; see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 30-32 (Brennan, Deane and Dawson JJ). The prerogative power also provides a basis for the Government to adopt measures concerning ingress of aliens: *Ruddock v Vadarlis* [2001] FCA 1329.

118 *Koon Wing Lau v Calwell* (1949) 80 CLR 533, 556 (Latham CJ).

119 *Kruger v Commonwealth* (1997) 190 CLR 1, 162 (Gummow J).

120 Ibid.

121 *Minister for Immigration & Multicultural & Indigenous Affairs v Al Masri* (2003) 197 ALR 241 (Black CJ, Sundberg and Weinberg JJ).

122 *Coco v R* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

that the safeguards against abuse indicate a non-punitive purpose.[123] Thus, the argument that detention without conviction for questioning is inherently unconstitutional is tenuous at best. It does not cause the detention powers to be uncertain or unclear.

The *ASIO Terrorism Act* requires that a person detained or questioned 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 implementing or enforcing the direction.'[124] A person's appearance before a prescribed authority for questioning must be video recorded.[125] The Inspector-General of Intelligence and Security may be present during questioning or when the person is taken into custody.[126] Failure to treat a detainee with humanity may result in up to two years imprisonment.[127] Similar penalties apply when police officers fail to bring the suspect before a prescribed authority immediately after arrest,[128] when an interview is conducted without an interpreter in circumstances where an interpreter is appropriate[129] or when the provisions regarding strip searches are not followed.[130] When a detainee first appears before the prescribed authority, and then once every 24 hours thereafter, he or she must be made aware of the right to seek a remedy in a judicial court relating to the warrant or to the detainee's treatment in connection with the warrant.[131] The tough penalties for transgressors of these safeguards are likely to deter their breach.

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123 Attorney-General, Daryl Williams AM PC MP, 'The war against terrorism, national security and the Constitution: A response to Dr Renwick' (Speech delivered at the annual dinner of the NSW Bar Association Constitutional Law Section, Sydney, 3 October 2002), available from Commonwealth Attorney-General's Website at <http://www.ag.gov.au/agd/www/Attorneygeneralhome.nsf/Page/RWP1ECEB58BC35FA567CA256B5F00755790?OpenDocument> at 14 February 2005.

124 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34J(2). The words 'cruel, inhuman or degrading treatment' in this provision reflect those used in the *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* [1989] ATS 21 (entered into force 26 June 1987). Jurisprudence established by the Committee Against Torture under this Convention could assist the interpretation of whether conduct amounts to cruel, inhuman or degrading treatment. Further, the Section 34D Protocol specifies that anyone who interacts with the person subject to a section 34D warrant must do so in a humane and courteous manner, and must not speak to that person in a demeaning manner. It provides that a 'subject must not be questioned in a manner that is unfair or oppressive in the circumstance' and that a police officer must be present at all times during questioning: above n 99.

125 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34K(1)(a).

126 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34HAB.

127 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34NB(4).

128 *Australian Security and Intelligence Organisation Act* 1979 (Cth) s 34NB(2).

129 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34NB(4).

130 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34NB(5), (6).

131 *Australian Security and Intelligence Organisation Act 1979* (Cth) ss 34E(1)(f), (3).

Where the procedures for requesting a warrant have been contravened, a person may complain to either the Inspector-General of Intelligence and Security under the *Inspector-General of Intelligence and Security Act 1986* or to the Ombudsman under Part III of the *Complaints (Australian Police) Act 1981*.[132] Questioning must be deferred if the Inspector-General is concerned about any 'impropriety or illegality' with regard to the questioning.[133] At time of writing (June 2005), the Inspector-General or a staff member has been present whenever a person subject to a section 34D was questioned (other than for a short period during one day of questioning, for which video-tape and a written transcript were provided to the Inspector-General). Nevertheless, the manifest weakness in this latter mechanism requiring deferral of questioning is that the Inspector-General is not required to be present or to be directly available to receive a complaint.[134]

The *ASIO Terrorism Act* also imposes a number of reporting requirements as additional safeguards. For example, the Director-General of ASIO must provide written reports to the Minister on every terrorism warrant that is issued (under section 34D), describing the extent to which action taken under the warrant assisted ASIO to carry out its functions.[135] In response to any concern of the Inspector-General of Intelligence and Security over impropriety or illegality, the Director-General of ASIO must provide copies of any warrant and video recording to the Inspector-General, as well as statements containing details of any seizures or describing any action that the Director-General has taken.[136] Where the Inspector-General receives a complaint from a person subject to a section 34D warrant, the Inspector-General has the discretion to conduct a formal inquiry into the complaint.[137] In conducting such an inquiry, the Inspector-General has the power to access ASIO's documents.[138] The Inspector-General must present a report of the resulting conclusions and recommendations to ASIO and the relevant minister, although ASIO is not obliged to take action on those conclusions or recommendations.[139] If the Inspector-General is of the opinion that ASIO has taken inadequate or inappropriate actions, the Inspector-General may prepare a report for the Prime Minister.[140]

Of course, in common with all administrative measures to enhance the public accountability of the executive, these safeguards against abuse of powers are

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132 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34NC.

133 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34HA.

134 2003-2004 IGIS Annual Report, above n 99, para 127.

135 *Australian Security and Intelligence Organisation Act 1979* (Cth), s 34P.

136 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34Q.

137 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 11.

138 *Inspector-General of Intelligence and Security Act 1986* (Cth) ss 18, 20.

139 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 23, 24(1).

140 *Inspector-General of Intelligence and Security Act 1986* (Cth) s 24(2).

administered by the executive itself and are vulnerable to manipulation. The Inspector-General's office has a small staff and one commentator has dismissed it as a mere 'veneer'.[141] It is too easy to junk administrative mechanisms for executive accountability, indeed the entire legal machinery for administrative review, without empirical study of the substantial public benefits that they provide. In fact, the safeguards against ASIO abuse of its security intelligence gathering powers are extraordinary in their detailed 'belt and braces' self-reinforcement. Although fallible, they are significant.

4.3 Secrecy

The *ASIO Amendment Act 2003* inserted secrecy provisions into the *ASIO Act*, which principally address ASIO officers, detainees and their lawyers.[142] A person commits an offence by disclosing 'operational information' or information related to a warrant.[143] Operational information is defined as information that ASIO has or has had, a source of information, or an operational capability, method or plan belonging to ASIO.[144] Information is warrant-related if it indicates that a warrant has been issued, the content of a warrant or the questioning or detention of a person in connection with a warrant.[145] Operational information is obtained as a direct or indirect result of the issue of the warrant or the doing of any act authorised under the warrant.[146]

It is now an offence to reveal operational information within two years after the expiry of a warrant and, again, when the person disclosing it has obtained the information as a direct or indirect result of the issue of the warrant or the doing of any act authorised under the warrant.[147] Both offences are strict liability offences,[148] which means that the onus falls upon suspects to demonstrate their innocence. There are exceptions for permitted disclosures, which include disclosures to a lawyer for the purpose of obtaining legal advice and to courts for the purpose of commencing proceedings.[149] There is also a safeguard that

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141 Michael Head, 'ASIO, Secrecy and Lack of Accountability' (2004) 11(4) *E Law - Murdoch University Electronic Journal of Law*, para 47 <http://www.murdoch.edu.au/elaw/issues/v11n4/head114.txt> at 10 August 2005.

142 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(3), which states that strict liability applies for the offences in ss 34VAA(1)(c) and 34VAA(2)(c) if the discloser is the subject of the warrant or the subject's lawyer.

143 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(5).

144 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(5).

145 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(1).

146 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(5).

147 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(2).

148 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(3).

149 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(5). Others noted in s 34VAA(5) include disclosures to a parent or guardian or sibling of the subject; to a prescribed authority; the Inspector-General of Intelligence and Security; the Ombudsman; etc.

provides that the criminal provisions do not apply to the extent that they inhibit any constitutionally implied freedom of political communication.[150]

It is questionable whether these secrecy provisions were necessary, given that the *Crimes Act 1914* already prohibits the disclosure of information by Commonwealth officers without lawful excuse if such information was obtained by virtue of their official positions.[151] The *Crimes Act* also sets out offences for disclosing official secrets and penalties ranging from six months' to seven years' imprisonment.[152] However, the effectiveness of the relevant *Crimes Act* provisions, sections 70 and 79, is doubtful. The Independent Review Committee on Commonwealth Criminal Law, chaired by Sir Harry Gibbs, found that the secrecy provisions in the Crimes Act needed to be limited to certain categories of information, such as information relating to intelligence and security, defence and foreign relations, or confidential governmental information.[153] Subsequent reviews of the espionage and security procedures have echoed this sentiment.[154] They informed amendments to the espionage provisions in the *Criminal Code Amendment (Espionage and Related Offences) Act 2002*. Yet, despite the extensive new espionage provisions in the *Criminal Code*, sections 70 and 79 in the *Crimes Act* remain. In light of the redundancy of the *Crimes Act* provisions, the ASIO secrecy provisions appear necessary because they specifically and clearly deal with containing intelligence leaks.

A further question concerns whether the secrecy provisions breach the freedom of political communication implied in the Commonwealth of Australia Constitution. The test for compatibility with this freedom was established in *Lange v Australian Broadcasting Corporation*, where it was held that legislation

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150 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(12). See text below n 155.

151 *Crimes Act 1914* (Cth) s 70.

152 *Crimes Act 1914* (Cth) s 79.

153 The Committee, formed in 1987 by the Federal Government, reviewed Part VII of the *Crimes Act*, which includes the espionage and secrecy provisions, and presented its report in 1991. The Committee sought to distinguish between disclosures that would harm the public interest and those that would not. Only the former would attract criminal sanctions. See Attorney-General's Department, *Review of Commonwealth Criminal Law: Final Report* (1991) 242, 315, 317 cited in Australian Law Reform Commission, *Keeping Secrets: The Protection of Classified and Security Sensitive Information*, Report No 98 (2004) 5.66, 5.67, 5.83. The Australian Law Reform Commission ultimately recommended that ss 70 and 79 be amended to provide that a court might grant an injunction to restrain the disclosure of information where it is satisfied that a person is about to disclose classified information (recommendation 5.1). It was also recommended that Parliament draw a distinction between conduct giving rise to criminal sanctions and conduct giving rise to administrative sanctions under the *Public Service Act 1999* (Cth) (recommendation 5.3) and that the relationship between ss 70 and 79 be clarified (recommendation 5.4).

154 These reports were: Senate Committee on Public Interest Whistleblowing, Parliament of Australia, *In the Public Interest* (1994) and *Commission of Inquiry into the Australian Secret Intelligence Service* (1994).

impinges on the implied freedom if it thwarts free communication about government or political matters in 'terms, operation or effect' and the law is not 'reasonably appropriate and adapted to serve a legitimate end the fulfillment of which is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.'[155] The ASIO secrecy provisions clearly operate to stifle the flow of communication about government. Keeping the public aware of ASIO activity may be important information for the public concerning governmental political activity. Although disclosures concerning operations and warrants are made illegal, there have been occasions where journalists have reported suspects being detained under ASIO's anti-terrorism laws and it is unclear whether such disclosures were 'permitted disclosures' under the secrecy provisions.[156] Although the *ASIO Terrorism Act* contains a provision upholding the freedom of political communication, only a High Court challenge will confirm its scope.[157] Thus, while the new ASIO provisions are generally necessary and clear, the precise scope of the secrecy provisions for the purposes of academic comment and journalism should be clarified.

Secrecy provisions (both the ASIO and the *Crimes Act* secrecy provisions) raise broader contentious issues concerning government accountability. Due to the sensitive nature of its operations, Australia's domestic intelligence gathering agency operates behind a cloak of secrecy. This might lead to the conclusion that ASIO's functions are inherently incompatible with notions of accountability and the rule of law in any democratic society.[158] Indeed, modern Western liberal democracies are built around notions of accountability. Should their intelligence services' activities never be open to democratic scrutiny? It is certainly arguable that, given the need for secrecy on the one hand and the need for public accountability on the other, Parliament attempted to strike a balance in the *ASIO Terrorism Act*. It set in place a system of administrative review through the Inspector-General. In addition, it set in place a cycle of parliamentary review and Executive actions are subject to judicial review.

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155 (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

156 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34VAA(5). See Parliament of the Commonwealth of Australia, Bills Digest No 68 2003-04, Australian Security and Intelligence Organisation Legislation Amendment Bill 2003, which cites an article in the *Weekend Australian*, which describes an ASIO arrest as an example ('ASIO flexes fresh muscle', *The Weekend Australian* (Sydney) 8 November 2003).

157 See generally Melissa Castan and Sarah Joseph, *Federal Constitutional Law: a Contemporary View* (2001) for cases and commentary on the implied freedom of political communication.

158 Joo-Cheong Tham, 'ASIO and the Rule of Law' (2002) 27(5) *Alternative Law Journal* 216.

4.4 Parliamentary and Judicial Review

The formulation and implementation of the *ASIO Terrorism Act* is subject to close parliamentary review, as evidenced by its passage through Parliament. The Bill was introduced to Parliament on 21 March 2002 and then referred to the Parliamentary Joint Committee on ASIO, ASIS and DSD, and to the Senate Legal and Constitutional Legislation References Committee. The Joint Committee released its report in May 2002.[159] The Bill then passed the House of Representatives with amendments on 24 September 2002 and was reintroduced into the Senate on 15 October. It was referred to the Senate Standing Committee for the Scrutiny of Bills on 16 October and then again to the Senate Legal and Constitutional References Committee on 21 October 2002.[160] The latter issued its report on 3 December,[161] but the Bill was laid aside on 13 December 2002 after the two Houses of Parliament could not agree on proposed amendments. It passed both Houses with amendments and received the Royal Assent on 22 July 2003. Subsequently, it has been amended five times.[162] A sunset clause provides that the *ASIO Terrorism Act* provisions are to expire three years from the date of commencement.[163] At the time of writing, the Parliamentary Joint Committee on ASIO, ASIS and DSD has commenced its review of ASIO's detention powers, pursuant to a provision inserted into the *Intelligence Services Act 2001* by the *ASIO Amendment Act 2003*.[164] Whether the ASIO provisions and safeguards have struck the appropriate balance, and whether the provisions are still necessary beyond 2006, is something that the Joint Committee will consider in light of their initial period

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159 See Parliamentary Joint Committee on ASIO, ASIS and DSD, above n 7; G Lanyi, 'Bringing Spies to Account: the Advisory Report of the Parliamentary Joint Committee on ASIO, ASIS and DSD on the ASIO Legislation Amendment (Terrorism) Bill 2002' (2002) 10 *Australian Journal of Administrative Law* 68; and *Consideration of Legislation Referred to the Committee:* Security Legislation Amendment (Terrorism) Bill 2002 [No 2]; Suppressing of the Financing of Terrorism Bill 2002; Criminal Code Amendment (Suppression of Terrorist Bombings) Bill 2002; Border Security Legislation Amendment Bill 2002; Telecommunications Interception Legislation Amendment Bill 2002.

160 Jessica Wyndham, *Commonwealth Anti-Terrorism Legislation*, Briefing Paper prepared for the Human Rights Council of Australia, March 2003, 4-6, available from the Human Rights Council of Australia Website <http://www.hrca.org.au/issues.htm#War> at 19 May 2004.

161 Senate Legal and Constitutional References Committee, above n 7.

162 *Australian Security and Intelligence Organisation Act 1979* (Cth) note 1 of the Notes to the *Australian Security and Intelligence Organisation Act 1979* (Cth) on Australasian Legal Institute (AUSTLII) Website <http://www.austlii.edu.au/au/legis/cth/consol_act/asioa1979472/notes.html> at 11 November 2005.

163 *Australian Security and Intelligence Organisation Act 1979* (Cth) s 34Y. Division III of Part 3 ceases to be in force on 23 July 2006.

164 *Intelligence Services Act 2001* (Cth) s 29(1)(bb). See The Parliamentary Joint Committee on ASIO, ASIS, and DSD's Review of ASIO's Questions and Detention Powers (2004) Parliament of Australia <www.aph.gov.au/house/committee/pjcaad/asio_ques_detention/background.pdf> at 1 March 2004.

of operation. Far from subverting the democratic process, it seems that the *ASIO Act* is properly exercising Australia's democracy.

Whether the courts can effectively review ASIO activities is uncertain. It can be argued that ASIO's actions are, in principle, subject to judicial review. In *Church of Scientology v Woodward*, ASIO's powers to investigate potential security threats were questioned by the Australian High Court, which was divided on the matter.[165] Murphy J held that any powers granted to ASIO must be exercised *bona fides*, 'for the purposes for which they are conferred and with due regard to those affected.'[166] Similarly, Mason J stated that ASIO is not authorised to exceed its statutory functions in relation to security and that a court can determine whether intelligence obtained by ASIO is relevant to security.[167] Although Brennan J agreed with the High Court's position that relief can be obtained if it can be shown that ASIO had acted *ultra vires*, he stated that the plaintiff must overcome evidentiary difficulties in proving that a particular matter is or is not relevant to security.[168] In that connection, Gibbs CJ held that 'it is impossible for a court to say that any intelligence collected in good faith … is not relevant to security, since it may, in the light of other material, bear on the question whether a person is or is not a security risk'.[169]

Thus, ASIO as an agency is subject to judicial review, in principle.[170] However, in practical terms, supporting evidence is difficult to adduce or assess. The judgment of Gibbs CJ indicates that the High Court might be reluctant to second-guess the particular decisions that ASIO considers necessary to protect national security. Judicial reluctance seems to be informed by the realization that, in fact, the judiciary is not well equipped to evaluate the competing interests that determine issues of national security.[171] That reluctance might be

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165 *Church of Scientology Inc v Woodward* (1982) 154 CLR 25. ASIO had collected information on the Church and its members and classed them as a security threat. The Church argued that it was unlawful for ASIO to do so.

166 Ibid 68 (Murphy J).

167 Ibid 61-62 (Mason J). Generally, intelligence is relevant to security when it establishes whether a person is or is not a security threat: at 60.

168 Ibid 72 (Brennan J).

169 Ibid 52 (Gibbs CJ).

170 Note that the 'constitutional writs' for judicial review of Executive action form part of the High Court's original jurisdiction as set out in the *Constitution* and cannot be ousted. *Commonwealth of Australia Constitution Act 1990* s 75; see *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476.

171 It has been suggested that substantive matters of national security themselves are inherently non-justiciable: Williams above n 3, 215 citing *Kruger v Commonwealth* (1997) 190 CLR 1, 162. See also *A v Hayden (No 2)* (the ASIS case) (1984) 156 CLR 532. In that case, several ASIS agents sought an injunction to restrain the Commonwealth from disclosing their identities to the Victorian Police Commissioner on the grounds that such disclosure would prejudice national security. The Victorian Police sought to investigate the ASIS agents for possible criminal prosecution arising out the agents' misconduct during training exercises. The Commonwealth denied that national security would be prejudiced should

confirmed in the current global security environment, where national security officers must synthesize and analyse complex data trails to draw conclusions concerning the intentions and resources of particular persons. For example, in a decision concerning deportation of a person on grounds of terrorism involvement, a majority of the British House of Lords considered that it could evaluate national security information, but declined to do so.[172] On the other hand, in a more recent decision, a British specialist judicial body, the Special Immigration Appeals Commission, overturned a decision of the Home Secretary.[173] The Home Secretary, who had assessed a detainee as a threat to national security, then appealed to the Court of Appeal, which dismissed the appeal as no error on the part of the Commission could be demonstrated.[174] The case might indicate a more muscular British judicial approach to reviewing security intelligence activities, one that could encourage Australian judiciary to examine security intelligence as evidence.

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the identities of the agents be revealed so that Court did not have to decide whether national security interests precluded disclosure. However, Mason J stated that security agencies must operate within the rule of law: at 550 and that in cases of misconduct, individual agents might be held criminally liable, although the Commonwealth would be immune from prosecution; at 550. Dawson and Wilson JJ considered that in certain circumstances, Government opinion on the public interest immunity, particularly where matters of national security are at stake, will carry significant weighting because 'the consequence of a decision of a court on a matter of national security which is contrary to the considered view of the government could be very serious indeed': at 576. For commentary on the ASIO and ASIS cases, see Head, above n 141.

172 In *Home Department v Rehman* [2001] UKHL 47, the appellant, a Pakistani national, appealed against a decision of the British Secretary of State for the Home Department to deport him as this would be 'conducive to the public good and in the interests of national security' because of his association with Islamic terrorist groups. The issue before the House of Lords was what could constitute a threat to national security and whether the Secretary's decision was open for review. Lord Slynn (with whom Lords Steyn and Huttom agreed) held that due weight must be given to the conclusions of the Secretary and to foreign policy, although the decision was open to review. Lord Hoffman (with whom Lord Clyde agreed) held that the issue of what constitutes a threat to national security was not justiciable but Lord Steyn suggested that the security matters are justiciable and that the UK *Human Rights Act 1998* had given the courts a greater role in determining matters of national security: para 30.

173 *Secretary of State for the Home Department v M* [2004] EWCA Civ 324. The Special Immigration Appeals Commission was specially created following criticism of British deportation procedures by the European Court of Human Rights in *Chahal v United Kingdom* (1996) 23 EHRR 413. See The Hon Justice Michael Kirby AC CMG, 'National Security: Proportionality, Restraint and Common Sense' (Speech delivered at the Australian Law Reform Commission, National Security Law Conference, Federal Court of Australia Conference Room, Sydney, 12 March 2005) available from the High Court of Australia website: <http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_12mar05.html#18> at 3 May 2005.

174 The hearing in the Commission and the Court of Appeal were largely conducted in closed sessions and as such, there is not much publicly available in the way of reasoning: see Kirby, above n 173.

5 CONCLUSION

Were the *ASIO Act* counter-terrorism amendments unnecessary, in the sense of being duplicative or overlapping substantially and inconsistently with existing national laws? ASIO already had the power to gather intelligence by means such as conducting searches and intercepting telephones prior to passage of the Act. However, it did not have the power to detain and compulsorily question individuals. Thus, the new detention powers are not duplicative of existing provisions. The actual use of the new powers is constrained by prerequisite approval of the Attorney-General and judicially or legally experienced 'issuing authorities' and questioning is to be undertaken before similarly qualified 'prescribed authorities'. These constraints seek to provide some assurance that individual detentions will be warranted only when properly considered necessary.

Are the amendments clear, in the sense of being specific, certain, readily understood and practicable? There is cause for concern on these grounds. Some of the safeguards against abuse of the new powers lack clarity. Most importantly, the safeguard concerning the presence of the Inspector-General of Intelligence and Security during detention procedures is not sufficiently practicable on the face of it. Importantly, it lacks a specific mandatory requirement for the Inspector-General to be present during questioning. Concomitant with this is the failure to specify, in case of the absence of the Inspector-General, a process for prompt and immediately effective delivery of complaints to the Inspector-General.

Another safeguard requiring clarification concerns attendance of a detainee's preferred legal adviser during questioning. The legislation allows for circumstances in which a detainee's preferred lawyer may be excluded but these circumstances are not made explicit. Finally, the scope of ASIO's new secrecy provisions also needs clarification as they relate to journalism and academic comment concerning warrant-related and operational information. (In general, the Commonwealth's outdated secrecy provisions need revision and clarification, particularly those in the *Crimes Act*.)

Despite the above shortcomings, adequately articulated safeguards include the required presence of independent 'prescribed authorities', the use of interpretation and humane treatment and mandatory audio-visual recording and the delivery of reports on each detention. Overall, these safeguards against abuse are relatively extensive, detailed and clear.

The strategy of terrorism is to generate public fear. The Hilton bombing imbroglio has ensured that the Australian public mistrusts security intelligence

agencies.[175] Nor should it trust agencies with opportunities to abuse their power. Nevertheless, alarmist accusations that the Australian Government's proposed reforms create a police state are themselves exploitative of a culture of public fear. There will always be debate as to whether security intelligence powers are proportionate to threats. The use of a legalistic rights-based framework to critique those powers cannot adequately assess proportionality. That debate is, in essence, political rather than legal and cannot be determined solely by legal arguments, even where human rights discourse is employed. The ASIO Terrorism Bill in its original form was subject to countless political critiques and to a robust process of democratic scrutiny that led to substantial amendments. Extended parliamentary scrutiny and debate produced a precise and clearly structured legal framework including calibrated safeguards that seek to ensure that the new powers include civil liberties protections, are exercised fairly and are subject to regular parliamentary review.

Ultimately, it is the role of Parliament to define the balance of interests on which security intelligence legislation is based, the role of the Executive to craft policies to implement that legislation, and the role of civil liberties communities to challenge them both. All three have been hard at work during the process of reform of Australian national security intelligence laws. It remains for the federal courts to review their work by ruling on the constitutionality of the Parliament's laws and the legality of the Executive's implementation of them. No doubt, the application of ASIO's new powers will be judicially tested for *ultra vires*, based on lack of *bona fides*, or for unconstitutionality, based on incompatibility with the implied freedom of political communication. In all likelihood, we shall not need to wait long for the judiciary to be called into play.

175 Greg Carne, 'Terrorism and the Ambit Claim: Security Legislation Amendment (Terrorism) Act 2002 (Cth)' (2003) 14 *Public Law Review* 18.