

Legal representation and access to complaint mechanisms

Legal representation

- 3.1 During the inquiry, witnesses, including the IGIS, raised a number of issues in relation to access to legal advice and the role of lawyers during questioning.¹
- 3.2 The starting point is subsection 34 F (8), which provides that a person is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention. While a number of exceptions apply, such as a guaranteed right of access to the IGIS and Ombudsman, one submission argued that these were insufficient.²
- 3.3 There is no guarantee of a right of access to a legal adviser under Division 3 Part III.³ The rights of a subject of a warrant to contact a legal adviser and to legal representation during questioning is regulated solely by:
 - the terms of the warrant;⁴
 - the discretion of the prescribed authority;⁵ and

1 See for example, HREOC submission no. 85, p.20; Law Institute of Victoria submission no. 82 p.14; PIAC submission no. 90, p. 25, Patrick Emerton submission no. 86, p. 30.

2 Patrick Emerton submission no. 86, p. 25.

3 PIAC submission no. 90, p.25.

4 Section 34D.

5 Sections 34 F and 34HB.

- the provisions of section 34 U.

3.4 Some witnesses raised concerns about the significant restrictions placed on the right of a subject of a warrant to contact a legal adviser, the powers to exclude lawyers from questioning procedures and to question a person in the absence of their lawyer. The differences that apply between questioning-only, questioning and detention warrants and directions of the prescribed authority would also benefit from clarification.

Contacts with lawyers

3.5 A detention warrant must permit the person to contact a single lawyer of choice at any time while they are detained.⁶ However, contact with a lawyer is not permitted until the person is brought before the prescribed authority and ASIO has had an opportunity to oppose access to the particular lawyer of choice.⁷

3.6 Access may be denied if the prescribed authority is 'satisfied on the basis of circumstances relating to that lawyer', that if contact is permitted a person involved in a terrorism offence may be alerted that the offence is being investigated; or a record or thing that may be requested to be produced may be destroyed, damaged or altered.⁸ Although contact with another lawyer of choice is permitted, so too is the prescribed authority entitled to exclude that person on the same grounds.

3.7 When a questioning-only warrant is issued, the Attorney General has no statutory obligation to ensure that such a warrant permits access to a lawyer and a warrant may be issued that prevents access or is simply silent on the matter. AGD has stated that:

Where a questioning warrant is executed, the warrant and the Act do not limit or prevent a subject from contacting a lawyer for the purposes of the questioning proceedings. This reflects a policy rationale that subjects are being questioned to elicit information only, and that as they are considered to comply with the terms of the warrant, there is no operational need to limit that person's contact with a lawyer.

3.8 However, as the Protocol is silent on the matter, the right to contact a legal adviser remains unclear.⁹ The prescribed authority has the discretion to

6 Paragraph 34C (3B) (a).

7 Paragraphs 34C (3) (b) (i) (ii) (iii).

8 Paragraph 34TA (2) (a) and (b).

9 AGD submission no. 84, p. 27 states that: "...such directions could be given in cases where a person has been brought before the prescribed authority on a questioning only warrant (and

make a direction to permit a person to contact others, including a lawyer or member of the family, but is not required to do so and may prevent access without breaching the Act or the Protocol.¹⁰ A clearly stated positive right of contact with a lawyer would therefore more accurately reflect the policy rationale.

3.9 Whereas a person held under a detention warrant must, subject to certain qualifications, be permitted to contact a single lawyer of choice, there is no equivalent protection for a person subject to a questioning-only warrant who is later detained under a direction of the prescribed authority.¹¹ The Committee notes that, in practice, those subject to questioning-only warrants have invariably been accorded the right to legal representation. The Committee also notes that the right to legal representation is not in dispute. Accordingly, there is no apparent reason that would justify the inconsistency.

3.10 In the words of one witness:

This is obviously inadequate – no person should be held in detention in Australia without the right to contact a lawyer.¹²

3.11 The Committee notes AGD's proposal to amend paragraph 34F(1)(d) to make it clear that the prescribed authority is required to issue a direction permitting a person, who is the subject of a detention direction, to contact certain persons (including a lawyer).¹³

3.12 The National Association of Community Legal Centres argued that, even where a person is permitted to contact a lawyer:

ASIO may question them prior to the arrival of the lawyer and before they have a chance to obtain legal advice. The failure to ensure adequate legal representation is aggravated by the person being required to answer questions or face penalty.¹⁴

has therefore not previously been subject to restrictions on contact with others)." The prescribed authority is limited by subsection 34F (2) to directions which are consistent with the warrant or have been approved in writing by the Minister: Paragraphs 34F (2) (a) and (b).

10 Paragraph 34F (1) (d).

11 Subsection 34C (3B); Patrick Emerton transcript, public hearing 7 June 2005, p. 25.

12 Patrick Emerton submission no. 86, p. 26.

13 AGD submission no. 84, p. 27.

14 NACLCL submission no. 42, p. 6.

Right to representation

- 3.13 In practice, each of the questioning-only warrants issued have been served in a reasonable time before the specified time to appear, providing subject with an opportunity to seek legal advice. An Australian Government Solicitor (AGS) lawyer is present to advise ASIO and the prescribed authority on aspects of the law and the subjects of warrants have had a lawyer present during questioning sessions, although it was reported that on two occasions there was not a lawyer present throughout proceedings.¹⁵ (See Chapter 1).
- 3.14 There is no evidence that the current practice of allowing contact with a lawyer and permitting representation has led to difficulties or frustrated the purpose of the process. However, it is clear that a number of issues concerning access to a lawyer and representations should be re-examined. In this regard, the Committee recalls its original recommendation that lawyers be entitled to be present during the entire proceedings and maintains that, as a general rule, where a person has elected to be represented, questioning in the absence of the lawyer should not occur.¹⁶
- 3.15 It is also appropriate to refer to the examination regime under the *Australian Crime Commission Act 2002*. The examination regime expressly provides for a person to be represented by a legal practitioner and prohibits the exclusion of the representative by direction of the examiner.¹⁷ The Committee is not aware that the ACC has been frustrated in performing its function as a result of the recognition of the basic right to legal advice and representation.
- 3.16 Having regard to these factors, the Committee is not persuaded that restrictions on access to lawyers or exclusions of lawyers from the process achieve the purpose of Division 3 Part III.
- 3.17 The legislation should be amended to guarantee the right of a person subject to a questioning-only or questioning and detention warrant to have access to a lawyer and representation throughout the questioning process. The discretion to deny access to a particular lawyer should only be available in exceptional circumstances, where the government has strong grounds of concern or where the lawyer has been assessed as a threat to national security.

15 IGIS transcript, public hearing, 20 May 2005, p.6.

16 Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisations Legislation Amendment (Terrorism) Bill 2002* May 2002, p. xiv.

17 Subsection 25A (2) and 25A (4) of the *Australian Crime Commission Act 2002*.

Recommendation 4

The Committee recommends that:

- a person who is the subject of a questioning-only warrant have a statutory right to consult a lawyer of choice; and
- the legal adviser be entitled to be present during the questioning process and only be excluded on the same grounds as for a detention warrant, ie where there are substantial reasons for believing the person or the person's conduct may pose a threat to national security.

The role of lawyers during questioning

- 3.18 Under section 34U the role of the legal adviser during questioning is restricted in a number of ways. The prescribed authority is required to ensure that a 'reasonable opportunity' is provided for the legal adviser to provide advice to his or her client during breaks in questioning.¹⁸ However, a legal adviser may not intervene in questioning or address the prescribed authority, except to request a clarification of an ambiguous question.¹⁹ A lawyer may also be removed if their conduct is 'unduly disrupting the questioning'.²⁰
- 3.19 As noted above, a person may be questioned without their lawyer being present.²¹ And ASIO may make submissions to extend questioning beyond the permissible 8 and 16 hours periods in the absence of the individual and their legal adviser.²²
- 3.20 While the practical effect of section 34U is to ensure that questioning is not unduly disrupted, the IGIS has observed that:

While this limitation exists for good reason, it has the potential to be the cause of some frustration when lawyers wish to raise procedural queries with the prescribed authority, but are unable to do so due to the limitations... [of section 34U].

18 Subsection 34U (3). The note to subsection 34U(3) explains that as warrants only permit questioning while the person is 'before the prescribed authority', the prescribed authority can control whether questioning occurs 'by controlling whether the person is before them'.

19 Subsection 34U (4).

20 Subsection 34U (5).

21 Subsection 34TB.

22 Subsection 34HB (3).

- 3.21 The subject of a section 34D warrant is able to raise queries directly with the prescribed authority; however,
- ... not surprisingly can sometimes have difficulty in fully expressing their point of view.²³
- 3.22 The evidence of the IGIS indicated that, in practice, the prescribed authorities have interpreted section 34U 'fairly strictly, by not permitting any questions put to them by lawyers other than to clarify ambiguity'.²⁴ The IGIS noted that some flexibility has been shown by, for example, allowing the lawyer to respond to an ASIO request that questioning be allowed to continue.²⁵ However, the Committee has been told in evidence that lawyers and the subjects of the warrants have been excluded when a submission for an extension of time has been made and that a request for questioning to cease to allow for a complaint to be made to IGIS has been denied. There appears to be no consistent practice in this regard and some clarification is necessary to ensure that representation is effective.
- 3.23 IGIS has proposed that a clearer role for lawyers can be achieved by providing:
- clearer authority in the ASIO Act for legal representatives to address the prescribed authority, at least in relation to certain matters; and
 - the legislation should be amended to make a clearer distinction between 'procedural time' and 'questioning time'.
- 3.24 The Committee finds merit in both of these proposals.²⁶

Interventions and representations

- 3.25 The prescribed authority is responsible for supervising the questioning process and, as HREOC observed:

The prescribed authority has a number of important discretions which are intended to safeguard the rights of the subject of a warrant...²⁷

The powers of the prescribed authority include the discretion to:

- direct that a person be detained;

23 IGIS submission no. 74, p.6.

24 IGIS submission no. 74, p.6.

25 IGIS submission no. 74, p.6.

26 See recommendations 5 and 6 below.

27 HREOC submission no. 85, p.21.

- release a person from detention;
 - direct the person's further appearance for questioning;
 - make a direction to address concerns raised by the IGIS;
 - make a direction to contact a person and disclose certain information; and
 - extend periods of questioning at the 8 and 16 hour mark.²⁸
- 3.26 HREOC argued that denying a person the opportunity to address the prescribed authority through their lawyer on these matters is restrictive because it deprives the prescribed authority of a useful perspective on limits of those discretions and the matters which should be taken into account.²⁹ The current restrictions also prevent an adviser from raising an objection to any question even where it is arguable that the question goes outside the scope of the warrant. It was argued that, in turn, this undermines the ability of the lawyer properly to represent his or her client and limits the prescribed authority's ability to discharge his duty to ensure the lawfulness of the process.³⁰
- 3.27 Procedural fairness may require that the prescribed authority hear submissions from the lawyer before discretions are exercised or when matters, such as the scope of a question, need to be addressed. As noted below, the IGIS has indicated that prescribed authorities have in fact taken submissions from legal representatives reflecting the practical need to do so.³¹ However, this appears to have generally occurred during what might be termed 'procedural time' (see below).
- 3.28 The Committee is mindful that some matters will arise during the course of questioning and will need to be dealt with straight away. Provided that interventions are not vexatious, a subject of a warrant should be able to make representations through his lawyer directly to the prescribed authority during the questioning period.

28 Section 34HB.

29 HREOC submission no. 85, p.21.

30 HREOC submission no. 85, p. 21.

31 IGIS transcript, public hearing, 20 May 2005, p.7.

Recommendation 5

The Committee recommends that subsection 34U (4) be amended and that individuals be entitled to make representations through their lawyer to the prescribed authority.

Procedural time

- 3.29 Current section 34HB provides guidance on the periods of time during which individuals can be questioned. ‘The provisions are expressed in terms of the calculation of when questioning occurs rather than a simple elapse of time.’³² In practice, there are periods which are not counted toward questioning time; for example, the time required to explain the meaning of the warrant. Breaks in questioning are also required to deal with ‘housekeeping’ matters, to permit audio and video tapes to be changed and address the personal needs of the individual, such as religious observance.³³
- 3.30 The notion of ‘procedural time’ to deal with housekeeping could also provide an additional opportunity for legal representatives to raise procedural and substantive matters with the prescribed authority.
- 3.31 The IGIS has advised that, in practice, the prescribed authority and an ASIO timekeeper keep a strict log of periods during which questioning occurs. The notion of procedural time encompasses all the other time when the prescribed authority is present; for example, the time taken to explain the meaning of the warrants and the person’s rights under the warrant.
- 3.32 Procedural time is also taken to deal with housekeeping matters, such as changing audio and video tapes or to meet the needs of the subject; for example, for religious observance, personal or medical needs. This does not count toward questioning time. A clearer distinction in the legislation will also provide greater opportunity for legal representatives to raise both procedural and substantive issues during ‘procedural time’.

32 IGIS submission no. 74, p.6.

33 Section 4 of the Protocol requires that, as a minimum, a person must be offered a break of 30 minutes ever four hours.

Recommendation 6

The Committee recommends that Division 3 Part III be amended to provide a clearer distinction between procedural time and questioning time.

Monitoring communications – privacy and privilege

- 3.33 Subsection 34U(2) requires that contact between a lawyer and their client is done in such a way as it can be monitored. It follows that all lawyer/client communications that take place during the execution of the warrant may be monitored. Subsection 34U (1) applies that requirement to the initial contact with a legal adviser gives rise to the inference that legal advice during breaks may also be monitored.³⁴
- 3.34 In hearings, the then Director-General of ASIO, Mr Richardson, observed that, in relation to detention warrants, there is a mechanism whereby ASIO can object to a particular lawyer and the decision rests with the prescribed authority. It was suggested that, where there is no objection to a lawyer, there is unlikely to be strong reason why the communication should be monitored.³⁵
- 3.35 The duty of confidentiality and legal professional privilege is premised on the principle 'that it is desirable for the administration of justice for clients to make full disclosure to their legal representatives so they can receive full, informed legal advice'.³⁶ PIAC objected to the lack of protection for private conversations and said that:
- This strikes at the heart of the basis of the relationship between client and lawyer, on which legal privilege is predicated, and by which the lawyer may give frank and fearless advice to their client based on full information.³⁷
- 3.36 It was also noted by the majority of the members of the Senate Legal and Constitutional Committee that this is inconsistent with the *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offences, which provides that:

34 Professor Williams submission no. 55, p.6.

35 Mr Richardson and Mr Kerr transcript, public hearing, 19 May 2005, p. 20.

36 Australian Law Reform Commission, *Review of the Uniform Evidence Acts*, Discussion Paper 69, para. 13.1.

37 PIAC submission no. 90, p. 25.

All arrested, detained and imprisoned persons shall be provided with adequate opportunities, time and facilities to be visited by and to communicate and consult with a lawyer, without delay, interception or censorship and in full confidentiality. Such consultations may be within sight, but not within hearing, of law enforcement officials.³⁸

- 3.37 Further, while section 34WA affirms that Division 3 Part III does not affect the law relating to legal professional privilege, the Commonwealth law of evidence protects only those lawyer client communications, which are confidential and made for the dominant purpose of giving legal advice.³⁹ Thus, for example, a lawyer who is the subject of a warrant may refuse to answer a question or produce a record, document or thing, which is privileged. However, as PIAC pointed out:

No such privilege arises if the communications between the lawyer and the client are not confidential in the first place.

- 3.38 The Committee has been informed that facilities for consultation have generally been adequate and confidentiality has been respected. The practice to date is a pragmatic approach, as subsection 34U (2) is of little value where a subject to a questioning-only warrant can communicate outside the place of questioning.
- 3.39 There are important public policy reasons for preserving the duty of confidentiality and legal professional privilege and these principles should not be compromised except in the most exceptional circumstances. The Committee considers that confidentiality should be fully protected where the person is subject to a questioning-only warrant.

38 Senate Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism,) Bill 2002 and related matters*, December 2002, p.52: Principle 8 *United Nations Basic Principles on the Role of Lawyers*, UN Doc A/CONF.144/28/Rev.1 (1990).

39 Section 118 Evidence Act 1995 provides that evidence is not to be adduced if, on objection by a client, the court finds that adducing the evidence would result in disclosure of (a) a confidential communication made between the client and the lawyer; or (b) a confidential communication made between 2 or more lawyers acting for the client; or (c) the contents of a confidential document (whether delivered or not) prepared by the client or a lawyer; for the dominant purpose of the lawyer, or one or more of the lawyers, providing legal advice to the client.

Recommendation 7

The Committee recommends that:

- Subsection 34U (2) be amended and communications between a lawyer and his or her client be recognised as confidential; and
- adequate facilities be provided to ensure the confidentiality of communications between lawyer and client in all places of questioning and detention.

Access to complaint mechanisms

Availability of federal court remedy

3.40 Following a recommendation by this Committee,⁴⁰ paragraph 34E (1) (f) of the ASIO Act, was inserted so as to require the prescribed authority to explain to the subject of a warrant that:

the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant.

Subsection 34E (3) further provides that:

At least once in every 24 hour period during which questioning of the person under the warrant occurs, the prescribed authority before whom the person appears for questioning must inform the person of the fact that the person may seek from a federal court a remedy relating to the warrant or the treatment of the person in connection with the warrant.

3.41 While these provisions ensure the subject of the warrant is aware of their right to review, there remain concerns about the drafting of Division 3 Part III and the availability and effectiveness of remedies. As mentioned above, restrictions on access to lawyers and legal representation during proceedings may impede access to the court where, for example, the prescribed authority:

40 PJC ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May 2002, p. 63; See also Senate Legal and Constitutional Legislation Committee, *Provisions of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*; December 2002.

- refuses to exercise their discretion to allow the subject of a questioning warrant to contact a lawyer after a detention direction is made under paragraph 34F(1)(a);
 - a person's lawyer is excluded from the proceedings under subsection 34U(5); or
 - a person's lawyer is not permitted to be present during the questioning period under subsection 34TB (1).⁴¹
- 3.42 In addition, some witnesses, including lawyers for subjects of warrants, have raised concerns about:
- grounds of review and reliance on the common law;
 - lack of specificity on the face of the warrant;
 - access to statements of facts and grounds which support the request for the warrant.

Grounds for review

- 3.43 There is no statutory right to judicial review of an administrative decision or conduct for the purpose of making an administrative decision under the ASIO Act. Such decisions are excluded from the operation of *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act).⁴² Consequently, a subject of a warrant must rely upon common law principles of judicial review and prerogative writs to obtain a remedy.
- 3.44 Access to the original jurisdiction of the Federal Court and the High Court of Australia is guaranteed by subsection 19(2) and section 23 of the *Federal Court of Australia Act 1976* (Cth) and 75(v) of the *Commonwealth Constitution* and section 39(B) *Judiciary Act 1903* (Cth) respectively.
- 3.45 Notwithstanding these avenues, several witnesses advocated that a clearer statutory right of access to the court should be expressed in the ASIO Act. In particular, the Law Institute of Victoria argued that Division 3 Part III lacks sufficient safeguards against arbitrary detention and fails to provide a clear right to challenge the lawfulness of detention.⁴³

41 HREOC submission no. 85, p.22.

42 Schedule 1 *Administrative Decisions (Judicial Review) Act 1977*. Exclusion from the ADJR Act also means there is no statutory right to reasons for a decision, which is otherwise available pursuant to section 13 ADJR.

43 Law Institute of Victoria submission no. 82, 15. In these circumstances the person would have to rely on the prerogative writ of *habeas corpus*.

- 3.46 A number of the factors, which have a bearing on the effectiveness of judicial review where national security considerations apply, were considered by the Senate Legal and Constitutional Reference Committee inquiry into the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002.⁴⁴ That discussion will not be repeated here; suffice it to say that historically the courts have shown a great degree of deference in matters that involve an evaluation of security intelligence.⁴⁵ The Senate Committee concluded that it may be difficult for a plaintiff to succeed unless there is some tangible evidence of bad faith or some basis for concluding that the relevant conduct, decision or opinion was ‘manifestly unreasonable’ or so ‘devoid of any plausible justification that no reasonable person could have come to it in the circumstances.’⁴⁶
- 3.47 It has been suggested that a separate clear statutory right of access to the court in the ASIO Act would remove some of the doubts and concerns about the scope of the right of review. If this approach is accepted, a provision which confers the right of review must be formulated in sufficiently broad terms as to allow substantive objections to be made and adjudicated by the Federal Court. An alternative approach to creating a separate statutory regime would be to include a note to s34E, as a signpost to subsection 19(2) and s23 of the *Federal Court of Australia Act 1976* (Cth) and 75(v) of the *Commonwealth Constitution* and the *Judiciary Act 1903* (Cth).

Recommendation 8

The Committee recommends that, in the absence of separate statutory right of judicial review, that a note to s34E be adopted as a signpost to existing legal bases for judicial review.

Specificity of warrants

- 3.48 Lawyers have complained that warrants lack sufficient detail about offences and that, where references are made, there are so many offences listed as to render the warrant vague and meaningless. The Committee is aware that, at least in one case, this has resulted in a complaint to the IGIS

44 Legal and Constitutional References Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, p. 121.

45 *Associated Provincial Picture House v Wednesday Corporation* (1948) 1 KB 223.

46 Senate Legal and Constitutional Committee, *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 and related matters*, December 2002, p. 123.

immediately prior to questioning. The matter was raised by the IGIS and determined by the prescribed authority at the time.

- 3.49 It has been argued that a Division 3 Part III warrant that lacks specific detail of the scope of matters to be dealt with under questioning is invalid. Lack of specificity also increases the risk of questioning that is not sufficiently connected to the purpose of the warrant, increasing the possibility of legal challenge.
- 3.50 While it is arguable that the collection of intelligence is necessarily a more open-ended exercise, it is not unlimited and must still fall within the statutory limits imposed by paragraph 34D (1) (b).

Access to ASIO statement of facts and grounds

- 3.51 Lawyers for subjects of section 34 D warrants are not required to be security cleared to represent their client during a questioning procedure. Subsection 34U (2A) requires that the legal adviser be given a copy of the warrant but does not entitle the legal adviser access to information which supports the warrant.⁴⁷
- 3.52 Lawyers for subjects have complained that lack of access to information upon which the warrant is based makes assessing the relevance of questions more difficult. It also makes it more difficult to test the reasonableness of directions of the prescribed authority to detain, require further questioning or extend the questioning period.
- 3.53 This Committee has previously recommended that a panel of security cleared lawyers be available in order to avoid problems associated with representing a person where national security considerations apply.⁴⁸
- 3.54 Clearly, it is not possible to release security information that would 'prejudice the interests of national security' to a lawyer who is not security cleared. However, not all security information is prejudicial to national security and the Secretary of the Attorney-General's could be authorised to consider disclosing information to lawyers representing a client during questioning proceedings.
- 3.55 Under Regulation 3B *ASIO Regulations 1980*, disclosure of security information is prohibited unless the lawyer has been given a security clearance by the Attorney General's Department or the Secretary is

47 Paragraph 34U (2A) (a) (b).

48 Recommendation 6, Parliamentary Joint Committee on ASIO, ASIS and DSD, *An Advisory Report on the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, May 2002, p. xiv.

satisfied that giving access to the security information would not ‘prejudice the interests of security’ and conditions may be applied.⁴⁹ Regulation 3B could be amended to permit consideration of release of information at an earlier stage.

- 3.56 By way of background, where information relevant to a proceedings for judicial review is likely to ‘prejudice national security’, the provisions of the new *National Security Information (Criminal and Civil Proceedings) Act 2005* will apply. In this context, ‘likely to prejudice national security’ means that there is a real, not merely a remote, possibility that a disclosure of national security information will prejudice national security.⁵⁰ In practice, this means that a lawyer representing a party to civil or criminal proceeding in a federal court in relation to Division 3 Part III of the ASIO Act must be security cleared.⁵¹

Recommendation 9

The Committee recommends that Regulation 3B be amended to allow the Secretary to consider disclosing information, which is not prejudicial to national security, to a lawyer during the questioning procedure.

Role of the prescribed authority

- 3.57 Matters concerning the role of lawyers, representations to the prescribed authority and the access to information bring into focus the need to clarify

49 Subsection 3B (2) states that access to security information may be given subject to any conditions that the Secretary considers appropriate including, but not limited to, conditions relating to the use, handling, storage or disclosure of the information. Subsection 3B (3) provides that nothing in the regulation entitles a lawyer who is given a security clearance by the Attorney-General’s Department to be given access to security information.

50 Norberry J., *National Security Information Legislation Amendment Bill 2005*, Law and Bills Digest Section, Department of Parliamentary Services, 29 April 2005, no.144, 2004-05, p 6.

51 The Attorney General may issue a certificate to exclude certain information or particular witnesses. But the court makes the final decision about whether the information can be excluded or disclosed in an edited or summarised form and must consider the matter in a closed hearing. The court can also stay a proceeding where it would have a substantially adverse effect on the substantive hearing. The Committee notes that while this would be to the clear advantage of a defendant in a criminal case, in the context of judicial review of a Division 3 Part III warrant, it would effectively shield ASIO and the responsible Minister from accountability.

the role of the prescribed authority. AGD described the role of the prescribed authority in the following terms:

The main role of the prescribed authority is to supervise the questioning of the subject of a warrant, inform the person of their rights, and ensure the terms of the warrant, the ASIO Act and the Protocol are complied with.⁵²

- 3.58 Section 34E could be amended to express more clearly the role of the prescribed authority as the body responsible for regulating the conduct of the questioning and ensure that questioning conforms to the legal requirements of Division 3 Part III of the ASIO Act.
- 3.59 The Committee believes that, for the prescribed authority to discharge fully their responsibilities, it is important that they have access to relevant information. The prescribed authority is not currently provided with a copy of ASIO's statement of facts and grounds which support the issuing of the warrant. Access to this information will assist the prescribed authority exercise their supervisory role and a copy of all the relevant documentation should be provided before questioning begins.

Recommendation 10

The Committee recommends that:

- the supervisory role of the prescribed authority be clearly expressed; and
- ASIO be required to provide a copy of the statement of facts and grounds on which the warrant was issued to the prescribed authority before questioning commences.

Access to a federal court

- 3.60 The legislation is silent on the procedural arrangement for when a subject of a warrant wishes to exercise their right to make an application to a federal court.⁵³ ASIO suggested that, where a person informs the prescribed authority that he or she intends to initiate proceedings, the person must be informed of their right to contact a lawyer.⁵⁴ There is no

52 AGD submission no. 84, p.13.

53 Legal Adviser transcript, public hearing, 19 May, p.23.

54 Legal Adviser, ASIO, transcript, public hearing, 19 May, p.23.

statutory provision that requires the individual be so advised, but good practice would require it be done.

- 3.61 It was also common ground between ASIO and the prescribed authority that appeared before the Committee, that, upon being notified that proceedings were to be filed in the Federal Court, the questioning process would cease until the matter had been determined by the court.
- 3.62 Although the Committee regards the position adopted by ASIO and the prescribed authority who gave evidence to the inquiry as proper, the supervision of the questioning procedure is the responsibility of the prescribed authority and there may be sound reasons for not ceasing the questioning process at the moment the prescribed authority is alerted to the intention to exercise the right. Clarification about the procedure to be followed in such cases could be provided by amendment to Division 3 Part III or an addition to the Protocol, which already provides guidance on contact with the IGIS and Commonwealth Ombudsman. The principle to which the amended protocol should give effect is that, except when the prescribed authority believes on reasonable grounds that the questioning relates to a possible imminent threat to life, the questioning must cease upon an application being made to the Federal Court – until determined by the court. If the prescribed authority believes on reasonable grounds that the questioning relates to a possible imminent threat to life, then questioning may be permitted to continue unless enjoined, notwithstanding an application being made to the Federal Court.

Access to IGIS and the Commonwealth Ombudsman

- 3.63 Section 34E requires the prescribed authority to explain at the commencement of questioning the fact that the person has a right to make a complaint orally or in writing to the IGIS in relation to ASIO or to the Commonwealth Ombudsman in relation to the Australian Federal Police. Subsection 34G(8) provides that a person subject to a detention warrant may be prevented from contacting anyone, except the IGIS and the Ombudsman, and that anyone holding a person in custody or detention must give the person facilities for contacting IGIS or the Ombudsman.⁵⁵ A person who is subject to a questioning-only warrant is free to contact the IGIS or Ombudsman outside the questioning procedure.

⁵⁵ Subparagraph 34G (9) (b) (i) (ii).

- 3.64 Under section 34HA, if the IGIS is concerned about impropriety or illegality in the way, for example, the questions that are being asked or the nature of the questions, the IGIS may inform the prescribed authority who is required to take that concern into account. Questioning may be suspended or a direction given to address the IGIS' concern.
- 3.65 These provisions are intended to provide a safeguard against *incommunicado* detention and ensure prompt access to an independent complaint mechanism; however, during hearings the Committee heard evidence of two practical shortcomings in the current arrangement. Section 34HA only operates when the IGIS is present and the person is before the prescribed authority. There is no rule that requires the prescribed authority to suspend questioning to permit a contact with the IGIS or Ombudsman during a period of questioning or to ensure that facilities are made available to lodge a complaint.
- 3.66 Where there are grounds for complaint, for example, that questioning is or has gone outside the scope of the warrant or that a person is not being treated with dignity, the matter should be dealt with by the prescribed authority. However, if, in the view of the legal representative, the matter is not dealt with satisfactorily, there is a limited scope to prevent breaches where access to the IGIS is delayed.
- 3.67 There was evidence, outlined in Chapter 1, that a request to a prescribed authority to cease questioning to allow contact with the IGIS and access to a telephone was denied. Provision for representations during the questioning period will help to overcome this type of difficulty. However, while it is preferable that the prescribed authority has discretion to regulate the proceedings, it is also important that access to the IGIS be facilitated.

Recommendation 11

The Committee recommends that:

- a subject of a questioning-only warrant have a clear right of access to the IGIS or the Ombudsman and be provided with reasonable facilities to do so; and
- there be an explicit provision for a prescribed authority to direct the suspension of questioning in order to facilitate access to the IGIS or Ombudsman provided the representation is not vexatious.

Access to State Ombudsman

3.68 A number of witnesses pointed out that while access to the IGIS and the Commonwealth Ombudsman has been expressly preserved, there is not equivalent protection for complaints to be made to other bodies. Consequently, although State police officers are empowered to assist in the execution of a warrant, there is no protection of the rights of subjects of a warrant to contact a State Ombudsman where he or she wishes to lodge a complaint about the conduct of a State police officer.⁵⁶

Recommendation 12

The Committee recommends that an explicit right of access to the State Ombudsman, or other relevant State body, with jurisdiction to receive and investigate complaints about the conduct of State police officers be provided.

⁵⁶ Federation of Community Legal Centres, submission no. 47, p. 7.

Financial assistance

Financial assistance for legal representation

- 3.69 Some witnesses have suggested that subjects of section 34D warrant should have an automatic right to legal aid.⁵⁷ Legal aid is administered through State-based Legal Aid Commissions and subject to means and merit testing under the various statutory regimes. There is no separate allocation by the Commonwealth to State Legal Aid Commissions for questioning procedures.
- 3.70 Financial assistance under the Special Circumstances Scheme administered by the Indigenous Justice and Legal Assistance Division of AGD is available to a person who is subject to a questioning or detention warrant. As the title suggests the Scheme is intended to cover special circumstances not covered by other statutory or non-statutory programs. The applicant's financial circumstances (means testing) are not a relevant consideration in deciding whether to make a grant. Merit tests, which apply under State legal aid schemes, are not relevant as a questioning procedure is not a court proceeding and no question of the prospects of success arises.⁵⁸
- 3.71 Under the Special Circumstances Scheme reasonable expenses are covered retrospectively where a person has been subject to a warrant and therefore unable to notify AGD that an application for financial assistance will be lodged.⁵⁹ This is another feature of the Scheme which distinguishes it from the core of legal aid funding.
- 3.72 The Special Circumstances Scheme is an administrative (non statutory) scheme and the grant of financial assistance remains discretionary. AGD has argued that this is essential to retain a level of control and oversight over expenditure and that there are no compelling reasons to create an automatic right to assistance.
- 3.73 Conversely, the IGIS has proposed that there are good arguments for ensuring that a person subject to a compulsory questioning warrant should have automatic access to necessary legal assistance, at the rate applicable under the Special Circumstances Scheme.⁶⁰ During hearings, the IGIS argued that:

57 HREOC submission no. 85, p.23; Victoria Legal Aid, submission no. 47, p.4; transcript, public hearing, 7 June 2005, p. 35-36 and 38-39.

58 Attorney General's Department submission no. 84, p.25.

59 Attorney General's Department submission no. 84, p.25.

60 IGIS submission no. 74, p.7.

Government bodies are generally wary of things that might be argued to them to be precedents in relation to other situations, but that should not be at the expense of dealing fairly with individuals in unusual circumstances. I think one only has to think of a non-legally trained person faced with serious and complex nature of coercive powers, use and derivative use concepts, strong offence provisions and strict secrecy requirements to know that these things need to be explained. I believe they should be explained by more than the prescribed authority...One of those is obviously the capacity to consult with a lawyer before they appear before the prescribed authority.

- 3.74 The Committee agrees that the nature of the proceedings is complex and take place in unusual circumstances of compulsion where the matters dealt with are serious and with the potential for serious criminal penalties. While the role of the prescribed authority in explaining these matters to the subject is an important safeguard, it is not sufficient that these matters only be explained once the person is already before the prescribed authority. It would seem that this type of procedure is the type of special circumstance that the Scheme is intended to cover. The Committee also understands that the Secretary of AGD has approved assistance in all cases so far.
- 3.75 The Scheme is discretionary and funding is limited. Consequently, if a significant increase in warrants were to occur, funding may be strained and will come into competition with other priorities and demands. In these circumstances it would be prudent to ensure that financial assistance for legal representation for subjects of section 34D warrants be the subject of a separate allocation and that reasonable assistance be provided automatically.

Recommendation 13

The Committee recommends that reasonable financial assistance for legal representation at rates applicable under the Special Circumstances Scheme be made available automatically to the subject of a section 34D warrant.

Witness expenses

- 3.76 The IGIS also raised the question of the reimbursement of reasonable expenses which may be incurred by a subject of a warrant. The Committee is concerned that the strict secrecy provisions have the potential to result in

financial disadvantage. The loss of earnings, loss of leave entitlements, costs associated with travel, child care or loss of earnings may be significant in some cases.⁶¹

- 3.77 There was a general agreement between members of the Committee, ASIO, AGD and IGIS that it would be appropriate to examine the possibility of establishing a scheme to provide reasonable level of compensation for out of pocket expenses incurred as a result of the obligation to comply with a section 34D warrant.
- 3.78 AGD argued that that expenses of this kind would normally be dealt with by the operational agency and drew the Committee's attention to the provision for compensation under section 26 *Australian Crime Commission Act 2002* and Regulation 5 and Schedule 2 to the *Australian Crime Commission Regulations 2002*. Under that scheme witness expenses at the amount set out in Schedule 2 of the High Court Rules at a rate of \$93.20 per day apply. AGD proposed that, if such a scheme is to be developed, it be modelled on the ACC program and that flat rate witness expenses should be covered, such as that set out in the High Court Rules and that it should be administered by ASIO.⁶²
- 3.79 The Committee recalls that that then Director-General stated that:
- Certainly, we would not have any issue from a security perspective. Indeed, it is in [ASIO's] security interests not to have people unfairly dismissed from jobs, as that can have other consequences for us.⁶³
- 3.80 The possibility that the prescribed authority be the body to decide on questions of compensation was canvassed but rejected by AGD. The Committee agrees that this would confuse the role of the prescribed authority.
- 3.81 There is no evidence before the Committee on the effectiveness of the ACC scheme; however, it provides a useful model that may appropriately be applied in this context. It has the appeal of being simple to administer, but may not, in fact, be sufficient to cover reasonable out of pocket expenses in all cases. Therefore, some flexibility would be needed to ensure that a person is properly compensated.

61 See for example, transcript, public hearing 19 May 2005, p.18 -19; transcript, public hearing, 20 May 2005, p.3; IGIS submission no. 74, p. 8; AGD supplementary submission no. 102, p. 23.

62 AGD supplementary submission no. 102, p.23.

63 Transcript, public hearing, 19 May 2005, p.19.

Recommendation 14

The Committee recommends that the Commonwealth establish a scheme for the payment of reasonable witness expenses.

