



anti-terrorism laws

ASIO, the Police and You

A plain English guide to anti-terrorism laws in Australia

third edition

What do I do if ASIO, the AFP or State Police came to visit me?

If you are contacted by the Australian Security Intelligence Organisation (ASIO), the Australian Federal Police (AFP), or the state police:

- Remain calm;
- Ask them to identify who they are and to explain what they want;
- If they want to search you or your premises, ask to see their warrant. If they do not have a warrant, tell them that you object to being searched. If they insist, make your objections clear but do not attempt to stop them.
- If they are ASIO officers and they do not have a warrant for questioning, you do not have to answer their questions. But if they do have a warrant for questioning or detention, you have to cooperate.
- If they are AFP officers or state police officers, you should provide your name and address. However,

“You are not obliged to make a statement or give an interview to the police, particularly if you have not talked to a lawyer first.”

- If possible, contact a lawyer or ask someone in the house to contact a lawyer immediately (See the resources section at the back of this guide for legal contacts);
- Request that a friend sit in with you;
- If you have any trouble understanding anything they say, always ask for an interpreter. In the meantime do not say anything, except to confirm your name and address;
- If they say they have a warrant, ask for a copy;
- If they have a warrant, check that the warrant has not expired;
- Take note of exactly what the warrant authorises the officers to do; you do not have to do any more than what is stated on the warrant;
- Check if there are any restrictions or conditions on what the officers can do;
- Keep a record of the names and identity numbers of the police officers visiting you, the date and the time;
- Keep a detailed record of any contact, touching, harassment or intimidation by any officer that you experienced.

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<http://www.lawfoundation.net.au>

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If you find yourself in a difficult situation, you should always seek advice from a lawyer. This booklet is not intended as legal advice, and should not be relied on as a substitute for legal advice. AMCRAN and its partners exclude liability for any loss suffered by any person resulting in any way from the use of, or reliance on, this material or its text.

The information in this booklet reflects the law as it stands on 1 January 2007. The law may have changed since then. You should check with your lawyer for changes to the law. You could also check our website regularly for updates, translations and more: <http://amcran.org>.

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preface to the third edition

The first edition of the Terrorism Laws: ASIO, the Police and You, was released in 2004, with contributions from a dedicated team of volunteers, AMCRAN, the UTS Community Law Centre and the NSW Council for Civil Liberties. Four thousand copies in English were printed and distributed, and all that remain now are a few archival copies. It has been commended by parliamentary committees, and we have received many expressions of appreciation. It is clear that it addressed a desire within the community for knowledge and understanding of the anti-terrorism laws. This was not only because the laws were new, or that they marked a major shift in the rights and responsibilities of Australian citizens and their government, but because the laws were complex and difficult to understand, and no-one had devoted the resources to explain it to the community.

Yet the booklet was already out of date by the time it was officially released. Anti-terrorism laws were introduced between the time the first edition was printed and when it was launched. After the first edition, a second edition was attempted, but that too, had to be postponed even before it hit the presses as a new slew of legislation rendered the second edition out of date. We have also had the benefit of conducting community legal education sessions and interacting with the community, and there have been some court cases that have also offered guidance. All of these experiences have informed the third edition of the booklet.

Through the generous funding of the Law and Justice Foundation of NSW and the UTS Students' Association, we are also now able to produce translated versions in Arabic, Bahasa Indonesia and Urdu as well as the original English. This new edition includes minor corrections to some of the finer legal points and includes updates that describe the latest changes to the laws, including: the association offence, secrecy provisions, control orders, preventative detention and stop and search powers.

We would like to thank all of those who contributed to the booklet, and we would like to thank the community for its continued support.

1 introduction

Since 2002, the Australian government has introduced many pieces of anti-terrorism legislation as part of its campaign to guarantee Australia's security and to comply with Australia's international obligations.

This booklet attempts to answer people's general questions about the anti-terrorism laws. It also talks about the extended powers and functions of the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP), and to some extent state police powers.

Though their powers are broad, ASIO and the AFP must be able to justify their actions. There are avenues of redress for people adversely affected by the improper exercise of these powers, some of which are outlined in this booklet.

This area of law is developing very rapidly, and is very complex, so we strongly advise you to read this booklet fully and carefully in order to understand your rights. There is also a series of translations of this booklet: Arabic, Bahasa Indonesia and Urdu. Please check our website regularly (<http://amcran.org/>) for updates.

You should not rely on this booklet as substitute for legal advice because it is only intended as general information. If you find yourself in a difficult situation, you should contact your lawyer immediately for legal advice if the situation allows it.

Some organisations that may be able to assist you are included at the end of the booklet.

2 'terrorism' offences¹

There are two main types of 'terrorism' offences under Australian law: crimes related to 'terrorist acts', and crimes related to 'terrorist organisations'.

2.1 crimes related to 'terrorist acts'

2.1.1 what is a 'terrorist act'?

For an action to be a 'terrorist act' under Australian law, the perpetrator must be shown to have an intention to coerce or influence the public or any government by intimidation. There must also be an intention to advance a political, religious or ideological cause. The person must also do, or threaten to do, one of the following things:

- cause serious physical harm or death to a person;
- cause 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 infrastructure, like the phone system or electricity network.

Planning to carry out any of these acts is also an offence. Prosecutors do not have to identify a particular act of terrorism; all they have to do is show that there was a threat or a plan to commit a terrorist act of some kind. For example, it is an offence for someone to plan to explode a bomb, regardless of whether they've yet decided where or when they intend to explode that bomb.

However, it may not be a terrorist act if the action is advocacy, protest, dissent or industrial action, and it is not intended to cause serious harm or damage.

¹ The Criminal Code is the most important piece of legislation relating to terrorism offences. The full name of the Code is Schedule 1 of the Criminal Code Act 1995 (Cth) and the relevant provisions start from section 100.1. It can be found at http://www.austlii.edu.au/au/legis/cth/consol_act/cca1995115/

2.1.2 what if I unknowingly end up involved in a terrorist act?

Even if you did not actually know that what you were doing was connected with a terrorist act, you may still be found guilty of an offence if you were reckless, i.e. you were aware of a substantial risk that it was connected to a terrorist act, and it was unjustifiable to take that risk.

2.1.3 what are the terrorist act offences and what are the penalties?

The law makes it an offence to do things in preparation of, or leading up to a terrorist act, or even just possessing 'things' connected with preparing for a terrorist act. In addition, it does not matter whether or not the terrorist act actually happens. These offences are:

Offence ²	Maximum Penalty	
	Knowingly	Recklessly
Engaging in a terrorist act	Life Imprisonment	
Any act done in preparation for, or planning, terrorist acts	Life Imprisonment	
Financing a terrorist act, whether the act occurs or does not occur, with money, weapons or equipment	Life Imprisonment	
Providing or receiving training connected with preparing for, engaging in, or assisting in terrorist acts	25 Years	15 Years
Possessing things connected with preparing for, engaging in, or assisting in terrorist acts intended to facilitate a terrorist act	15 Years	10 Years
Collecting or making documents connected with preparing for, engaging in, or assisting in terrorist acts	15 Years	10 Years

Table 1: Terrorist act offences

² The Criminal Code, from ss 101.1 to 106.1

2.1.4 what if the terrorist act occurs overseas?

All of the above offences apply anywhere in the world.

2.2 crimes related to ‘terrorist organisations’

2.2.1 what organisations are considered ‘terrorist organisations’?

There are two types of ‘terrorist organisations’ according to Australian law.

The first type of terrorist organisation is any organisation that is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act, whether or not any ‘terrorist’ act actually occurs. This means that even if an organisation is not on the banned list (see the second type of terrorist organisation below), it could still be an offence to be involved with the organisation. In these situations, the fact that the organisation is a terrorist organisation would have to be proved in court.

The second type is a proscribed organisation, which means that the organisation is specifically banned in Australia. The government can ban an organisation if it is satisfied that the organisation is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a terrorist act. The government can also ban an organisation if it ‘advocates’ the doing of a terrorist act, i.e. if it directly or indirectly counsels or urges, or provides instruction on the doing of a terrorist act, or if it directly praises the doing of a terrorist act where there is a risk that the praise might lead a person to engage in a terrorist act.

As at 1 June 2007, organisations banned as ‘terrorist organisations’ are as follows:³

³ To check for updates, see Criminal Code Regulations 2003, or <http://www.nationalsecurity.gov.au/> and follow the Quick Links to “Terrorist Organisations”.

- Hizballah External Security Organisation
- Hamas’ Izz al-Din al-Qassam Brigades
- Lashkar-e-Tayyiba
- Al Qaeda or Islamic Army
- Jemaah Islamiyah
- Abu Sayyaf Group
- Jamiat ul-Ansar (formerly Harakat Ul-Mujahideen - HUM)
- Armed Islamic Group
- Salafist Group for Call and Combat/ GSPC
- Ansar al-Islam
- Al-Jihad / Egyptian Islamic Movement
- Asbat Al-Ansar
- Islamic Army of Aden
- Islamic Movement of Uzbekistan
- Jaish-I-Mohammed
- Lashkar-I-Jhangvi
- Palestinian Islamic Jihad
- Al-Zarqawi Network
- Kurdistan Workers Party (PKK)

Table 2: Proscribed terrorist organisations

2.2.2 what are the offences relating to ‘terrorist organisations’ and what are the penalties?

Just like ‘terrorist act’ offences, different penalties apply depending on whether you knew that the organisation you were involved in was a terrorist organisation, or if you were reckless, i.e., you were aware of a substantial risk that it was a terrorist organisation and it was unjustifiable to take that risk. The offences are as follows:

Offence ⁴	Maximum Penalty	
	Knowingly	Recklessly
Directing the activities of a terrorist organisation	25 Years	15 Years
Recruiting for a terrorist organisation. This also includes inducing, inciting or encouraging other people to join or participate	25 Years	15 Years
Providing training to a terrorist organisation or receiving training from a terrorist organisation*	25 Years	25 Years
Directly or indirectly receiving funds from, makes funds available to, or collect funds for a terrorist organisation*	25 Years	15 Years
Providing support or resources to a terrorist organisation to help them engage in a terrorist act	25 Years	15 Years
Formal or informal membership of a terrorist organisation*	10 Years	-

⁴ The Criminal Code, from ss 102.2 to 102.8.

Associating with a director, promoter, or member of a proscribed terrorist organisation where the association provides support intended to assist the organisation to expand or exist*

3 Years

-

Table 3: Terrorist organisation offences

*These are further explained below

Directly or indirectly receiving funds from, makes funds available to, or collect funds for a terrorist organisation

It is an offence to directly or indirectly receive funds from, makes funds available to, or collect funds for a terrorist organisation if you knew or were reckless as to whether or not it was a terrorist organisation.

► Scenario: Sending Funds

Ann donated money to her local charity to assist the homeless in Pakistan as she has done for several years. Ann has no reason to believe her charity has any connection with any of the 19 organisations listed by the Attorney General as terrorist organisations. However, if Ann has reason to believe that the organisation is directly or indirectly engaged in preparing, planning, assisting or fostering the doing of a 'terrorist act', then she may be committing an offence, if that organisation is later proved to be a terrorist organisation by a court.

Ann is concerned that she should protect herself as she knows the laws are very broad, so she does the following things.

Ann confirms with the charity that the money will be directed to a homelessness project and that her money is not being used for terrorism. She also confirms that the charity is not banned in Australia. Ann is satisfied there is no substantial risk of the money being used for the purposes of a terrorist act.

If the funds meant for the homelessness project were later passed on by the charity to another organisation and were used in a terrorist act, would Ann be liable?

To make out a charge against Ann, the prosecution would need to prove

beyond a reasonable doubt, that Ann was reckless as to the circumstances. This means there would need to be evidence that Ann was aware of a substantial risk that the funds could have been used by the charity to fund a terrorist act. To be liable, it would need to be unjustifiable for Ann, knowing all the circumstances, and being aware of a substantial risk, to take that risk. In the situation described above, it is unlikely Ann would be found by a court to have committed the offence.

Exceptions for receiving funds offence

It is an offence to receive funds from a terrorist organisation, except if it was received from a terrorist organisation solely for the purpose of:

- providing legal representation for proceedings relating to terrorism charges, or
- providing assistance to ensure that the organisation complies with Commonwealth or State laws

Membership of a terrorist organisation

It is an offence to be a member of a terrorist organisation, even informally. You are also regarded as a member if you have taken steps to become a member. If you find out that an organisation you belong to is a terrorist organisation, you should take all reasonable steps to cancel your membership as soon as possible.

Training with a terrorist organisation

It is an offence to provide training to, or to receive training from, a terrorist organisation. The offence may be committed even if the training is for a completely innocent purpose. In addition, if you train with a banned terrorist organisation, then you must produce evidence that shows you were not reckless as to the identity of the organisation. If you cannot produce any such evidence, then you could be found guilty of this offence even if the prosecution cannot prove that you knew or were reckless as to the identity of the organisation.

Associating with a member, promoter or director of a banned organisation

It is an offence to associate (which means to meet, or to communicate)

with a person who is a member, promoter or director of a banned terrorist organisation on two or more occasions, if you know that they are involved with a terrorist organisation, and by associating with them you provide support intended to assist the organisation to expand or continue to exist.

This offence only applies to organisations that are on the banned list (see Part 2.2.1) However, you would still be committing an offence even if you did not know that the organisation was on the banned list, as long as you knew that the organisation was 'engaged in preparing, planning, assisting or fostering the doing of a terrorist act'.

► Scenario 1 – Offence only applies to banned organisations

Ahmed knew that Simon was a member of XYZ organisation. Ahmed thought that XYZ was a good charitable organisation that raised money for orphans, and had no connection to any violent activities. Ahmed visited Simon at his home and told him that it was good that he was a part of XYZ and that they should continue with their work. A week later Ahmed wrote an e-mail to Simon to see how things with XYZ were going, and he wrote at the end, "Keep up with the good work!" Ahmed was not aware that XYZ was a banned terrorist organisation.

Under the laws, Ahmed would not be committing the association offence, because he did not know that XYZ was a banned terrorist organisation, or that it was engaged in preparing, planning, assisting or fostering the doing of a terrorist act.

► Scenario 2 – Association with intention to assist the organisation to expand or continue to exist

Even if Ahmed knew that XYZ was a banned terrorist organisation, the prosecution would still have to prove that he was somehow helping the organisation to expand or continue to exist. It has been suggested that 'the preliminary stages of recruiting a person to a terrorist organisation', or 'lending public support to a terrorist organisation to give it credibility' might come under the offence⁵. Ahmed's email might be considered to be providing public support to XYZ.

However, there are exceptions to this offence. For example, it is acceptable

⁵ Attorney-General's Department, 2006, Submission to the Security Legislation Review, at p.3.

for a close family member to associate with a person connected with a terrorist organisation about a purely family or domestic matter. There is also an exemption if the association takes place in the course of practising a religion at a place of public religious worship, or if the association is to provide humanitarian aid or legal advice or representation about certain terrorist, security and criminal related matters.

2.3 other terrorism related offences

2.3.1 financing terrorism or terrorists⁶

It is against the law to provide or collect funds, or to make funds available to another person where there is a substantial risk that the funds will be used to facilitate or engage in a terrorist act. The maximum penalty is life imprisonment. You may be found guilty even if a terrorist act does not occur.

2.3.2 planting a bomb, an explosive or other lethal device⁷

It is against the law to plant or set off a bomb in a public place where it is intended to cause death, serious injury or serious damage to property. The maximum penalty is life imprisonment.

2.3.3 freezing of assets linked to terrorist activity⁸

It is against the law to deal with the money or assets of a person or organisation if they have been listed under the Charter of United Nations Act 1945 (Cth)⁹. This list is different to the banned terrorist organisations list described above (see Part 2.2.1). It contains over 500 individuals and organisations. The Foreign Minister lists a person or organisation if the Minister is satisfied that the person or organisation commits terrorist acts. Under this listing law, a 'terrorist act' is not defined.

The law permits the Minister to freeze the assets of people or entities that are listed. The law prohibits the use of any asset (which includes money, cheques, shares etc) belonging to the organisation, or the supply of any asset to the organisation. For example, making donations to the

⁶ The Criminal Code, Div 103.

⁷ The Criminal Code, s. 72.3.

⁸ Charter of the United Nations (Terrorism and Dealings with Assets) Act 2002.

⁹ The Consolidated List can be found at the website of the Department of Foreign Affairs and Trade at http://www.dfat.gov.au/icat/freezing_terrorist_assets.html.

organisation, or collecting money on behalf of the organisation, which is then supplied to the organisation, is prohibited. It is also against the law to give any asset to a person or organisation on this list. The maximum punishment is 5 years imprisonment. Assistance which does not take the form of providing property of some sort is not an offence.

2.3.4 engaging in hostile activities overseas¹⁰

Australian citizens and residents are prohibited from engaging in or preparing to engage in hostile activities overseas, including recruiting other people. It is also an offence to engage in hostile activities overseas to overthrow the government of that country, causing death or injury to the head of state, or unlawfully destroying or damaging any property of the government of that country. This offence carries a maximum penalty of 20 years imprisonment.

2.3.5 sedition offences

The maximum penalty for committing a sedition offence is 7 years imprisonment. You may commit a sedition offence if you:¹¹

- urge another person to overthrow by force or violence the Australian Constitution, any Australian government or the lawful authority of the federal government;
- urge another person to interfere by force or violence with federal parliamentary elections;
- urge a racial, religious, national or political group to use force or violence against another group in circumstances where it would threaten the peace, order and good government of the Commonwealth; or
- urge another person to engage in conduct intended to assist an organisation or country at war with the Commonwealth, or engaged in armed hostilities against the Australian Defence Force. It is a defence if the assistance was to provide humanitarian aid.

The law provides a defence if you can show that you acted in good faith to:

- point out errors or defects in the government and its actions or laws, or the laws of another country;
- urge someone to attempt lawfully to bring about a change to a law, policy or practice;
- point out any matters that are producing feelings of ill will or hostility between different groups, in order to bring about the removal of those matters;
- do anything in connection with an industrial dispute or an industrial matter; or
- publish a report or commentary on a matter of public interest.

¹⁰ Crimes (Foreign Incursions and Recruitment) Act 1978.

¹¹ The Criminal Code s 80.2. For more detailed information, see Dr Ben Saul's seminar slides available from <http://amcran.org>

3 organisations that have powers under anti terrorism legislation

There are two main organisations empowered under the anti-terrorism legislation.

The Australian Security Intelligence Organisation (ASIO) is an agency that gathers intelligence, or information, relating to security. ASIO gathers intelligence by looking at newspapers, radio and television, and also by questioning people, using spies and informants, and intercepting communications such as mail, telephones and emails. ASIO has the power to question you and also to detain you for questioning, but it is not responsible for law enforcement activities such as arresting or charging people, and ASIO officers do not carry arms.

The Australian Federal Police (AFP) investigates federal crimes, including terrorism offences, and enforces federal criminal law. AFP officers have general police powers of search, arrest and detention. Both the AFP and the relevant state police have the power to arrest you if you were suspected of committing a terrorism-related offence. In this booklet we only look at the AFP powers in relation to offences under Commonwealth law, and in some cases specifically with respect to terrorism offences.

3.1 how do ASIO and the AFP operate?

It is very important to understand the differences between ASIO and the AFP. For example, ASIO officers may only search, question or detain you if they have a warrant to do so. ASIO must obtain the Attorney-General's consent before obtaining a warrant from a Federal Magistrate or Judge, and they must reasonably believe that it would substantially help with the collection of intelligence about a security matter.

AFP or state police officers also need to obtain a warrant to do certain things, but they may also detain you immediately without a warrant if they reasonably suspect that you have something that could cause

death or serious harm to a person, or substantial damage to a place or a thing. However, you should never talk to the police unless your lawyer is present, except in order to confirm your name and address. This is because anything you say to them may be used in evidence against you. This applies whether you are formally interviewed by the AFP or if you speak with them 'off the record'. Even if you have already given information to ASIO, you should still not talk to the AFP without your lawyer.

The two agencies sometimes work together. For example, the AFP may take you into detention for questioning by ASIO, or they may be asked by ASIO to help gain entry into premises to help minimise the risk to ASIO officers conducting a search.

Part 4 discusses the 'search powers' of both ASIO and the AFP. Their detention and questioning powers are discussed separately in Parts 5.1 and 5.3.

4 searching

4.1 can ASIO or the AFP search my house?

ASIO may only search your house if they have a warrant and they can only do the things set out in the warrant.¹² If the warrant specifies that they can only enter your premises at a certain time, you do not have to allow them access at any other time. Make sure you check the warrant to see precisely what the ASIO officer is permitted to search under the warrant. You should also ask for a copy.

A warrant may enable ASIO to search for any record or 'thing' that they consider relevant to a security matter. A 'thing' could be computers, lists of names, a mobile phone, and so on. They may search through any electronic equipment, safe, box, drawer, parcel, envelope or other container. They may inspect, examine, copy and remove any record or thing.

The AFP,¹³ as distinct from ASIO, may also obtain a warrant to search a place or vehicle if they have reasonable grounds to suspect that evidence of a federal crime may be found at that moment, or at some time in the next three days.

A warrant to search premises allows the police to enter the place or car to search for and record fingerprints and other samples, to take photographs, and to record the search on video.

4.2 can they search without a warrant?

ASIO is not allowed to search without a warrant.

However, the AFP may stop, detain and search a car without a warrant if they reasonably suspect that some evidence that needs to be seized urgently is in the car, and that it is likely to be hidden, lost or destroyed if it is not taken. If they find other evidence during the search, they may also take that away. During the search, the police may examine any container, such as boxes or suitcases, in or on the vehicle.

¹² For ASIO's search powers see Australian Security Intelligence Organisation Act 1979 s. 25.

¹³ For AFP's search powers see Crimes Act 1914, Part IAA, Division 2.

However, when a police officer searches a car without a warrant, he or she must:

- perform the search in a public place;
- not detain the car once the search is complete, unless it is suspected of being stolen;
- not damage any container when opening it, unless you refused to help open it.

Any item taken during a search without a warrant must be returned to you unless it is to be used as evidence or a magistrate orders that it be retained.

4.3 if the owner of the house is not at home, do I still have to let them in?

If you are the occupier of the place or car being searched, or if you represent the occupier, you are entitled to see a copy of the warrant. If the officer has a warrant to search those premises then they can enter, whether or not you are the owner of the premises.

4.4 can they take things away, including my passport?

ASIO may remove and retain for a reasonable time any record or thing relevant to a security matter that they find in the course of their search under a valid warrant. Your passport may only be taken during a search if it was somehow relevant to a security matter, for the purpose of inspecting, examining or copying it, but not in order to prevent you from leaving the country.

The AFP may take away anything that they think might be evidence of any offence and which they reasonably believe might be hidden, lost, destroyed or used to commit an offence in the future. They may also take away anything that they reasonably believe is a dangerous item or that might help you escape.

The AFP must give you a receipt for any item that they remove. They must also tell you where they are taking the item and allow you to be present when the item is examined at that place. The item must be returned within three days, unless a magistrate or other authorised person gives an

extension. They must tell you if an extension is applied for and you also have the right to say why you think it should be returned immediately. If during the search, the police seized any item that can be easily copied, such as a document, film, computer file or computer disk, then you may ask for a copy of that item and the police must give you a copy as soon as practicable.

4.5 can they search through my computer files?

If they have a warrant, ASIO may gain access to your computer or other electronic equipment for the purpose of obtaining data believed to be relevant to security. This type of warrant is only valid for six months. They may inspect and examine any data, including printing, removing and copying it, and they may add, delete or alter other data in order to achieve that purpose.

4.6 do I have to cooperate?

When dealing with both ASIO and the AFP, you should remain calm. You do not have to cooperate if ASIO does not have a warrant. However, if ASIO does have a warrant, it is against the law to refuse to cooperate. Both ASIO and police warrants authorise them to use force that is necessary and reasonable to do the things specified in the warrant.

It is a crime to harm or threaten to harm a police officer. You could be sent to prison for up to 13 years if you harm a police officer, or up to nine years if you threaten to harm a police officer. It is also a crime punishable by up to two years imprisonment to obstruct, hinder, intimidate or resist a police officer performing his or her duties.

4.7 can I watch them search through my things?

Yes. Generally search warrants do not allow them to detain you in any way, unless this is specified in the warrant. You are free to move about and they cannot stop you from being in the same room they are searching, as long as you do not try to disrupt the search. You are also free to leave if you wish.

You have the right to observe the search unless you are under arrest or if

you try to interfere with the search. However, the police may still search in more than one place on the premises at the same time.

4.8 can they search me?

When the law talks about searching a person, it specifies three different types of search:

- frisk search: a search of a person where the officer quickly runs his or her hands over the person's outer clothing. You may be asked to remove any clothing or hand over any item you are carrying for examination. However, the removal of clothing and handing over of items is voluntary and you do not need to comply with this request during a frisk search
- ordinary search: you may be asked to remove items like your overcoat, coat, jacket, gloves, shoes or hat to be examined. This may include pockets or bags or other things in your possession. You must cooperate when asked to remove these items.
- strip search: you may be asked to remove all of your clothes so an officer can determine whether you have a dangerous item or something that you could use to escape. The officer may examine your clothes and your external body, but not your body cavities. A strip search must be done in private and by an officer of the same gender. With the exception of a medical doctor and family member, people of the opposite gender are not allowed to view the strip search. The officer must not remove more clothes, or look at you for longer than is necessary.

ASIO and the AFP do not have the power to conduct a strip search under a warrant to search your premises, and you should not give your consent to a strip search. They may only conduct a strip search if you have been detained (see Part 5 for information on Arrest, Detention and Questioning). However, the warrant may authorise ASIO and the AFP to conduct a frisk search or an ordinary search if you are at, or near, the premises where a search warrant is being executed. If they find anything, they may also have the power to inspect or examine the thing, make copies, or remove the thing from you altogether.

4.9 can I stop an officer of the opposite gender from touching me?

The law says that ordinary and frisk searches must, if practicable, be conducted by a person of the same gender. This means that the ordinary search and the frisk search must be carried out by a person of the same gender unless there is a good reason not to (such as in an emergency). A strip search must only be conducted by someone of the same gender.

4.10 are the police always required to have reasonable suspicion to search me?

In most cases, the answer is 'yes'. However, if a terrorist act has just occurred, or if the Attorney-General believes that a terrorist act is about to occur, in an area controlled by the federal government (like an airport or a shipping wharf), then he or she can authorise the police, including Federal and State police, to search anyone found in that area¹⁴. If you are in that area, then the police are not required to have reasonable suspicion to search you, your car, or anything else you have brought into the area for a 'terrorism-related item'. They can only perform ordinary or frisk searches on you. The police are still required to have reasonable suspicion to conduct a strip search.

If the police find any items during a search that might be related to a terrorist or other criminal offence, then they can take that item off you. If this happens to you, then you should see a lawyer to find out how to get your things back.

¹⁴ Crimes Act 1914 (Cth) Pt IAA Div 3A ('Powers to stop, question and search persons in relation to terrorist acts').

5 arrest, detention and questioning

As stated above, the AFP is a traditional police force with investigative and arrest powers, while ASIO may only question or detain you to gather intelligence if they have a warrant. With respect to detention and questioning, the powers and responsibilities of ASIO and the AFP are more different than in other areas, and so they are discussed separately in this booklet. Part 5.1 looks at ASIO detention and questioning powers; Part 5.2 discusses ASIO's detention and question powers with respect to minors; Part 5.3 discusses the AFP's arrest and detention powers; and finally Part 5.4 discusses preventative detention orders.

5.1 ASIO detention and questioning powers¹⁵

Detention and questioning by ASIO is different to detention or arrest by the AFP. ASIO has no power to arrest you, but they can question you if they believe it would help them gather intelligence in relation to a terrorism offence. You do not need to be suspected of any wrongdoing. They can also get the AFP to detain you for questioning by ASIO if the Attorney-General is satisfied that without detention you will alert a person involved in a terrorism offence of the investigation, you won't appear for questioning, or you might destroy something you are asked to produce.

As with searching, ASIO needs a warrant in order to detain or question you. The warrant may be a questioning warrant, which would require you to present yourself at a specific time and place for questioning; or it may be a questioning and detention warrant, which would authorise ASIO to have the AFP take you into custody immediately for questioning.

The warrant may also specify other things, for example, that you are not allowed to leave Australia for the period of the warrant. You are also required to surrender your passport.

¹⁵ Details of the ASIO's special powers in relation to terrorism offences can be found in Div 3 of the Australian Security Intelligence Organisation Act 1979 (Cth). This Act can be found at http://www.austlii.edu.au/au/legis/cth/consol_act/asioa1979472/

5.1.1 what happens if they approach me for a 'friendly chat'?

If there is no warrant to question or detain you, then you are not obliged to go anywhere with ASIO officers and/or to answer any of their questions. You should only talk to them if you want to. If you are unsure whether any information you may have would have a detrimental effect on you or anyone, it is best to consult your lawyer.

Keep in mind that if there is no warrant, then anything discussed in this Part (Part 5.1) will not apply. In particular, the secrecy provisions will not apply, and it may be permissible for you to disclose the fact that you have been questioned by ASIO and/or any other operational information.

Remember, if you are being questioned under an ASIO warrant, any questioning must occur before the prescribed authority. If you are alone in a room with an ASIO officer, you do not have to answer any questions.

5.1.2 what happens when I'm being questioned under either warrant?

If you have been taken into custody under a warrant, you should be immediately brought before a 'prescribed authority' for questioning. A 'prescribed authority' is a former or serving senior Judge or the President or Deputy President of the Administrative Appeals Tribunal. This person is there to make sure that your questioning is conducted properly according to the law.

During the questioning process they may ask you to provide information, or produce records or other things. They are allowed to make copies of any documents you provide. Your questioning will be video-recorded. The prescribed authority will inform you that the questioning is being recorded, and will state the time and date of the questioning.

5.1.3 what must they tell me when I am being questioned?

When you are first brought before the prescribed authority, he or she must explain:

- his or her role and the reason for his or her presence and the presence of anybody else questioning you;
- how long you can be questioned or detained;
- what the warrant authorises ASIO to do;
- that it is against the law to fail to answer ASIO's questions or to fail to provide them with information it requests;

- how long the warrant is in force;
- your right to make an oral or written complaint to the Inspector General of Intelligence and Security (IGIS) in relation to ASIO (for further information on IGIS see Part 8);
- your right to make an oral or written complaint to the Commonwealth Ombudsman in relation to the AFP (for further information on the Commonwealth Ombudsman see Part 8);
- your right to apply to the federal court to review your warrant or to seek a remedy relating to their treatment of you under the warrant (this must be repeated to you once in every 24 hours);
- whether there are any limits on contact with others, and if so, who you may contact and when.

If you are unsure about anything, do not hesitate to ask the prescribed authority to explain it to you, as he or she must make sure that you understand the explanations.

5.1.4 do I have a right to an interpreter?

If you require an interpreter, you may request one, and the prescribed authority has to arrange for an interpreter unless he or she reasonably believes that you are able to communicate with reasonable fluency in English.

If you are allowed to have an interpreter, do not say anything until the interpreter arrives as the questioning cannot start until your interpreter is present.

5.1.5 do I have a right to have my lawyer present when they interrogate me?

The warrant will specify that you are allowed to contact a lawyer of your choice, but this may be denied if the prescribed authority decides that contacting any particular lawyer may alert another person that a terrorism offence is being investigated, or that some document that you are required to produce may be destroyed, damaged or altered. If a lawyer is allowed to be present, he or she must be provided with a copy of the warrant.

If a lawyer is allowed to be with you during questioning, he or she may ask for clarification of ambiguous questions, but apart from that, he or she is not allowed to interrupt questioning. Your lawyer may be removed if the

prescribed authority thinks he or she is unduly disrupting the questioning. If this happens, you may contact another lawyer. During breaks in questioning, you must be given reasonable opportunity for your lawyer to advise you, but your conversations may be monitored. While anything you tell your lawyer is still privileged and therefore cannot be used as evidence against you in and of itself, the information could still be relied on by ASIO to gather other evidence.

5.1.6 do I have a right to silence? can I be compelled to testify against myself?

Normally, if there is no warrant, you don't have to speak to ASIO. But if there is an ASIO warrant, it is against the law not to answer their questions. You do not have the right to silence if you are being questioned under a valid ASIO warrant. The maximum penalty for not answering ASIO questions when they have a warrant is five years imprisonment.

Any information or evidence you give to ASIO under a warrant cannot be used in court against you later. It is different to the situation where you have been arrested by the AFP for committing an offence, in which case the police must caution you that anything you say or do may be used in evidence against you (see Part 5.3.10 for comparison).

Having said this, there may be some incidental or derivative use of the information that you give. Firstly, the information could be used to further ASIO's investigations, in which case it may lead them to other intelligence or other information that may be used against you.

Secondly, the information may be used against you in court if you are being charged with one of the offences in the ASIO Act, for example, for providing a false statement, which carries a penalty of 5 years imprisonment. In these limited circumstances, the information given by you under a questioning, or questioning and detention warrant, could be used against you.

5.1.7 how long can they question me?

Under a questioning warrant, ASIO may question you for up to eight hours at a time and they may request permission from the prescribed authority to question you for two further 8-hour blocks. This means that the maximum period of time they may question you is 24 hours. If the

prescribed authority does not give permission for further questioning or you have been questioned for 24 hours, you must be released immediately. You cannot be questioned continuously for more than 4 hours without being offered a break, and the breaks must be at least 30 minutes. They may continue to question you if you consent, but it is best to ask for a break.

If you are being questioned with an interpreter, the maximum period of time they can question you is 48 hours. If they are not allowed by the prescribed authority to ask you further questions or if you have been questioned for 48 hours, they must release you immediately.

5.1.8 how long can they detain me?

Under a questioning and detention warrant, you are brought before the prescribed authority to answer questions until they reach the maximum number of hours permitted under the legislation (i.e. 24 hours, or 48 hours if there is an interpreter), but this must not exceed seven days in total. However, if ASIO believes they have new evidence about your activities, they may apply for a further warrant to detain you for another 7 days.

5.1.9 what kind of body searches can ASIO carry out on me while I am detained?

A questioning only warrant does not permit anyone to search you. However, under a questioning and detention warrant, they may conduct an ordinary search (see Part 4.8 for the definition of ordinary search and strip search).

A strip search may also be conducted, but only if they suspect you have an item that could present a danger or which could be used to help you escape. Anything taken must be returned to you when you are released. They may ask a doctor to be present, and they may use reasonable force if necessary.

If a strip search is necessary, it must be conducted by a police officer of the same gender, in a private area, out of the view or presence of any person of the opposite gender and people whose presence is unnecessary. If they take away your clothing, you must be provided with some adequate clothing.

5.1.10 can they order me to remove my head covering if I am a Muslim woman?

If a strip search is being conducted, then only a female officer may require you to remove your head veil. The law is not clear whether an ordinary search which allows the officer to ask you to remove your hat for examination also includes a Muslim woman's head covering. If so, the search will be conducted by someone of the same gender if practicable.

5.1.11 do I have to turn up and tell the truth?

If you have been given a warrant for questioning, it is an offence to not appear, punishable by a maximum of five years imprisonment. During questioning under either warrant it is an offence to give false or misleading answers, punishable by a maximum of five years imprisonment.

5.1.12 can I communicate with my family members?

Under a questioning and detention warrant, you are restricted from contacting others. You do not have the right to contact a family member unless you are a minor (see Part 5.2 below) or unless such contact is specifically allowed by the warrant. However, you may contact the Inspector-General of Intelligence and Security (IGIS) or the Commonwealth Ombudsman if you want to make a complaint (for more information on complaints see Part 8).

5.1.13 can I tell other people what happened?

A warrant to detain or question you will have an 'expiry date', which is not more than 28 days. Before the warrant has 'expired', it is an offence to tell anyone, including the media, anything that reveals that the warrant has been issued, what is in it, or any facts relating to how the warrant is executed. This offence carries a maximum penalty of five years imprisonment.

After the warrant has expired, you may disclose that a warrant was issued against you. But you still may not reveal 'operational information' within 2 years of the expiry of the warrant. This includes telling the media, your family or anyone else (unless it was the lawyer or family member who was with you during questioning) any information that ASIO has, the source of the information, or any method or plan used by ASIO. The offences

can apply to other people as well, such as any family member, friends or lawyer who was with you during the questioning or the execution of the warrant.

Operational information includes:

- information, or a source of information, ASIO has or had; and
- an operational capability, method or plan of ASIO.

If you tell someone about your detention or questioning under an ASIO warrant, then you are breaking the law and that other person would be breaking the law if they were to tell anyone.

► Scenario

William has not been home for 7 days as he has been detained and questioned under an ASIO warrant. Worried, his wife Ann calls the police. While the police are at their house, a journalist from The Australian Herald newspaper arrives, thinking that it might be an interesting story. When William arrives home, it would be against the law for William to tell the police, his wife, or the journalist where he has been for the past 7 days if the warrant has not expired. After the warrant has expired, William could tell them he was questioned by ASIO, but not how he was questioned or what information ASIO had, until two years have passed.

However, the law allows you to disclose information:

- to complain to the IGIS or the Ombudsman;
- to a lawyer to ask for legal advice in connection with an issued warrant;
- to a lawyer to ask for legal representation in legal proceedings related to an issued warrant, or your treatment under a warrant; or
- as permitted by the prescribed authority.

5.2 ASIO powers of detention and questioning of minors¹⁶

There are special rules that apply if you are 16 or 17 years old.

¹⁶ ASIO's powers with respect to young people are contained in s 34ZE of the Australian Security Intelligence Organisation Act 1979 (Cth).

5.2.1 can I be detained by ASIO if I am under 16 years old?

If you are under 16 years old, you cannot be detained or questioned by ASIO. If you are forcibly taken into custody, you should let ASIO and the prescribed authority know as soon as possible that you are under 16. ASIO must not question or detain you and you must be released immediately.

5.2.2 can I be detained by ASIO if I am between 16 and 18 years old?

You must only be questioned in the presence of your parent, guardian, or person who is representing your interest. You should not answer any questions until they arrive.

If you are 16 or 17 years old, a warrant may be issued if ASIO believe that you will commit, are committing, or have committed a terrorism offence. The warrant must allow you to contact your parents or guardians, or if they are not acceptable to you, anyone who is able to represent your interests. You can contact them at any time while you are in detention.

However, if your parent or guardian is being unduly disruptive during questioning, they may be asked to leave. If they are, you may ask for another person to be present, and you can contact that person. If this happens, you should not answer any questions until the person arrives.

5.2.3 if I am 16 or 17 years old, can they search me?

Yes, they may conduct both an ordinary and a strip search on you. A strip search must be conducted with your parent or guardian in the room, or someone who can represent your interests. The same rules that apply for general strip-searching also apply (see Part 4.8 for definition of strip search).

5.2.4 if I am 16 or 17 years old, how long can they question me?

You cannot be questioned for more than 2 hours at a time without a break.

5.3 AFP arrest and detention powers¹⁷

5.3.1 can the police ask for my name on the street?

If the AFP have a reasonable belief that you can help with their inquiries

¹⁷ Details of AFP arrest powers can be found in the Crimes Act 1914 (Cth) Part IAA, Division 4.

into a crime, then the officers can ask you for your name and address. If they tell you why they need your name and address, you must give it to them unless you have a reasonable excuse. It is an offence if you refuse or give a false name or address and you could be fined up to \$550.

You should also ask the officers for their name and place of duty. If they are in uniform, they should have an identification name or number on the front of their uniform. You should also write it down and keep it. If the officers are not in uniform, you may ask for proof that they are really police officers. Police officers must comply with this request. It is important that you take the time to write down the names or identification numbers of the officers so that if there is a need to follow-up with the police again or to make a complaint, the process can go smoothly.

If a terrorist act has just occurred, or if the Attorney-General believes that a terrorist act is about to occur, in an area controlled by the federal government (like an airport or a shipping wharf), then he or she can authorise the police, which includes federal and state police operating in the area, to demand the name, address and proof of identity of anyone found in that area.¹⁸ The police are not required to have reasonable suspicion, they can demand that you explain why you are in the area simply because you are there. It is an offence not to answer these questions and you could be fined up to \$2,200 for not answering. The police officer must tell you it is an offence if you do not answer the question so you will know if this applies to you.

5.3.2 do I have to answer their questions if they approach me on the street?

You do not have to go with a police officer to answer questions unless you are under arrest. If a police officer asks you to go with them to answer some questions, you should ask the officer if you are under arrest. If they say 'no', then you do not have to go with them. If they say 'yes', then you should go with them. However, you should never say anything to the police unless you talk to your lawyer first. See Part 5.3.10 below.

5.3.3 can they arrest me on the street?

The AFP may obtain a warrant to arrest you if they have a reasonable belief that you have committed a crime, or that you are committing a crime.

¹⁸ Crimes Act 1914 (Cth) s3UC.

If there is a warrant, it must name or describe the person to be arrested and briefly state the reasons for the arrest. If you are arrested under a warrant, you must be brought before a magistrate as soon as possible. A warrant to arrest you only expires when you are arrested.

5.3.4 can they arrest me without a warrant?

The AFP may also arrest you without a warrant if they reasonably believe that you have committed or are committing an offence. As soon as the police officer ceases to have reasonable grounds to believe that you committed the offence, you must be released.

5.3.5 can they enter private premises to arrest me?

Whether the police have a warrant or not, they can enter premises if they reasonably believe the person to be arrested is on the premises. The officer should not try to enter a house (or anywhere where people sleep at night) to search for or arrest a person between 9 pm and 6 am. However, if the police reasonably believe that it is not practical to arrest the person at the house or elsewhere during the day or that evidence might be hidden, lost or destroyed unless they act immediately, then the police may enter premises at anytime of the day or night to search for or arrest a person.

5.3.6 what happens if I'm arrested?

When arresting a person, the AFP may only use reasonable force to perform their duty, so they should not harm you if you do not resist arrest. The police officer should also tell you why you are being arrested. Do not resist arrest but ask for legal assistance as soon as practicable. Note the time of arrest if you can.

If you are being arrested at your home or work, the police may also take away any item that is in plain view if they reasonably believe that it is evidence of a crime, even if the item does not belong to you.

The police may frisk search you when you are being arrested, if they reasonably suspect it is prudent to check if you have a dangerous item or an item that might help you escape. The police can conduct an ordinary search of you if they reasonably suspect that you have such an item (see Part 4.8 for definitions of frisk search and ordinary search). If they find such an item on you, they may take it from you.

5.3.7 can they search me once they have arrested me?

If you are taken to a police station, the police may, if they have not already, perform an ordinary search on you.

At the police station, the police may also perform a strip search if they reasonably suspect that you have evidence or an item that is dangerous or that might help you escape, and that a strip search is necessary to recover such an item. A strip search must be authorised by a senior police officer. Any evidence or dangerous item found during the strip search may be seized (see Part 4.8 for the definitions of ordinary search and strip search).

5.3.8 do they have to tell me anything?

If a police officer arrests you, they should tell you that you are under arrest and the reason you are under arrest. You should ask 'Why am I under arrest?' if they don't tell you. The police officer should also caution you by saying something like 'You do not have to say anything, but anything you do say may be used in evidence'.

5.3.9 can the police question me after I'm arrested?

Once you have been arrested, they can detain you for questioning for a limited period without charging you with any offence. When questioning you they must record on tape or video any questions that they ask and any answers that you give. The police must give you or your lawyer a copy of the tape of any interviews within seven days.

5.3.10 do I have to answer their questions?

The only information you must give the police if asked is your name and address.

Anything else you say to the police may be used against you in court, which is why you have the right to remain silent. This means that you do not have to answer any questions, and your choice to be silent cannot be used as evidence of guilt against you in court. Therefore it is extremely important that you do not say anything unless you get advice from your lawyer first.

In practice, it can be quite difficult to exercise your right to silence and to avoid answering police questions. The easiest way is simply to say, "No

comment,” to anything that the police ask you. You should be aware that an officer may make a note of any reactions you have, like laughing or shrugging your shoulders, during questioning. Therefore remain calm at all times and do not react to their questions.

5.3.11 can I contact a lawyer?

You have the right to contact a lawyer to ask them to be present when you are questioned. The AFP may only refuse this if they reasonably believe that:

- your accomplices might hide from the police if they hear that you are in custody;
- evidence might be hidden, made up or destroyed;
- witnesses might be intimidated;
- the lives of people are in imminent danger and so questioning must start immediately.

If your lawyer is too slow in arriving, then the police must offer you another lawyer.

5.3.12 can I contact my family, or an interpreter?

You have the right to contact a friend or relative to let them know where you are. You also have the right to an interpreter, unless the police think that your English is good enough for the purposes of their questioning.

5.3.13 what if I’m not an Australian citizen?

If you are not an Australian citizen, you have the right to contact your embassy or consulate. The police cannot start questioning you until they have allowed you reasonable time to contact, or attempt to contact, the consulate.

5.3.14 how long can they detain me?

The AFP can only hold you for a maximum of four hours without charge. If you are a juvenile (under 18), or Aboriginal or Torres Strait Islander, they may only hold you for a maximum of two hours. The police may apply to a magistrate or other authorised person to extend your detention to up to a total of 12 hours for serious non-terrorism offences, or 24 hours for terrorism offences. An extension may only be granted if it is necessary to protect or to get further evidence, or to complete the investigation.

Any ‘dead time’ does not count towards the period of your detention. ‘Dead time’ includes the time it takes:

- to drive you to the place of detention;
- for you to contact a lawyer, friend, relative, parent or interpreter;
- for your lawyer, friend, relative, parent or interpreter to arrive;
- for you to receive medical help;
- for you to sober up, if you are drunk;
- to organise and conduct an identification parade;
- for the police to get an order from a magistrate to undertake a forensic procedure on you;
- for the police to get an extension of the time they can keep questioning you;
- for the police to inform you of your rights about forensic procedures;
- for you to rest and recover during the questioning;
- to carry out a forensic procedure on you;
- for investigators to collect information, including the time it takes to translate the information.

5.3.15 when will they release me?

After the time limit for holding you has expired, the police must either:

- let you go unconditionally;
- let you go on bail; or
- bring you before a magistrate or other authorised person to apply for bail.

If the police let you go, but arrest you again within two days for the same crime, then the maximum time they may hold you the second time is four hours minus the amount of time they detained you the first time.

5.4 preventative detention¹⁹

You can be detained for a period of up to 48 hours under a preventative detention order if it is reasonably necessary, if the order will substantially assist in preventing an imminent terrorist act that is expected to occur in the next 14 days, and the AFP has reasonable grounds to suspect you:

¹⁹ The Criminal Code Div 105.

- will engage in a terrorist act;
- possess a thing that is connected with preparation for, or engagement in, a terrorist act; or
- have done an act in preparation for, or planning of, a terrorist act.

You can also be detained for up to 48 hours where a terrorist act has occurred in the last 28 days and your detention is necessary for the preservation of evidence. Detention under a preventative detention order can be continued under state law for up to a total of 14 days.

To get a preventative detention order, the AFP will start by applying to a senior police officer for an initial preventative detention order. This will allow the AFP to detain you for up to 24 hours. If the AFP want to detain you for longer, they must apply to the 'issuing authority'. The 'issuing authority' is not a court but a serving or retired senior judge, federal magistrate, or senior member of a tribunal who has been appointed by the government.

You or your lawyer are not entitled to appear before, or talk to, the 'issuing authority' but you can give the AFP material to support your case. The AFP must pass this on to the 'issuing authority'.

5.4.1 what power do the police have?

Once the police have a valid order that applies to you, they can:

- enter property using reasonable force to carry out a search or take you into custody (the police cannot enter property between 9 pm and 6 am, unless the police reasonably believe that they need to prevent the loss of evidence, or because it is not practical to enter outside of these hours);
- conduct an ordinary or frisk search of you (see Part 4.8 for definition of ordinary search and frisk search); and
- ask any person for their name and address if the police believe they can help them in carrying out the order.

5.4.2 what are my rights?

If you are taken into police custody under a preventative detention order, the police must:

- provide you with a copy of the order and explain the period of detention;
- explain any restrictions about contacting people;
- explain your right to contact a lawyer, to make a complaint and to seek a federal court remedy in relation to the order or in relation to the treatment; and
- provide the name and telephone number of the senior police officer overseeing the order.

If you need an interpreter, you should tell the police officer explaining the order. If the police officer reasonably believes you are unable to communicate with reasonable fluency in English, he or she must arrange for an interpreter.

Under a preventative detention order, you cannot be questioned by the police or ASIO. The police can only ask for confirmation of your identity and to ensure your well-being.

You have a right to:

- contact a lawyer – if the police officer reasonably believes, because of language or disability problems, you are unable to communicate fluently, or if you are unable to contact your lawyer, the police officer must give you assistance in choosing a contacting a lawyer;
- contact the Commonwealth Ombudsman to make a complaint; and
- make representations, or speak, to the senior police officer overseeing your order about the operation of your order, your treatment and about revoking your order.

You are entitled to make representations to the senior AFP officer to try and get the preventative detention order revoked. You also have the right to challenge the order in the federal court.

You must be treated humanely and with respect and not subject to cruel inhuman or degrading treatment.

5.4.3 who can I contact while I am being detained?

As stated above, you can contact a lawyer and the Ombudsman. If you cannot contact your lawyer, the police must give you reasonable assistance to choose another lawyer. You can also contact one relative or housemate, one employer, one employee and one work partner, as

applicable, and anyone else the police allows. If you are between 16 and 18, you can also contact both parents or guardians, or a person able to represent your interests.

You do not have a right to contact with family and lawyers that is free from monitoring. But any contact between you and your lawyer is not admissible as evidence in a court.

The police can also apply to the issuing authority to prohibit contact between you and any other person, including those listed above. The police can do so:

- to avoid risking an action being taken in order to prevent a terrorist act or serious harm to a person;
- to preserve evidence in relation to a terrorist act;
- to prevent interference with the gathering of information about a terrorist act or planning for such an act; or
- to avoid risking an arrest, the taking into custody under a preventative detention, or the serving with a control order of another person.

5.4.4 can I tell people I am being detained?

You can only tell people that you are safe and cannot be contacted for the time being. You cannot tell anyone that you are subject to a preventative detention order, that you are being detained or for how long you are being detained. It is an offence to do so punishable by up to five years in prison. The only exceptions to this are your lawyer, the Ombudsman or your parents if you are a minor. If you are under 18, it is an offence for your parents to tell anyone of these details.

If you are being under detained under state or territory law, state laws apply. In some Australian states it is a crime to tell your relative or work colleague that you are being detained; in other States you are allowed to tell your relative that you are being detained. You should ask your lawyer or the people detaining you whether you are allowed to tell your relative that you are being detained, or whether you're only allowed to say that you are safe and cannot be contacted.

6 control orders²⁰

A control order may impose a variety of obligations, prohibitions and restrictions on you. However the court must be satisfied that each of the restrictions is reasonably necessary and appropriate for the purpose of protecting the public from a terrorist act.

You do not need to be charged with a criminal offence to be subject to a control order. The AFP may obtain a control order against you if a court is satisfied that:²⁰

- making the control order will substantially assist in preventing a terrorist act; or
- you have trained with a banned terrorist organisation.

6.1 can I contest the order?

An interim control order is first issued by the court without you knowing about it. You do not have an opportunity to be heard and contest the order at this stage. The interim control order only has effect once it is served, or delivered, personally to you. You cannot apply to have the order varied or revoked. The interim control order must inform you when you will need to attend court to have the order confirmed or revoked. This will be at least three days after the making of the interim order.

If you are served with a control order you should contact a lawyer as soon as possible.

6.2 how long does a control order last?

Once a control order is confirmed it may last for a maximum of 12 months, but the police can seek a new control order when the old one expires. You may apply to the court to have the order revoked or varied.

6.3 what restrictions can be imposed by a control order?

Under a control order, you can be subject to a wide range of restrictions

²⁰ The Criminal Code Div 104.

and conditions, including orders:

- requiring you to wear an electronic tracking device;
- requiring you to remain at certain premises at certain times or days;
- requiring you to attend counselling or education;
- preventing you from being at certain places or leaving Australia;
- preventing you from communicating or associating with specified people;
- preventing you from accessing certain telecommunications or technology, such as the Internet.

6.4 I'm under 18, can they impose a control order on me?

Young people between 16 and 18 years may be subject to control orders that last for 3 months. A new order can be sought when the old one expires. A control order cannot be imposed on you if you are under 16 years of age.

6.5 what if I don't abide by the control order?

It is an offence to break a control order and you could be jailed for up to five years.

7 what else can ASIO or the AFP do?

7.1 can ASIO or the AFP use a listening device?

If they have a warrant, ASIO may use a listening device to record your communications.²¹ The warrant must not exceed a period of 6 months, although a new warrant may be issued once an old warrant has expired.

Under the warrants, both ASIO and the AFP may enter your premises and install, test, maintain, or remove a listening device. They may record your conversations, with or without your permission.

The AFP also has the power to use listening devices, data surveillance devices, optical surveillance devices and tracking devices. The police, including state police, can use optical surveillance devices such as binoculars and video cameras without a warrant if it does not involve entering onto premises.²² Under certain circumstances, the police may also use a listening or tracking device without a warrant.

Police may also obtain a 'surveillance device warrant' to use surveillance devices on premises or specific objects, or to listen to the conversations of a person whose identity is unknown. A surveillance device warrant authorises the AFP or state police to enter onto premises or adjoining premises to install, maintain and use surveillance devices.

7.2 can they tap my telephone or other telecommunications?²³

The AFP can only intercept 'live communications', such as telephone calls, facsimiles, or Internet chat sessions, if they have a telecommunications interception warrant (a 'TI warrant'). Before the AFP can get a TI warrant, they must convince a judge (or someone similar) that you are involved in committing a serious criminal offence. This warrant can also permit an officer to enter your premises to install equipment for monitoring

²¹ ASIO Act 1979 (Cth), s 26.

²² Surveillance Devices Act 2004 (Cth) ss 37-40.

²³ Telecommunications (Interception and Access) Act 1979 (Cth).

telecommunications, even without your permission.

A TI warrant is valid for up to 90 days, but the AFP may apply for another warrant if it expires. The warrant also expires immediately when the police no longer reasonably suspect you of committing a terrorist offence.

If police believe that a criminal suspect is using your telephone, then they can apply for a warrant to tap your phone. Police can tap all calls made to and from your phone, not just those calls made by or to that criminal suspect.

The AFP can also obtain a warrant to intercept 'stored communications'. This means that the AFP can gain access to voicemail, SMS, MMS or e-mail if it is stored on an Internet server, or in a telecommunications system.

ASIO can also obtain similar warrants to intercept 'stored' and 'live' telecommunications. These warrants are valid for 6 months.

If you have communicated with a terrorism suspect (even if you did so unwittingly), ASIO and the AFP can also obtain warrants to monitor all your telecommunications, including that with family members, friends, work colleagues, your lawyer and your doctor. They can only do so once they have exhausted all other practicable methods of identifying the suspect's telecommunications service, or where it is not possible to intercept the suspect's telecommunications. They must also satisfy the issuing authority you will likely be contacted on that telecommunications service by the person of interest.

7.3 can they look through my mail?

If they have a warrant, ASIO may gain access to any postal parcel or any delivered parcel.²⁴ This type of warrant is valid for 90 days. They may be authorised by the warrant to inspect, open, make copies of the articles or the cover of the articles, and inspect and make copies of the contents. This may apply to items posted or delivered by you or being received by you.

7.4 can they monitor my movements using a tracking device?

If they have a warrant, ASIO may use tracking devices to track a person

²⁴ Australian Security Intelligence Organisation Act 1979 (Cth), s 27.

or an object, including a car, an aircraft, a vessel, and clothing.²⁵ This type of warrant will remain valid for 6 months. A warrant may authorise ASIO to enter your premises to attach a tracking device, and to maintain that tracking device. The warrant will also authorise any force necessary and reasonable, and will also specify the time of day that they can enter your premises. Under a control order (see Part 6), a person may also be required to wear an electronic tracking device.

²⁵ Australian Security Intelligence Act 1979 (Cth), s 26B.

8 Lodging a complaint

8.1 complaints about ASIO

8.1.1 if I want to complain about the conduct of an ASIO officer, what can I do?

It is strongly advisable that you talk to your lawyer, or contact your local community legal centre first, before making a complaint. A complaint about ASIO may be made orally or in writing to the Inspector General of Intelligence and Security (IGIS). The role of the IGIS is to monitor intelligence and security agencies, including ASIO, to conduct inquiries, to investigate complaints and to protect the rights of citizens and residents against possible excesses by agencies. For this reason, the IGIS may sometimes be present during questioning by ASIO.

If the IGIS is not present, and you wish to make a complaint while you are in detention, you have the right to be given the facilities for contacting IGIS. When making a complaint, you must be allowed to do so in private and not in front of any of the officers. It is important to make a complaint within 12 months of an incident. The IGIS may decline to make inquiries in relation to your complaint if more than 12 months have passed. The contact details of the IGIS can be found in Part 10 of this booklet. You also have the right to ask the federal court to review a warrant or your treatment under a warrant.

8.1.2 what can I complain about in relation to ASIO?

If there has been a warrant issued against you, you must be treated humanely and with respect and dignity. This relates to every aspect of the warrant including the point of contact and the process through which you are taken into detention. You may complain about any injury you have sustained, damage to property, any improper conduct or activities of ASIO and its officers, any action or practice that is inconsistent with, or breaches any human right, or constitutes discrimination, in particular, on the basis of sex or race.

It is therefore important that you note down the names of the officers who contact you and the date, time and circumstances of that contact. That way you will be in a better position to make a complaint later if there

is a need. However, keep in mind that, as discussed in Part 5.1.13, it is unlawful to disclose any operational information of ASIO if you have been subject to a questioning or detention warrant. This means that you would have to keep this information confidential, and only use this information in complaint situations, or in discussions with your lawyer.

In relation to detention and questioning under an ASIO warrant, you may make complaints if your rights are not met. Some of these are set out in a protocol document "ASIO Protocol to Guide Warrant Process",²⁶ and they include the following:

- You must not be questioned in an unfair, oppressive or demeaning manner. Interactions with you should be humane and courteous.
- If you are to be transported, the transportation must be safe and dignified, with adequate ventilation or lighting. It should not expose you to unnecessary physical hardship.
- You must have access to fresh drinking water, toilet and sanitary facilities at all times. These facilities must be clean.
- You are allowed to bathe or shower daily, in private, and you must be provided with other toilet articles for health, cleanliness and the maintenance of self-respect.
- The place of detention and questioning must have adequate fresh air ventilation, floor space, lighting and adequate climate control.
- You must be provided with three meals a day at the usual hours. If you are fasting, they must provide you with food at the appropriate times.
- You must be provided with food appropriate for your religious beliefs; you have the right to request halal food if you are Muslim. They must also accommodate any other dietary or medical needs.
- You are allowed to engage in religious practices such as prayers subject to safety and security requirements.
- You must be provided with a separate bed in a separate room or cell, with clean bedding.
- You must be allowed a minimum of eight hours continuous undisturbed sleep in any 24 hour period of detention
- You must be provided medical or health care when required.

8.2 complaints about the AFP

8.2.1 if I want to complain about the conduct of an AFP

²⁶ Available online: <http://parlinfoweb.aph.gov.au/piweb/repository1/media/pressrel/h04a63.pdf#search=%22ASIO%20protocol%22>

officer, what can I do?

You may complain by letter, telephone, fax, in person or online to:

- any AFP office;
- AFP Internal Investigations Division; or
- the Commonwealth Ombudsman.

Again, it is strongly advisable that you talk to your lawyer or local community legal centre first before you make a complaint.

8.2.2 what can I complain about in relation to the AFP?

It is important to note that if you have been subject to an ASIO warrant, and you wish to complain about an AFP officer in relation to this warrant, you should make a complaint to the Ombudsman rather than to the AFP. This is because there are complex rules around what disclosures are permitted in relation to an ASIO warrant.

You have the right to complain about the conduct or actions of individual AFP members. Your complaint may concern:

- action taken by an AFP officer that involves discourtesy, rudeness or abruptness to you;
- action that arises out of a misunderstanding of the law, of the policy or procedures of the AFP;
- serious ill-treatment by an AFP officer; or
- assault by an AFP officer.

Unless there has been an ASIO warrant, you should first make your complaint to the AFP, whether the complaint involves allegations of minor or serious misconduct. The complaint will either be dealt with by AFP's Workplace Resolution Program through a conciliation process or the AFP Internal Investigations Division. This process is monitored by the Ombudsman's office.

In every case, a report detailing the actions taken by Internal Investigations must be forwarded to the Ombudsman's office for independent scrutiny. If the Ombudsman is not satisfied with the AFP's investigation of your complaint, he or she may ask the AFP to reconsider its recommendations, require Internal Investigations to investigate further, or conduct his or her own investigation.

While you are entitled to lodge a complaint to the Ombudsman at any time, he or she will usually only intervene in the matter if you have already raised the complaint with the AFP directly. If you are being detained, you have the right to be provided with facilities to make a complaint to the Ombudsman.

If you have a grievance, you should lodge the complaint as soon as possible, but at most within one year of the incident. The contact details for the Ombudsman are available in Part 10 of this booklet.

9 state counter-terrorism legislation

In addition to the Australia-wide laws, there are specific laws in some states that only apply to those states.

All state police have powers in relation to Preventative Detention Orders (see Part 5.4 for an overview of police powers). All states give police covert search warrants for the police to enter premises without the occupants' knowledge to search for, seize, replace, copy, photograph or record any thing or document. The grounds for obtaining a covert search warrant vary across states but generally provide for reasonable grounds that a terrorist act is being or is likely to be committed, the warrant will substantially assist in responding to or preventing the terrorist act and that it is necessary for the search to occur without the occupants' knowledge.

Most states give police special powers to stop, search and question people and vehicles in certain circumstances in relation to a terrorist act. These powers may apply to a particular person, or a person in a particular area, or any person in a particular vehicle. It varies between states whether the police must apply to a court for authorisation to exercise special police powers, or whether an authorisation can be made by the Commissioner of Police.

We briefly discuss some of the different aspects of special powers across the states. You should contact your local community legal centre for more specific information.

9.1 new south wales

The Terrorism (Police Powers) Act 2002 (NSW) gives police special powers when a special 'authorisation' is made by the Commissioner of Police or a senior police officer immediately after a terrorist act, or where there are reasonable grounds to believe that there is a threat of a terrorist act occurring in the future. This gives ordinary police officers special powers to force people to identify themselves, and special powers to search people, vehicles, premises and the right to seize things. It also authorises strip searches, but just like under the federal laws, a strip search must take place in a private place and be conducted by a person of the same gender. Special authorisations are in effect for up to 24 hours for the investigation

of a terrorist act which has occurred, and up to 7 days where there is a reasonable belief that a terrorist act will occur in the future.

9.2 victoria

The Terrorism (Community Protection) Act 2003 (Vic) gives police special powers in a situation where it is suspected that a terrorist act has or may have occurred and that area may have been exposed to chemical, biological or radiological contamination. A senior police officer may authorise police officers to direct people to enter or leave the area, detain a person, and direct a person to submit to decontamination procedures. The maximum period of time that the authorisation will have effect is 8 hours, but they may request an extension for up to 16 hours.

Police officers also have special powers to force people to identify themselves, to search people, vehicles, premises and to seize things without a warrant. These powers may be approved by the Chief Commissioner of Police, with the Premier's approval, for up to 24 hours. The authorisation may be given in relation to events which might be the subject of a terrorist act, to prevent or reduce the impact of a terrorist act, to assist in the investigation of a terrorist act, or to protect essential services from a terrorist act. The police may apply to the Supreme Court for an authorisation to extend the special powers for up to 14 days.

9.3 queensland

The Terrorism (Community Safety) Amendment Act 2004 (Qld) increases the power of the police and the Crimes and Misconduct Commission (CMC) to investigate terrorism-related crimes with further surveillance powers. The Act introduces a "sabotage" or "threatened sabotage" crime –which makes it an offence to destroy or damage a public facility with the intention of causing major economic loss, or major disruption to government functions and the use of services by the public. It is punishable by a maximum penalty of 25 years imprisonment.

The CMC may inspect and seize financial records or passports in the course of their investigations, and has the power to require a person to give information about the property, financial transactions or movement of money and assets by another person being investigated.

In the event of an actual terrorist act, the police and emergency officers also have public safety powers to respond to incidents involving chemical,

biological or radiological substances.

9.4 western australia

The Terrorism (Extraordinary Powers) Act 2005 (WA) gives police special powers to obtain a person's personal details, and search people and vehicles who leave or enter an identified area or if they are a target person. An authorisation may be made by the Police Commissioner for up to 24 hours and then must be approved by a court, if a terrorist act has been, is being or is about to be committed. Further, the authorisation may be granted if its purpose is to find a person who may be connected with the terrorist act.

9.5 south australia

The Terrorism (Police Powers) Act 2005 (SA) provides for an authorisation for special powers to be made by a senior police officer, then by a judicial officer within 24 hours, if a terrorist act is imminent and if the authorisation will substantially assist in the prevention of the terrorist act. The authorisation may be for up to 14 days where it relates to preventing a terrorist act, and up to 48 hours for investigating a terrorist act. An authorisation allows police to search specific persons and people in their company, or people or vehicles entering or leaving an area subject to an authorisation. Police may also search premises in an area and seize and detain things.

A strip search may only be conducted if the person is specifically named as the target of the authorisation and the seriousness and urgency of the circumstances requires the strip search to be undertaken.

9.6 northern territory

The Terrorism (Emergency Powers) Act 2006 (NT) allows the Commissioner of Police, with the approval of the Minister of Police, to make an authorisation for the exercise of special police powers, if a terrorist act has occurred or is likely to occur in the near future. There must also be reasonable grounds for believing the authorisation will prevent a terrorist act, find, preserve or remove evidence, or apprehend a person who has committed or intends to commit a terrorist act. An authorisation may be in effect for up to 14 days.

Police can demand a person's identity and address, search people, vehicles and premises. In addition a police officer may enter and remain on

premises for the purposes of surveillance, or to ensure the health or safety of a person, without a warrant. Items may be seized, but must be returned within 5 days unless an application is made by police to a Magistrate that the item be retained by police.

9.7 australian capital territory

The Terrorism (Extraordinary Temporary Powers) Act 2006 (ACT) allows the Magistrates or Supreme Court to make an authorisation for the exercise of special police powers at the request of the Chief Police Officer. The grounds for an authorisation are a reasonable belief that a terrorist act will happen in the next 14 days and the authorisation will substantially assist in preventing the terrorist act. Police may demand personal details (name, date of birth, address), search persons, premises or vehicles, to seize things and cordon off a target area.

9.8 tasmania

The Police Powers (Public Safety) Act 2005 (Tas) allows the Commissioner of Police, with the Premier's approval, the power to make an authorisation for the exercise of special police powers in relation to an event, where there are reasonable grounds that the event might be subject to a terrorist act. Under this type of authorisation, Police may demand personal details (name, date of birth, address), conduct ordinary search of persons or vehicles, and cordon off a designated area. An authorisation may be sought from the Supreme Court for police to exercise additional powers which include the power to conduct strip searches, to enter and search premises and to give directions to public bodies. Such an authorisation may be given where it is reasonably necessary to protect an area from a terrorist act, or to minimise the effects or assist in the recovery of a terrorist act.

10 where to go for help

10.1 general information

If you would like to find out more about this area of the law, keep updated with the latest changes, or if you would like to get involved in contributing to the debate about these laws, you can visit one of these websites:

Australian Muslim Civil Rights Advocacy Network
<http://amcran.org>

The Gilbert + Tobin Centre of Public Law
<http://www.gtcentre.unsw.edu.au/>

NSW Council for Civil Liberties
<http://www.nswccl.org.au>

Victorian Council for Civil Liberties (Liberty Victoria)
<http://libertyvictoria.org.au/index.asp>

Amnesty International Australia
<http://www.amnesty.org.au/>

Civil Rights Network Victoria
<http://www.civilrightsnetwork.org>

Civil Rights Defence
<http://www.civilrightsdefence.org>

Legislation
<http://www.austlii.edu.au>

10.2 legal advice

New South Wales

- Legal Aid Commission – NSW
Ground Floor
323 Castlereagh Street

Sydney NSW 2000
Tel: (02) 9219 5000
LawAccess: 1300 888 529
<http://www.legalaid.nsw.gov.au>

- Legal Aid Hotline for under 18s
Tel: 1800 101 810
- Your local community legal centre
Combined Community Legal Centres Group (NSW) Inc.
Tel: (02) 9318 2355
<http://www.nswclc.org.au>
- Law Society of NSW (for referral to private lawyers)
Tel: (02) 9926 0333
<http://www.lawsociety.com.au>

Victoria

- Victoria Legal Aid
350 Queen Street
Melbourne VIC 3000
Tel: (03) 9269 0234
<http://www.legalaid.vic.gov.au>
- Your local community legal centre
Federation of Community Legal Centres (Vic) Inc.
Tel: (03) 9654 2204
<http://www.communitylaw.org.au>
- Law Institute for Victoria (for referral to private lawyers)
Tel: (03) 9607 9311
<http://www.liv.asn.au>

Australian Capital Territory

- Legal Aid Commission ACT
4 Mort Street
Canberra City ACT
Tel: 1300 654 314
- Your local community legal centre

Tel: (02) 6257 4377

- The Law Society of the Australian Capital Territory (for referral to private lawyers)
Tel: (02) 6247 5700
<http://www.lawsocact.asn.au/>

Queensland

- Legal Aid Queensland
44 Herschel Street
Brisbane QLD 4000
Tel: 1300 65 11 88
<http://www.legalaid.qld.gov.au/gateway.asp>
- Your local community legal centre
Queensland Association of Independent Legal Services
Tel: (07) 3392 0644
<http://www.qails.org.au/>
- Queensland Law Society (for referral to private lawyers)
Tel: (07) 3842 5888
<http://www.qls.com.au>

Western Australia

- Legal Aid Western Australia
55 St Georges Terrace
Perth WA 6000
Tel: (08) 9261 6222
Fax: (08) 9325 5430
Info line: 1300 650 579
<http://www.legalaid.wa.gov.au>
- Your local community legal centre
Community Legal Centres Association (WA) Inc
Tel: (08) 9221 9322
- The Law Society of Western Australia (for referral to private lawyers)
Tel: (08) 9322 7877
<http://www.lawsocietywa.asn.au>

South Australia

- Legal Services Commission of South Australia
GPO Box 1718
Adelaide 5001
Tel: (08) 8463 3555
Fax: (08) 8463 3599
<http://www.lsc.sa.gov.au>
- Your local community legal centre
South Australian Council of Community Legal Services
Tel: (08) 8723 6236
<http://www.saccls.org.au/>
- The Law Society of South Australia (for referral to private lawyers)
Tel: (08) 8229 0222
<http://www.lssa.asn.au>

Northern Territory

- Northern Territory Legal Aid Commission
Locked Bag 11
Darwin 0801
Tel: (08) 8999 3000
Fax: (08) 8999 3099
<http://www.nt.gov.au/ntlac/>
- Your local community legal centre
Tel: (08) 8982 1182
- Law Society Northern Territory (for referral to private lawyers)
Suite G16, 1st Floor
Paspalis Centrepoint
48-50 Smith Street (Mall)
Darwin NT 0800
Tel: (08) 8981 5104
Fax: (08) 8941 1623
<http://www.lawsocnt.asn.au>

Tasmania

- Legal Aid Commission of Tasmania

GPO Box 9898
Hobart Tas 7001
Tel: (03) 6236 3800
Fax: (03) 6236 3811
<http://www.legalaid.tas.gov.au>

- Your local community legal centre
Hobart Community Legal Service
Tel: (03) 6223 2500
- Law Society of Tasmania (for referral to private lawyers)
Tel: (03) 6234 4133
<http://www.taslawsociety.asn.au>

10.3 complaints

Complaints about ASIO

- Inspector-General of Intelligence and Security
3-5 National Circuit
Barton ACT 2600
Tel: (02) 6271 5692
Fax: (02) 6271 5696
<http://www.igis.gov.au>
info@igis.gov.au

Complaints about AFP

Complaining to the AFP

- AFP National Headquarters
68 Northbourne Avenue
Canberra ACT 2601
Tel: (02) 6256 7777
- AFP Western Australia
619 Murray Street
West Perth WA 6000
Tel: (08) 9320 3444
- AFP New South Wales
110 Goulburn Street

Sydney NSW 2000
Tel: (02) 9286 4000

- AFP South Australia
8th Floor 55 Currie Street
Adelaide SA 5000
Tel: (08) 8416 2811
- AFP Victoria
383 Latrobe Street
Melbourne VIC 3000
Tel: (03) 9607 7777
- AFP Northern Territory
21 Lindsay Street
Darwin NT 0800
Tel: (08) 8981 1044
- AFP Queensland
203 Wharf Street
Spring Hill QLD 4000
Tel: (07) 3222 1222
- AFP Tasmania
47 Liverpool Street
Hobart TAS 7000
Tel: (03) 6231 0166

Commonwealth Ombudsman

The Commonwealth Ombudsman hears complaints about the AFP and ASIO. Complaints may be made for the cost of a local call from anywhere in Australia on 1300 362 072. There is also an online complaint form: <http://www.comb.gov.au>.

Complaints about State police

Contact the Police Commissioner in your State. If you are not happy with how your complaint is being handled, you can complain to your State Ombudsman.

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This booklet answers people's general questions about the anti-terrorism laws that have been introduced in Australia since 2001, including the terrorism offences, the extended powers and functions of the Australian Security Intelligence Organisation (ASIO) and the Australian Federal Police (AFP), as well as information on control orders, preventative detention, and the sedition offences.