

AUSTRALIA

Country Report: Anti-terrorism laws & policing

1. Country Summary*

- a. **Government:** Constitutional monarchy with a federal parliamentary democracy and a federation of states
- b. **Population:** 20.6 million
- c. **Size:** 7 741 220 square kilometers
- d. **Region:** Pacific
- e. **General**

Australia has had a history of stability since Federation in 1901. The conservative Liberal/National Coalition led by Prime Minister John Howard is now in its tenth year and fourth term of power. In regard to the role of the police, the last two years have seen serious race based riots in the New South Wales suburbs of Redfern, Cronulla and Macquarie Fields where police action and involvement has been subject to criticism. In regard to terrorism,¹ Australian troops have been involved in the United States-led military campaigns in both Afghanistan and Iraq. The Australian Government has close economic and political ties with the United States and has aligned itself with the US approach to counter-terrorism. Traditionally criminal law has been largely state based, however the federal government takes a lead role in criminal laws relating to counter-terrorism and national security.

Australia is the only democratic country without a bill of rights. Canada, New Zealand and the United Kingdom each have domestic charters that protect fundamental rights such as freedom of speech, freedom of association and the right to a fair trial. The Australian Constitution provides few guarantees of individual rights, and these have been interpreted narrowly by the High Court. Only the Australian Capital Territory and Victoria have a formal method of rights protection.

2. Relevant Legislation

a. Amending Acts

- *Security Legislation Amendment (Terrorism) Act 2002 (SLAT Act)*: This Act inserted Part 5.3 “Terrorism” into the *Criminal Code Act 1995* which was subsequently repealed and substituted by the *Criminal Code Amendment (Terrorism) Act 2003*.
- *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Act 2003 (ASIO Act 2003)*: This Act inserted Division 3 (“special powers relating to terrorism offences”) into Part III of the *Australian Security Intelligence Organisation Act 1979*.

* Many thanks to Alison Duxbury and Katie Wood for their thoughtful reviews of this report. As well, we thank Jude McCulloch, whose contributions have been used extensively throughout this report.

- *Criminal Code Amendment (Terrorism) Act 2003 (CCATA)*: This Act repealed the existing Part 5.3 and replaced it. Part 5.3 has subsequently been amended by the pieces of legislation listed below.
- *Anti-Terrorism Act 2004 (ATA 2004)*
- *Anti-Terrorism Act (No 2) 2004 (ATA (No 2) 2004)*: This Act created the offence “associating with terrorist organisations”.
- *Anti-Terrorism Act 2005 (ATA 2005)*: This Act replaced the existing provisions of the CCA 1995 with the following Subsections:
 - 101.2(3) “Providing or receiving training connected with terrorist acts”;
 - 101.4(3) “Possessing things connected with terrorist acts”;
 - 101.5(3) “Collecting or making documents likely to facilitate terrorist acts”;
 - 101.6(2) “Other acts done in preparation for, or planning, terrorist acts”;
 - 103.1(2) “Financing terrorism”.
- *Anti-Terrorism Act (No. 2) 2005 (ATA (No 2) 2005)*: Significantly amended CCA 1995 with the insertion of Divisions 4 and 5 relating to control orders and preventative detention orders; enhanced the powers to stop, search and detain under the CA 1914.
- *Australian Security Intelligence Organisation Amendment Act 2006 (ASIO Act 2006)*: Enacted to extend the powers under ASIO Act 2003 for a further 10 years.

b. Existing Acts


- *Crimes Act 1914 (CA 1914)*.
- *Australian Security Intelligence Organisation Act 1979 (ASIO Act 1979)*: ASIO Act 2003 inserted Division 3 (“special powers relating to terrorism offences”) into Part III of this Act and ASIO Act 2006 legislated for the continuation of this provision until 2016.
- *Criminal Code Act 1995 (CCA 1995)*: Part 5.3 dealing with terrorism was amended by ATA 2004, ATA 2005, and ATA (No 2) 2005 (which inserted Divisions 4 and 5 on control orders and preventative detention orders).

c. Other Anti-Terrorism Legislation

- *Suppression of the Financing of Terrorism Act 2002 (SFTA 2002)*
- *Criminal Code Amendment (Suppression of Terrorist Bombings) Act 2002*.
- *Border Security Legislation Amendment Act 2002*.
- *Criminal Code Amendment (Espionage and Related Offences) Act 2002*
- *Anti-Terrorism Act (No 3) 2004 [ATA (No 3)]*
- *Crimes (Foreign Incursions and Recruitment) Act 1978 (CFIRA)*: Sections 6, 7 and 11 amended by ATA 2004.
- *Proceeds of Crime Act 2002 (PCA 2002)*: Sections 20, 152, 153, 337A and 338 amended by ATA 2004.
- *Customs Act 1901 (CA)*: Subparagraph 203DA(1)(c)(i) amended by ATA (No 2) 2005.
- *Financial Transaction Reports Act 1988 (FTRA)*: Subsection 16(6) amended by ATA (No 2) 2005 regarding the definition of financing of a terrorism offence.

3. Law Summary

Post-2001, the federal government introduced a raft of new legislation. These legislative instruments made significant amendments to Australia’s existing criminal legislation, the *Crimes Act 1914* and the *Criminal Code Act 1995*. The legislation was enacted with the



primary objective of preventing or discouraging terrorist acts. The first wave of reforms focused on core offences, terrorist acts and the proscription of terrorist organisations. More recent reforms have focused on pre-empting activities through detention, control orders, association offences, and a broader definition of proscribed terrorist organisation and reformed sedition offences. In employing the law in a preventative policy, the laws expand police powers beyond those traditionally associated with policing. For example, under amendments by the ATA 2005 to Divisions 4 and 5 of the CCA 1995, police have been given the power to issue control and preventive detention orders. Such expanded powers have also been extended to Australia's national security service, the Australian Security Intelligence Organisation (ASIO), who have heightened powers to stop, search, question and detain suspects without charge.

Australia had no specific national anti-terrorism laws prior to 2001. However, from 2001 up until September 2006, approximately one new law has been passed every seven weeks. Commentators have described the shift in powers granted to the police, security services and government as unprecedented.

Despite the extensive nature of the legal changes there have been few prosecutions under the new laws. In addition, the expanded police powers of detention, questioning and control orders have not been used extensively. As of March 2007, ASIO has not used its amended detention powers and has only used its new questioning power 15 times between 2003 and 2006. There have been no preventative detention orders, and only one control order.

4. Provisions

a. Definition


CCA 1995 Part 5.3, Section 101.1 defines a "terrorist act" as:

an action or threat of action where:

- (a) the action falls within subsection (2) and does not fall within subsection(3); and
- (b) the action is done or the threat is made with the intention of advancing a political, religious or ideological cause; and
- (c) the action is done or the threat is made with the intention of:
 - (i) coercing, or influencing by intimidation, the government of the Commonwealth or a State, Territory or foreign country, or of part of a State, Territory or foreign country; or
 - (ii) intimidating the public or a section of the public.

CCA 1995 Part 5.3, Section 101.2 identifies the action that falls within subsections (2) and (3) as referred to above:

- (2) Action falls within this subsection if it:
 - (a) causes serious harm that is physical harm to a person; or
 - (b) causes serious damage to property; or
 - (c) causes a person's death; or
 - (d) endangers a person's life, other than the life of the person taking the action; or
 - (e) creates a serious risk to the health or safety of the public or a section of the public; or
 - (f) seriously interferes with, seriously disrupts, or destroys, an electronic system including, but not limited to:

- 
- (i) an information system; or
 - (ii) a telecommunications system; or
 - (iii) a financial system; or
 - (iv) a system used for the delivery of essential government services; or
 - (v) a system used for, or by, an essential public utility; or
 - (vi) a system used for, or by, a transport system.

- (3) Action falls within this subsection if it:
 - (a) is advocacy, protest, dissent or industrial action; and
 - (b) is not intended:
 - (i) to cause serious harm that is physical harm to a person; or
 - (ii) to cause a person's death; or
 - (iii) to endanger the life of a person, other than the person taking the action; or
 - (iv) to create a serious risk to the health or safety of the public or a section of the public.

The ATA 2004 amended 1A Subsection 3(1) of the *Crimes Act* 1914 to read:


terrorism offence means:

- (a) an offence against Division 72 of the Criminal Code; or
- (b) an offence against Part 5.3 of the Criminal Code.

The definition of an "offence" under Division 72.2 of the CCA 1995 ("International terrorist activities using explosive or lethal devices") is:

- (1) A person commits an offence if:
 - (a) the person intentionally delivers, places, discharges or detonates a device; and
 - (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
 - (c) the device is delivered, placed, discharged, or detonated, to, in, into or against:
 - (i) a place of public use; or
 - (ii) a government facility; or
 - (iii) a public transportation system; or
 - (iv) an infrastructure facility; and
 - (d) the person intends to cause death or serious harm.
- (2) A person commits an offence if:
 - (a) the person intentionally delivers, places, discharges or detonates a device; and
 - (b) the device is an explosive or other lethal device and the person is reckless as to that fact; and
 - (c) the device is delivered, placed, discharged, or detonated, to, in, into or against:
 - (i) a place of public use; or
 - (ii) a government facility; or
 - (iii) a public transportation system; or
 - (iv) an infrastructure facility; and
 - (d) the person intends to cause extensive destruction to the place, facility or system; and
 - (e) the person is reckless as to whether that intended destruction results or is likely to result in major economic loss.

- (3) Strict liability applies to paragraphs (1)(c) and (2)(c).



Section 3 of the CA 1914 (inserted by ATA (No 2) 2005) defines a "serious terrorism offence" to mean:

- (a) terrorism offence (other than offence against section 102.8, Division 104 or Division 105 of the Criminal Code); or
- (b) an offence against a law of a State:
 - (i) that has a federal aspect; and
 - (ii) that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104 or Division 105 of the Criminal Code); or
- (c) an offence against a law of a Territory that has the characteristics of a terrorism offence (other than such an offence that has the characteristics of an offence against section 102.8, Division 104 or Division 105 of the Criminal Code).

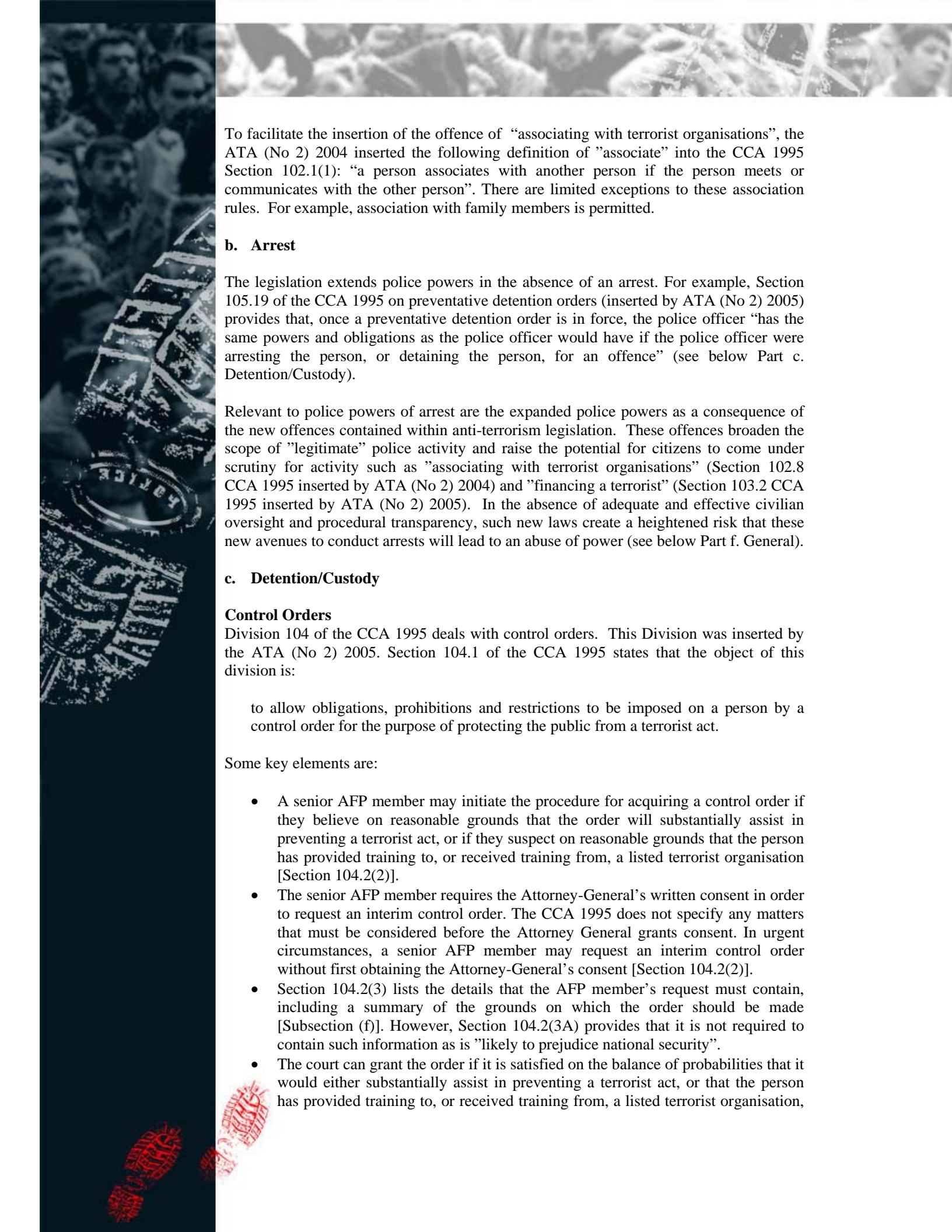
CCA 1995 Part 5.3, Section 102.1 defines "terrorist organisation" as:

- (a) an organisation that is directly or indirectly engaged in, preparing, planning, assisting in or fostering the doing of a terrorist act (whether or not a terrorist act occurs); or
- (b) an organisation that is specified by the regulations for the purposes of this paragraph (see subsections (2), (3) and (4)).

The ATA (No 2) 2005 repealed the specific definitions of the terrorist organisations Hamas, Hizballah and Lashkar-el-Tayyiba from the CCA 1995. This might be seen as a generalization and broadening of the defined category of "terrorist organisations".

In regard to control orders and preventative detention orders, the ATA (No 2) 2005 inserted the following definitions into Section 100.1(1) of the CCA 1995:

- AFP member
- Confirmed control order
- Continued preventative detention order
- Control order
- Corresponding State preventative detention law
- Frisk search
- Identification material
- Initial preventative detention order
- Issuing authority
- Issuing court
- Judge
- Lawyer
- Listed terrorist organisation
- Ordinary search
- Police officer
- Prescribed authority
- Preventative detention order
- Prohibited contact order
- Seizable item
- Senior AFP member
- Superior court
- Tracking device.



To facilitate the insertion of the offence of “associating with terrorist organisations”, the ATA (No 2) 2004 inserted the following definition of “associate” into the CCA 1995 Section 102.1(1): “a person associates with another person if the person meets or communicates with the other person”. There are limited exceptions to these association rules. For example, association with family members is permitted.

b. Arrest

The legislation extends police powers in the absence of an arrest. For example, Section 105.19 of the CCA 1995 on preventative detention orders (inserted by ATA (No 2) 2005) provides that, once a preventative detention order is in force, the police officer “has the same powers and obligations as the police officer would have if the police officer were arresting the person, or detaining the person, for an offence” (see below Part c. Detention/Custody).

Relevant to police powers of arrest are the expanded police powers as a consequence of the new offences contained within anti-terrorism legislation. These offences broaden the scope of “legitimate” police activity and raise the potential for citizens to come under scrutiny for activity such as “associating with terrorist organisations” (Section 102.8 CCA 1995 inserted by ATA (No 2) 2004) and “financing a terrorist” (Section 103.2 CCA 1995 inserted by ATA (No 2) 2005). In the absence of adequate and effective civilian oversight and procedural transparency, such new laws create a heightened risk that these new avenues to conduct arrests will lead to an abuse of power (see below Part f. General).

c. Detention/Custody


Control Orders

Division 104 of the CCA 1995 deals with control orders. This Division was inserted by the ATA (No 2) 2005. Section 104.1 of the CCA 1995 states that the object of this division is:

to allow obligations, prohibitions and restrictions to be imposed on a person by a control order for the purpose of protecting the public from a terrorist act.

Some key elements are:

- A senior AFP member may initiate the procedure for acquiring a control order if they believe on reasonable grounds that the order will substantially assist in preventing a terrorist act, or if they suspect on reasonable grounds that the person has provided training to, or received training from, a listed terrorist organisation [Section 104.2(2)].
- The senior AFP member requires the Attorney-General’s written consent in order to request an interim control order. The CCA 1995 does not specify any matters that must be considered before the Attorney General grants consent. In urgent circumstances, a senior AFP member may request an interim control order without first obtaining the Attorney-General’s consent [Section 104.2(2)].
- Section 104.2(3) lists the details that the AFP member’s request must contain, including a summary of the grounds on which the order should be made [Subsection (f)]. However, Section 104.2(3A) provides that it is not required to contain such information as is “likely to prejudice national security”.
- The court can grant the order if it is satisfied on the balance of probabilities that it would either substantially assist in preventing a terrorist act, or that the person has provided training to, or received training from, a listed terrorist organisation,



and that the restrictions imposed are reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act (Section 104.4).

- Section 104.5 sets out the wide-ranging restrictions that an interim control order may impose. These include prohibitions or restrictions on: leaving Australia; being at specified areas or places; communicating with specified individuals; accessing certain forms of telecommunication; possessing certain articles or substances; or carrying out specified activities (“including in respect of his or her work or occupation”). A person may also be required to: remain at specified premises at specified times; wear a tracking device; report to specified persons at specified places; allow himself or herself to be photographed; have their fingerprints taken; or participate in counseling and education.
- The maximum term of the control order is 12 months from the day on which it is made [Section 104.5(1)(f)], or three months for a person 16-18 years. However, Section 104.5(2) allows for the making of successive control orders in relation to the same person.
- There is a sunset provision stipulating that a control order that remains in force 10 years after the day Division 4 commenced ceases to be in force at that time, and that no control order may be requested after this date (Section 104.32).

Control orders are one of the most controversial features of Australia’s anti-terrorism legislation. Only one control order has been issued to date. It resulted in substantial public debate and is currently the subject of a High Court challenge. Control orders have primarily been criticised for encroaching upon civil rights including the right to due process and the prohibition on arbitrary detention. They are a potential tool for police harassment, abuse or persecution. As well, they represent a substantial expansion of police powers in that it is Australian Federal Police officers who apply for the orders, decide whether or not to seek confirmation, and who may request successive renewals of the orders for up to one decade. The financial consequences resulting from an order should be noted, particularly in regard to the restrictions placed on a person’s working life. The Human Rights Watch submission to the Senate Legal and Constitutional Committee also referred to the potential impact suffered by family members living with a person subjected to an order.²

Preventive Detention Orders


Division 105 of the CCA 1995 deals with preventive detention orders. This Division was inserted by the ATA (No 2) 2005. Section 105.1 of the CCA 1995 states that the object of this division is:

to allow a person to be taken into custody and detained for a short period of time in order to:

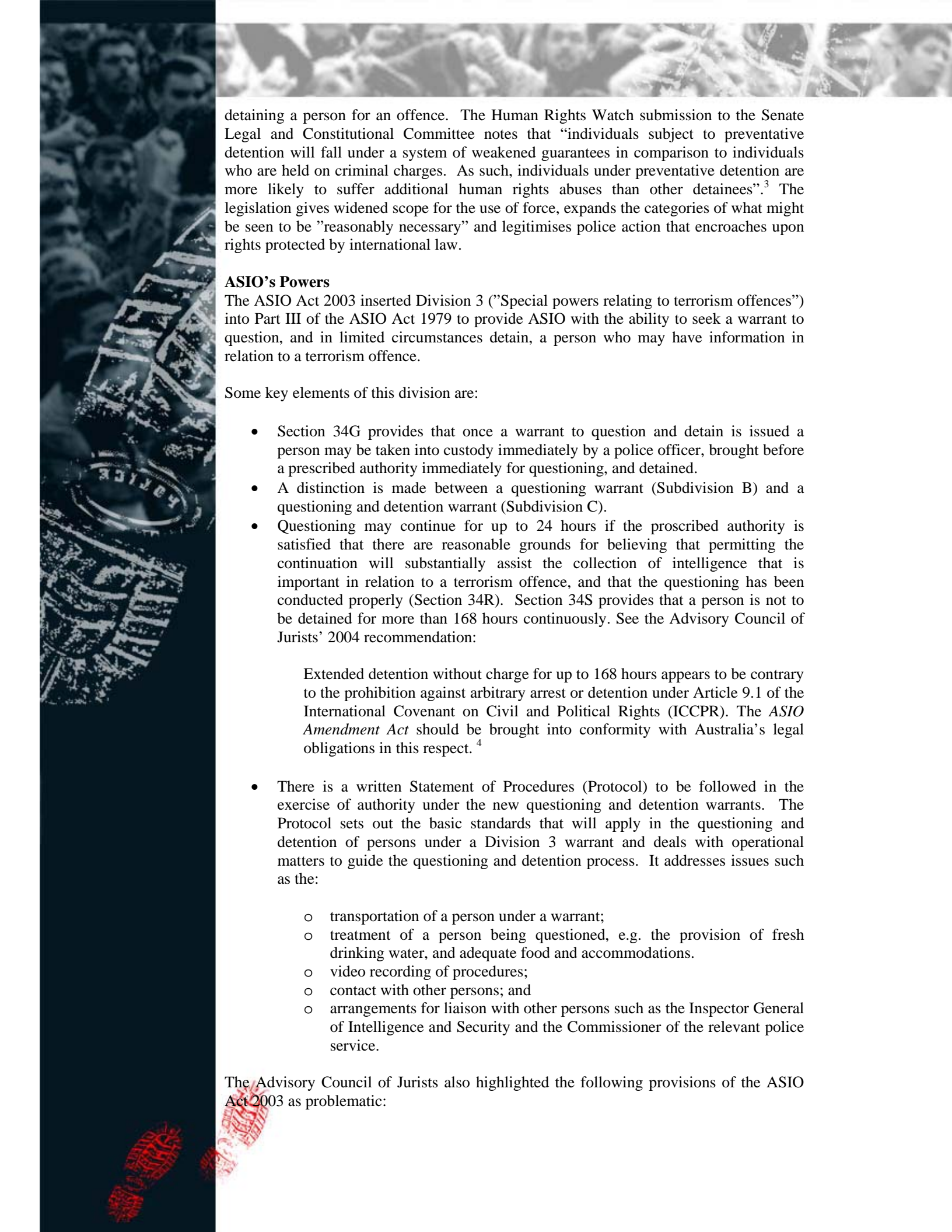
- (a) prevent an imminent terrorist act occurring; or
- (b) preserve evidence of, or relating to, a recent terrorist act.

In summary:

- A senior AFP member may apply for a preventative detention order if there are reasonable grounds to suspect that the subject will engage in a terrorist act; possesses a thing that is connected with the preparation for, or the engagement of a person in, a terrorist act; has done an act in preparation for, or planning, a terrorist act. They must also be satisfied that making the order will substantially assist in preventing a terrorist act occurring, and that detaining the subject for that period is reasonably necessary (Section 105.4(4)).

- 
- The terrorist act must be one that is imminent, and must be expected to occur at some time in the next 14 days (Section 105.4(5)).
 - A subject may be detained if a terrorist act has occurred in the last 28 days, and it is reasonably necessary to detain the subject to preserve evidence relating to the terrorist act (Section 105.4(6)).
 - Section 105.6 states the restrictions on multiple preventative detention orders, as well as the exceptions. For example, if an initial preventative detention order is made in relation to a person on the basis of assisting in preventing a terrorist act occurring within a particular period and the person is taken into custody under that order, another initial preventative detention order cannot be applied for *unless* the application or order is based on information that became available only after the initial order was made.
 - Senior AFP officers are legitimate issuing authorities for initial preventative detention orders (definition in Section 100.1(1)).
 - The initial preventative detention order allows for a person to be taken into custody and detained during a period that commences when the person is first taken into custody (Section 105.8(3)). The period of time must not exceed 24 hours. Section 105.11 allows for the application for continued preventative detention orders which may extend the period to a maximum of 48 hours since the time of being taken into custody under the initial order.
 - An AFP member may apply for a prohibited contact order if they are satisfied that it is reasonably necessary to: avoid a risk of action being taken towards a terrorist act; prevent serious harm to a person; preserve evidence relating to a terrorist act; prevent interference with the gathering of information; or avoid a risk to the arrest of a suspect (Section 105.14A). A prohibited contact order can be used to prevent the subject from contacting specific people whilst in preventative detention [Section 105.15(4)].
 - While a preventative detention order is in force in relation to a person, any police officer may take the person into custody, and any police officer may detain the person (Section 105.19). A police officer, in taking a person into custody under and in detaining a person under a preventative detention order, has the same powers and obligations as the police officer would have if the police officer were arresting the person, or detaining the person, for an offence.
 - Section 105.19(5) requires that a senior AFP member oversee the exercise of powers under, and the performance of obligations in relation to, the preventative detention order.
 - The preventative detention order also activates the police power to enter a premises “using such force as is necessary”, to conduct a frisk search, to conduct an ordinary search, and seize anything found as a result of the search (Sections 105.22-24).
 - Section 105.33 requires that a person being taken into custody or detained under a preventative detention order must be treated with humanity, respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment.
 - Section 105.38 provides that contact between the person being detained under the preventative detention order and the few people they are allowed to contact to inform of their safety, as well as communication with their lawyer, will be monitored by a police officer.
 - Section 105.42 provides that a police officer must not question a person while the person is detained under a preventative detention order.

The fact that AFP officers themselves are able to issue initial preventative detention orders is a significant expansion of their powers. It allows a person to be taken into custody and detained with no immediate oversight from administrative or judicial bodies. It provides all police with the powers they would have if carrying out an arrest or



detaining a person for an offence. The Human Rights Watch submission to the Senate Legal and Constitutional Committee notes that “individuals subject to preventative detention will fall under a system of weakened guarantees in comparison to individuals who are held on criminal charges. As such, individuals under preventative detention are more likely to suffer additional human rights abuses than other detainees”.³ The legislation gives widened scope for the use of force, expands the categories of what might be seen to be “reasonably necessary” and legitimises police action that encroaches upon rights protected by international law.

ASIO’s Powers

The ASIO Act 2003 inserted Division 3 (“Special powers relating to terrorism offences”) into Part III of the ASIO Act 1979 to provide ASIO with the ability to seek a warrant to question, and in limited circumstances detain, a person who may have information in relation to a terrorism offence.

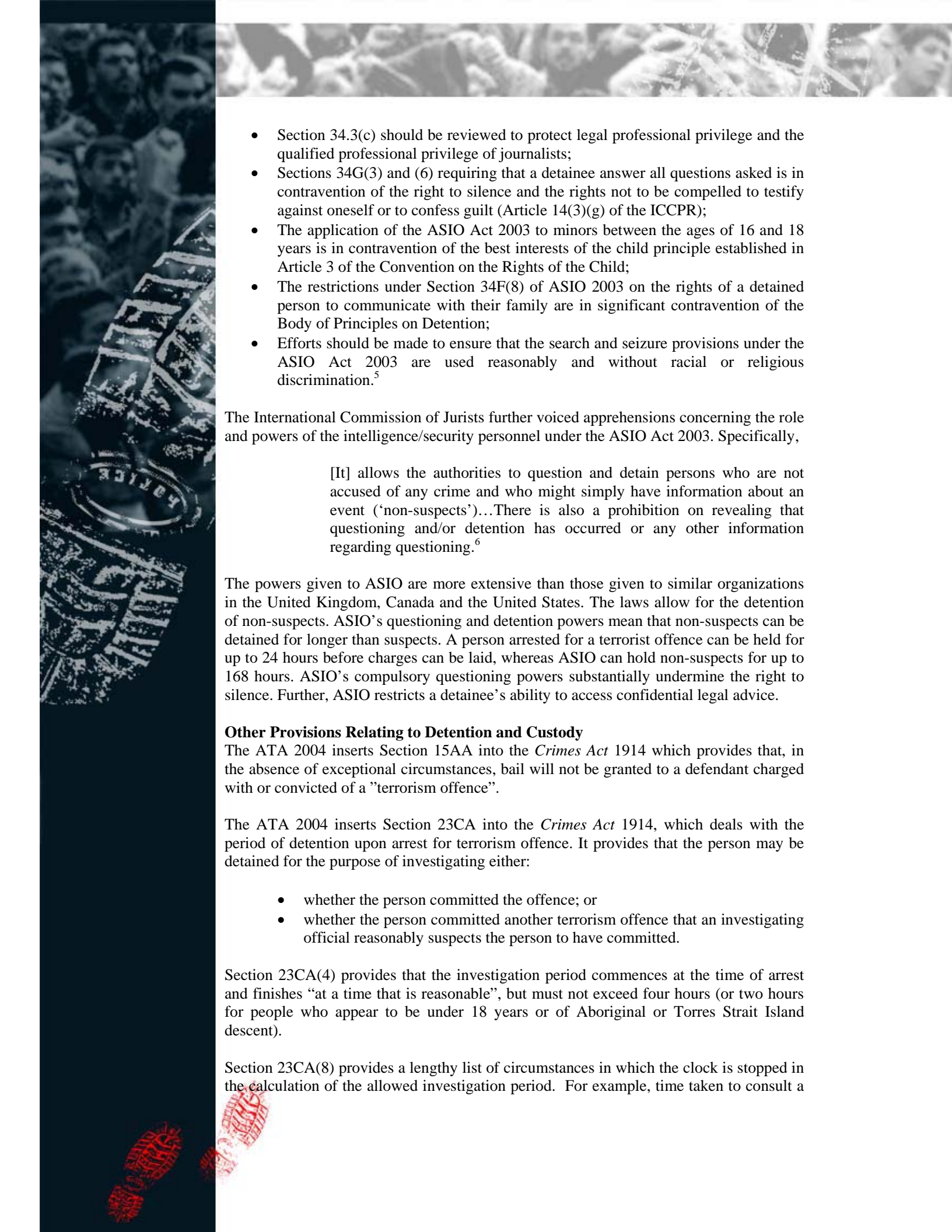
Some key elements of this division are:

- Section 34G provides that once a warrant to question and detain is issued a person may be taken into custody immediately by a police officer, brought before a prescribed authority immediately for questioning, and detained.
- A distinction is made between a questioning warrant (Subdivision B) and a questioning and detention warrant (Subdivision C).
- Questioning may continue for up to 24 hours if the proscribed authority is satisfied that there are reasonable grounds for believing that permitting the continuation will substantially assist the collection of intelligence that is important in relation to a terrorism offence, and that the questioning has been conducted properly (Section 34R). Section 34S provides that a person is not to be detained for more than 168 hours continuously. See the Advisory Council of Jurists’ 2004 recommendation:

Extended detention without charge for up to 168 hours appears to be contrary to the prohibition against arbitrary arrest or detention under Article 9.1 of the International Covenant on Civil and Political Rights (ICCPR). The *ASIO Amendment Act* should be brought into conformity with Australia’s legal obligations in this respect.⁴

- There is a written Statement of Procedures (Protocol) to be followed in the exercise of authority under the new questioning and detention warrants. The Protocol sets out the basic standards that will apply in the questioning and detention of persons under a Division 3 warrant and deals with operational matters to guide the questioning and detention process. It addresses issues such as the:
 - transportation of a person under a warrant;
 - treatment of a person being questioned, e.g. the provision of fresh drinking water, and adequate food and accommodations.
 - video recording of procedures;
 - contact with other persons; and
 - arrangements for liaison with other persons such as the Inspector General of Intelligence and Security and the Commissioner of the relevant police service.

The Advisory Council of Jurists also highlighted the following provisions of the ASIO Act 2003 as problematic:

- 
- Section 34.3(c) should be reviewed to protect legal professional privilege and the qualified professional privilege of journalists;
 - Sections 34G(3) and (6) requiring that a detainee answer all questions asked is in contravention of the right to silence and the rights not to be compelled to testify against oneself or to confess guilt (Article 14(3)(g) of the ICCPR);
 - The application of the ASIO Act 2003 to minors between the ages of 16 and 18 years is in contravention of the best interests of the child principle established in Article 3 of the Convention on the Rights of the Child;
 - The restrictions under Section 34F(8) of ASIO 2003 on the rights of a detained person to communicate with their family are in significant contravention of the Body of Principles on Detention;
 - Efforts should be made to ensure that the search and seizure provisions under the ASIO Act 2003 are used reasonably and without racial or religious discrimination.⁵

The International Commission of Jurists further voiced apprehensions concerning the role and powers of the intelligence/security personnel under the ASIO Act 2003. Specifically,

[It] allows the authorities to question and detain persons who are not accused of any crime and who might simply have information about an event ('non-suspects')...There is also a prohibition on revealing that questioning and/or detention has occurred or any other information regarding questioning.⁶

The powers given to ASIO are more extensive than those given to similar organizations in the United Kingdom, Canada and the United States. The laws allow for the detention of non-suspects. ASIO's questioning and detention powers mean that non-suspects can be detained for longer than suspects. A person arrested for a terrorist offence can be held for up to 24 hours before charges can be laid, whereas ASIO can hold non-suspects for up to 168 hours. ASIO's compulsory questioning powers substantially undermine the right to silence. Further, ASIO restricts a detainee's ability to access confidential legal advice.

Other Provisions Relating to Detention and Custody


The ATA 2004 inserts Section 15AA into the *Crimes Act* 1914 which provides that, in the absence of exceptional circumstances, bail will not be granted to a defendant charged with or convicted of a "terrorism offence".

The ATA 2004 inserts Section 23CA into the *Crimes Act* 1914, which deals with the period of detention upon arrest for terrorism offence. It provides that the person may be detained for the purpose of investigating either:

- whether the person committed the offence; or
- whether the person committed another terrorism offence that an investigating official reasonably suspects the person to have committed.

Section 23CA(4) provides that the investigation period commences at the time of arrest and finishes "at a time that is reasonable", but must not exceed four hours (or two hours for people who appear to be under 18 years or of Aboriginal or Torres Strait Island descent).

Section 23CA(8) provides a lengthy list of circumstances in which the clock is stopped in the calculation of the allowed investigation period. For example, time taken to consult a



lawyer, seek medical attention or to transport the accused to the place of questioning is not considered when calculating the allowed period.

Section 23DA provides for the extension of the investigation period if arrested for terrorism offence. The investigating official may apply for an extension before or at the end of the investigation period. The extension will be granted if the magistrate or justice of the peace is convinced that "further detention of the person is necessary to preserve or obtain evidence or to complete the investigation into the offence or into another terrorism offence". Numerous extensions may be granted but the person may not be detained for more than 24 hours in total.

At the end of the investigation period the person must either be released unconditionally or on bail, or be brought before a judicial officer. However, Section 23CA(3)(b) provides that if it is not possible to do so within that period, it may be done "as soon as practicable".

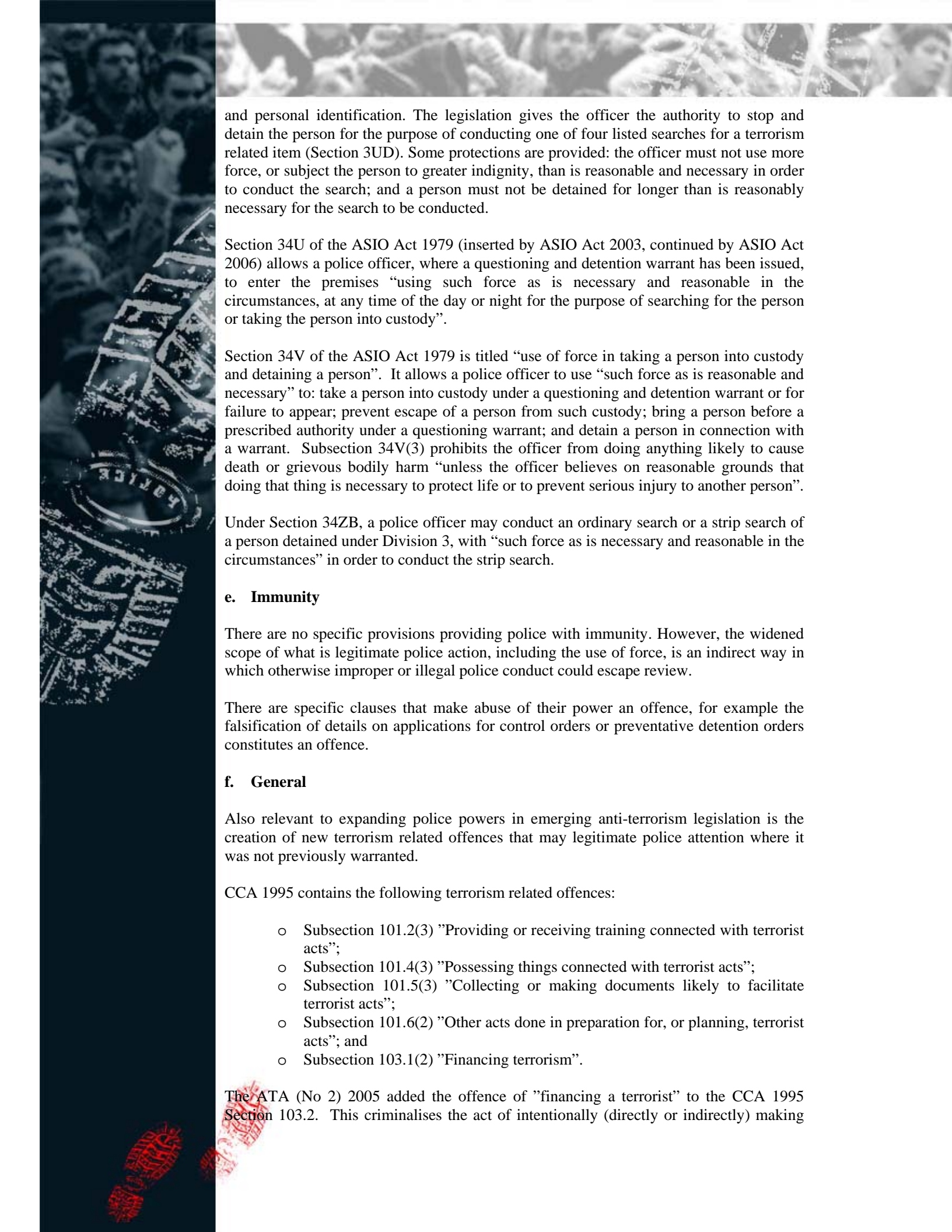
d. Use of Force

Police powers to stop, question, search and detain people have been significantly increased by recent anti-terrorism legislation. This expansion of police authority, requiring only "reasonable grounds" for suspecting a terrorism-related offence, presents an increased risk that these powers will be abused at the expense of citizens' rights. Moreover, a number of the sections allow for the use of "such force as is necessary and reasonable in the circumstances". Section 34V(3) of the ASIO Act 1979 (inserted by ASIO Act 2003) allows the police officer to act in a manner that is likely to cause death or grievous bodily harm to the person if "the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person". "Reasonable and necessary in the circumstances" is a discretionary concept. The assessment of proportionality may be conducted differently in an atmosphere of fear and heightened security, thus presenting a risk to the public at the hands of over zealous police officers.

Division 5 (preventative detention orders) of the CCA 1995 (inserted by the ATA (No 2) 2005) gives the police expanded powers to resort to force. Once a preventative detention order is in place in relation to a person, the police officer may (with the presence of the belief of necessity based on reasonable grounds):

- Enter premises "using such force as is necessary and reasonable in the circumstances and with such assistance from other police officers as is necessary, at any time of the day or night for the purpose of searching the premises for the person or taking the person into custody" (Section 105.22).
- Conduct a frisk search of the person and seize any seizable items found as a result of the search (Section 105.23).
- Conduct an ordinary search of the person and seize any seizable item relating to a terrorist act found as a result of the search (Section 105.24).
- Use such force as is necessary and reasonable in the circumstances to take identification material from a person (Section 105.43(3)).

The ATA (No 2) 2005 inserted Division 3A into the CA 1914. Division 3A deals with "powers to stop, question and search persons in relation to terrorist acts". If the officer suspects on reasonable grounds that the person might have just committed, might be committing or might be about to commit a terrorist act, or if the person is in a Commonwealth place in a prescribed security zone, Section 3UB gives police increased powers to request the person to provide their name, address, reason for being in that place



and personal identification. The legislation gives the officer the authority to stop and detain the person for the purpose of conducting one of four listed searches for a terrorism related item (Section 3UD). Some protections are provided: the officer must not use more force, or subject the person to greater indignity, than is reasonable and necessary in order to conduct the search; and a person must not be detained for longer than is reasonably necessary for the search to be conducted.

Section 34U of the ASIO Act 1979 (inserted by ASIO Act 2003, continued by ASIO Act 2006) allows a police officer, where a questioning and detention warrant has been issued, to enter the premises “using such force as is necessary and reasonable in the circumstances, at any time of the day or night for the purpose of searching for the person or taking the person into custody”.

Section 34V of the ASIO Act 1979 is titled “use of force in taking a person into custody and detaining a person”. It allows a police officer to use “such force as is reasonable and necessary” to: take a person into custody under a questioning and detention warrant or for failure to appear; prevent escape of a person from such custody; bring a person before a prescribed authority under a questioning warrant; and detain a person in connection with a warrant. Subsection 34V(3) prohibits the officer from doing anything likely to cause death or grievous bodily harm “unless the officer believes on reasonable grounds that doing that thing is necessary to protect life or to prevent serious injury to another person”.

Under Section 34ZB, a police officer may conduct an ordinary search or a strip search of a person detained under Division 3, with “such force as is necessary and reasonable in the circumstances” in order to conduct the strip search.

e. Immunity

There are no specific provisions providing police with immunity. However, the widened scope of what is legitimate police action, including the use of force, is an indirect way in which otherwise improper or illegal police conduct could escape review.

There are specific clauses that make abuse of their power an offence, for example the falsification of details on applications for control orders or preventative detention orders constitutes an offence.

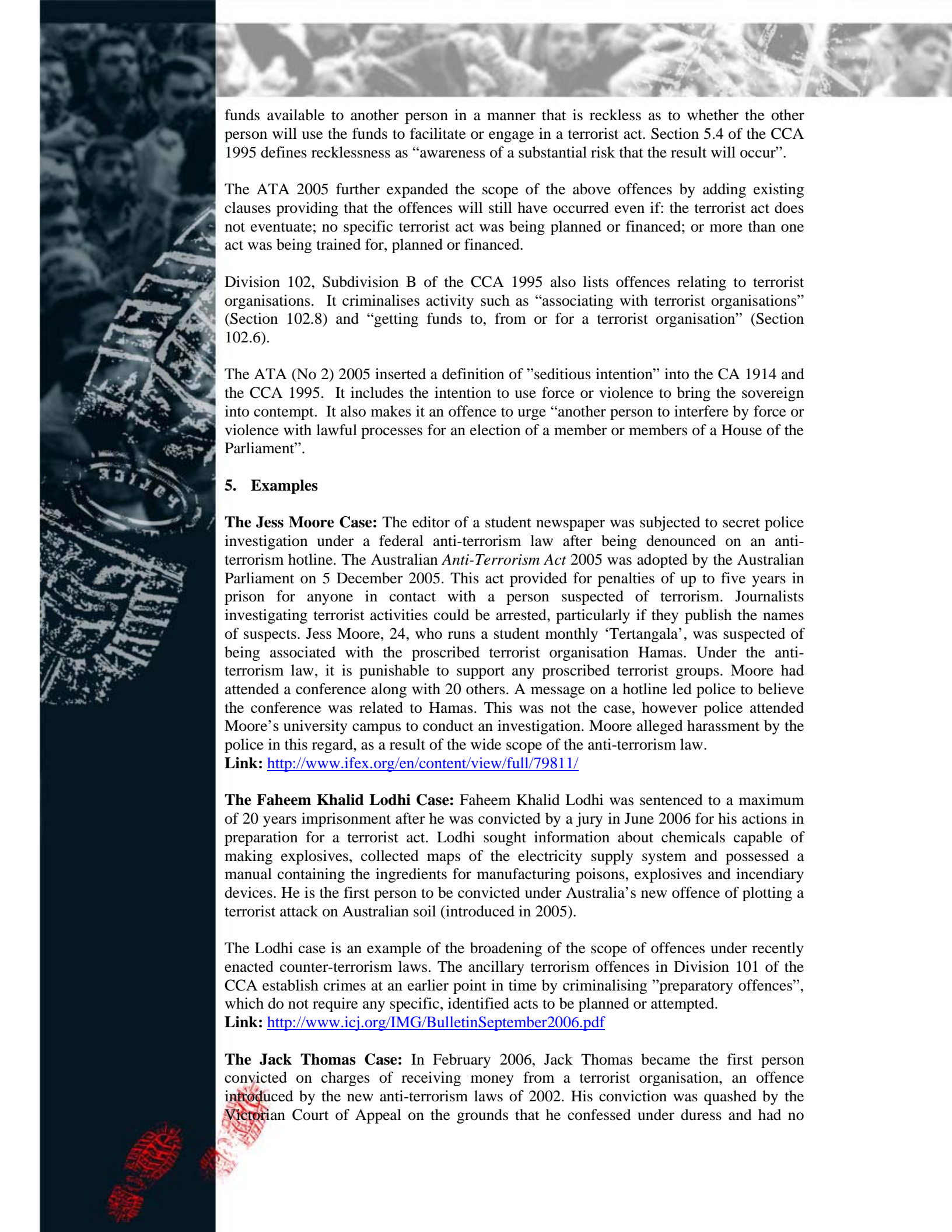
f. General

Also relevant to expanding police powers in emerging anti-terrorism legislation is the creation of new terrorism related offences that may legitimate police attention where it was not previously warranted.

CCA 1995 contains the following terrorism related offences:

- Subsection 101.2(3) “Providing or receiving training connected with terrorist acts”;
- Subsection 101.4(3) “Possessing things connected with terrorist acts”;
- Subsection 101.5(3) “Collecting or making documents likely to facilitate terrorist acts”;
- Subsection 101.6(2) “Other acts done in preparation for, or planning, terrorist acts”; and
- Subsection 103.1(2) “Financing terrorism”.

The ATA (No 2) 2005 added the offence of “financing a terrorist” to the CCA 1995 Section 103.2. This criminalises the act of intentionally (directly or indirectly) making



funds available to another person in a manner that is reckless as to whether the other person will use the funds to facilitate or engage in a terrorist act. Section 5.4 of the CCA 1995 defines recklessness as “awareness of a substantial risk that the result will occur”.

The ATA 2005 further expanded the scope of the above offences by adding existing clauses providing that the offences will still have occurred even if: the terrorist act does not eventuate; no specific terrorist act was being planned or financed; or more than one act was being trained for, planned or financed.

Division 102, Subdivision B of the CCA 1995 also lists offences relating to terrorist organisations. It criminalises activity such as “associating with terrorist organisations” (Section 102.8) and “getting funds to, from or for a terrorist organisation” (Section 102.6).

The ATA (No 2) 2005 inserted a definition of “seditious intention” into the CA 1914 and the CCA 1995. It includes the intention to use force or violence to bring the sovereign into contempt. It also makes it an offence to urge “another person to interfere by force or violence with lawful processes for an election of a member or members of a House of the Parliament”.

5. Examples

The Jess Moore Case: The editor of a student newspaper was subjected to secret police investigation under a federal anti-terrorism law after being denounced on an anti-terrorism hotline. The Australian *Anti-Terrorism Act* 2005 was adopted by the Australian Parliament on 5 December 2005. This act provided for penalties of up to five years in prison for anyone in contact with a person suspected of terrorism. Journalists investigating terrorist activities could be arrested, particularly if they publish the names of suspects. Jess Moore, 24, who runs a student monthly ‘Tertangala’, was suspected of being associated with the proscribed terrorist organisation Hamas. Under the anti-terrorism law, it is punishable to support any proscribed terrorist groups. Moore had attended a conference along with 20 others. A message on a hotline led police to believe the conference was related to Hamas. This was not the case, however police attended Moore’s university campus to conduct an investigation. Moore alleged harassment by the police in this regard, as a result of the wide scope of the anti-terrorism law.


Link: <http://www.ifex.org/en/content/view/full/79811/>

The Faheem Khalid Lodhi Case: Faheem Khalid Lodhi was sentenced to a maximum of 20 years imprisonment after he was convicted by a jury in June 2006 for his actions in preparation for a terrorist act. Lodhi sought information about chemicals capable of making explosives, collected maps of the electricity supply system and possessed a manual containing the ingredients for manufacturing poisons, explosives and incendiary devices. He is the first person to be convicted under Australia’s new offence of plotting a terrorist attack on Australian soil (introduced in 2005).

The Lodhi case is an example of the broadening of the scope of offences under recently enacted counter-terrorism laws. The ancillary terrorism offences in Division 101 of the CCA establish crimes at an earlier point in time by criminalising “preparatory offences”, which do not require any specific, identified acts to be planned or attempted.

Link: <http://www.icj.org/IMG/BulletinSeptember2006.pdf>

The Jack Thomas Case: In February 2006, Jack Thomas became the first person convicted on charges of receiving money from a terrorist organisation, an offence introduced by the new anti-terrorism laws of 2002. His conviction was quashed by the Victorian Court of Appeal on the grounds that he confessed under duress and had no



access to a lawyer while detained in Pakistan in 2003. Thomas became the first Australian to be subjected to an Australian Federal Police control order. The order was sought and granted at a Federal Magistrates' Court hearing, and served to restrict Jack Thomas' movements and require that he report to police regularly.

Link: <http://www.abc.net.au/7.30/content/2006/s1727427.htm>

¹ In the absence of internationally accepted definitions of the terms "terrorism", "terrorist" and "terrorist act", in this report these terms refer to either the definition as enshrined in the country's legislation, or the common use of the term. The use and meaning of these terms is addressed in CHRI's report "Stamping Out Rights: The impact of anti-terrorism laws on policing" (2007).

² Human Rights Watch (2005) *Submission from Human Rights Watch to Senate Legal and Constitutional Committee Inquiry into the Provisions of the Anti-Terrorism Bill (No. 2) 2005*.

³ Ibid.

⁴ Advisory Council of Jurists (2004) Asia Pacific Forum of National Human Rights Institutions, *Final Report: References on the Rule of Law in Combating Terrorism 2004*, Kathmandu, p. 21.

⁵ Ibid, pp. 21-22.

⁶ International Commission of Jurists, Eminent Jurists Panel on Terrorism, Counter-Terrorism and Human Rights (17 March 2006) *Press Release: Eminent Jurists Panel Concludes Australia Hearing on Counter-Terrorism Laws, Practices and Policies* http://ejp.icj.org/IMG/pdf/press_release_final_Australia.pdf.