



# AFP

AUSTRALIAN FEDERAL POLICE



## Independent National Security Legislation Monitor

Review of questioning and  
detention powers in  
relation to terrorism

(Part IC of the  
*Crimes Act 1914*)

August 2016

Submission by the  
Australian Federal Police

**UNCLASSIFIED**

## Introduction

The Australian Federal Police (AFP) welcomes the opportunity to make this submission as part of the Independent National Security Legislation Monitor (INSLM) 2016 review of certain questioning and detention powers in relation to terrorism. Relevantly, this submission focusses on the AFP's use of Part IC of the *Crimes Act 1914* in the investigation of terrorism offences.<sup>1</sup>

2. The AFP has appeared before the INSLM for this review, both in private hearings and at the public hearing. The AFP has made a confidential submission to the INSLM for the purpose of this review. While this public submission reflects the position stated in the AFP's confidential submission, classified material has been removed.

3. The ability to detain and question persons following arrest is an integral part of the criminal investigation process (for both terrorism and non-terrorism offences). The questioning of an arrested person is an important step in the criminal justice process. Police have a duty to be impartial and to endeavour to uncover the truth. Post-arrest interviews provide police with the opportunity to provide the person who has been arrested (the 'suspect') with evidence of their guilt in a controlled environment so that the suspect may provide their version of events. The interview also affords the suspect with the opportunity to proclaim their innocence or make an early admission of guilt, as the case may be. In some instances, the information provided to police in an interview may dispel the suspicion on which the arrest was made and result in the suspect being released without charge.

4. Part IC provides a statutory basis for the detention and treatment of arrested persons. Part IC seeks to balance the legitimate needs of law enforcement with the civil liberties of an arrested person. Part IC was introduced in 1991 and has not been subject to holistic review since that time. The operational environment in which Part IC applies – particularly for terrorism investigations – has changed considerably over the last 25 years.

5. The AFP's practical experience with Part IC is that the legislative regime no longer strikes the appropriate balance between operational needs and individual rights.

6. The AFP considers that the INSLM's current inquiry provides an opportunity to examine the ongoing efficacy of Part IC. The AFP does not, however, propose any changes to the fundamental safeguards contained in Part IC.

7. While this submission focusses on the AFP's practical experience with Part IC in a terrorism context, many of the challenges with Part IC also arise in non-terrorism investigations (which fall outside the remit of the INSLM).

---

<sup>1</sup> Note that this submission deals only with the AFP's use of Part IC of the *Crimes Act 1914* in relation to persons arrested for terrorism offences and does not examine the provisions of Part IC that relate to protected suspects.

**UNCLASSIFIED**

## Overview of submission

8. This submission provides an overview of how Part IC operates, its legislative history, and its application in the current terrorist threat environment.
9. The investigation of terrorism offences is complex. It often involves the simultaneous execution of multiple search warrants, liaison with relevant agencies, and the assessment of voluminous or complex evidential material. Investigative plans can often be fluid and investigators need to be responsive to rapidly changing circumstances.
10. Processing and communicating relevant information to satisfy legislative requirements in Part IC (including to enable the continued detention of the person) takes a significant amount of time. This may pose a risk where there is an imminent threat of a terrorist attack and investigative resources have to be diverted to satisfy administrative requirements.
11. A key issue with the current structure of Part IC is that the initial investigation period is too short to conduct an interview in relation to the suspected commission of a terrorism offence, and comply with all other requirements of Part IC. This is exacerbated by the fact that parts of the four hour initial investigation period are invariably lost during mandatory administrative tasks, such as processing the arrest, custody notifications and charging (generally safeguards for the arrested person). These time constraints mean it is often necessary to seek an extension to the investigation period or to apply for time to be specified as disregarded time (referred to in this submission as 'specified time').
12. Operational experience has shown that the time and resources required to thoroughly and accurately prepare these applications in satisfaction of the legislative tests significantly disrupts the effective utilisation of the investigation period. Each application requires reasonable and considered estimates of the time required to advance and complete inquiries from investigators, search teams, forensic teams and interview teams in order to provide a complete and accurate as well as justifiable application to a magistrate for an extension. To meet timeframes, this process and the drafting of the application must be commenced shortly after the investigation period begins.
13. Practical issues are also experienced by investigators in complying with Part IC, in particular in relation to the procedures for applying for extensions and specified time, and the availability of magistrates to hear these applications.

## Overview of Part IC

14. Part IC of the Crimes Act sets out the parameters within which a person arrested for a Commonwealth offence can be detained for the purpose of investigation, and sets out safeguards for the arrested person. Part IC is a crucial aspect of the AFP's investigation process, both for terrorism investigations, and non-terrorism investigations more broadly.
15. Part IC allows police to hold an arrested person in custody for an 'investigation period'. The investigation period starts from the moment the person is arrested and continues regardless of whether investigators are actually questioning the arrested person.

**UNCLASSIFIED**

At the end of the investigation period, the arrested person must either be released or brought before a judicial officer as soon as practicable.<sup>2</sup>

16. There is a maximum initial investigation period of two hours for juveniles, Aboriginal persons and Torres Strait Islanders, and four hours for all other arrested persons.<sup>3</sup> Investigators are not required by Part IC to apply to a magistrate or seek approval from a senior member of the AFP to use the initial investigation period.

17. For arrests for serious Commonwealth offences and terrorism offences, the initial investigation period can be extended by application to a magistrate. For terrorism offence arrests, any number of extensions can be granted, to a combined maximum of 20 hours.<sup>4</sup> Including the initial investigation period, this makes the maximum investigation period for terrorism offence arrests 24 hours (or 22 hours for juveniles).

18. Despite the prescribed maximum investigation period, there is an overriding provision in Part IC that the investigation period must not extend beyond what is reasonable having regard to all the circumstances.<sup>5</sup>

## **Investigation Period**

19. The investigation period continues to run unless a category of disregarded time applies. Therefore, the investigation period will continue to run even if investigators are not interviewing the arrested person. Because of the limited categories of disregarded time, the actual time spent interviewing the arrested person may be significantly less than the four (or two) hours afforded under Part IC. As a result, the period during which the arrested person is actually interviewed is often considerably less than the investigation time used.

20. Generally, the total investigation period used by the AFP amounts to a very small portion of the total duration of Part IC detention. In several recent arrests, the total investigation time used has been less than ten per cent of the time detained under Part IC. For the balance of the time the arrested person may, for example, be sleeping, eating, consulting their legal practitioner (or waiting for them to arrive), waiting while the AFP makes an application for an extension, or waiting under a declaration of specified time.

## **Disregarded time**

21. The investigation period is suspended when a category of disregarded time applies (commonly known as 'down time'),<sup>6</sup> provided no questioning takes place.<sup>7</sup> Categories of disregarded time include communicating with a legal practitioner, medical attention, rest, and conveying the arrested person to premises that have facilities for complying with

---

<sup>2</sup> Subsection 23DB(4) of the *Crimes Act 1914*.

<sup>3</sup> Subsection 23DB(5) of the *Crimes Act 1914*.

<sup>4</sup> Subsection 23DF(7) of the *Crimes Act 1914*.

<sup>5</sup> See subsection 23DB of the *Crimes Act 1914*.

<sup>6</sup> Subsection 23DB(9) of the *Crimes Act 1914*.

<sup>7</sup> Subsection 23DB(10) of the *Crimes Act 1914*.

**UNCLASSIFIED**

Part IC.<sup>8</sup> Time is also disregarded when the AFP makes various applications to a magistrate under Part IC.<sup>9</sup>

22. There are thirteen categories of disregarded time which do not count toward the investigation period in terrorism offence arrests. Most categories of disregarded time serve as safeguards for the arrested person. They ensure there is no disincentive for investigators to stop their questioning to give the arrested person time to meet that person's needs or to give investigators time to comply with the requirements of Part IC. For example, the investigation period is paused when the arrested person is resting, receiving medical treatment, or communicating with their family or lawyer.

23. The time taken to allow the making of an application for an extension to the investigation period or for specified time may also be disregarded from the investigation period.<sup>10</sup> This category of disregarded time can include time for the arrested person's legal representative to prepare and attend before the magistrate to make submissions in response to the application.

### Specified time

24. Where a person has been arrested for a terrorism offence, there is an additional category of disregarded time called 'specified time' which must be approved by a magistrate.<sup>11</sup> An instrument permitting specified time can be issued by a magistrate where continued detention is necessary to preserve or obtain evidence or to complete the investigation. Specified time is capped at seven days.<sup>12</sup> If specified time is granted, the AFP is able to disregard time that is being used to obtain evidence or complete the investigation.

25. It takes time to conduct search warrants, seize evidence, transport evidence to a forensics facility and analyse the evidence. In modern investigations, evidence can be extracted from a wide array of sources, including electronic devices and other material seized under warrant. Time is needed to analyse this information and compare it to evidence provided in interviews. The arrested person will not necessarily be interviewed during this time, but may need to be detained under Part IC to be questioned on evidence as it becomes available. For these reasons, investigators may apply to a magistrate for specified time.

26. It should be noted that time during which an interview takes place must be classified as investigation time; it may not be disregarded or used as specified time. As such, the time restraints on interviewing a suspect are not addressed by specified time.<sup>13</sup>

---

<sup>8</sup> See full list at subsection 23DB(9) of the *Crimes Act 1914*.

<sup>9</sup> Subsections 23DB(9)(g) and (h) of the *Crimes Act 1914*.

<sup>10</sup> Subsection 23DB(9)(h) of the *Crimes Act 1914*.

<sup>11</sup> Subsection 23DB(9)(m) and section 23DD of the *Crimes Act 1914*.

<sup>12</sup> Subsections 23DB(11) of the *Crimes Act 1914*.

<sup>13</sup> Subsection 23DB(10) of the *Crimes Act 1914*.

**UNCLASSIFIED**

## Safeguards

27. Part IC also provides a number of safeguards for arrested persons, including a requirement for police to:

- caution the arrested person, including about their right to silence and right to communicate with a friend/relative/legal practitioner,
- record interviews,
- treat the person with humanity and dignity, and
- provide the person with certain information (for example, a copy of instruments issued by a magistrate for extensions and specified time).

Additional safeguards apply for juveniles, Aboriginal persons and Torres Strait Islanders, including the requirement for an 'interview friend' to be present during the interview.

## The environment in which Part IC is applied has evolved

28. Part IC, and other statutory pre-charge detention regimes in Australia, were originally enacted to formalise and regulate processes that had developed ad hoc within the constraints of the common law. Under common law, police are required to bring a suspect before a magistrate as soon as practicable after the arrest. Prior to the enactment of pre-charge detention legislation, police had no authority to delay bringing an arrested person before a magistrate in order to question them or continue investigations.

29. In practice, however, police regularly questioned suspects after arrest and prior to bringing them before a magistrate. For example, if a person was arrested at night, they could be lawfully detained (and questioned) until the courts re-opened again. Where a delay was considered unreasonable, the courts had discretion to reject evidence on the ground that it had been unlawfully obtained. These principles are supported by a large body of case law.<sup>14</sup>

30. Part IC was enacted in 1991 to formalise pre-charge investigative detention at the Commonwealth level, set a time limit on detention and ensure the protection of the rights of an arrested person.

31. A summary of the policy development of Part IC, and amendments to the regime, are set out at **Attachment A**. Most notably, Part IC was amended in 2004 to increase the maximum extension of the investigation period for terrorism offences to 20 hours, and introduced the concept of 'specified time' (which was later capped to seven days in 2010).

32. Terrorism has changed significantly since the initial introduction of Part IC in 1991. Historically, the perceived primary threat was from al-Qa'ida and its affiliates. This threat was characterised by sophisticated, well-coordinated plots with multiple operatives and long planning cycles. This attack style was epitomised by the September 11 attacks in

---

<sup>14</sup> See, for example, *Cleland v R* (1982) 151 CLR 1; *Williams v R* (1986) 161 CLR 278.

2001, which comprised of four highly coordinated attacks, financed and planned at the highest level of the al-Qa'ida hierarchy, and involved years of planning.

33. The terrorism threat environment changed significantly around 2014-15 with the rise of Islamic State of Iraq and Syria (ISIS) and the increasing occurrence of smaller-scale lone actor style attacks in Western countries. The current terrorism threat environment in Australia is characterised by low cost, locally financed plots using relatively simple tactics and readily acquired weapons (knives, improvised explosive devices, firearms etc.) which do not necessarily require specialist skills or expertise to use effectively. Perpetrators do not necessarily receive in-person or extensive training. While an attack may be carried out in the name of a terrorist organisation such as ISIS, plans are not necessarily centrally coordinated or financed by the organisation.

34. Current perpetrators are very effective at using the internet to recruit (including 'grooming' young people), train, incite and plan attacks. By using encrypted chat applications, chat rooms and social media, a person can become radicalised and plan an attack very quickly and with very little outward signs of radicalisation.

35. A significant, practical impact of this fast paced and dynamic terrorist threat environment is that plots develop quickly and with little opportunity for law enforcement to intervene. The Joint Counter Terrorism Teams (JCTTs) often need to make arrests very soon after becoming aware of the threat.

36. Despite the changed threat environment, Part IC has not significantly changed since its initial introduction. The initial four hour investigation period, for example, remains unchanged since 1991. The most significant amendment to Part IC has been the introduction of 'specified time' in 2004, allowing investigators to disregard time that is necessary to preserve or obtain evidence or complete the investigation. However, investigators cannot question the arrested person during this time.

## Challenges in applying Part IC to terrorism investigations

37. The AFP's experience with Part IC is that the initial investigation period of four hours (and two hours for juveniles, Aboriginal persons and Torres Strait Islanders) is rarely enough time to conduct an effective interview. While there is a mechanism to extend the investigation period, the process of seeking an extension can impede or delay completion of the investigation and, in some cases, unnecessarily prolong the detention of the arrested person. A longer initial investigation period would more adequately reflect the reality of complex investigations (such as terrorism), without significantly impacting on the existing rights of the arrested person.

38. Streamlining the process for seeking extensions would also facilitate the AFP's efficient and effective use of investigative (including legal) resources, and may also reduce total detention times for arrested persons. Clarifications to certain categories of disregarded time may also be necessary to ensure that the investigation period is not unnecessarily reduced by legitimate police activities.

**UNCLASSIFIED**

39. The availability of declarations of specified time does not reduce the need for a longer initial investigation period because investigators cannot question the arrested person during specified time.

## **Historical policy basis for four hours initial investigation period**

40. Placing a cap on the initial investigation period was considered necessary in order to ensure that arrested persons were not kept in police custody for 'too long'.<sup>15</sup> The 1975 Australian Law Reform Commission report recommended a four hour initial investigation period on the basis of statistics relating to case clearance time, but generally acknowledged that clearance times may be faster where arrest represented the culmination of an investigation (rather than its commencement).<sup>16</sup>

41. In 1989, the *Review of Commonwealth Criminal Law: Interim Report, Detention Before Charge* (known as the Gibbs Committee Report), recommended a four hour initial investigation period for less serious offences, and a six hour initial investigation for offences punishable by imprisonment for more than 12 months (recognising that more time would be required for the investigation of offences related to more serious and complex matters).<sup>17</sup> Indeed, the Gibbs Committee Report further observed that an initial investigation period of between six and 12 hours would not contravene article 9(3) of the *International Covenant on Civil and Political Rights*.

42. The *Crimes (Investigation of Commonwealth Offenders) Amendment Act 1991* did not follow the Gibbs Committee Report recommendation and set the initial investigation period at four hours. In the accompanying Second Reading Speech, the then Attorney-General explained that having an initial investigation period that differed depending on the seriousness of the offence could lead to evidentiary problems where a person was arrested for a more serious offence but later charged with a less serious offence.<sup>18</sup> At the time, the then Attorney-General considered that the need to extend the investigation period would only happen in 'those very few complex cases'.<sup>19</sup>

## **Operational reality and challenges for investigators**

### Length of initial investigation period

43. The need for a longer investigation period reflects the operational reality of terrorism investigations, namely that they cannot generally be completed within four hours. The reasons for this are set out below:

- i. Terrorism investigations tend to move quickly from referral to arrest – there is often very little warning before police need to act to prevent an attack being

---

<sup>15</sup> Australian Law Reform Commission (ALRC) 1975, *Criminal Investigation Report 2*, para 90 p40.

<sup>16</sup> *Ibid* para 92 p40.

<sup>17</sup> P36.

<sup>18</sup> Mr Duffy, Second Reading Speech: Crimes (Investigation of Commonwealth Offences) Amendment Bill 1990, 15 November 1990.

<sup>19</sup> *Ibid*.

**UNCLASSIFIED**

carried out. Arrest in these situations often represents the commencement of the investigation rather than the culmination of an investigation. As a result, the interview of the suspect may inform operational decisions and be included in the brief of evidence.

- ii. Terrorism suspects can be arrested based on reasonable suspicion rather than reasonable belief (allowing police to intervene at an earlier point in time to protect the community from potentially catastrophic harm).<sup>20</sup>

In these situations, police will need to gather sufficient evidence during the investigation period (and during any disregarded time, including specified time) to inform a decision on whether to release the person or bring the person before a magistrate.

- iii. Investigators may not be able to complete a search warrant prior to the expiry of the initial investigation period. AFP investigations (across a range of Commonwealth crime types, not just terrorism) now tend to involve large amounts of digital material seized under warrant and on arrest. The significant expansion in the use of electronic devices and the massive amounts of data that is now stored on such devices was not contemplated at the time that the four hour investigation period was introduced.

44. Because the initial investigation period is so short, investigators will often begin drafting an application for extension almost immediately after the investigation period begins. Even where the extended investigation period is ultimately not needed, investigators will almost always have to begin an extension application to ameliorate the risk of going over time. This is particularly the case for juveniles, where the initial investigation period is just two hours.

45. Applications to extend the investigation period can be particularly time consuming. It can be difficult to gain access to a magistrate in remote locations and after hours (see 'Magistrate Availability' below). Furthermore, Part IC includes a requirement that the arrested person (or their legal representative) be provided with a copy and allowed to make representations to the magistrate about the application. Magistrates sometimes adjourn applications to a time when the arrested person's legal practitioner is available.

46. In practice, extension applications can delay the investigation period by many hours, even where investigators only need a small amount of the additional investigation period. The AFP's operational experience suggests that, in some cases, a longer initial investigation period could potentially reduce the total amount of time spent in detention under Part IC, and, in all cases, would permit investigators to focus on interviewing the suspect and investigating the offence(s) rather than proactively preparing applications for an extension of time.

---

<sup>20</sup> *Counter-Terrorism Legislation Amendment (Foreign Fighters) Act 2014* changed the threshold of arrest for terrorism investigations.

47. There are a number of negative consequences of making an extension application during the first four (or two) hours of the investigation period:

- Instead of interviewing the arrested person or examining and collating evidence, the investigators' time is spent applying for an extension. Because the application generally includes specific details of the ongoing investigation, the application is usually prepared by investigators that are directly involved in the operation.
- The flow of the interview is disrupted as investigators are drawn away to consult the AFP's lawyers, draft applications and appear before the magistrate. This interferes with the interview strategy, disrupts the flow of the interview and can be confusing for the arrested person.
- The time taken to make the extension application is classified as disregarded time under subsection 23DB(9)(h). Therefore the extension application may unnecessarily extend the total time spent in detention.

48. The reality of modern investigations and the current terrorism threat environment is that the four hour initial investigation period prescribed by Part IC is inadequate. Extending the initial investigation period by an additional four to eight hours (i.e. increasing the initial investigation period to eight or 12 hours) would allow investigators sufficient time to interview the arrested person, including putting evidence before the arrested person for comment.

49. Extending the initial investigation period by an additional four to eight hours may appropriately balance the rights of the arrested person with the reality of modern investigations. The total investigation period could still be expressed as a 'maximum', and be subject to the overriding requirement that the investigation period must not extend beyond what is reasonable having regard to all the circumstances. There would not be any need to change the maximum total time for the investigation period (being 24 hours for arrests for terrorism offences).

50. In recognising the need for a longer initial investigation period, the Gibbs Committee Report recommendation was made against the backdrop of the criminal threat environment of the 1980s, contemplating drug importations and conspiracies, rather than the fast paced and high stakes environment of terrorism. In light of the potentially catastrophic impact on the community of a successful terrorist attack, coupled with the complexities in investigating terrorism offences in today's environment, consideration could be given to whether the initial detention period should be extended. Further, the speed at which police must act to prevent a terrorist attack means that arrest often occurs at a very early stage of the investigation.

51. In some cases, the practical effect of having a longer initial investigation period could mean that the person is released sooner (even within four hours) as precious time is not being used to prepare and apply for extensions to the investigation period.

52. Other Australian jurisdictions have longer or more flexible limits to the maximum initial investigation period, including for non-terrorism offences. Western Australia has an

**UNCLASSIFIED**

initial investigation period of six hours.<sup>21</sup> In Victoria and the Northern Territory, investigating officials may hold a person in custody for a reasonable period of time.<sup>22</sup>

### Certain categories of disregarded time

#### *Administrative tasks*

53. Parts of the four hour initial investigation period are invariably lost during mandatory administrative tasks, such as processing the arrest, custody notifications and charging. None of this time can be 'disregarded' and in some instances, these administrative tasks can take up to an hour and a half of the investigation period.

54. For example, in a busy local police station an arrested person may have to wait in line to be brought before the custody officer. There may also be a wait for an interview room to become available. Furthermore, state and territory laws have varying procedural requirements which are generally safeguards for the arrested person. For example, where an arrested person has items present on them at the time of the arrest, these items need to be individually recorded on a property register.

55. Considering that the initial investigation period is only four hours (or two in some instances) these activities can take up a large proportion of the time that was intended to be set aside for interviewing. The AFP notes some administrative procedures constitute important safeguards for the arrested person and it may be appropriate to consider legislative solutions to this issue.

### Electronic application process

56. The provisions for making Part IC applications by telephone or electronic means are outdated and onerous. Relevant provisions in Part IC refer to telex and fax, which are technologies rarely used today. For terrorism offence arrests, applications must be made in writing, while all other applications can be made over the telephone. This fails to recognise the fast paced operating environment of most terrorism investigations.

57. Where an application is made in writing by electronic means, the magistrate must inform the investigating official of the matters included in the instrument and provide a copy of the instrument as soon as practicable after signing it. As soon as practicable after being informed, the investigating official must make a written copy of the information provided and send this back to the magistrate. If there is any material error in the copy, the entire instrument is taken to have no legal effect.<sup>23</sup> This applies even where the material error has no bearing on other aspects of the instrument and the material error has not had any adverse impact on the arrested person at the time it was identified.

58. The requirements in regards to electronic written applications create legal risk for the police by requiring an unnecessary duplication of process. The electronic

---

<sup>21</sup> Section 140 of the *Criminal Investigation Act 2006* (WA).

<sup>22</sup> Section 464A of the *Crimes Act 1958* (Vic); section 137 of the *Police Administration Act 1978* (NT)

<sup>23</sup> Section 23E of the *Crimes Act 1914*.

**UNCLASSIFIED**

communication of written applications (e.g. by email) does not require this degree of corroboration. In person applications take considerable time and carry their own set of practical difficulties (see further detailed below). Consideration could be given to whether the electronic application requirements remain current in light of the evolving terrorist threat and modern technology.

### **Magistrate availability**

59. In many instances, the AFP has experienced difficulties in securing an available magistrate to hear the application. In some circumstances AFP investigators have had to call magistrates at their place of residence or on their personal mobile number during the night to find someone who is available to assist.

60. It can also be difficult to secure an available magistrate in remote areas, including outside capital cities. For example, in one case, the AFP was required to make contact with an on-call magistrate who was, at the time, in a location 800km away from a major city. Arrangements were subsequently made to have the applications heard by the Magistrates Court during normal business hours, however, the timing of the applications were constrained by resourcing and timetabling factors at the Court. This example highlights the challenges that may be faced when making applications in remote and regional areas, including where there may be a lack of familiarity with the processes provided for under Part IC.

61. As early as 1989, the Gibbs Committee anticipated that Part IC would create issues in terms of magistrate availability:

*The vast geographical spread of Australia makes it more difficult to fix a period that would be appropriate for outback areas as well as for larger cities... In practice a justice or magistrate will not necessarily be available, in country areas, before whom the arrested person may be charged or to whom an application might be made for an extension of the period of detention... It might be doubtful whether the Commonwealth would be able to secure the necessary agreement of the States and the Northern Territory to making magistrates or other court officers available on a 24-hour basis to review the continued justification for police custody.<sup>24</sup>*

62. The difficulties regarding magistrate availability could, in some circumstances, be addressed through the introduction of a longer initial investigation period (although this would not eliminate the need for applications for specified time). It may also be worth considering amendments to Part IC to allow the AFP to approach other issuing officers.

---

<sup>24</sup> P35.

## Attachment A - Timeline of amendments to Part IC

- Pre 1991 Under common law, police are required to bring a suspect before a magistrate as soon as practicable after the arrest. Prior to the enactment of pre-charge detention legislation, police had no authority to delay bringing an arrested person before a magistrate in order to question them or continue investigations. In practice, if a person was arrested at night, they could be lawfully detained (and questioned) until the courts re-opened. This is supported by a large body of case law.
- 1975 Australian Law Reform Commission (ALRC) released a report titled, 'Criminal Investigation Report 2', recommending, amongst other things, enactment of a procedural code covering arrest and questioning. The report recommended an initial detention period of four hours, which could be extended by a magistrate. Time taken to travel to the police station, communicate with relatives or a lawyer and wait for their arrival was not to be included in the four hour period.
- 1977 Based on the ALRC recommendations, the *Criminal Investigation Bill 1977* was introduced into Federal Parliament, but lapsed at dissolution.
- 1981 A second *Criminal Investigation Bill* was introduced but again lapsed at dissolution. Meanwhile, aspects of the ALRC recommendations were enacted by some states and territories.
- 1986 In *Williams v R* (1986) 161 CLR 278, the High Court confirmed that, in the absence of a statutory power, police have no authority to delay in taking an arrested person before a magistrate for the purpose of questioning them. The decision also confirmed that a court has the discretion to reject a confession made voluntarily during an unlawful detention.
- 1989 The Commonwealth Attorney-General tasked Sir Harry Gibbs (former Chief Justice of the High Court) with undertaking a review of the Commonwealth's criminal laws, including, in particular, a review of pre-charge detention. In 1989, the Gibbs Committee released an interim report titled 'Detention before Charge', which recommended the following.
- The introduction of legislation prescribing a maximum period in which an arrested person can be detained for investigation before charge or release ('the investigation period'). The Report recommended six hours for arrests for offences punishable by imprisonment for a period exceeding 12 months, and four hours in all other cases.
  - The investigation period be extendable to a total period of 24 hours by a magistrate or justice of the peace.
  - Travel to the nearest police station, communications with a legal practitioner, friend or relative, the making of an extension application etc. be excluded from the investigation period.

**UNCLASSIFIED**

- Key safeguards, including the right to communicate with a legal practitioner, friend or relative, cautioning, the right to an interpreter etc.

1991 In response to the Gibbs Committee Report, the *Crimes (Investigation of Commonwealth Offences) Amendment Act 1991* was passed. This Act introduced Part IC into the *Crimes Act 1914*, authorising police to detain a person for the purpose of investigating whether the person committed the offence for which they were arrested or some other Commonwealth offence.

The key feature of Part IC was the four hour investigation period, extendable by up to eight hours on application to a magistrate in the case of offences punishable by more than 12 months imprisonment. The Act also included safeguards such as the right to communicate with a legal practitioner, family member or friend, and interview recording requirements.

2004 In 2004, the *Anti-Terrorism Act 2004* amended Part IC to increase the maximum extension for terrorism offence arrests to 20 hours. The maximum extension for non-terrorism offence arrests remained at eight hours. Specified time was introduced as an uncapped category of disregarded time that could be approved by a magistrate, justice of the peace or bail justice, including by telephone.

This amendment was a response to the 2004 Madrid train bombings. In the wake of the attack the then Victorian Police Chief Commissioner, Christine Nixon, announced that if a Madrid-style attack were carried out in Australia, state police officers would not have enough time to interrogate suspects because federal law required them to be charged or released.

2008 The Hon John Clarke QC was appointed to conduct an independent inquiry into the case of Dr Mohamed Haneef (who was arrested for the offence of providing support to a terrorist organisation). At the time, Dr Haneef's arrest was the only instance where Part IC had been used to prolong detention in a terrorism investigation. The Clark Report, tabled in Parliament on 23 December 2008, recommended reform of Part IC.

The Clark Report focused on a specific terrorism operation and did not provide a general examination of terrorism laws.

2010 In response to the Clark Report, the *National Security Legislation Amendment Act 2010* amended Part IC to:

- clarify the interaction between the power of arrest without warrant under section 3W with the powers of investigation under Part IC
- introduce a seven day limit to 'specified time', include a requirement that the application be in writing, and remove the ability to apply to a justice of the peace or bail justice

**UNCLASSIFIED**

- clarify how the investigation period and disregarded time are calculated
- clarify the procedures for making applications for extensions and specified time, including enhancement of safeguards, and
- separate terrorism and non-terrorism provisions into sub-divisions A and B.

**UNCLASSIFIED**