REPORT OF INQUIRY INTO THE ACTIONS TAKEN BY ASIO IN 2003 IN RESPECT OF MR IZHAR UL-HAQUE AND RELATED MATTERS

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This is a report made pursuant to section 22 of the *Inspector-General of Intelligence and Security Act 1986* (IGIS Act) on an inquiry, conducted under the IGIS Act, into the actions taken by the Australian Security Intelligence Organisation (ASIO) in 2003 in respect of Mr Izhar Ul-Haque[1], and related matters.

BACKGROUND

2. On 5 November 2007 Adams J of the NSW Supreme Court criticised the conduct of certain ASIO officers in his decision *R v Ul-Haque* [2007] NSWSC 1251.

3. The matter before the court involved charges against Mr Ul-Haque for an offence under s102.5(1) of the *Criminal Code.* That is, "between 12 January 2003 and 2 February 2003, in Pakistan, he did receive training with respect to combat and the use of arms from a terrorist organisation, namely Leshkar-e-Taiba, ... knowing that the said organisation was a terrorist organisation."

4. It was agreed by the prosecution and defence that, prior to the empanelment of a jury, Adams J would separately hear and determine the admissibility of certain evidence upon which the prosecution wished to rely. This evidence related to alleged admissions made by Mr Ul-Haque during interviews with the Australian Federal Police (AFP) on 7 and 12 November 2003 (which were held soon after ASIO had interviewed Mr Ul-Haque on 6 and 7 November 2003) and also on 9 January 2004.

5. At the completion of *voir dire* hearings, Adams J found that the AFP records were inadmissible because:

(a) they were influenced by oppressive conduct toward Mr Ul-Haque by ASIO and AFP officers (with reference to s84 of the *Evidence Act 1995*)[2]

(b) the truth of certain admissions made by Mr Ul-Haque was likely to have been adversely affected by the methods of questioning employed by two ASIO officers, known to the court as B15 and B16 (with reference to s85 of the Evidence Act)[3], and

(c) admissions had been obtained through improper conduct by the ASIO officers, B15 and B16 (with reference to s138 of the Evidence Act)[4].

6. Despite the absence of charges against B15 and B16, notice of those charges to them, legal representation for them as individuals in respect of those charges, and a hearing to specifically determine those charges and at which they could be heard and

[1] I understand that he has since been formally conferred the title of Doctor. However, at the time of the relevant events this was not the case and I have therefore referred to him as "Mr" for the purposes of this report.
[2] Judgment in *R v Ul-Haque* [2007] NSWSC 1251, paragraphs 94-99.
[3] Judgment in *R v Ul-Haque* [2007] NSWSC 1251, paragraphs 100-103.
[4] Judgment in *R v Ul-Haque* [2007] NSWSC 1251, paragraphs 104-106.

put a defence, the Judgment also stated that one or both of them had committed the offences of false imprisonment and kidnapping at common law and under s86 of the *Crimes Act 1900* (NSW). The Judgment further stated that the torts of false imprisonment and unlawful trespass at the residence of Mr Ul-Haque had been committed (as the conduct of an interview at that residence was not reasonably incidental to the authority provided by an entry and search warrant executed there on 6 November 2003). [5]

7. After this Judgment was given, the prosecution withdrew the case against Mr Ul-Haque.

8. The position of the Director-General of Security is that ASIO at all times acted lawfully and properly in the discharge of its functions in this matter. He submitted to me that when the Judgment was given, it was not possible for him, nor for B15 or B16, to appeal against the decision because none were parties to the Supreme Court proceedings. He also noted that B15 and B16 were not legally represented in their own right in the *voir dire* proceedings and the Director-General was only represented in relation to public interest immunity issues.

BASIS OF INQUIRY

9. Section 8(1)(a) of the IGIS Act relevantly provides me the following powers of inquiry in respect of ASIO:

> *(1) Subject to this section, the functions of the Inspector-General in relation to ASIO are:*
>
> *(a) at the request of the responsible Minister, of the Inspector-General's own motion or in response to a complaint made to the Inspector-General, to inquire into any matter that relates to:*
>
> *(i) the compliance by ASIO with the laws of the Commonwealth and of the States and Territories;*
>
> *(ii) the compliance by ASIO with directions or guidelines given to ASIO by the responsible Minister;*
>
> *(iii) the propriety of particular activities of ASIO;*
>
> *(iv) the effectiveness and appropriateness of the procedures of ASIO relating to the legality or propriety of the activities of ASIO; or*

[5] Judgment in *R v Ul-Haque* [2007] NSWSC 1251, paragraph 62.

(v) an act or practice of ASIO that is or may be inconsistent with or contrary to any human right, that constitutes or may constitute discrimination, or that is or may be unlawful under the Age Discrimination Act 2004, the Racial Discrimination Act 1975 or the Sex Discrimination Act 1984, being an act or practice referred to the Inspector-General by the Human Rights and Equal Opportunity Commission;

10. In all the circumstances I decided that it would be appropriate for me to conduct an own motion inquiry, under s8(1)(a) of the IGIS Act, looking broadly into:

(a) actions taken by ASIO in respect of Mr Ul-Haque throughout 2003, and

(b) ASIO's policy, procedures and general practices on the interviewing of persons of security interest, as they stood in November 2003 and currently (if different). This would include interviews conducted during the execution of entry and search warrants as well as those in other circumstances, and the interaction of these activities with activities of the AFP.

11. The inquiry in relation to (a) above fell within my powers under s8(1)(a)(i) and (iii) of the IGIS Act, and in relation to (b) above within my powers under s8(1)(a)(iv) of the IGIS Act.

12. It is important to note that my role is not to make findings on whether criminal offences or misconduct have occurred, nor is it to usurp the role of prosecutorial authorities. However, it is within my remit to consider what action(s), if any, ASIO should take related to the matter.

13. This process is one whereby I can separately and independently examine all the relevant material and make recommendations, to the extent consistent with my remit. The IGIS Act provides for an inquisitorial process with significant flexibility as to how lines of inquiry are pursued.

METHODOLOGY

File holdings

14. I made arrangements for ASIO to produce all materials relevant to this case including:

(a) files with information on Mr Ul-Haque and records relating to its contacts with him in 2003, any plans to interview him, warrant requests, operational planning for the execution of a search warrant, post operation reporting and records of interview, and

(b) information on ASIO's policy, procedures and general practices on the interviewing of persons of security interest, the conduct of enter and search operations and liaison arrangements with police services.

15. This material was made available for review.

Electronic records

16. One video tape recording, taken during part of the search of Mr Ul-Haque's residence, was reviewed. Audio recordings of the interview ASIO had conducted with Mr Ul-Haque at his residence had been made, but (as noted by Adams J[6] these were inaudible).

17. I arranged for the data from six internal ASIO email accounts to be retrieved from the period 1-10 November 2003. The holders of these accounts had been involved in the operational planning and execution of the interviews and/or the entry and search warrant.

18. Voice recordings from telecommunications intercept activities were also reviewed.

Statutory declarations

19. I sought and received statutory declarations from 14 ASIO officers who were present at the search of Mr Ul-Haque's residence on 6 and 7 November 2003, which addressed specific questions from me about the conduct of ASIO and police officers during the search and their interactions with members of the Ul-Haque family.

20. Five other ASIO officers, who were also present at the above search, had these same questions put to them under oath or affirmation during questioning by me (see below).

Interviews under oath or affirmation

21. Having reviewed the documentary and electronic material listed above, I decided to serve notice, under s18 of the IGIS Act, on nine ASIO officers to attend before me to answer questions. The purpose of the interviews was to enable me to seek further information relevant to my inquiry and, in doing so, to also give those officers an opportunity to provide any information that they considered was relevant.

22. Under the terms of s18(6) of the IGIS Act, the officers were not excused from giving an answer to any of my questions on the basis that to do so would contravene

[6] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 77, lines 4-5 and 10-11.

the provisions of any Act, be contrary to the public interest or might tend to incriminate them or make them liable to a penalty. On the other hand, nothing given to me in those questioning sessions, in answer to my specific questions, can subsequently be used in any proceedings against the officers themselves (except in proceedings for an offence relating to the requirements of s18). This immunity ensures that, to the extent that I can, I am able to ascertain the truth of a matter rather than engaging persons in an adversarial process.

23. The officers concerned were required to swear an oath or make an affirmation before me and their interviews were recorded and transcribed.

24. B15 and B16 were two of the ASIO officers from whom I took sworn testimony. They were also able to make further submissions to me and in so doing had the assistance of external legal advisers, including from counsel.

25. I also gave consideration as to whether I should interview Mr Ul-Haque during the course of my inquiry, to clarify aspects of the sworn testimony he provided to the NSW Supreme Court on 25 October 2007.

26. I twice wrote to Mr Ul-Haque's legal representative, Mr Adam Houda, on 14 November 2007 and 21 February 2008 inviting him to provide me with any information or comment that Mr Ul-Haque wished to offer. I received no response to either of these letters. Given that I had access to the court transcripts of Mr Ul-Haque's previous evidence, I decided that it was not essential for the purposes of my inquiry – given the purpose and boundaries as noted in paragraph 12 – to have further evidence from him. I also decided that it was not necessary for me to approach any other member of the Ul-Haque family.

27. I might say at this point that representations were made to me that I should draw inferences from this lack of response by Mr Ul-Haque. I do not accept this. There could be a number of reasons why Mr Ul-Haque chose not to respond to my invitation. Having said that, there are implications for my ability to consider whether or not compensation should be paid to Mr Ul-Haque.

28. More generally, I had available to me all of the sworn testimony provided to the NSW Supreme Court in *R v Ul-Haque* over the period 15 October 2007 to 2 November 2007, as I had access to transcripts from both the open and closed court sessions.

29. One submission to me argued that because of procedural and legal issues such as those noted in paragraph 6 earlier,[7] I should not make any use of the evidence given

[7] Attention was also drawn to the absence of any warning to B15 and B16 that the privilege against self-incrimination could be claimed. Nor was consideration apparently given to whether B15 and B16 should be

by B15 and B16 in the *voir dire* hearing. While this supports a view that I should approach that material having regard to the circumstances in which it came into existence, I believe it is still open to me to have regard to such material in the course of an inquiry under the IGIS Act. I appreciate that such material, along with other material to which I am able to have regard, may not be admissible in any further legal proceedings.

Legal advice

30. I engaged Australian Government Solicitor (AGS) lawyers to assist me with the points of law raised in the course of this inquiry. The AGS officers so engaged had not previously been involved in any of the Commonwealth prosecution activity concerning Mr Ul-Haque. Through the AGS I also took legal advice from external senior counsel on the applicable law.

Submissions from other agencies and individuals

31. Concurrent with the conduct of my inquiry, the Commissioner of the AFP engaged a committee of eminent persons to examine, *inter alia*, the effect of interactions between ASIO and the AFP on its national security operations. The committee comprised the Hon Sir Laurence Street AC KCMG QC, Mr Ken Moroney AO APM and Mr Martin Brady AO. I met with the committee during the course of our respective inquiries.

32. *The Street Review: a review of interoperability between the AFP and its national security partners*[8] was released to the public on 12 March 2008 and contains a number of recommendations which will help to ensure that ASIO's activities are complementary to the activities of the AFP. In particular the Street Review recommendations covering a joint decision making framework, a joint operations protocol, counter-terrorism prosecution guidelines, and training enhancement will all assist in this regard.

33. I also had discussions with the AFP and the Commonwealth Director of Public Prosecutions about these and related matters.

34. Three unsolicited submissions to the inquiry, of a general nature, were received from private members of the public.

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given the opportunity to obtain independent legal advice (see the NSW Judicial Commission's *Criminal Trial Court Bench Book*, chapter 1).

[8] www.afp.gov.au/_data/assets/pdf_file/71833/The_Street_Review.pdf.

PART A: ASIO'S INTEREST IN MR UL-HAQUE AND POSSIBLE FALSE IMPRISONMENT AND KIDNAPPING

ASIO's strategic and operational environment in late 2003

35. In reviewing the actions of ASIO officers in relation to Mr Ul-Haque throughout 2003, it was necessary for me to obtain a clear understanding of the strategic and operational environment for ASIO at that time. In particular, I was concerned to fully understand any contemporaneous operational planning issues, which would have been at the forefront of ASIO officers' minds at the time, and that had the potential to influence their decisions and actions.

36. Managing and reducing the risk posed to Australia and Australians by politically motivated violence, including terrorism, is one of ASIO's principal outputs and was so at the time of the matters under review[9]. In 2003, the majority of ASIO's operational and analytical resources were focused on this task. Notably:

(a) in the relatively short period of time that had elapsed since the 11 September 2001 attacks, Australia had been specifically named in a number of public statements by senior members of al-Qa'ida and Australia was also mentioned in media and internet statements by other Islamist extremists, and

(b) the bombings in Bali on 12 October 2002 had subsequently heightened the perceived threat of a terrorist attack either in Australia or directly against Australians and Australian interests.

37. On 22 September 2003, the French security service advised ASIO that a French national, Mr Willy Brigitte, was thought to be in Australia and that he had participated in military training in Pakistan and/or Afghanistan. He was later assessed as 'possibly dangerous' and a potential terrorist threat to Australia.

38. On 9 October 2003, Mr Brigitte was detained by Australian authorities in Sydney and placed into immigration custody. On 17 October 2003, he was returned to France and detained by French authorities upon arrival.[10]

39. ASIO raised investigations into a number of Mr Brigitte's associates, in order to gain information on the possibility that planning for a terrorist attack in Australia was underway. The investigations involved multiple targets and liaison with both the AFP and the NSW police. ASIO staff worked very long hours for an extended period.

40. Classified information on the overall conduct of the counter-terrorism investigation is detailed at Attachment C. It seems that ASIO actively used a wide

[9] ASIO Annual Report 2003-2004, pages 14-20.
[10] Mr Brigitte was ultimately convicted of a terrorism offence, in France, in January 2008.

range of its capabilities, over a short period of time and with an appropriate sense of urgency, to resolve the possible scope and timing of the suspected terrorist activities.

Finding 1: In early November 2003, ASIO was justified in apprehending the real possibility of a terrorist attack in Australia. It was appropriate for ASIO to take action to resolve the possible scope and timing of any such attack as a matter of urgency.

41. Prior to approaching Mr Ul-Haque on 6 November 2003 ASIO's knowledge of him, from a security point of view, was that there were reasonable grounds to believe he had trained with a terrorist organisation in early 2003. ASIO also had reasonable grounds to believe that he had been communicating covertly with Mr Faheem Khalid Lodhi, who was a close associate of Mr Brigitte and was subsequently convicted of a number of terrorist offences[11]. ASIO was further concerned to identify if Mr Ul-Haque was involved in the matters mentioned in paragraph 39 above.

Finding 2: The nature of ASIO's information about Mr Izhar Ul-Haque justified him being a person of interest to ASIO in 2003, in the context of the operation referred to in Finding 1.

42. Having reviewed the legality and propriety of actions taken by ASIO in respect of Mr Ul-Haque prior to 6 November 2003, I did not identify any activity as being of concern.

43. I also confirmed that the information which had first triggered ASIO's interest in Mr Ul-Haque had been provided to both ASIO and the AFP at the same time, and the sharing of information between the agencies was therefore not of concern on that particular point. I will return, more generally, to cooperative arrangements between ASIO and the AFP in Parts C and D of this report.

Finding 3: Prior to 6 November 2003, none of ASIO's activities in respect of Mr Izhar Ul-Haque are of legal concern or could be considered improper.

44. I found that ASIO managers had orally tasked B15 and B16 to conduct an interview with Mr Ul-Haque on 6 November 2003 and that this approval had included the giving of broad directions on the manner in which he was to be approached.

[11] In June 2006, Mr Faheem Khalid Lodhi was found guilty of three terrorism-related offences. These concerned doing an act in preparation for a terrorist act (making inquiries about the availability of chemicals), possessing a document connected with preparation for a terrorist act (instructions as to how to manufacture poisons, explosives, detonators and incendiary devices) and collecting documents connected with preparation for a terrorist act (maps of the electricity supply system). He was sentenced to concurrent terms of imprisonment totaling 20 years (with a non-parole period of 15 years). *Regina v Lodhi* [2006] NSWSC 691 refers.

45. While it is more usual for a written interview plan to be prepared and approved, I do not draw any adverse conclusions from directions being provided orally in this instance. As outlined above, the operational environment in ASIO at the time was one where developments in the counter-terrorism area were unfolding quickly. The suspicion that a domestic terrorism event may have been impending was reasonable cause for ASIO managers to streamline procedures where possible. The relevant ASIO policies and procedures allowed for interviews to be verbally approved in urgent circumstances.

Finding 4: It was proper for ASIO management to provide oral, rather than written, approval for the interview of Mr Izhar Ul-Haque on 6 November 2003 (given the urgency of a possible terrorist threat).

46. Attachment A provides a timeline for certain actions taken by ASIO in respect of Mr Ul-Haque in the 24 hour period from approximately 3:00pm on Thursday 6 November 2003. This timeline has been independently derived from the records obtained in the course of this inquiry.

47. In brief, the following steps occurred:

(a) On 6 November 2003, Mr Ul-Haque and his youngest brother (who was aged 17 at the time) were met by B15 and B16 at around 7:10pm at a car park near the Blacktown railway station, in suburban Sydney, as Mr Ul-Haque was returning home from university.

(b) After a brief conversation, he went with them (and another ASIO officer who was driving) in an ASIO vehicle to a public park a short distance away. There B15 and B16 had a discussion with Mr Ul-Haque outside the car for about 40 minutes.

(c) While this was occurring an ASIO entry and search warrant was executed at the residence of the Ul-Haque family[12].

(d) Mr Ul-Haque and the ASIO officers then travelled to the residence.

(e) After about an hour Mr Ul-Haque and the ASIO officers returned to the railway station car park to retrieve his car. They had a discussion in the ASIO vehicle for about 45 minutes, and then returned with Mr Ul-Haque's car to the residence.

(f) After about an hour and a half, Mr Ul-Haque was interviewed in one of the bedrooms of the Ul-Haque family residence by B15 and B16, with a police

[12] The entry and search was authorised under the *Australian Security Intelligence Organisation Act 1979* Part III, Division 2, Section 25.

officer sitting in as an observer. The interview spanned three hours 40 minutes although there were four breaks which in aggregate totalled a little over an hour. The interview concluded at 3.45am.

(g) ASIO and the police officers departed the residence at 4:30am.

(h) B15 had arranged with Mr Ul-Haque to meet again on 7 November 2003, but (as directed by his senior officers and following a meeting with the AFP) B15 subsequently told Mr Ul-Haque that he would be contacted by the AFP instead.

Overview of Mr Ul-Haque's NSW Supreme Court testimony

48. In his sworn testimony to the NSW Supreme Court, Mr Ul-Haque gave evidence that:

(a) he thought he was under arrest or could be arrested, and that he did not think he had a choice about doing what B15 and B16 asked[13]

(b) he was "*really shocked*" at being approached by ASIO officers, and "*really shocked and frightened*" by the search at his residence[14]

(c) the questioning by B15 and B16 was traumatic because he believed that unless he kept answering their questions, the range of consequences might include things such as physical violence, deportation, arrest and interrogation in a secret location for himself and/or family members[15], and

(d) he thought such consequences were possible because B15 and B16 could tell the highest levels of Government in Australia if he was uncooperative[16].

49. I have noted that, equally, Mr Ul-Haque did not make any claims in his sworn testimony that B15 and/or B16:

(a) told him he was under arrest

(b) threatened him with the possible use of questioning and/or questioning and detention warrants by ASIO[17]

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[13] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 299, lines 18-25; page 306, lines 56-58; see also page 304, lines 28-26; page 306, lines 13-14; and page 314, line 10.
[14] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 296, line 55 and page 299, lines 48-52.
[15] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 299, lines 20-23 and page 306, lines 11-19.
[16] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 327, lines 35-58 and page 328, lines 1-16.
[17] *Australian Security Intelligence Organisation Act 1979* Part III, Division 3 provides for special powers relating to terrorism offences and details the circumstances under which a subject may be brought before a prescribed authority for questioning.

(c) verbally abused or shouted at him

(d) came into deliberate physical contact with him or otherwise subjected him to physical restraint

(e) made actual threats against him, including threats of violence, deportation or arrest, or

(f) made actual threats in respect of his family.

50. I make the assumption that Mr Ul-Haque would not have left anything of significance out of his account to the Court, given what he was facing. I would also note I did not find any evidence or indication during the course of my inquiry that B15 and/or B16 did any of the things listed in paragraph 49.

General legal setting

51. I have taken legal advice on the elements of the offences referred to in the Judgment and a summary of that advice is provided at Attachment B.

52. I will return to the law on these offences later, but at this point I will note that in Australian law, every person is generally entitled to move about in public places, and in his or her home and other places he or she is entitled to enter, in a manner which is unfettered save by lawful restrictions.

53. It should also be noted that ASIO has no powers of arrest, or powers to stop and search. ASIO is an intelligence agency, not a law enforcement body, and in large part it collects, analyses and reports on matters relevant to security. To the extent it has powers, these are set out in the *Australian Security and Intelligence Organisation Act 1979* (ASIO Act) and the *Telecommunications (Interception and Access) Act 1979*.

54. ASIO can seek the issue of a questioning warrant or a questioning and detention warrant under the ASIO Act, and if one is issued a person can be compelled to answer questions. The legislative restrictions on these warrants mean they can only be obtained as a "last resort" (as reflected in the considerable limitations and safeguards on their use and the very small number issued since 2003). No warrants to date have involved detention.

55. ASIO is not prohibited from talking to people if it is on a voluntary basis. Indeed, ASIO is able to talk with many people in this way and it is usually beneficial to the individual, as well as to ASIO and the community.

56. My office has received relatively few complaints in the last few years about ASIO approaching individuals about having a discussion, or any interviews which

followed an approach. Such inquiries as were made into those complaints have not indicated any systemic problem. Indeed, the office has usually been able to access recordings or other material which has exonerated the ASIO officers concerned.

57. The ASIO Act also allows ASIO to seek the issue of an entry and search warrant in prescribed circumstances. Such warrants, if issued, give ASIO the power to enter, search and take copies or remove records or items relevant to security. ASIO can also do anything "reasonably incidental" to the purpose of the warrant. However, ASIO cannot detain a person under an entry and search warrant and, while a person present at the premises can be asked questions which facilitate the search, any interview must still be voluntary. In other words, an entry and search warrant does not include any power to compel people present to answer questions. [18]

Blacktown railway station car park and journey to Francis Park

58. Mr Ul-Haque gave testimony before the NSW Supreme Court that he was shocked at being approached by B15 and B16 at Blacktown railway station car park on 6 November 2003. During the course of my investigation, I have ascertained that introducing an element of surprise, through approaching Mr Ul-Haque without notice (colloquially known as conducting a 'cold start interview') was an intended part of ASIO's approach.

59. The testimonies of Mr Ul-Haque, B15 and B16 generally agree as to the sequence of events. It seems that B15 and B16 approached Mr Ul-Haque and his youngest brother in the car park near Blacktown railway station as they were walking towards their car. B15 took the lead role by confirming Mr Ul-Haque's identity and then showing him his ASIO identification.

60. In sworn testimony to the NSW Supreme Court on 24 October 2007, Mr Izhar Ul-Haque said:

> "*As I was walking to the car park, two men approached me and one of them said, "I'm an ASIO officer", or, "I'm from ASIO" or something like that and he showed me a badge. I was really shocked and I took one or two steps in the direction I was walking and then that person, whom I later found out to be* [B15]*, came in front of me and looked into my face and said, "You're in serious trouble", and he was just a few breaths away from me, in front of me. "You're in serious trouble. You need to talk to us and you need to talk to us now." He said, "We are doing a very serious terrorism related investigation and we require your full cooperation and it's in your own benefit to talk to us." And at that time, I was with my brother* [A] *and he was being talked to by the*

[18] *Australian Security Intelligence Organisation Act 1979* Part III, Division 2, Section 25 and 25AA provides, *inter alia*, those things which may be specified in a search warrant. Interviewing or questioning persons at the search location are not specifically provided for.

other person, [B16] *I believe, and* [B15] *said, "We need to have a discussion with you and we need to have it right now and you need to come with us" and I was really frightened.*

I didn't know what was happening and I just mumbled "yes", I nodded trying to understand what they are saying. Then I said to – [B15] *said, "Would you come into the car with us?" They had their own car, and I said, "What about my brother? I was supposed to take him home in the car?" and he said, "Give the keys to him." But I said, "He can't drive." He said, "Well we need to have the discussion now. Leave the other matters as they are." Then on his orders I got into the car and I was sitting in the middle and I'm not sure who was on the right or left, but I was sitting in the middle in between* [B15 and B16] *in the back seat and they said, "We are taking you somewhere to have a private discussion and to talk to you." At that time really I didn't know where I was being taken. In my mind a lot of things were going on, you know, am I being taken to a secret location or some secret ASIO interrogation rooms. I didn't know what was going to happen to me and then they took me to a park near the Blacktown Railway Station. I think it's Francis Park, and when we got to the park, officer* [B15] *told me to get out of the car."*[19]

61. In an AFP Witness Statement dated 12 August 2005, B15 described the first interaction in the railway station car park in the following way:

"*I said: "Izhar UL-HAQUE?"*

UL-HAQUE said: "Yes."

I said: "I am B15. I am an officer of the Australian Security Intelligence Organisation and I would like to have a private discussion with you and we need to have that discussion now."

He said: "OK."

I said: "We'd like you to accompany us in our car and we'd like to go somewhere else and have a private discussion with you about an important matter."

He said: "OK, but what about my brother?"

I said: "We have no interest in having a discussion with your brother. Why don't you give your brother your car keys?"

He said: "But my brother can't drive."

[19] *R v Ul-Haque* 2005/2660, *Voir Dire* transcript page 296, lines 52-57; page 297, lines 1-34.

I then suggested to UL-HAQUE that at least his brother could wait inside the vehicle.

UL-HAQUE then accompanied B16 and me to an ASIO vehicle and B14 drove us to Francis Park in Blacktown, a drive of about less than five minutes. During the drive to Francis Park UL-HAQUE sat in the back seat of the vehicle between B16 and myself. On the way to the park I said to UL-HAQUE words to the effect of:

I said: "We wish to discuss a very important matter with you and we require you to be honest with us and we require your full cooperation with us in investigating this matter."

On the way to the park I do not recall UL-HAQUE engaging in any discussion with me, B16 or B14."[20]

62. When cross examined in 2007, B15 denied acting in an aggressive and menacing manner. He also denied that use of a public park was intended to provoke fear in Mr Ul-Haque.[21]

63. In an AFP Witness Statement dated 12 August 2005, B16 stated:

"*B15 and I approached UL-HAQUE and the other male whilst B14 remained in an ASIO vehicle. B15 showed his ASIO identification to UL-HAQUE and said words similar to:*

B15 said: "Are you Izhar UL-HAQUE?"

UL-HAQUE said: "Yes."

B15 said: "I want to speak with you because you're in serious trouble."

I cannot recall what UL-HAQUE said but from his facial expression he appeared shocked and surprised.

I then spoke to the other male person with UL-HAQUE and said words like:

I said: "Who are you?"

He said words to the effect of: "My name is [A]*, Izhar's younger brother."*

[20] B15 Witness statement of 12 August 2005, paragraphs 4-15.
[21] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 56, lines 29-32; page 59, lines 15-22.

I cannot remember the exact words he used but B15 then asked UL-HAQUE to accompany us to our vehicle as we wished to ask some questions to which he agreed. As we entered our vehicle B15 told UL-HAQUE that we would speak to him further at a park a short distance away, but I cannot remember the exact words he used. I remember that B15 and I sat in the back of the vehicle with UL-HAQUE but I cannot recall exactly where we sat in relation to each other.

B14 then drove B15, UL-HAQUE and me to Francis Park, Blacktown a drive of about five minutes duration. I remember that there was not much conversation during the drive to Francis Park."[22]

64. I should note that B14, the driver of the car, also made a statement but remained in the car at the station car park (and at Francis Park) and does not remember any conversation that occurred during the drive to Francis Park.

65. The following are some points that these accounts have in common or are otherwise noteworthy:

(a) B15 used words to the effect that Mr Ul-Haque was in serious trouble

(b) Mr Ul-Haque was visibly shocked according to B16

(c) B15 said that there was a "*need*" for discussion straight away

(d) Mr Ul-Haque said either "*Yes*" or "*OK*"

(e) at either the railway station car park or on the way to Francis Park, B15 used the word "*require*" in connection with cooperation by Mr Ul-Haque

(f) Mr Ul-Haque was not given an explanation of ASIO's functions (and that they differ from the police and their powers) at the railway station car park or on the way to Francis Park

(g) both B15 and B16 sat in the back seat of the car with Mr Ul-Haque on the drive to Francis Park, and

(h) there is no indication that Mr Ul-Haque voiced any objection or raised any questions about getting in the car and going with B15 or B16.

[22] B16 Witness statement of 12 August 2005, paragraphs 4 -13.

At Francis Park

66. On arrival at Francis Park, it is common ground that B15, B16 and Mr Ul-Haque got out of the vehicle and engaged in discussion. B14 remained in the car.

67. Mr Ul-Haque's evidence in the *voir dire* hearing about the discussion outside the car was as follows:

> "*Then* [B15] *then said, "Izhar, you need to be honest because we have a lot of information about you and we need your full answers. You should know why we are here." I was really hesitant in what was going on and I said, "Is it because of the training I've done in January 2003?" They said, "No, we know about that. We're not concerned with that. There are lots of other things you need to tell us about." And I could not come up with the answers immediately and they said, "Look Izhar, we can do this the easy way or we can do this the hard way. Either you should co-operate with us or there'll be consequences for you, and it's in your own benefit that you keep talking to us." Then they said, "Do you know Mr Lodhi?" I said, "Yes I know Mr Lodhi."*
>
> *Then they showed me a few pictures and I recognised Mr Lodhi and then they discussed where and how and when I had met Mr Lodhi and what I talked – what I was told in the discussions with him and they were saying words to the effect that whenever I would give an answer, they would say, "Look, you're not being honest with us. We already have a lot of information about you and if you don't co-operate, things will get worse for you."*
>
> *I was really afraid of what's going to happen to me. This went on for about, I would say, 30 minutes or 45 minutes. Then they said, "We are going to your house now and they are raiding your house right now at the moment", and I was really afraid what's going to happen to my family at the house. Because I didn't know until they told me that my house was being raided. Then they told me to get into the car and I sat in between* [B16] *and* [B15] *and they drove me back to my house in* [Suburb].
>
> *Q. Was there conversation in the car?*
>
> *A. Yes, there were lots of conversations in the car, and they said that you need to be honest with us, and this issue has gone to the highest levels of government. And if you don't cooperate, we have other sources of extracting information, and we need you to cooperate with us; words to that effect.*
>
> *Q. Pausing there, when you had the first – after the first approach you were told to get into the car?*

A. Yes.

Q. You were told to get out of the car and told to answer questions. Did you believe you had any choice in the matter?

A. Not really, no. I never thought I had a choice because I believed I was under arrest and that if I did not comply with whatever they asked me that they will either use physical violence or take me to a more sinister place to interrogate me or, you know, do something to my family or deport me, or lots of other things were going on in my mind, and the thought of choice never really occurred because I was under extreme pressure and stress."[23]

68. When questioned in court Mr Ul-Haque responded as follows:

"Q. When [B15] *referred to there being an easy way and a hard way, are you able to recall what it was that he said to you?*

A. He basically said that, "You have to tell us all the information you have. If you don't then we have more – we have other ways of extracting information and things will get worse for you if you don't answer us."

Q. Do you remember him saying words to this effect, "We can go down the difficult path or a less difficult path"?

A. Yes, in general, yes.

Q. Do you remember him saying that, "The difficult path would mean that we stand here putting these questions to you, like this"?

A. I don't remember him saying those particular words, but he said things like that, that "we'll keep interrogating you".

Q. Did you understand [B15] *to be saying this, "There are two ways we can go, an easy way and a hard way"?*

A. Yes.

Q. Did you understand that what he saw as the easy way was you cooperating and providing answers to him?

A. That was my understanding.

[23] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 297, lines 39-58; page 298, lines 1-13; page 299, lines 1-25.

Q. And did you understand that from what he said was the hard way, was as far as he was concerned, telling him things that you knew to be untrue and him having to continuously correct you?

A. I wouldn't put it that exclusively. He was saying basically that it wasn't just in relation to some information which may be untrue but was, in general about cooperation that, unless you co-operate, you'll go down the difficult path. It wasn't exclusively related to those untrue answers.

Q. Did he say anything else to you that you can recall in relation to that subject of how it was that this process could be done, other than telling you, as you say, to co-operate?

A. He said, "We can continue this interrogation on and on, and we have various sources of getting information and it will be in your benefit to comply with us."

Q. You thought that meant, did you, that if you didn't answer his questions, a number of things might happen to you or your family?

A. That's true.

Q. One of the things that you say you thought might happen to you was that you'd be deported. Do you remember saying that?

A. Yes.

Q. Did [B15] *or anybody else threaten you with deportation?*

A. Not with those words, but demeanour and the tone of the voice to me, suggested anything would be possible because they were involved in the highest levels of Government in Australia, that it was in their power to do those things if you did not co-operate with them.

Q. When do you say [B15] *told you that because he was in the higher echelons or higher powers of Government--*

HIS HONOUR: I don't think that's what he said. He said that's what he believed."[24]

[24] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 326, lines 36-58; page 327 lines 1-47.

69. In his written statement of 12 August 2005 B15 described the interaction at Francis Park in the following manner:

"I said: "You must know why we're here talking to you."

He said: "No."

I said: "So, you really have no idea why we need to talk with you."

He said: "No."

I said: "You're in a substantial amount of trouble. We are conducting a very serious terrorist investigation at the moment and that investigation has lead us to you. We have many means of investigation and we hold considerable information about you. What we now require from you is your full co-operation with ASIO in resolving the matter by being honest with us."

UL-HAQUE did not reply and looked at the ground.

I then said words to the effect of:

I said: "How do you know Faheem LODHI."

He said: "Who?"

I said: "Faheem LODHI."

UL-HAQUE was then shown a photograph of a person known as Faheem LODHI by either B16 or myself and I said words to the effect of:

I said: "We know you know him."

He said: "Yes, that's Faheem LODHI. I know him."

B16 and I then had a further conversation with UL-HAQUE during which we discussed his relationship with Faheem LODHI and the manner in which he maintained contact with him and regarding the use of a code. I remember at one point in our conversation I drew a figure "Y" in the gravel with my foot. At that point I said to UL-HAQUE words to the effect of:

I said: "This is a Y. We are here."

At that point I was gesturing towards the intersection of the "Y". I then said words to the effect of:

I said: "We've got two choices. We can go down the difficult path or a less difficult path. The difficult path would mean that we stand here putting these questions to you like this, having you tell us things which we know to be untrue, and having to demonstrate to you that we know these things are untrue before you give us a truthful answer. Or, we can take a less difficult path which would involve you co-operating and proving truthful answers to our questions and assisting us in resolving our concerns."

I then stated that ASIO has many means of investigation and knows much in relation to the matter we are investigating. We noted we had concerns in relation to Faheem LODHI and his affiliations. We then had a further conversation that related to Faheem LODHI and UL-HAQUE's relationship with the organisation Lashkar-e-Taiba. The conversation at Francis Park lasted for about thirty minutes in total. Neither B16 nor I took notes of this conversation at the time.

At the conclusion of this conversation I said words like:

I said: "Thanks for that and for being honest with us. What I propose to do now is to take you to your home where an ASIO search warrant is being conducted."

He said: "Yeah, OK."[25]

70. The relevant section of B16's written statement of 12 August 2005 was:

"*B15 then said words to UL-HAQUE to the effect of:*

B15 said: "ASIO is aware of your activities and it is important that you are honest with ASIO."

UL-HAQUE said words like: "I don't know what you're talking about."

B15 and I then had a further conversation with UL-HAQUE which lasted in total for about half an hour. I cannot recall the exact words used but I remember that B15 told UL-HAQUE that ASIO was aware he had trained with Lashkar-e-Taiba and that ASIO knew of a numeric code that UL-HAQUE was aware of. B15 and I also explained to UL-HAQUE that ASIO was an intelligence organisation and provided him with information regarding ASIO's role providing advice to the government on matters of national security. I remember that during the majority of this conversation UL-HAQUE was looking at the ground and appeared to be avoiding eye contact. I also

[25] B15 Witness statement of 12 August 2005, paragraphs 17 – 37.

remember that during this conversation UL-HAQUE said words to the effect of:

UL-HAQUE said: "I don't know what you're talking about."

I remember at one point during the conversation B15 drew a figure "Y" in the dirt where we were standing and said words to UL-HAQUE to the effect of:

B15: "You are standing at the point where the Y intersects and you have to decide whether you will continue lying to ASIO or start telling the truth to ASIO."

I cannot recall what UL-HAQUE said in relation to this statement by B15. Further, I cannot recall any exact words used by UL-HAQUE but I recall that towards the end of our conversation he was more responsive to our questions. Again, I cannot recall the words used, but I remember that it was explained to UL-HAQUE that it was important for him to tell the truth to ASIO as we knew things about him and that if he did not tell the truth, his credibility would suffer. Further, I remember that during this conversation and in later conversation with UL-HAQUE, B15 and I said words to him like:

B15 and I said: "It's important that you tell your story honestly."[26]

71. At the *voir dire* hearing B15 was questioned on the interaction at Francis Park and the following exchange occurred:

"*Q. From the third paragraph, you say that, "At Francis Park it was pointed out to Izhar that he was in substantial trouble and that his full cooperation with ASIO in resolving the matter at hand would be required." Again there doesn't seem to be much room for an option not to co-operate with ASIO, does there?*

A. I can't speculate as to what he had in mind--

Q. I'm not asking you to speculate, I'm asking you to consider the words, "his full cooperation in resolving the matter with ASIO would be required", not asked for, "required". It's a perfectly simple English word, isn't it?

A. It is.

Q. There's no doubt about what you were doing, you were requiring him to answer questions?

A. In order to establish the truth of the matter.

[26] B16 Witness statement of 12 August 2005, paragraphs 15 – 23.

Q. Then we go on to say in the last paragraph on that page, the last sentence, "After robust discussion and considerable prompting from the interviewing officers, information was elicited from Izhar concerning his relationship with Lodhi and regarding his training with Lashkar-e-Taiba in Pakistan substantially confirming ASIO's knowledge of the subject." Now, "robust discussion and considerable prompting", suggests that you were putting information to him rather than he putting information to you. Doesn't it?

A. No, it doesn't.

Q. You were prompting him to agree, putting information to him and asking whether he agreed with it?

A. That's not the case." [27]

Arrival at residence and later return to station car park

72. Mr Ul-Haque gave evidence about the arrival at his residence as follows:

"*A. Once I got to the house I then went up to my family who was sitting in the lounge, in the middle, and I saw about 20 or 30 people doing a house search and lots of cars around the house.*

BARKER

Q. Stop there for a moment. What was your reaction to all that?

A. Well, I was really shocked and frightened, and the immense nature of the operation and the search and the personnel and the security around it, and the way they were going through stuff in the bedrooms, in the TV lounge and everything."[28]

73. While it is entirely understandable that execution of an entry and search warrant can be disconcerting if not inherently alarming to the occupants of a residence, there is nothing about the way in which it was effected, in all the material I have seen, that indicated any intention by ASIO to cause more concern by any member of the household than was inherently going to be the case. The video recording of the latter part of the search and the absence of complaint to my office confirm this general view. One point I will note is that ASIO officers paid attention to the need for cultural sensitivity. I also discuss the entry and search of the Ul-Haque

[27] *R v Ul-Haque* 2005/2660 *voir dire* transcript page 84, lines 22-55.
[28] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 299, lines 39-52.

residence in Part B of this report.

74. Mr Ul-Haque gave evidence that later in the evening on 6 November 2003:

> "[B15] *came back to me and said, "Look, we need to have another discussion with you, and we need you to come with us in the car." And I complied, and went with* [B16] *and* [B15] *and the same driver in their ASIO car. Then we drove back to the car park and at the car park they put the car next to my car but I wasn't allowed to get out of the car. And inside the ASIO car we had about a one hour discussion regarding lots of issues, like my relationship with Mr Lodhi and particulars of my conversation with him, and I was seated in between* [B16] *and* [B15] *in the back for about one hour.*
>
> *Q. When he said he needed you to get in the car, did you believe he had authority to direct you to get into the car?*
>
> *A. In my belief, at that time at least, I thought he had authority to do this to me because I saw him as a government authority and…*
>
> *Q. Did he tell you why he wanted to take you back to the car park to ask you questions?*
>
> *A. No, he didn't. No, he just said, "We have to go back to the car park to talk further."*
>
> *Q. Did you believe you had any choice in the matter?*
>
> *A. No, I did not have any choice in deciding if I should decline them or not talk to them or talk to them.*
>
> *Q. In the car, between leaving the house and stopping at the car park, did you or were you spoken to by* [B15]*?*
>
> *A. Yes,* [B16] *and* [B15] *spoke to me during the trip and reiterated similar issues. Like they said, "You are not being honest with us" or "you have to tell us the whole truth and tell us all the information you have, and this will not end until you give us everything you have and you have to give us full answers and cooperate with whatever we ask you."*
>
> *Q. During the hour's questioning at the car park, were there occasions on which* [B15] *would intervene or dispute an answer or tell you you weren't telling the truth or something to that effect?*

A. There were lots of occasion like that, and I couldn't number them, but there were occasions where he would say, "Look, we know a lot more than you do" or words to that effect. That "we have a lot of intelligence and you are not telling us the truth, and it is in your own benefit to start talking straight with us."

Q. What happened after the end of the questioning in the car park?

A. Around 11.30, [B15] *told me to get out of the car and then* [B15] *and I came back into our car, I mean my car, the red car. And I think I drove, or I am not sure if* [B15] *drove, and the other officer was driving behind us. And* [B15] *told me to drive back to the home. The other officer then pursued or behind me, and then --"*[29]

75. In his written statement of 12 August 2005, B15 gave his account:

"*I said: "OK, why don't we go and pick up your car now?"*

He said: "OK."

B14 then drove B16, UL-HAQUE and me to the car park near Blacktown Railway Station where we had met him earlier. During the drive I remember I had a conversation with him during which I reiterated to him the importance of his being completely honest with us in resolving the matter, but I cannot remember the exact words used. I remember that UL-HAQUE said words like:

UL-HAQUE said: "Yes, I know. I know I have to tell you the truth."

After about fifteen to twenty minutes we arrived at the car park near Blacktown Railway Station where UL-HAQUE's car was parked. I then said to UL-HAQUE words to the effect of:

I said: "Do you mind if I come with you in your car?"

He said: "No, I don't mind."[30]

76. B16's account in his written statement was:

"*During the drive, which lasted about fifteen minutes, and then later in the car park of Blacktown Railway Station, we discussed a number of topics including his relationship with a person known as Faheem LODHI and other persons and*

[29] *R v Ul-Haque* 2005/2660 *voir dire* transcript page 301, lines 1-58.
[30] B15 Witness statement of 12 August 2005, paragraphs 40-46.

training with Lashkar-e-Taiba, but I cannot recall exactly what words were said during this conversation.

About 10:15pm we left Blacktown Railway Station car park and returned to UL-HAQUE's premises. When we returned to UL-HAQUE's premises I went with B14 in an ASIO vehicle and B15 returned with UL-HAQUE in his vehicle which I recall was a small, older model car and was red in colour. B14 and I followed immediately behind UL-HAQUE's vehicle on the return journey."[31]

77. B14 could recall something of the discussion when they were all in the car at the station car park later in the evening, and said in his written statement of 12 August:

"*I cannot recall any conversation that took place during the drive, however I can remember some details of conversation between B15, B16 and UL-HAQUE after we arrived at the station car park. I can remember that the conversation related to where UL-HAQUE prayed, his relationship with a person called Faheem LODHI and weapons UL-HAQUE had been trained to use in a camp. I cannot remember details of the exact words used during this conversation but that it related to those topics, amongst others which I also cannot recall. At the conclusion of this conversation B16 and I drove back to UL-HAQUE's premises in the ASIO vehicle, following behind B15 and UL-HAQUE in UL-HAQUE's vehicle. I can remember that UL-HAQUE's car was small and red in colour but I cannot remember any other details about it.*

On the night of 6-7 November 2003 I had no direct conversation with UL-HAQUE and I myself have never spoken to him. During the conversations I overheard between ASIO officers and UL-HAQUE at no time did I hear any ASIO officer threaten UL-HAQUE in any way or offer UL-HAQUE any benefit in return for assisting ASIO in its enquiries. From what I observed, UL-HAQUE appeared to be participating in these conversations with ASIO officers of his own free will."[32]

Second period at the Ul-Haque residence

78. Mr Ul-Haque gave this evidence in court about what then occurred:

"*A. Once we got back, the officers told me to again sit in the main area in the lounge while the search was being carried out and around 12.15* [B15] *said, "We need to talk about further issues with you and let's go to this bedroom, your parents' bedroom which is empty." And I went with* [B15] *to the bedroom, and with* [B16] *there and another police officer, which I later found*

[31] B16 Witness statement of 12 August 2005, paragraphs 27-28.
[32] B14 Witness statement of 12 August 2005, paragraphs 8-9.

out to be [B]. *And I sat in one of the chairs, and they started interviewing me, and this went on for a long time, for about three hours, with some breaks in between. And they asked me further questions about how I knew Mr Lodhi and if I knew of what was happening in Sydney regarding any terrorism type plans. And they asked me about my association with the organisation and the nature of the camps and how people go there and things like that. And this went on for about three hours, I would say, approximately.*

Q. Was it the same sort of questioning as had occurred earlier; that is to say, did they dispute or question things you said and did they give you information? Did they prompt answers?

A. Yes, there were instances like that. For example, I would say something and they would say, "You know we know a lot about this issue, and we don't think you are telling us the truth." And then I would give them a more detailed answer of what they are asking, and then they would say, you know, "That's better, you have to cooperate with us in answer these questions."

Q. Who asked most of the questions?

A. I would say [B15] *but* [B16] *also asked a few questions.*

Q. Did you believe you had any choice in the matter but to answer the questions?

A. That thought never occurred to me. I never thought I had a choice not to answer. I believed that I was under arrest and if I did not cooperate with these ASIO officers things would get worse for me, and especially the issue about they were telling me that "we can do this the easy way or the hard way" and I believe that if I did not keep answering the questions, they would use the hard way. This was supposed to be the easy way, so I was really afraid of the adverse consequences that would occur if I did not keep talking to them."[33]

79. B15's written statement of 15 August 2005 gives this account:

"I said: "What we need to do now is go over the matters that we discussed before in an organised way and in more detail and to conduct a formal interview of you."

He said: "OK."

B16, UL-HAQUE and I then went to a bedroom at the front of the premises where we conducted the formal ASIO interview. A police officer, whose name I

[33] *R v Ul-Haque* 2005/2660 *voir dire* transcript page 302, lines 19-58 and page 303, lines 1-6.

cannot recall, was also present and I introduced him to UL-HAQUE. I explained the interview process to UL-HAQUE by saying words to him like:

I said: "This officer is a police officer. He'll take no part in the interview but he'll be sitting in, if you don't mind."

He said: "That's OK. That's fine."

I said: "ASIO would like to tape this interview."

He said: "That's OK."

I then had a further interview of UL-HAQUE at the commencement of which I activated an audio tape recorder which B16 also operated at times. This interview concluded at 3:45am and totalled approximately 90 minutes with breaks in between. I observed that the police officer appeared to take notes of the interview but did not ask any questions himself. During the interview we discussed matters which UL-HAQUE had discussed previously that night but with some additional detail."[34]

80. The relevant section of B16's written statement simply said:

"*About 12:00am B15 and I had another conversation with UL-HAQUE in a bedroom at the premises. Detective Senior Constable* [B] *was also present and appeared to make notes of the conversation. I cannot recall* [B] *asking any questions of UL-HAQUE.*

This conversation lasted until about 3:45am and was recorded on an audio tape recorder operated by B15 and myself at different times. I do not recall taking any notes during this conversation although I had made some notes during previous conversations with UL-HAQUE."[35]

81. On 8 November 2003 B15 and B16 wrote about the events in an internal ASIO record. The record relevantly included that:

"Izhar agreed to accompany [B15] *and* [B16] *to Francis Park, Blacktown (in a hired Ford Falcon motor vehicle driven by* [B14] *in an operational support role), where discussions were held"*, and

"Izhar readily agreed to the formal ASIO interview, which consisted of three main session blocks which were taped by ASIO with Izhar's agreement."

[34] B15 Witness statement of 12 August 2005, paragraphs 49-56.
[35] B16 Witness statement of 12 August 2005, paragraphs 29-30.

Law on kidnapping and false imprisonment

82. As noted earlier, in Australian law, every person is generally entitled to move about in public places, and in his or her home and other places he or she is entitled to enter, in a manner which is unfettered save by lawful restriction.

83. I am advised that to prove a criminal charge of false imprisonment at common law against B15 and B16, it would have to be established, beyond reasonable doubt, that they confined Mr Ul-Haque at a place or places:

(a) without Mr Ul-Haque's consent, and

(b) without lawful excuse, and

(c) by force, or threat of force, or by fraud, and

(d) they did so deliberately.

84. I understand that there are few cases that have considered in detail what is meant by acting 'deliberately' or 'intentionally' in relation to false imprisonment. However, I am advised that the offence may be made out if B15 or B16:

(a) gave Mr Ul-Haque to understand, by words or by conduct, that he had no option but to remain with them in the place or places of confinement, and

(b) they did so intentionally or did so foreseeing a likelihood that Mr Ul-Haque would regard himself as being so confined.

85. In relation to paragraph 84(a), it is also important that the conduct of B15 or B16 was such that the will of Mr Ul-Haque had been overborne to the extent that he could not exercise a free choice in the matter, as distinct from him being persuaded that he should remain with the officers:

> "[I]*t is not sufficient in law that conduct of the defendant have contributed to or influenced the plaintiff's decision to remain unless the conduct has overborne the plaintiff's will. It must be shown that, but for the defendant's conduct, the plaintiff would not have yielded to the total restraint; that the plaintiff's determination to remain was a coercive consequence of the defendant's acts.*"[36]

86. In relation to paragraph 84(b), an important distinction is to be made between what B15 and B16 *actually* thought and what they *ought* to have thought. It is only the former that arises for consideration in establishing criminal responsibility for this

[36] *McFadzean v CFMEU* [2007] VSCA 289, at [41], applying *Myer Stores Limited v Soo* [1991] 2 VR 597.

offence[37], while the latter might be relevant in any civil action (see paragraphs 89 and 90 below).

87. To prove a criminal charge of kidnapping at common law against B15 and B16, it would also have to be established, beyond reasonable doubt, that they did all of the above and that the circumstances also included an additional element of taking or carrying Mr Ul-Haque away, but that need not be by use of actual force. Again, I am advised that it would not matter whether B15 or B16 sought to arrest and take away Mr Ul-Haque. What would matter is whether they took him from one place to another, deliberately, without consent, and without lawful justification. The distance that a person is taken or carried away does not need to be very great for the commission of this offence.

88. There is also a statutory crime of kidnapping contained in s86 of the *Crimes Act 1900* (NSW). To prove a charge under s86 against B15 and B16, it would have to be established that they kidnapped Mr Ul-Haque (as outlined above) and that they did so with the intention of holding him to ransom or obtaining any other advantage. The maximum penalty for this offence is increased from 14 to 20 years if the offence is committed in the company of another person or persons.

89. Apart from criminal liability, a person can be sued in a civil case for damages arising from the tort of false imprisonment. As with the common law criminal offence, this involves the unlawful restraint of the liberty of one person under the custody of another. I am advised that the circumstances (or physical elements) of false imprisonment discussed above are equally applicable in relation to the existence of the tort as they are in relation to the criminal offence and, in fact, most of the relevant case law actually involves actions in tort.

90. I am also advised, however, that there seems to be a wider area of culpability in terms of the mental elements required for the commission of the tort. That is, the tort of false imprisonment can be committed deliberately or intentionally (in the sense described above), but further, I am advised that the position in Australia is that actions for false imprisonment may also be brought where the detention or restraint has been brought about by conduct that is negligent or careless in the circumstances[38].

Consideration of material

91. As I have already noted, it is not my role to attempt any determination as to whether or not criminal offences have been committed. What I have considered, among other things, is whether the Director-General of Security should, as a matter of

[37] In *McPherson v. Brown* (1975) 12 SASR 182, Bray CJ said, at 189 that "*It is contrary to fundamental principles and the whole tenor of modern thought to judge a man in a criminal court, except under statutory compulsion, not by his actual intention, knowledge or foresight, but by what a reasonable and prudent man would have intended, known or foreseen in the circumstances.*"

[38] Refer to Attachment B paragraphs 10 to 12.

propriety, refer the issue to the relevant NSW authority for further consideration.

92. The IGIS Act does not require that I apply any particular test when considering whether or not to make a particular recommendation. I therefore took legal advice on an approach that would be proper for me to take in this case. The advice, which I accept, was that:

(a) If there is some substantial evidence, and therefore a reasonable basis, for warranting further consideration as to whether offences may have been committed, then I might decide that referral would be appropriate.

(b) On the other hand, I might decide that referral would not be appropriate, if I was satisfied that, on all the material before me, there is no substantial evidence, and no reasonable basis, to warrant further consideration as to whether offences may have been committed.

(c) I should avoid a process whereby I am determining the issue by weighing the conflicting evidence of different persons, in terms of deciding whose evidence I prefer, as this could lead to criticism that I am performing a role more appropriate for prosecuting or judicial authorities to perform.

(d) I should also avoid taking into account factors relevant to the prosecutorial discretion (for example, the elapse of time since the relevant events, prejudicial publicity and public interest considerations).

93. Both B15 and B16 have denied any intention to detain Mr Ul-Haque on 6-7 November 2003. They have also maintained that, at the time, they did not think that Mr Ul-Haque could have regarded himself as being detained by them; hence, they did not foresee a likelihood that their actions might have had that result. Their view of the matter is, in effect, that they were seeking to persuade Mr Ul-Haque to accompany them (albeit I would observe that this was occurring in what they regarded as urgent circumstances).

94. The testimonial evidence of Mr Ul-Haque is that he felt compelled to go with B15 and B16 because of their actions in approaching him and the perception he had of what consequences might follow if he did not.

95. It seems to me entirely possible for the participants in this series of events to substantially differ in their apprehension of what was occurring. Mr Ul-Haque may have subjectively felt that he had no practical alternative but to go with the ASIO officers, especially given that his impressions of how security agencies operate might have been shaped by how some agencies in other countries operate. On the other hand, given their own background and understanding of ASIO's role, a physical confinement or detention of Mr Ul-Haque may be something that was neither intended

by the ASIO officers, nor something which they actually foresaw as occurring.

96. Pertinent in this regard are the following aspects:

(a) Mr Ul-Haque saying either "*Yes*" or "*OK*" at the railway station car park in response to B15's request to accompany the ASIO officers (see paragraphs 60-61).

(b) Mr Ul-Haque apparently taking time to consider how he might respond to questions and the effect any particular response might have in relation to continued questioning.

(c) Mr Ul-Haque not voicing any objection, or questioning at any point about whether he had a choice, nor asking to consult a lawyer.

(d) The absence of any assertion by Mr Ul-Haque that B15 or B16 threatened or otherwise mistreated him.

(e) Mr Ul-Haque not alluding to or raising with B15 and B16 any of the fears he says he held for his family.

Mr Ul-Haque may still have subjectively felt compelled, in all the circumstances, to go or remain with the ASIO officers. However, this is not necessarily inconsistent with the evidence of B15 and B16 that they neither intended to detain Mr Ul-Haque or foresaw that result.

97. Consideration must also be given to other circumstantial aspects. In the judgment of Adams J the circumstances from the moment in which Mr Ul-Haque was approached at Blacktown railway station are considered to have supported the proposition that he was unlawfully detained by the ASIO officers. It has been put to me on the other hand, that there is nothing in the circumstances which is inconsistent with the proposition that B15 and B16 did not intend to confine Mr Ul-Haque.

98. There are several aspects to the circumstantial evidence.

99. In examining these aspects, I have the advantage of familiarity with ASIO's operations and culture gained over the last four and a half years in particular. Also, in giving evidence to me there was no basis for B15 and B16 or other ASIO officers to be inhibited or reticent in discussing ASIO methodologies, operations or personnel as their testimony was being given before officials with comprehensive security clearances and in a security cleared environment. B15 and B16 may well have been more reticent or hesitant while giving testimony in court proceedings.

100. The first aspect is whether Mr Ul-Haque's 17 year old brother had been left stranded at the railway station car park for a lengthy period of time and if so, what this might indicate about Mr Ul-Haque's will having been overborne.

101. The inference was drawn in paragraph 36 of the Judgment of Adams J that Mr Ul-Haque's failure to consider the situation of his younger brother later in the evening was evidence that he was "*under the thrall*" of the ASIO officers. However, it seems that Mr Ul-Haque had an opportunity to talk to his brother before leaving for Francis Park. Apparently the younger brother contacted a family member almost immediately upon Mr Ul-Haque's departure from the railway station car park and waited only 10 to 15 minutes to be picked up and taken home. The younger brother arrived back at the residence before Mr Ul-Haque arrived at 2014 hours, not afterwards.

102. A second aspect was the use of a public park for the first of the substantive discussions. I believe that the general approach approved by ASIO's managers (for B15 and B16 to ask Mr Ul-Haque to go from the railway station car park to a more private location) was understandable in the circumstances. In the car park Mr Ul-Haque could conceivably have been recognised by passers by, with issues arising about his safety and/or that of the ASIO officers. It was also desirable that the place not be too far away, to avoid undue delay in later going to the Ul-Haque residence. An open space such as a park will often be less threatening than going to an enclosed space. I do not think ASIO using a public park is necessarily improper, and it was not improper in this instance in itself.

103. Third, there was the fact that B15 and B16 both sat with Mr Ul-Haque in the back of the ASIO vehicle at various times, apparently one on either side of Mr Ul-Haque. This raised a question in my mind about whether those circumstances suggested the confinement of Mr Ul-Haque. B16's evidence to me was that safety considerations played a part. ASIO's belief was that Mr Ul-Haque had trained with a terrorist organisation within the past year. In such circumstances reducing risks to their own physical safety was a legitimate consideration. B15 did not make the same explanation. Rather, he said to me that the car was of sufficient size that the back seat comfortably held the three individuals concerned, and "*that's just the way it happened*". None of the three individuals involved are large. Mr Ul-Haque did not place any emphasis on the seating in the car in his own evidence and there was no cross-examination of B15 and B16 on the point in the *voir dire* proceedings.

104. Fourth, there was use of the word "*require*" by B15. I am satisfied, from B15's statements given in testimony to me, that he intended to use this word to mean "*depend on for success*" or "*depend on to complete a task*" (as provided for in the Oxford and Macquarie Dictionaries), rather than trying to indicate compulsion. This was in the context of a serious investigation - see paragraphs 35-41. However, the more common use of this word in popular English usage is to indicate an order or

direction and this gives some credibility to Mr Ul-Haque's testimony that he felt that he had had no choice in the matter.

105. Fifth, there was the use by B15 of language about Mr Ul-Haque being in serious trouble or a substantial amount of trouble. Tone and demeanour are essential to understanding how an oral communication was given and how it was received. Telling someone that they are in serious trouble could, depending on tone and demeanour, be an attempt to frighten and coerce a person into cooperation; or it could be an attempt to encourage maximum cooperation through the implication that this is an opportunity for them to correct misunderstandings. There are no recordings of the interaction between B15 and Mr Ul-Haque. Mr Ul-Haque did not elaborate on his reference to tone and demeanour in his court testimony.[39] In their testimony to me B15 and B16 denied that their tone and demeanour had been inappropriate; i.e. that it had been threatening or coercive as opposed to persuasive.

106. Sixth, during the discussion at Francis Park, B15 used an analogy of a 'Y' (which he drew on the ground) and he indicated that there were two paths the discussion could take: a difficult path or a less difficult path. Mr Ul-Haque gave testimony that this caused him to believe that he was compelled to answer questions under one or other of those options[40].

107. B15 stated that he used the analogy in a particular context and he was not implying that there were not other options. He says he simply meant that there were two types of questions he could ask: one using prompting and challenging of Mr Ul-Haque by disclosing some of what ASIO knew (which would be time consuming and tedious) or a second, where Mr Ul-Haque volunteered relevant information on his own initiative (which would be quicker and more convenient). I would observe that B15 may have left himself open to the risk that Mr Ul-Haque would not understand that there was a 'third option'; i.e. to not answer the questions at all.

108. However, it should also be noted from Mr Ul-Haque's account, as well as those of B15 and B16, that this element of the discussion did not occur immediately at Francis Park, but rather after Mr Ul-Haque was not responding or responding fully to questions (see paragraphs 67-70). This could be argued as confirming that the analogy was used in a persuasive context.

109. Seventh, there is in itself the use of prompting and disclosure of some information by B15 and B16. In police procedure, it is well understood that police must avoid certain questioning techniques in an interview under caution. However, it is important to draw a distinction in this case, in that B15 and B16 were conducting an intelligence collection interview that was not under caution and, in their minds, was not intended to produce evidence admissible in a court. Importantly, my experience

[39] See paragraph 68 and also *R v Ul-Haque* 2005/2660 *voir dire* transcript page 331, lines 1-4.
[40] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 306, lines 9-12.

has been that ASIO officers are conscious that the result of their work must be information which is as reliable as possible, to meet their intelligence objective. It does not serve that end to put words in the mouth of the person from whom they are seeking information.

110. Eighth, there is an issue of what was said early on to Mr Ul-Haque about ASIO's role. It is usual (but not a legal requirement) for ASIO officers to give a general outline of the Organisation's role and explain that it is different from the police. In the railway station car park B15 introduced himself as being from ASIO and showed identification, but the interaction was brief, as was the drive to Francis Park.

111. It seems that some explanation of ASIO's role was given at Francis Park, although it is not clear how extensive it was. Mr Ul-Haque claimed to have little knowledge of any distinction between ASIO and the AFP.[41] B15 and B16 put to me that he was intelligent and had undertaken some secondary and tertiary education in Australia. I think it is quite possible that Mr Ul-Haque's view of intelligence and law enforcement agencies was, at least in part, shaped by how such agencies operate in some overseas countries. This may support his evidence that his own state of mind was that he felt compelled to go and remain with the ASIO officers, but it is not inconsistent with circumstances in which B15 and B16 may have had a different view about his state of mind.

112. There are some other matters that support the arguments put to me that it was reasonable for B15 and B16 to have held the view that Mr Ul-Haque had consented to what had occurred and that they did not set out to coerce and overbear Mr Ul-Haque's will or foresee that this might have been the effect of their actions. These are:

(a) The internal record made by B15 and B16 on 8 November 2003 says that Mr Ul-Haque "*agreed*" to accompany them to Francis Park and "*readily agreed*" to the interview at the residence which was taped, and when this record was written, there was no expectation on their part that they would have to give evidence about their activities.

(b) If B15 and B16 had intended to make Mr Ul-Haque as fearful as possible, they would have mentioned the entry and search warrant at the railway station car park or before the end point of the discussion at Francis Park (and they did not – see Mr Ul-Haque's own account at paragraph 67).

(c) It would have been reasonable for B15 and B16 to have expected that Mr Ul-Haque would respond with some level of surprise and/or apprehension at their

[41] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 300, lines 32-47.

approach, including in circumstances that Mr Ul-Haque knew himself to be of security interest.[42]

Credibility of B15 and B16

113. While conscious of the limitation I have stated in paragraph 92(c), I think it appropriate that I make certain comment on the general experience in ASIO of the conduct of B15 and B16.

114. Sworn testimony from a number of other ASIO officers said that, in their experience, B15 and B16 are habitually professional and respectful in approaching members of the community, and that they are regarded as honest and reliable employees of ASIO. For example, one officer who trained with B15 and knew his work well, described him as very thorough, considered and considerate. This officer had been very pleased to have B15 on the same team when they went to Bali in the aftermath of the Bali bombings. I do not see such comments as colleagues merely "sticking together" because I have a good knowledge of the work of the officer who gave this testimony to me, and I am confident he is a person of integrity and professional in his work.

115. I have separately confirmed that during the course of their respective careers, neither B15 nor B16 has been the subject of any internal investigations or action by ASIO as to their conduct as ASIO officers.

116. As noted earlier in paragraph 99, I found B15 and B16 to be forthcoming in giving evidence to me. While their accounts are not absolutely identical, there are no differences on significant points. Their accounts do not bear the hallmarks of collusion (for example see paragraph 103). They were prepared to make concessions in relation to matters that could be said to support Mr Ul-Haque (for example see paragraph 177).

Credibility of Mr Ul-Haque

117. I have not had the opportunity to take evidence from Mr Ul-Haque in the course of this inquiry but, as I have said, I draw no inference from the lack of response to my invitation for him to provide information or comment on these matters. I have had regard to the evidence he gave to the NSW Supreme Court. Not having had the opportunity to question Mr Ul-Haque myself, I am not in a position to assess the credibility of that evidence when it differs from that of others. To a significant extent it can be reconciled with the other evidence and material I have had before me. In any case, as I have said, I do not see it as my role to come to a view as to whether I prefer the substance of the evidence of one person over another.

[42] Mr Ul-Haque acknowledged this at *R v Ul-Haque* 2005/2660, *voir dire* transcript pages 323-324.

Conclusion on the basis of available material

118. Having regard to all the material before me and conscious of my proper role in this matter (see paragraphs 12, 13 and 92), I do not consider that there is substantial evidence that B15 or B16 may have committed the relevant offences (noting all the elements required - see paragraphs 83 to 86). I therefore have no reasonable basis for thinking further consideration of the matter is warranted.

119. My principal reason for this conclusion is that I do not think there is evidence for concluding that B15 or B16 possessed the required mental element for the offences of false imprisonment or kidnapping. That is, that they intended to relevantly confine or detain Mr Ul-Haque or foresaw, at that time, that Mr Ul-Haque would regard himself as in confinement or detention as a result of their conduct.

120. I regard the surrounding circumstances on 6-7 November 2003 as being consistent with the absence of this mental element.

121. As a result, I have concluded that I should not recommend to the Director-General that the matter be referred to the relevant NSW authority for further consideration of whether or not criminal offences were committed by B15 and B16 on 6-7 November 2003.

> **Finding 5: The material does not warrant referral of the matter to relevant authorities for consideration of prosecution action.**

122. While satisfied that this is the correct conclusion for me to reach, I would note that it has been, and is, open to Mr Ul-Haque to approach relevant NSW authorities or for those authorities to initiate investigations of their own motion. I appreciate that my conclusion differs from that expressed by Adams J in the NSW Supreme Court. I do not do so lightly. Nevertheless, the material that is now before me, and which I have set out above, leads me to the conclusion I have reached.

The tort of false imprisonment

123. Whether there is a reasonable basis for thinking that the tort of false imprisonment may have been committed is a more difficult matter. The legal advice provided to me, which I accept, is that the tort can be committed in circumstances where a person relevantly felt detained and where those responsible for effecting the perceived detention were negligent or careless as to the bringing about of that result. In other words, if Mr Ul-Haque considered himself compelled to go and remain with B15 and B16 (at least on reasonable grounds) the tort may have been committed if the ASIO officers ought to have realised that would be the result of their actions (even if they did not actually foresee that result).

124. I am also advised that the position in Australian law is probably that, once a plaintiff has established that he or she felt detained, then it would be for a defendant to prove that that detention was not brought about carelessly or negligently.

125. The IGIS Act provides me with the discretion to consider the issue of compensation, if I consider that a person has been adversely affected by the action(s) taken by an agency within the Australian Intelligence Community (including ASIO) and to make a recommendation in that regard.[43]

126. As things stand, I do not consider it is appropriate for me to make any recommendation as to compensation in this matter. In circumstances where Mr Ul-Haque has not made a complaint or provided evidence to me, I am unable to test his version of events and come to any view as to whether he was wronged by the actions of the ASIO officers.

127. In this context, I also note that it remains open for Mr Ul-Haque to attempt to pursue, in another appropriate forum, any remedy for false imprisonment that he feels may be due to him, should he be prepared to give evidence for this purpose in future.

Finding 6: The evidence before me is not sufficient to support a finding in respect of compensation for reason of false imprisonment.

128. This is not to say that I am completely comfortable with some of the elements of what occurred. There are risks of misunderstanding with three people sitting in the back seat of a car, and also in talking about difficult and less difficult paths and drawing a "Y" diagram. Use of the word "require" in other than its most common usage does not seem well advised, in my view.

129. I would also make the general comment that ASIO officers need to be careful about assuming much knowledge at all on the part of someone they approach, about ASIO, its powers, and the difference between ASIO and the AFP. This is even more so when the person may have views of government authorities which are shaped by the activities of particular agencies in some overseas countries.

[43] Section 22(2) of the IGIS Act refers.

PART B: POSSIBLE TRESPASS AND UNLAWFUL DETENTION AT THE UL-HAQUE RESIDENCE

Possible trespass

130. The Judgment in *R v Ul-Haque* included comment that there had been unlawful trespass at the residence of Mr Ul-Haque, because the conduct of an interview at that residence was not reasonably incidental to the authority provided by the search warrant executed there on 6 November 2003.

131. Where presence at the Ul-Haque's house involved activity beyond what was authorised by the warrant (including that which was necessary for its effective execution), and was not genuinely voluntary, then it seems clear, from the legal advice provided to me, that a trespass would have occurred. This is the case irrespective of whether it was apprehended by Mr Ul-Haque that the activity was authorised by the warrant. Although trespass (to land or to the person) is also one of the 'intentional' torts, I am advised that the tort may have been committed if either B15 or B16 acted directly and voluntarily in terms of the acts that amount to an unlawful interference – they need not necessarily have been aware or intended that the acts involve trespass. Further, I am also advised that it appears to be the case in Australian law that trespass to land may occur intentionally or carelessly[44].

132. I have reviewed documentary evidence that shows a properly authorised delegate approved the attendance of B15 and B16 at the location of the search on 6 and 7 November 2003, and that their presence at the residence did not extend beyond the natural expiration of the search warrant. However, as it transpired, B15 and B16 were not called upon to take part in the actual search proceedings.

133. The question therefore arises as to under what authority did B15 and B16 enter and remain in the Ul-Haque residence on 6-7 November 2008?

134. It does not seem to me that the entry and search warrant provided authority for any ASIO officers to enter and remain solely for the purpose of interviewing any occupant of the residence. Section 25 of the ASIO Act concerns access by ASIO to records or other things on particular premises, not access to individuals. Some level of discussion about items found in the search would be within the authority of the warrant but that does not encompass most (if not all) of the discussion which B15 and B16 had with Mr Ul-Haque.

135. An alternative source of authority for B15 and B16 to enter and remain would be the consent of the occupier. Did that exist in this instance?

[44] Refer to Attachment B paragraphs 20-23.

136. Mr Ul-Haque's evidence did not address in any detail what was said between he and B15 and B16 on approach to the residence, nor did the written statements and evidence given in court by B15 and B16. It might be implied from Mr Ul-Haque's evidence about earlier events that he felt under compulsion to allow B15 and B16 to enter his residence.

137. In response to specific questions from me, B15 gave the following sworn testimony:

> "*Well we just pulled up in the car in the driveway and we said, you know "do you mind if we come in with you?" He said "no, come in." We went inside, I think he said something about "do you want to talk more now?" And we said "no, no, you should break the fast, celebrate Iftar with your family.*"

138. I also asked B15 why he thought Mr Ul-Haque had "readily agreed" to an interview at the residence (as was recorded in the report written by B15 and B16 on 8 November - see paragraph 81). His response was that:

> "*Because he said "yeah yeah, no problem, OK." And he didn't say "oh, is this necessary, or we've already gone through that, why do we need to go through it again." Hence we use the term "readily agreed". He said "yep" you know, "no problem". I mean, we had explained the purpose of it quite clearly to him, just to go through in a more systematic and detailed way, the information which he'd already provided for which we were very thankful, but we just needed to flesh out a bit of the detail.*"

139. B16's testimony to me was that he could not remember being part of that particular conversation with Mr Ul-Haque, and B16's general recollection was that Mr Ul-Haque did not object to the interview.

140. Given the position I have taken about the earlier events, and noting B15's sworn testimony immediately above, there is insufficient basis for me to recommend the payment of compensation for trespass by ASIO officers.

> **Finding 7: The evidence before me is not sufficient to support a finding in respect of compensation for reason of trespass.**

141. As a general point, however, I would sound a caution for ASIO about interviews in the context of entry and search warrants. If ASIO officers attend premises for only the purpose of seeking an interview with a person present, then they cannot enter or remain on the premises without the consent of the occupant(s). Entry and search warrants can only authorise certain things and as the exercise of a coercive power, will be read narrowly by the courts.

142. Even where an ASIO officer otherwise engaged in a search seeks to interview a person present on matters not necessary to the execution of the warrant, I believe that, generally, steps should be taken to ensure that the person has not been intimidated or misled by the circumstances in which an entry and search warrant has been executed.

143. I say this because I agree with comments in the Judgment of Adams J that the execution of a warrant is likely to colour a person's understanding of the powers that ASIO officers hold.[45] The presence of police officers during an entry and search operation might amplify this impression.

> **Recommendation 1: ASIO should ensure that any person it interviews on premises where an entry and search warrant is being executed, clearly understands that the interview is not conducted under the authority of the warrant.**

Possible unlawful detention

144. In *R v Ul-Haque*, testimony was also provided by Mr Inam Ul-Haque (another of Mr Izhar Ul-Haque's brothers) about his recollections of the events that took place at the Ul-Haque family home on 6 and 7 November 2003.

145. Mr Inam Ul-Haque stated that during the course of the search, he asked to speak with his brother, Mr Izhar Ul-Haque. He recalls that, in response, an unidentified officer told him to "*Sit at the dining table*"[46] and he was not able to see his brother.

146. This gave me cause to consider whether members of the Ul-Haque family may have been unlawfully detained during the course of the search.

147. I was particularly sensitised to such an allegation, because this office had previously received a number of complaints making similar allegations in respect of ASIO searches in 2001. In all of the investigations conducted by my predecessor into these matters, he found no information to support a claim of detention. There was evidence which showed that people had been free to move into, out of and within the properties.

148. I reviewed the briefing material provided to ASIO and police officers prior to the search of the Ul-Haque residence and confirmed that it included clear directions that they could not make people stay at the residence or make them return and they could not impede their freedom of movement within the home, unless it had some negative impact on the conduct of the search itself.

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[45] Judgment in *R v Ul-Haque* [2007] NSWSC 1251, paragraph 95.
[46] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 392, lines 44-58; page 393, lines 1-13.

149. The preparatory notes of the team leader for the entry and search were available, and he confirmed to me in sworn testimony that among the things he had expressly told Mr Ul-Haque's mother, when he met her at the front of the residence, that "*you are not under arrest or being detained, you are free to come and go as you wish.*"

150. I also sought and received either statutory declarations or sworn testimony from all the ASIO officers present at a search of Mr Ul-Haque's residence about the conduct of ASIO and police officers during the search and their interactions with members of the Ul-Haque family. Specifically, I asked about any interaction(s) between any member of the Ul-Haque family, including Mr Inam Ul-Haque, and an ASIO officer or police officer in which the family member asked to speak to Mr Izhar Ul-Haque. None of the officers had any such recollection and they all said that they had not observed any behaviour, by anyone present, that would have been contrary to ASIO's policies and procedures.

151. While Mr Inam Ul-Haque's testimony appears to contain errors as to the timing of events on 6 November 2003, that does not mean that all of his recollections are necessarily incorrect. On the other hand, there is no support for his account in the statutory declarations or sworn testimony I obtained. I cannot be satisfied on the evidence before me that there was unlawful detention.

Finding 8: The evidence before me does not support a finding of unlawful detention of members of the Ul-Haque family by ASIO officers at their residence on 6 and 7 November 2003.

152. I would make the general comment that care should be taken by those executing ASIO search warrants that 'requests' are not perceived as 'directions'. This may involve an explanation to the occupant as to why the request is being made.

PART C: ASIO INTERACTION WITH LAW ENFORCEMENT AGENCIES IN THE UL-HAQUE MATTER

153. I should say upfront that I found no evidence that ASIO and the AFP engaged in a conspiracy to trap or coerce Mr Ul-Haque into incriminating himself. On 6 November 2003 ASIO saw itself conducting an intelligence collection exercise. What issues there are concern how well the two agencies communicated and interacted in pursuing their separate, albeit related, objectives. I discuss this more generally in Part D of this report, but before doing so should comment on three specific aspects of ASIO/AFP interaction in early November 2003.

Information provided to the AFP in planning

154. I reviewed the material that ASIO had prepared when it was planning for the search of the Ul-Haque residence. I found that the required documentation had been produced in draft, with final approval being provided orally (rather than in writing) by ASIO managers.

155. As I noted at paragraphs 44 and 45 (in respect of the giving of oral approval to interview Mr Ul-Haque), while it is more usual for a final approved version to exist, I do not draw any adverse conclusions from the final approval being provided orally in this instance. As already explained, the operational environment in ASIO at the time was one where developments in the counter-terrorism area were unfolding quickly. The suspicion that a domestic terrorism event may have been impending was reasonable cause for ASIO managers to streamline procedures where possible.

156. I also reviewed the briefing material provided by ASIO, prior to the search of the Ul-Haque residence. This included information provided to:

(a) ASIO's own officers

(b) AFP officers (for example, those attending to assist with the seizure of material), and

(c) state police officers (who routinely fulfil a protective security role on such operations).

157. The approach taken with planning and briefing gave me cause for concern on two specific matters.

158. First, it was unclear if the AFP knew about ASIO plans to interview Mr Ul-Haque on 6 November 2003 before he returned to the residence. The potential for a discussion with Mr Ul-Haque was certainly raised in the course of planning for the enter and search operation at Mr Ul-Haque's residence. It is unclear, however,

whether the AFP knew that B15 and B16 wished to conduct a 'cold start interview' with Mr Ul-Haque at Francis Park before coming to the residence with him on 6 November 2003.

159. There are some indications that this may have discomforted the AFP, as B15 and B16 were recalled to the residence later in the evening (when they had gone to Blacktown railway station with Mr Ul-Haque to collect his car), seemingly at AFP request.

160. This goes to the level of confidence that ASIO might or might not have had in sharing contextual information with the AFP (that was not directly relevant to any of the duties that police officers were asked to perform during the search, but nonetheless would have assisted the AFP's broader understanding of the situation). It also goes to the level of trust that the AFP might or might not have had in ASIO eventually sharing information derived from interviews at which they were not present.

161. The second of my concerns is that two operational briefings were held by ASIO managers on 6 November 2003 prior to the entry and search of Mr Ul-Haque's residence. One was for ASIO officers alone and the other was a joint briefing for both ASIO and police officers. Such an arrangement increases the potential for misunderstandings to arise between the organisations, if some information is included in one briefing, but not the other.

162. In respect of these issues I recommend that:

Recommendation 2: ASIO's operational plan for the execution of an entry and search warrant should be provided to the relevant police service(s) prior to the conduct of the operation.

Recommendation 3: A combined pre-entry briefing should be provided to all ASIO and police officers involved in a particular entry and search operation.

163. These measures should go some way to ensuring that law enforcement agencies are apprised of the full scope of ASIO's proposed activities in any enter and search operation under an ASIO warrant.

Attendance of an AFP officer at the ASIO interview

164. ASIO's immediate interest in Mr Ul-Haque in November 2003 was associated with its broader investigation into the possibility that planning for a terrorist attack in Australia was underway. As already noted, this investigation involved multiple targets and liaison with both the AFP and the NSW police.

165. Prior to the search of the Ul-Haque residence, a number of other ASIO entry and search operations had been conducted and a practice adopted of having AFP officers sit in on any ASIO interviews associated with the searches. This practice was followed in the Ul-Haque matter.

166. I have given consideration as to the reasons why AFP officers sit in on ASIO interviews and whether it is advisable for this practice to continue. The principal reason given to me is that police officers often accompany ASIO officers to an interview location, to help ensure their physical safety. It is the exception rather than the rule, occurring in a small minority of cases, and the presence of a police officer must be made known to the interviewee. Other reasons go to the efficient use of resources and transparency between the agencies.

167. While I accept the valuable protective security role that police officers provide, I remain concerned for the rights of the person being interviewed if he/she makes admissions of a criminal nature during the interview. There is also potential for a lack of clarity about the distinction between ASIO and the police.

168. Two new sets of operational guidelines have the potential to affect ASIO's management of such issues in future:

(a) The first relates to new ASIO policies and procedures (which have been developed subsequent to the Ul-Haque Judgment) which set out a range of considerations that should be taken into account when police are present at ASIO interviews, including discussing the eventuality that the individual may incriminate him or herself in the interview. The policies and procedures contemplate each agency agreeing, on a case-by-case basis, what should occur in that situation.

(b) The second relates to the implementation of Recommendation 2 from the Street Review, on the establishment of a joint operations protocol between ASIO and the AFP (see Part D of this report). The joint operations protocol provides a framework within which the agencies could develop or agree to some high level principles about their preferred approach.

169. I will take an ongoing interest in the further development and implementation of both of the above documents.

ASIO's handover to the AFP

170. At the conclusion of the search of the Ul-Haque home, B15 spoke to Mr Ul-Haque about having further discussions with him later that day (i.e. on the afternoon of 7 November 2003). They made arrangements for Mr Ul-Haque to contact B15 at an agreed time.

171. As it eventuated, more senior managers in ASIO and the AFP subsequently agreed that primary carriage of investigation into Mr Ul-Haque's activities should pass to the AFP. That is, the purpose of any further contact with Mr Ul-Haque should be law enforcement rather than intelligence collection. The AFP therefore asked that B15 not have any further discussions with Mr Ul-Haque for the time being, aside from calling him to say that their meeting that afternoon was cancelled, and to provide him with the contact details of an AFP officer.

172. B15 and an ASIO manager (among others) went to AFP Headquarters on the afternoon of 7 November 2003 and B15 was asked to telephone Mr Ul-Haque while he was there.

173. There does not seem to have been any particular crafting of what words B15 should use in speaking with Mr Ul-Haque. The recollection of the ASIO manager present was that the preliminary discussion focussed on the withdrawal of ASIO from the relationship with Mr Ul-Haque, although there was reference to the desirability of Mr Ul-Haque being encouraged to assist.

174. B15 made the call from an adjoining office and no one overheard his end of the conversation.

175. Mr Ul-Haque's evidence on the conversation he had with B15 included that:

> "*I was told to go and have an interview with the police by* [B15], *and I felt that it was like an order from* [B15] *that I have to answer the questions of the police, and for me that was my understanding. And as I said before, if I stop answering their questions at any stage, then things will happen to me.*"[47]

> "[B15] *told me that "I cannot emphasise this enough, that you must answer their questions fully and honestly and cooperate with them in any extent they ask you.*"[48]

176. B15's written statement of 12 August 2005 described the conversation as follows:

> "*I said: "I won't be meeting with you for a chat this afternoon as we agreed earlier this morning, however what I'd like you to do is to contact* [a name I now cannot remember], *a police officer, on* [a telephone number I now cannot remember] *and he will want you to meet him at the police centre in Sydney."*

[47] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 320, lines 10-16.
[48] *R v Ul-Haque* 2005/2660, *voir dire* transcript page 333, lines 26-28.

UL-HAQUE said: "OK, I'll do that."

177. I asked B15 if he had urged Mr Ul-Haque to go and see the police and be truthful and be fully forthcoming with them. He responded:

> "*I don't recall urging him. I said, you know "what I would like you to do is" and then I said "and what the police officer will want you to do is to meet with him." I don't recall but I'm not disagreeing that I may have said to him, you know, "you should be truthful and honest" because that was the line that we had said with him all along, is that, you know, he should be truthful in answering questions about his involvement with Mr Lodhi. So I don't disagree that I may have however briefly mentioned that, you know, he should be truthful. But it wasn't a protracted conversation. I certainly didn't need to urge him, he had agreed that he would call the police officer.*"

178. The Judgment said that by using this method of 'handing over' the case, ASIO and the AFP had introduced an element of compulsion into the subsequent AFP interviews.

179. There is an important caution here for ASIO about the care which is needed when speaking with people who, in the foreseeable future, are likely to be interviewed by police. In some circumstances what ASIO officers say can readily be argued in court as having affected the voluntariness and hence admissibility of the record of any subsequent police interview(s).

> **Finding 9: ASIO needed to be more conscious of the potential for any comments to Mr Ul-Haque, about how he should interact with the AFP, to impact on any subsequent police interview(s).**

180. This is part of a general issue about ASIO having a sufficient appreciation of what might impact on police activities, and which I will now discuss in Part D of this report.

PART D: ASIO INTERACTION WITH LAW ENFORCEMENT AGENCIES - BROADER ISSUES AND CONSIDERATIONS

Changes to ASIO's operating environment

181. It is clear that ASIO and the police services have been required to work much more closely together since the Sydney 2000 Olympics and the introduction of counter-terrorism legislation in Australia, in 2001 and afterwards.

182. This has thrown up a number of issues for ASIO to manage in the recent past including:

(a) recognising that its 'intelligence collection' work can no longer be separated neatly from the 'evidence collection' work of the police services

(b) modifying a strong organisational culture of secrecy, so that its employees are well-disposed to finding solutions that allow it to share information, where necessary, with the police services

(c) a marked increase in the intersection of ASIO operations with those of police services, and

(d) a greater exposure to the requirements of the judicial system and participation in court processes.

183. The issues raised in the Judgment provide further impetus for ASIO to ensure that its policies and procedures adequately reflect the entirety of its new roles and responsibilities in the counter-terrorism area and the manner in which it must now interact with its national security partners and the judicial system.

ASIO interaction with the AFP

184. As part of my inquiry, I sought information on the arrangements and agreements that ASIO and the AFP had in place in 2003 to ensure that their activities did not come into conflict or have foreseeable adverse consequences for the other agency.

185. It seems that any arrangements and agreements that existed were of an informal nature. It was common practice for counterparts in each agency to speak with each other, on a not infrequent basis, and operations officers in a number of locations were becoming used to working together more often (in particular during joint interviews and during ASIO entry and search operations, where police officers provided a level

of physical security and also acted as property officers in charge of taking seized material into custody).

186. At that time ASIO managers considered it important that they approach their new counter-terrorism responsibilities in an innovative and flexible manner, and they therefore preferred to agree procedures with the AFP on a case-by-case basis. The idea of a formal memorandum of understanding had been proposed by the AFP, but this possibility had not been taken on board by ASIO.

187. While it is undoubtedly true that the development of individual relationships between officers in ASIO and the AFP is important, it must now be acknowledged that the time has come for more formal arrangements to be put in place. This comes of necessity with the increasing size and ongoing nature of the counter-terrorism caseload and the range of activities now occurring between ASIO and the AFP. ASIO has recognised this itself in endorsing the recommendations of the Street Review, which I return to in more detail below.

188. It seems to me that a cause of some reticence on ASIO's part, in its dealings with the AFP, is the ready potential for conflicting interests to arise if the police services want to gather evidence on a particular person, leading to a criminal prosecution, but ASIO has an operational interest in that person continuing to move about in the community, so that he or she can act as a source (wittingly or unwittingly) of intelligence information.

189. In conducting its functions under the ASIO Act, ASIO is not primarily interested in identifying any criminal conduct that might be occurring. While ASIO is committed to supporting law enforcement when necessary, a criminal investigation is properly seen by ASIO as a separate function to the gathering of intelligence related to security. If one of ASIO's sources or contacts is prosecuted for a criminal matter, or even comes to overt police attention, this is likely to inhibit or bring to an end the productive gathering of further intelligence.

190. Equally, in cases where ASIO decides to use overt investigative methods (such as asking a person for an interview, searching their home under a warrant or questioning them under a warrant) it is inevitable that the person will then know that their activities have come to official notice. This may cause them to stop those activities. While one could be satisfied with that outcome (because it potentially deters a threat to Australia's national security), there may be no subsequent opportunities for the AFP to gather evidence and a successful prosecution may never be possible.

191. The potential for the work of the AFP and ASIO to overlap and clash is therefore significant. Working through this requires trust, communication and a suitable decision making framework.

The Street Review

192. Among its 10 recommendations, the authors of the AFP's Street Review have suggested three new management arrangements between ASIO and the AFP, to assist the agencies reconcile their work, and to ensure that information is exchanged in a regular and accountable way[49]. These recommendations are:

(a) **Street Review Recommendation 1**: *... that the AFP Commissioner, the Director-General of Security and the Commonwealth Director of Public Prosecutions constitute a committee to ensure issues relevant to national security, strategic priorities and enhanced interoperability are reviewed and resolved on a regular basis. The committee may also include representatives of relevant Commonwealth, State and Territory agencies and other appropriate persons either permanently or on a needs basis.*

(b) **Street Review Recommendation 2**: *... that a Joint Operations Protocol between the AFP and ASIO be adopted formally establishing a mechanism vesting responsibility in the AFP Deputy Commissioner National Security and the relevant ASIO Deputy Director-General that*:

> *(a) provides for a regular and accountable exchange of all information held by each agency that:*
>
> > *(i) is relevant to a national security operation of the other agency; or*
> >
> > *(ii) is national security related and is of a nature that the other agency has or may have statutory obligations in respect to that information*
>
> *(b) establishes an accountable handover process where it is agreed that lead responsibility for a matter is to be passed between agencies; and*
>
> *(c) enables a process for ongoing, regular and frequent consultation at a senior level to review matters being jointly managed, or matters where the AFP and/or ASIO may have an operational or functional interest.*
>
> *This Protocol should be supported by regular exchanges in State and Territory capitals between the State and Territory Police and local AFP and ASIO management on threat levels and terrorism investigations. Endorsement of this Protocol by the Attorney-General should be jointly sought by the AFP and ASIO.*

[49] The Street Review: *a review of interoperability between the AFP and its national security partners*, pages vi-vii.

(c) **Street Review Recommendation 4:** *... [the] full-time attachment, physical co-location and participation of ASIO officers to the [AFP] Joint Counter-Terrorism Teams in Sydney and Melbourne, with consideration to be given to other appropriate locations, on a mutually agreed basis…*

193. I endorse these recommendations in full, with the additional comments that:

(a) The successful implementation of Recommendations 1 and 2, in particular, can be expected to yield a better outcome in terms of the agencies making early and clear decisions on the relative merits of either ASIO having the lead with an investigation focussed on intelligence collection versus the AFP having the lead with a prosecution-focussed investigation.

(b) The successful implementation of Recommendation 2 will depend on both ASIO and the AFP exercising their discretion (to decide what information is '*relevant*' or '*national security related*') in favour of disclosing the maximum amount of material possible. ASIO has assured me that this is the approach it expects to take.

Nonetheless, it cannot be overemphasised that each agency needs to be aware of all of the investigations of the other, to avoid the possibility of (unintentionally) impeding or confounding the activities of the other agency. Moreover, the combination of what each agency knows may have far greater significance than each of the component parts taken alone. It may also be that duplication can be avoided on occasion.

For this reason, I would encourage ASIO to develop mechanisms (within the Street Review framework and having regard to the relevant provisions on disclosure contained in the ASIO Act) for it to regularly advise the AFP of all counter-terrorism investigations[50] which it approves internally (with an expectation of ongoing reciprocity from the AFP). I am of the understanding that this level of detailed information exchange was envisaged by the Street Review Committee in making its recommendations.

(c) Prior to the commencement of ASIO officers on full-time attachment to the Joint Counter-Terrorism Teams (see Recommendation 4 of the Street Review above), it would be desirable for the existing Memorandums of Understanding between the AFP and various State jurisdictions (on the establishment and operation of these teams) be reviewed to reflect ASIO's participation where appropriate. As noted in paragraphs 187 and 191, it is important to have a

[50] The Attorney-General's Guidelines in relation to the performance by ASIO of its functions of obtaining, correlating, evaluating and communicating intelligence relevant to security (including politically motivated violence), paragraph 4.1(e) states that an 'investigation' means '*a concerted series of inquiry in relation to a subject where it has been determined that the activities of the subject could be relevant to security*'.

sufficient framework of written agreements and guidance where there is interaction between ASIO and law enforcement.

Recommendation 4: The existing Memorandums of Understanding between the AFP and various State jurisdictions on the establishment and operation of the Joint Counter-Terrorism Teams should be reviewed to reflect ASIO's participation where appropriate.

194. I note that the **Street Review's Recommendation 3** envisages the Commonwealth Director of Public Prosecution (CDPP) regularly providing advice to ASIO and the AFP when they are in the early stages of planning a counter-terrorism investigation. The respective roles of ASIO, the AFP and the CDPP are to be formalised in a document entitled the 'Counter-Terrorism Prosecution Guidelines and Checklist'[51].

195. I support this recommendation in principle, without being able to endorse the actual draft Guidelines and Checklist document itself (as I have not been a party to the development of that document).

196. While there are undoubtedly advantages in the CDPP providing advice to the police during an investigation, the respective roles and the types of advice which can (and cannot) be appropriately given by the CDPP need careful and precise articulation. I would sound a note of caution that enhancements in the arrangements for ASIO, the AFP and the CDPP to work together, when necessary, must avoid risks of collusion being alleged. The clear suspicion of the Court in the Ul-Haque matter was that there was collusion between ASIO and AFP in the eventual charges brought against Mr Izhar Ul-Haque[52]. I did not find evidence of such collusion and I am unable to posit, of course, whether early intervention by the CDDP in the investigation would either have added to, or detracted from, the concerns of Adams J.

197. The **Street Review's Recommendations 5, 6 and 7** deal with improving the physical means by which ASIO can share its classified information with the AFP and successful implementation of these action items should help to create an environment in which ASIO feels it can appropriately share information with its national security colleagues. I therefore fully endorse these recommendations.

Improper conduct and training

198. The **Street Review's Recommendations 8, 9 and 10** deal with training matters[53]. Where intelligence officers are operating in close cooperation with law enforcement agencies they should be aware (at least generally) of the nature of the

[51] The Street Review, page vi.
[52] Judgment in *R v Ul-Haque* [2007] NSWSC 1251, paragraph 70 and 97.
[53] The Street Review, pages vii-viii.

requirements placed upon law enforcement officers in relation to the gathering of evidence and the obtaining of admissions during questioning. They also need to be generally aware that their actions in dealing with persons of security interest, or potential interest to police, may affect the ability of the police to obtain admissible evidence.

199. In its submission to this inquiry, ASIO advised me that it has been working collaboratively with training staff from the police forces to best prepare ASIO officers to work on matters closely aligned with criminal investigations. For example, I am advised that ASIO training courses have been run by the AFP in evidence handling since 2005 and (since the Ul-Haque Judgment) discussions have been held with the AFP to ensure that the training it presents to ASIO specifically addresses the exclusionary rules of evidence with regard to admissions. A strategy for rolling out this training is apparently being settled.

200. In practice the application of the rules of evidence in intersecting ASIO / AFP operations is not always straightforward. Courts have recently recognised there is a distinction between police criminal investigations and ASIO intelligence collection operations, and that ASIO is not necessarily bound by the same procedures as police. On the other hand, the courts have previously considered the collective conduct of officials in determining whether evidence gathering behaviour has been oppressive or improper (rather than confining themselves to the actions of individuals acting in isolation). In such instances (for example in the Ul-Haque matter) the courts have viewed the actions of police and ASIO officers as related, rather than separate. It is therefore reasonable to assume that the courts will continue, at times, to take into account any relevant conduct of ASIO officers where their activities occur in the context of a joint or coordinated operation or otherwise have some connection to the evidence gathering activity.

201. It is important to note that there is not an exact alignment between what will be ruled as improper or oppressive conduct by the courts for the purpose of determining the admissibility of evidence, and what might be taken as impropriety, while still lawful, in the course of intelligence collection. Activity which is improper in the context of Evidence Acts will not necessarily involve a lack of propriety in the context of the IGIS Act, although there may be areas where the same conduct would be improper in either context. However, because there can be a convergence of intelligence and evidence gathering activity, it seems to me that ASIO should continue to assess where the boundary on what constitutes impropriety in intelligence collection, differs from what might be improper or oppressive conduct in evidence law.

202. Importantly, ASIO needs to implement in a comprehensive manner the training strategy under development to ensure that its employees have sufficient knowledge to avoid, where realistically possible, ASIO activities being able to ground a successful

challenge to the admissibility of evidence presented in a prosecution. Not only is this desirable for the obvious reason of not causing prosecutions to stumble, but will also give ASIO staff the confidence to approach their work knowing that there are no legal landmines on which they may step.

> **Recommendation 5: ASIO should further train all relevant staff on what steps can reasonably be taken to avoid ASIO activities impacting on the gathering of admissible evidence by police.**

Other training and procedural matters

203. In addition to the above matters in this Part, I considered certain other issues related to ASIO's policies, procedures and training programs during the course of this inquiry, which cannot be put in the public domain.

204. Classified information on my conclusions and recommendations in respect of those matters is provided at Attachment D.

PART E: FINDINGS AND RECOMMENDATIONS

205. After being provided a draft of this report, as required by section 21 of the IGIS Act, the Director-General of Security advised me that he adhered to the submissions he had made to me in the course of the inquiry and did not wish to comment further.

206. I also discussed my proposed report with the Attorney-General in accordance with s17(9) of the IGIS Act. No changes were requested or made as a result of this discussion.

207. Having regard to the profile given to the Judgment and general public interest in the outcomes of my inquiry, I have prepared all but two attachments to this report as an unclassified document, with a view to enabling as much detail as is possible being released into the public domain, should the Attorney-General be of a mind to do so.

B15 and B16's legal costs

208. I take the view that the actions of B15 and B16 should be viewed as the actions of ASIO, noting that ASIO managers gave them approval to adopt the tactics they used and that ASIO's training does not appear to have fully sensitised them to matters such as potential impact on police prosecution activities.

209. I have indicated that it would be proper for ASIO to meet the reasonable costs of B15 and B16 seeking legal representation, to assist them in making submissions to me, when I sought their comments.

210. I understand that ASIO has met these costs to date.

211. At paragraphs 122 and 127 I alluded to the fact that is open to Mr Ul-Haque to approach relevant NSW authorities, or for those authorities to initiate investigations of their own motion, if I have misunderstood or misinterpreted the situation or the law in this matter. Should that eventuate, I also consider that it would be appropriate for ASIO to meet the reasonable costs of B15 and B16 being represented in such proceedings.

212. After inquiring into the particulars of these matters, I have made the following findings:

> **Finding 1: In early November 2003, ASIO was justified in apprehending the real possibility of a terrorist attack in Australia. It was appropriate for ASIO to take action to resolve the possible scope and timing of any such attack as a matter of urgency.**

Finding 2: The nature of ASIO's information about Mr Izhar Ul-Haque justified him being a person of interest to ASIO in 2003, in the context of the operation referred to in Finding 1.

Finding 3: Prior to 6 November 2003, none of ASIO's activities in respect of Mr Izhar Ul-Haque are of legal concern or could be considered improper.

Finding 4: It was proper for ASIO management to provide oral, rather than written, approval for the interview of Mr Izhar Ul-Haque on 6 November 2003 (given the urgency of a possible terrorist threat).

Finding 5: The material does not warrant referral of the matter to relevant authorities for consideration of prosecution action.

Finding 6: The evidence before me is not sufficient to support a finding in respect of compensation for reason of false imprisonment.

Finding 7: The evidence before me is not sufficient to support a finding in respect of compensation for reason of trespass.

Finding 8: The evidence before me does not support a finding of unlawful detention of members of the Ul-Haque family by ASIO officers at their residence on 6 and 7 November 2003.

Finding 9: ASIO needed to be more conscious of the potential for any comments to Mr Ul-Haque, about how he should interact with the AFP, to impact on any subsequent police interview(s).

213. I also concluded that I should make the following general recommendations:

Recommendation 1: ASIO should ensure that any person it interviews on premises where an entry and search warrant is being executed, clearly understands that the interview is not conducted under the authority of the warrant.

Recommendation 2: ASIO's operational plan for the execution of an entry and search warrant should be provided to the relevant police service(s) prior to the conduct of the operation.

Recommendation 3: A combined pre-entry briefing should be provided to all ASIO and police officers involved in a particular entry and search operation.

Recommendation 4: The existing Memorandums of Understanding between the AFP and various State jurisdictions on the establishment and operation of the Joint Counter-Terrorism Teams should be reviewed to reflect ASIO's participation where appropriate.

Recommendation 5: ASIO should further train all relevant staff on what steps can reasonably be taken to avoid ASIO activities impacting on the gathering of admissible evidence by police.

Recommendation 6: Classified.

Recommendation 7: Classified.

Ian Carnell
Inspector-General
of Intelligence and Security

12 November 2008

Unclassified Attachments:

A. Timeline of ASIO activities on 6 and 7 November 2003 in respect of Mr Izhar Ul-Haque
B. Key tests in the law – false imprisonment, kidnapping and trespass

Classified Attachments:

C. Strategic and operational environment in ASIO in late 2003
D. ASIO training and procedural matters

Attachment A

Timeline of ASIO activities in respect of Mr Izhar Ul-Haque on 6 and 7 November 2003

6 November 2003

1500 hrs	ASIO senior managers briefed ASIO and AFP teams about a proposed search of Mr Izhar Ul-Haque's (Izhar) residence later that evening.
1835 hrs	B15, B16 and an ASIO driver arrive at the Blacktown railway station car park.
Before 1910 hrs	The eldest of Izhar's brothers was approached by two ASIO officers at his residence. (The ASIO objective in doing this was to ensure that, having regard to the cultural traditions of the Ul-Haque family, the eldest male family member was advised that a search was to be conducted at his parent's home, and to provide him the opportunity to be at the residence during the search.)
1910 hrs	Izhar enters the Blacktown railway station car park with his youngest brother. They are met by B15 and B16.
~1913 hrs	Izhar accompanies ASIO officers to Francis Park, Blacktown leaving his youngest brother in the car park.
1913 hrs	The brother contacts a family member to be picked up from the car park.
~1920 hrs	Izhar, B15, B16 and the ASIO driver arrive at Francis Park, Blacktown.
1927 hrs	Entry and search warrant served at the Ul-Haque family residence. The entry and search warrant was explained to Mrs Ul-Haque.
1947 hrs	Mr Inam Ul-Haque (the second eldest of Izhar's brothers) arrives at his residence accompanied by the youngest brother. The warrant was explained to both persons by the ASIO Team Leader.

~2000 hrs	Izhar, B15, B16 and the ASIO driver depart Francis Park to go to Izhar's residence.
2003 hrs	The eldest brother arrives at the residence accompanied by an ASIO officer. The warrant is explained by the ASIO Team Leader.
2014 hrs	Izhar, B15, B16 and the ASIO driver arrive at the Ul-Haque residence. Izhar has discussions with his family, prays and breaks his fast. He is not accompanied by ASIO officers during these activities.
2044 - 2156 hrs	Discussions between the eldest brother and a male ASIO officer occur, after the family meal has concluded.
2117 hrs	Izhar, B15, B16 and an ASIO driver depart the residence to return to the Blacktown railway station car park and retrieve Izhar's vehicle.
2127 - 2227 hrs	Discussions between Mrs Ul-Haque and a female ASIO officer occur.
~2130 hrs	Izhar, B15, B16 and an ASIO driver arrive at Blacktown railway station.
2206 - 2320 hrs	Discussions between Inam and a male ASIO officer occur.
~2215 hrs	Izhar, B15, B16 and an ASIO driver depart Blacktown railway station: Izhar and B15 in Izhar's car, and B16 and the driver in the ASIO vehicle.
2230 hrs	Izhar, B15, B16 and an ASIO driver arrive at the Ul-Haque residence. Izhar sits in the main lounge area.

<u>7 November 2003</u>

0005 - 0055 hrs	Recorded interview of Izhar commenced in bedroom by B15 and B16 with a Federal Agent in attendance.
0055 – 0010 hrs	15 minute break in interview.
0100 - 0107 hrs	Interview continued.

0107 - 0155 hrs	48 minute break in interview.
0155 - 0205 hrs	Interview continued.
0205 - 0209 hrs	4 minute break in interview.
0209 - 0300 hrs	Interview continued.
0258 hrs	Physical searching concluded.
0300 - 0317 hrs	17 minute break in interview.
0317 - 0345 hrs	Interview concluded.
0325 - 0410 hrs	Log checking of seized materials with Ul-Haque family.
0423 hrs	ASIO departure protocols.
0430 hrs	ASIO and police officers depart residence.
Early am	Telephone conversation between ASIO senior managers in Canberra and AFP senior managers, followed by a meeting between the ASIO and AFP senior operational managers in Sydney. It was decided that primary carriage of the matter would transfer from ASIO to the AFP and that ASIO officers would introduce Izhar and his eldest brother to nominated AFP officers.
Late am	A senior ASIO operational manager was asked to attend AFP Headquarters with B15 and another ASIO officer (who had interviewed the eldest brother the day before) to discuss arrangements for ASIO officers to contact Izhar and the eldest brother later that day.
Time u/k	Meeting at AFP Headquarters between AFP and ASIO officers.
~1500 hrs	B15 telephones Izhar cancelling their appointment to meet that day and asking him to contact an AFP officer.
~1500 hrs	Another named ASIO officer telephones the eldest brother asking him to contact an AFP officer.
~1510 hrs	A police officer calls Izhar.

Attachment B

Key Points of Law

1. The following is a summary of aspects of the law of false imprisonment, kidnapping and trespass, having regard to the issues raised in *R v Ul-Haque* [2007] NSWSC 1251. It was prepared on the basis of advice that I have received, and is included in this report to better indicate the range of relevant legal matters that I had to have in mind during the course of this inquiry.

False Imprisonment – the Crime at Common Law

2. I am advised that to prove a charge of false imprisonment, the Crown must establish, beyond reasonable doubt, that the accused confined the victim at a place or places, without the consent of the person taken, and without lawful excuse, this being done deliberately and by force or the threat of it or by fraud. The accused need not intend to effect an arrest. It will suffice to make out the offence if the accused gives the victim to understand, by words or by conduct, that he or she has no option but to remain in the place or places of confinement.

3. It was said by Bray CJ in *MacPherson v Brown* (1975) 12 SASR 182 at 197 that, 'the mens rea [mental element] necessary to constitute the crime of false imprisonment is the intention to deprive the victim of his liberty…' The statement was approved in *R v Vollmer* [1996] 1 VR 97, per Ormiston J at 186, Southwell and McDonald JJ agreeing, at 173.

4. In the English case of *R v Rahman* (1985) 81 Cr App R 349 at 353 it was held that 'false imprisonment consists of the unlawful and intentional or reckless restraint of a victim's freedom of movement from a particular place. In other words, it is unlawful detention which stops the victim moving away as he would wish to move.'

5. While *R v Rahman* refers to 'reckless' restraint, this can be reconciled with the Australian cases on the basis that, at common law in relation to offences against the person of this type (such as common assault), a person will also be taken to have intended the result of their conduct if they foresaw the likelihood of that result and proceeded with that conduct nevertheless. Another way of describing recklessness in this context is to refer to the accused being 'advertant' of the 'relevant consequence' as Bray CJ and Zelling J preferred in *MacPherson v Brown* (at 189 and 200). This emphasises the distinction to be made between what the accused *actually* thought and what the accused *ought* to have thought, the latter involving negligence but not criminal responsibility in relation to this crime.

6. The restraint need not be by physical barrier or actual physical force. It is sufficient for a restraint of the liberty of the person to have occurred in that a person has completely submitted to the control of another in circumstances in which they (reasonably) felt compelled to so do, for example, because of the threat that force may be used to secure compliance: *Symes v Mahon* (1922) 22 SASR 447; *Myer Stores Limited v Soo* [1991] 2 VR 597; *McFadzean v CFMEU* [2007] VSCA 289.

7. It is not necessary for a person to know that they have been detained, provided a total restraint has, in fact, been effected: *Murray v Ministry of Defence* [1988] 1 WLR 692.

8. Cases of false imprisonment, where there has been no forcible detention of the victim, commonly arise in the context of cases of suspected shoplifting. These cases typically involve a person being asked to accompany the store employee for the purposes of investigating the matter and no physical force is applied to secure compliance with that request. Two sets of circumstances may be considered.

(a) If the employee suspects the shopper of shoplifting and asks the shopper to accompany him or her to an office and stay there while the matter is investigated, there will be no false imprisonment if the shopper has gone there voluntarily to clear his or her name: *Fogg v Knight* [1968] NZLR 330; however the action of the shopper must be truly voluntary: *Myer Stores Ltd v Soo.*

(b) On the other hand, if a shopper has been accused or 'charged' with shoplifting and accompanies the store employee to a manager's office because force may be applied to them, then a false imprisonment may be taken to have occurred: *Peters v Stanway* (1835) 172 Car & P 737. And it will certainly be a false imprisonment if the employee at any time indicates that force will be used if the shopper does not comply with the employee's request: *Myer Stores Ltd v Soo*.

False Imprisonment - the Tort

9. As with the common law criminal offence, the tort of false imprisonment involves the unlawful restraint of the liberty of one person under the custody of another. The circumstances or physical elements of false imprisonment discussed above are equally applicable in relation to the existence of the tort as they are in relation to the criminal offence. In fact, most of the cases discussed above actually involved actions in tort.

10. Nevertheless, in terms of the mental element required for the commission of the tort, there would appear to be a wider area of culpability. While false imprisonment is one of the 'intentional' torts that may be committed against a person, and an action is usually brought for an intentional restriction on the freedom of movement of the

plaintiff, actions for reckless or negligent false imprisonment are not excluded: Trindade, Cane and Lunney *The Law of Torts in Australia* 4th ed, p56.

11. The tort of false imprisonment has also been described as the direct and intentional or careless total confinement of the plaintiff by the defendant: Mendelson, *The New Law of Torts*, p 106. In this context it seems correct to equate negligence with carelessness (in the sense of failure to take due care): see the cases discussed in *Halsbury's Laws of Australia* [415-335].

12. In *MacPherson v Brown*, Zelling J, at 209, appeared to contemplate that the tort of false imprisonment could be committed recklessly or negligently. He gave the example of a person imprisoned by mechanical doors set up by a defendant, where the likelihood of a person being so imprisoned could be foreseen by the defendant.

13. A successful action in tort for false imprisonment requires the plaintiff to prove the elements of the tort on the balance of probabilities. However, the tort is one of strict liability; once the plaintiff has established the imprisonment, it seems that the law in Australia requires the defendant to prove any lawful justification or excuse for the imprisonment: see *McHale v Watson* (1964) 111 CLR 384; Trindade, Cane and Lunney, p 57. It has also been held that the executive government must establish that its officers had lawful authority to detain: *Ruddock v Taylor* (2005) 222 CLR 612.

Kidnapping - the Crime at Common Law

14. At common law, it is an offence to unlawfully take and carry away a person or hold a person in secret against his or her will: *R v D* [1984] AC 778. All that must be proved is a deprivation of liberty and a taking away of the victim from the place he or she wishes to be. It is unnecessary to prove that the kidnapper took the victim to the place the kidnapper intended: *R v Wellard* (1978) 67 CR App R 364.

15. The distance which the person has been carried away does not need to be very great: see *Davis v R* [2006] NSWCCA 392, including the discussion of *R v Wellard*.

Kidnapping – the Statutory Offence

16. Section 86(1) of the *Crimes Act 1900* (NSW) relevantly provides that:

> *A person who takes or detains a person, without the person's consent:*
> *(a) with the intention of holding the person to ransom, or*
> *(b) with the intention of obtaining any other advantage,*
> *is liable to imprisonment for 14 years.*

17. In relation to the elements of taking and detaining, there is the question of what is the relevant intention. In that regard it has been held that the intention to hold a victim

extends to the intention to hold the victim irrespective of whether the victim is willing or consents to remain with the accused: *R v DMC* [2002] NSWCCA 513, at [42].

18. In *Davis v R*, Howie J stated (and the other judges agreed) that the original purpose of the modern kidnapping provisions was to provide for more serious and definite penalties than might otherwise be appropriate for an offence which, at common law, was a mere misdemeanour. The provisions were directed, not against the physical removal of the victim, but against the additional intent to hold the victim for some advantage to the offender.

19. The reference in s 86(1)(b) to the 'obtaining of any other advantage' is not limited to obtaining some monetary or similar benefit from a third party but extends to where the object of the detention is to force the detainee to do something for the detainer: see *R v DMC* at [32], where the trial judge was not overruled on this point.

The Tort of Trespass

20. Generally speaking, an act of trespass is a tort rather than a crime although the term 'criminal trespass' is sometimes used to refer to a trespass for the purpose of committing a crime – and can be a specific circumstance of self-defence under NSW law - e.g. ss418 and 420 of the *Crimes Act 1900* (NSW).

21. The tort of trespass to land will occur where there is no authority to enter or remain on a person's property[54].

22. A search warrant may effectively authorise a person executing the warrant to communicate with and ask questions of any person present at the premises to be searched where this is necessary or reasonably incidental to the effective execution of the warrant. Further, the fact of the existence of the warrant does not prohibit the conduct of a genuinely voluntary interview with a person who is present at the premises.

23. However, where there is activity beyond that which is authorised by the warrant (or which is necessary for its effective execution or was genuinely voluntary) then a trespass may occur, particularly if it was apprehended by the occupiers that the activity (such as an interview) was authorised by the warrant: *Waters v Maynard* (1924) 24 SR (NSW) 618; *Watson v Murray* [1955] 1 All ER 350; *Halliday v Neville* (1984) 155 CLR 1, per Brennan J at 10; *Plenty v Dillon* (1991) 171 CLR 635. Although trespass (to land or to the person) is also one of the 'intentional' torts, the tort will be committed if the defendant acts directly and voluntarily in terms of the

[54] Lawful authority to enter and remain may consist of the consent of the occupier, a statutory right (for example under a warrant) or a common law right (for example to prevent threats to life or property). If a person lawfully enters the land of another, but that lawful authority expires or is revoked, then a trespass occurs if the person does not leave the land as soon as it is reasonably practicable: *Kuru v State of New South Wales* [2008] HCA 26.

acts that amount to an unlawful interference; the defendant need not necessarily be aware or intend that the acts involve trespass: Mendelson, p117. Further, it also appears to be the case in Australia that trespass to land may occur intentionally or carelessly; again see the cases discussed in *Halsbury's Laws of Australia* [415-335].