

SENATE STANDING COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS
AUSTRALIAN FEDERAL POLICE

Question No. 1

Senator Ludlum asked the following question at the hearing on Friday, 21 May 2010:

Senator LUDLAM—We dealt this morning with the body of law relating to sedition, and the proposed name change there, and treason, which effectively are dead areas of law which have never been enlivened in history so far. Apart from the instance with Dr Haneef, are you saying that dead time is not used at all and that we are leaving it there as a hedge against needing to at some time in the future?

Cmdr Lee—I would need to take on notice how many times we may have used those provisions, if at all. As you say, the Haneef matter is certainly the case that has led to this discussion. But there you have the spectrum of how we would undertake our counterterrorism operations. Where we have a lead-in time, generally the requirement for it is less, but where it is more reactive in nature and the lead-in time is significantly less then it has been shown that we need the ability, on a sliding scale, to use these provisions to a greater degree.

Senator LUDLAM—Could you provide for the committee in some format an indication of to what degree that is theoretical. We are having a debate now about whether seven days is appropriate. Most of the submitters to this inquiry have said that it is not appropriate at all. If you are landing on seven days, is it based on operational experience or is it based on something else? I am interested to know that.

The answer to the honourable senator's question is as follows:

Specified time is a special category of disregarded time or dead time that is only available in terrorism cases. The Australian experience has shown that where counter-terrorism investigations are undertaken with minimal lead in time there is greater requirements for specified time provisions. Specified time provisions have been used only once and that was a reactive matter with minimal lead time to that investigation. The international experience is consistent with that of Australia.

The one occasion that the AFP used the 'specified time' provisions, in particular subsection 23CA(8)(m) of the *Crimes Act 1914*, was during Operation Rain, the investigation of Dr Haneef.

In Operation Rain the AFP was granted eight days of specified time as a result of three applications to a Magistrate. The key reasons why the AFP was granted specified time in that case included:

- A large portion of material was sourced from the UK. The AFP had to wait for the UK to respond to AFP requests for material and the AFP then had to analyse the material received. The time zone difference of nine hours added to the delay; and
- The AFP needed time to collect, collate and analyse material from a broad range of sources including computer hard drives that were seized during the execution of search warrants and call charge records for phones linked to Dr Haneef and associates.

The AFP believes that this experience shows that specified time provisions provide police with a flexible framework and sufficient oversight for pre-charge detention where the investigation is undertaken with limited lead in time

To ensure public confidence in the oversight of specified time, the AFP supports the creation of a cap on specified time. In our view seven days is an appropriate period that balances the rights of an arrested person with the needs of law enforcement. There appears to be some support for this view in the Report of the Inquiry into the Case of Dr Mohamed Haneef (the Clarke Report) in which Clarke said at 5.4.7 on page 249 “If pressed—and having regard to Dr Haneef’s detention in circumstances where the overseas involvement created time problems generally for the investigation—I would tend to say the cap should be no more than seven days.”, although we acknowledge that Clarke made no formal recommendation in relation to the length of the cap.

In terrorism cases it is essential that law enforcement have a reasonable pre-charge detention period in which to conduct essential and broad ranging enquiries to:

- identify the persons involved in the terrorism offence(s) and rule out persons who are not involved;
- ensure the proper interview and charging of the arrested person and any associates; and
- protect the public and prevent a terrorist act, or further terrorist acts, from occurring.

We believe the following key points are relevant to the consideration of a 7 day cap:

Threat to public safety and need for broad ranging investigation

- Terrorism presents a high risk to public safety and terrorism investigations are often undertaken with minimal lead in time or prior knowledge. These investigations must be thorough and broad ranging and often involve multiple suspects, the execution of multiple search warrants, the seizure of large numbers of exhibits, considerable forensic analysis of crime scenes and seized items and significant enquiries and liaison with overseas agencies. These activities can take many days to complete, even on a preliminary basis.
- It takes considerable time to collate and analyse the large volumes of information gathered from these activities and it is often necessary for significant elements of the activities to occur pre-charge to ensure that the arrested person can be properly interviewed and that police can prevent terrorist acts.

Reliance on overseas enquiries

- Counter terrorism investigations are often heavily reliant on information from overseas sources and the receipt of this information can significantly influence the direction and outcomes of an investigation.
- Difficulties are commonly encountered in securing important and accurate information expediently from overseas. Such difficulties include delays associated with time zone differences and delays in overseas authorities processing inquiries from Australian authorities.
- It is important to note that in these cases overseas agencies may be engaged in their own concurrent terrorism investigations and therefore will have a reduced capacity to respond to our requests.

Classification of information

- During counter terrorism operations, police work in partnership with both domestic and foreign law enforcement and intelligence partner agencies. It is common for highly classified information to be sourced from domestic and/or foreign intelligence agencies.
- It is necessary to convert such highly classified information into a form that can be used in an interview with a suspect or produced in evidence. This is often a very time consuming process, particularly in circumstances where the information has been sourced from foreign intelligence agencies.

- It is also necessary to obtain written approvals from the owners of the original classified information prior to it being used in any way which can result in further delays.

Difficulties with electronic evidence

- The growing range and availability of electronic equipment in which information can be stored and significant increases in its capacity to store data has resulted in substantial increases in the time taken to examine and process seized equipment containing electronic evidence. This situation is exacerbated in circumstances where material is seized from multiple premises as part of the one operation, as is typically the case in the investigation of counter terrorism offences.
- An analogy which has been used by the AFP in Australian courts is that 4 terabytes represented in A4 pages of printed text would occupy approximately:
 - 214,748 filing cabinets;
 - 81,000 cubic metres;
 - 32 Olympic swimming pools;
 - The MCG arena filled to a depth of almost 4 metres;
 - 2/3 of the office space in the AFP's new headquarters, the Edmund Barton Building.
- In Operation Rain a total of 759 gigabytes (3/4 of a terabyte) of data was seized from various computers and portable media devices.

Translation and decryption requirements

- There is a high likelihood in terrorism investigations that information obtained from overseas agencies, the execution of search warrants and other enquiries will require translation and/or decryption.

A cap on 'specified time' of less than seven days has the potential to hamper the ability of law enforcement agencies to conduct sufficiently comprehensive pre-charge investigations and potentially, to affect the ability of police to protect the public and prevent terrorist attacks.

