3

Detention

3.1 This chapter examines some of the most contentious aspects of the proposed Bill including, detention of persons, detention incommunicado, the rights and obligations of detainees, and the treatment of persons in detention.

3.2 The Bill provides for the detention of persons who may not themselves be suspected of a crime. Under the proposed legislation, a person may only be detained if the prescribed authority 'is satisfied that there are reasonable grounds for believing that the person may alert a person involved in a terrorist offence that the offence is being investigated; may not continue to appear or not appear again, before a prescribed authority as required by a warrant; or may destroy, damage or alter a record or thing the person has been requested, or may be requested, under the warrant to produce.'[1]

3.3 While in detention, a person may be detained incommunicado without access to legal advice so as to avoid the possibility that the legal adviser would alert terrorist suspects.

3.4 The general provisions for detaining a person are set out under proposed section 34F. Proposed section 34G gives directions as to the requirements of a person when appearing before a prescribed authority for questioning. A person subject to a warrant may not refuse to give information even if doing so might incriminate them.

3.5 Proposed section 34J concerns the treatment of persons while under a warrant issued under proposed section 34D. A direction is given that the person must be treated with humanity and with respect for human dignity.

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1 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill, 2002,* Explanatory Memorandum, p. 13.

3.6 No age limit is given in the Bill in relation to persons who may be detained. It is therefore possible for children to fall under the ambit of the legislation and be held in detention and incommunicado without their parent's knowledge. This is discussed in the final section of this chapter.

Proposed section 34F Detention of persons

Background

3.7 Proposed section 34F of the Bill covers matters including the role of the prescribed authority in authorising detention and the role of the police in taking the person named in the warrant into custody and bringing them before the prescribed authority.

3.8 This section also provides for the issuing of successive warrants and the process for keeping a person detained incommunicado. Proposed section 34F is produced, in full, below.

Proposed section 34F Detention of persons

(1) At any time when a person is before a prescribed authority for questioning under a warrant, the authority may give any of the following directions:

(a) a direction to detain the person;

(b) a direction for the further detention of the person;

(c) a direction about any arrangements for the person's detention;

(d) a direction permitting the person to contact a specified person (including someone specified by reference to the fact that he or she is the person's legal adviser) or any person;

(e) a direction for the person's further appearance before the prescribed authority for questioning under the warrant;

(f) a direction that the person be released from detention.

(2) The prescribed authority is only to give a direction that:

(a) is consistent with the warrant; or

(b) has been approved in writing by the Minister.

(3) The prescribed authority is only to give a direction described in paragraph (1)(a) or (b) if he or she is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person:

(a) may alert a person involved in a terrorism offence that the offence is being investigated; or

(b) may not continue to appear, or may not appear again, before a prescribed authority; or

(c) may destroy, damage or alter a record or thing the person has been requested, or may be requested, in accordance with the warrant, to produce.

(4) A direction under subsection (1) must not result in:

(a) a person being detained at a time more than 48 hours after the person first appears before a prescribed authority for questioning under the warrant; or

(b) a person's detention being arranged by a person who is not a police officer. Giving effect to directions

(5) Directions given by a prescribed authority have effect, and may be implemented or enforced, according to their terms.

(6) A police officer may take a person into custody and bring him or her before a prescribed authority for questioning under a warrant issued under section 34D if the person fails to appear before a prescribed authority as required by the warrant or a direction given by a prescribed authority under this section.

Direction has no effect on further warrant

(7) This section does not prevent any of the following occurring in relation to a person who has been released after having been detained under this Division in connection with a warrant issued under section 34D:

(a) a prescribed authority issuing a further warrant under that section;

(b) the person being detained under this Division in connection with the further warrant.

Communications while in custody or detention

(8) A person who has been taken into custody, or detained, under this Division is not permitted to contact, and may be prevented from contacting, anyone at any time while in custody or detention.

(9) However:

(a) the person may contact anyone whom the warrant under which he or she is detained, or a direction described in paragraph (1)(d), permits the person to contact; and

(b) subsection (8) does not affect the following provisions in relation to contact between the person and the Inspector-General of Intelligence and Security or the Ombudsman:

(i) sections 10 and 13 of the Inspector-General of Intelligence and Security Act 1986;

(ii) section 22 of the Complaints (Australian Federal Police) Act 1981; and

(c) anyone holding the person in custody or detention under this Division must give the person facilities for contacting the Inspector-General of Intelligence and Security or the Ombudsman to make a complaint orally under a section mentioned in paragraph (b) if the person requests them.

Note: The sections mentioned in paragraph (9)(b) give the person an entitlement to facilities for making a written complaint.

3.9 The directions that a prescribed authority may give when a person is before a prescribed authority for questioning under a warrant are set out in proposed subsection 34F(1)[2]. For example, a prescribed authority may direct a person to be detained or further detained. It appears, however, that a direction by a prescribed authority may only be given when the person is appearing before the prescribed authority as set out under proposed subsection 34F(1).

3.10 The Explanatory Memorandum (EM) states that proposed subsection 34F(1) allows the prescribed authority to make, 'a direction permitting the person to contact a specified person or any person (this may include a person's legal adviser)'. This is a qualified power, however, when read with paragraph 34F(9)(a), which sets out the directions for determining who a person may contact while in custody or being detained. If a person is being detained under a 34D warrant, subsection 34F(8) prohibits the person contacting 'anyone at any time while in custody or detention'[3] except persons who are contemplated by the warrant.

3.11 As indicated in Chapter 2, subsection 34F(7) allows for requests to be made for successive warrants, which may result in detention for an indefinite period of time as there is not a proposed limit in the Bill to the number of warrants, which may be issued. It is conceivable that a person may be detained for an indefinite period.

3.12 During hearings, ASIO commented that in 'some circumstances, the proposed amendments could prove crucial in actually preventing a terrorist attack.'[4]

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2 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill, 2002,* Explanatory Memorandum, p. 12.

3 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill, 2002,* Explanatory Memorandum, p. 12.

4 Mr Denis Richardson, Director-General of Security, ASIO, *Transcript* p. 22.

3.13 The provision for detention appears to be a precautionary measure. Detention is proposed:

- as the person may pass on information to someone suspected of planning a terrorist activity that ASIO is investigating;
- because the person may destroy or alter records that may be important to an investigation; and,
- so ASIO may continue to question someone if there is a belief that the person may not continue to appear before the prescribed authority.

3.14 A number of individuals and organisations expressed strong concerns relating to the detention provisions. These concerns relate to:

- detention incommunicado without access to legal representation;
- the absence of any protocols concerning the circumstances of detention of persons; and
- no protection against self-incrimination for information, relating to a terrorism offence, provided at an interview;
- lack of penalties for officials who fail to comply with the legislation; and
- the detention of children.

Proposed section 34F Incommunicado detention and legal representation

3.15 Proposed subsection 34F(8) provides for a person under a warrant to be held incommunicado. A person will be refused the right to contact any one not specified in the warrant. Thus a detainee may not be able to contact their family, their place of work, and most importantly have access to legal representation.

3.16 The Castan Centre for Human Rights Law commented that 'the incommunicado aspects of the detention is one of the most potentially dangerous aspects of this Bill'.[5]

3.17 The Attorney-General's Department justified the need for incommunicado detention on the basis of ensuring that a potential terrorist could alert other terrorists or dispose of evidence. The Attorney-General's Department commented that what 'was primarily behind this provision

5 Ms Sarah Joseph, Castan Centre for Human Rights Law, Monash University, *Transcript*. p.160.

was the operational aspects of how the agency thought that it would do its work and how best to ensure that somebody who might be in a position to pass out information that then could result in either a terrorist attack happening or letting people know that they are in custody'.[6]

3.18 It was argued by Amnesty International that one of the key premises on which the provision is based, that detaining people will lessen the chance of a detainee being able to tip off someone involved in a terrorist activity, will simply not work. Amnesty International stated:

> Amnesty International finds it difficult to believe that a person's disappearance for 48 hours without contact with their family or friends would not draw similar attention to an investigation.[7]

3.19 One of the focus areas during the scrutiny of incommunicado detention was the possibility that a person would be denied access to legal representation. The Law Council of Australia commented that it sees 'no reason why a citizen who is subject to the potentially frightening prospect of having to give evidence against their neighbour or someone like that should not have the right to legal representation.'[8]

3.20 During hearings, the option of having a panel of lawyers, who are security cleared and appointed by various law councils, available to provide legal representation was examined. The Law Council of Australia stated:

> If you have a concern about a lawyer being a possible breach of security requirements, there are ways in which that can be overcome. But the fundamental right must be that a person taken into custody by administrative action and not supervised by judicial process has access to legal advice and can take certain steps, whatever they may be, to secure some form of justice. This legislation does not permit that. It is a gross departure from every standard that currently governs the way in which we legislate for criminal and other conduct.[9]

3.21 The NSW Council for Civil Liberties (NSW CCL) acknowledged that the creation of a pool of cleared legal representatives would be 'a basic minimum standard that could be applied.' However the NSW CCL warned that the problem is 'if you create that environment, you may get someone who is not going to look after the best interests of the person

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6 Mr Keith Holland, Attorney-General's Department, *Transcript*. p. 45.

7 Amnesty International, *Submission No. 140,* p. 14.

8 Mr Anthony Abbott, President, Law Council of Australia, *Transcript*, p. 2.

9 Mr Michael Rozenes, Criminal Law Committee, Law Council of Australia, *Transcript*, p. 3.

because they are in a compromising position: if they do that, they may have their security clearance rejected or revoked.'[10]

3.22 Professor George Williams supported the proposal for a pool of legal representatives 'as long as those people were chosen, say, in consultation with the Law Council of Australia or some other appropriate body to make sure that there was outside input'.[11]

3.23 The Islamic Council of Victoria supported the proposal but warned that some of the lawyers selected should have knowledge of the Muslim community.[12]

3.24 ASIO indicated that the possibility of providing legal representation from a pool of cleared lawyers was not canvassed during the development of the Bill. However, ASIO did raise the following concern about the proposal.

> I have no comment on the suggestion that someone detained should have access to independent legal advice. However, I would have concerns from where I sit about someone detained having access to a legal representative, up front, to engage in an adversarial process. I believe that would defeat the purpose of the timely intelligence in certain crucial situations.[13]

Conclusions

3.25 The Bill provides for detention incommunicado. No provision is made for the person who is the subject of a warrant to have access to legal representation. Evidence to the inquiry was opposed to this arrangement particularly in view of the fact that a person would not have the right to silence. The Committee agrees that this is an unacceptable situation, which must be rectified.

3.26 The Attorney-General's Department suggests that access to a lawyer could lead to information about the person in detainment being made public. This position is unsustainable. The Committee notes that there is not the same concern about the provision of interpreters under proposed section 34H and the provision of a medical practitioner under proposed subsection 34M(3).

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10 Mr Cameron Murphy, NSW Council for Civil Liberties, *Transcript*, p. 110.

11 Professor George Williams, *Transcript*, p. 138.

12 Mr Bilal Cleland, Islamic Council of Victoria, *Transcript*, p. 153.

13 Mr Denis Richardson, Director-General of Security, *Transcript*, p. 224.

3.27 The Committee proposes the creation of a pool of legal representatives, possibly selected by the Law Council of Australia, who will be security cleared. A person who is detained for questioning under the provisions in this Bill will have access to these legal representatives from a list supplied by the prescribed authority under proposed section 34E.

3.28 The Islamic Council of Victoria suggested that some of the legal representatives should have knowledge of the Muslim community. The pool of available lawyers should, as far as possible, be representative of Muslim and other communities.

Recommendation 6

3.29 **The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to provide for legal representation for persons who are the subject of a warrant. The following framework should apply:**

- **a panel of senior lawyers recommended by the Law Council of Australia to be formed who could represent persons being held in detention;**
- **the Bill should be amended to allow these lawyers to sit in on the entire proceeding of the prescribed authority, and represent a person at any further hearings which seek to extend detention; and**
- **the lawyers on the panel may have to be security cleared so as to be eligible to represent people in detention.**

Proposed section 34E should be amended to ensure that the prescribed authority must advise the person, when they first appear before the prescribed authority, that they have access to a legal representative from a list that will be given to the person.

Protocols governing custody, detention and interview

3.30 It became evident during hearings that there were no guidelines on how certain legislative provisions relating to detention and interview would be implemented and governed. For example, what arrangements would be

made when police took a person into custody? Where would a person be detained? Would ASIO officers be with police officers when a person was taken into custody? What are the steps that are taken during the first 48 hour period? How long should an interview be conducted before a break is required? As these issues were discussed, it became clear that a protocol governing custody, detention and the interview process should be developed.

3.31 Dr Greg Carne discussed some international comparisons relating to the issue of a protocol. He indicated that similar provisions are provided for in the UK Terrorism Act. The Minister provides a code of conduct which must then be tabled in the Parliament.[14] Dr Carne stated:

> Thirty years of experience has suggested that it is both better for national security and better for the state's reputation to set down these things in clear terms for minimum compliance with these human rights provisions and to ensure the reliability of evidence. So there are benefits on both sides. I take your point: that would be an improvement. But there is already a template or a model, even though you will see I have mentioned some articles that are strongly critical of the weakness of the UK act. But it is a vast improvement upon what we have got here.[15]

3.32 The NSW Council for Civil Liberties (NSW CCL) acknowledged the advantage of having protocols. The NSW CCL commented that 'there are very few considerations or protections in place and anything that can be added is of benefit.'[16]

3.33 The Administrative Appeals Tribunal (AAT), which will provide members to act as prescribed authorities, called for protocols to guide the operations between ASIO and the AAT. The AAT commented that 'the development of a sensible and fair protocol in relation to all parties would be something that we would see as a priority, once the final form of the legislation is known.'[17]

3.34 Professor Williams supported the need for protocols but advised that there would also be the need for oversight and enforcement. Professor Williams commented that 'if that was to happen then you would need a process following that where ASIO would need to demonstrate that they

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14 Dr Greg Carne, Faculty of Law, University of Tasmania, *Transcript*, p. 90.

15 Dr Greg Carne, Faculty of Law, University of Tasmania, *Transcript*, p. 90.

16 Mr Cameron Murphy, NSW Council for Civil Liberties, *Transcript*, p. 112.

17 Ms Kay Ransome, Administrative Appeals Tribunal, *Transcript*, p. 118.

followed their protocols and indeed that this committee perhaps, or the inspector, could actually examine to see whether that occurred.'[18]

3.35 The Castan Centre for Human Rights Law pointed out that an enforceable protocol could act as a powerful accountability mechanism governing the operation of ASIO. Professor Kinley stated:

> But woe betide ASIO if it is found out that they did not abide by those, and they did have people standing up against walls et cetera. Maybe one of the statements of intent that could be part of that undertaking would be a protocol. I could see that adding to it. In a way, it is a good compromise because it gives ASIO the opportunity to state these things, yet it gives the judge the opportunity to say, 'We expect you to abide by these. This is your statement of intent.'[19]

3.36 ASIO accepted the need for the development of a protocol for the treatment of persons in detention. ASIO stated:

> I believe it would be a good thing to develop a protocol about the conduct and responsibility of ASIO officers in relation to detention and how people should be treated. I believe such a protocol would be needed anyway and believe personally that, in terms of public trust and confidence, it ought to be approved by the Inspector-General and considered by this committee.[20]

Conclusions

3.37 The Bill sets out the framework for the issuing of a warrant and the custody, detention and interviewing of a person. However, the actual operation of performing these functions is administratively complex and contains numerous parts. It was widely agreed during hearings that there is a need for an enforceable protocol or code of conduct that would provide a detailed guide to the custody, detention and interviewing stages set out in the Bill.

3.38 The Committee proposes that ASIO should develop a protocol, which guides the operations of the Bill, in consultation with the Inspector-General of Intelligence and Security, the Australian Federal Police and the Administrative Appeals Tribunal. The protocols should be approved by the Attorney-General. The Committee should be briefed on the protocols

18 Professor George Williams, *Transcript*, p. 145.

19 Professor David Kinley, Castan Centre for Human Rights Law, *Transcript*, p. 164.

20 Mr Denis Richardson, Director-General, Australian Security Intelligence Organisation, *Transcript* p. 224.

as soon as they are developed and then subsequently they should be tabled in the Parliament. The Bill should not commence until the protocols are developed and in place.

3.39 The Inspector-General of Intelligence and Security should monitor the use and application of the protocols. Where a breach of the protocols is discovered, the IGIS should not wait to report this event in his Annual Report. The Committee should be informed of the breach immediately.

3.40 Some of the issues that should be included in the protocols include:

- arrangements for informing the AAT and the IGIS about an impending warrant;
- arrangements for informing the Police;
- arrangements for custody and detention;
- interview duration periods and breaks required during a 48 hour detainment period.

3.41 The previous list is not exhaustive but meant as a guide to developing a comprehensive protocol.

Recommendation 7

3.42 **The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include a proposed section which requires the development of protocols governing custody, detention and the interview process provided for under the Bill.**

- **ASIO should develop the protocols in consultation with the Inspector-General of Intelligence and Security, the Australian Federal Police, and the Administrative Appeals Tribunal. The protocols should be approved by the Attorney-General;**
- **the Committee should be briefed on the protocols which should then be tabled in the Parliament; and**
- **the Bill should not commence until the protocols are developed and in place.**

Proposed Section 34G – protection against self-incrimination

Background

3.43 The main purpose of the legislation as put forward by the Attorney-General's Department is to gather intelligence relating to a possible terrorist or terrorist activity.

3.44 The powers provided under section 34G that relate to giving information and producing things are therefore considerable in scope. The proposed legislation reverses the onus of proof which requires that the person prove that they do not have something required under the warrant. Refusal to give information or produce a required record or thing carries a penalty of 5 years imprisonment.

3.45 Declining to give information or to produce a record or thing on the grounds that you might be incriminating yourself is no grounds for refusal.

3.46 The directions governing information and the producing of things etc contained in section 34G are reproduced in full below:

Proposed section 34G Giving Information and producing things etc

(1) A person must appear before a prescribed authority for questioning, as required by a warrant issued under section 34D or a direction given under section 34F.

Penalty: Imprisonment for 5 years.

(2) Strict liability applies to the circumstance of an offence against subsection (1) that:

(a) the warrant was issued under section 34D; or

(b) the direction was given under section 34F.

Note: For ***strict liabilit***y, see section 6.1 of the *Criminal Cod*e.

(3) A person who is before a prescribed authority for questioning under a warrant must not fail to give any information requested in accordance with the warrant.

Penalty: Imprisonment for 5 years.

(4) Subsection (3) does not apply if the person does not have the information.

Note: A defendant bears an evidential burden in relation to the matter in subsection (4) (see subsection 13.3(3) of the *Criminal Cod*e).

(5) If:

(a) a person is before a prescribed authority for questioning under a warrant; and

(b) the person makes a statement that is, to the person's knowledge, false or misleading in a material particular; and

(c) the statement is made in purported compliance with a request for information made in accordance with the warrant;

the person is guilty of an offence.

Penalty: Imprisonment for 5 years.

(6) A person who is before a prescribed authority for questioning under a warrant must not fail to produce any record or thing that the person is requested in accordance with the warrant to produce.

Penalty: Imprisonment for 5 years.

(7) Subsection (6) does not apply if the person does not have possession or control of the record or thing.

Note: A defendant bears an evidential burden in relation to the matter in subsection (7) (see subsection 13.3(3) of the *Criminal Cod*e).

(8) For the purposes of subsections (3) and (6), the person may not fail:

(a) to give information; or

(b) to produce a record or thing;

in accordance with a request made of the person in accordance with the warrant, on the ground that the information, or production of the record or thing, might tend to incriminate the person or make the person liable to a penalty.

(9) *However, the following are not admissible in evidence against the person in criminal proceedings other than proceedings for an offence against this section or a terrorism offence:*

(a) anything said by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to give information;

(b) the production of a record or thing by the person, while before a prescribed authority for questioning under a warrant, in response to a request made in accordance with the warrant for the person to produce a record or thing.

3.47 Under subsection 34G (3) '(a) person may not fail to give any information requested in accordance with the warrant.' Subsection 34G(6) requires a person to produce any record or thing as requested in accordance with the warrant. To fail to give the required information or produce a record or thing carries a penalty of 5 years imprisonment.

3.48 Further to this, the Bill states that the person bears an 'evidential burden in relation to the matter in subsection 34G(7).' Thus they would have to prove that they did not possess or control the record or thing to not be charged with an offence.

3.49 Under subsection 34G(8) a person has no right to refuse giving information or providing a record or thing on the grounds that to do so might tend to incriminate the person or make the person liable to a penalty in relation to a terrorism offence. The EM states:

> The normal privilege against self-incrimination does not apply in relation to proposed new subsection 34G(8) to maximise the likelihood that information will be given or records or things produced that may assist to avert terrorism offences. The protection of the community from such violence is, in this special case, considered to be more important than the privilege against self-incrimination.

3.50 Under proposed paragraphs 34G(9) (a) and (b) a person could incriminate themselves in relation to a terrorism offence by not complying with the directions of the warrant. Other information that they might disclose that does not relate either to the directions of the warrant or a terrorism offence could not be used as evidence against the person. However, if the person named in the warrant provided evidence against another person then that information could be used against that person.

Analysis

3.51 Scrutiny at public hearings of proposed section 34G focused on the combined issues of the refusal of the right to silence and no protection against self incrimination for information relating to a terrorism offence provided at an interview.

3.52 Terrorism offences are punishable by imprisonment for life. Under proposed subsection 34G(3) a person does not have the right to silence. The penalty for failure to comply is imprisonment for five years. Therefore, a person who provides incriminating evidence relating to a terrorism offence could get life imprisonment or alternatively if the person fails to provide information they could get five years imprisonment. The

inadequacy of this arrangement was identified during hearings. In addition, the evidence indicated that it was incompatible for a person to have their right to silence removed and, at the same time, have no protection against self-incrimination for information relating to a terrorism offence which is provided during an interview.

3.53 A further aspect of the investigative powers under the Bill is that they are not primarily a tool to collect evidence for the purpose of prosecution. Rather, the powers are designed for intelligence collection with the purpose of preventing a terrorist attack. It was suggested during hearings that this point seemed to undermine the argument for having a self-incrimination provision. ASIO stated that 'in terms of principle, the new powers are intended as an enhancement of ASIO's existing intelligence collection powers.'[21] The LCA stated:

> Really, what is happening here is an investigative exercise. It is not an attempt to find evidence against the suspect. It is aimed at, as we see it, people who are not suspects but who are people who know. They are just witnesses. It is never intended that they will be charged or convicted of any criminal offence, necessarily. They are going to provide evidence against other people.[22]

3.54 The Attorney-General's Department advised that there were provisions in a range of legislation where it was an offence to refuse to answer questions. These include the National Crime Authority Act, Taxation Administration Act, Education Services for Overseas Students Act, Ozone Protection Act, Census and Statistics Act, Quarantine Act, Migration Act and Motor Vehicle Standards Act.[23]

3.55 At the same time, however, many of these Acts provide protection against self-incrimination. The Law Council of Australia (LCA) indicated that there were a range of agencies such as the Australian Tax Office, the National Crime Authority and Royal Commissions which provide protection against self-incrimination for information provided.'[24]

3.56 ASIO confirmed that if protection against self-incrimination was provided for, then things said during an interview would not diminish the information that they would be likely to obtain from that person.[25]

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21 Mr Dennis Richardson, Director-General of Security, ASIO, *Transcript*, p. 25.

22 Mr Michael Rozenes, Criminal Law Committee, Law Council of Australia, *Transcript*, p. 5.

23 Ms Susan McIntosh, Attorney-General's Department, *Transcript*, p. 32.

24 Mr Michael Rozenes, Criminal Law Committee, Law Council of Australia, *Transcript*, p. 5.

25 Mr Dennis Richardson, Director-General, Australian Secret Intelligence Organisation, *Transcript*, p. 40.

3.57 It was made clear during hearings that protection against self-incrimination for information provided at an interview was not the same as immunity from prosecution. If a law enforcement agency could collect alternative evidence to a person's statement then they could prosecute on the basis of the alternative evidence. The Castan Centre for Human Rights Law commented that 'there can be other sources of evidence besides just a confession.'[26] The Attorney-General's Department stated:

> The way it works is that it [interview information] cannot be used directly against the person. If that information were, under proper channels, to be passed to a law enforcement agency and independently verified and corroborated, then the corroborating evidence could be used against the person.[27]

Conclusions

3.58 Proposed section 34G requires a person to provide information at an interview. This provision removes the right to silence. In addition, this section does not provide protection against self-incrimination for information relating to a terrorism offence which may be provided at an interview. If a person provides information relating to a terrorism offence they could be subject to life imprisonment or five years imprisonment for failing to give information. Under this arrangement, logically, a person would remain silent and take the five years imprisonment. This approach is contradictory and incompatible with ASIO's primary objective, in relation to this Bill, of collecting intelligence to prevent a terrorist attack.

3.59 If the Bill must include a provision where the right to silence is removed then a person must have protection against self-incrimination for the provision of information relating to a terrorism offence. This approach would provide a fair balance if the right to silence were removed. In addition, this approach should, potentially, be a more effective way of collecting intelligence relating to terrorism offences.

3.60 The provision of protection against self-incrimination for information provided at an interview is not the same as immunity from prosecution. A person, for example, could not confess, at an interview, to undertaking a terrorism offence and then gain immunity from prosecution. It is only the information taken at an interview which could not be used in a prosecution. If law enforcement agencies could collect alternative evidence then they could use that information to conduct a prosecution.

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26 Ms Sarah Joseph, Castan Centre for Human Rights Law, *Transcript*, p. 161.

27 Mr Karl Alderson, Attorney-General's Department, *Transcript*, p. 38.

Recommendation 8

3.61 **Proposed section 34G of the Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to provide protection against self incrimination for the provision of information relating to a terrorism offence.**

Proposed section 34J Humane treatment of persons specified in warrant

Background

3.62 Proposed section 34J of the Bill provides that a person being detained under a warrant must be treated with humanity and not subject to cruel, inhuman or degrading treatment.'[28]

3.63 In addition to section 34J, there are a number of other sections in the proposed Bill, described by the Explanatory Memorandum, as providing safeguards in relation to the treatment of detainees. These include:

- 'The Director-General must ensure that video recordings are made of the proceedings before the prescribed authority or any other matter that the prescribed authority directs. These recordings must be provided to the Inspector-General of Intelligence and Security (IGIS).'[29]
- 'The Bill requires the prescribed authority to inform the person being detained under the warrant of the effect of the warrant; the length of time the warrant is in force; the legal consequences of non-compliance with the warrant and the right of the person being detained to communicate with the IGIS and the Ombudsman. Interpreting services must be provided before any questioning can take place if the person detained is unable to communicate in English.'[30]
- 'The person detained has the right to make a complaint in relation to ASIO to the IGIS or, if their complaint relates to the AFP, the

28 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum, p.1.

29 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum, p.1.

30 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum, p.1.

Ombudsman. On request, the person detained is to be provided with the facilities to communicate with the IGIS or the Ombudsman.'[31]

- 'The Bill also requires ASIO to give a copy of any warrant issued and a statement containing details of any detention that has taken place to the IGIS. The Attorney-General will also receive a report from ASIO on each warrant.'[32]

3.64 The directions governing the detention of a person contained in section 34J is produced in full below:

Proposed section 34J Humane treatment of person specified in warrant

(1) This section applies to a person specified in a warrant issued under section 34D while anything is being done in relation to the person under the warrant or a direction given under section 34F.

(2) The person must be treated with humanity and with respect for human dignity, and must not be subjected to cruel, inhuman or degrading treatment, by anyone exercising authority under the warrant or implementing or enforcing the direction.

Analysis

3.65 Proposed section 34J serves an important purpose which is to ensure that officials applying the provisions in the Bill treat a person with humanity and with respect for human dignity. However, there is no incentive in the form of penalties to ensure that these goals are delivered. Scrutiny of the Bill reveals that there are no penalties in the Bill. Professor Williams commented that 'this legislation does not provide penalties for, for example, inhumane treatment.'[33] The Federation of Community Legal Centres stated:

> What penalties are there for ASIO or for police who violate the processes set out in this act? If an ASIO officer does act inappropriately, how do you take action against them, because it is illegal even to name them? You are not even going to know their name necessarily.[34]

3.66 The Attorney-General's Department confirmed that there are no penalties for non-compliance with proposed section 34J or with other 'provisions

31 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum, p.1.

32 *Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002*, Explanatory Memorandum, p.1.

33 Professor George Williams, *Transcript*, p. 136.

34 Mr Damian Lawson, Federation of Community Legal Centres, *Transcript*, p. 185.

such as that.'[35] However, the Attorney-General's Department did qualify this answer:

> …it is rare in legislation to provide criminal penalties for officers going outside the legislation, but one of the key safeguards that overlays this is that, when you put in a legal rule like this, if officers go outside that and can be shown to be negligent, legal action could be taken against the officer, the agency and the Commonwealth.[36]

3.67 It is worth noting that, if the treatment of a person detained under a warrant was seen to fail to comply with the requirement of section 34J, the person may be able to mount a successful judicial review. This would, however, be dependent on the person being able to prove that their treatment did not comply.

3.68 The Law Council of Australia taking into account a number of aspects of the bill stated:

> …..without access to independent legal counsel, the guarantee in s.34J of treatment with humanity and respect for human dignity, and freedom from cruel, inhuman or degrading treatment, is effectively meaningless whilst a person is undergoing questioning or detention. Moreover, no attempt has been made to give any content to this standard in the context of compulsory questioning and incommunicado detention, and hence to provide authorities with any guidance as to the minimum standards of treatment to be applied."[37]

Conclusions

3.69 The omission of penalty clauses in this Bill is an area which requires rectification. It is unacceptable for the types of measures contained in this Bill not to have penalty clauses attached for actions by officials who do not comply with the legislation. The most prominent omission relates to proposed section 34J which requires the humane treatment of a person specified in a warrant.

3.70 The Attorney-General's Department indicates that it is rare in legislation to include criminal penalty clauses because, in any event, legal action could be taken against an officer if it could be proven that they were in breach of a legal rule. This is not a satisfactory response. The inclusion of a penalty

35 Ms Susan McIntosh, Attorney-General's Department, *Transcript*, p. 41.

36 Mr Karl Alderson, Attorney-General's Department, *Transcript*, p. 41.

37 Law Council of Australia, *Submission No.147* pp. 23-24.

clause applying to proposed section 34J, and other sections in the Bill, would send a clear message to the public and government officers, that severe penalties will be incurred for non-compliance with the law. Therefore, proposed section 34J, and other relevant sections, should have a note attached to them indicating that penalties apply.

Recommendation 9

3.71 **The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to include penalty clauses which will apply to officials who do not comply with the provisions of the Bill. In particular, a penalty clause must apply to the operation of proposed section 34J.**

Detention of Children

Background

3.72 The Bill does not place an age restriction on who may be detained. It is therefore possible that children could be detained under the legislation. The only reference to children in the Bill comes under proposed subparagraph 34M(1)(e) which places an age restriction of under ten years on strip searches.

Analysis

3.73 In a radio interview for the Law Report, Radio National, the Attorney-General was asked if children would be included under the legislation. He commented that 'anyone who has information would be appropriate to be detained.'[38]

3.74 The Attorney-General's Department on being asked by the Committee why the provision for strip searching 10 year old children was in the proposed legislation stated:

38 Radio interview, Damien Carrick, *Australia's Proposed Anti-Terrorism Laws, The Law Report* Radio National, 12 February 2002, Transcript p. 4.

> This is a replica of the Crimes Act provisions in sections 3ZH and 3ZL, dealing with the strip search. The same rules apply as to police in the Crimes Act. The key thing is that the power can only be accessed if there are reasonable grounds to suspect a person has an object that could be a danger to a person or assist their escape. So in practice the situation where a 10-year-old would have such an item would be extremely limited. Nonetheless, if they did—and there are real circumstances where a 12-year-old may have a gun or something like that—rather than artificially say 'You can never do anything about it,' the provision lays down a mechanism so that you can talk to the prescribed authority, meet the safeguards and remove that item.[39]

3.75 ASIO acknowledged that children could be subject to the legislation. ASIO stated:

> There is nothing in the bill that distinguished detention of adults and detentions of people who are below the age of 18 and I think there ought to be some room to work on that.[40]

3.76 The Law Institute of Victoria, Young Lawyers' Section pointed out disparities between the treatment of children under the Bill and the provisions for their treatment under the Crimes Act. The Law Institute of Victoria stated:

> The proposed Bill provides that a child under the age of 18 may be detained for 48 hours – the same period as for an adult. Presently under the *Crimes Act 1914 (Cth*) a child may be detained for only 2 hours – half the time of an adult.[41]

3.77 In relation to strip searches the Law Institute of Victoria stated:

> The proposed Bill provides for children between the ages of 10 and 18 to be strip-searched without sufficient protection against abuse of the process. Presently under the *Crimes Act 1914 (Cth)* a Magistrate is guided as to what they must consider in deciding to permit a strip search of a suspect under the age of 18.[42]

3.78 Some groups, in evidence, raised concerns about the lack of guidelines for questioning children. For example, the length of time children might be detained or who might be there to support and protect the rights of the child. The submission from Amnesty International states:

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39 Attorney General's Department, *Transcript* p. 48.

40 Mr Denis Richardson, Director-General of Security, *Transcript* p. 225.

41 Law Institute of Victoria, *Submission, No.73* p. 1.

42 Law Institute of Victoria, *Submission, No.73* p.2.

> It is unreasonable that under this legislation a 10 year old child could be held and questioned without the ability to notify his or her parents of the fact of their detention, and the place that they are being kept in custody. It is also unreasonable that a child is not able to have an 'interview friend' present with them during questioning.[43]

3.79 Dr Jenny Hocking from Monash University stated:

> It is extraordinary that a democratic nation adhering to notions of the rule of law can even contemplate the passage of legislation which would permit children to be taken and held incommunicado without their parents' knowledge, let alone consent. That children can be held without suspicion of their involvement in any offence, without legal representation, strip searched and questioned is an appalling proposal and one which has no place in a humane and just society.[44]

3.80 Mr Gabr Elgafi, from the Supreme Islamic Council of New South Wales pointed out to the Committee the culturally sensitive issues involved in strip-searching. He commented that, 'in Islam, we are prohibited to appear nude in front of someone.'[45] On the particular issue of the strip–searching of children he further stated:

> If a husband sees his wife or his 10-year-old kid being searched it is going to be traumatic for him; it is going to cause a lot of disharmony. He is not going to look nicely at them in the future. This guy will be carrying a grudge because he has seen his 10-year-old kid terrified. Searching a 10-year-old kid, asking them to strip, is a major issue—and not just for me, I am sure, but with any Anglo-Saxon as well.[46]

3.81 The Law Institute of Victoria, Young Lawyer's Section claimed that the proposed legislation 'contravenes 6 articles of the Convention on the Rights of the Child to which Australia became a signatory in 1991.'[47]

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43 Amnesty-International, *Submission No. 145.* p. 9.

44 Dr Jenny Hocking, Monash University, *Submission No.140* p. 6.

45 Supreme Islamic Council of New South Wales, *Transcript*, p. 77.

46 Supreme Islamic Council of New South Wales, *Transcript*, p. 77.

47 Law Institute of Victoria, *Submission*, *No. 73* p. 2.

Conclusions

3.82 It is a major concern that children could be subject to the provisions in the Bill. The Committee does not support the right to detain or strip-search children as provided for under the legislation. There already exists a procedure under the Crimes Act which allows for the questioning of children.

3.83 The legislation as it currently stands would allow for the detention of a child without the parents' knowledge. The Bill would also provide for strip searches to be undertaken of children 10 and over. Many protections could be put into the legislation with regard to children under the age of 18, however, it is the view of the Committee that it would be simpler and safer to have the legislation not apply to anyone under 18 year of age.

Recommendation 10

3.84 **The Australian Security Intelligence Organisation Legislation Amendment (Terrorism) Bill 2002 be amended to ensure that no person under the age of eighteen years may be questioned or detained under the legislation.**