

Chapter 2

THE BILL

Introduction

2.1 The Bill amends the *Australian Security Intelligence Organisation Act 1979* (the ASIO Act) to give the Australian Security Intelligence Organisation (ASIO) additional powers in relation to collecting intelligence that may substantially assist in the investigation of terrorism offences.

2.2 The key change is that ASIO is empowered to seek a warrant to detain and question people for up to 48 hours for the purposes of investigating such offences: such people need not be suspects in relation to those offences.

Warrants for questioning

2.3 The Director-General of Security (who is the Director of ASIO) may request an issuing authority (defined as a person, appointed by the Minister, who is a federal judge or federal magistrate, or a member of another class of people nominated in regulations - proposed section 34AB) to issue a warrant that will either:

- require a person to appear before a 'prescribed authority' to provide information or produce records or things; or
- authorise a police officer to take the person into custody and bring him or her before a 'prescribed authority' for such purposes (proposed section 34D).

2.4 The 'prescribed authority' is a senior legal member of the Administrative Appeals Tribunal - either the Deputy President, or a senior member or member who has been enrolled as a legal practitioner for at least five years (proposed section 34B).

Grounds for issue of a warrant

2.5 Before the Director-General can seek a warrant, the Minister must give consent. The Minister must be given a draft of the warrant and a statement of relevant matters, and must be satisfied before giving consent:

- that there are reasonable grounds for believing that issuing the warrant will substantially assist in the collection of intelligence that is important in relation to a terrorism offence;
- that relying on other methods of collecting the intelligence would be ineffective;
- that written procedures that are to be followed in exercising powers under a warrant have been approved in accordance with the Act; and
- if the person has already been detained, that the continuous period of detention would not exceed 168 hours (7 days) (proposed section 34C).

2.6 Where the warrant authorises the person to be taken into custody immediately and detained, the Minister must also be satisfied that there are reasonable grounds for believing that the person (i) might otherwise alert a person involved in a terrorism offence that the offence is being investigated, (ii) may not appear before the prescribed authority, or (iii) may destroy relevant documents or things that he or she may be required to produce (proposed section 34C). The warrant in that case must permit the person to contact identified persons at specified times when the person is in custody or detention (proposed paragraph 34C(2)(b)).

Issue of a warrant

2.7 An issuing authority (defined above in paragraph 2.3) may only issue a warrant if satisfied that there are reasonable grounds for believing that such action will substantially assist in the collection of intelligence that is important in relation to a terrorism offence (proposed section 34D). The warrant must be in the same terms as the draft warrant and must specify the period for which it is in force, not exceeding 28 days.

Powers and duties of the prescribed authority

2.8 When the person first appears before the prescribed authority for questioning under the warrant, the prescribed authority must inform him or her of:

- the effect of the warrant;
- the length of time the warrant is in force;
- the legal consequences of non-compliance with the warrant;
- the right to make a complaint to the Inspector-General of Intelligence and Security (IGIS) and the Ombudsman (see below); and
- the right to seek a remedy from a federal court relating to the warrant or the person's treatment under it, and
- whether there is any limit on the person contacting other people and, if the warrant permits contact with identified people at specified times, who those people are and what the specified times are (proposed section 34E).

2.9 If the prescribed authority believes on reasonable grounds that the person detained is unable to communicate with reasonable fluency in English, interpreting services must be provided before any questioning can take place (proposed section 34H).¹

2.10 The prescribed authority must be present throughout the questioning process. The prescribed authority may give directions relating to nominated issues, including the person's detention or further detention, release from detention or permission to contact an identified person (proposed section 34F). Such directions must be either

1 This provision is similar to section 23N of the *Crimes Act 1914*, which deals with questioning of people arrested for Commonwealth offences.

consistent with the warrant or approved in writing by the Minister, unless a direction is necessary to address a concern raised by the IGIS.

2.11 Where the IGIS is concerned about 'impropriety or illegality' in the exercise of powers in the Bill, he or she may inform the prescribed authority, who must consider those concerns. The prescribed authority may then give a direction deferring questioning of the person or the exercise of another power, until the prescribed authority is satisfied that the concerns have been addressed (proposed section 34HA).

2.12 Apart from these provisions, the Bill is largely silent as to the role of the prescribed authority in relation to the actual questioning. Proposed subsection 34D(5) states that the warrant must authorise ASIO 'subject to any restrictions or conditions' to question the person before the prescribed authority, but no elaboration is given.

Search of people detained

2.13 A detained person may be searched by a police officer, by either an ordinary search or, subject to certain conditions, a strip search (proposed section 34L). The Bill sets out various rules governing the conduct of strip searches (proposed section 34M): these are very similar to the general rules for strip searches under the *Crimes Act 1914* (for example, the strip search must be conducted in a private area by a police officer of the same gender as the detained person).

Extension of detention

2.14 The Director-General may request successive warrants, each of which may not exceed 48 hours. Where the person's continuous detention could exceed 96 hours, the Director-General must make a request only to an issuing authority who is a judge or member of a prescribed class (proposed subsection 34C(5)).

2.15 When the person is before a prescribed authority, the prescribed authority can give a direction for further detention (proposed subsection 34F(1)). The direction cannot result in a person being detained at a time more than 48 hours after the person first appeared for questioning under the warrant (proposed paragraph 34F(4)(a)). The extension may also not result in a continuous period of detention of more than 168 hours from the time the person first appeared before any prescribed authority for questioning under an earlier warrant (proposed paragraph 34F(4)(aa)).

Offences

2.16 The Bill creates a number of new offences punishable by a maximum penalty of five years' imprisonment:

- failing to appear before a prescribed authority as required by a warrant;
- failing to give information in accordance with the warrant;
- knowingly making a false or misleading statement during questioning; and

- failing to produce any record or thing requested in accordance with the warrant, unless the person can prove that he or she does not have the record or thing (proposed section 34G).

2.17 Self-incrimination is not a ground for refusing to give information or produce a thing, but that information or thing may not be used in criminal proceedings against the person (proposed subsections 34G(8) and (9)).

Safeguards and accountability measures

2.18 The Bill includes various safeguards on the exercise of the new powers.

Humane treatment

2.19 The Bill provides that a person being detained under a warrant must be treated with humanity and not subjected to cruel, inhuman or degrading treatment (proposed section 34J).

Right to legal representative

2.20 The warrant may specify that a person is permitted to contact an 'approved lawyer' or someone whom with whom the person has 'a particular legal or familial relationship' (proposed subsection 34D(4)).

2.21 Where the warrant specifies that a person is to be taken into custody immediately and brought before a prescribed authority, the Minister **must** ensure that the warrant permits the person to contact an 'approved lawyer' at any time during custody or detention (proposed subsection 34C(3B)). This requirement does not apply, however, in the first 48 hours of detention if the Minister is satisfied on reasonable grounds that the person is at least 18 years old, it is likely that a terrorism offence is being committed or about to be committed and may have serious consequences, and it is 'appropriate in all the circumstances' that the person not be permitted to contact a legal adviser (proposed subsection 34C(3C)).

2.22 'Approved lawyers' must be appointed by the Minister (proposed section 34AA). Conditions of such appointment are that the lawyer must have been enrolled for at least five years and have consented to being approved, and the Minister must have considered a security assessment of the lawyer and any other material the Minister considers relevant.

2.23 Proposed section 34U governs the involvement of lawyers. It provides for access to a legal adviser, whether or not the legal adviser is an approved lawyer, and states:

- The person being questioned must be given a reasonable opportunity for the legal adviser to provide advice during breaks in questioning. However, contact must be able to be monitored;
- The legal adviser may not intervene in questioning or address the prescribed authority, except to request clarification of an ambiguous question;

- The legal adviser may be removed if the prescribed authority considers his or her conduct is unduly disrupting the questioning. In such a case, the prescribed authority must direct that the person may contact an approved lawyer other than the legal adviser;
- The legal adviser commits an offence if he or she communicates information to an unauthorised third person about the detention or questioning, while the person is being detained.

Young people

2.24 There is a special regime for questioning young people 14 years of age and over (proposed section 34NA). Warrants cannot be issued in relation to a child who is under the age of 14.

2.25 For those young people between the ages of 14 and 18, a higher threshold applies. A warrant may be issued only if the Minister is satisfied on reasonable grounds that:

- the person is at least 14 and is likely to commit, is committing or has committed a terrorism offence;
- the draft warrant permits the person to contact a parent or guardian, or another approved person, and an approved lawyer; and
- the draft warrant authorises ASIO to question the person before a prescribed authority only in the presence of a parent or guardian or other approved person, and only for continuous periods of up to two hours (proposed subsection 34NA(4)).

2.26 Proposed section 34V allows the prescribed authority to order the removal of the parent, guardian or other approved person from the questioning if the prescribed authority considers that the third person's conduct is 'unduly disrupting questioning'. In such a case, the prescribed authority must tell the detained young person of his or her right to have another person present, and must direct that the questioning is not to proceed until a suitable person is present.

Accountability mechanisms

2.27 The Bill includes various other accountability mechanisms:

- 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 (proposed section 34K). These recordings must be provided to the IGIS (proposed section 34Q).
- Detained persons have the right to complain to the IGIS (about ASIO) or the Ombudsman (about the AFP). On request, the person detained is to be provided with 'facilities' to communicate with the IGIS or the Ombudsman (proposed subsection 34F(9)).

- ASIO must give a copy of any warrant and a statement containing details of any detention to the IGIS (proposed section 34Q). The Minister will also receive a report from ASIO on the extent to which each warrant has assisted ASIO in carrying out its functions (proposed section 34P).
- The IGIS may advise the prescribed authority of any concerns it has about an illegal act or impropriety committed by ASIO. As noted above, the prescribed authority is empowered to suspend questioning until satisfied that the IGIS's concerns have been addressed.
- It is an offence punishable by a maximum of two years imprisonment for an official exercising powers under a warrant to fail to comply with the safeguards in the Bill (proposed section 34NB).

Amendments to the Bill following the PJCAAD's report

2.28 The PJCAAD was concerned about the lack of limitations on various aspects of the proposed powers and accountability for their use. Their concerns focussed on the lack of a limit on the maximum period of detention; the detention of children; the lack of legal representation for people being questioned; and the inadequacy of the accountability and review mechanisms.

2.29 The Government accepted most of the PJCAAD's recommendations in amendments that were subsequently passed by the House of Representatives. The key recommendations which were only partially accepted or rejected were:

- Recommendation 6 that people detained should have access to legal representation: this recommendation was partially accepted, in that the Bill provides for access to a security-cleared lawyer, except where the Minister considers on specified grounds that it is appropriate that access is denied in the first 48 hours;
- Recommendation 10 that the provisions should not apply to children under 18: the Government amendments provide that no child under 14 may be detained and questioned under the Bill; that a warrant may only be issued for a young person between 14 and 18 if he or she is a suspect in relation to a terrorism offence; and that the young person may only be questioned in the presence of a parent, guardian or other representative and for no more than two hours without a break;
- Recommendation 12 that the Bill should include a three-year sunset clause: there is no sunset clause, but the Bill provides that the PJCAAD is to review the operation, effectiveness and implications of the Bill as soon as possible after three years from the date of assent to the legislation;
- Recommendation 14 that the IGIS should be given power to suspend questioning on the basis of non-compliance with the law or impropriety: this recommendation was not accepted, but the Bill provides that the IGIS may inform the Director-General and the prescribed authority of any concerns about impropriety or illegality, and the prescribed authority must consider those concerns and may defer questioning until the concerns are addressed.