Chapter 7

DETENTION

A central issue

7.1 The proposed power to detain people for questioning, particularly those who are not suspects, emerged as one of the most controversial issues during this inquiry, attracting comment from the vast majority of submissions and witnesses.

7.2 The features of the Bill relating to detention that have emerged as significant are as follows:

- a person, being either a suspect or a non-suspect, who may have information that may assist in preventing terrorist attacks or prosecuting those who have committed terrorist offences, may be taken into custody and brought before a Prescribed Authority for questioning;
- the person may be detained incommunicado for up to 48 hours;
- the period of detention may be extended up to a maximum of 168 hours through the process of the Director General of ASIO applying for successive warrants.

7.3 Once in detention, the person loses the right to silence and the privilege against self incrimination, as described in the previous chapter. Effectively, this means that a person who is not suspected of committing an offence but who is detained under the provisions of this Bill is subjected to severe criminal penalties which include custodial sentences, should they decline to cooperate. They also have restricted access to independent legal advice.

7.4 The detention provisions do contain a number of safeguards and accountability provisions, as described elsewhere in this report. It is also true that proponents of the Bill contend that it is intended to facilitate the gathering of intelligence in order to prevent terrorist acts, not for the purposes of prosecuting the person detained. Nonetheless, the detention provisions are considerably more severe than apply even to persons charged under the criminal code with serious offences, and persons who would be detained under this Bill have fewer rights and protections. As such, the detention provisions have aroused disquiet among many people.

7.5 Mr Jacob Fajgenbaum QC, giving evidence on behalf of the Victorian Bar, articulated the feelings of many in the legal and wider communities:

> The Bar has taken the position that it opposes the scheme of the legislation for the compulsory detention and isolation of people not suspected of complicity in any criminal behaviour or terrorist behaviour simply on the basis that they may be able to provide information in relation to terrorism offences … The extraordinary powers which the bill proposes to be given to the government are unknown in any other Western democracy. No other

> Western democracy has responded as we have to the scourge of terrorism. None, including the United States, the United Kingdom or Canada, has responded in a similar fashion. The Bar takes the view that the bill threatens an invasion of human rights otherwise held sacred in this society.[1]

Purpose

7.6 A key concern is the purpose of detention. Dr Stephen Donaghue said:

> I would suggest that it is necessary to answer a fundamental question before it is possible to sensibly consider alternative models, and that question is this: what is the purpose of detention under the existing bill? Until that purpose can be very precisely identified, it is not possible to make a judgment as to when you need to detain someone and when you do not.[2]

Competing purposes

7.7 In theory, the purpose of detention is limited to the prevention of acts that may prejudice the task of collecting intelligence. The Bill allows the Attorney-General to authorise detention if there are reasonable grounds for believing that, if the person is not immediately taken into custody and detained he or she may *alert a person* involved in a terrorist offence, may *fail to appear* before the Prescribed Authority or may *destroy, damage or alter evidence* described in the warrant.[3] The Prescribed Authority may authorise detention during the questioning process on similar bases.[4]

7.8 In practice, detention might be authorised for broader purposes. For example, it could be authorised in order to directly facilitate the collection of intelligence, the prosecution of detainees, or the prevention of possible acts or further acts of terrorism. Within these broad purposes, there is the possibility that detention might be authorised for more untoward purposes. For example, it might be authorised for the unstated purpose of coercing a person to provide answers or the prosecution of a person who might more properly be considered as a suspect in the criminal justice system. These broader purposes were raised in evidence and submissions that are discussed below.

Other issues

7.9 The discussion of purpose imports a discussion of a range of broader issues. The first issue is the competition between the objectives of intelligence collection and criminal investigation that was discussed in Chapter 3. As indicated, the need to distinguish between these objectives has been a threshold issue for the inquiry. Failure to do so may suggest that the purpose of detention is connected with criminal prosecution. The second issue is the competition in respect of suspects and non-suspects that was discussed in Chapter 5. As noted, there is a wide discretion to select

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1 *Hansard*, 22 November 2002, p. 158.

2 Ibid, p. 168.

3 Proposed paragraph 34C(3)(c).

4 Proposed subsection 34F(3).

from suspects and non-suspects who may have a remote proximity to terrorist acts. This is complicated by the fact that there are not only primary but *secondary* offences.

7.10 These issues are also complicated by the offence of failing to appear before the Prescribed Authority. The existence of this offence, and the choice as to whether a person will be charged, may have an effect in facilitating the questioning process.

Constitutional issues

7.11 The discussion of purpose is critical to the discussion of constitutional bases. As noted in Chapter 4, Dr Greg Carne observed in his submission that the various heads of power that have been put forward in support of the proposed measures 'are purposive in nature or have a purposive aspect' and '[t]he purpose of the relevant law "must be collected from the instrument in question, the facts to which it applies and the circumstances which called it forth": *Stenhouse v. Coleman* (1944) 69 CLR 457':[5]

> Accordingly, the relevant test … as to constitutionality is to ask whether the legislation in question is reasonably capable of being considered appropriate and adapted to an identified constitutional purpose under the relevant head of power. In other words the High Court applies a proportionality test to these powers to assess the constitutionality of the relevant law.[6]

7.12 The nature and purpose of detention will impact upon 'heads of power' issues:

> Some sections of the bill, eg 34F(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' may fail the test of being reasonably capable of being considered appropriate and adapted to a relevant identified constitutional purpose.[7]

7.13 The broad proportionality point was reiterated by Phillip Boulten on behalf of the Criminal Defence Lawyers Association:

> In considering what its response should be to the terrorist phenomenon, parliament should act with proportionality and it should introduce measures that are truly proportionate to the threat that country faces that are not arbitrary and that are likely to achieve their purpose. The provision for detention of people for up to 48 hours with the capability of rolling the detention over … is neither proportionate to the threat and nor is it likely to achieve the purpose for which the parliament thinks it should be imposed.[8]

7.14 These issues may also impact on other constitutional issues or limitations.

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5 *Submission 24*, p. 6.

6 Ibid.

7 Ibid.

8 *Hansard*, 26 November 2002, p. 227.

7.15 Professor George Williams argued that the detention provisions under the Bill may be inconsistent with the requirement for separation of powers in Chapter III of the Constitution. In support, he quoted Brennan, Deane and Dawson JJ in *Lim's Case* who said that 'the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt'.[9] At the same time, he did acknowledge that administrative detention might not offend this principle if it can be characterised as not being penal or punitive. He quoted Gummow J in *Kruger's Case*, '[t]he categories of non-punitive, involuntary detention are not closed'.[10] He noted that one such category relates to defence or national security.

7.16 In summary, Professor Williams made the following statement:

> It is not possible to say with confidence whether the High Court would find that the Constitution has been infringed. However, the arguments for invalidity are sufficiently strong that a High Court challenge is probable in the event of a detention (assuming … that there is knowledge of the detention).[11]

Lim's Case

7.17 In *Lim's Case*, Brennan, Deane and Dawson JJ indicated that *ordinarily* '[t]o make imprisonment lawful, it must either be by process from the courts of judicature, or by warrant from some legal officer having authority to commit to prison'.[12]

7.18 In this respect, the judges referred to a long standing common law tradition or rule that can be traced to a frequently cited passage from *Blackstone's Commentaries*:

> The confinement of the person, in any wise, is an imprisonment. So that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment … To make imprisonment lawful, it must either be, by process from the courts of judicature, or by warrant from some legal officer, having authority to commit to prison; which warrant must be in writing, under the hand and seal of the magistrate, and express the causes of the commitment, in order to be examined into (if necessary) upon a *habeas corpus*.[13]

7.19 The kernel of this rule is really a fundamental observation about *habeas corpus*: 'it is unreasonable to send a prisoner, and not to signify withal the crimes

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9 Blackstone, quoted by Brennan, Deane and Dawson JJ in *Chu Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 28.

10 *Kruger v Commonwealth* (1997) 190 CLR 1 at p. 162.

11 *Submission 22*, p. 6.

12 *Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 at p. 28.

13 William Blackstone, *Commentaries on the Laws of England*, First Edition, Dawsons, 1765, Vol. 1, pp. 132-133.

alleged against him'.[14] This observation is based on a comment in *Coke's Institutes* that 'no man ought to be imprisoned, but for some cause: and … that cause must be showed: *for otherwise how can the Court take order therein according to law*?'.[15]

Exceptions

7.20 Behind these comments lie a number of live concerns which are particularly relevant to the subject matter of this inquiry. It is significant that, before making the 'fundamental observation' quoted above, Blackstone expressly referred to the dangers of arbitrary detention, the exigencies of national security, the balance between liberty and security and the role of the judiciary as a fetter on executive power:

> Of great importance to the public is the preservation of this personal liberty … to bereave a man of life, or by violence to confiscate his estate, without accusation or trial, would be so gross and notorious an act of despotism, as must at once convey the alarm of tyranny … But confinement of the person, by secretly hurrying him to gaol, where his sufferings are unknown or forgotten; is a less public, a less striking, and therefore a more dangerous engine of arbitrary government. *And yet sometimes, when the state is in real danger, even this may be a necessary measure*. But the happiness of our constitution is, that it is not left to the executive power to determine when the danger of the state is so great, as to render this measure expedient.[16]

7.21 In this passage, Blackstone referred to the practice in the Roman Senate of creating a magistrate of absolute authority in times of emergency. He observed that 'this experiment ought only to be tried in cases of extreme emergency; and in these the nation parts with its liberty for a while, in order to preserve it forever'.[17]

7.22 The same theme was reflected in a comment made by former Liberal Prime Minister Sir Robert Menzies that was quoted by the Australian Section of the International Commission of Jurists:

> The greatest tragedy that could overcome a country would be for it to fight a successful war in defence of liberty and lose its own liberty in the process.[18]

Defence and national security

7.23 Clearly, there may be an exception to the rule 'when the state is in real danger'. As noted, Professor George Williams refers to a defence or national security exception. In the *Communist Party Case* Dixon J made the following observation:

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14 Ibid.

15 Edward Coke, *The Second Part of the Institutes of the Laws of England: Concerning the Jurisdiction of the Courts*, Sixth Edition, London, 1681, p. 53.

16 Blackstone, op. cit., pp. 131-132.

17 Ibid.

18 Sir Robert Menzies, *House of Representatives Hansard*, 1 September 1939, in *submission 237*, p. 2.

> [I]t is futile to deny that when the country is heavily engaged in an armed conflict … the defence power will sustain a law conferring upon a minister power to order the detention of persons whom he believes to be disaffected or of hostile associations and whom he believes that it is necessary to detain with a view to preventing their acting in any manner prejudicial to the public safety and defence of the Commonwealth.[19]

7.24 The difficulty is to show that the potential terrorist threat in Australia is a sufficient threat to national security that it enlivens this aspect of the defence power. There may also be a significant difference between 'hostilities' and 'threats to national security' so as to enliven the defence exception. As PIAC noted, while the majority in *Lim's Case* recognised the exception in relation to defence, the court 'did not recognise an exceptional category of "detention for national security" purposes.'[20]

Non-punitive detention

7.25 In addition to an exception in favour of defence or national security, there may be a wider set of exceptions that relate to non-punitive detention. A key passage from Brennan, Deane and Dawson JJ's judgment in *Lim's Case* relates to this issue:

> Involuntary detention in cases of mental illness or infectious disease can … legitimately be seen as non-punitive in character and as not necessarily involving the exercise of judicial power. Otherwise, … the citizens of this country enjoy, at least in times of peace … a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.[21]

7.26 Clearly, detention for the purpose of mental health or quarantine purposes may not offend Chapter III. Also, as was noted above, Gummow J said in *Kruger's Case* that '[t]he categories of non-punitive, involuntary detention are not closed'.[22]

Proportionality

7.27 The expression 'non-punitive detention' may be a euphemism for a broader concept. *Lim's Case* may even suggest that administrative detention is permissible if it is connected with a head of legislative power and is reasonably necessary for the purpose of its exercise. In the context of the mandatory detention of asylum seekers Brennan, Deane and Dawson JJ held that, in order to be non-punitive, it had to be 'limited to what is *reasonably capable of being seen as necessary* for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered' otherwise it will be 'of a punitive nature and contravene Ch.III's insistence

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19 *Australian Communist Party v. Commonwealth* (1951) 83 CLR 1, per Dixon J at p. 195, citing *Lloyd v. Wallach* (1915) 20 CLR 299; *Ex parte Walsh* (1942) ALR 359; *Little v. Commonwealth* (1949).

20 Public Interest and Advocacy Centre, *submission 52*, p. 5.

21 *Chu Kheng Lim v. The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, at p. 28.

22 *Kruger v Commonwealth* (1997) 190 CLR 1, at p. 162.

that the judicial power of the Commonwealth be vested exclusively in the courts'.[23] McHugh J said that a law permitting detention cannot be characterised as punitive 'if the purpose of the imprisonment is to achieve some legitimate non-punitive object'.[24]

7.28 In this context 'punitive' might be considered a term of art. The question is not whether the administrative detention arrangements are harsh or degrading, or whether they resemble criminal incarceration, but whether they are connected with a head of legislative power and whether they are reasonably capable of being seen as necessary for the purpose of pursuing a legitimate objective. This appears to be a *purposive* test involving questions of *proportionality* that exist in other constitutional areas.

Protective detention

7.29 One of the objectives surrounding detention may be the prevention of terrorist acts *themselves*. In October 2001 the Attorney-General stated the draft proposed measures would '*only* be authorised where the [Prescribed Authority] was satisfied it was *necessary in order to protect the public* from politically motivated violence'.[25] Since then there seem to have been no references to protective or preventive detention.

7.30 In *Kruger's Case* Gaudron J suggested that the exceptions in *Lim's Case* were 'neither clear nor within precise and confined categories', but that they may suggest a wider set of exceptions based on concerns for the welfare of the community:

> the exceptions with respect to mental illness and infectious disease point in favour of broader exceptions relating…to the detention of people in custody for their own welfare and for the safety or welfare of the community. Similarly, it would seem that, if there is an exception in war time, it, too, is an exception which relates to the safety or welfare of the community.[26]

7.31 As with reasonable necessity, any test based on the need to protect the community would seem to be a *purposive* test involving questions of *proportionality*.

Preventive detention

7.32 One concern is the extent to which protective detention might be characterised as preventive detention.

7.33 The notion of preventive detention is contrary to common law standards. For example, the common law does not accept excessive periods of detention for the sole

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23 *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per Brennan, Deane and Dawson JJ, at p 33.

24 *Chu Keong Lim v The Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, per McHugh J, at pp 71–72.

25 The Hon. Daryl Williams, MP, 'New Counter-Terrorism Measures', *Media Release*, 2 October 2001 (emphasis added).

26 *Kruger v Commonwealth* (1997) 190 CLR 1, at p. 110.

purpose of protecting the community from repeat offenders.[27] Indeed, imprisonment is generally considered as a last resort and a court will generally strive to impose the minimum sentence necessary to protect the community. Moreover, while community protection is a primary consideration in sentencing, it will be weighed against the personal characteristics and circumstances of the offence and the offender.[28]

7.34 It may be that preventive detention is, itself, inconsistent with the separation of powers requirement. The issue arose before the High Court in a different context in *Kable's Case*. The Court held that state legislation, which empowered state judges to order preventive detention of Gregory Kable, conferred powers that were inconsistent with the exercise by those judges of federal judicial power. While the New South Wales Parliament had the authority to 'make general laws for preventive detention when those laws operate in accordance with the ordinary judicial processes of the … courts', it did not have the authority to 'remove the ordinary protections inherent in the judicial process'. McHugh J suggested that the state legislation did so by 'stating that its object is the preventive detention of the appellant' and, among other things, by 'removing the need to prove guilt beyond reasonable doubt' and 'by providing for proof by materials that may not satisfy the rules of evidence'.[29]

Other standards?

7.35 There may be other ways of approaching issues surrounding administrative detention. Detention *might* be characterised as judicial rather than administrative based on some other features, such as its purpose or the particular powers available.

7.36 There may even be other ways of testing permissibility that do not rely on a characterisation of detention as being punitive or non-punitive or even judicial *per se*.

7.37 Dr Carne suggested that the constitutional limits might be inherent in the legislative powers conferred by section 51 rather than the separation of powers in Chapter III.[30] In *Kruger's Case* Gaudron J suggested that 'the power to authorise detention in custody is not exclusively judicial in character',[31] citing the possible exceptions relating to 'the welfare of the individual or that of the community'. Thus, a law with respect to various topics—*defence*, *quarantine*, *aliens*, *influx of criminals* and perhaps even *race*—might validly authorise detention. But, beyond these heads of power 'a law authorising detention in custody, divorced from any breach of the law, is not a law on a topic with respect to which s 51 confers legislative power'.[32]

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27 *Veen v. R* per Mason J at p. 468 per Jacobs J at pp. 482-3; *Veen v. R* (No 2) at 473; *Chester v. R* (1988) 165 CLR 611, at 618.

28 *Lowe v. R* (1984) 154 CLR 606 at p. 612.

29 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, per McHugh J at p. 122.

30 *Submission 24*, p. 8.

31 *Kruger v Commonwealth* (1997) 190 CLR 1, per Gaudron J at p. 111.

32 Ibid, at p. 110.

7.38 While this approach explains the exceptions relating to defence and contempt of Parliament, it is not sufficiently explored to provide guidance for the present Bill.

Referral of powers from the States

7.39 The earlier discussion on constitutional bases described the referral of powers from the States to the Commonwealth under section 51(xxxvii). The Committee's attention was drawn to the fact that this would not resolve the constitutional problems associated with *Lim's Case* and *Kable's Case*. Professor Williams indicated that any scarcity of legislative power could be resolved by referral of powers from the States. In his view 'any arguments as to invalidity there would clearly disappear if, indeed, there is a referral of matters relating to terrorism to the Commonwealth parliament'.[33]

7.40 Professor Williams, however, hastened to add: 'there is still a secondary issue that cannot be removed by any referral' relating to *Lim's Case* and *Grollo v. Palmer*. Similarly, Dr. Carne pointed out that, in *Kable's Case*, the issue of incompatibility with federal judicial power arose in relation to 'state preventive detention legislation enacted by the NSW Parliament under the authority of the NSW Constitution'.[34] On this basis, no referral of power would seem to be capable of resolving this issue.

International law issues

7.41 Detention, and the limits of executive and judicial power, is covered in various international instruments. For example, the *ICCPR*[35] prohibits arbitrary detention.[36] Moreover, international law recognises that detention may be arbitrary notwithstanding that it is lawful as the concept of arbitrary detention includes 'elements of inappropriateness, injustice and lack of predictability'. The Human Rights Committee has stated that detention 'must not only be lawful but *reasonable* in all the circumstances' and 'must be *necessary* in all the circumstances, for example, to prevent flight, interference with evidence, or the recurrence of crime.[37]

7.42 Also, the *International Covenant on Civil and Political Rights* contains an express caveat that, '[i]n time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed', a State Party may take measures derogating from their obligations under the Covenant 'to the extent strictly required by the exigencies of the situation' and provided they are 'not inconsistent with their other obligations under international law and do not involve discrimination

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33 *Hansard*, 13 November 2002, p. 59.

34 *Submission 24*, p. 9.

35 The ICCPR was adopted by the UN General Assembly in 1966 and came into operation in 1976. Australia signed it on 18 December 1972 and ratified it on 13 August 1980. Australia signed the First Optional Protocol on 25 September 1991 with effect on 1 December 1991.

36 Article 9(1).

37 *Alphen v. The Netherlands* (1990) Communication No. 305/1988, Human Rights Committee Report 1990, Volume II: UN Doc. A/45/40, paragraph 5.8 (emphasis added).

solely on the ground of race, colour, sex, language, religion or social origin'.[38] Any derogation must be made in accordance with a prescribed notification procedure.[39]

Application of these issues

7.43 Many submissions and witnesses focused on the purpose of detention. The issues they raise go partly to the constitutional bases of the proposed measures, in terms of the 'head of power' issues and the 'constitutional immunity' in *Lim's Case*. Other issues relate to the manner in which the proposed powers may be exercised, and go more to grounds of judicial review, such as abuse of power or improper purpose. The following discussion commences with issues that may relate to constitutional bases and finishes with issues that relate more to judicial review grounds, or policy arguments relating to the possible limitations that might be applied to the regime.

Non-punitive detention

7.44 A number of comments in submissions and evidence addressed the limits of non-punitive detention. The Attorney-General's Department expressed the view that:

> [G]iven the nature of this particular detention, given that the person is not being detained to be punished, given that the purpose of this detention is to seek from them any intelligence information that they may have in relation to a terrorist act, given the checks and balances that are available in this case … and given that the Prescribed Authority tells the person at the very beginning of their detention that they have the right to have recourse to the Federal Court, it is not seen as offending the principle [in *Lim's Case*].'[40]

7.45 Alongside the general intelligence collection purpose, the checks and balances and the caution regarding judicial review, there may be other mitigating factors in the mix, such as time limits. Thus, while Dr Gavan Griffith QC noted in his submission that the detention powers may be 'beyond the reach permissible by the recognised exceptions', he said 'I see some difficulty in applying the *Lim* argument, given the constraints on the operation of the scheme limited to an investigation process of seven days'.[41] In evidence he thought it was 'most likely' that the seven day detention would be 'admitted as one of the new categories of the sort that Justice Gummow touched upon [*Kruger's Case*]'.[42] His conclusion was that the *Lim* argument was 'a tenable one' but he said: '[m]y own view is that I doubt very much that the High Court would hold this provision invalid, but it would be an interesting case to argue either side'.[43]

7.46 However, there were divergent views, even on the narrow issue of punishment. FCLC (Victoria) argued that the power to detain persons for the statutory

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38 Article 4(1).

39 Article 4(3).

40 *Hansard*, 12 November 2002, p. 16.

41 Mr Gavan Griffith QC, *Submission 235*, p. 6.

42 *Hansard*, 22 November 2002, p. 151.

43 Ibid.

purposes in proposed subsections 34C(3) and 34F(3) was punitive by its very nature. They argued that the power to detain related to the particular conduct of the detainee and was punitive by virtue of this relationship. Moreover, it was punitive whether or not the detention related to past or future conduct. They suggested that the 'quarantine' objectives 'stamp that power to detain as a punitive power in that the detention is ordered in response to particular anticipated conduct of the person detained … [it] is analogous to punishment inflicted on persons convicted of attempting crimes'.[44]

7.47 Another issue was the consequences arising from silence before the Prescribed Authority. This issue was discussed in Chapter 5 in relation to the validity of the warrant. This comment was made by the legal adviser to ASIO:

> [I]f [ASIO] became convinced that there was no way that the person would provide the information that was being sought and that with it was entirely fruitless to have the warrant, then the Director-General would have an obligation to inform the minister and the issuing authority that the ground upon which the warrant existed had ceased to exist, and take steps necessary to ensure that further action under the warrant was discontinued.[45]

7.48 Mr Jacob Fajgenbaum applied similar reasoning to the validity of detention:

> [I]f somebody has been detained under the current proposal and refuses to answer questions, any continued detention of that person might be seen to be punitive, in the absence of that person having been otherwise arrested for failure to cooperate as he might be obliged to cooperate. Any continued detention of such a person without such arrest would definitely be punitive and would be simply detention in order to try to compel or force somebody to answer questions, and to punish him for not doing so.[46]

7.49 On the other hand, Dr Stephen Donaghue pointed to the fact that detention in these circumstances might serve a legitimate purpose of preventing interference with the intelligence collection process. His views on this issue are discussed below.

Proportionality

7.50 As noted above, the test of 'reasonable necessity' focuses more closely on the purpose behind the proposed detention powers. As noted, this seems to require an examination of proportionality, or whether detention is reasonably capable of being considered appropriate and adapted to the object of intelligence collection. The purposes behind the proposed powers are discussed below in relation to the general objective of preventing prejudice to investigations and in relation to the possible purpose of coercing persons to answer questions or provide documents.

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44 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 27.

45 *Hansard*, 12 November 2002, p. 31.

46 *Hansard*, 22 November 2002, p.160.

Intelligence collection

7.51 Clearly detention has an indirect purpose in facilitating intelligence collection. For example, it may allow time for questions to be developed, issues to be explored and connections drawn among the various links in the evidential chain. Detention may also have a more direct purpose in facilitating questioning, although this was queried by Dr Donaghue:

> It is not at all clear to me how detention facilitates evidence gathering. Why is it that somebody who is in detention is more likely to answer questions that are asked of them than somebody who is not? No other … questioning regime that operates in Australia takes people into detention in order to encourage them to answer questions and there just does not seem to me to be any logical connection between the detention aspect of the regime and the suggestion that what is sought here is to have people answer questions.[47]

7.52 Similarly, Mr Greg Connellan, on behalf of the Victorian Bar, said if a person is:

> … prepared to divulge the information they have, then they may well have been prepared to do it without being brought to task under this legislation, without the threat of five years in jail. If they are reluctant to disclose the information, then no matter what sort of threat you hang over their head, short of torturing it out of them, they are not going to give it up. If these people are so close to the action of people who are so fanatical that they can kill hundreds of people and thousands of people in single events, they are not going to readily give that information up, I would not have thought.[48]

7.53 This was also reflected in comments by Mr Phillip Boulten to the effect that 'detention over and above the need for questioning is unnecessary':

> In the submission of the [Criminal Defence Lawyers] Association, detention for that purpose will neither be effective nor proportionate to the threat. It will not be effective because, if people are held after the period for, say, another day or two after the questioning concludes, or if there is a rollover for four days, five days, six days or seven days, then those who are connected to that person—their family, their friends and their terrorist contacts if they have any—will be alerted to the fact that they have gone missing in action. There will be no effective way of curtailing the terrorists' knowledge that the person is likely to be in the custody of ASIO. The mere fact of their detention will act as a signal to terrorists. What is more, at some stage—whether it be after the first warrant expires or after a rollover warrant subsequently issued expires—they will have to be released. What is the difference if they are actively disseminating the fact of their detention 41 hours or 49 hours after their arrest, or whether or not they are actively disseminating it 12 or 13 hours after their arrest? In some circumstances—

47 Ibid, pp. 168-169.

48 Ibid, p. 205.

> where, say, there is great urgency and sensitivity involved in the purpose for the detention—it might make a difference, but rarely will it be so.[49]

7.54 Moreover, the Committee's attention was drawn to the possibility that detention may be used to coerce an otherwise silent detainee to provide answers. In seeking a connection between questioning and detention Dr Stephen Donaghue said:

> If there is a connection, it seems to me that the connection lies in the fact that, if you are detained involuntarily and nobody is told where you are and that detention gets longer and longer, the pressure on the witness to talk as a way of bringing their ordeal to an end increases. So it might be that by the time you get to day five you have not told your family where you are, you have lost your job, you are starting to think, 'I need to end this detention,' and the only way you can see to do that is to answer the question.[50]

7.55 The AFPA appeared to suggest that detention, particularly if extended, might serve a greater purpose in encouraging cooperation than the threat of prosecution for failure to answer questions. They argued that '[i]ncarceration until information is provided in accordance with the questioning warrant is seen as more practical'.[51] Similarly, FCLC (Victoria) argued that prosecution for failure to answer would be 'the last resort'. 'In most circumstances,' they argued, 'authorities will resort to other means to cajole or coerce the detained person to disclose relevant information. It is very likely that one of the means relied upon will be further periods of detention.'[52]

7.56 As Dr Donaghue noted, pressure on a detainee might arise out of the impact of their detention on third parties. ICJ (Australia) pointed to the reverse possibility that detention of third parties might pressure a person to provide information: 'the holding of the whole family of a wanted terrorist who may be suspected of knowing his whereabouts and whose detention may be an intimidation to the wanted person'.[53]

7.57 When asked about the possibility of extending a warrant on the basis that a detainee 'might say something in the end', the Director-General suggested that '[i]t would in part depend on a judgment made about the criticality of the time factor'.[54] However, the legal adviser to ASIO did concede, as noted in Chapter 5, that a person's silence might tend to undermine the validity of the warrant:

> [I]f [ASIO] became convinced that there was no way that the person would provide the information that was being sought and that with it was entirely fruitless to have the warrant, then the Director-General would have an obligation to inform the minister and the issuing authority that the ground

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49 *Hansard*, 26 November 2002, p. 228.

50 *Hansard*, 22 November 2002, p. 169.

51 *Submission 144*, p. 11.

52 Federation of Community Legal Centres (Victoria), *Submission 243*, p. 28.

53 International Commission of Jurists (Australian Section), *Submission 237*, p. 8

54 *Hansard*, 12 November 2002, p. 28.

> upon which the warrant existed had ceased to exist, and take steps necessary to ensure that further action under the warrant was discontinued.[55]

7.58 Dr Stephen Donaghue queried whether this would in fact be the case:

> The department's suggestion to the committee, I think on the first day of hearings, that if someone made it clear right from the outset, 'I am not going to cooperate, I am going to refuse to answer your questions,' they commit an offence under this regime. If ASIO then said, 'We wouldn't renew the warrant, we wouldn't keep them in detention for seven days', that does not make sense. If what they are trying to do is stop the investigation from being prejudiced, they need to keep them in detention anyway.[56]

Prejudice to intelligence collection

7.59 One of the stated purposes of detention is to prevent any prejudicial acts, such as alerting another person or destroying, damaging or altering evidence. While preventive detention may be constitutionally suspect, detention for the purpose of avoiding prejudice to criminal investigations may be permissible. For example, there is a power to detain in the criminal justice system that is based on the same considerations that ground the power in the Bill: that the person under questioning may alert a person involved in an offence, may fail to appear before the relevant authority or may destroy, damage or alter evidence described in the warrant.

7.60 The latter purpose may not be particularly relevant to detention under the Bill. In this respect, the Association of Criminal Defence Lawyers argued that:

> Fears that people might destroy records are unlikely to arise in practice because a detention warrant would normally be executed simultaneously with a search warrant empowering ASIO to seize relevant documents.[57]

7.61 The former purpose may be closer to the ultimate purpose of detention:

> [T]here are a number of clauses in the bill that make it clear it has nothing to do with intelligence gathering; it is has to do with not having your investigation spoilt by having questioned a suspect who then goes and tells their terrorist accomplices that you are onto them and that the investigation is prejudiced in that way. If that is correct … you might need to detain someone whether or not they are answering your questions.[58]

7.62 However, this purpose was not without its critics. Mr Bret Walker SC, on behalf of the Law Council of Australia rejected what he described as 'prophylactic detention' as 'a nonsense', describing it as a 'quite disturbing elision and confusion of

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55 Ibid, p. 31.

56 *Hansard*, 22 November 2002, p. 169.

57 Association of Criminal Defence Lawyers, *Submission 236*, p. 2.

58 Dr Stephen Donaghue, *Hansard*, 22 November 2002, p. 169.

concept advanced by ASIO, maybe by the AFP and certainly by the government'.[59] He argued that it tended to 'confuse the notion of non-suspects being questioned with the notion that somebody suspected of being a conspirator … should be charged'.[60]

7.63 Moreover, this purpose may have its own limitations. The Committee's attention was drawn to the limited role that detention might have in relation to preventing prejudicial acts, or indeed in relation to preventing terrorist acts, by virtue of the uncertainty surrounding the timeframes of terrorist cells. The AFPA observed that 'terrorism is an intended and planned crime'.[61] The Prime Minister has acknowledged that '[i]ntelligence is a very inexact science'.[62]

7.64 Mr Lex Lasry, on behalf of the Victorian Bar, raised concerns as to whether it was possible to control prejudicial acts by an arbitrary period of detention:

> For example, let us assume the information is that the terrorist act—whatever it is—is not going to occur for some weeks and that an investigation is going on in relation to something which is three or four weeks away. If a person is brought in to be compulsorily questioned, do you keep them for three or four weeks? Overnight is one thing, but holding someone for seven days will not necessarily solve that problem.[63]

7.65 As Mr Bret Walker SC argued, this applied a fortiori to terrorist acts:

> We do not have a concept of detention in order to prevent crime and, in relation to terrorist offences in particular, one can see why, in principle, we would never have it and it is for this reason: terrorist offences are not committed according to a prearranged and pre-announced timetable nor, if they do have timetables, does anyone have any right to believe that they cannot be rearranged. Therefore, if you are serious about prophylactic detention, you must be talking about indefinite duration, and that is monstrous. Nobody is seriously talking about that.[64]

7.66 Dr Donaghue said there were other ways to address problems relating to prejudice:

> There are lots of other ways you could achieve that objective, including, for example, making it an offence for anyone to talk about the fact that an interview has taken place between the questioning agent and the witness, and there are models for that in the NCA Act as it currently sits.[65]

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59 *Hansard*, 22 November 2002, p. 247.

60 Ibid.

61 *Submission 144*, p. 5.

62 The Hon. John Howard MP, Transcript of Interview, *Sunday*, October 20 2002.

63 Mr Lex Lasry, *Hansard*, 22 November 2002, p. 162.

64 *Hansard*, 22 November 2002, p. 247.

65 Ibid, p. 169.

Alternative model

7.67 Dr Donaghue pointed to an alternative approach to detention:

> [Y]ou need to find a way of detaining people who you really need to detain and not detaining people who you do not. The way I suggest … that that should be done is to bring someone in, using the coercive power, very similar to the current model, and to ask them questions. If they answer your questions satisfactorily and provide you with the information you need, you have achieved your objective under the bill. They seem to be cooperating with you, so in that circumstance there may be no reason to suspect that this is the sort of person who is going to go and alert their terrorist associates to your investigation. You do something like the NCA model again: you tell them, 'It is very important that you not speak to anyone that you have been here.' You make it a serious offence if they do speak to anyone about having been there and you have achieved the objective of the regime.[66]

7.68 This approach would adopt the methods used in other commissions of inquiry relating to provisions of arrest and detention for procedural offences, and, indeed, for more substantive offences, that arise in evidence:

> If … they do not answer your questions or they lie to you, or in the course of questioning you form the view that they are legitimately suspected of a terrorist offence, on all of those occasions you can detain them for the criminal offence that they have committed. That … is important because there is no constitutional problem with that. It is easy to detain someone in connection with a criminal offence; the problem with this current bill is that it authorises the detention regime without that connection.[67]

7.69 Moreover, this approach would take advantage of the unhindered power to continue questioning that is built into the 'commission of inquiry' model:

> If, at the end of day one, they have refused to answer your questions or have lied, and you then arrest them and put them in detention, you can still question them thereafter—not in relation to the offence you have charged them with but any other offence. If you have charged them with an offence against the Royal Commissions Act or the equivalent, you can still question them about the terrorist offence you are interested in but you do not need to renew it every 48 hours, because they are in detention anyway.[68]

7.70 The approach would involve an initial questioning period of around 8 hours, with a capacity to consider and review the need for detention, based on the existence of either of the procedural or substantive offences that were discussed above:

> In the model that I propose, for the sake of argument, you have eight hours to question them and to get a feel for whether they are themselves

66 Ibid, pp. 169-170.

67 Ibid, pp. 169-170.

68 Ibid, p.173.

> involved—in which case, you can arrest them at the end of that time—or whether they are cooperating with you by giving you full and truthful answers. If they can convince you of those things for eight hours, I would have thought the risk of their absconding would be reasonably low—you have had a pretty good chance to check them out. I would let them go at the end of the day and bring them back the next morning for more questioning if you need to under a royal commission type model. If they are a great liar, I suppose they get through their eight hours, you let them go and then they run off. That is a risk, but it is a matter of balancing these things.[69]

7.71 Dr Gavan Griffith described this as a 'step by step approach' which, he considered was 'logically compelling'. As he suggested, '[o]ne could have an initial interrogation provided for and then review the position as it emerges':

> For example, if a person comes and gives frank evidence, it may be appropriate then to allow that person to finish their evidence and leave or to leave and come back the next day and complete it. If a person comes and refuses to give evidence, then one can deal with the person as being in breach of the statutory obligation to answer the questions and arrest the person on the ground that they have committed an offence and deal with the person on that basis—that they apparently have committed an offence and will be charged with it. If you have someone who apparently lies, then you could also arrest them and deal with them because they would be in breach of the provisions of the act. If you have someone who is a particularly good liar, you have to deal with that difficulty in any event.[70]

7.72 The issue of prophylactic detention, to address acts that may prejudice the task of collecting intelligence, would be dealt with by disclosure offences:[71]

> You do something like the NCA model again: you tell them, 'It is very important that you not speak to anyone that you have been here.' You make it a serious offence if they do speak to anyone about having been there and you have achieved the objective of the regime.[72]

Commissions of inquiry

7.73 Clearly, this approach relies on aspects of the commission of inquiry model.

Detention for interrogation

7.74 A general common law rule is that a person who has been arrested should be brought before a judge as soon as is reasonably practicable.[73] The underlying philosophy is that 'the law enforcement processes should be transferred as quickly as

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69 Ibid, p.175.

70 Ibid, p. 150.

71 *Submission 61*, pp. 8-9.

72 *Hansard*, 22 November 2002, p. 170.

73 *R v. Williams* (1986) 161 CLR 278.

possible from the committed police stage of the criminal process to the uncommitted judicial stage'.[74] Its corollary is that there is no power to detain for interrogation.[75]

7.75 However, the practice of detention for interrogation may have a close parallel in respect of royal commission and commissions of inquiry. The *Royal Commissions Act* 1902 provides for the arrest under warrant of a person for failure to attend in answer to a summons. The warrant 'shall authorize the apprehension of the witness and the witness being *brought before the Commission*, and … *detention in custody for that purpose* until … released by order of the [Commission].[76] It is unclear whether the commission may continue to question a witness who has been arrested. But there would seem to be little point in bringing the witness before it for any other purpose.

7.76 Provisions for arrest of witnesses for failure to appear exist in the *National Crime Authority Act* 1984,[77] *Independent Commission Against Corruption Act* 1988 (NSW),[78] *Crime and Misconduct Act* 2001 (Qld).[79] The NCA provisions expressly permit detention for the purpose of ensuring attendance before the NCA.

Disclosure offences

7.77 Some powers under the *National Crime Authority Act* 1984 aim to prevent acts that are prejudicial to an investigative hearing. At the first instance, a summons to appear or notice to produce a document may prohibit disclosure of its contents in certain circumstances.[80] Ordinarily, it is an offence to disclose, subject to various exceptions, for example it is not an offence to disclose to a lawyer or a legal aid officer for the purpose of obtaining legal advice, representation or assistance.[81]

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74 John Bishop, *Criminal Procedure*, Second Edition, Butterworths, Sydney, 1998, p. 137.

75 *R v. Williams* (1986) 161 CLR 278; *R v. Lemsatef* [1977] 1 WLR 812 at 816; *R v. Banner* [1970] VR 240 at 249; *Kenlin v. Gardiner* [1967] 2 QB 510; *Rice v. Connelly* [1966] 2 QB 414; *Bales v. Parmeter* (1935) 35 SR (NSW) 182 at 199-190 'arrest and imprisonment cannot be justified merely for the purpose of asking questions' (per Jordan CJ at p. 188); *Ex parte Evers; Re Leary* (1945) 62 WN (NSW) 146; *R v. Clune* [1982] VR 1 at 10-11 and 17-19; *R v. Blundell* [1968] NZLR 341.

76 *Royal Commissions Act* 1902, section 6B(2).

77 *National Crime Authority Act* 1984, section 31.

78 *Independent Commission Against Corruption Act* 1988, section 36.

79 *Crime and Misconduct Act* 2001, sections 168-169.

80 *National Crime Authority Act* 1984, section 29A.

81 Ibid, section 29B.

Practical issues

7.78 Beyond questions of consistency or inconsistency with the constitution or international law, a range of practical issues were raised in submission and evidence to the Committee.

Thresholds

7.79 One of the issues raised in submissions was the low threshold for detention. '[T]aking the minimum position' the Victorian Bar noted the threshold was the existence of 'reasonable grounds for believing that the person concerned might alter a 'record or thing' that they may be requested to produce under the warrant'.[82] Moreover, the 'record or thing' involved may not even constitute admissible evidence. Another 'minimum position' would be that there are reasonable grounds for believing that a person may alert another person who is involved in a secondary offence. As noted previously, this might be no more than membership of a terrorist organisation.

Mechanics

7.80 Various concerns in the inquiry related to practical aspects of the regime. One issue was where the questioning would be undertaken. In evidence the Attorney-General's Department stated they were 'absolutely certain … that it will not be held at ASIO's place'.[83] Likewise, the Director-General of ASIO indicated that 'there was no intention of anyone being questioned on ASIO's premises, and if there was any concern on that point, then of course the legislation could be explicit on that'.[84]

7.81 A related issue was where the detention would be effected. Aside from brief comments, for example that '[t]he police would do that',[85] the Committee did not receive detailed evidence or submissions on this topic except to suggest that these issues would be resolved by protocols. This is considered more fully in Chapter 9.

7.82 Related to many of these issues are concerns as to lines of accountability. The South Australian Police pointed to uncertainty regarding cooperative arrangements for arrest and detention, complaints and avenues of accountability and the liability of State officers under Commonwealth law. A specific concern was that the proposed legislation did not 'provide for any specific indemnity from civil liability for police officers or other officials acting in good faith whilst performing their duties pursuant to the Bill'. Their assumption was that 'State police exercising authority under Commonwealth provisions would be indemnified by State provisions'.[86]

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82 Victorian Bar, *Submission 307*, p. 2.

83 *Hansard*, 12 November 2002, p. 37.

84 Ibid, p. 37.

85 Director General of ASIO, *Hansard*, 12 November 2002, p. 37.

86 *Submission 131*.