Chapter 11

THE COMMITTEE'S CONCLUSIONS

11.1 The key change proposed by the Bill is that ASIO will be empowered to seek a warrant to detain and question people for up to 48 hours for the purposes of investigating terrorism offences: such people need not be suspects in relation to those offences. The Bill also allows extension of the period of detention in certain circumstances for up to seven days.

11.2 These proposed changes caused considerable controversy during the inquiry. For the reasons set out in this report, the Committee considers that, while the threat of terrorism justifies compulsory questioning powers, such powers must be limited, subject to proper checks and balances and accountable to the Parliament and the public insofar as the nature of the intelligence permits. Consequently the Committee recommends certain amendments to the Bill as essential for its passage.

Prescribed Authority

11.3 A key role in the Bill is that of the Prescribed Authority, before whom questioning must take place. The 'Prescribed Authority' is currently defined as a senior legal member of the AAT - 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).

11.4 The Committee heard evidence of concerns about the appointment of AAT members to this critical role, as set out in Chapter 8. Former Solicitor-General Dr Gavan Griffith QC, Dr Stephen Donaghue and representatives of the Victorian Bar supported the allocation of these critical responsibilities to a judge. This would have two benefits: the appointment of a judge would increase public confidence in the questioning and detention process, and a judge would be better placed to ensure that questioning was appropriate.

11.5 Because of possible concerns about constitutional implications, the Committee considers that retired judges would be preferable. The Committee also favours the Law Council of Australia's suggestion that ten years' experience as a judge of a superior court should be required. Although these requirements will narrow the pool of suitable appointees, ASIO gave evidence that the powers in the Bill would be used sparingly. The Committee notes also that the Minister must be satisfied, amongst other things, that relying on other methods of collecting the intelligence would be ineffective.

11.6 The Committee recommends that a pool of suitable people should be appointed by the Attorney-General for a maximum period of three years.

Recommendation 1

The Committee recommends that proposed section 34B should be amended to provide for the appointment by the Attorney-General as a Prescribed Authority of a number of retired federal or state judges, with at least 10 years' experience on a superior court, and that the appointments should be for a maximum period of three years.

The issue of warrants

11.7 The current threshold for the issue of a warrant for questioning is that there are reasonable grounds for believing that the warrant will substantially assist the collection of intelligence that is important in relation to a terrorism offence (proposed section 34D). The warrant is to be sought by the Director-General of ASIO following the Minister's consent.

11.8 The Committee supports that test. However, the Committee considers that the definition of Issuing Authority (defined in proposed section 34AB as a federal magistrate or judge appointed by the Minister, or a member of a specified class declared by way of regulation) requires amendment.

11.9 The High Court's decision in *Grollo v. Palmer* indicates that the power to issue warrants may be conferred on a judge provided it is given to the judge as an individual, it is received by consent and the function is not incompatible with the performance by the judge of his or her judicial functions or the proper discharge of the judiciary of its responsibilities as an institution. Since a judge must consent, an important practical concern is whether any federal or state judges would be willing to consent, given the nature of the warrants and the possibility of later review. The Committee considered the evidence of Dr Gavan Griffith QC about the experience in relation to issuing telecommunication intercept warrants to be particularly compelling. He noted that most Federal Court judges had advised the Government in 1997 that they would no longer issue such warrants, partly because they considered the function to be administrative rather than judicial, and partly because they 'increasingly found themselves as a respondent in issued applications of their own court'.[1]

11.10 Dr Griffith expressed doubt over whether any federal judicial officer, 'acting advisedly', would volunteer to accept the conferral of power to issue the warrant proposed in this Bill. There appeared to be some acceptance of this doubt in the Attorney-General's Department's acknowledgement that it would be 'interesting' to see how many judges agreed to issue warrants. Consequently, the issue of warrants might fall to the members of a 'specified class' declared in regulations.

11.11 Dr Griffith called for an 'impartial authority' constituted by retired federal or other judges to issue warrants, on the basis that it would maintain public confidence.

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1 *Submission 25*, p. 3.

11.12 The Committee agrees with this suggestion and considers that the Issuing Authority should be a retired federal or state judge, with the same conditions as apply to the proposed Prescribed Authority. There should be no capacity to prescribe a class of issuing authorities by regulation.

Recommendation 2

The Committee recommends that the definition of Issuing Authority in proposed section 34AB should be amended to refer to a retired federal or state judge appointed by the Minister, as for the Prescribed Authority. The Attorney-General should not be able to appoint persons as 'members of a class prescribed by regulations'.

11.13 The Committee is also concerned to ensure that the Issuing Authority and the Prescribed Authority who supervises the questioning are different people although drawn from the same pool.

Recommendation 3

The Committee recommends that a Prescribed Authority that has issued a warrant should not be permitted to supervise questioning under the same warrant.

Questioning

11.14 During this inquiry, one of the proposals was that the AFP rather than ASIO should conduct questioning. Various areas of incompatibility were raised, with respect to their relative expertise in subject matter, experience in dealing with evidence, lines of accountability and extraterritorial operation. Ultimately, however, it was noted that, in practice, whichever agency was responsible for questioning, ASIO would be likely to have an active presence and play a primary role in determining its course.

11.15 The Committee considers that ASIO should conduct the questioning, and therefore recommends no change to the provisions of the Bill. However, the Committee considers that additional information on the extent of use of the questioning regime should be reported, as is discussed further below.

11.16 With regard to the role of the AFP, the Committee considers that the AFP should execute the questioning warrants, including if necessary conveying a person to the place of questioning. The AFP should be responsible for all the logistical aspects of questioning, such as providing a suitable venue, managing the time of questioning periods, ensuring access to legal and medical advice, provision of meals and refreshments, and any complaints except those relating specifically to the questioning itself.

Time limits for questioning

11.17 Apart from a provision specifying that a young person may not be questioned without a break for more than two hours, the Bill is silent as to the period for which a

person may be questioned when appearing before a Prescribed Authority on a questioning or detention/questioning warrant.

11.18 The Law Council of Australia was one of several groups which argued that questioning should occur in accordance with well recognised criminal investigation procedures. The Law Council supported the model in the *Crimes Act* 1914 concerning the questioning of people who have been arrested for federal offences. That regime allows for an initial period of four hours of questioning with an eight hour extension available by warrant.

11.19 The questioning period in the Crimes Act (defined as an 'investigation period') excludes periods during which questioning is suspended or delayed for various defined reasons, such as transport of the person, attendance for medical treatment, or time spent waiting for the attendance of legal advisers, interpreters or other approved persons. As the Criminal Defence Lawyers Association (NSW) noted, this regime gives the investigating authorities quite substantial periods of time in which to hold someone, but it is far less than the 168 hours envisaged under this Bill.

11.20 The Committee considers that the Crimes Act model is appropriate, particularly in light of the fact that many of the people who will be held under these provisions will not be held on suspicion of having committed any criminal offence. To allow such people to be held for far longer periods and with fewer safeguards than apply to people suspected of often very serious offences is not acceptable.

Recommendation 4

The Committee recommends that the maximum time allowable for questioning under the warrant should be modelled on the questioning periods and down-time set out in sections 23C and 23D of the *Crimes Act* 1914. The provisions relating to maximum times allowable are to be provided for in legislation.

Recommendation 5

The Committee recommends that an extension of time for questioning under the original warrant should be given by the Prescribed Authority where it is satisfied that there are reasonable grounds to believe further questioning is likely to yield relevant intelligence, with the questioning regime modelled on the provisions of the *Crimes Act* 1914.

11.21 The Committee considers that further warrants should not be allowed to be issued for the same person for a seven day period after the initial questioning. However, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of that person, a second warrant can be issued for that person, for a maximum period modelled on the *Crimes Act* 1914.

Recommendation 6

The Committee further recommends that, in exceptional circumstances, where the Attorney-General and the Issuing Authority are satisfied there is substantial new information relating to an imminent terrorist act justifying the further questioning of a person, a second warrant can be issued for that person, for questioning for a maximum period modelled on the provisions of the *Crimes Act* 1914.

11.22 The Committee considers that a person who has been the subject of two consecutive warrants could not in any circumstances be further questioned under this regime for a seven day period after the completion of the second questioning and then only if the threshold test and processes that apply to the second warrant are repeated and met.

Recommendation 7

The Committee recommends that where a person has been the subject of two consecutive warrants, no further warrants are permitted for the next seven days after the completion of questioning, and then only if the threshold test and processes that apply to the second warrant are met.

The majority of the Committee considers that the Bill must also include a provision ensuring that once questioning has finished, a person is free to leave.

Recommendation 8

The majority of the Committee recommends that the Bill include a provision ensuring that once questioning has finished, a person is free to leave.

Government Senators support this recommendation subject to the proviso that it would not apply where the Prescribed Authority otherwise directs, in accordance with proposed section 34F(3) (that the Prescribed Authority is satisfied that there are reasonable grounds for believing that, if the person is not detained, the person may alert a person involved in a terrorism offence that the offence is being investigated, or may destroy, damage or alter a thing the person has been requested to provide under the warrant) and it is likely that a terrorism offence that may have serious consequences is being committed, or is about to be committed.

Legal representation

11.23 Many submissions raised concerns about the legal representation provisions, particularly in relation to the lawyer's role in proceedings; the system of approved lawyers; and the ability to prevent access to a lawyer in certain circumstances during the first 48 hours of detention.

11.24 Because of the compulsory nature of questioning, the criminal penalties for failure to comply and the possibility of detention without charge under this regime, the majority of the Committee considers that the right to legal representation is essential.

11.25 The Bill recognises possible access to a legal adviser by providing that the warrant may specify people who may be contacted, and that where the warrant authorises detention or where the person is a child, this access must be provided. However, the right to legal advice is not absolute: access may be prevented in the first 48 hours of detention if the Minister is satisfied on reasonable grounds that it is likely that a terrorism offence that may have serious consequences is being committed or about to be committed, and it is 'appropriate in all the circumstances' that the person not be permitted to contact a legal adviser (proposed subsection 34C(3C)).

11.26 The majority of the Committee considers that access to a legal adviser should be a right throughout the detention and questioning process. Moreover, consultations should be private: the provision which requires that contact between lawyer and client is able to be monitored (proposed subsection 34U(2)) should be removed. The Committee notes that the right to have a lawyer of one's own choice and to communicate privately are basic principles recognised in the *United Nations Basic Principles on the Role of Lawyers 1990* (see Chapter 6)

Recommendation 9

The majority of the Committee recommends that proposed subsection 34U(2) should be amended to recognise that, while visual monitoring of a person's contact with his or her legal adviser may be permissible, the communications between a person and his or her legal adviser must be confidential.

Government Senators support the recommendation subject to an exception where the Prescribed Authority is satisfied based on advice from ASIO that confidential communication may prejudice public safety.

11.27 The Committee also heard concerns during this inquiry that communications between legal advisers and their clients may not be privileged, in other words, the legal adviser may be compelled to answer questions about his or her advice to clients. The Committee notes the assurance by an ASIO representative that this effect is not intended and that 'normally' abrogation of the privilege would need either to be explicit or necessarily implied in order to give effect to the legislation. However, given the importance of this issue, the Committee considers that the Bill should expressly address it.

Recommendation 10

The Committee recommends that the Bill should expressly provide that legal professional privilege is not affected.

11.28 A concern that became evident during the inquiry was the process for the selection of approved lawyers. Under proposed section 34AA, a person would become

an 'approved lawyer' based on a security assessment and 'any other matter that the Minister considers is relevant'. This is a very wide discretion.

11.29 The Association of Criminal Defence Lawyers Association (NSW) argued that people being questioned under this regime should be able to choose their own lawyers, while acknowledging that a power of veto may be appropriate in certain circumstances. It was suggested that the NSW Crime Commission model, whereby the Commission has a power to veto a lawyer if there was a real risk that the investigation would be jeopardised by that lawyer's attendance at the proceedings, would be appropriate.[2] This proposal was supported by the Law Council of Australia. The Committee notes Mr Walker SC's concerns that '[t]he profession fears that, under the pretext of approving lawyers, there will be a determined effort to remove all lawyers generically'.[3]

11.30 The Committee notes advice from the Director-General of ASIO about how long security assessments would take:

> It depends what sort of check you are doing. If you are doing an electronic check, that could be a matter of minutes. If you are doing more substantive checks, it can take longer. Sometimes it depends on the information that people will be accessing. So I am not in a position to give a set time.[4]

11.31 The Committee notes also that legal advisers will be subject to an offence of disclosure of information about the detention or questioning while the person is in detention, and that they are also subject to a professional misconduct regime. These are important safeguards.

Recommendation 11

The majority of the Committee recommends that proposed section 34AA concerning approved lawyers should not proceed. Instead, the Prescribed Authority should be given the power to refuse to permit a particular legal adviser to be present on the application of ASIO if the Prescribed Authority believes on reasonable grounds that the particular person represents a security risk and that to allow representation by that person may prejudice public safety.

Government Senators support this recommendation insofar as it allows for a person to choose his or her own lawyer. However, in cases where the person's first nominated legal adviser has been refused permission to be present,

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2 Section 13B of the *New South Wales Crime Commission Act* 1985 states that the Commission may refuse to permit a particular legal practitioner to represent a particular witness in an investigation if it believes on reasonable grounds and in good faith that to allow representation by the particular legal practitioner will, or is likely to, prejudice its investigation. There does not seem to be any right of appeal against such a ruling in the Act.

3 *Hansard*, 26 November 2002, p. 253.

4 *Hansard*, 13 November 2002, p. 54.

Government Senators consider that the person being questioned should have access to an approved lawyer if he or she wishes.

11.32 In cases where the Prescribed Authority has refused to permit a particular legal adviser to be present, there should be provision for the person to be able to choose another legal adviser. The Committee is aware of the potential for either party to abuse this process in order to frustrate fair questioning, either by consecutive nominations of inappropriate legal advisers or alternatively by repeatedly opposing nominations of individual legal advisers. To that end, the Committee considers that the Prescribed Authority should have the power in such cases to order that questioning should proceed, as is recommended below.

Recommendation 12

The Committee recommends that where the Prescribed Authority has refused to permit a particular legal adviser to be present, the person being questioned or detained should be able to choose another legal adviser.

11.33 The Committee also notes the Law Council's suggestion that while urgent circumstances might require that the commencement of questioning is not delayed, this should not require access to legal representation to be denied for a particular period - merely that the legal adviser would be told that questioning was commencing immediately. In Mr Walker's words, emergency does not mean no lawyers: 'it can only mean no waiting for lawyers'. As Dr Carne pointed out, the delay in access to a lawyer would also affect other safeguards under the Bill, and would effectively nullify the right to seek judicial review in such cases.

11.34 The Victorian Bar pointed out that there was a model in section 464C of the *Crimes Act* 1958 (Vic). Before any questioning of a person in custody may take place, an investigating official must defer it for a reasonable time to allow the person to communicate with a legal practitioner, unless the investigating official believes on reasonable grounds that the communication would result in the escape of an accomplice or the fabrication or destruction of evidence, or that the questioning or investigation is so urgent, having regard to the safety of other people, that it should not be delayed.

Recommendation 13

The Committee recommends that access to a legal adviser should not be barred under the terms of a warrant, but that if the Prescribed Authority is satisfied on the application of ASIO that there is a real and immediate threat to public safety, the Prescribed Authority should be empowered to order that questioning commence without waiting for the attendance of a legal adviser. Once a legal adviser arrives, he or she should have immediate access to the person being questioned. The Prescribed Authority should also have the power to order that questioning should proceed where he or she is satisfied that consecutive nominations of legal advisers constitute an attempt to frustrate the questioning process.

Recommendation 14

The Committee recommends that denial of access to a legal adviser who has arrived after questioning has commenced should be listed as an offence in the Bill.

Use of evidence

11.35 The Bill takes away the common law right to silence and the privilege against self-incrimination. Amongst the proposed new offences punishable by a maximum penalty of five years' imprisonment are the offences of failing to give information in accordance with the warrant unless the person can prove that s/he does not have the information, 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.

11.36 The Bill provides that 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 (in other words, there is a *use immunity* in relation to the information gained). However, the Bill does not protect the person from indirect or *derivative use* of any answers they give. Thus if police find evidence based on the person's answers during questioning (for example, by later executing a search warrant of the person's premises and finding incriminating material there), that evidence may be used against the person.

11.37 Consequently, any information obtained by ASIO during the proposed questioning regime may, like other information gleaned in the course of gathering intelligence, be passed on to federal or State police where it appears to relate to an indictable offence. The Committee considers that these provisions represent an appropriate balance between the public interest in obtaining important intelligence about terrorist offences and the public interest in being able to prosecute those who are the principal offenders. The Committee notes also that the derivative use immunity has been abrogated in Australia in other legislation dealing with commissions of inquiry, and considers there is no compelling reason why the provisions should be different in these circumstances.

11.38 While some submissions argued that the removal of the right to silence was unacceptable, others noted that precedent existed in Australia in the *Royal Commissions Act* 1902 and the *National Crime Authority Act* 1984.

11.39 The reversed onus of proof (that is, that the person must raise evidence to show that he or she does not have the information or thing that is sought) was also opposed by several groups, including the Federation of Community Legal Centres (Victoria) and Amnesty International. The majority of the Committee does not support the reversal of the onus of proof and recommends that this provision not proceed.

Recommendation 15

The majority of the Committee recommends that proposed section 34G should be amended to remove the evidential burden placed on the person who is appearing for questioning under a warrant to show that he or she does not have the information sought or possession or control of the relevant record or thing.

Senator Scullion dissents from this recommendation.

11.40 However the Committee recommends no changes to the provisions relating to the removal of the right to silence and the use immunity.

Protocols and safeguards

11.41 Chapter 9 sets out the various safeguards that are currently in the Bill. They include mandatory videorecording of proceedings before the Prescribed Authority; provision of interpreting services where appropriate; the giving of information about the right, and the provision of facilities, to make a complaint to the IGIS or Ombudsman; and regulation of searches and strip searches.

11.42 The Committee endorses all those safeguards, but believes that certain additional safeguards are required. The Committee is also concerned that important matters are not left to a written statement of procedures that, while tabled in Parliament, does not have sufficient accountability.

Additional safeguards during questioning

11.43 The Committee considers that the person being questioned has a right to know the function of all parties who are present during questioning.

11.44 While the Prescribed Authority has obligations under the Bill to inform the person about certain matters, including the right to make a complaint and to seek judicial review, the Committee considers that the Bill should also specify that such information should be given both orally and in writing, with translation into an appropriate language if necessary. In addition to the power in proposed section 34H of the Prescribed Authority to order that an interpreter be provided in appropriate cases, the Committee considers that a person who is being questioned should also be able to request an interpreter.

Recommendation 16

The Committee recommends that the Prescribed Authority be required to inform the person being questioned of the function of all parties who are present during questioning.

Recommendation 17

The Committee recommends that information required to be given under proposed section 34E, as well as the person's right to request an interpreter, should be given both orally and in writing, with translation into the person's first language where appropriate.

Recommendation 18

The Committee recommends that proposed section 34H be amended to provide that an interpreter is also to be provided on request by the person being questioned.

11.45 The Committee also considers that a right to legal advice is not effective if a person lacks the funds to pay for the attendance of a lawyer. Consequently the Committee recommends that a person being questioned should have access to legal aid funding if they do not have adequate means, and that funding should be available for an action for judicial review in the Federal court.

11.46 The Committee notes advice received from ASIO's legal counsel regarding the provision of funding for legal costs:

> In terms of providing access to lawyers and funds for lawyers, when the government's response to the parliamentary joint committee was first announced, the Attorney-General released a press release with a precis of the types of government amendments which would be moved in the House and which were ultimately passed. That included a precis of the approved lawyer process and all those sorts of issues. Included in that release was the statement that the costs for approved lawyers would be met by the Commonwealth through, potentially, a legal aid style program so that those people who are required to have a lawyer that is approved by the Commonwealth will not be put to the cost of acquiring that lawyer.[5]

Recommendation 19

The Committee recommends that a person being questioned should have access to legal aid funding as appropriate.

11.47 The Bill also seems to allow for the IGIS to be present during the questioning process, given that he or she will have the power to inform the Prescribed Authority of any concerns about 'impropriety or illegality' in the exercise of powers in the questioning process (proposed section 34HA). The Committee considers that the Bill should make explicit the IGIS's right to attend during the questioning process.

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5 *Hansard*, 26 November 2002, p. 275.

Recommendation 20

The Committee recommends that the Bill should make explicit the IGIS's right to attend during the questioning process.

11.48 As discussed in Chapter 9, representatives of the Muslim community were particularly concerned about the search provisions in the Bill. They recommended that the Bill should include a requirement similar to that applying to arrested persons under the *Crimes Act* 1914 that, as far as practicable, ordinary searches and frisk searches should be conducted by an officer of the same gender as the person being searched. The Committee endorses this suggestion.

Recommendation 21

The Committee recommends that the Bill should include a requirement that ordinary searches and frisk searches, as far as practicable, should be conducted by an officer of the same gender as the person being searched.

11.49 The Committee also notes that, in response to the PJCAAD's concerns, the Bill was amended to create various criminal offences for non-compliance with safeguards. Proposed section 34NB creates various offences where an official exercising powers under a warrant fails to comply with certain safeguards in the Bill, including knowingly contravening a condition or restriction in a warrant or a direction of a Prescribed Authority, or knowingly conducting a search or strip search in contravention of the Bill. These offences will apply principally to police officers and ASIO officers. Each offence is punishable by a maximum of two years' imprisonment.

11.50 During this inquiry questions were raised as to whether those provisions are enforceable in practice, particularly where they refer to vaguely worded standards. In particular, questions were raised about the 'humane treatment' provision under proposed section 34J. Some submissions argued that the requirement that the offences be committed 'knowingly' imposed too high a standard. On the other hand, the Committee heard concerns from the Australian Federal Police Association that the offences were unnecessary and were already provided for in other legislation that deals with complaints and disciplinary procedures against police, as well as in existing criminal laws.

11.51 The Committee considers that the criminal offences should remain as drafted in the Bill.

Written protocols

11.52 Before any warrant may be issued, the Bill requires that a written statement of procedures to be followed in the exercise of authority under warrants has been adopted (proposed paragraph 34C(3)(ba)). This provision was inserted to address the PJCAAD's concern about the absence of guidelines as to the operation of the custody, detention and questioning regime, for example, what arrangements would be made

when a person was taken into custody, where the person would be detained, and when breaks in questioning would be required.[6]

11.53 While agreeing with the proposition that the powers must not be able to be used until the procedures have been finalised and approved by external parties, the Committee does not consider that the provisions are sufficiently rigorous. Under proposed section 34C(3A), the only person who need approve the statement is the Minister. All other parties (the IGIS, the AFP Commissioner and the President of the AAT) need only be consulted. In the case of Parliament, there is a requirement that the PJCAAD be 'briefed' and the statement tabled, rather than it being a disallowable instrument.

11.54 It is also unclear, either from the Bill, the Explanatory Memorandum or evidence during this inquiry, exactly what the written statement would cover. ASIO and the Attorney-General's Department told the Committee that only preliminary work had been done on the protocols pending the outcome of this inquiry. The Committee considers that matters such as the place and conditions of custody and detention, including overnight detention, security arrangements, the time limits on questioning, including required breaks in questioning and the responsibilities of various agencies (such as the involvement of State or Territory police) should be included.

11.55 The Committee also considers that because of the importance of the issues to be covered, they should not be by way of a 'written statement', but should be given legislative force. While the details will be too comprehensive to include in the Act, the Committee considers that they warrant inclusion in regulations. If time permits and given the Committee's recommendations for further amendments to the Bill, the protocols should ideally be developed for passage with the Bill.

11.56 If not, the Committee recommends that the regulations must be made prior to the Minister giving consent to a request for a warrant. The Committee prefers that the legislation does not commence until the detail of the proposed regulations is known.

Recommendation 22

The Committee recommends that:

(i) reference to adoption of a written statement of procedures in proposed paragraph 34C(3)(ba) and proposed subsection 34(3A) should be amended to require such procedures to be included in regulations;

(ii) those regulations must be made prior to the Minister giving consent to a request for a warrant; and

(iii) powers under the warrants must be exercised in accordance with those regulations.

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6 PJCAAD, pp. 36-39.

Recommendation 23

The Committee recommends that the regulations should include but not be limited to specifying the place and conditions of custody and detention, including overnight detention, security arrangements, the time limits on questioning, including required breaks in questioning, and further guidelines on searches, consistent with current policing protocols.

11.57 The Committee heard significant concerns during this inquiry that while ASIO officers are subject to a complaints process through the IGIS, they are not subject to the same accountability processes, including a disciplinary regime, that apply to police officers. The Committee considers that the importance of these powers warrants the development of additional disciplinary procedures.

Recommendation 24

The Committee recommends that ASIO develop and implement separate disciplinary procedures in relation to officers who conduct questioning.

Annual reporting

11.58 The Bill adds new requirements to the information that the Director-General must report annually, following the PJCAAD's recommendation.[7] Proposed section 94(1A) specifies that the annual report is to include a statement of the total number of requests for warrants and the total number of warrants issued, broken down into the number requiring appearance for questioning and the number authorising a person to be taken into custody.

11.59 There is also a provision requiring the Director-General to provide a written report to the Minister on the extent to which action taken under a warrant has assisted ASIO in carrying out its functions (proposed section 34P). Such reports, however, go no further than the Minister.

11.60 The Committee welcomes the additional reporting requirements in the Bill, but considers that there would be merit in requiring ASIO to provide further details on the use of warrants: the total number of hours of questioning, plus the hours and number of warrants for questioning heard before each Prescribed Authority. While protecting information about the details of individual cases, this additional requirement would provide more meaningful information about the use of the powers.

11.61 The Committee notes that the Director-General of Security had commented in relation to additional reporting requirements:

> As I have mentioned before, this is a power that, I believe, could be used very rarely. I have said on the record that there have been probably two or three occasions since September 11 where there have been situations in

7 PJCAAD Recommendation 11.

> which, had it been law prior to September 11, we would have pursued the issued to see whether it was possible to enact the power. We understand the particular interest and accountability arrangements here, and for that reason, unlike our other warrants, we would not see an issue with the number of warrants issued and like being in our public annual report.[8]

Recommendation 25

The Committee recommends that proposed subsection 94(1A) should be amended to require the report to include information about the total number of hours of questioning under warrants, the hours of questioning and length of detention in respect of each person questioned, and number of warrants for questioning heard before each Prescribed Authority.

Sunset clause

11.62 The Committee notes that the Bill contains provision for a review of the operation of the legislation, to commence as soon as possible after three years of operation.

11.63 A review of the Bill is important in order to ascertain the extent of the use of the powers, to identify any problems with their use and to propose appropriate amendment. However, the Committee considers, as did the PJCAAD, that such important and extensive powers should be subject to a sunset clause. If a review finds that the circumstances at that time justify the continued availability of such powers and that the powers have been exercised appropriately, its recommendations will be brought to Parliament which may then reconsider the matter.

Recommendation 26

The majority of the Committee recommends the insertion of a sunset clause of three years from the date of commencement of the legislation.

Senator Scullion dissents from this recommendation.

Children

11.64 As discussed in Chapter 10, particular concerns were expressed about the application of the detention and questioning regime to children. The Committee notes that the application of the proposed questioning and detention regime to young people, limited to those between the ages of 14 and 18 who are suspects in relation to terrorism offences, has come about through Government amendments introduced in response to the PJCAAD's recommendations. During public hearings, ASIO and the Attorney-General's Department emphasised that the lower age limit of 14 years reflects the age of criminal responsibility, and stressed that the purpose of questioning young people under this regime would be to gather intelligence, not to gather evidence

8 *Hansard*, 18 November 2002, p. 115.

for a prosecution. However, the Committee is concerned that the regime now proposed, in focussing only on young people who are suspects, contradicts the stated purpose of the Bill in gathering intelligence.

11.65 The Committee is concerned about the possible targeting of young people to gather intelligence, particularly where questioning relates to the activities of parents or other family members. While the proposed regime contains some safeguards that recognise the special vulnerability of young people, including the mandatory presence of a parent, guardian or other acceptable person during questioning as well as access to legal representation, those safeguards do not overcome all the concerns that have been raised, particularly in relation to children as young as 14. For a person aged 17, the concerns will be less. However, some limit needs to be drawn, and the Committee considers that 14 is too young. The Committee notes also that where a young person is a suspect in relation to a terrorist offence, current provisions of the *Crimes Act* 1914 provide for questioning following arrest for a maximum period of two hours, only half that of an adult.

Recommendation 27

The majority of the Committee recommends that the Bill not apply to anyone under the age of 18 years.

Senator Scullion dissents from this recommendation and supports the existing provisions in the Bill as they apply to young people.

Senator the Hon Nick Bolkus
Chair